



1-1-2005

## Discrimination in the Name of Secularism: A Ban on Religious Symbols in Québec

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### Recommended Citation

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# Discrimination in the Name of Secularism: A Ban on Religious Symbols in Québec

Tina Mirzazadeh\*

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“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

¶Article 18,  
Universal Declaration of Human Rights<sup>1</sup>

## I. INTRODUCTION

In 1998, Fereshta Ludin, a German citizen and Muslim woman, was declined a teaching position at an elementary school in the state of Baden-Wurtemberg in Germany because “[she] showed no interest in removing her headscarf while teaching classes.”<sup>2</sup> The German Constitutional Court subsequently overturned the ban imposed on Ludin, but did so for “administrative reasons,” allowing room for states to continue enacting similar bans on symbols of faith.<sup>3</sup> In 2006, in reaction to the German Constitutional Court’s ruling,<sup>4</sup> the German state of Berlin, adopted the Berliner Neutralitätsgesetz, or Berlin Neutrality Law.<sup>5</sup> The law prohibited religious garb among public employees such as teachers, judges, and police.<sup>6</sup> Ironically, the Berlin Neutrality law is anything but neutral.<sup>7</sup> It effectively forces people, including Muslim women, in Berlin to choose between their religious beliefs and their careers.<sup>8</sup> Concurrently, it denies female German citizens of the Muslim faith protection under the freedom of religion clause of the German Constitution.<sup>9</sup>

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\* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2015; B.A. University of California, Davis, 2011. Thank you to my faculty advisor, Professor Brian Landsberg, for his guidance throughout the writing process; to my mom, Maryam, dad, Morrey, and brother, Cyrus, for the encouragement and support. Finally, thank you to Steven Cross; without your help I would not have had the opportunity to write this Comment in the first place. I dedicate this Comment to my family.

1. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

2. Cindy Skach, *From “Just” to “Just Decent”? Constitutional Transformations and the Reordering of the Twenty-first-century Public Sphere*, 67 MD. L. REV. 258, 268 (2007).

3. BRIAN LANDSBERG & LESLIE JACOBS, *GLOBAL ISSUES IN CONSTITUTIONAL LAW* 197 (2007) (citing Headscarf Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003 108 Entscheidungen des Bundesverwaltungsgerichts [BVerfGE] 282, 2003 (Ger.).

4. *Id.*

5. Joyce Marie Mushaben, *Women Between a Rock and a Hard Place: State Neutrality vs. EU Anti-Discrimination Mandates in the German Headscarf Debate*, 14 GERMAN L.J. 1757 (2013), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1578>.

6. LANDSBERG & JACOBS, *supra* note 3; *see also* Mushaben, *supra* note 5.

7. *See* Mushaben, *supra* note 5, at 1759; *see also* HUMAN RIGHTS WATCH, *Germany: Headscarf Bans Violate Rights: State Restrictions on Religious Dress for Teachers Target Muslim Women* (Feb. 26, 2009, 10:15 AM), <http://www.hrw.org/news/2009/02/26/germany-headscarf-bans-violate-rights>.

8. HUMAN RIGHTS WATCH, *supra*, note 7.

9. *See* Mushaben, *supra* note 5, at 1759.

In September of 2013, the Parti Québécois<sup>10</sup> proposed a bill similar to the Berlin Neutrality Law, which would ban all government employees in Québec from donning “overt and conspicuous” symbols of faith.<sup>11</sup> Parallel to its German counterpart, the Québec Charter of Values, also known as Bill 60, would have imposed the same choice on Muslim women working in the public sector—either stand by a sincere belief of faith to wear a headscarf or continue to work.<sup>12</sup> The federal governments of both Germany and Canada have constitutionally declared freedom of religion a fundamental right.<sup>13</sup>

Both have also ratified international agreements that uphold religious freedom and non-discrimination.<sup>14</sup>

Decreed in almost all international human rights documents, the freedom of religion has become a global value, promoted by both international law as well as the constitutions of many countries.<sup>15</sup> Article 1 of the Universal Declaration of Human Rights (UDHR), which states that “[a]ll human beings are born free and equal in dignity and rights,”<sup>16</sup> emphasizes the philosophical and intellectual autonomy accorded to the individual.<sup>17</sup> Article 1 thereby provides the foundation for the notion that the right to freedom of religion is an individual right as

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10. The PQ is a political party in the province of Québec. The party maintains a plurality of seats in the National Assembly as of the 2012 provincial election; see *Pauline Marois to become Quebec's 1st Female Premier*, CBC NEWS (Sept. 4, 2012, 9:20 AM), <http://www.cbc.ca/news/canada/montreal/pauline-marois-to-become-quebec-s-1st-female-premier-1.1143249>.

11. Ian Austen, *Quebec Calls for Ban on Wearing Symbols of Faith*, N.Y. TIMES (Sept. 10, 2013, 10:15 AM), [http://www.nytimes.com/2013/09/11/world/americas/quebec-calls-for-ban-on-wearing-symbols-of-faith.html?\\_r=0](http://www.nytimes.com/2013/09/11/world/americas/quebec-calls-for-ban-on-wearing-symbols-of-faith.html?_r=0).

12. See Nadio Elboubkri, *Quebec to Prohibit Citizens from Wearing Religious Symbols in Public Spaces*, MOROCCO WORLD NEWS (Sept. 14, 2013, 11:15 AM) <http://www.moroccoworldnews.com/2013/09/104837/quebec-to-prohibit-citizens-from-wearing-religious-symbols-in-public-spaces/> (showing examples of religious symbols worn in public, including a headscarf).

13. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, c.11 §§ 2a,15.1,33 (U.K.); Religious freedom is guaranteed in Article 4 of the German Constitution, which translates as follows:

- I. Freedom of faith and of conscience and freedom to profess a religious or philosophical creed, are inviolable.
- II. The undisturbed practice of religion shall be guaranteed.
- III. No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY], May 23, 1949, BGBl. 1, art 4.

14. EUROPEAN COURT OF HUMAN RIGHTS, *Press Country Profile: Germany*, [http://www.echr.coe.int/Documents/CP\\_Germany\\_eng.pdf](http://www.echr.coe.int/Documents/CP_Germany_eng.pdf) (last visited Feb. 17, 2014); FOREIGN AFFAIRS, TRADE AND DEVELOPMENT IN CANADA, *Canada's International Human Rights Policy*, <http://www.international.gc.ca/rights-droits/policy-politique.aspx> (last visited Feb. 17, 2014).

15. See Jonatas E. M. Machado, *Symposium: Religious Liberty in America and Beyond: Celebrating the Legacy of Roger Williams on the 400th Anniversary of his Birth: Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U. L. REV. 451, 467 (2005).

16. G.A Res. 217, *supra* note 1.

17. *Id.*

opposed to a national one.<sup>18</sup> Although not legally binding itself,<sup>19</sup> Article 18 of the UDHR has been incorporated into international treaties such as the European Convention of Human Rights (ECHR),<sup>20</sup> which is legally binding on the countries that have ratified it.<sup>21</sup> Globally, Article 18 of the UDHR has been reiterated in the International Covenant of Civil and Political Rights (ICCPR).<sup>22</sup> Refining the protective measures outlined in the UDHR, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (DEIDRB) prohibits discrimination by any State “on grounds of religion.”<sup>23</sup> The DEIDRB details that the definition of such discrimination includes “any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of . . . fundamental freedoms.”<sup>24</sup> Despite global validation that the right to religious freedom has attained in national and international law,<sup>25</sup> some countries still adopt laws that impede this fundamental right and promote religious discrimination.<sup>26</sup>

The Québec Charter of Values did not proceed to a vote because the Parti Québécois lost the election and thereby the majority in the National Assembly of Québec in April of 2014.<sup>27</sup> Despite the loss, the policies of “state neutrality” that the Charter of Values promotes are far from dead.<sup>28</sup> The controversial issue of religious neutrality has plagued Québec since 2006, when many religious and cultural groups specially requested public institutions to make reasonable accommodations in observance of the groups’ faiths and beliefs.<sup>29</sup> In response, Québec created the Bouchard-Taylor Commission in 2007.<sup>30</sup> The Commission was developed to address the issues of reasonable accommodations for these

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18. Machado, *supra* note 15, at 468.

19. AUSTRALIAN HUMAN RIGHTS COMMISSION, *What is the Universal Declaration on Human Rights?*, <http://www.humanrights.gov.au/publications/what-universal-declaration-human-rights> (last visited Nov. 21, 2014) (stating that the UDHR is not a treaty, so it does not directly create legal obligations for countries).

20. Machado, *supra* note 15, at 468.

21. EUR. PARL. ASS. RES. 1031 (Apr. 14, 1994, 11:00 AM), *available at* <http://assembly.coe.int/Documents/AdoptedText/TA94/ERES1031.HTM>.

22. International Covenant on Civil and Political Rights, art. 18(1),(3), G.A. Res. 2200A (XXI) (Dec. 16, 1966), *available at* <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx#>; *see also* G.A. Res. 217, *supra* note 1.

23. G.A. Res. 36/55, art. 2, U.N. Doc A/RES/36/55 (Nov. 25, 1981), *available at* <http://www.un.org/documents/ga/res/36/a36r055.htm>.

24. *Id.* at art. 2, sec. 2.

25. *See supra* Part I.

26. *See infra* Part II and III.

27. *See infra* Part V.

28. *See infra* Part V.

29. *Quebec Will Require Bare Face for Service*, CBC NEWS (Mar. 24, 2010), <http://www.cbc.ca/news/canada/montreal/quebec-will-require-bare-face-for-service-1.913095>.

30. *Id.*

types of minority communities in the province.<sup>31</sup> Then, in 2010, the Québec legislature introduced Bill 94, which sought to ban state employees and recipients of public services from wearing face covering garments such as the “niquab.”<sup>32</sup> The Québec Charter of Values surfaced in 2013.<sup>33</sup> The vast support the proposed Charter garnered indicates that the trend towards state neutrality in Québec is here to stay.<sup>34</sup> According to a poll conducted by La Presse, fifty-one percent of voters in Québec favored the bill.<sup>35</sup> The leader of the current majority party in Québec, Phillipe Couillard, has vowed to reintroduce measures similar to those in the Québec Charter to address the divisive issue of state neutrality.<sup>36</sup>

This Comment will argue that bills like the Charter of Québec Values and the Berlin Neutrality Law are not only unconstitutional and discriminatory nationally, but also illegal under international law.<sup>37</sup> The Comment will juxtapose the two laws because of their similarities in terms of text and because Berlin and Québec are both provinces in their respective countries, meaning that the legal effects of both laws will not reach beyond the provinces. Section II will describe the socio-political climate in Canada, and specifically in Québec, to demonstrate how and why the Parti Québécois arrived at the decision to propose such a Charter.<sup>38</sup> Section II, part B will compare these findings to the socio-political climate in Germany that led to the Berlin Neutrality Law.<sup>39</sup> Before analyzing the constitutionality of each law, Section III will begin with a comparison of the two texts. It will demonstrate why the Berlin Neutrality Law is constitutional under the German Constitution.<sup>40</sup> The Comment will ultimately argue that a bill like the Québec Charter of Values would be unconstitutional under Canadian law because it would violate the fundamental right of religious freedom.<sup>41</sup> Section IV will argue that laws like the Québec Charter of Values and the Berlin Neutrality Law are illegal under the International Covenant on Civil and Political Rights, which

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31. GÉRARD BOUCHARD & CHARLES TAYLOR, *BUILDING THE FUTURE: A TIME FOR RECONCILIATION* 13 (2008); *see also* CBC NEWS, *supra* note 29.

32. Sarah Chowdhury, *Is Canada's Multiculturalism in Peril?*, ALJAZEERA (Apr. 2, 2014), <http://www.aljazeera.com/indepth/opinion/2014/03/canada-multiculturalism-peril-201432914124951524.html>.

33. *See generally* Barbara Kay, *'Values' Return to Quebec in More Sensible Liberal Version*, NATIONAL POST (Sept. 18, 2014, 11:00 AM), <http://fullcomment.nationalpost.com/2014/09/18/barbara-kay-values-return-to-quebec-in-more-sensible-liberal-version/>.

34. Chowdhury, *supra* note 32; *see also* Rachel Décoste, *Did the Ethnic Vote Crush Pauline Marois?*, HUFFINGTON POST CANADA (Apr. 8, 2014), [http://www.huffingtonpost.ca/rachel-decoste/pauline-marois\\_b\\_5112189.html](http://www.huffingtonpost.ca/rachel-decoste/pauline-marois_b_5112189.html).

35. Andrea Janus, *Couillard promises 'most transparent government' in Quebec history*, CTV NEWS (Apr. 8, 2014), <http://www.ctvnews.ca/canada/couillard-promises-most-transparent-government-in-quebec-history-1.1765991>.

36. *Id.*

37. *See infra* Part III and IV.

38. *See infra* Part II.A.

39. *See infra* Part II.B.

40. *See infra* Part III.A.

41. *See infra* Part III.B.

Canada and Germany have ratified, and the European Convention on Human Rights, which Germany has ratified.<sup>42</sup> Finally, Section V will explain how future bills like the Québec Charter of Values can be modified to withstand the requirements of Canadian law and the international laws to which Canada is bound.<sup>43</sup>

## II. SOCIOPOLITICAL CLIMATES

### A. *Canada and Québec*

Known for embracing cultural diversity, Canada accepts more immigrants than any other country considered “economically advanced.”<sup>44</sup> By implementing multiculturalism as an official policy in 1971, Canada became one of the first countries in the world to affirm the value of according equal treatment to all Canadian citizens regardless of religion, race, ethnicity, or language.<sup>45</sup> The country prides itself on ensuring that all citizens can maintain their cultural identities while also “having a sense of belonging” and acceptance in Canada.<sup>46</sup> Canadian case law reflects the equal rights protections that Canada has historically promised people of all religious backgrounds.<sup>47</sup>

Despite Canada’s history of embracing multiculturalism,<sup>48</sup> polls demonstrating a growing intolerance towards other religions have surfaced.<sup>49</sup> A recent report shows that more than fifty-four percent of Canadians, not including those in Québec, hold Islam in an unfavorable light, compared to seventy-five

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42. *See infra* Part IV.

43. *See infra* Part V.

44. Alistair MacDonald, *Is Religious Tolerance on the Decline in Canada?*, WALL ST. J. BLOG (Oct. 3, 2013, 4:05 PM), <http://blogs.wsj.com/canadarealtime/2013/10/03/is-religious-tolerance-on-the-decline-in-canada/>; *see* Benjamin Dolin & Margaret Young, *Parliamentary Info. and Research Serv., BP-190E*, BACKGROUND PAPER: CANADA’S IMMIGRATION PROGRAM 9 (2004), available at <http://publications.gc.ca/collections/Collection-R/LoPBdP/BP-e/bp190-e.pdf> (stating that Canada has one of the highest per capita immigration rates in the world).

45. *Canadian Multiculturalism: An Inclusive Citizenship*, GOVERNMENT OF CANADA: IMMIGRATION & CITIZENSHIP, <http://www.cic.gc.ca/english/multiculturalism/citizenship.asp> (last visited Nov. 15, 2014).

46. *Id.*

47. *See* Chaput v. Romain, [1955] S.C.R. 834 (Can.), (holding that all religions possess equal rights, founded upon tradition and Canadian rule of law at a time when this argument was not upheld by Canadian statutory law); *see also* R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295 (Can.) (where non-Christians were banned from carrying out normal activities on Sundays in observance of the “Lord’s Day,” the Canadian Supreme Court held that religious freedom in Canada included “the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”); *see also* Multani v. Comm’n scolaire Marguerite-Bourgeoys [2006] 1 S.C.R. 256 (Can.) (holding that because of their right to religious freedom, Sikh children can wear a kirpan to school).

48. *Canadian Multiculturalism: An Inclusive Citizenship*, *supra* note 45.

49. MacDonald, *supra* note 44.

percent of Canadians who view Christianity favorably.<sup>50</sup> Other polls indicate that seventy percent of respondents feel that immigrants are not integrating into Canadian culture.<sup>51</sup> When compared to data in previous years, the recent polls show that the percentage of Canadians with unfavorable impressions of non-Christian religions has increased.<sup>52</sup>

These percentages increase drastically in Québec, where eighty-three percent of people reported they were Roman Catholic in the 2001 census,<sup>53</sup> and a reported seventy percent of people view Islam unfavorably.<sup>54</sup> It must be noted that French-speaking Québec differs from the other nine provinces in Canada.<sup>55</sup> Instead of a multi-cultural policy like the one that Canada promotes federally, Québec promotes “interculturalism.”<sup>56</sup>

Although the policy of interculturalism in Québec endorses diversity, it only does so to the extent that the diversity allows for the sustainment of the French language and culture of Québec.<sup>57</sup>

The cultural differences between the province of Québec and the rest of Canada have caused much political tension dating back to the 1960s.<sup>58</sup> These tensions ultimately led the province of Québec to hold a vote on the issue of sovereignty in two referendums in the 1980s and 1990s.<sup>59</sup> The former provincial leader and head of the Parti Québécois, Jacques Parizeau, placed the blame for the failure of the vote to separate Québec on “money and the ethnic vote.”<sup>60</sup> In the same speech, he specifically referred to those who voted in favor of Québec’s sovereignty as “nous les Québécois,” which translates to “we, the people of Québec.”<sup>61</sup> His statements led some to view the Québec Separatist movement as racist and exclusive.<sup>62</sup>

In spite of instituting secularist policies, the majority of people in Canada and Québec are Christian, and Christian values continue to influence the country’s

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Population by religion, By Province and Territory (2001 Census)*, STATISTICS CANADA, <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo30b-eng.htm>.

54. MacDonald, *supra* note 44.

55. Erik Leijon, *11 things to know before visiting Quebec*, CNN (last updated Aug. 28, 2014, 11:20 AM), <http://www.cnn.com/2013/05/01/travel/quebec-11-things/>.

56. CHRIS DURANTE, QUEBEC’S INTERCULTURAL RESPONSE TO RELIGIO-CULTURAL PLURALISM: WHAT’S AT STAKE FOR RELIGIOUS FREEDOM?

57. *Id.* at 3.

58. See Jennifer Selby, *Islam in Canada*, EURO-ISLAM.INFO (Sept. 5, 2008, 11:30 AM), <http://www.euro-islam.info/country-profiles/canada/>.

59. *Id.* (discussing the 1980 and 1995 political referendums that demanded Quebec’s sovereignty, which led to both provincial and national tension and debate.)

60. *Id.*

61. *Id.*

62. See Doug Thomas, *The Quebec Enigma—Part II*, AMERICAN HUMANIST ASSOCIATION (Jan. 19, 2005), <http://americanhumanist.org/hnn/archives/?id=176&article=6>.



culture.<sup>63</sup> Cultural tensions continue to brew as more immigrants from different ethnic and religious backgrounds trickle into Canada.<sup>64</sup> Tensions in Québec are especially exacerbated by the special devotion of the Québécois to the preservation of their French language and Christian-influenced culture.<sup>65</sup>

In 2006, several faith-based requests made by the immigrant community led to legal discussions regarding “reasonable accommodations.”<sup>66</sup> The requests included a father who asked the school to serve his son halal food.<sup>67</sup> In another request, Hassidic Jews asked that the YMCA across from a yoga studio tint its windows so that Jews who were attending synagogue across from the YMCA were not distracted by the women in the yoga classes.<sup>68</sup> In a third such request, three high school-aged Muslim women asked to be excused from co-ed swimming classes.<sup>69</sup>

The reasonable accommodation debates evolved from discussions about minority religious practices to a more comprehensive analysis of the integration of minorities into Québec culture.<sup>70</sup> In 2007, as a response to public disgruntlement, Québec established the Consultation Commission on Accommodation Practices Related to Cultural Differences to monitor the “accommodation practices in Québec.”<sup>71</sup> The Commission’s duties consisted of analyzing the issues resulting from accommodation, and “formulat[ing] recommendations to the government” to ensure that accommodation practices conformed to Québec’s society values.<sup>72</sup> Research from the Commission revealed that the public’s perception of the facts from reasonable accommodation cases was distorted, which led to a negative perception of reasonable accommodation.<sup>73</sup> Specifically, Quebecers perceived the accommodations as threats to Québec’s traditional values.<sup>74</sup> Dissatisfaction with reasonable accommodation mainly came from Quebecers of French-Canadian origin.<sup>75</sup> About seventy percent French-speaking Quebecers found Québec’s society to be “overly tolerant of

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63. Selby, *supra* note 58.

64. *See id.*

65. *See generally* Audrey Ann Lavalée-Belanger, *Quebec’s Charter of Values: Citizenship, Patriarchy and Paranoia*, OPEN DEMOCRACY (Oct. 22, 2013, 9:00 AM), <http://www.opendemocracy.net/audrey-ann-lavalée-belanger/quebec%E2%80%99s-charter-of-values-citizenship-patriarchy-and-paranoia>.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. GÉRARD BOUCHARD & CHARLES TAYLOR, QUÉBEC (PROVINCE). COMMISSION DE CONSULTATION SUR LES PRATIQUES D’ACCOMMODEMENT RELIÉES AUX DIFFÉRENCES CULTURELLES, BUILDING THE FUTURE, A TIME FOR RECONCILIATION: ABRIDGED REPORT 13–15 (2008).

71. *Id.* at 7.

72. *Id.*

73. *Id.* at 20.

74. *Id.* at 12–13.

75. *Id.* at 20.

accommodation,” as opposed to thirty-five percent of English-Speaking Quebecers.<sup>76</sup>

The controversy surrounding “reasonable accommodation” has led to a broader debate involving religious freedom and discrimination in Québec.<sup>77</sup> The Québec Charter of Values, announced in September of 2013 by Parti Québécois, proposes a ban on the wearing of religious symbols for government employees.<sup>78</sup> Although prefaced with the goal “to entrench the religious neutrality of the state and the secular nature of public institutions”<sup>79</sup> the charter’s many critics rightfully claim that the charter specifically targets Québec’s Muslim population.<sup>80</sup> If it passes, the Charter will not only prohibit government employees from wearing “conspicuous” symbols of faith in the workplace, it will also bar citizens from “receiving government services while wearing those symbols.”<sup>81</sup>

### *B. Germany*

A large population of Muslims in Germany, and specifically Berlin, can be attributed to the former West Germany’s settlement policies in the 1960s.<sup>82</sup> Today, approximately nine percent of Berlin’s population is Muslim.<sup>83</sup> Unlike Canada’s multiculturalism policy, Germany has adopted integration as its main policy.<sup>84</sup> Polls show that Germans are especially cynical about the integration of Muslim immigrants, as about two thirds think that Muslim immigrants in Germany do not accept German values.<sup>85</sup> Furthering tension towards immigrants, German chancellor Angela Merkel, has shot down any attempts at a multicultural approach, claiming that culturally diverse people are not capable of living

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76. BOUCHARD, *supra* note 70, at 20–21.

77. *See* MacDonald, *supra* note 44.

78. *Id.*

79. Daniel Schwartz, *Charter of Quebec values on collision course with Constitution? Parti Quebecois government wants to entrench religious neutrality*, CBC NEWS (Sept. 11, 2013, 5:21 AM), <http://www.cbc.ca/news/politics/charter-of-quebec-values-on-collision-course-with-constitution-1.1699637>.

80. *See* Jérémie Bédard-Wien & Alain Savard, *The Charter of Québécois Values: A Socialist View From Inside Quebec*, NEW SOCIALIST GROUP (October 24, 2013 1:41 PM), <http://www.newsocialist.org/723-the-charter-of-quebecois-values-a-socialist-view-from-inside-quebec>; *see also* Lavalée-Belanger, *supra* note 65.

81. Lavalée-Belanger, *supra* note 65.

82. *Islam in Berlin*, EURO-ISLAM.INFO (Sept. 5, 2008), <http://www.euro-islam.info/country-profiles/city-profiles/berlin/>.

83. *Id.*

84. *See generally* OYA S. ABALI, MIGRATION POLICY INSTITUTE, GERMAN PUBLIC OPINION ON IMMIGRATION AND INTEGRATION (2009), *available at* <http://www.migrationpolicy.org/research/german-public-opinion-immigration-and-integration>.

85. *Id.* at 1.

together harmoniously.<sup>86</sup> Touting Germany's integration policy, Merkel has said that the burden of integrating into German society is on immigrants.<sup>87</sup>

While Germany's Basic Law protects freedom of religion as a "fundamental right,"<sup>88</sup> the legal protection has been unequally distributed across the *Länder* (German states).<sup>89</sup> Although the German Constitutional Court lifted the headscarf ban in the Ludin case,<sup>90</sup> the decision imposed a duty on the German states to implement bans on religious symbols.<sup>91</sup> Many German states have adopted laws prohibiting Muslim headscarves in the classroom, while allowing displays of the crucifix.<sup>92</sup> Legislators justify the different treatment by arguing that unlike the Muslim headscarf, "the crucifix stands for tolerance, freedom, and reconciliation" and it "is not a symbol of oppression."<sup>93</sup>

### III. COMPARISON OF THE BERLIN NEUTRALITY LAW AND THE SIMILAR HYPOTHETICAL BAN IN QUÉBEC

Berlin adopted the Berlin Neutrality Law, with the so-called purpose of upholding neutrality and the negative rights of parents not to subject their children to any religious influence.<sup>94</sup> Berlin's law prohibits employees and civil servants who work in legal and probationary service areas as well as the police force and teachers from donning "visible religious and world-view items of clothing and symbols."<sup>95</sup>

The law allows "symbols worn as jewelry items," and explicitly exempts Christian cross jewelry from the ban because such jewelry does not "[demonstrate] belonging to a faith community."<sup>96</sup> At the same time, the law prohibits government employees and those in childcare services from donning

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86. Matthew Weaver, *Angela Merkel: German multiculturalism has "utterly failed,"* THE GUARDIAN, Oct. 17, 2010, <http://www.theguardian.com/world/2010/oct/17/angela-merkel-german-multiculturalism-failed>

87. *Id.*

88. Mushaben, *supra* note 5 at 1760.

89. *Id.* at 1757

90. See LANDSBERG & JACOBS, *supra* note 3, at 197. Despite the German Constitutional Court's decision to overturn the ban on wearing a headscarf in the Ludin case, the case did little to protect the religious freedoms of women like Fereshta Ludin. The German Constitutional Court only overturned the ban for "administrative reasons," conveniently leaving out any opinion on whether the ban had infringed on Ms. Ludin's right to religious freedom under the German Constitution.

91. *Id.* at 197 (citing Headscarf Case, 108 BVerfGE 282 (2003) (F.R.G. Fed. Const. Ct.).

92. LANDSBERG & JACOBS, *supra* note 3.

93. Astrid Holscher, *Germany: A Country with a Christian Character; The Trouble with the Head Scarf*, World Press Review, March 2004, at 12, available at <http://www.worldpress.org/Europe/1802.cfm>.

94. Mushaben, *supra* note 5, at 1757–58.

95. Exemptions may be granted according to the law. *Id.*

96. SUSANNE BAER & KIRSTEN WIESE, IST DAS BERLINER NEUTRALITÄTSGESETZ MIT DEM ALLGEMEINEN GLEICHBEHANDLUNGSGESETZ VEREINBAR? EXPERTISE IM AUFTRAG DER LANDESSTELLE FÜR GLEICHBEHANDLUNG–GEGEN, DISKRIMINIERUNG IN BERLIN 48 (2008), [http://www.berlin.de/imperia/md/content/lb\\_ads/materialien/diskriminierung/06\\_lb\\_ads\\_neutrg\\_agg\\_bf\\_50\\_neu.pdf?start&ts=1398255366&file=06\\_lb\\_ads\\_neutrg\\_agg\\_bf\\_50\\_neu.pdf](http://www.berlin.de/imperia/md/content/lb_ads/materialien/diskriminierung/06_lb_ads_neutrg_agg_bf_50_neu.pdf?start&ts=1398255366&file=06_lb_ads_neutrg_agg_bf_50_neu.pdf).

headscarves<sup>97</sup>—this ban primarily affects Muslim woman who choose to wear the headscarf in observance of their faith. Therefore, the law fails to uphold religious neutrality, the very purpose behind its enactment.<sup>98</sup>

Bill 60, also known as the Québec Charter of Values, boasted many similarities to the Berlin Neutrality law. Firstly, neither law is nationally imposed; Québec is a province of Canada, and Berlin is one of the German *Länder*. Although similar, the Canadian Bill would reach farther in scope than its German counterpart.<sup>99</sup> Parallel to Berlin Neutralitätsgesetz, Bill 60 would have also affected public sector employees by requiring all government personnel to “reflect the secular nature of the State,” by not wearing any “religious objects that overtly indicate a religious affiliation.”<sup>100</sup> Like the Berlin law,<sup>101</sup> Bill 60 specifically targeted the Muslim hijab by explicitly stating that all public personnel must carry out their jobs with “their faces uncovered.”<sup>102</sup> Broader than the Berlin Neutrality law, Québec’s Bill 60 would have prohibited anyone receiving services from government employees from wearing overtly religious symbols and from covering their faces while receiving those services.<sup>103</sup> This means that public school students would be restricted from wearing overt religious symbols to school because the school is a public body from which they receive education services.<sup>104</sup> Both the Berlin Neutrality law and Bill 60 specifically address teachers and childcare personnel, and also impose the same duties of religious neutrality on them.<sup>105</sup> Both laws emphasize religious neutrality as a purpose; however Québec’s Bill 60 would have placed special emphasis on the preservation of Québec’s culture in addition to the preservation of a secular state.<sup>106</sup>

#### *A. Constitutionality of the Berlin Neutrality Law*

The Berlin Neutrality Law was passed in 2006, and it is presumed to be constitutional under the German Basic Law (GG) because fundamental rights

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97. *Id.*

98. *Id.*

99. *See supra* Part II & III.

100. Like the Berlin law, the restrictions set out in Bill 60 extend to public employees in the judicial and administrative areas. Quebec Charter of Values, Bill 60, 40th Leg., 1st Sess. (2013) (Que.)

101. DAGMAR SCHIEK, CASES, MATERIALS, AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW (2007).

102. Specifically, the bill restricts government employees from wearing “headgear, clothing, jewelry or other adornments which, by their conspicuous nature, overtly indicate a religious affiliation.” Pictures accompanying the Charter of Québec Values proposal showcase Muslim headgear and specifically ban it. Bill 60.

103. A Firm Belief in Our Values, QUEBEC, <http://archive.today/J2L2n>; Chapter VI, § 19 of the Bill requires public bodies to adopt policies that implement restrictions outlined in the Bill. Bill 60.

104. *Id.* at § 17.

105. Mushaben, *supra* note 5, at 1766.

106. Bill 60, § 41.

outlined in the German Constitution are supreme to *Länder* (German state) laws.<sup>107</sup> Article 4 of the GG specifically guarantees “the undisturbed practice of religion.”<sup>108</sup> Article 4 gives German people the positive right to adhere to a faith of their choosing; however, German policy also accords everyone the negative right not to observe a faith as well.<sup>109</sup> Because the government may not interfere with the positive or the negative religious freedom rights, the German Federal Constitutional Court (FCC) is barred from promoting any faith.<sup>110</sup> The FCC has used this prohibition and the negative right not to share in any belief to uphold legislation such as the Berlin Neutrality Law.<sup>111</sup> For example, the FCC looked to Article 6(2) of the GG: “the care and upbringing of the children is the natural right of parents and a duty primarily incumbent upon them,”<sup>112</sup> to support the notion that Muslim head coverings should be prohibited in the classroom.<sup>113</sup> Specifically, the FCC interprets this article to give parents the negative right of religious freedom not to have their children exposed to the Muslim faith while receiving a public education.<sup>114</sup>

*B. Constitutionality of a Hypothetical Ban on Religious Symbols in Québec*

Although the FCC has paved the way for the Berlin Neutrality law to find validity under the German Basic Law, a law like Québec’s Bill 60 will not find the same type of justification in case law regarding the fundamental right to religious freedom.<sup>115</sup> Opponents of the Québec Charter of Values claimed that the charter violated the constitutional right to freedom of religion and state that it is “state-sanctioned discrimination.”<sup>116</sup> Canada’s Constitution, the Canadian Charter of Rights and Freedoms, guarantees that everyone has the fundamental freedoms of expression and religion.<sup>117</sup> It also guarantees that every person has the right to equal benefit of the law and equal protection under the law without discrimination based on religion.<sup>118</sup> Unlike the German Basic Law, the Charter of

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107. If the Berlin Neutrality Law conflicted with the fundamental right to freedom of religion in the Basic Law, the former would be invalidated; Mushaben, *supra* note 5.

108. GRUNDGESETZ FÜR BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I, Art. 4. [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#GGEngl\\_000P81](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#GGEngl_000P81).

109. T. Lock, “Of Crucifixes and Hedscarves: Religious Symbols in German Schools” in *Law, Religious Freedoms and Education in Europe* (2012) p. 348.

110. *Id.*

111. *Id.*; see also Mushaben, *supra* note 5 at 1769.

112. Lock, *supra* note 109, at 348.

113. Mushaben, *supra* note 5, at 1769.

114. *Id.*

115. See *supra* pp. 16–25.

116. Austen, *supra* note 11.

117. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c.11 §§ 2a,15.1,33 (Can.).

118. *Id.*

Rights and Freedoms posits the notwithstanding clause,<sup>119</sup> in Section Thirty-Three. The clause states that the parliament of any province can declare that an act of that parliament will operate notwithstanding the freedom of expression and religion provisions in the Charter.<sup>120</sup> If this clause is invoked, the Québec parliament could expressly declare that Bill 60 will “operate notwithstanding”<sup>121</sup> Section 2 of the Canadian Constitution, which grants everyone the fundamental “freedom of conscience and religion.”<sup>122</sup> In this case, Bill 60 would override the fundamental right of religious freedom, and would be domestically constitutional, regardless of whether it violates freedom of religion.<sup>123</sup> In the case of Bill 60, the Parti Québécois allegedly promised not to invoke the notwithstanding clause, and if so, the Canadian Charter of Rights and Freedoms would have been fully applicable to the Bill.<sup>124</sup>

The Canadian Charter of Rights and Freedoms begins by stating that the rights and freedoms listed in it are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>125</sup> This language suggests that freedom of religion, along with other rights provided in the Charter, is qualified.<sup>126</sup> The Oakes test, derived from the 1986 Canadian Supreme Court case, *R. v. Oakes*, provides a framework to analyze the limitations on rights and freedoms in the Canadian Charter of Rights and Freedoms.<sup>127</sup> The Oakes court introduced four factors, which if satisfied, will uphold a limitation on the rights and freedoms outlined in the Constitution.<sup>128</sup> These factors state that:

1. The reason for limiting the Charter right must be shown to be important enough to justify overriding a constitutionally protected right.

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119. Constitution Act, 1982, § 33(1) (Can.).

120. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c.11 §§ 2a,15.1,33 (Can.).

121. *Id.* at c.11 §§ 33(1) (Can.).

122. Constitution Act, 1982, § 2(a) (Can.).

123. If parliament invokes the notwithstanding clause, Bill 60 will override the fundamental right to freedom of religion for five years. The law must expire after five years, but it may be renewed. LANDSBERG & JACOBS, *supra* note 3.

124. Sean Fine, Is Quebec’s Secular Charter constitutional? Nine legal experts weigh in, *The Globe and Mail* (Sept. 14, 2013) *available at* <http://www.theglobeandmail.com/news/politics/is-quebecs-secular-charter-constitutional-nine-legal-experts-weigh-in/article14324825/?page=all> (quoting Julius Grey).

125. CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c.11 §§ 1 (Can..)

126. *See id.* at c.11 §§ 2a.

127. Fine, *supra* note 124 (quoting Sylvain Lussier).

128. Blair, Annice et al. *LAW IN ACTION: UNDERSTANDING CANADIAN LAW*. (Pearson Education Canada Inc., 2003), *case summary available at* [http://studentlaw11.wikispaces.com/file/view/r.\\_v.oakes.pdf](http://studentlaw11.wikispaces.com/file/view/r._v.oakes.pdf); *R v. Oakes*, [1986] 1 S.C.R. 103 (Can.) (finding “it may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical [opposed] to the realization of collective goals of fundamental importance [to the people of Canada].”).

2. The measure carried out to limit the right must be reasonable and logically connected to the objective for which it was enacted.
3. The right must be limited as little as possible.
4. The more severe the rights' limitation, the more important the objective must be.<sup>129</sup>

Some argue that the Québec Charter of Values would have been constitutional because the Canadian government's objectives of secularism and religious neutrality are important enough to justify an override of the right to religious freedom.<sup>130</sup> The fact that such a ban would only be imposed on "conspicuous" religious symbols, as opposed to discrete ones, also reflects that the Charter might have only limited the right to freedom of religion outlined in the Canadian constitution to a reasonable extent.<sup>131</sup> However, relevant Canadian case law decided by the Supreme Court refutes this view.<sup>132</sup>

*Syndicat Northcrest v. Amselem*, a Canadian Supreme Court case originating in Québec, set the precedent for the freedom of religion analysis.<sup>133</sup> Moise Amselem, an orthodox Jew, had asked Northcrest, the condominium management company, for approval to build a sukkah<sup>134</sup> on his limited common balcony for the duration of the Jewish holiday, the Sukkot.<sup>135</sup> Upon denying the request, Northcrest offered to construct a shared sukkah for all the Jewish owners to use together.<sup>136</sup> Amselem refused the offer, and erected an individual sukkah on his balcony.<sup>137</sup> The Superior Court and the Québec Court of Appeals held in favor of Northcrest, but the Supreme Court of Canada reversed in a majority decision.<sup>138</sup> The Supreme Court of Canada outlined the freedom of religion analysis:

Freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion. Once religious freedom is triggered, a court must then ascertain whether there has been non-trivial or non-insubstantial interference with the exercise of the implicated right so as to constitute an infringement of

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129. Blair, *supra* note 128.

130. Fine, *supra* note 124 (quoting Daniel Turp).

131. *See id.*

132. *See infra* Part III.B.

133. *See Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 5 (Can.).

134. A sukkah is a temporary hut (translated as a booth) to be used as a type of dwelling during the Jewish holiday of Sukkot. *See Ozzie Nogg, Sukkot: A Time to Rejoice*, THE JEWISH FEDERATIONS OF NORTH AMERICA, <http://www.jewishfederations.org/page.aspx?id=47442>.

135. *Syndicat Northcrest*, [2004] 2 S.C.R. 551.

136. *Id.* at 568.

137. *Id.* at 565.

138. *Id.* at 601.

freedom of religion under the Quebec (or the Canadian) Charter. However, even if the claimant successfully demonstrates non-trivial interference, religious conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.<sup>139</sup>

The Court stated that the Canadian Constitution does not require the claimant to show that the religious practice in question is mandatory according to his faith's doctrine, but simply that his belief in the practice is sincere.<sup>140</sup> According to the Court, Amselem demonstrated his sincere belief in needing to construct the sukkah on his own balcony by positing expert testimony of his "sincere individual belief as to the inherently personal nature of fulfilling the commandment of dwelling in a [sukkah]."<sup>141</sup> The Court rejected Northcrest's argument that the declaration of co-ownership of the property explicitly barred any "decorations, alterations and constructions on balconies."<sup>142</sup> The Court found that the clauses in the declaration constituted a non-trivial interference with Amselem's right to freely practice his religion because barring Amselem from constructing his own sukkah "obliterate[d] the substance of his right."<sup>143</sup> The alternative option, offered by Northcrest, to dwell in a shared sukkah was found to unlawfully undermine the Sukkot festivities, which would cause "extreme distress."<sup>144</sup> After weighing Northcrest's interest in the aesthetics of the building against the non-trivial interference with Amselem's rights, the Supreme Court reasoned that the effects on Northcrest were "minimal," and therefore could not reasonably "impos[e] valid limits" on Amselem's right to freedom of religion.<sup>145</sup> The Northcrest case demonstrates the high burden of proof that the any party proposing such a bill must meet to show that limitations on the freedom of religion are reasonable and logically connected to the objective.<sup>146</sup> That means the Parti Québécois would have been required to prove that the ban on conspicuous religious symbols achieved the objective of secular statehood and outweighed the peoples' right to observe their faith.<sup>147</sup>

In *Multani v. Commission scolaire Marguerite-Bourgeoys*, another Canadian Supreme Court case that first developed in Québec, the Supreme Court

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139. *Id.* at 554.

140. *Id.* at 554-55.

141. *Syndicat Northcrest*, [2004] 2 S.C.R. 551, 2004 SCC 47, 554-55.

142. *Id.* at 552.

143. *Id.* at 555.

144. *Id.*

145. *Id.* at 555.

146. *See generally Syndicat Northcrest*, [2004] 2 S.C.R. 551, 2004 SCC 47, 557.

147. *See id.* at 571-72.



invalidated an order that banned a Sikh child from wearing his kirpan<sup>148</sup> to school.<sup>149</sup> Québec's Attorney General, arguing in favor of the Québec school, claimed that the kirpan ban was "a fair limit on freedom of religion" because freedom of religion is also limited by the goal of security, which the kirpan infringed on.<sup>150</sup> In applying the *Syndicat Northcrest* freedom of religion analysis, the Court found that the practice of wearing a kirpan was sufficiently connected to religious belief because it is a mandatory practice in the Sikh religion.<sup>151</sup> The plaintiff's sincere belief in wearing a metal kirpan to comply with the Sikh religion was not contested.<sup>152</sup> It also found that although the right to religious freedom was not absolute,<sup>153</sup> the kirpan ban constituted a non-trivial infringement on the plaintiff's right because he had to choose between his right to attend public school and his right to practice his religion.<sup>154</sup> Upon balancing the school's interest in safety against the plaintiff's right to religious freedom, the Supreme Court found that the Québec school failed to explicitly demonstrate the presence of safety concerns,<sup>155</sup> which is required to justify a limit on the right to religious freedom outlined in Section 2 of the Canadian Charter of Rights and Freedoms.<sup>156</sup>

If a claim against a future bill like the Charter were to arise, both *Syndicat Northcrest* and *Multani* would require the Canadian Supreme Court to rule that the Bill is unconstitutional under Section 2 of the Canadian Constitution.<sup>157</sup> The cases, coupled with the language in Section 1 of the Canadian Constitution, imply that absent injustice, reasonable accommodations can and will be made.<sup>158</sup> The fact that the Québec Charter of Values specifically would have affected public sector jobs would make it very difficult for Québec to justify a limitation of the right to religious freedom because a ban on the wearing of religious symbols, such as the Muslim headscarf, would constitute a non-trivial interference with an individual's right to religious freedom.<sup>159</sup>

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148. A kirpan is symbol of faith that must be carried by baptized Sikhs. It resembles a miniature sword. See *Understanding the Kirpan*, WORLD SIKH ORGANIZATION OF CANADA, <http://worldsikh.ca/page/understanding-kirpan>.

149. *Multani*, *supra* note 47, at 257.

150. *Id.* at 275–76.

151. *Id.* at 279–81.

152. *Id.* at 280.

153. *Id.* at 258.

154. *Id.* at 258–59.

155. See *Multani*, *supra* note 47 at 259–260 (reasoning that the safety risk imposed was low because the wearing of a kirpan had never been related to a violent incident at school, and could not be used to harm others according to the Sikh religion. The Court stated that other objects at school such as scissors or pencils could just as easily be used as a weapon).

156. *Id.* at 265.

157. Fine, *supra* note 124 (quoting Julius Grey).

158. *Id.*; CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c.11 §§ 2a, 15.1, 33 (Can.).

159. Fine, *supra* note 124 (quoting Julius Grey); *Multani*, *supra* note 47, at 6.

Many Muslim religious scholars view the headscarf as a necessity to preserve modesty restrictions as outlined in the Qu'ran.<sup>160</sup> Many Muslim women agree with this viewpoint, and don headscarves based on a sincere belief that it is necessary in observance of their Muslim faith.<sup>161</sup> Therefore, barring a Muslim woman from wearing her headscarf<sup>162</sup> while working in the public sector or receiving public services can be argued to be a non-trivial interference of her fundamental right to freedom of religion.<sup>163</sup> Like the Sikh plaintiff in *Multani* who had to choose between practicing his religion by wearing his kirpan and attending public school, under the Québec Charter, a hijab-wearing Muslim woman would have been forced to choose as well.<sup>164</sup> She would have had to choose between adhering to a sincere belief in her faith by wearing her headscarf, and working at her public sector job or receiving public benefits, such as a public education.<sup>165</sup> In *Multani*, the Supreme Court found the requirement of such a choice to constitute a non-trivial burden on the claimant.<sup>166</sup> Therefore the Canadian Supreme Court will likely find the burdens imposed by a future law like Bill 60 to be non-trivial and thus a violation of the Canadian Constitution.<sup>167</sup>

#### IV. DO THE BERLIN NEUTRALITY LAW AND A SIMILAR BAN ON RELIGIOUS SYMBOLS IN QUÉBEC VIOLATE INTERNATIONAL LAW?

In 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR), a binding international treaty that obliges nation signatories to respect civil and political rights, including freedom of religion.<sup>168</sup> Germany and Canada have both ratified and acceded to this treaty.<sup>169</sup>

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160. See Sadia Aslam, *Hijab in the Workplace: Why Title VII Does not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance*, 80 UMKC L. REV. 221, 223–25 (2011).

161. Reuven Ziegler, *The French “Headscarves Ban”: Intolerance or Necessity*, 40 J. MARSHALL L. REV. 235, 243 (2006).

162. Pictures accompanying the Charter of Quebec Values proposal showcase Muslim headgear and specifically ban it. See STAFF, *At a glance: Quebec Charter of Values’ 5 proposals*, GLOBAL NEWS (Sept. 10, 2013, 11:03 AM), <http://globalnews.ca/news/830801/at-a-glance-quebec-charter-of-values-five-proposals/>.

163. See *Multani*, *supra* note 47, 259, 273.

164. See *id.* at 282.

165. See *id.*

166. *Id.* at para. 6.

167. See generally *id.*

168. International Covenant on Civil and Political Rights, art. 18, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> [hereinafter ICCPR].

169. *Id.*; see also List of Participant Nations, *available at* [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&lang=en) (showing Germany’s adoption of the ICCPR as Dec. 17, 1973 and adoption by Canada as May 19, 1976).

A. *Banning Conspicuous Religious Symbols in Québec*

Articles 18 and 19 of the ICCPR protect the rights of freedom of religion and expression, respectively.<sup>170</sup> Freedom of expression coupled with freedom of religion can be argued to jointly preserve the right of people to wear religious symbols, like the Muslim headscarf, in order to express and observe their faith.<sup>171</sup>

Although the ICCPR expressly protects freedom of religion in Article 18, the treaty does permit signatory states to limit this right so long as it is “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>172</sup> Such limitations cannot be imposed “for discriminatory purposes, or applied in a discriminatory manner.”<sup>173</sup> The purpose of Québec’s Bill 60 would have been to preserve “state secularism and religious neutrality.”<sup>174</sup> However, the prohibition on religious symbols only applies to conspicuous religious objects, such as “headgear, clothing, jewelry or other adornments . . . which overtly indicate a religious affiliation.”<sup>175</sup> In fact, the fourth page of the official brochure for the Charter, displays pictures which show “ostentatious” or banned symbols, versus “non-ostentatious,” or permitted symbols.<sup>176</sup> Headscarves, turbans, skullcaps, and unusually large crosses are banned, whereas the more typical small cross necklace and other small items of jewelry are permitted.<sup>177</sup> Cross jewelry is usually smaller than the one displayed as “ostentatious” in the brochure,<sup>178</sup> and even if it is not small, it can be covered by clothing worn on a daily basis, such as a t-shirt. Headscarves and turbans, on the other hand, are worn on and around the face. They are patently visible, and therefore they are per se conspicuous, both in reality and according to the Charter. Thus, although the purpose of such a Bill is to protect the religious neutrality of Québec, the effect would be anything but neutral because it treats people of different faiths differently.<sup>179</sup> In fact, under the effects-test of the United Nations Declaration (UND), the effect of such a Bill would be discriminatory because the UND defines discrimination based on belief to mean:

Any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or

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170. ICCPR, *supra* note 168, at art. 18(3), 19(2).

171. Reuven Ziegler, *The French “Headscarves Ban”: Intolerance or Necessity*, 40 J. MARSHALL L. REV. 235, 243(2006).

172. ICCPR, *supra* note 168.

173. HUMAN RIGHTS WATCH, *supra* note 7.

174. Bill 60 *supra* note 100.

175. *Id.* at ch. II, div. II(5).

176. PARCE QUE NOS VALEURS, ON Y CROIT, TELECHARGER LE DEPLIANT LONG 4, *available at* [http://www.nosvaleurs.gouv.qc.ca/medias/pdf/Valeurs\\_depliant\\_version\\_courte.pdf](http://www.nosvaleurs.gouv.qc.ca/medias/pdf/Valeurs_depliant_version_courte.pdf); Kelley *supra* note 162.

177. PARCE QUE NOS VALEURS, ON Y CROIT *supra* note 176..

178. *Id.*

179. *See supra* Part IV.A.

impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.<sup>180</sup>

The effect of a future law like the Québec Charter is discriminatory according to the aforementioned definition because under such a law Christians would be able to continue to wear cross necklaces, whereas Muslims and Sikhs would not be able to wear head coverings under the law.<sup>181</sup> Another example of such a law's discriminatory nature lies in the fact that a crucifix hangs on display in Québec's legislature.<sup>182</sup> Although such a crucifix would normally fall under the category of "conspicuous," and therefore should be removed to comply with the Charter,<sup>183</sup> the Parti Québécois exempts the crucifix from the ban because it is an "item of cultural heritage."<sup>184</sup> In effect, even when a Christian religious symbol is ostentatious,<sup>185</sup> it is permitted and treated much differently from a Muslim religious symbol like the headscarf. Articles 18 and 19 of the ICCPR, combined with an analysis of the Bill under the UND effects test, unequivocally demonstrate that a bill that proposes similar prohibitions to those proposed in the Québec Charter of Values will have discriminatory effects. Therefore, such a ban would violate the ICCPR, an international treaty that Canada has acceded to.<sup>186</sup>

#### *B. The Berlin Neutrality Law*

Germany is also a party to the ICCPR, and therefore must comply with the same international standard of religious freedom and freedom of expression as Canada.<sup>187</sup> Also enacted to preserve religious neutrality,<sup>188</sup> the Berlin Neutrality Law prohibits government employees from wearing patently visible religious symbols,<sup>189</sup> while exempting Christian cross jewelry because such jewelry allegedly does not demonstrate a religious affiliation.<sup>190</sup> The cross is plainly a religious symbol that represents the Christian faith. Germany may not limit

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180. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., 73rd plen. mtg., Supp. No. 51, at 171, U.N. Doc A/RES/36/55 at art. 2(2) (Nov. 25, 1981).

181. PARCE QUE NOS VALEURS, *supra* note 176 ; Kelley *supra* note 162.

182. PARCE QUE NOS VALEURS, *supra* note 176; Kelley, *supra* note 162.

183. The crucifix that hangs in Quebec's legislature is far larger than the picture showing a conspicuous cross. PARCE QUE NOS VALEURS, *supra* note 176.

184. *Quebec's Identity in Politics: When is a crucifix not religious?*, THE ECONOMIST, Sept. 14, 2013, available at <http://www.economist.com/news/americas/21586338-when-it-object-electoral-calculation-when-crucifix-not-religious>.

185. The crucifix that hangs in Québec's legislature is far larger than the picture showing a conspicuous cross. PARCE QUE NOS VALEURS, *supra* note 176.

186. ICCPR, *supra* note 168.

187. *Id.*

188. Mushaben, *supra* note 5.

189. Exemptions may be granted according to the law. *Id.*

190. BAER & WIESE, *supra* note 96.

religious freedom or freedom of expression granted by the ICCPR, if such limitation is discriminatory.<sup>191</sup> The fact that head coverings are not permitted but crosses are illustrates the discriminatory effect of the Berlin Neutrality Law. The same analysis of the UND effects-test coupled with the ICCPR applies in this case, and the outcome is the same.<sup>192</sup> The Berlin Neutrality Law is discriminatory because it treats Christianity and Islam differently, and therefore the Berlin law, like Bill 60, violates the ICCPR.

As a member state of the European Union, Germany has ratified the European Convention on Human Rights (ECHR) and is legally bound by it.<sup>193</sup> The ECHR expressly protects the freedom of religion in Article 9(1), and similar to the ICCPR, lists limitations on the right in Article 9(2).<sup>194</sup> Article 9(2) states that the right to freedom of religion is subject to limitations necessary for the protection of “public safety, public order, health or morals, or the protection of rights and freedoms of others.”<sup>195</sup> As a member state of the European Union (EU), Germany must comply with the ECHR, and specifically with the Allgemeines Gleichbehandlungsgesetz (AGG), legislation which transposes EU anti-discrimination directives into German Law.<sup>196</sup> The AGG delineates definitions of direct and indirect discrimination that are found in the EU directives as well.<sup>197</sup> It defines direct discrimination as occurring “where one person is treated less favorably than another . . . on any of the prohibited grounds.”<sup>198</sup> Indirect discrimination “occur[s] where an apparently neutral provision . . . would put persons . . . at a particular disadvantage compared with other[s] . . .”<sup>199</sup> The Berlin Neutrality Law clearly treats a Muslim woman less favorably than a woman who chooses to wear a small cross necklace.<sup>200</sup> This is because the law forbids the former while allowing the latter.<sup>201</sup> In sum, the Berlin Neutrality Law violates the anti-discrimination directives transposed into German law by the AGG because it favors Christianity over Islam.<sup>202</sup>

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191. HUMAN RIGHTS WATCH, *supra* note 7.

192. *See supra* Part IV.A.

193. EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 14.

194. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, §1, art. 9, C.E.T.S. 005, *available at*, <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

195. *Id.*

196. Lock, *supra* note 106, at 655, 659.

197. Act Implementing European Directives

Putting Into Effect the Principle of Equal Treatment, Aug. 14, 2006, § 3, *available at* [http://www.agg-ratgeber.de/files/pdf/AGG\\_en.pdf](http://www.agg-ratgeber.de/files/pdf/AGG_en.pdf).

198. Mushaben, *supra* note 5, at 1768.

199. Mushaben, *supra* note 5 at 1768.

200. *See generally id.* at 1766; *see also* BAER & WIESE, *supra* note 96.

201. *See generally* Mushaben, *supra* note 5; *see also* BAER & WIESE, *supra* note 96.

202. *See supra* Part IV.B.

V. FINAL RECOMMENDATION: REQUIREMENTS OF A CONSTITUTIONALLY SOUND AND INTERNATIONALLY LEGAL BILL IN QUÉBEC

The Québec Charter of Values, or Bill 60, was presented as part of Parti Québécois's political platform when running in the election to win the majority in Quebec's Congress.<sup>203</sup> In the spring of 2014, the Québec Liberal Party beat the Parti Québécois in the election.<sup>204</sup> As a result, Bill 60 did not proceed to a vote.<sup>205</sup> However, the issues triggered by the Bill are far from irrelevant, and the potential for a very similar bill in the near future is great.<sup>206</sup> Firstly, a March 2014 poll for *La Presse* demonstrated that fifty-one percent of voters supported the Charter.<sup>207</sup> This statistic highlights the fact that the Charter, although highly controversial, introduced measures aimed at state neutrality that many Quebecers agreed with.<sup>208</sup> Secondly, the leader of the winning party, Philippe Couillard, has promised to reintroduce measures to sort out the reasonable accommodation issues raised by the Charter.<sup>209</sup> He indicated that he would do so "early in [his] government," because of the divisive effect that the Charter had on Québec.<sup>210</sup> Justice Minister Stephanie Vallee expects the legislation that the government "calls a 'moderate' version of the Charter of Values" to be introduced in autumn.<sup>211</sup> The Minister specifically stated that the legislation will prohibit religious garb that covers a woman's face and women's arms.<sup>212</sup> Finally, after the resignation of Pauline Marois, the former leader of the Parti Québécois, the Parti Québécois will have to elect a new leader.<sup>213</sup> Bernard Drainville of the Parti Québécois was the minister in charge of the Charter of Québec Values,<sup>214</sup> and is a potential candidate for

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203. *Values Charter Tops Parti Quebois Election Platform*, CTV MONTREAL (March 8, 2014), <http://montreal.ctvnews.ca/values-charter-tops-parti-quebecois-election-platform-1.1720471>.

204. Allan Woods, *Quebec Liberals Win Majority Over Parti Quebecois as Marois Steps Down*, THE STAR, Apr. 7, 2014, available at [http://www.thestar.com/news/canada/2014/04/07/quebec\\_liberals\\_jump\\_to\\_early\\_lead\\_over\\_parti\\_qubcois.html](http://www.thestar.com/news/canada/2014/04/07/quebec_liberals_jump_to_early_lead_over_parti_qubcois.html).

205. Rachel Decoste, *Did the Ethnic Vote Crush Pauline Marois?*, HUFFINGTON POST, (Apr. 8, 2014), [http://www.huffingtonpost.ca/rachel-decoste/pauline-marois\\_b\\_5112189.html](http://www.huffingtonpost.ca/rachel-decoste/pauline-marois_b_5112189.html); See also Janus, *supra* note 35; Philip Authier, *Charter support not a handicap: Drainville*, THE MONTREAL GAZETTE, (Aug. 27, 2014), <http://montrealgazette.com/news/local-news/charter-support-not-a-handicap-drainville>.

206. Janus, *supra* note 35.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Quebec Liberals Working on Moderate Charter of Values*, CTV MONTREAL (Sept. 17, 2014, 12:55PM), <http://montreal.ctvnews.ca/quebec-liberals-working-on-moderate-charter-of-values-1.2011365>.

212. *Id.*

213. *Parti Quebecois To Announce Rules For Leadership Race on September 27*, THE CANADIAN PRESS (Aug. 12, 2014, 7:29PM), <http://montreal.ctvnews.ca/parti-quebecois-to-announce-rules-for-leadership-race-on-sept-27-1.1957217>.

214. *Charter of Quebec Values Would Ban Religious Symbols for Public Workers*, CBC NEWS (Sept. 10, 2013, 6:07 AM), <http://www.cbc.ca/news/canada/montreal/charter-of-quebec-values-would-ban-religious-symbols-for-public-workers-1.1699315>.

leadership of the Parti Québécois.<sup>215</sup> He stands by his belief in the principles of neutrality showcased by Bill 60, and has not rejected the idea that he will introduce a bill similar to Bill 60 again in the near future.<sup>216</sup> Based on these happenings, it is clear efforts to maintain state neutrality are ongoing in Québec.<sup>217</sup>

One way for measures like those presented in the Charter of Québec Values to pass is if the party presenting such a bill elects to invoke the notwithstanding clause of the Canadian Constitution.<sup>218</sup> If the party does not do so, measures banning so-called “conspicuous” religious symbols must be modified in order to abide by domestic Canadian law.<sup>219</sup> The significantly high burden of proof on the State to prove that a limitation on the constitutional right of religious freedom outweighs a non-trivial interference with the right will make it extremely difficult for such measures to be approved by the Canadian Court.<sup>220</sup> One viable solution is to propose a bill that bans religious symbols that are especially “excessive.” Unfortunately, such a bill would be very vague, and the word “excessive” would be up for endless interpretation. An example of what is “excessive” could include full-face coverings. This type of bill would be parallel Bill 94, which was initially presented by the Liberal Party in 2010.<sup>221</sup> Québec could argue that such a limitation is reasonable by proving that full-face coverings threaten the Québécois objectives of secularity and gender equality.<sup>222</sup> This argument will be very difficult to make because the precedential case law favors reasonable accommodation over limitations on freedom of religion, if such accommodation can be accorded “without cost or injustice.”<sup>223</sup>

In order to comply with the objective of neutrality and to escape a violation of international law on discrimination grounds, such a bill must not have a discriminatory effect when applied to different religions.<sup>224</sup> The fact that the Charter of Québec Values would have expressly exempted Christian symbols of

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215. Authier, *supra* note 205.

216. *Id.*

217. *See supra* Part V.

218. Jay Makarenko, *The Notwithstanding Clause: Section 33 of the Charter*, MAPLELEAFWEB (Jun. 1, 2006), <http://mapleleafweb.com/features/notwithstanding-clause-section-33-charter>; *see also* LANDSBERG & JACOBS, *supra* note 3 at 34.

219. *See supra* Part III.B.

220. *See supra* Part II.B.

221. Dana Olwan, *The Unfairness of Bill 94 Unveiled*, RABBLE (May 12, 2010), <http://rabble.ca/news/2010/05/unfairness-bill-94-unveiled>.

222. Meena Sharify-Funk, *Governing the Face Veil: Quebec’s Bill 94 and the Transnational Politics of Women’s Identity*, 43 REVUE INTERNATIONALE D’ETUDES CANADIENNES [INTERNATIONAL JOURNAL OF CANADIAN STUDIES], 136–163 (2011), available at <http://www.erudit.org/revue/ijcs/2011/v/n43/1009458ar.html>.

223. *See supra* Part III.B; *see also* Sean Fine, *Is Quebec’s Secular Charter Constitutional? Nine Legal Experts Weigh In*, THE GLOBE AND MAIL (Sept. 14, 2013), <http://www.theglobeandmail.com/news/politics/is-quebecs-secular-charter-constitutional-nine-legal-experts-weigh-in/article14324825/?page=all>.

224. *See supra* Part IV.A.

faith, such as a cross necklace or a crucifix, clearly demonstrates the Charter would have treated Christianity differently than Islam. For this reason, Québec would have to propose a bill that either allows religious symbols from all religions, or ban such symbols entirely, regardless of religious affiliation. In the case of Bill 60, Parti Québécois claimed that it would only restrict “‘conspicuous’ religious symbols,” yet it defended the large and conspicuous crucifix that still hangs today in Québec’s legislature.<sup>225</sup> Such different treatment does not logically achieve the objective of religious neutrality. The discrepancies also demonstrate blatant discrimination that violates international law.<sup>226</sup> Future bills must comply with international law such as the ICCPR, and to do so they must rid themselves of any discriminatory effect.<sup>227</sup> Specifically, future bills must treat all symbols of faith in the same manner.<sup>228</sup> If the bill bans public employees and individuals interacting with the public sector from wearing headscarves, turbans, or skullcaps, then it must also prohibit all visible Christian symbols as well. In order to not violate international law, Québec must propose a bill that does not discriminate between different religious communities.<sup>229</sup>

## VI. CONCLUSION

The Québec Charter of Values, or Bill 60, as it is now called, would have been unconstitutional under domestic law because it violated the freedom of religion clause of the Canadian Constitution.<sup>230</sup> The bill also failed to adhere to the anti-discriminatory standards laid out in the International Covenant on Civil and Political Rights and the United Nations Declaration, because its effects treat Islam and Christianity differently, and therefore it violates international law.<sup>231</sup> Unlike Bill 60, the German legislature narrowly upheld the Berlin Neutrality Law based on the FCC’s interpretation of the negative right not to share in a certain religion.<sup>232</sup> Although the logic is questionable, the FCC came to the conclusion that the donning of religious symbols such as the headscarf forces individuals to share in that faith, and thereby strips individuals from their negative religious freedom right.<sup>233</sup> Therefore, the Berlin Neutrality Law is constitutional

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225. *Quebec’s identity politics: When is a crucifix not religious?* THE ECONOMIST (Sept. 14,, 2013), <http://www.economist.com/news/americas/21586338-when-it-object-electoral-calculation-when-crucifix-not-religious>.

226. *See supra* Part IV.A.

227. *See supra* Part IV.A.

228. *See supra* Part IV.A.

229. *See supra* Part V.

230. *See supra* Part III.B.

231. *See supra* Part IV.A.

232. *See supra* III.A.

233. *See supra* III.A.



domestically.<sup>234</sup> On the other hand, parallel to Bill 60, the law does not hold up under international law because of its discriminatory effects.<sup>235</sup>

Modern-day societies must mediate between two competing values: the globally recognized right of religious freedom and the preservation of a secular government. So far, eight of the sixteen German *Länder* have passed faith-restricting legislation like the Berlin Neutrality Law.<sup>236</sup> France,<sup>237</sup> Turkey,<sup>238</sup> Belgium,<sup>239</sup> and the Netherlands,<sup>240</sup> are just a few of the many countries around the world that have enacted legislation placing restrictions on certain religious symbols. Each day more Middle Easterners are immigrating to Western countries, such as Canada and Germany.<sup>241</sup> The intermixing of cultures and religions has driven many Western governments to enact legislation to preserve the religious neutrality of the state, and in some cases, to preserve Western traditions and Christian values.<sup>242</sup> In many cases, such as Québec, the preservation of neutrality is just a guise.<sup>243</sup> Places like Québec are questioning where their loyalty lies—with the preservation of the freedoms guaranteed in their constitutions, or with the preservation of their own country's culture and identity.<sup>244</sup> The current political and social instability in countries such as Afghanistan, Iraq, Syria, Libya, Lebanon, and Egypt will only fuel this tension as people with different faiths and traditions continue to emigrate to the West. Countries that have ratified international treaties such as the ICCPR must ensure that future legislation enacted to maintain secular statehood complies with international anti-discriminatory directives and with their constitutional promise of religious freedom.

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234. See *supra* III.A. But see, AP, *In Germany, High Court Overturns Headscarf Ban for Teachers*, HUFFINGTON POST, March 3, 2015, [http://www.huffingtonpost.com/2015/03/13/germany-headscarf-ban\\_n\\_6863336.html](http://www.huffingtonpost.com/2015/03/13/germany-headscarf-ban_n_6863336.html) (reporting that Germany's highest court struck down a law banning teachers from wearing headscarves in the state of North Rhine-Westphalia for being unconstitutional. The article states that holding will also apply to headscarf bans in other German states, implicating the Berlin Neutrality Law.).

235. See *supra* IV.B.

236. Tobias Lock, *Of Crucifixes and Hedscarves: Religious Symbols in German Schools in LAW, RELIGIOUS FREEDOMS AND EDUCATION IN EUROPE* 347, 361 (2012).

237. Bruno Waterfield, *Netherlands to Ban the Burka*, THE TELEGRAPH (Sept. 15, 2011, 2:00 PM), available at <http://www.telegraph.co.uk/news/worldnews/europe/netherlands/8765673/Netherlands-to-ban-the-burka.html>.

238. *Turkey: Constitutional Court Ruling Upholds Headscarf Ban*, HUMAN RIGHTS WATCH (Jun. 6, 2008, 2:15 PM), <http://www.hrw.org/news/2008/06/05/turkey-constitutional-court-ruling-upholds-headscarf-ban>.

239. Waterfield, *supra* note 237

240. *Id.*

241. See *supra* Part II.

242. See *supra* Parts II.A–B.

243. See *supra* Parts II.A, III.B.

244. See *supra* Part II.A.