

QUEBEC’S BILL 62: LEGISLATING DIFFERENCE

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On October 18, 2017, Bill 62, whose full English title is “An Act to foster adherence to state religious neutrality and, in particular, to provide a framework for religious accommodation requests in certain bodies,” came into force in the Canadian province of Quebec. In effect, Bill 62 prohibits niqab-wearing women from giving or receiving public services. It reflects anxiety about religious minorities’ illiberal practices and discomfort with the accommodation of religious difference—the “hypervisibility” of Islamic differences in particular. Bill 62 constructs the multiculturalism and reasonable accommodation debates in a way that erases race and replaces it with culture and religion. In turn, the politics of reasonable accommodation in Quebec conceptualize racialized minorities as threats to Canadian and Quebecois national identity and casts them aside as illegitimate citizens unless they assimilate. State multiculturalism and the reasonable accommodation discourse reinforce the racial status quo by setting the terms of the debate and the limits of tolerance—the “epistemic conditions” that dissuade a close scrutiny of the state’s management of diversity. This Article offers a close analysis of Bill 62 by following a framework that is built on four pillars: (1) interrogating secularism and state neutrality; (2) foregrounding structural difference to achieve systemic equality; (3) theorizing reasonable accommodation; and (4) combatting persisting colonial and Orientalist tropes of racialized Muslim women.

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I. INTRODUCTION

On October 18, 2017, the Quebec Legislature enacted Bill 62, or “An Act to foster adherence to state religious neutrality and, in particular, to provide a framework for religious accommodation requests in certain bodies,” with sixty-six votes in favor and fifty-one votes against the controversial provincial legislation.¹ Bill 62, which effectively prohibits niqab-wearing women from giving or receiving public services, is the result of a history of political debates in the province of Quebec starting in the early 2000’s concerning reasonable accommodation. Borrowing from human rights legislation in the employment discrimination context, the

¹ An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies, S.Q. 2017, c 19 (Can.).

doctrine of reasonable accommodation sets out the legal duty of employers to accommodate the religious practices of their employees.² Since 1985, Canadian jurisprudence has quickly extended reasonable accommodation beyond the employment context to the balancing of religious freedom with other rights, notably equality rights.³ These claims invariably converge at the intersection of religious freedom, equality, and minority rights.⁴

In its proportionality analysis under section 1 of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada asserted that the state has the duty to accommodate religious difference up to the point of undue hardship.⁵ The Supreme Court of Canada's decisions regarding religious freedom and reasonable accommodation are inevitably embedded in the context of public debate about religious difference and the limits of toleration. Reasonable accommodation and its accompanying discourse represent the framework within which the state accommodates both minority difference and efforts to establish the extent to which the state ought to permit minority cultural and religious practices in the public sphere. Reflecting the public discourse regarding the anxiety about religious minorities' illiberal practices and the discomfort with the accommodation of religious difference, particularly the "hypervisibility" of Islamic differences,⁶ successive provincial governments have tabled bills regulating the presence of religion in public spaces. These legislative efforts punctuate provincial politics and provide a useful prism for analyzing legal institutions' role in responding to popular anxieties and shaping the perception of difference.

² Lori G. Beaman, *Introduction: Exploring Reasonable Accommodation*, in *REASONABLE ACCOMMODATION* 1, 2 (Lori G. Beaman ed., 2012).

³ Sujit Choudhry, *Rights Adjudication in a Plurinational State: The Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation*, 50 *OSGOODE HALL L.J.* 575, 585–86 (2013).

⁴ *Id.*

⁵ See *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256 (Can.); see also Lorne Sossin, *God at Work: Religion in the Workplace and the Limits of Pluralism in Canada*, 30 *COMP. LAB. L. & POL'Y J.* 485, 491 (2009).

⁶ See Amélie Barras, *Exploring the Intricacies and Dissonances of Religious Governance: The Case of Quebec and the Discourse of Request*, 4 *CRITICAL RES. ON RELIGION* 57, 59 (2016).

Bill 62 intervenes in the evolution of Canadian multiculturalism and reasonable accommodation at a crucial time. Hate crimes against Muslims are on the rise, marked most notably by the Quebec City Mosque shooting of 2017.⁷ Contemporary public and political discourse focuses on the “crisis of multiculturalism”: the notion that multiculturalism has failed to foster inclusion and integration of minority groups within liberal democracies.⁸ Some go so far as to announce the “death” of multiculturalism.⁹ Although scholars note that Canada has not experienced the same rejection of multiculturalism as some European countries such as Denmark or Germany, and the majority of Canadians appear to support multiculturalism as official policy, support for multiculturalism in Canada has been primarily for national minorities.¹⁰ There has not been similar enthusiasm with respect to immigrant minorities, particularly in Quebec.¹¹ As distinguished sociologist and professor at the University of Montreal Sirma Bilge notes:

In recent years, the belief that multiculturalism has been a dismal debacle in Europe and that Canada will inevitably follow a similar path has gained dominance in Canadian media discourses. Despite research evidence showing stable public support for multiculturalism in Canada, several analysts, convinced of the fate awaiting Canadian multiculturalism, diligently

⁷ See Amy Minsky, *Hate Crimes Against Muslims in Canada Increase 253% over Four Years*, GLOBAL NEWS (June 13, 2017), <https://globalnews.ca/news/3523535/hate-crimes-canada-muslim/> [<https://perma.cc/PCW7-WNG6>].

⁸ See, e.g., David Miller, *The Changing Face of Multiculturalism in Europe*, GLOBE & MAIL (Apr. 18, 2016), <https://www.theglobeandmail.com/opinion/the-changing-face-of-multiculturalism-in-europe/article29647990/> [<https://perma.cc/3F6X-VGJK>]; John Paul Tasker, *Maxime Bernier Criticizes Liberals for 'Extreme Multiculturalism'*, CBC NEWS (Aug. 13, 2018), <https://www.cbc.ca/amp/1.4783325> [<https://perma.cc/ZE6C-D34B>].

⁹ Miller, *supra* note 8.

¹⁰ See, e.g., Will Kymlicka, *The New Debate on Minority Rights*, in MULTICULTURALISM AND POLITICAL THEORY 25, 25 (Anthony Simon Laden & David Owen eds., 2007); Ayelet Shachar, *Squaring the Circle of Multiculturalism: Religious Freedom and Gender Equality in Canada*, 10 L. & ETHICS HUM. RTS. 31 (2016).

¹¹ Keith Banting & Will Kymlicka, *Canadian Multiculturalism: Global Anxieties and Local Debates*, 23 BRIT. J. CANADIAN STUD. 43 (2010); Shachar, *supra* note 10, at 34–35.

track the signs of this imminent collapse—signs among which the Québécois *reasonable accommodation* (RA) debate holds a privileged place, deemed “the first crack in the wall, the first real sign of a European-style retreat from multiculturalism, and a harbinger of what is likely to happen in the rest of Canada.”¹²

Within this changing context, the focus of this Article is Bill 62's intervention in these debates, its legal implications, and its theoretical underpinnings. This Article argues that Bill 62 reflects a populist trend in Québécois politics. For Ernesto Laclau, populism creates “empty signifiers” that symbolically order the realm of politics, so that many divergent groups with separate interests can identify with slogans and symbols that represent broad and vague values such as “justice” or “equality.”¹³ Bill 62 is premised on understandings of multiculturalism and reasonable accommodation that erase race and replace it with culture and religion. The politics of reasonable accommodation in Quebec arguably target racialized minorities with language of culture and religion, which will have the greatest impact on Muslim women.¹⁴ Analysis of Bill 62 illuminates this.

Racialized minorities, particularly Muslim women, are constructed as threats to Canadian and Québécois national identity. National identity becomes an “empty signifier” with which a number of different social groups identify. Racialized minorities are produced as an “Other” against Canadian and Québécois mainstream society, and they are cast aside as illegitimate citizens unless they assimilate.¹⁵ State multiculturalism and the reasonable accommodation discourse reinforce

¹² Sirma Bilge, *Reading the Racial Subtext of the Québécois Accommodation Controversy: An Analytics of Racialized Governmentality*, 40 POLITIKON 157, 157 (2013) (footnotes omitted).

¹³ Ernesto Laclau, *Populism: What's in a Name?*, in POPULISM AND THE MIRROR OF DEMOCRACY 32 (Francisco Panizza ed., 2005), reprinted in ERNESTO LACLAU: POST-MARXISM, POPULISM AND CRITIQUE 152, 157 (David Howarth ed., 2015).

¹⁴ See generally Gada Mahrouse, ‘Reasonable Accommodation’ in Québec: *The Limits of Participation and Dialogue*, 52 RACE & CLASS 85 (2010).

¹⁵ See generally Sherene Razack, *The ‘Sharia Law Debate’ in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture*, 15 FEMINIST LEGAL STUD. 3 (2007).

the racial status quo by setting the terms of the debate and the limits of tolerance—the “epistemic conditions” that dissuade a close scrutiny of the state’s management of diversity.¹⁶

The purpose of this Article is to offer a close analysis of Bill 62 that “counter[s] the limitations of liberal solutions offered to systemic oppression.”¹⁷ This analysis follows a framework built on four pillars: (1) interrogating secularism and state neutrality; (2) foregrounding structural difference to achieve systemic equality; (3) theorizing reasonable accommodation; and (4) combatting persisting colonial and Orientalist tropes of racialized Muslim women. Part II contextualizes Bill 62 within the history of legislative efforts and jurisprudential interventions from which it emerges, paying particular attention to the debates in Quebec. Part III sets out the theoretical framework used to analyze Bill 62. Finally, Part IV provides a close reading of the legislative text and a substantive analysis as per the theoretical framework outlined in Part III.

II. CONTEXT

The context of Bill 62 is divided into two parts. First, Bill 62 is placed within its historical and political context by tracing the lineage of various legislative initiatives in Quebec and Canada, including Bill 94, Bill 60 (the Quebec Charter of Values), and the Zero Tolerance for Barbaric Cultural Practices Act (“BPA”).¹⁸ Next, relevant jurisprudence from the Supreme Court of Canada is analyzed to provide the legal context of the Bill’s main claims about religious neutrality, religious freedom, and reasonable accommodation. The aim in that section is not only to address the Bill’s constitutionality, but also to set out the legal context in which the Bill makes its intervention.

¹⁶ Bilge, *supra* note 12, at 162.

¹⁷ *Id.*

¹⁸ Bill 94, An Act to establish guidelines governing accommodation requests within the Administration and certain institutions, 2010, 1st Session, 39th Legislature, Québec, 2010 (Can.); 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, 2013, 1st Session, 40th Legislature, Québec, 2013 (Can.); Zero Tolerance for Barbaric Cultural Practices Act, S.C. 2015, c 29 (Can.).

A. Historical and Political Context

As contemporary Canadian society has grappled with increasing ethno-cultural diversity, the legal recognition of minority rights through an official policy of multiculturalism has been controversial. There is tension between women's equal rights on the one hand and multiculturalism and religious freedom on the other; minorities seek to have their religious needs accommodated, often in the form of exemptions from the application of general rules.¹⁹ Legislative initiatives, public policy, political rhetoric, and public discussions increasingly tie the multiculturalism crisis to gender equality.²⁰ These debates are often framed in terms of the limits of tolerance and the extent to which majority culture can accommodate difference.²¹ The politics of recognition emphasize practices such as veiling and polygamy as feminism is pitted against multiculturalism.²² Reasonable accommodation discourse tends to portray racialized religious minority communities as backward while constructing majority culture as the norm.²³ This obscures issues of gendered structural inequality.

Canada's religious landscape is constantly transforming because of a steady increase in the number of individuals who identify as members of minority religious groups.²⁴ To some scholars, Canada continues to appear as a multicultur-

¹⁹ See Vrinda Narain, *Critical Multiculturalism*, in FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 377 (Beverly Baines et al. eds., 2012).

²⁰ See Mahrouse, *supra* note 14, at 88.

²¹ Lori G. Beaman, "It Was All Slightly Unreal": What's Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?, 23 CANADIAN J. WOMEN & L. 442, 447–51 (2011).

²² See Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1181 (2001); Iris Marion Young, *Structural Injustice and the Politics of Difference*, in MULTICULTURALISM AND POLITICAL THEORY 60, 87 (Anthony Simon Laden & David Owen eds., 2007).

²³ Beaman, *supra* note 21, at 442, 447; see also Vrinda Narain, *Taking "Culture" out of Multiculturalism*, 26 CANADIAN J. WOMEN & L. 116 (2014).

²⁴ Lori G. Beaman, *Religious Diversity in the Public Sphere: The Canadian Case*, 8 RELIGIONS 259, 260 (2017).

alist haven.²⁵ While other Western nation-states have increasingly embraced far-right parties and policies, the current federal Liberal government has firmly asserted its support for multiculturalism and detailed policies sympathetic to immigration, including a promise to settle a large number of Syrian refugees.²⁶ In contrast, the Conservative Party under former prime minister Stephen Harper focused on emphasizing “Canadian values,” constructing a narrative of the ideal citizen that linked citizenship with integration rather than accommodation of minority difference.²⁷ Indeed, the Conservative government focused on economic immigration and introduced reform to reduce the number of refugee claimants.²⁸ The government tightened citizenship rules, making it harder to obtain citizenship while also making it easier to be stripped of citizenship on grounds of state security or terrorism, which reflects the global impact of 9/11.²⁹ Significantly, the Conservatives under Stephen Harper opposed “symbolic” identity markers such as hijabs, niqabs, and kippahs.³⁰

In September 2018, Maxime Bernier, former Conservative Party member of Parliament, announced the formation of a new party—the People’s Party of Canada.³¹ He criticized Prime Minister Justin Trudeau’s stance on multiculturalism, asserting that Trudeau’s “extreme multiculturalism and cult of diversity . . . will divide us into little tribes that have less and less in common, apart from their

²⁵ See, e.g., Cas Mudde, *Putting Canada in a Comparative Context: Still the Multiculturalist Unicorn*, 22 NATIONALISM & ETHNIC POL. 351 (2016).

²⁶ *Id.* at 352; Kalyani Thurairajah, *The Jagged Edges of Multiculturalism in Canada and the Suspect Canadian*, 12 J. MULTICULTURAL DISCOURSES 134, 135 (2017).

²⁷ Shachar, *supra* note 10, at 55–57.

²⁸ *Id.* at 58.

²⁹ *Id.* at 32–34.

³⁰ Kathryn May & Ian Macleod, *Bureaucracy Baffled by Harper's Niqab Stance*, OTTAWA CITIZEN (Oct. 7, 2015), <https://ottawacitizen.com/news/politics/harper-doubles-down-on-possible-niqab-ban-in-public-service> [<http://perma.cc/DVW5-D2KW>].

³¹ Rachel Aiello, *Maxime Bernier Launches People's Party of Canada*, CTV NEWS (Sept. 14, 2018), <https://www.ctvnews.ca/politics/maxime-bernier-launches-people-s-party-of-canada-1.4094059> [<https://perma.cc/3BXG-E4NL>].

dependence on government in Ottawa.”³² Illustrating the construction of immigrants as a threat to democracy and stability, he went on to write, “Having people live among us who reject basic Western values such as freedom, equality, tolerance and openness doesn’t make us strong. People who refuse to integrate into our society and want to live apart in their ghetto don’t make our society strong.”³³ Bernier has stated that “the ‘old parties’ are not speaking for Canadians, and [has] decried political correctness.”³⁴ He has also said that he will reconsider current immigration levels and, significantly, that he is committed to “making sure that newcomers share Canadian values . . . including respecting diversity, the rule of law, and the equality of men and women.”³⁵

Given the centrality of multiculturalism to its national identity, Canada provides an interesting lens through which issues of inclusion and difference can be viewed. Canada’s federal government officially adopted multiculturalism as formal policy in the early 1970’s, and this was institutionalized in section 27 of the Canadian Charter of Rights and Freedoms (“the Charter” or “Charter”)³⁶ and in the Canadian Multiculturalism Act of 1988.³⁷ Section 27 of the Charter provides that the “Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”³⁸ Notably, through section 28, the Canadian Charter has embraced gender equality together with multiculturalism as an interpretive provision of Canadian constitutionalism. Section 28 states, “Notwithstanding anything in this Charter, the rights and

³² Martin Patriquin, *Fears Multiculturalism Will Doom Canada Are Unwarranted*, Montreal Gazette (Aug. 15, 2018), <https://montrealgazette.com/opinion/columnists/martin-patriquin-fears-multiculturalism-will-doom-canada-are-unwarranted> [<https://perma.cc/F9BG-9WDZ>].

³³ *Id.*

³⁴ Aiello, *supra* note 31.

³⁵ *Id.*

³⁶ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) [hereinafter Charter].

³⁷ Canadian Multiculturalism Act, R.S.C. 1985, c 24.

³⁸ Charter, *supra* note 36, § 27.

freedoms referred to in it are guaranteed equally to male and female persons.”³⁹

As public policy, Canadian multiculturalism is generally understood as a hallmark of Canadian national identity. Nonetheless, some perceive Quebec as having spurned English Canada’s turn towards multiculturalism by perceiving multiculturalism as “a subversion of the recognition of the importance of the French as a founding people.”⁴⁰ This has led some Quebec scholars to instead propound interculturalism, a concept that seeks to facilitate integration of ethnic minorities while preserving the hegemony of the majority culture.⁴¹

Quebec’s approach to legislation may differ from common law provinces because it is the only civil law province in Canada. In the civil law tradition, there is an impetus to make law and to draft bills as a response to perceived social ills. France follows a similar approach by drafting laws as a response to social or “cultural” problems. Laws on the veil, for example, have been debated since the late 1980’s and were finally enacted in 2004 as the *Loi sur les signes religieux dans les écoles publiques françaises* (Law on Religious Symbols in French Public Schools).⁴² France banned the niqab in 2010 with the *Loi du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public* (Law of October 11, 2010 Prohibiting Face Covering in the Public Space).⁴³ The 2010 law, like Bill 62, is an example of viciously colorblind legislation; while it does not explicitly name a religious or ethnic

³⁹ *Id.* § 28.

⁴⁰ Beaman, *supra* note 24, at 262.

⁴¹ *Id.* For a discussion of interculturalism in Québec, see Daniel Weinstock, *Interculturalism and Multiculturalism in Canada and Quebec: Situating the Debate*, in LIBERAL MULTICULTURALISM AND THE FAIR TERMS OF INTEGRATION 91 (Peter Balint & Sophie Guérard de Latour eds., 2013).

⁴² Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004, framing the Law on Religious Symbols in French Public Schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 7, 2004, p. 5190.

⁴³ Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 11, 2010 Prohibiting Face Covering in the Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 11, 2010, p. 18344.

community and does not mention the niqab explicitly, its provisions target Muslim women.⁴⁴

Bill 62 has galvanized a number of responses. Constitutional scholar Emmett McFarlane notes that Bill 62 “is neither neutral nor constitutional.”⁴⁵ He asserts that, “It is impossible to reconcile this law as anything other than the targeting of a minority group, a slightly narrower spin on the now perennial Quebec debate over the wearing of (non-Catholic) religious identifiers.”⁴⁶ According to then justice minister Vallée, however, the law is meant to safeguard security and identification and to ensure that people can communicate.⁴⁷ Nonetheless, this has not quelled the belief that Bill 62 clearly targets Muslim women.⁴⁸

The focus on cultural difference in Canadian multiculturalism serves to conceal structural inequalities, including racial inequality.⁴⁹ Recent scholarship, for example, has emphasized multiculturalism’s exclusionary discursive effects and the limits of reasonable accommodation as a discourse and practice of multiculturalism.⁵⁰ In Quebec, the debate over reasonable accommodation, the primary framework by which religious diversity is managed in the public sphere, has been particularly heated since the Supreme Court of Canada’s 2006 decision in *Multani v. Commission scolaire Marguerite-Bourgeois*.⁵¹ Indeed, the rhetoric of reasonable

⁴⁴ Morgan Lowrie, *Bill 62: Niqabi Women Fear Quebec's Religious Neutrality Law*, HUFFINGTON POST (Oct. 22, 2017), https://www.huffingtonpost.ca/2017/10/22/bill-62-niqabi-women-fear-quebecs-religious-neutrality-law_a_23251719/ [https://perma.cc/5V2T-HEBJ].

⁴⁵ Emmett Macfarlane, *Quebec Law Banning Face Coverings Is Neither Neutral nor Constitutional*, CBC (Oct. 19, 2017), <https://www.cbc.ca/news/opinion/quebec-neutrality-law-1.4360942> [https://perma.cc/WC3U-2LD6].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., Lowrie, *supra* note 44 (“[M]any say it unfairly targets Muslim women who wear religious face coverings.”).

⁴⁹ It also serves to conceal the country’s settler-colonial history. See Barbara Perry, *Disrupting the Mantra of Multiculturalism: Hate Crime in Canada*, 59 AM. BEHAV. SCIENTIST 1637, 1640 (2015); Thurairajah, *supra* note 26, at 137.

⁵⁰ See, e.g., Barras, *supra* note 6; Beaman, *supra* note 24; Perry, *supra* note 49.

⁵¹ *Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, paras. 71, 78 (Can.).

accommodation and its migration from the courts to the arena of public discourse can be traced to *Multani* and the Bouchard-Taylor Commission that followed.⁵² Here, the rhetoric of reasonable accommodation often functions as code for “too much accommodation.”⁵³

The Quebec provincial government established the Bouchard-Taylor Commission in February 2007. The Commission was headed by two professors, Gerard Bouchard and Charles Taylor. The mandate of the Commission was to

a) take stock of accommodation practices in Québec; b) analyze the attendant issues bearing in mind the experience of other societies; c) conduct an extensive consultation on this topic; and d) formulate recommendations to the government to ensure that accommodation practices conform to Québec’s values as a pluralistic, democratic, egalitarian society.⁵⁴

Bouchard and Taylor’s report for the Commission concluded that the perception of minorities as threatening Quebec identity was unfounded.⁵⁵ Nevertheless, some criticized the report for perpetuating the very racial hierarchies and exclusions it sought to overcome.⁵⁶ Through their process of public consultations, Bouchard and Taylor inadvertently served to reify and validate anti-immigrant, anti-Muslim discourse.⁵⁷ Contrary to political intentions, the Commission’s report did not settle the issue of reasonable accommodation,

⁵² Barras, *supra* note 6, at 58; Beaman, *supra* note 24, at 262; see also GÉRARD BOUCHARD & CHARLES TAYLOR, BUILDING THE FUTURE: A TIME FOR RECONCILIATION (2008) [hereinafter BOUCHARD-TAYLOR COMMISSION REPORT].

⁵³ Beaman, *supra* note 24, at 263.

⁵⁴ BOUCHARD-TAYLOR COMMISSION REPORT, *supra* note 52, at 17.

⁵⁵ *Id.* at 186 (arguing that French-Canadian Quebecers’ beliefs that immigrants are devout believers whose “culture is thus sustained by a wealth of symbols” is unfounded and that the “identity-related anxiety” of the former has “targeted immigrants”).

⁵⁶ Mahrouse, *supra* note 14, at 88.

⁵⁷ *Id.* at 89.

which returned to the public eye with Bill 94 in 2010⁵⁸ and Bill 60, also known as the Charter of Values, in 2013.

The now-defunct Bill 60 proposed an amendment to the Quebec Charter of Human Rights and Freedoms, banned all “conspicuous” religious symbols for state personnel, and required receivers of public services to show their faces.⁵⁹ It was received with controversy and criticism and did not survive the Parti Québécois’s removal from power with the election of the Quebec Liberal Party in 2014.⁶⁰ Liberal leader Philippe Couillard opposed the Charter of Values in 2013, promising nonetheless to pass a “less constraining version” of Bill 60.⁶¹

Bill 62 was the Liberal Party’s response to the Parti Québécois’s Bill 60.⁶² By banning the niqab, which covers the face of the woman who wears it, rather than all religious garments, Bill 62 represents an answer to the Liberal government’s electoral promises of a “less constraining” Charter of Values.⁶³ Bill 62 illustrates the persistence of notions of state neutrality and secularism and the focus on regulating minority women in political rhetoric. It demonstrates the

⁵⁸ Bill 94, An Act to establish guidelines governing accommodation requests within the Administration and certain institutions, 2010, 1st Session, 39th Legislature, Québec, 2010 (Can.). Bill 94 was precipitated by the controversy in February 2009 concerning a young woman enrolled in a French language course who refused to remove her niqab. Her continued refusal, despite attempts to accommodate her, eventually led to her expulsion from the course. Bill 94’s purpose was “to establish guidelines governing accommodation requests within the Administration and certain institutions.” It would have effectively prevented niqabi women from receiving or delivering services from a range of public institutions when communication, identification, or security was at issue. This restriction would have covered nearly every public institution, including childcare centers, school boards, and public health facilities.

⁵⁹ 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, 2013, 1st Session, 40th Legislature, Québec, 2013 (Can.).

⁶⁰ Maxime Dagenais, *Québec Values Charter*, CANADIAN ENCYCLOPEDIA (Nov. 16, 2017), <https://www.thecanadianencyclopedia.ca/en/article/the-charter-of-quebec-values> [<https://perma.cc/9JEW-KU3N>].

⁶¹ Patrick Bellerose, *Promesses électorales: les 12 travaux de Philippe Couillard*, HUFFINGTON POST QUE. (Apr. 9, 2014), https://quebec.huffingtonpost.ca/2014/04/09/promesses-electorales-philippe-couillard-plq_n_5120400.html [<https://perma.cc/72HG-K5ZL>].

⁶² *Id.*

⁶³ Dagenais, *supra* note 60.

preoccupation with the limits of tolerance and the accommodation of religious difference. The question of what ought to be considered reasonable accommodation and the reasonable constraints that can be imposed on religious women, particularly women of color, are theorized in Part III.

A number of civil society organizations, such as the Canadian Civil Liberties Association (CCLA) and the Women's Legal Education and Action Fund (LEAF) have opposed Bill 62. LEAF asserted that

this Bill is divisive, discriminatory, and will serve to further entrench inequality along gender, race, and ethnic lines. The Bill intentionally excludes niqab-wearing women from public employment and denies them access to fundamentally important social services such as healthcare and childcare. This will exacerbate the inequality already experienced by Muslim women due to violence, racism, sexism, Islamophobia, and xenophobia.⁶⁴

CCLA also “firmly opposes Bill 62,” claiming that many of the legislation’s provisions “clearly violate guarantees set out in both the Québec Charter of Human Rights and Freedoms and the Canadian Charter of Rights and Freedoms.”⁶⁵

Bill 62 is currently facing a constitutional challenge. The National Council of Canadian Muslims (NCCM) and the CCLA launched a legal attack on section 10 of the Bill, the article that prohibits receiving or giving public services with one’s face covered.⁶⁶ The action was brought on behalf of Marie-Michelle Lacoste, a convert to Islam, and includes testimony from Fatima Ahmad, a McGill University student. Justice Babak heard arguments in mid-November 2017. No judgment has been rendered on the merits, but a temporary

⁶⁴ *LEAF Opposes the Québec Government’s “Religious Neutrality” Bill, Bill 62*, LEAF, <http://www.leaf.ca/leaf-opposes-the-quebec-governments-religious-neutrality-bill-bill-62/> [https://perma.cc/F2AU-YXLL].

⁶⁵ *Quebec Bill 62 Infringes on Freedom of Religion and Equality*, CANADIAN CIV. LIBERTIES ASS’N (Oct. 17, 2017), <http://ccla.org/quebec-bill-62-infringes-on-freedom-of-religion/> [https://perma.cc/TFV2-S3R3].

⁶⁶ *CCLA and NCCM Launch Legal Challenge Against Quebec’s Bill 62*, CANADIAN CIV. LIBERTIES ASS’N (Nov. 7, 2017), <https://ccla.org/ccla-nccm-launch-legal-challenge-quebecs-bill-62/> [https://perma.cc/H6HD-6Z5H].

stay on section 10's application was granted on December 1, 2017, pending the enactment of guidelines for Bill 62's application and a method for requesting accommodation.⁶⁷ These guidelines identified six criteria for granting a request for accommodation and explained that accommodation will be given on a case-by-case basis.⁶⁸ The suspension of section 10's application was set to end on July 1, 2018, when the guidelines were officially enacted as regulation, bringing Bill 62 into conformity with Justice Babak Barin's decision.

Nonetheless, the NCCM and the CCLA still hold that these guidelines are not enough to immunize Bill 62 from a Charter violation, claiming that they are "inherently problematic and do nothing to save a law that is fundamentally unconstitutional."⁶⁹ Indeed, in a decision rendered on June 28,

⁶⁷ National Council of Canadian Muslims (NCCM) v. Attorney General of Quebec, 2017 QCCS 5459, [2017] Q.J. No. 16952 (Can. Que.) (judgment on application for stay); *Judge Grants Stay of Part of Quebec's Controversial Religious Neutrality Law*, CBC (Dec. 1, 2017), <https://www.cbc.ca/news/canada/montreal/judge-grants-stay-of-bill-62-1.4429199> [<https://perma.cc/BL5S-J3R3>].

⁶⁸ Marilla Steuter-Martin, *Bill 62: Quebec Releases Criteria for Requesting, Granting Religious Accommodation*, CBC (May 9, 2018), <https://www.cbc.ca/news/canada/montreal/quebec-bill-62-guidelines-accommodations-1.4655620> [<https://perma.cc/6U7M-6UX9>]. The government issued the following guidelines for accommodation under Bill 62:

1. The request must prove that the difference in treatment is impairing his or her rights.
2. The request must be serious and based on sincere belief.
3. The accommodation must be in line with the principle of equality of all people. Therefore, it must not result in the discrimination of another group.
4. The accommodation must be in line with the principle of the state's religious neutrality.
5. The accommodation is reasonable. In other words, it does not cause undue hardship on others or affect the quality of service or public health of others. This also factors in the cost of any accommodation.
6. The person making the request is co-operating in seeking a solution, including making concessions. Failure to cooperate may result in the request being denied.

Id.

⁶⁹ *Bill 62 (Niqab Ban) Guidelines Cannot Save an Unconstitutional Law*, CANADIAN CIV. LIBERTIES ASS'N (May 11, 2018), <http://ccla.org/bill-62->

2018, Quebec Superior Court Justice Marc-André Blanchard criticized Bill 62 and further extended the suspension of section 10. The court was clear that the process of accommodation provided for under Bill 62, even with the guidelines, stood on shaky constitutional ground. According to Justice Blanchard, “[t]he Court can only be highly dubious as to the constitutional validity of a legal process that requires a citizen to obtain, in advance, a permission from a state representative to go about her daily life.”⁷⁰

It seems that repeated attempts to use reasonable accommodation as a way to maintain the status quo—by funding a commission or drafting a bill to that effect—are destined to accomplish the opposite and to be followed by debate, controversy, and legal challenge. Reasonable accommodation is a jurisprudential tool rather than a definable notion. Its strength, as well as its weakness, stems from its adaptability and its ambiguity. As we will see in the analysis of Bill 62, reasonable accommodation often defies definition, resists codification, and unsettles legislative efforts.

B. Legal Context

Analysis of certain cases provides important insight into the broader area of religious freedom, accommodation of difference, and minority rights. This jurisprudence situates Bill 62 within the federal understanding of the role of the state in mediating religion and religious freedom claims. It also draws the legal horizon of the theoretical framework described in Part III by giving concrete examples of the limits of legal intervention as well as the legal norms which critical scholarship must re-envision in view of the substantive equality of all Canadians.

The Supreme Court of Canada has accommodated certain objects that are used in religious practice. In *Syndicat*

niqab-ban-guidelines-cannot-save-unconstitutional-law/ [https://perma.cc/9YAJ-5PJF].

⁷⁰ National Council of Canadian Muslims (NCCM) v. Attorney General of Québec, 2018 QCCS 2766 (Can. Que.) (judgment on application for stay); Ingrid Peritz, *Superior Court Judge Censures Quebec's Face-Cover Law Bill 62*, GLOBE & MAIL (June 28, 2018), <https://www.theglobeandmail.com/canada/article-superior-court-judge-censures-quebecs-face-cover-law-bill-62/> [https://perma.cc/DP8V-3RLZ].

Northcrest v. Amselem, the Supreme Court of Canada specified that the state could not rule on religious dogma and accommodated the construction of a succah, a structure used in the observation of the Jewish holiday of Sukkot, in contravention of a condo association's bylaws.⁷¹ The reasonable accommodation debate was triggered again with *Multani*. In *Multani*, the Supreme Court of Canada upheld the right of a Sikh boy to carry a kirpan⁷² to school. The court once again invoked the value of multiculturalism to send a powerful message of equality between all religions under the Charter.⁷³

In *Bruker v. Marcovitz*, the court considered the use of religious freedom to evade secular legal obligations—namely, a husband's refusal to grant his wife the Jewish *get* (required for divorce) despite an agreement to do so. The *Bruker* court emphasized that Canada's growing diversity had resulted in the judicial recognition of the constitutional value of multiculturalism and respect for difference.⁷⁴ Justice Abella explained that while claims to exemptions and accommodation cannot always be privileged and must be balanced against the public interest, deciding what aspects of difference can be accommodated must be a contextual, purposive exercise focused on providing the benefit of the protection of the Charter on the claimant.⁷⁵

In *Alberta v. Hutterian Brethren of Wilson Colony*, however, the Supreme Court of Canada signaled a greater deference to secular government objectives in limiting religious freedom, moving away from the understanding of reasonable accommodation as articulated in earlier jurisprudence.⁷⁶ This

⁷¹ *Syndicat Northcrest v. Amselem*, 2004 SCC 47, para. 50 (Can.).

⁷² *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (Can.). A kirpan is a Sikh religious symbol; it is a small metal dagger or sword and is one of the five articles of faith one is obligated to carry at all times in the Sikh tradition.

⁷³ *Id.* at paras. 71, 78.

⁷⁴ *Bruker v. Marcovitz*, 2007 SCC 54, para. 70 (Can.).

⁷⁵ *Id.* at para. 2.

⁷⁶ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, paras. 66–71 (Can.). *Hutterian Brethren* involved a challenge to an Alberta law requiring driver's licenses to include a photograph of the driver. Members of the Hutterian Brethren view voluntarily having their photo taken as a violation of their religious beliefs. As a result, they argued that they should be accommodated by instead having a driver's license stamped with the words "not to be used for identification purposes." The Supreme Court of

case concerned the infringement of the Hutterian Brethren's right to religious freedom by the new regulation in Alberta requiring a universal mandatory photograph requirement for all driver's licenses. Members of the Hutterian Brethren sincerely believe that their religion prohibits them from having their photograph willingly taken and challenged this new regulation on the ground of religious freedom. The majority ruled that although their right to religious freedom was infringed, it was only minimally impaired.⁷⁷ In its proportionality analysis, the majority upheld the regulation requiring universal mandatory photographs to obtain a driver's license.⁷⁸

The complexity of the issues arising at the intersection of gender equality, religious freedom, and minority rights is epitomized by *R. v. N.S.*, a case concerning the right of a Muslim woman to wear a niqab while testifying. There, the Supreme Court of Canada displayed tensions in understandings of multiculturalism and accommodation of religious difference.⁷⁹ The issue of the niqab raised questions of gender equality, religious freedom, secularism, and state neutrality and tested the limits of the accommodation of difference as evidenced by the court's three separate opinions. The majority in *N.S.* rejected the claim advanced by the concurrence that to accommodate religion in the courtroom would be to compromise the neutrality of public institutions and reiterated the duty of state institutions to accommodate sincerely held religious beliefs to the point of undue hardship.⁸⁰ Whereas the majority ruled that the right to religious freedom must be balanced, on a case-by-case basis, against countervailing rights such as the accused's right to a fair trial, the concurring and dissenting opinions reflected the range of perspectives on reasonable accommodation and religious freedom.

In dissent, Justice Abella offered a contextual analysis that centered *N.S.*—evinced a specific understanding of *N.S.*'s social location and the context of sexual assault—and concluded that she must be permitted to wear her niqab while testifying.

Canada disagreed, reasoning that the government interest in reducing identity theft and fraud outweighed the Hutterian Brethren's religious freedom claim.

⁷⁷ *Id.* at para. 62.

⁷⁸ *Id.* at para. 104.

⁷⁹ *R. v. N.S.*, 2012 SCC 72 (Can.).

⁸⁰ *Id.* at para. 51.

In contrast, the concurring opinion framed the niqab as a threat to core values, reflecting an uncritical notion of multiculturalism and a dogmatic interpretation of state secularism and religious neutrality.⁸¹ *N.S.* may weigh against the constitutionality of Bill 62 because the law represents a blanket ban on face coverings irrespective of whether countervailing rights or public policy concerns—such as security, identification, or communication—are at issue.

Recent jurisprudence on state neutrality and secularism includes *Loyola High School v. Quebec*⁸² and *Mouvement laïque québécois v. Saguenay*.⁸³ In *Loyola*, the Supreme Court of Canada held that a state could not constitutionally require secular instruction in a religious school.⁸⁴ In *Saguenay*, the court overturned the court of appeal's finding that "absolute state neutrality is not possible from a constitutional point of view" because it is contrary to the state's preservation of its history and tradition.⁸⁵ It cited *N.S.* to reinforce that public space should be free from "coercion, pressure and judgment on the part of public authorities."⁸⁶ It also emphasized that "in addition to its role in promoting diversity and multiculturalism, the state's duty of religious neutrality is based on a democratic imperative."⁸⁷

III. THEORETICAL FRAMEWORK

Analysis of Bill 62 requires a specific theoretical framework rooted in substantive legal analysis and critical race and post-colonial theory. The following theoretical framework

⁸¹ This should be understood in the political context of post-9/11 Islamophobia.

⁸² *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (Can.).

⁸³ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (Can.).

⁸⁴ *Loyola*, 2015 SCC 12, at paras. 80–81. *Loyola High School*, a Catholic school, argued that it should be exempt from a secular program that required secular, objective instruction on the basis that this requirement violated the school's freedom of religion under section 2(a) of the Charter.

⁸⁵ *Saguenay*, 2015 SCC 16, at paras. 77–78. In this case, an atheist man argued that prayer at the start of a municipal council's public meeting violated his freedom of religion under section 2(a) of the Charter.

⁸⁶ *Id.*

⁸⁷ *Id.* at para. 75.

is useful in analyzing Bill 62; it contextualizes policies of reasonable accommodation as well as notions of secularism and state neutrality as they relate to racialized minorities.

A. Interrogating Secularism and State Neutrality

Secularism is a political philosophy that aims to create a secular state.⁸⁸ It is a historically and geographically precise concept that should be understood as contingent and ideological. Neutrality, which is rarely included in legislation but is internationally a tenet of jurisprudence, is both ideological and procedural; whatever it means, it is “not a self-defining concept.”⁸⁹ With respect to religion, state neutrality can mean both equal distance from religion and equal participation in religion.⁹⁰ Despite their differences, secularism and neutrality are distinct but related concepts that are often used interchangeably. Though there remains a longstanding question as to whether secularism is indeed neutral,⁹¹ the two concepts work together in jurisprudence and legal interpretation as a basis for the adjudication and accommodation of difference. Jointly, they have been used to resist reasonable accommodation in religious equality claims and to “justify the regulation of minority women . . . as a universal model of women’s freedom.”⁹²

Canadian state neutrality was recently reaffirmed in *Saguenay*. There, the Supreme Court of Canada held that a state’s duty of neutrality was breached when a Christian prayer was pronounced before council meetings, because it showed a preference for one religion to the detriment of others

⁸⁸ Rex Adhar, *Is Secularism Neutral?*, 26 *RATIO JURIS* 404, 405 (2013); see also Richard Moon, *Liberty, Neutrality, and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms*, 41 *BRANDEIS L.J.* 563, 563 (2003).

⁸⁹ Adhar, *supra* note 88, at 406.

⁹⁰ *Id.* at 412.

⁹¹ *Id.* at 419.

⁹² Choudhry, *supra* note 3, at 592; but see Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *BOS. REV.* (Oct. 1, 1997), <http://bostonreview.net/forum/susan-moller-okin-multiculturalism-bad-women/> [<https://perma.cc/UJA2-TFDN>] (arguing that the multicultural group rights framework leaves minority women less protected from violence).

(or none).⁹³ It found that the state's duty of neutrality cannot be reconciled with a "benevolent neutrality" that does not require complete secularity.⁹⁴ The court rejected "benevolent neutrality" and instead propounded "true neutrality," which does not allow the state to adhere to a form of religious expression under the guise of historical reality or heritage and denies it the right to favor one religion over others.⁹⁵

Concepts of state secularism and neutrality have emerged as pivotal to the construction of national identity in the context of debates about reasonable accommodation—particularly in Quebec. Sujit Choudhry argues that the sensitive socio-political context of intense debates regarding questions about religion in Quebec has led the Supreme Court of Canada to craft state neutrality as a way of mediating the tension between Quebec and the rest of Canada on issues of accommodation.⁹⁶ Choudhry notes that Quebec judges tend to see a public interest in the neutrality of public or shared spaces, explaining that "to engage in religiously rooted conduct in these common portions could give rise to conflict, because it would alter the character of those spaces in a way that didn't accord with the religious beliefs of others who had an equal legal right to those spaces."⁹⁷ According to this concept, state neutrality can function to privatize religion, thereby insulating both the state and its constituents from any religion-based conflict.⁹⁸ Any positive obligation on the part of the state is thus bound up in endorsing a particular religion and institutionalizing it in the public sphere, effectively creating the conditions for conflict that Quebec justices want to avoid.⁹⁹ This view sits in tension with those articulated by supreme court judges from the rest of Canada for whom the positive obligation to accommodate does not necessarily compromise state neutrality. The ambiguity and historical specificity of state neutrality thus serves as a flexible legal concept that can be used to justify

⁹³ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 150 (Can.).

⁹⁴ *Id.* at paras. 77–78.

⁹⁵ *See R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.); *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235 (Can.).

⁹⁶ Choudhry, *supra* note 3, at 580.

⁹⁷ *Id.* at 595.

⁹⁸ *Id.* at 599.

⁹⁹ *Id.*

competing visions of the state's role in managing religious diversity.

Many have used state neutrality to resist claims for reasonable accommodation.¹⁰⁰ In *Amselem*, dissenting judges cited state neutrality as the basis for their refusal to incorporate the notion of reasonable accommodation into their analysis.¹⁰¹ Justice LeBel's dissent in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine* focused on concerns for maintaining the state's religious neutrality by refusing to accept any claim for state action to support religious practice.¹⁰² In *Multani*, the state neutrality principle arguably formed the basis of Justice Deschamps's refusal to invoke the Charter to resolve an administrative law issue.¹⁰³ State neutrality may also be seen as the premise of Justice Deschamps's dissent in *Bruker*, in which the justice refused to engage in adjudicating a religious matter—the Jewish *get*.¹⁰⁴ Finally, in *Hutterian Brethren*, the Supreme Court of Canada relied on the notion of the neutral state to argue against the accommodation of religious practices.¹⁰⁵

At the same time, the concept of “religious cultural heritage” has emerged to justify the continued presence of Christian symbolism in the public sphere. A recent controversy involving a Quebec City hospital illustrates this. The hospital triggered public outrage amongst the majority Christian culture when it decided to remove a crucifix from its lobby. Beaman explains that “[r]ather than defend the crucifix drawing on its religious qualifications, the public debate and discussion focused almost entirely on culture, heritage, and the meaning of the neutrality of the state. When religion was mentioned, it was linked to heritage and culture.”¹⁰⁶ As a result of the general public's response, the hospital returned

¹⁰⁰ *Id.* at 592.

¹⁰¹ *Id.* at 594–96.

¹⁰² See *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650 (Can.); Choudhry, *supra* note 3, at 592.

¹⁰³ Choudhry, *supra* note 3, at 604–05.

¹⁰⁴ *Id.* at 600 (discussing *Bruker v. Marcovitz*, 2007 SCC 54, paras. 102, 122–32 (Can.)).

¹⁰⁵ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 108 (Can.) (characterizing mandatory photograph requirement for licenses as a “neutral and rationally defensible policy choice”).

¹⁰⁶ Beaman, *supra* note 24, at 266.

the crucifix to its place only to affix alongside it a plaque historicizing the role of the Church in the hospital's founding.¹⁰⁷ This episode exemplifies how notions of culture and heritage are deployed today to render the majority religious faith universal in the public sphere. The effect of this is to make minority religions' claims to public space even more visible—while “ours” is culture, part of our heritage and values, theirs is “religion,” particularistic and foreign. In this way, hegemonic religion claims physical space in the guise of culture.¹⁰⁸

B. Foregrounding Structural Difference to Achieve Systemic Equality

Multiculturalism in Canada is premised on an understanding of culture that homogenizes and essentializes groups.¹⁰⁹ Canadian multiculturalism manages minority populations by slotting cultural communities into certain easily recognizable boundaries and rejecting diversity within groups to render them legible to the state.¹¹⁰ In failing to problematize culture, both state multiculturalism and the political theory on multiculturalism reinforce stereotypical views of racialized minority groups.¹¹¹ This, in turn, homogenizes and essentializes minority groups by ignoring the diversity within them.¹¹² Minority groups are popularly understood to be profoundly different in their practices, beliefs, and values. The dominant discourse tends to understand minority cultural and religious practices simplistically. For example, the veil is often understood as a symbol of oppression and victimization, signifying the wearer's lack of agency rather than spiritual devotion or

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 267; see also Lori G. Beaman, *Between the Public and the Private: Governing Religious Expression*, in RELIGION IN THE PUBLIC SPHERE: CANADIAN CASE STUDIES 44, 54–55 (Solange Lefebvre & Lori G. Beaman eds., 2014).

¹⁰⁹ ANNE PHILLIPS, MULTICULTURALISM WITHOUT CULTURE 162–63 (2007).

¹¹⁰ HIMANI BANNERJI, THE DARK SIDE OF THE NATION: ESSAYS ON MULTICULTURALISM, NATIONALISM, AND GENDER 6 (2000).

¹¹¹ Yasmeen Abu-Laban, *The Politics of Recognition and Misrecognition and the Case of Muslim Canadians*, in RECOGNITION VERSUS SELF-DETERMINATION: DILEMMAS OF EMANCIPATORY POLITICS 125 (Avigail Eisenberg et al. eds., 2014).

¹¹² PHILLIPS, *supra* note 109.

assertion of religious freedom.¹¹³ In turn, critics of multiculturalism claim that minority groups are inherently hostile to the values of the Canadian liberal democratic state, thereby posing a threat to political stability.¹¹⁴

Canadian multiculturalism is thus mired in false binaries: East versus West, modernity versus tradition, and culture versus equality. Such an understanding of cultural difference does not only impact public policy; it also structures group identity, in response to the distribution of state patronage and benefits, through identity markers made salient by the state.¹¹⁵ As a result, questions of representation, agency, authenticity, and democratic participation gain urgency. Moreover, it raises concerns stemming from the paradox of multicultural vulnerability, whereby both state and community leaders exclude minorities within minorities from the articulation of group interests and group identity.¹¹⁶ It is precisely at the intersection of multiple axes of discrimination—religion, gender, community, race, and class—that immigrant minority racialized women are located.

Multiculturalism policy based on cultural difference is distinct from multiculturalism policy designed to respond to structural inequality. Proper legal analysis of Bill 62 must be concerned with the latter. Structural inequality is premised on what Iris Young calls a politics of structural difference.¹¹⁷ It is policy that focuses on issues of exclusion and inclusion, revising majority norms and standards that perpetuate systemic inequality. Structural difference is primarily concerned with inequalities that arise out of structural disadvantage—when group subordination limits individual participation in social and political institutions. In contrast, culturally-based inequalities arise when groups or individuals within groups

¹¹³ Vrinda Narain, *The Place of the Niqab in the Courtroom*, 9 ICL J. 41, 45 (2015).

¹¹⁴ Azizah Y. al-Hibri, *Is Western Patriarchal Feminism Good for Third World/Minority Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 41 (Joshua Cohen et al. eds., 1999); PHILLIPS, *supra* note 109, at 3–24.

¹¹⁵ See Courtney Jung, *Race, Class, and Ethnicity in the History of Mexican Indigenous Politics*, in *RECOGNITION VERSUS SELF-DETERMINATION: DILEMMAS OF EMANCIPATORY POLITICS* 21 (Avigail Eisenberg et al. eds., 2014).

¹¹⁶ See Abdullahi An-Na'im, *Promises We Should All Keep in Common Cause*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 59, 64 (Joshua Cohen et al. eds., 1999).

¹¹⁷ Young, *supra* note 22, at 74, 79.

are denied the liberty to pursue distinct ways of life or when they bear significant economic or political costs in seeking to do so.¹¹⁸

Of course, the politics of cultural difference predominate in the debate of political theorists. This emphasis on cultural difference represents a shift away from issue-based politics to identity-based politics. Though it is important to accommodate cultural difference by recognizing and affirming distinct cultures and practices, it is critical to pay attention to structural injustice and systemic inequality in responding to minority claims. For a multiculturalism policy to be effective, it must focus on exclusions that result from structural inequalities and not just on those that result from cultural difference. This exposes the structural dimensions of processes of exploitation and normalization that keep groups in marginalized positions. Structural problems are displaced onto issues of culture when policies based on cultural difference focus, as they invariably do, on what practices are or are not palatable to the state. Issues of racism, poverty, unemployment, poor education, and access to justice are obscured in the process, while issues related to religion and culture are amplified.¹¹⁹ This is not to say that the politics of cultural difference must be rejected. Instead, as Nancy Fraser has argued, group difference that results *both* from cultural *and* from structural difference must be emphasized.¹²⁰ To refocus attention on structural inequality, simplistic, oppositional understandings of women's substantive equality and minority rights must be complicated.

C. Theorizing Reasonable Accommodation

Reasonable accommodation is the framework through which the state accommodates minority rights by balancing or reconciling competing rights, such as equality and religious freedom. Informed by unequal power relations whereby a normative "we" is empowered to determine which aspects of "their" difference may be tolerated, reasonable accommodation measures minority practices against mainstream norms that,

¹¹⁸ *Id.* at 63.

¹¹⁹ *Id.* at 83.

¹²⁰ *Id.* at 60.

though invisible, set the limits of accommodation.¹²¹ Religious difference, imagined as particularist and intolerant, is deemed a special exception while the normative majority's culture, rational and tolerant, is normalized.¹²² As such, reasonable accommodation is "a tool of governmental intervention to manage diversity-related conflict," a term that communicates the existence of problematic social behavior and renders state intervention necessary.¹²³ Because reasonable accommodation focuses on the limits of toleration, it ignores any consideration of minority women's rights and instead reinforces racial hierarchies. In the process, structural racism and systemic discrimination survive while state multiculturalism is strengthened and legitimized.

Dominant understandings of multiculturalism define and shape the nature of reasonable accommodation, as do understandings of state secularism, religious neutrality, and gender equality implicated in this discourse.¹²⁴ Legislative initiatives both in Quebec and in the rest of Canada (such as the BPA)¹²⁵ make evident that there are shared understandings of these concepts. Such initiatives function discursively to affirm the nation's core values, which are deeply intertwined with specific gender norms.¹²⁶ As such, reasonable accommodation further reifies the imagined "feminism versus multiculturalism" and "secularism versus religion" dichotomies, which reinforce racialized governmentality and determine the limits of accommodation.¹²⁷

The discourse around reasonable accommodation normalizes race privilege and fails to adequately consider the power dynamics inherent in this paradigm. Sirma Bilge has examined how the terms of Quebec's reasonable accommoda-

¹²¹ See Beaman, *supra* note 21, at 443–45. Beaman notes that *NS* reveals how concepts like accommodation maintain unequal power relations, moving those who are "Other" further away from equality by singling out minority women's claims as exceptions that may or may not be accommodated, without paying adequate attention to issues of race or systemic disadvantage. *Id.*

¹²² *Id.* at 447–51.

¹²³ Bilge, *supra* note 12, at 158.

¹²⁴ Beaman, *supra* note 2, at 4.

¹²⁵ Zero Tolerance for Barbaric Cultural Practices Act, S.C. 2015, c 29 (Can.).

¹²⁶ Bilge, *supra* note 12, at 175.

¹²⁷ *Id.*

tion debate racialize immigrant women. Bilge traces the ways in which public discourse uses culture as a mnemonic for race—what she calls a “racializing code”¹²⁸—to construct normative citizenship along racial lines.¹²⁹ The language of “common values,” “ways of life,” and “shared heritage” function to inscribe racial difference while erasing race.¹³⁰ Thus, whereas reasonable accommodation is commonly understood to be about religion and not race, it works in effect to exclude racialized Others from the national family while maintaining its legitimacy.¹³¹ Although race is embedded in the contested terrain of reasonable accommodation, the debate around reasonable accommodation has been “largely cast as raceless.”¹³² Whiteness as privilege is unnamed.¹³³

Himani Bannerji emphasizes questioning how the language of state multiculturalism obscures relations of power and reconceiving a popular or critical multiculturalism that reflects a “politicized understanding of cultural representation.”¹³⁴ Embedded as it is in the governmentality of equity and diversity policies, reasonable accommodation tokenizes minority groups, as there is a lack of political will to really engage minorities or challenge institutionalized racism. The language of reasonable accommodation also simplifies complex religious subjectivities by forcing individuals, deemed “requesters,” “to frame their religiosity as something that is well-defined and ‘public.’”¹³⁵ This, in turn, contributes to the hypervisibility of religious difference.¹³⁶ In this way, reasonable accommodation imposes stereotypical, essentialized understandings of minority cultures that “elude[] notions of equality.”¹³⁷

Debates over reasonable accommodation posit gender equality as irreconcilable with assertions of difference, such that a dialectical tension between difference and conformity

¹²⁸ *Id.* at 176.

¹²⁹ *Id.*

¹³⁰ *Id.* at 172, 176.

¹³¹ *Id.* at 159–60.

¹³² *Id.* at 158.

¹³³ *Id.* at 166.

¹³⁴ BANNERJI, *supra* note 110, at 5.

¹³⁵ Barras, *supra* note 6, at 12.

¹³⁶ *Id.*

¹³⁷ Beaman, *supra* note 21, at 447.

lies at the center of these debates.¹³⁸ Often, the tension between women's rights and multiculturalism is expressed as a sharp binary. Their membership as equal citizens is seen as conflicting with their membership in a minority religious or cultural group, with the latter acting as a direct threat to the former. Minority women are thus presented with an either/or choice between culture and rights, forced to trade access to education, employment, and political participation for cultural autonomy.¹³⁹ In these contexts, women are seen and coded according to single-axis frameworks which "distort the experience" of racialized minority women" and erase race from the analysis by substituting "religion and culture."¹⁴⁰ By entering state interests in its management of the putative "problem" of diversity, reasonable accommodation and state multiculturalism fail to redistribute social, economic, and political power to minority communities. Such top-down practices of governmentality must be rejected in favor of intersectional anti-racist theory and policy that looks to crafting remedies and institutional responses from the ground-up—from the daily experiences of those at the intersections of multiple axes of discrimination—to create radical social justice tools that challenge racial injustice.¹⁴¹

D. Combatting Persisting Colonial and Orientalist Tropes of Racialized Muslim Women

As we have seen, reasonable accommodation constructs some citizens as ideal and casts out others.¹⁴² The discourse that names racialized Muslim women as "Other" is often Orientalist and derived from persisting colonial tropes, particularly when it focuses on the veil. In Egypt, the British

¹³⁸ See Austin Sarat, *The Micropolitics of Identity/Difference: Recognition and Accommodation in Everyday Life*, in *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* 396, 398 (Richard A. Shweder et al. eds., 2002).

¹³⁹ Maleiha Malik, 'Progressive Multiculturalism': *Minority Women and Cultural Diversity*, 17 *INT'L J. ON MINORITY & GROUP RTS.* 447, 464 (2010).

¹⁴⁰ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139, 139.

¹⁴¹ Bilge, *supra* note 12, at 162.

¹⁴² *Id.* at 167.

distributed step-by-step guides on how to remove the veil.¹⁴³ The genealogy of laws controlling the veil is distinctly colonial and can be traced back to French colonialism in North Africa. In “Algeria Unveiled,” a landmark essay published in 1959, Frantz Fanon describes the veil as an object of colonial policy:

We shall see that this veil, one of the elements of the traditional garb, was to become the bone of contention in a grandiose battle, on account of which the occupation forces were to mobilize their most powerful and most varied resources, and in the course of which the colonized were to display a surprising force of inertia. . . . The officials of the French administration in Algeria, committed to destroying the people’s originality, and under instructions to bring about the disintegration, at whatever cost, of forms of existence likely to evoke a national reality directly or indirectly, were to concentrate their efforts on the wearing of the veil, which was looked upon at this juncture as a symbol of the status of the Algerian woman.¹⁴⁴

Evoking the relationship between knowledge and power so well examined in Said’s work on Orientalism, Fanon goes further: “Such a position is not the consequence of a chance intuition. It is on the basis of the analyses of sociologists and ethnologists that the specialists in so-called native affairs and the heads of the Arab Bureaus coordinated their work.”¹⁴⁵ The work of these state-sponsored academics, who developed the cultural analyses and strategies of the colonial administration, had profound repercussions on the lives of Muslim colonial populations.

Two justifications that dominate colonial literature against the veil are the narrative of rescue and the need for communication. The familiarity of these justifications is striking; they have barely changed since the 1950’s. Colonial policy depicted Algerian women as backwards and in need of

¹⁴³ LEILA AHMED, *A QUIET REVOLUTION: THE VEIL’S RESURGENCE, FROM THE MIDDLE EAST TO AMERICA* (2011).

¹⁴⁴ FRANTZ FANON, *A DYING COLONIALISM* 36–37 (Haakon Chevalier trans., 1965).

¹⁴⁵ *Id.* at 37.

saving, with the veil standing in as a symbol of identity and culture and thus of oppression.¹⁴⁶ Today, commentators and media sources continue to depict veiled women as subordinate and in need of rescue.¹⁴⁷ This discourse animates the obsession with “choice”—the opposition of religious freedom and women’s equality—which in turn has stoked the fears of mainstream liberal feminists such as Susan Okin and Martha Nussbaum, who argue that “granting rights to protect minority or traditional cultural practices jeopardizes the struggle for gender equality because minority and traditional culture so often engage in domination of women.”¹⁴⁸ Mainstream liberal feminists believe that minority women want to and must cast off their minority culture in order to realize their equal rights and join the ranks of “universal sisterhood.”¹⁴⁹ Governmentality regulated by particular understandings of gender normativity portrays Muslim women as unassimilable; they are constructed as threats to democratic values, to gender equality, and to the nation and its “legitimate” citizens.¹⁵⁰ Paradoxically, Muslim women are simultaneously perceived as victims lacking agency and free choice and therefore in need of saving.¹⁵¹

One of Bill 62’s purposes for the veil ban is the need for abolishing impediments to communication.¹⁵² According to this rationale, which mirrors the colonial logic of integration, the veil is an impediment to the integration of “Otherized” women into Canadian society as well as an undue burden on Canadian tolerance. Questions related to communication often over-emphasize the veil’s impact on actual communication and displace ideological stances onto the veil as a neutral physical object.

The debates surrounding the veil and the niqab, as well as a number of other debates concerning reasonable accom-

¹⁴⁶ *Id.* at 37–38.

¹⁴⁷ Homa Hoodfar, *The Veil in Their Minds and on Our Heads: The Persistence of Colonial Images of Muslim Women*, 22 *RESOURCES FOR FEMINIST RES.* 5, 5 (1993).

¹⁴⁸ See Okin, *supra* note 92.

¹⁴⁹ Volpp, *supra* note 22, at 1201.

¹⁵⁰ Razack, *supra* note 15, at 87.

¹⁵¹ *Id.*

¹⁵² An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies, S.Q. 2017, c 19, § 1 (Can.).

modation, rehash colonial and Orientalist tropes about Muslim women. These tropes are barriers to rational deliberation and stand in the way of a politics of multiculturalism rooted in substantive equality.

IV. BILL 62

Justice Minister Stéphanie Vallée introduced Bill 62 in June 2015, and it was enacted into law on October 18, 2017.¹⁵³ From the outset, Bill 62 was the focus of controversy. Although several organizations were in favor of the legislation, many opposed it on the grounds that the law unconstitutionally targeted Muslim women by the very terms of the law's reference and application. This section will review Bill 62 in detail and provide an analysis pursuant to the theoretical framework described in Part III.

A. Purpose, Scope, and Provisions of Bill 62

Chapter I of Bill 62 enunciates the Bill's purpose. The purpose of the law is to establish measures to foster adherence to state religious neutrality:

This Act affirms the religious neutrality of the State To that end, *the Act imposes a duty of religious neutrality, in particular on personnel members of public bodies in the exercise of the functions of office.*

A further purpose of the Act is to *recognize the importance of having one's face uncovered when public services are provided and received* so as to ensure quality communication between persons and allow their identity to be verified, and for security purposes.

The Act also sets out *criteria to be taken into consideration when dealing with requests for accommodations on religious grounds* resulting from the application of the Charter of human rights and freedoms.¹⁵⁴

¹⁵³ *Id.*

¹⁵⁴ *Id.* (emphasis added).

Chapter II of Bill 62 (“Measures Fostering Adherence to State Religious Neutrality”) is organized into three divisions. Division I defines the scope of the Bill—the public bodies and state personnel affected.¹⁵⁵ The scope is amplified by Division III, which allows public bodies to enforce the Bill contractually by importing its provisions into supplier contracts.¹⁵⁶ Thus, Bill 62 includes personnel members of childcare centers, home daycare and any daycare centers subsidized by the government, and any private institution that may receive government resources.

Strikingly, the Bill makes exceptions for public personnel whose purpose is providing spiritual care in health care, university, or correctional contexts.¹⁵⁷ It also allows for religious instruction to be funded by the public as part of university-level educational institutions.¹⁵⁸ These provisions respond to *Loyola*.¹⁵⁹ Finally, Bill 62 claims that health professionals “may refuse to recommend or provide professional services because of their personal convictions, as permitted by law.”¹⁶⁰

Chapter III (“Measures Within Various Bodies”) is also organized into three divisions. Division II (“Services with Faces Uncovered”) sets out the duty of uncovering one’s face:

Personnel members of a body must exercise their functions with their face uncovered.

Similarly, *persons who request a service from a personnel member of a body referred to in this chapter must have their face uncovered when the service is provided.*¹⁶¹

Division I gives the scope of Chapter III. Combined with Division I of Chapter II, which gives the scope of the duty of religious neutrality, the Bill 62’s scope is very broad and includes within its ambit personnel members of all government

¹⁵⁵ *Id.* §§ 2–3.

¹⁵⁶ *Id.* § 7.

¹⁵⁷ *Id.* § 5.

¹⁵⁸ *Id.* § 6.

¹⁵⁹ *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (Can.).

¹⁶⁰ S.Q. 2017, c 19, § 6.

¹⁶¹ *Id.* § 10 (emphasis added).

departments, government-funded bodies, and bodies whose personnel is appointed by government authorities. Going further, it also applies to government agencies, school boards, general and vocational colleges and universities, municipalities, and public transit authorities. Health services are also included so that hospitals and clinics come within its scope. Finally, all bodies to which the National Assembly or any of its committees appoints the majority of the members are also subject to Bill 62.¹⁶² When the Bill refers to personnel members it also includes all personnel members of the National Assembly and the staff of the Lieutenant Governor's office; all persons appointed or designated by the National Assembly to any office under its authority; persons appointed under the Public Service Act; any person appointed by the government or by a minister to exercise an adjudicative function within the administrative branch; all peace officers; and all physicians, dentists, and midwives who work in publicly funded health institutions.¹⁶³ Notably, an amendment at the committee stage extended Bill 62's reach to affect elected members of the National Assembly as well as elected municipal officers.¹⁶⁴ This list exhibits the immense scope of Bill 62 in affecting those who work in any institution funded or even partially funded by the provincial government—administrative bodies, service providers, health, and education.

Division III (“Religious Accommodation”) of Chapter III lays out the framework for reasonable accommodation of the face-covering ban.¹⁶⁵ The provision stipulates that a request for religious accommodation must be made pursuant to section 10 of the Quebec Charter of Human Rights and Freedoms.¹⁶⁶ Subsection 1 of section 11 provides that the request must be serious. Per subsections 2 and 3, the accommodation requested must also be consistent with the right of equality between men and women and the accommodation requested must not compromise the principle of state neutrality.¹⁶⁷ Finally, subsection 4 requires that the accommodation be “reasonable in that it does not impose undue hardship with regard to,

¹⁶² *Id.* § 2.

¹⁶³ *Id.* § 3.

¹⁶⁴ *Id.* § 9.

¹⁶⁵ *Id.* §§ 11–14.

¹⁶⁶ Charter of Human Rights and Freedoms, CQLR, c C-12 (Can.).

¹⁶⁷ S.Q. 2017, c 19, § 11.

among other considerations, the rights of others, public health and safety, the proper operation of the body, and the costs involved.”¹⁶⁸

Strikingly, section 11 ends with the additional requirement that “[a]n accommodation may be granted only if the person making the request has cooperated in seeking a solution that meets the criterion of reasonableness.”¹⁶⁹ Sections 13 and 14 also specify the factors that must be considered for a request for accommodation that involves an absence from work or a student attending a school-board-regulated educational institution.

Lastly, Chapter IV (“Interpretative and Miscellaneous Provisions”) provides Bill 62’s most overwhelming caveat:

The measures introduced in this *Act must not be interpreted as affecting the emblematic and toponymic elements of Québec’s cultural heritage, in particular its religious cultural heritage, that testify to its history.*¹⁷⁰

B. Analyzing Bill 62

1. Interrogating Secularism and State Neutrality

Bill 62 is an example of how state neutrality is used to limit rights. As Sujit Choudhry argues, the idea of state neutrality has been used by the Supreme Court of Canada in an effort to mediate the tensions between Quebec and the rest of Canada and to reach a normative consensus with regard to reasonable accommodation.¹⁷¹ Indeed, Bill 62 aims to cast religion to the private sphere by barring the niqab in the use and provision of public services, thereby preserving Quebec’s divergent vision of state neutrality.

Bill 62’s explanatory notes succinctly show some of the contradictions in the position of “state neutrality.”¹⁷² These notes are premised on an incorrect understanding of

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* § 16 (emphasis added).

¹⁷¹ Choudhry, *supra* note 3, at 580.

¹⁷² S.Q. 2017, c 19, at 2.

secularism and neutrality. The Bill inexplicably links its insistence on religious neutrality to a prohibition on the manifestation of religious faith. As per case law, religious neutrality is a debated notion whose meaning and application is not yet settled.¹⁷³ Therefore, both parties in the ongoing constitutional challenge to Bill 62 are likely to marshal the concept to support their take as to the constitutionality of the law, with the government pointing to majority and minority opinions on neutrality in *Lafontaine*, *Multani*, and *Hutterian Brethren* and the plaintiffs pointing to opinions, exemplified in particular by *Saguenay* and *N.S.*, that distinguish between state action and individual practice and reinforce the relationship between neutrality and Canadian multiculturalism.¹⁷⁴

The fact that the only manifestation of religious faith noted by the law is that of face coverings—which apply only to some female adherents of the Muslim faith—is discriminatory and contradicts the Bill's purpose of religious neutrality. Furthermore, the Bill codifies into law the concept of “religious cultural heritage,” a notion that, as noted above, carries considerable popular discursive power as of late. The provision, which references Quebec's long history of Catholicism, shields majority cultural values, norms, and symbols, excluding these from Bill 62's regulatory power as a matter of interpretation. Evidently, while Quebec's (White) majority is understood to have “heritage,” distinct and apart from religion, minority groups are racialized by reference to their supposed religious excess.

2. Foregrounding Structural Difference to Achieve Systemic Equality

Bill 62 focuses on cultural difference to the detriment of an approach based on structural difference. By foregrounding women's rights in opposition to the wearing of the niqab, the Bill opposes women's rights and cultural and religious identity. It does not consider the effect of the Bill on Muslim women whose mobility, health, and educational op-

¹⁷³ For a discussion of the Supreme Court of Canada's conflicting understanding of religious neutrality, see Choudhry, *supra* note 3.

¹⁷⁴ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 74 (Can.).

portunities will be affected. Instead, it focuses on the intolerance of a religious practice to the mainstream, on what it symbolizes for the majority, and on the importance of imposing consensus in an area that does not require unanimity.

The plaintiffs who have filed a legal challenge to Bill 62 have described the substantial impact of the Bill on their daily lives. According to the pleadings,

Since the passage of the Act, Ms. Ahmad's daily life has become significantly more difficult. She is concerned that the Act will impact her ability to continue going to university, visiting the library, going to the doctor, and taking public transportation. In fact, Ms. Ahmad now avoids taking public transportation for fear of being turned away or asked to remove her niqab, instead relying on her father to drive her around. Ms. Ahmad has also experienced an increase in the number of Islamophobic and aggressive remarks she hears on the street. She has become uncomfortable being outside of her home alone, so she now often avoids leaving her house except to go to class.¹⁷⁵

The Bill is indifferent to the Muslim women it affects. It interferes substantially with niqabi women's ability to access services and to participate in public life as equal citizens. The barriers Bill 62 poses for Muslim women will further entrench poverty's gendered nature. Indeed, the Bill operates in direct contrast to Professor Maleiha Malik's call for a "progressive multiculturalism" that seeks to include minority women in social, economic, and political life.¹⁷⁶

Finally, Bill 62's drafters appear to have written it without consulting or including the voices of those groups whom it would most directly affect. This lack of consultation underscores how legislative efforts that aim to manage religious diversity often neglect to consider the power relations or hierarchies inherent within them. There is no critical interrogation of who gets to decide what or who are the subjects

¹⁷⁵ National Council of Canadian Muslims (NCCM) v. Attorney General of Quebec, 2017 QCCS 5459, [2017] Q.J. No. 16952, paras. 24–25 (Can. Que.).

¹⁷⁶ Malik, *supra* note 139, at 458.

of regulation and the limits of toleration imposed by this framework.¹⁷⁷ Instead, Bill 62 aims to placate popular anxieties over the presence of Islam in Quebec and its purported effects on gender equality without engaging the women who are best positioned to speak to the nexus between their faith and their gender.

3. Theorizing Reasonable Accommodation

Reasonable accommodation is premised on a particular understanding of the national image. It invokes a construction of the Other who seeks to be accommodated as somehow deviant. The reasonable accommodation framework perpetuates a hierarchy of privilege that preserves the hegemonic power of the majority.¹⁷⁸ As critiqued by scholars, reasonable accommodation is dominated by unequal power relations in which a normative dominant group determines which aspects of difference may be accepted. All minority claims are thereby measured against the yardstick of mainstream norms. This yardstick is the epistemological tool that determines the visibility and invisibility of religion in the public sphere as well as the “quality of communication” that is hindered by face coverings. Chapter I of Bill 62 states:

This Act affirms the religious neutrality of the State To that end, *the Act imposes a duty of religious neutrality, in particular on personnel members of public bodies in the exercise of the functions of office.*

A further purpose of the Act is to recognize *the importance of having one's face uncovered when public services are provided and received* so as to ensure quality communication.¹⁷⁹

¹⁷⁷ Narain, *supra* note 113, at 49.

¹⁷⁸ See Narain, *supra* note 23, at 131–32.

¹⁷⁹ An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies, S.Q. 2017, c 19, § 1 (Can.) (emphasis added).

Indeed, Bill 62 privileges mainstream culture and religious traditions.¹⁸⁰ Catholicism, the historically dominant religion in Quebec, is immune from Bill 62's effects, allowing hegemonic religious norms to escape regulation or obvious sequestering to the private sphere. The legislation targets Muslim niqabi women alone, whose faith comes in direct conflict with the Bill's effects. In doing so, Bill 62 effectively positions niqabi women outside of the public for whom state neutrality serves as a collective interest. This is an example of the objectionable category of religious accommodation that fixes dominant and subaltern cultures by placing limits on other religious practices that are premised on whether the mainstream finds such practices tolerable. At the same time, it relies on the myth of "national culture"—portrayed in Bill 62 as Catholic and French—to assert dominance over "non-national" cultures.¹⁸¹ By classifying Catholic symbols as part of "religious cultural heritage"¹⁸² and thus incapable of posing a threat to religious neutrality, it refuses to extend the generous title of "religious cultural heritage" to Muslim practices, which are understood as deeply religious, irrational, unreasonable, and fanatic. The Other is stripped of religious symbols and manifestations, which are only permitted on some occasions and at the discretion of members of the majority community. The majority community additionally decides if the Other is deserving of accommodation (and even then, only if they "cooperate").

4. Combatting Colonial and Orientalist Tropes of Racialized Muslim Women

Certain provisions of Bill 62 reflect an Orientalist framing of minority rights and multiculturalism. The Bill reaffirms Orientalist categories of analysis: us versus them, West versus East, secularism versus religion, modernity versus tradition, and gender equality versus the oppression of women.

¹⁸⁰ *Id.*

¹⁸¹ Ingrid Peritz, *Quebec Legislature's Crucifix Hangs over Secularism Debate*, GLOBE & MAIL (Oct. 23, 2017), <https://www.theglobeandmail.com/news/national/opposition-party-looks-to-remove-crucifix-in-quebecs-national-assembly-amid-bill-62-debate/article36700123/> [https://perma.cc/5TVV-JLBG].

¹⁸² S.Q. 2017, c 19, at 2.

This reinforces the cultural status quo, essentializing and othering members of racialized minority communities and reinforcing a Western moral and cultural superiority. Bill 62 does not further inclusion, equality, or democratic citizenship. On the contrary, it further stigmatizes and marginalizes Muslim women, who are portrayed as in need of saving and rescue from their own communities and from their own religious beliefs which are seen to impede “communication” and participation in the body politic.

Bill 62 is an example of dog-whistle politics—the red herring of gender equality is raised once again, pandering to Orientalist and colonial stereotypes of the oppressed Muslim woman. Similar to previous legislative initiatives such as Bill 94 and Bill 60, Bill 62 prominently notes the principle of gender equality,¹⁸³ and it identifies principles of secularism and state religious neutrality as its justification. These principles are the ground on which mainstream liberal feminists have supported legislative regulation of Muslim and minority racialized women.¹⁸⁴ Pursuant to subsections 2 and 3 of section 11, an accommodation request must be consistent with the right of equality between men and women and must not compromise the principle of state neutrality.¹⁸⁵ In this way, Bill 62 and its predecessors animate and reinforce narratives of saving and rescue endemic to contemporary, neo-colonial debates on reasonable accommodation. Furthermore, by positioning Catholic symbols as a part of Quebec’s history, Bill 62 plants a flag in symbolic culture, asserting the primacy and singular legitimacy of French Catholic culture in Quebec.

C. The Future of Religious Discrimination in Canada

The October 2018 elections, in which the Liberal Party was defeated by the Coalition Avenir Québec (CAQ), indicate that the controversies surrounding Bill 62 remain at the

¹⁸³ *Id.* at 5.

¹⁸⁴ See, e.g., Commentaires sur le projet de loi no 62, Loi favorisant le respect de la neutralité religieuse de l’État, CONSEIL DU STATUT DE LA FEMME (Nov. 9, 2016), www.csf.gouv.qc.ca/article/2016/11/09/commentaires-sur-le-projet-de-loi-no-62-loi-favorisant-le-respect-de-la-neutralite-religieuse-de-letat/ [https://perma.cc/568P-W275].

¹⁸⁵ S.Q. 2017, c 19, § 11.

forefront of political debate. Premier-elect Francois Legault announced that he would move quickly to propose a prohibition on people in public service wearing religious garb, such as kippahs, turbans, and hijabs.¹⁸⁶ As a consequence of this proposed law, “public school teachers, crown prosecutors, police officers and judges would not be permitted to wear what the party calls religious signs.”¹⁸⁷ Placing the blame for any adverse effects of this law on religious minorities themselves, CAQ representative Geneviève Guilbault “told reporters that public sector employees in the targeted professions will be the authors of their own demise if they choose to wear outwardly religious clothing or head coverings and will have to find other jobs.”¹⁸⁸ Mindful that Bill 62 is currently subject to a constitutional challenge, Legault has asserted a willingness to invoke the “notwithstanding clause” that permits the state to override fundamental rights.¹⁸⁹ Under this new government, it appears religious minorities will not even be afforded the protections of the Charter, paving the way for increased regulation and marginalization.

V. CONCLUSION

The implications of Bill 62 become evident upon its analysis under a theoretical framework focused on interrogating secularism and state neutrality, foregrounding structural difference to achieve systemic equality, theorizing reasonable accommodation, and combatting persisting colonial and Orientalist tropes of racialized Muslim women. According to this framework, Bill 62 uses state neutrality to limit minority rights, focuses on cultural difference rather than structural equality, reifies majority culture as the mainstream

¹⁸⁶ Jason Magder, *CAQ Proposed Ban on Religious Garb Called 'Legalized Discrimination'*, MONTREAL GAZETTE (Oct. 3, 2018), <https://montrealgazette.com/news/local-news/caq-proposed-ban-on-religious-garb-called-legalized-discrimination> [<https://perma.cc/6MZF-FFGU>].

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ The Canadian Press, *Legault Prepared to Override Charter to Ban Religious Symbols*, YOUTUBE (Oct. 3, 2018), <https://www.youtube.com/watch?v=E8Yw87FNSw0> [<https://perma.cc/8YMP-ANCX>]. Section 33 of the Canadian Charter, known as the notwithstanding clause, allows the government to pass a law in violation of the rights protected under sections 2 and 7-15 of the Charter, subject to a five-year renewal.

norm, and rehashes colonial and Orientalist tropes of saving and rescuing Muslim women.

Bill 62 codifies centuries-old stereotypes because it was enacted by a government stoking the fires of populism. Contrary to the drafters' misguided attempts to foster a more inclusive society, the Bill will result in the exclusion of Muslim women. It is, accordingly, anti-democratic. More importantly, it likely violates the guarantees of religious freedom and gender equality under both the Quebec Charter of Human Rights and Freedoms and the Canadian Charter of Rights and Freedoms. Bill 62 does not respond to a legal vacuum; it instead serves a political purpose, demonstrating a populist response to anti-immigrant sentiment and widespread anxiety about the place of Muslim immigrants in Quebec.

