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State Neutrality in Religious Affairs -- Civil Servants and Religious Dress

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State Neutrality in Religious Affairs -- Civil Servants and Religious Dress

Erratum
article

STATE NEUTRALITY IN RELIGIOUS AFFAIRS – CIVIL SERVANTS & RELIGIOUS DRESS

Simon Pelsmakher[†]

ABSTRACT: This article examines the question of whether civil servants have the right to wear religious dress. The law in Canada, the United States, and Europe will be examined in order to review different policies regarding the relationship between state neutrality and religious affairs, freedom of religion, and equality. A synthesis of these laws will then be proposed in order to argue that civil servants should have the right to wear religious dress, and by doing so, laws pertaining to neutrality are not violated.

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I. INTRODUCTION

Over the past few centuries there has been a growing debate in the Western world about the relationship between state and religion. This issue took center stage in the U.S. founding laws and principles and it is a significant issue in Canada and Western Europe. Whereas the law mandates an official “separation of church and state” in the United States,¹ the law in Canada provides no such guarantee. Canadian jurisprudence favors a so-called “state-neutrality” approach as a means of balancing the interests of competing religious groups while remaining neutral. The jurisprudence in Europe is arguably somewhat contradictory. States such as Italy actively promote secularism, yet conversely uphold the importance of Roman Catholicism in their societies.

In recent years, one aspect of the state-religion debate has focused on the rights of civil servants to wear religious dress while conducting their official

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¹ U.S. Library of Congress, Information Bulletin, *Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson* (Jan. 1, 1802).

public duties. The former Parti Québécois government attempted to address this issue by proposing the *Quebec Charter of Values* (“*Quebec Charter*”) in 2013, which would have prohibited civil servants from wearing religious dress.² Canadian political leaders heavily criticized the *Quebec Charter* and it did not become law. Nevertheless, the debate over the use of religious dress by civil servants while on the job continues to unfold in Quebec and the rest of Canada within the greater context of accommodation of religious minorities and the relationship between state and religion.

This article will argue that Canadian civil servants should have the right to wear their respective religious dress at work. A comparative approach will be taken to outline the methods used in Canada, the United States, and Europe, with a particular emphasis on Italy, in order to determine how this issue is tackled around the world. First, there will be a discussion on how the law operates in Canada (excluding Quebec). Sections 2(a), 15, and 27 of the *Canadian Charter of Rights and Freedoms*³ (“*Charter*”) will be reviewed. There will also be a discussion of the “Sunday closing cases.”

Next, this article will discuss how the law operates in Quebec, and will outline the Outremont secularism and religious-accommodation disputes. The cases of *Syndicat Northcrest v. Amselem*,⁴ and *Rosenberg v. Outremont*,⁵ will be reviewed, as will the *Bouchard-Taylor Report*.⁶ The article will subsequently survey the relevant law in the United States. The Establishment Clause of the First Amendment of the U.S. Constitution⁷ will be reviewed in addition to applicable American case law. These cases include *Van Orden v. Perry*,⁸ *Everson v. Board of Education*,⁹ *McCreary County v. ACLU of Kentucky*,¹⁰ and *Lemon v. Kurtzman*.¹¹ Finally, this article will briefly review the law in Europe, such as in the European Court of Human Rights decision in *Lautsi and Others v. Italy*.¹² Following the discussion, a proposal will be introduced which synthesizes the relevant laws surveyed in order to demonstrate why civil servants should have the right to wear religious dress while at work.

² Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess., 40th Leg., Quebec, 2013. (not entered into force) [hereinafter *Quebec Charter*].

³ Canadian Charter of Rights and Freedoms, Part I of The Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11, § 27 (Can.) [hereinafter *Charter*].

⁴ *Syndicat Northcrest v. Amselem*, 2004 S.C.C. 47 (Can.) [hereinafter *Syndicat*].

⁵ *Rosenberg v. Outremont (City)*, [2001] R.J.Q. 1556, 84 C.R.R. (2d) 331 (Can.) [hereinafter *Rosenberg*].

⁶ Gérard Bouchard & Chris Taylor, *Building the Future: A Time for Reconciliation*, COMMISSION DE CONSULTATION SUR LES PRATIQUES D'ACCOMODEMENT RELIÉES AUX DIFFÉRENCES CULTURELLES. <https://www.mce.gouv.qc.ca/publications/CCPARDC/rapport-final-integral-en.pdf> [hereinafter *Bouchard-Taylor Report*].

⁷ U.S. CONST. amend I.

⁸ *Van Orden v. Perry*, 545 U.S. 677 (2005) [hereinafter *Van Orden*].

⁹ *Everson v. Board of Education*, 330 U.S. 1 (1947).

¹⁰ *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) [hereinafter *McCreary*].

¹¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971) [hereinafter *Lemon*].

¹² *Lautsi and Others v. Italy* (No. 30814/06), Eur. Ct. H.R. (2011) [hereinafter *Lautsi*].

II. CANADIAN CASE STUDY

While Canadian law does not make any specific mention to “separation of church and state,” as is the case in the United States under the U.S. Constitution,¹³ Canadian jurisprudence does reiterate that government should remain neutral regarding matters of religion. The relevant black-letter law on this issue can be found in ss. 2(a) and 15 of the *Charter*:

2 (a) “everyone has the following fundamental freedom: (a) freedom of conscience and religion”¹⁴

15 (1) “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”¹⁵

As the following cases demonstrate, the interpretation of these sections of the *Charter* have been hotly debated and have helped shape the relationship between government and religion.

A. Sunday Closing Cases

In the Sunday closing cases of *R v. Big M Drug Mart*¹⁶ and *R v. Edwards Books*,¹⁷ the courts ruled that laws of a religious nature that are coercive can be tantamount to a s. 2(a) violation.¹⁸ This is because such rules violate an individual’s right to freedom of religion. In *Big M Drug Mart*, the Supreme Court of Canada (“SCC”) ruled that the *Lord’s Day Act*, which prohibited the retail sale of goods on Sundays, was a clear violation of s. 2(a) of the *Charter*. The SCC came to this position because the law in that case was religious in nature and coercive.¹⁹ Justice Dickson (as he then was) stated that laws such as the *Lord’s Day Act*, which are not secular in nature and whose purpose is the “compulsion of religious observance,” offend freedom of religion.²⁰ He went on to state:

¹³ ROSALIE JUKIER & JOSE WOEHLING, *National Report for Canada on Religion and the Secular State*, in NATIONAL JUDICIAL INSTITUTE, 155-191 (2010) [hereinafter Jukier & Woehrling].

¹⁴ *Charter*, *supra* note 3.

¹⁵ *Id.*

¹⁶ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481 (Can.) [hereinafter *Big M*].

¹⁷ *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 (Can.) [hereinafter *Edwards*].

¹⁸ *Big M*, [1985] 1 S.C.R. 295.

¹⁹ *Id.* at 296-297.

²⁰ *Id.*

“It is unnecessary to consider the actual impact of Sunday closing upon religious freedom. Legislation whose purpose is found to violate the *Charter* cannot be saved even if its effects were found to be inoffensive.”²¹

In contrast to the findings of this case, the SCC in *Edwards Books* held that similar laws, which create an indirect economic hardship, are not sufficient to demonstrate a *Charter* violation.²² The statute in that case, the *Retail Business Holidays Act*, was of a secular nature. Unlike the *Lord’s Day Act*, the *Retail Business Holidays Act* merely had an unintended effect on the rights and interests of religious minorities, such as Saturday Sabbath observers. For religious reasons, the businesses of such observers were already closed on Saturdays; due to the *Retail Business Holidays Act* they also had to close on Sundays. The Court found that such laws do not demonstrate a clear violation of the *Charter* unjustified by s. 1.²³ Moreover, the law in *Edwards Books* was not religious and coercive in nature.²⁴ As such, the *Retail Business Holidays Act* was upheld in *Edwards Books*.²⁵

B. Religion in Public Institutions

As discussed in Richard Moon’s “Freedom of Conscience and Religion,” in the cases of *Zylberberg v. Sudbury*²⁶ and *Canadian Civil Liberties Association v. Ontario*,²⁷ the courts ruled that laws which require students to read and study Christian religious texts violate s. 2(a) of the *Charter* and cannot be saved by s. 1.²⁸ The courts determined that such actions demonstrated state favoritism of a specific religion and were therefore, coercive and discriminatory against non-adherents of said religion. *Mouvement laïque québécois v. Saguenay (City)*²⁹ also considered this issue, which will be further explored in the Quebec Case Study section of this article. In *Mouvement laïque québécois v. Saguenay (City)*, the SCC held that the requirement to read specific religious texts in town municipal buildings was a violation of the *Charter*.³⁰

In *Allen v. Renfrew*³¹ (predating *Saguenay*), the Ontario Superior Court of Justice also ruled on this issue but came to a different conclusion, holding that

²¹ *Id.* at 296.

²² *Edwards*, [1986] 2 S.C.R. 713.

²³ *Id.* at 715-717.

²⁴ As these two cases differ, in that one is of a religious nature and the other is of a secular nature, courts use entirely different analyses in reaching their conclusion.

²⁵ *Edwards*, [1986] 2 S.C.R. 713, at 716-718.

²⁶ *Zylberberg v. Sudbury Board of Education*, [1988] O.J. No. 1488 (Can.).

²⁷ *Canadian Civil Liberties Association v. Ontario (Minister of Education)*, [1990] O.J. No. 104 (Can.).

²⁸ RICHARD MOON, FREEDOM OF CONSCIENCE AND RELIGION 31-33 (2014).

²⁹ *Mouvement laïque québécois v. Saguenay (City)*, 2015 S.C.C. 16, ¶ 150 (Can.) [hereinafter *Saguenay*]. Also known as *Simoneau c. Tremblay*.

³⁰ *Id.*; The Court focused the majority of its attention on the issue of religious prayers in municipal buildings, but it also discussed the issue of displaying crosses in state buildings which it did not outright oppose.

³¹ *Allen v. Renfrew (Corp. of the County)*, 2004 O.J. No 1231 (Can.).

requirements to read ecumenical religious texts at the opening of a municipal council session and at meetings is not a s. 2(a) *Charter* violation. The Court in *Allen v. Renfrew* reasoned that the religious texts were more of a neutral nature rather than being specific to one particular religion.³² The Court in *Saguenay* reviewed the *Renfrew* decision, holding that the prayer in *Renfrew* was not religious in substance or observance, nor otherwise coercive and burdensome. The prayer requirement in *Saguenay*, however, was religious in practice and had a burdensome effect on the complainant.³³

C. Multiculturalism and the Charter

While rarely invoked by the courts, s. 27 of the *Charter* has been used to protect the multicultural heritage of Canadians. It states: “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”³⁴ As there have not been many cases specifically focusing on s. 27, the cases that will be discussed in this section will more so outline how the law has adapted to issues pertaining to multiculturalism.

Section 27 was famously cited in *R v. Videoflicks*.³⁵ In that case, the Ontario Court of Appeal held that s. 27 should be used as a mechanism to reinforce freedom of religion.³⁶ The Court reasoned that if a law restricts an individual’s right of religious expression, then the law does not promote multiculturalism, which is an integral part of an individual’s identity and culture.³⁷ Section 27 was also cited by the SCC in *Big M Drug Mart*, where the Court found that the *Lord’s Day Act* was imposing a standard applicable only to individuals of the Christian faith. Therefore, this policy did not promote the multicultural heritage of all Canadians.³⁸

In *Adler v. Ontario*,³⁹ the SCC heard the issue of whether non-Christian denominational schools should receive government funding. The majority ruled against this position, as Christian denominational school funding stems from a compromise reached during Confederation between the federal Government and Quebec: an issue unrelated to multiculturalism or freedom of religion.⁴⁰ In Justice L’Heureux-Dubé’s dissent, she argued that the primary issue in that case was the survival of religious minorities in a larger secular society.⁴¹ She went on to state that their non-recognition “strikes at the very heart of the principles

³² *Id.*; Here, the Court focused its attention on the issue of religious prayers in municipal buildings, but it also discussed the issue of displaying crosses in state buildings which it did not outright oppose.

³³ *Id.* at 65.

³⁴ *Charter*, *supra* note 3.

³⁵ *R v. Videoflicks Ltd.*, [1984] 48 O.R. 2d 395 (Can.).

³⁶ *Id.*

³⁷ *Id.* at 67-68.

³⁸ *Jukier & Woehrling*, *supra* note 13, at ¶ 99.

³⁹ *Adler v. Ontario*, [1996] 3 S.C.R. 609, 680-681 [hereinafter *Adler*].

⁴⁰ *Id.*

⁴¹ *Id.* at 616.

underlying [the] s. 15 right to equality.”⁴² Therefore, s. 27 creates a duty on the state to accommodate freedom of religion, particularly within religious minority communities.⁴³

In *Bhinder v. Canadian National Railway Co.*,⁴⁴ the SCC ruled that preventing Sikhs from wearing a turban in place of a hardhat at a construction site does not constitute a *Charter* violation, as the hardhat requirement is a *bona fide* workplace requirement for safety reasons.⁴⁵ Issues pertaining to an individual’s safety can therefore temporarily trump an individual’s right to wear items of a religious nature if the religious dress prevents them from maintaining proper safety attire. In *Grant v. Canada*,⁴⁶ the Federal Court ruled that a Sikh police officer has the right to wear a turban as part of his Royal Canadian Mounted Police uniform.⁴⁷ In wearing turbans, Sikhs were not violating the plaintiff’s (non-Sikh) *Charter* rights, nor were the plaintiffs being discriminated against by this policy. No safety violations were present as in *Bhinder*.

The laws outlined in this case study demonstrate that the jurisprudence actively protects freedom of religion rights; however, there are instances when the specific issue in question exceeds the rights guaranteed in the *Charter*. The *Charter* is very much open to interpretation. Nevertheless, it can be argued that the right for civil servants to wear religious dress does not extend beyond the limits of the *Charter* and should thus be recognized and protected.

D. Quebec Case Study

In Chapter 1 of Richard Moon’s “Law and Religious Pluralism in Canada,” Professor Moon uses the tort of nuisance as a mechanism to outline the ongoing debate on religious freedom in Quebec. He defines the tort of nuisance as: “[w]hen one neighbour takes actions that makes life unbearable for another... [When this occurs], prior agreements and arrangements must be reestablished, in order to maintain social norms.”⁴⁸ What appears to be the norm for one neighbour, however, can appear to be a nuisance for another. This was particularly true in *Syndicat Northcrest v. Amselem*.⁴⁹ In this case, an individual of the Jewish faith erected a *sukkah* on the balcony of his condominium, which was in contravention of the condominium corporation by-laws.⁵⁰ A *sukkah* is a temporary small wooden dwelling that Jewish people erect for the holiday of *Sukkot*.⁵¹ The SCC held that an individual has the right to erect a *sukkah* on the balcony of their condominium even if there are opposing regulations, so long as

⁴² *Id.* at 619.

⁴³ *Id.*

⁴⁴ *Binder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561 (Can.).

⁴⁵ *Id.*

⁴⁶ *Grant v. Canada (Attorney General)*, [1995] 1 F.C. 158 (Can.).

⁴⁷ *Id.*

⁴⁸ RICHARD MOON, LAW AND RELIGIOUS PLURALISM IN CANADA 22-23 (2008).

⁴⁹ *Syndicat*, 2004 S.C.C. 47.

⁵⁰ *Id.*

⁵¹ Louis Jacobs, *The Sukkah, A Temporary Dwelling*, MY JEWISH LEARNING (1995), <http://www.myjewishlearning.com/article/the-sukkah/>.

this action is connected to an individual's genuine religious belief. Opposing interpretations by other religious leaders are not binding.⁵²

In *Rosenberg v. Outremont*,⁵³ the Quebec Superior Court heard a case involving *eruv*s in public places. An *eruv* is a natural boundary that can be replaced with a wire, which religious Jews use to outline their communities so that they can conduct their daily affairs on the Sabbath without being in contravention of religious law.⁵⁴ In that case, the City of Outremont adopted a practice of removing *eruv* wires upon receiving complaints from non-Jewish residents. The Court rejected the City's claim that permitting Jewish residents to erect *eruv*s implied state favoritism of Judaism over other religions.⁵⁵ The Court held that preventing the erection of *eruv*s would be a violation of an individual's freedom of religion.⁵⁶ Furthermore, the Court outlined that the presence of an *eruv* is no more or less intrusive than that of Christmas trees, neither of which demonstrates favoritism by the state.⁵⁷

In Professor Moon's text, he argues that individuals should be allowed to freely practice their religion, but a compromise should be sought when the actions in question have a significant impact on the rights and interests of others.⁵⁸ Courts should maintain a balanced equilibrium and compromise between the rights and interests of the majority population and those of religious minorities.⁵⁹

This debate set the stage for the dispute on "religious accommodation" as outlined in the *Bouchard-Taylor Report*⁶⁰ and the *Quebec Charter of Values*.⁶¹ The *Bouchard-Taylor Report* describes religious and reasonable accommodation as a legal mechanism to accommodate religious and ethnic minorities when facing discrimination.⁶² Similar to the *Quebec Charter of Values* (to be discussed below), the *Bouchard-Taylor Report* argues against some governmental officials such as judges, prison guards, and policy makers wearing religious dress. Other employees, such as physicians and university officials, would not be prohibited from doing so.⁶³

As per Howard Adelman and Pierre Anctil's "Religion, Culture, and the State: Reflections on the Bouchard-Taylor Report," reasonable accommodation would require negotiations at times between the different interested parties to

⁵² *Adler*, [1996] 3 S.C.R. 609, at 39-41, 47-49.

⁵³ *Rosenberg*, [2001] R.J.Q. 1556.

⁵⁴ Lorne Rozovsky, *What Is an Eruv?*, CHABAD, http://www.chabad.org/library/article_cdo/aid/700456/jewish/What-Is-an-Eruv.html.

⁵⁵ *Rosenberg*, [2001] R.J.Q. 1556.

⁵⁶ *Id.* at 43-44.

⁵⁷ *Id.*

⁵⁸ *Id.* at 35-36.

⁵⁹ *Id.* at 35-36.

⁶⁰ *Bouchard-Taylor Report*, *supra* note 6.

⁶¹ *Quebec Charter*, *supra* note 2.

⁶² *Bouchard-Taylor Report*, *supra* note 6.

⁶³ HOWARD ADELMAN & PIERRE ANCTIL, RELIGION, CULTURE, AND THE STATE: REFLECTIONS ON THE BOUCHARD-TAYLOR REPORT, 32-34 (2011) [hereinafter Adelman & Anctil].

ensure full participation.⁶⁴ Examples of this can include requests for special foods in hospitals (e.g., kosher, halal, etc.). The *Bouchard-Taylor Report* thus supports the “open secularism” model. This philosophy attempts to balance the secular nature of Quebec with the accommodation requests from its religious minorities.⁶⁵ In doing so, the goal is for religious minorities to be better integrated into society.⁶⁶ When tensions arise from competing groups, conflict should be resolved in favor of religious equality.⁶⁷

In contrast to this approach, the Parti Québécois’s (“PQ”) *Quebec Charter of Values*⁶⁸ sets out a significantly different proposal. First put forward in 2013, the PQ recommended the *Quebec Charter* as a mechanism to address the opposition of the Québécois people, particularly those from rural communities, against the accommodation requests from Hasidic and Muslim communities.⁶⁹ As part of the *Quebec Charter*, public sector employees would be banned from displaying religious symbols⁷⁰ and individuals would be banned from wearing face coverings when providing or receiving government services. The *Quebec Charter* established an official duty of neutrality for all state personnel, such as health care workers, and amended the *Quebec Charter of Human Rights and Freedoms*⁷¹ to instill the principles of the *Quebec Charter*.⁷²

The *Quebec Charter* was heavily criticized in Quebec, throughout the rest of Canada, and by federal party leaders.⁷³ Ultimately, the PQ was voted out of office in the 2014 Quebec provincial elections before the *Quebec Charter* was ever approved. While no longer part of the ruling government, Mr. Drainville, the then-Minister in charge of the *Quebec Charter*, has proposed a scaled-back version. This version would still ban civil servants from donning religious dress, but public workers such as physicians, nurses, and teachers would not lose their jobs due to wearing religious dress. These latter employees’ pre-existing rights would be “grandfathered in,” but new public workers would have these rights restricted.⁷⁴

The case of *Simoneau c. Tremblay*⁷⁵ demonstrates how the principles of open secularism and religious accommodation are able to operate in conjunction with one another. In that case, the SCC ruled that town hall council meetings are not

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 93-97.

⁶⁷ *Id.* at 97-99.

⁶⁸ *Quebec Charter*, *supra* note 2.

⁶⁹ Adelman & Anctil, *supra* note 63, at 90-92.

⁷⁰ *Id.* at 97-99.

⁷¹ *Charter*, *supra* note 3.

⁷² Adelman & Anctil, *supra* note 63, at 95-96.

⁷³ *Round up of reaction to Quebec’s proposed Charter of Values*, GLOBAL NEWS (Sept. 11, 2013), <http://globalnews.ca/news/833458/watch-various-reactions-to-quebecs-proposed-charter-of-values/>.

⁷⁴ Philip Authier, *Drainville unveils watered-down charter of values*, MONTREAL GAZETTE (Jan. 15, 2015) <http://montrealgazette.com/news/quebec/drainville-suggests-watered-down-charter-of-values>.

⁷⁵ *Saguénay*, 2015 S.C.C. 16.

to open with religious prayers, as this violates the freedom of conscience and religion of minorities and non-believers.⁷⁶ Mr. Simoneau, an atheist, argued that the City of Saguenay was violating his *Charter* rights by displaying crucifixes and holding official Catholic prayer services prior to the commencement of council meetings.⁷⁷ *Simoneau c. Tremblay* helps demonstrate the operability of open secularism where tensions, which arise between the ruling majority and the minority, should be resolved in favor of religious equality. In *Simoneau c. Tremblay*, the conflict was between the majority Catholic population and the minority non-Catholic, agnostic, and/or atheist populations. While the courts should not and do not automatically rule in favor of religious minorities, open secularism helps to reaffirm Quebec's secular nature and maintain a healthy balance of the legal rights and interests of all.

III. U.S. CASE STUDY

The law pertaining to religious equality in the United States was drafted in such a way as to ensure the separation of state from religion, to prevent state favoritism of one or any particular religion, and to ensure the free exercise thereof. The binding law on this issue stems from the Establishment Clause of the First Amendment of the U.S. Constitution, and mandates that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."⁷⁸ As Thomas Jefferson once said, the First Amendment has been deemed to "have erected a wall of separation of Church and State."⁷⁹

The First Amendment also guarantees the right to expression. Read in its entirety, the First Amendment states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."⁸⁰

In Noah Feldman's "Divided by God," the author argues that one of the central motivations for this philosophy is that the framers of the Constitution and early American leaders feared that the establishment of an official religion would lead to persecution of non-believers, dissenters, and individuals from other religious groups.⁸¹ It is for this reason that American law highly reinforces the notion that matters of religion and civil life should be separated.⁸²

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Supra* note 7.

⁷⁹ *Lautsi*, (No. 30814/06), Eur. Ct. H.R. (2011).

⁸⁰ *Supra* note 7.

⁸¹ NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT* 24 (2005) [hereinafter *Feldman*].

⁸² It is worth mentioning that there are some similarities to that of the Canadian approach but an important difference. Both countries strive to maintain religious equality, yet there was not an overt-fear of non-believers being discriminated against during Canadian Confederation,

One of the earliest instances of litigation relating to law and religion dates back to 1828, when the American public protested the delivery of mail on Sundays. Kentucky Senator Johnson responded by stating: “[o]ur government is a civil and not a religious institution.”⁸³ He opposed changing the law to prevent mail being delivered on Sundays, because in doing so, he felt that the government would legally recognize an official Sabbath day. According to Senator Johnson, this would begin the process of recognizing the “Laws of God.”⁸⁴ Senator Johnson felt that such steps would lead to religion influencing the civil sphere.

While American law strongly enforces the separation of “church and state,” there are instances where the state has become slightly involved with matters of religion. So long as the state is not favoring one religion over another, nor officially establishing an official religion, American jurisprudence has not had a problem upholding such practices. In *Everson v. Board of Education*,⁸⁵ the plaintiff brought an action pertaining to the First Amendment. He claimed that taxpayers’ dollars were being used to reimburse parents for their children’s transportation costs to private denominational schools.⁸⁶ The Supreme Court of the United States (“SCOTUS”) ruled that the law in question was not in violation of the Constitution, as the state was not expressly favoring one religion over another. Other parents from other denominational schools could also receive such funding.⁸⁷

SCOTUS ruled in a similar fashion in *Van Orden v. Perry*.⁸⁸ In that case, the issue was whether displaying a monument of the Ten Commandments on the grounds of a Court House was in violation of the Establishment Clause. The Court ruled that the monument was designed to convey a historical and social context of its importance to the development of the United States and the evolution of its laws. Therefore, SCOTUS held that the display was not unconstitutional; the state was not favoring one religion over another.⁸⁹

While SCOTUS was deciding *Van Orden*, the Court ruled on a separate Ten Commandments case. In *McCreary County v. American Civil Liberties Union*,⁹⁰ SCOTUS held that displaying a monument of the Ten Commandment inside a courthouse was a violation of the Establishment Clause.⁹¹ The Court felt that that the monument was not attempting to convey a secular meaning, as was the case

as was the case in the United States. The Protestant and Catholic Churches played an active role in public life in the 19th century. This perhaps is this reason why Canadian law does not provide a direct and express guarantee against the establishment of an official religion, as is the case in the U.S. Constitution.

⁸³ Feldman, *supra* note 81, 54-55.

⁸⁴ *Id.* at 54-55.

⁸⁵ *Everson v. Board of Education*, 330 U.S. 1 (1947).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Van Orden*, 545 U.S.

⁸⁹ *Id.*

⁹⁰ *McCreary*, 545 U.S.

⁹¹ *Id.*

in *Van Orden*.⁹² In *McCreary*, the Ten Commandments were part of a display inside the courthouse pertaining to the importance of the Ten Commandments and Abrahamic Religions for the development of the United States.⁹³ Displaying such a religious monument in a government office is not, in and of itself, a violation of the Constitution. Rather, when the religious display is not of a secular nature, then the Establishment Clause is violated. In Justice Scalia's dissent in *McCreary*, he argued that the Ten Commandments is a symbol relevant to the vast majority of adherents to organized religion in the United States (the monotheistic religions of Christianity, Judaism, and Islam). Therefore, displaying and honoring this symbol cannot be viewed as official government endorsement of one religion over another, or the establishment of an official religion.⁹⁴

In this case and other Establishment Clause disputes, a highly-cited legal test is applied from the case of *Lemon v. Kurtzman*,⁹⁵ in which a dispute arose involving government payment of private Catholic school teachers' salaries. From this case, SCOTUS developed the *Lemon Test*,⁹⁶ which posits that for government action to be compatible with the Establishment Clause, the action in question must have a secular purpose, its primary effect must not be in promoting or inhibiting a particular religion, and the action must not cause the state to become excessively entangled with religion.⁹⁷

Applied to the issue being analyzed in this article, the *Lemon Test* can be applied to illustrate that there are instances where civil servants should be able to demonstrate their religiosity and wear religious dress, with the caveat that such actions should not demonstrate the favoring of one religion over another, nor excessively intertwine state affairs with that of religion. Practically speaking, this can be achieved by looking to *Rosenberg v. Outremont*.⁹⁸ On the surface, it can be argued that a civil servant donning religious dress demonstrates religious favoritism. Nevertheless, so long as civil servants are merely expressing their religious belief with a simple item such as a cross, kippa, or turban, and not expressly promoting their religious scripture and beliefs, then this behavior is merely a minor "nuisance" to individuals of other faiths and/or to non-believers. It is no more of an inconvenience for non-believers or adherents of other faiths than when the state permits the erection of an *eruv*. The state is not becoming grossly entangled in religious affairs as per the *Lemon Test*, and there is no recognition or favoritism of one religion over another; any civil servant from any religious background is permitted to wear their religious dress. This would be similar to the reasoning in the *Renfrew* decision. Permitting civil servants from different religious groups to wear their religious dress is no more indicative of

⁹² *Id.* at 22-25.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Lemon*, 403 U.S.

⁹⁶ *Id.* at 674.

⁹⁷ *Id.*

⁹⁸ *Rosenberg*, [2001] R.J.Q. 1556.

favoritism of a specific religion than is permitting ecumenical and neutral prayers in public institutions.

While the First Amendment expressly prohibits the entanglement of state and religion, there are instances like in the *Renfrew* decision where references to “God” do not cross this threshold. For instance, in *Elk Grove United School District v. Newdow*,⁹⁹ Justice O’Connor argued that references to “God” in public institutions such as state legislatures are not in violation of the U.S. Constitution so long as one religion is not being favored over another.¹⁰⁰ Indeed, the Justice argued that the phrase “In God We Trust” on U.S. currency is not a violation of the Establishment Clause, nor is having “God” mentioned in the Pledge of Allegiance a violation. These instances are not demonstrative of state favoritism of any single specific religion.¹⁰¹

Like in the Quebec religious-accommodation disputes, American jurisprudence has also been willing to accommodate religious minorities. In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,¹⁰² SCOTUS held that states cannot restrict religiously mandated ritual slaughter of animals.¹⁰³ The lower courts turned to the *Employment Division v. Smith* decision, which determined that when a law has an incidental effect of restricting the exercise of religion, the First Amendment has not been violated.¹⁰⁴ At SCOTUS level, however, the Court held that the ordinances in question were not neutral and were applied exclusively in regards to the Church group in question. Therefore, the *Employment Division* case did not apply and the ordinance was deemed unconstitutional.¹⁰⁵

While there are strict rules prohibiting the intermingling of religious and governmental affairs, like in Canada, the law in the United States is very much open to interpretation on this issue. Nevertheless, arguably, there is a growing consensus in American jurisprudence that permits a degree of religious observance in public institutions. Such action must not cross a fine line demonstrating state favoritism or establishment of a particular religion, nor promote discrimination against other individuals who are non-believers or are from different faiths and traditions. Allowing civil servants to don religious dress while at work could arguably be one such scenario, so long as any and all, civil servants are permitted to wear their religious dress should they choose to do so.

⁹⁹ *Elk Grove United School District v. Newdow*, 542 U.S. 5-6 (2004).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

¹⁰³ *Id.*

¹⁰⁴ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

¹⁰⁵ *Van Orden*, 545 U.S. 677.

IV. EUROPEAN CASE STUDY

The law on the issue of freedom of religion in Europe stems from the European Convention on Human Rights (“ECHR”). Article 9 of the ECHR states that:

“[e]veryone 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 worship, teaching, practice and observance.”¹⁰⁶

Unlike the North American experience, and apart from Quebec, countries such as Italy emphasize their secular nature while simultaneously reinforcing the importance of Christianity in their historical development and modern-day life. As such, there have been many disputes pertaining to questions of freedom of religion in Europe. One such case will be reviewed to determine how European jurisprudence can be applied to the issue of civil servants wearing religious dress.

A. Italian Case Study

In *Lautsi v. Italy*,¹⁰⁷ a case brought before the European Court of Human Rights, the Court dealt with the issue of whether crucifixes can be displayed in public schools. The Court held that in order to satisfy Article 9 of the ECHR, states are required to act with neutrality and impartiality regarding religious belief systems within governmental and public institutions.¹⁰⁸ The Court held that the crucifix was not a violation of Article 9. In reaching this decision, the Court determined that the crucifix is not an item which coerces students to engage in one particular practice over another. It is a passive symbol, which was not accompanied with any official recognition or engagement of Christian teachings among its students.¹⁰⁹ The Court did also note that the cross has an important historical context for the role of the Catholic Church in the development of the Italian State, but it insisted that its presence was merely for historical purposes and did not serve a religious purpose.¹¹⁰

In Justice Kalaydjieva’s dissent, she argued that the court improperly interpreted Article 9 of the ECHR and the relevant case law on this issue. First, she argued that the legal basis for permitting crucifixes in state schools is found in laws passed by royal decree and by fascist governments during the late 19th and early 20th centuries; it is thus not reflective of the democratic process.¹¹¹ Second, she argued that Article 9 creates a duty of tolerance and mutual respect

¹⁰⁶ ECHR, *Convention for the Protection of Human Rights and Fundamental Freedoms*, No. 14 (CETS No. 194), 1 June 2010.

¹⁰⁷ *Lautsi*, (No. 30814/06), Eur. Ct. H.R. (2011).

¹⁰⁸ Jukier & Woehrling, *supra* note 13.

¹⁰⁹ *Id.* at 12-13.

¹¹⁰ *Id.* at 12-13.

¹¹¹ *Id.* at 47.

by the State for its population. She determined that displaying crosses in public schools disregards the beliefs of religious minorities. Therefore, the State failed to uphold the essence of the Convention.¹¹²

Finally, Justice Kalaydjieva looked to the United Nations Convention on the Rights of the Child. She also looked to the SCC's decision in *Ross v. New Brunswick School District*,¹¹³ which requires that schools be a discrimination-free environment. In order to achieve this goal, all pupils must be treated equally and encouraged to fully participate.¹¹⁴ Justice Kalaydjieva acknowledges that while the crucifix may have a secular meaning, it also has a clear and unwavering religious connotation. Justice Kalaydjieva pointed to a decision by the German Constitutional Court, where it was held that individuals do not have the right to be "spared from other manifestations of faith."¹¹⁵ The issue arises when the State exposes individuals to one particular religion, and those individuals do not have a means to "escape" its influence.¹¹⁶ Justice Kalaydjieva therefore reasoned that while a State can appear to be neutral and expose individuals to a variety of different religious symbols and philosophies, subjecting students to one particular religion without the means to "escape" demonstrates that the State is no longer neutral since students are required to attend schools where they will be exposed to the crucifix.

Applied to the issue of religious dress in government workplaces, Justice Kalaydjieva's dissent helps support the proposition that civil servants should be permitted to wear religious dress on the job. Forcing individuals to be exposed to one specific religion without the means of "escaping" its influence, even if it is a passive symbol, is demonstrative of state favoritism of a particular religion. By permitting civil servants to wear religious dress, however, Canadians will not be exposed to one specific religion, nor will they be unable to "escape" its influence. Any civil servant from any religious background should be permitted to wear their religious dress. In doing so, Canadians will be exposed to a variety of different religious influences, which is perfectly acceptable according to Justice Kalaydjieva.¹¹⁷

V. FINAL SYNTHESIS

Civil servants should be allowed to wear religious dress while at work in Canada. Whereas the law in Canada focuses on maintaining state neutrality in religious affairs, the United States takes a stricter approach in separating all aspects of religion from public life. Quebec law takes a similar approach to the United States. Yet, even in these latter cases, the jurisprudence covers many

¹¹² *Id.* at 48-49.

¹¹³ *Ross v. New Brunswick School District*, [1996] 1 S.C.R. 825 (Can.).

¹¹⁴ *Jukier & Woehrling*, *supra* note 13, at 50.

¹¹⁵ *Id.* at 50.

¹¹⁶ *Id.* at 50.

¹¹⁷ *Id.* at 50.

instances where there are exceptions that can be applied to the question of civil servants and religious dress.

One method of protecting the rights of civil servants to wear religious dress would be to reinvigorate s. 27 of the *Charter* and adopt the *Lemon* Test from the United States. Such a method can potentially be achieved via new legislation combining the *Lemon* Test with ss. 2(a) and 27.¹¹⁸ As previously argued, s. 27 of the *Charter* can work hand in hand with freedom of religion. In emphasizing the importance of s. 27 and reinvigorating its use, the Canadian government would be able to demonstrate that it is seeking to recognize and protect the multicultural heritage of all Canadians.

Protecting the rights of civil servants to wear religious dress would arguably fall in line with the multiculturalism goals of s. 27. Furthermore, the *Lemon* Test should also be able to reaffirm and work well within the confines of ss. 2(a) and 27 of the *Charter*. The doctrine of reasonable accommodation, as demonstrated in the *Outremont* cases likewise falls within this scope of reasoning. Arguably, permitting civil servants to wear their religious dress is no different from the reasonable accommodation regarding the *eruv* disputes in Quebec. An individual wearing a kippa or turban is not coercing others to follow their religious beliefs; such actions are no more coercive than the State displaying Christmas trees or *eruv* wires. As long as civil servants are permitted to wear their religious dress at work, Canadians will be exposed to a variety of different religious symbols, which does not violate the principles of freedom of religion, as per the dissent in *Lautsi*. Therefore, in taking an approach that effectively reinvigorates s. 27 and combines it with the *Lemon* Test and s. 2(a) of the *Charter*, the law would ensure that civil servants in Canada have the right to wear religious dress on the job.

¹¹⁸ While a discussion on amending the *Charter* is beyond the scope of this article, these are just some examples of reinvigorating s.27 with the *Lemon* Test.