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Is Quebec's secular charter constitutional? Nine legal experts weigh in

By SEAN FINE

The Globe asked nine lawyers to form an expert panel and give their opinions on the constitutionality of Quebec's proposed prohibitions on religious clothing and symbols in public-sector workplaces

Sean Fine, The Globe and Mail's justice writer, asked nine distinguished lawyers to form an expert panel and give their opinions on the constitutionality of Quebec's proposed prohibitions on religious clothing and symbols in public-sector workplaces. The panel was chosen for regional balance – to reflect the composition of the Supreme Court of Canada, including three members from Quebec. Two advocates from Quebec – law professor and former Bloc Québécois MP and Parti Québécois MNA Daniel Turp and human-rights lawyer Julius Grey – presented the arguments, for and against, and their arguments were distributed to the panel. The panel, drawn mostly from law schools across Canada, was resoundingly opposed to the new 'charter of values' by a count of 9-0 – though with an asterisk on one of the nine.

Is the proposal to prohibit the wearing of conspicuous religious symbols by state personnel in carrying out their duties for the purpose of reflecting state neutrality consistent with the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms?

THE ARGUMENTS

Daniel Turp – Yes, it is constitutional

The proposal is consistent with the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms.

Both charters provide that the fundamental freedom of religion can be subject to limitations. Section 1 of the Canadian Charter provides that it can be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In an analogous manner, article 9.1 of the Quebec Charter states that "in exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec" and adds that "in this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law."

The measures relating to the prohibitions have been carefully designed to achieve the objective of organizing the state around the principle of secularism and, more specifically, to outline the principles of religious neutrality, separation of religion and state and the secular nature of its institutions, as well as to clarify how these principles are embodied. Accordingly, the measures are not to be arbitrary, unfair or based on irrational considerations,

notably as they apply to all religions. To quote the European Court of Human Rights (ECHR) in the Sahin case, it is legitimate to "impose limitations ... in order to reconcile the interests of various groups and ensure the respect for the convictions of each" and focus "on the role of the state as a neutral and impartial organizer of the exercise of various religions, faiths and beliefs, religious harmony and tolerance in a democratic society."

The means referred to in the proposal impair as little as possible the fundamental freedom of religion inasmuch as they apply only to state personnel in carrying out their duties and the wearing of "conspicuous" religious symbols. Discreet religious symbols would not be affected by this proposal. As the measures are adopted in accordance with a sufficiently important objective, their effects should be deemed proportional.

It should be accepted that when questions "arise about the relationship between the state and religion, issues on which differences can reasonably exist in a democratic society, it is necessary to pay particular attention to the role of the national decision" (ECHR, Sahin case). In light of the adoption by the House of Commons of Canada in 2006 of a motion recognizing that Quebec forms a "nation," such a national decision belongs to Quebec's National Assembly. Thus a margin of appreciation should be provided to Quebec in these matters.

Daniel Turp is a professor of constitutional and international law in the Faculty of Law, Université de Montréal.

Julius Grey – No, it's not constitutional

The charter of Quebec values is unconstitutional unless the Supreme Court decides to reverse its consistent jurisprudence – Multani (kirpan), Amselem (Sukkah) and Bergevin (Jewish holidays). Certainly the Supreme Court could change its mind. However, there is a presumption that recent jurisprudence will be followed. The proclamation of state secularism would remain but not all of the new prohibitions.

The jurisprudence is to the effect that if accommodation can be made without excessive cost or injustice, it should be. Unreasonable accommodation is already denied and no new charter is needed to establish this. For instance, a photograph was required for a driver's licence despite religious objections.

While the National Assembly could try to define some "excessive" demands, such as a complete face-covering, it would be difficult to justify the proposed elaborate limitation of accommodation based on the size and type of religious object. The problem is both freedom of religion and equality.

A justification under section 1 of the Canadian Charter of Rights and Freedoms would be especially difficult to make because the charter of Quebec values limits access to employment. The jobs affected are often ones to which immigrants gravitate – police services, the health sector and education. Moreover, recent statistics show that immigrant families fare less well in Quebec than others. There is clearly a discriminatory effect.

At present, the result would be the same under the Quebec charter as under the Canadian Charter. It is true that Quebec could amend its Charter of Human Rights and Freedoms to comply with its new vision. However, the Canadian Charter would remain, and since Quebec has already promised not to invoke the notwithstanding clause, it would receive its full application.

Other difficulties abound. Quebec proclaims gender equality as a predominant "value." It is indeed very important, but does it necessarily carry more weight than racial equality? In any event, the Supreme Court said in Dagenais that one does not rank basic rights, but rather one tries to reconcile them if they conflict. That would continue to be so because of the Canadian Charter.

On the issue of religion, Quebec forgets the use of the word "conscience" in the Charter. Amselem shows that the Charter does not protect the dogmas of any religion, but rather the conscience of each believer or non-believer. The new approach would force a choice between conscience and employment, and that is surely not compatible with Canadian and Quebec tradition.

Julius Grey is a human-rights lawyer who lives in Montreal.

THE PANEL

Shauna Van Praagh – No, it goes against both charters of rights

Just last week, first-year law students started their formal legal education, eager to learn about individual rights and obligations, institutional structures and capacities and constitutional pillars and promises.

Could a hypothetical law forbidding state employees from wearing "ostentatious" signs of religious identity withstand the scrutiny of the Canadian Charter of Rights and Freedoms? Students would quickly point out that such a rule clearly infringes upon fundamental human rights to expression, association and belief – and that it's hard to see how such a prohibition is carefully tailored to meet the objective of ensuring fair treatment in education, health care or social services. Their assessment – even before studying constitutional jurisprudence – would be exactly right.

But constitutional invalidity is the easy part. Law students should also learn that Quebec law with respect to how people treat each other is shaped by the Quebec Charter of Human Rights and Freedoms. Each of us must act in a way respectful of each other's rights – and must repair any harm caused by our failure to do so. Nothing need be added to that charter to ensure appropriate behaviour by, or interactions with, individuals of faith. Further, law professors should invite students to compare legal frameworks of democratic mixed societies, look to international norms for guidance and find evidence from other disciplines that children and adults can embrace, rather than fear, diversity.

It's a good lesson in all aspects of law, and a reminder of the many ways we can participate in creative, constructive critique and conversation.

Shauna Van Praagh is a law professor at McGill University.

Hugo Cyr – No, Quebec hasn't proved its case

No one has a constitutional right to a specific job. Nonetheless, the state does not have an absolute right to decide whom to hire; it cannot use employment criteria that violate the Canadian Charter of Rights and Freedoms.

By forcing state personnel to choose between their employment and their own sincere religious convictions, the proposal would impose an exceptionally heavy burden on members of certain religious minorities. The proposal would thus infringe upon the freedom of conscience and religion and the right to equal benefit of the law without discrimination.

Ensuring state neutrality in relation to religious views may be a "pressing and substantial" state objective. However, the Quebec government has not shown a rational connection between that objective and the challenged proposal. No evidence has been presented to demonstrate a connection between the capacity of state personnel to be (and appear) religiously neutral in the fulfilment of their employment duties and the way they dress.

In fact, the state has presented the exact opposite evidence by recognizing that wearing a small visible Christian cross does not affect the capacity of the state employee to appear and remain neutral. Also, by covering all state personnel – whether or not they represent state authority – the measure is not sufficiently tailored to minimally impair the constitutional rights in question.

Unless the notwithstanding clause of s. 33 were used to shield the proposal from Charter challenges, it would be unconstitutional. Moreover, s. 33 could not protect against the unconstitutional violation of the principle of judicial independence that would result from the submission of provincial judges to the proposal and to the attendant risk of dismissal in case of non-compliance.

Hugo Cyr is a professor of public law at the University of Quebec at Montreal.

Sylvain Lussier – No, Quebec's justification isn't 'pressing'

Neutrality of the state is not a problem even if, oddly enough, our Constitution recognizes "the supremacy of God" even before that of the "rule of law." It cannot be doubted that the state of Quebec has been neutral since the *Révolution tranquille* of the 1960s. But it is from the Catholic Church that it emancipated itself. No one would believe that it needs to complete its separation from the church, although it may be questioned why the government insists on maintaining the crucifix, hung up by the Duplessis regime in 1936 in the National Assembly.

The "ostentatious religious signs" that are to be banned in the public service are hardly those of Catholics. The effects of the proposed measures are discriminatory, affecting Muslims, Jews and Sikhs. Notwithstanding the reiteration of the equality of men and women in the proposed *charte des valeurs*, these measures could in addition discriminate between men and women (the beard and the veil, or the wig and the kippa).

Justification requires a "pressing and substantial objective" (Oakes, Supreme Court of Canada, 1986). "Pressing" imports a sense of urgency that is absent from the demonstrations given to date by the government. One equally fails to detect the "substantial" need to address.

The justification of the restriction in a "free and democratic society" cannot rely solely on European precedents. It has to be contextualized in the Canadian and even North American environment, with its unique tolerance of religious diversity, the foundation of Canada and the United States.

Sylvain Lussier is a barrister appearing before the courts of the province of Quebec and before the Federal and Supreme courts of Canada. He represented Canada before the Gomery Commission.

Jamie Cameron – No, the breach of rights is flagrant

At best, Quebec's values charter suffers from incurable design flaws. Creating a secular state requires religion to be invisible or almost invisible, but how that is done matters. To start, what counts as overt and conspicuous and which symbols are religious remain uncertain. More problematic are exemptions for some employees in some institutions, but not others, and for elected officials who are among the most visible representatives of the state. Most telling of all are heritage exceptions for the public and highly conspicuous symbols of a religious past – the crucifixes and pervasively sainted towns, streets and landmarks that name the province of Quebec.

The design is incoherent and unconstitutional on that ground alone. Dangerously, the values charter privileges the artifacts of Quebec's Christian and Catholic heritage at the expense of the visible symbols of Quebec's religious demographic today. It is difficult to imagine what neutral secularism would look like in the face of history's embedded religiosity. Yet banning some religious symbols from the public sphere but saving others is nativism, and using the law to ban symbols of faith is an insidious form of statism.

Make no mistake: The values charter strikes at the core of fundamental freedoms that belong to all Canadians – freedom of religion, but also freedom of expression and association. This flagrant breach of constitutional rights could only be saved by the override, and overriding the Canadian Charter would confirm that intolerance, not neutrality, is the values charter's truth.

Jamie Cameron of Osgoode Hall Law School is a constitutional law scholar.

Nathalie Des Rosiers – No, with one exception about exceptions

Prohibiting the wearing of conspicuous religious symbols by civil servants violates their right to freedom of religion and freedom of expression. But both charters accept that the state may violate the rights of people for good reasons, in a manner that is "reasonable in a free and democratic society." To determine whether a measure is reasonable, a court must be convinced that a) there is a pressing state interest at stake and b) the measure is rational and infringes the freedom as little as possible.

To ask such questions is to answer them. There is no pressing need to monitor civil servants' dress. There is no problem that needs fixing. No one can demonstrate that Quebec citizens receive bad, unfair or discriminatory government services because some civil servants may be wearing religious symbols. There is no evidence that people who wear religious symbols discriminate in the delivery of service.

The government suggests that appearances do matter. A civil servant should present a bland face, costume or demeanour to ensure that citizens trust that they are indeed receiving services in a non-discriminatory way – symbols over substance, you might say. Limitations on civil servants' political speech are viewed by the government as analogous, although recently, more and more freedom of speech has been conferred on civil servants because they are people, too.

Courts do give governments latitude in deciding whether a measure is "reasonable." If there are enough exceptions, where religious employees can still work for the government but not in direct contact with the public, a court could decide that this is good enough. The prohibition could pass, but it does not make it right. The trend should be to provide more freedom, not less.

Nathalie Des Rosiers is dean of common law at the University of Ottawa and the former executive director of the Canadian Civil Liberties Association.

Tsvi Kahana – No, it's a blatant case of rights violation

This policy is plainly unconstitutional. The only question is how polite the court will be in stating so.

Had Quebec Justice Morris Fish, famous for calling a spade a spade, still been on the court, he would have found

the purpose of "religious neutrality" disingenuous. It is no coincidence that few Christians wear "conspicuous" garb while many people of Islamic, Sikh and Jewish persuasion do. Moreover, the policy leaves untouched the crucifix at the Quebec National Assembly (where this policy would be enacted), the giant cross on Mount Royal and Christmas trees in government offices.

The inevitable conclusion is that rather than promoting religious neutrality, the true purpose of the policy is to gain political capital by ganging up on the visible symbols of visible minorities. In Baier (2008), a less blatant case of rights violation, Justice Fish did not hesitate to expose true governmental motivation. He found that an Alberta law banning teachers from serving on school boards had the purpose of retaliating against teachers after a bitter labour dispute. Even less zealous judges, relying on more technical grounds, will surely find this policy unconstitutional. The legislation is not rationally connected to the goal of "religious neutrality" because leaving Christian symbols intact sends the message of Christian supremacy, not religious neutrality; the legislation is disproportional because the concrete harm inflicted upon religious minorities far outweighs the abstract gains to society at large, if those exist at all.

Tsvi Kahana is an associate professor of law at Queen's University in Kingston, Ont.

Kathleen Mahoney – No, it's an unjustifiable violation of rights

Quebec's proposal to prohibit the wearing of conspicuous religious symbols by state employees unjustifiably violates rights protected by the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms.

A government can violate the rights of its citizens only if it can show that the benefits of doing so outweigh the harms caused. Quebec's proposal fails to meet the test.

The purpose of Quebec's proposal is to achieve neutrality and secularism in the public service. Until now, employees in the public service have worn visible religious symbols, and there is no evidence that the neutrality and secularism of the public service is in jeopardy. The benefits of the prohibition are therefore speculative at best and more hypothetical than real.

At the same time, the proposal will impose heavy costs on the targeted individuals and their communities, some more so than others. Members of more visible religious minorities will be coerced into choosing between keeping their jobs and practising their faith. This is not a meaningful choice. It is deeply wrong to put citizens in such an invidious position. It is not an answer to say they can wear their religious symbols after working hours. This amounts to the government mandating how citizens practise their religion and treating some citizens as less equal than others – reminiscent of the dictatorial religious policies imposed during the Duplessis era.

On the scales of justice, the harms caused by the proposal will far outweigh the benefits to the province. It fails to meet the proportionality test and is unconstitutional.

Kathleen Mahoney is a professor of law at the University of Calgary and a constitutional and human-rights expert.

Stephen J. Toope – No, it would lead to absurdities of inequality

The proposed charter of Quebec values is not a serious attempt to grapple with a major social problem through law. It is a crass exercise in identity politics, proclaiming neutrality and inclusion but delivering a giant social wedge. It will not pass scrutiny under the Quebec or Canadian charters of rights. People with sincerely held religious beliefs will be denied public-sector employment unless they hide their religious identity, even though that identity has absolutely no bearing on their ability to do a job.

In Canada, including Quebec, freedom of religion encompasses the right not only to hold beliefs but to practise those beliefs without interference from government. Wearing religious symbols is a form of practice. Limitations upon religious practice can only be justified by showing serious social harm or injury to others – a tough test that the proposed charter of values would fail.

The inequality is revealed clearly by the Quebec government's stated desire to ensure that the traditional (read Christian) "patrimony" of the province is protected.

Far from guaranteeing the equality of men and women, the charter would produce absurdities of inequality. An Orthodox Jewish man must wear a kippa, but there is no corresponding external symbolic expression of devotion required of Orthodox Jewish women. The man could not be hired by government; the woman could, unless the ban

is extended to all wigs. The inverse is true for some forms of Muslim practice. Women wearing the hijab could not be hired, but men who have no similar requirement of modest clothing could – unless all beards are banned as well.

Stephen J. Toope is president and vice-chancellor of the University of British Columbia, as well as a professor of law.

Jennifer Llewellyn – No, it violates freedom of religion protections

As proposed, the prohibition would violate the freedom of religion protected in the Canadian Charter. The prohibitions cannot be defended in the name of freedom of conscience for those exposed to religious symbols.

The Canadian Charter protects the right to be free from state interference, including enforced secularism. The expression of personal religious beliefs by state employees does not necessarily amount to state endorsement of religion and interference with others' freedom of religion or conscience. Neutrality requires that the state not sanction religious views or views about religion that infringe on individual freedom.

This interpretation is consistent with the commitment in the Canadian Charter to our multicultural heritage. The values charter rejects state neutrality in favour of a secularism that prohibits individual freedom. Further, if the legislation focuses on "conspicuous" symbols, it would adversely affect some religious adherents more than others and run afoul of the equality protections in the Canadian Charter.

Violations of rights can be justified if consistent with a free and democratic society. A pressing and substantial objective is required to justify rights infringement. Courts typically look for more than assertions of broad, abstract social goals like secularism or state neutrality. Even if a sufficient objective is found, it is unlikely the government could show a rational connection to the specific provisions of the legislation. The exceptions for certain symbols by size or historical significance undermine this connection. The prohibitions would also likely fail the requirement to impair fundamental freedoms as little as reasonably possible.

Jennifer Llewellyn is Viscount Bennett professor of law at Schulich School of Law, Dalhousie University.