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Religion and the Law: Bill-21 and its Dysfunctionalities

La religion et le droit : la loi 21 et ses dysfonctionnements

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Abstract

When it comes to understanding the intersection of religion and law, one would typically look to understand how legislation is used to protect an individual's right to practice religion in Canada. The purpose of the law is to ensure fairness and equality for all, however there are instances in which laws with seemingly good intentions can have negative effects in practice- demonstrating how laws can be dysfunctional. Some examples of dysfunctionality in law include the continued pardoning of powerful individuals, or the allowance of human rights violations. In this case, I will analyze Quebec's secularism bill, better known as Bill 21, to illustrate the interplay of religion and the law, and to demonstrate how law can become dysfunctional by hindering an individual's right to freedom of religion. I will briefly introduce the Bill at hand, the principles upon which the Bill was founded, the deficiencies of the law, and finally some implications of this legislation for identifiable minority groups, specifically focusing on the consequences it has on Muslim women who wear the hijab.

Lorsqu'il s'agit de comprendre l'intersection de la religion et du droit, on cherche généralement à comprendre comment la législation est utilisée pour protéger le droit d'un individu à pratiquer sa religion au Canada. Le but de la loi est d'assurer l'équité et l'égalité pour tous, mais il arrive que des lois apparemment bien intentionnées aient des effets négatifs dans la pratique, ce qui démontre que les lois peuvent être dysfonctionnelles. Parmi les exemples de dysfonctionnement de la loi, on peut citer le pardon continu accordé à des individus puissants ou l'autorisation de violations des droits de l'homme. Dans le cas présent, j'analyserai le projet de loi sur la laïcité du Québec, mieux connu sous le nom de projet de loi nº21, afin d'illustrer l'interaction entre la religion et la loi, et de démontrer comment la loi peut devenir dysfonctionnelle en entravant le droit d'un individu à la liberté de religion. Je présenterai brièvement le projet de loi en question, les principes sur lesquels il a été fondé, les lacunes de la loi et, enfin, certaines implications de cette législation pour des groupes minoritaires identifiables, en me concentrant spécifiquement sur les conséquences qu'elle a sur les femmes musulmanes qui portent le hijab.

Introduction

When it comes to understanding the intersection of religion and law, one typically looks to understand how legislation is used to protect an individual's right to practice religion in Canada. The purpose of the law is to ensure fairness and equality for all, however there are instances in which laws with seemingly good intentions can have negative effects in practice. This demonstrates how a law can be dysfunctional. Some examples of dysfunctionality in law include the continued pardoning of powerful individuals, or the allowance of human rights violations. In this case, I will analyze Quebec's secularism bill, better known as Bill 21, to illustrate the interplay of religion and the law, and to demonstrate how law can become dysfunctional by hindering an individual's right to freedom of religion. I will briefly introduce the Bill at hand, the principles upon which the Bill was founded, the deficiencies of the law, and finally some implications of this legislation for identifiable minority groups, specifically focusing on the consequences it has on Muslim women who wear the hijab.

Bill-21: Founding Principles

On June 16th 2019, Bill No.21, also known as *An Act respecting the laicity of the State*, was passed in Quebec. In its own words, the essence of Bill 21 is to "affirm the laicity of the State" a concept that historically comes from French secularism (Bill 21 2019, 2) and is based on four principles (Bill 21 2019, 5):

(1) the separation of State and religions
(2) the religious neutrality of the State.
(3) the equality of all citizens; and
(4) freedom of conscience and freedom of religion.

According to Naved Bakali in his article *Contextualizing the Quebec Charter of Values: how the Muslim 'Other' is conceptualized in Quebec*, Laicite or French secularism was historically used when an influx of North African Muslims to France in the mid-20th century were framed as a threat to French culture and security (Bakali 2015, 416). Quebec adopted this secularism during the Quiet Revolution to remove power from the Catholic Church, and the same idea has been projected onto the growing number of Muslims in

the province (Bakali 2015, 416). For many years, Quebec has struggled to keep Quebecois culture alive, and in pursuit of this, the ideal of secularism and neutrality have been leveraged to such an extent that bills such as Bill 21 get passed (Bakali 2015, 415).

In section 4, the Bill states that to achieve laicity of the State, "compliance with the prohibition on wearing religious symbols" must occur (Bill 21 2019, 6). This ruling applies to any individual who is a public servant and in a position of authority, including, but not limited to teachers, judges, and peace officers (Bill 21 2019, 7). Public workers are in a way representative of the State and its values, so prohibition of such imagery would help to ensure the State's laicity. Drawing from these conditions, it is clear that the display of religious symbols including hijabs, kippahs, and necklaces depicting crosses would presumably undermine the state's pursuit of neutrality. However, these workers are still individuals who may practice a religion that requires specific articles of clothing such as the hijab. The main point of dispute surrounding this Bill is whether it is a direct infringement of the religious freedoms outlined in Sections 2 and 15 of The Canadian Charter of Rights and Freedoms, or if the Quebec government is within their rights to pass such a law based on prior established principles and values which have been used to substantiate Bill 21.

Limitation and Deficiencies of Religious Legislation/Bill 21: Re-framing the Principle of Reasonable Accommodation

Though multiple identifiable religious groups have been affected by this Bill, I will be focusing this essay on Muslim women who wear the hijab. The hijab cannot be hidden behind another article of clothing. It is on full display and used to cover the hair, neck, and chest for religious purposes. When rules in a public environment don't allow for head coverings such as hats or hoodies, the principle of reasonable accommodation typically comes into play. Reasonable accommodation is the recognition of the religious obligation and belief of others, and therefore allows the hijab, as well as other religious attire, in that space.

Regarding Bill 21, reasonable accommodation happens to be an issue because its main premise is to restrict the religious imagery of clothing items such as the hijab,

whereas reasonable accommodation allows for religious minorities to keep them. This issue is addressed in the Bill itself when it calls for an amendment to the framework in which it requests for accommodations on religious grounds to made to be more stringent (Bill 21 2019, 10). This follows logically from their position, considering reasonable accommodation is almost contradictory to the founding principles of Laicite and neutrality that Bill 21 attempts to affirm (Bill 21 2019, 2).

First, as outlined by Bribosia *et al* (2010) in *Reasonable Accommodation for Religious Minorities*, reasonable accommodation is used to meet the needs of a society that has a significant amount of religious diversity and is based on the idea that those with characteristics fundamental to their identity such as disability and religion might face a situation that prevents them from full participation in society, like getting education or employment (Bribosia 2010, 138). In such cases, employers and legislators adjust the law to fit the individual's needs and avoid unintentional discrimination. Institutionalized discrimination is then addressed through the use of reasonable accommodation to help serve the minority (Bribosia 2010, 145). Bribosia *et al* (2010) states that "in Canada, courts and legislatures have expressed themselves in favour of reasonable accommodation" (159), which poses an issue to Bill 21, which performs the opposite function of reasonable accommodation for public workers. The idea of accommodating religious symbols within the public workplace would then undermine the principle of laicity that the Coalition Avenir Quebec (CAQ), the Quebec party that sponsored Bill 21, feels can only happen when these symbols are removed from their person.

Reasonable accommodation, as stated above, is not a new idea for the Canadian bodies of government, and it has come a long way through many different court cases such as *Human Rights Commission (O'Malley) v. Simpson-Sears Limited* (Bribosia 2010, 145). This case features O'Malley, a Seventh-day Adventist who was unable to work Friday and Saturday to observe the Sabbath as dictated by her religion. She was denied accommodation by her employer because workers were scheduled for those typically busy days, however, the Supreme Court ruled that the employer had to make reasonable accommodations for her case (Bribosia 2010, 145). Other cases have shown the limitation of reasonable accommodation such as the *Alberta v. Hutterian Brethren of Wilson*

Colony, in which the Hutterite community could not personally take photographs of themselves for driver's licenses due to their beliefs in the Ten Commandments (Bribosia 2010, 146). The court ruled against this order to maintain safety against identity theft and the integrity of the licensing system in Canada (Bribosia 2010, 146).

My reasons for using the above court case examples is three-fold:

1) To examine how the interaction between religion and law has been dealt with in the past (through the reasonable accommodation principle),
2) To highlight that the Canadian judicial system has previously been involved and vouched for the use of reasonable accommodation in multiple cases (i.e the *Multani V. Commission Scolaire Marguerite-Bourgeoys* case that ruled allowed an orthodox sikh student to wear his kirpan/sacred dagger, despite rules regarding weapons, out of accommodation for his sincere religious beliefs and low chances of harm.) (Bhabha 2017, 8),
3) And to illustrate limitations to reasonable accommodation are possible, as has been seen with the Hutterites, however, that limitation was born out of the need for safety and integrity.

The first two points demonstrate how reasonable accommodation in past Canadian court cases has been a viable and explored option. However, the reason why it is such a point of contention in Quebec is because of the principle of neutrality and laicity. To my final point, in the case of religious clothing such as hijabs, skull caps and turbans; these would be and are typically accepted and accommodated for in many situations here in Canada. Bill 21, on the other hand, does the opposite by essentially revoking the of reasonable accommodation. In law, there is an importance of consistent application, especially when it comes to cases with many similarities. Because Canada has such a vast and consistent experience with reasonable accommodation, Bill 21 is antithetical to this fact.

In 2008, there was much debate on reasonable accommodation and Quebecois culture which was sparked by the famous Bouchard-Taylor commission. The commission released a report that year suggesting banning religious symbols in the public service

(Montreal Gazette 2019). According to Bakali, the report, which outlined the commission's stance on reasonable accommodation actually "reinforced racial hierarchies" and further stigmatized the Muslim population. Much Quebec legislation that has since been pushed forward regarding secularism has used this commission report as support and has led to a resurgence of general anti-Muslim rhetoric (Bakali 2015, 422). The report has been used to create bills such as Bill 21 or the Quebec Charter of Values. Another reason why the Bouchard-Taylor commission was polarizing is because it stated an intention to broaden the commission past the legal framework to include sociocultural integration (Taylor & Bouchard 2008, 17). Gada Mahrouse mentions in *'Reasonable accommodation' in Québec: The limits of participation and dialogue (2010)* that this shift in focus is detrimental as it misses the opportunity to uphold minority rights and freedoms, and rather suggests making room for general tolerance (Mahrouse 2010, 90). By changing the narrative in a subtle way, the report fails to explicitly affirm whether reasonable accommodation is within the rights of minorities and should be practiced.

The province of Quebec has tried to pass a bill for its own charter that ensures the principle of Laicite, or secularism, in the public sphere, and states that the neutrality of the state will always be a primary concern. In fact, the original name given to this piece of legislation was the Charter Affirming the Values of State Secularism and Religious Neutrality, prior to being changed to Quebec Charter of Values (Bakali 2015, 413). The bill itself failed, however, its premise of secularism and neutrality, backed by the findings of the Bouchard-Taylor commission, is contradictory to Canada's policy of multiculturalism as introduced by Pierre Trudeau in 1971 (Bakali 2015, 417) and ultimately the principle of reasonable accommodation itself.

However, and most unexpectedly, in the ten years since the report had been published, co-author Charles Taylor has recently revoked his support of the report's findings after seeing the detrimental impacts of Bill 21 on minority communities (Montreal Gazette 2019). During a hearing for Bill-21, he states that it is "stirring up various kinds of suspicion, even hatred, and a sense of danger around minority religious groups" (Montreal Gazette 2019). The refusal of reasonable accommodation for the sake of neutrality is a true testament to a case of rule versus reality. Without reasonable

accommodation, Muslim women and other members of religiously identifiable would be barred from working in the public sector due to religious clothing items or symbols. Despite this sentiment of outward neutrality, Bill 21 is creating a deep divide in employability and equality in society, which could be argued to ultimately contradict the principle of neutrality.

Notwithstanding Clauses and Public Interest Presumption

Another aspect of Bill 21 that makes it difficult to challenge is that it has invoked the notwithstanding clause of the Canadian constitution. The bill states that "This Act and the amendments made by Chapter V of this Act have effect notwithstanding sections 2 and 7 to 15 of the Constitution Act, 1982" (Bill 21 2019, 12). The Canadian constitution's notwithstanding clause allows a law to overlook a section of the Charter of Rights and Freedoms for a certain period. In this case, the Bill uses the clause to override sections of the Charter that outline religious freedoms, indicating that the Quebec government is aware that Bill 21 is potentially an infringement on an individual's religious rights. According to Colin Feasby in *Charter Injunctions, Public Interest Presumption, and the Tyranny of the Majority (2020),* this prevents the Bill from being blocked or shut down for going directly against rights outlined in the Charter (Feasby 2020, 22). Invoking this clause essentially immunizes the Bill from being rejected or attacked for a violation of Charter rights.

The outcome of such a measure is the inability to challenge the Bill effectively. The court case *Nourel Hak, et al. v. The Attorney General of Québec* has been mounting a challenge for nearly two years. This case involves the National Council of Canadian Muslims (NCCM) against the Government of Quebec. The NCCM had applied for a hold of the bill after it was proposed on June 17th (*Hak v. Quebec* 2019, 3). The applicants stated three reasons as to why the bill was unconstitutional, including that the proposed Bill was above Quebec's power (*ultra vires)*, that the Bill's use of vague language made it unsuitable to become legislation, and lastly, that the bill prohibited specific individuals from accessing the public sphere, which should fall under criminal law (*Hak v Quebec* 2019, 3).

The hold application failed, but despite this, the applicants went ahead with an appeal and argued an interesting stance. Considering some sections of the bill enacted the

notwithstanding clause, the applicants argued that the Bill violated section 28, not hindered by the clause. According to the Charter, section 28 states: “notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons" (Canadian Charter 1982). This would allow the applicants to challenge this bill in term of gender equality, specifically for Muslim women who wear the hijab and are disproportionately affected by this bill (Feasby 2020, 22). The preamble to the Bill mentions the value of equality between males and females, and Hak challenges the Bill on the grounds that this value is not being extended to Muslim women, most of who choose to dress in full coverage and a modest manner.

However, the appeal was also denied in a 2-1 vote because “balance of convenience weighed against suspending the Act” (*Hak v Quebec* 2019, 4). Essentially, the government must be thought of as working in the interest of the public, and unless the applicants were able to prove that a hold or a stay would be in public interest, then the act remains in its current state as of the *Hak v Quebec* case. Feasby gives insight on this principle and how its potential can be detrimental such cases that attempt to challenge potentially discriminatory laws. Feasby argues that the concept of public interest presumption is problematic because the government is run and voted in by the majority, hence sharing the views of the majority (Feasby 2020, 21). This is another good example of rule of law versus the reality of its implementation. As seen in the *Hak v Quebec* case, it was difficult for the NCCM and Hak to sway parliament’s perception that protecting Muslim women against this bill would in fact be in the public’s interest. Both public interest presumption and the notwithstanding clause have shown how it is possible to limit the Charter of Right and Freedoms. The Charter is meant to protect minorities against majority imposition, but these principles function as loopholes in favor of the majoritarian government, silencing the minority.

Implications

Looking at law within a sociological lens allows us to analyze the implications it has on society. In this case, the implications fall on Muslim women when legislation is imposed in such a way that hinders their ability to freely practice their religion. This case demonstrates the tangible impacts of Bill 21 on those who wear visible religious articles of such as the hijab. In their journal *Hijab, niqab, and the religious symbol debates:*

consequences for health and human rights, Ifftah b. Syed speaks on these implications by looking at both the mental and psychological health problems that arise from such legislation, which have unfortunately not been part of mainstream discourse since the passing of Bill 21 (Syed 2020, 2). In their earlier piece, *Forced Assimilation is an Unhealthy Policy Intervention: The Case of the Hijab ban in France and Quebec, Canada*, Syed argues that for many, spirituality is a part of emotional mental health, and that a ban on hijab in places such as France and Quebec should also be considered a public health violation (Syed 2013, 430). Syed expands the issue by stating that a ban on the hijab would also lead to a Muslim women's inability to observe two daily prayers that take place during normal school and work hours, ultimately leading her to potentially feel uncomfortable and distressed (Syed 2013, 435). A person who is rendered unable to practice their faith when they need could potentially leave them feeling ostracized by their workplace, government, and society. In the case of a Muslim woman who needs the hijab to complete their prayers during work hours, she would be unable to use faith and prayer as a healthy way of coping with stress and feeling connected to her religion, God, and community.

In Bruce Ryder's *The Canadian Conception of Equal Religious Citizenship*, he states that religious rights and freedoms in Canada are outlined in the Charter, in part, to "advance the rights of religious persons to participate equally in Canadian society without abandoning the tenets of their faith" (Ryder 2008, 1) On the other hand, Quebec's decision on the principle of laicity and neutrality when imposing this law requires individuals to potentially abandon a tenet of their faith. This is far from neutral, as it sends a clear message of who is and isn't allowed to participate in each aspect of society. By prohibiting any visible religious wear from a person can seem neutral in its intentions, it effectively creates a divide wherein an individual is not accepted, can no longer be employed, or receive important/essential services in each space. Consider the example of a Muslim woman who wears the hijab but is also a teacher looking for a job. She either cannot be employed within the province, or she abides by the new law and is forced to remove her hijab while teaching. In connection to the writing of Syed, it isn't far from the imagination that such an individual is subject to an internal moral dilemma while in the workplace because of compromising their faith, potentially affecting their health. This is because beliefs, whether they be religious or irreligious, are central to one's identity, and

an individual must have the autonomy to make decisions for themselves on what how they can best align with their own belief systems (Ryder 2008, 7).

Connection to France

Legislation such as Bill 21 that restricts the right of Muslim women to wear the hijab does not only exist in Canada. Recently, the news cycle has been flooded with reports on France's new ban on hijab for minors. The bill would prohibit Muslim girls under majority age from wearing the hijab in public, as well as not allowing any Muslim women who wear the hijab to be allowed on school trips (Al Jazeera 2021). Though the bill is not yet law, it has a strong potential to become reality. Through these legal similarities, it becomes evident that France and Quebec have strongly connected shared values and history. The beginning of Bill 21 mentions that Quebec has "a civil law tradition, distinct social values and a specific history that have led it to develop a particular attachment to State laicity" (Bill 21 2019, 5). As previously mentioned, Quebec's struggle to revitalize Quebecois culture has also involved a growing anti-religion and anti-Muslim rhetoric, as they have adopted the French Laicite, originally used when French culture was deemed to be under threat by minority cultures. My reason for mentioning the history of Quebec is to highlight how societal values can influence law, and vice-versa. Historical context is important when engaging in an analysis of law and sociology so that we can understand the ways in which laws have changed, or haven't changed, in regard to particular societal and governmental beliefs. Additionally, given that Quebec's history and values are reminiscent of France, it begs the question of whether a bill on hijab or other religious clothing, as stringent as the one France is currently tabling could happen in Canada.

Conclusion

The intersection between religion and law can, at times, be a very slippery and complex slope. Legislation can be used to ensure reasonable accommodation and full participation of every citizen regardless of their religious beliefs, but as we see with Bill 21, it can also restrict this right. Bill 21, the principles used to justify the tabling and passing of the bill, the deficiencies within it, and its implication on members of identifiable groups all prevent real action being taken against it. These factors exhibit

different ways in which a piece of legislation could become dysfunctional and potentially do more harm than good in a society.

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