

THE “NAKED FACE” OF SECULAR EXCLUSION: BILL 94 AND THE PRIVATIZATION OF BELIEF

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This article will consider the case study of Québec’s Bill 94 (An Act to establish guidelines governing accommodation requests within the Administration and certain institutions), introduced in March 2010, one of many recent bans imposed on the wearing of the niqab in the West. Citing the importance of “the right to gender equality and the principle of religious neutrality of the State,” Bill 94 emphasizes the necessity of “un visage découvert” or “naked face” when giving or receiving a broad range of public services in Québec, including all government services, childcare centres, hospitals, and health and social service agencies. According to section 6 of the Act, “If an accommodation involves an adaptation of that practice and reasons of security, communication or identification warrant it, the accommodation must be denied.” While quasi-neutral, this bill clearly has a disproportionate impact on religious women who wear the niqab. In fact, as a direct result of the legislation, Muslim women will likely disappear from the public sphere and be restricted to the private home where they might effectively be dependent on male family members to navigate the “market place” on their behalf. Borrowing from Charles Taylor’s A Secular Age, this paper will consider the distributive consequences of the niqab ban, a critical juncture of “religion-state relations” in which belief is more and more relegated to the private sphere in Quebec. The article will use Bill 94 to explore this peculiar manifestation of “secularism” with the concurrent existence of “governance feminism”— how the privatization of belief goes hand in hand and is perversely reinforced by a colonial discourse on gender equality, leaving some already marginalized women out of the public gaze. Is this legislated demand for a “naked face” truly the logical outcome of a successful feminist movement (as some have asserted) or is

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*Cet article porte sur le projet de loi n° 94 du Québec (Loi établissant les balises encadrant les demandes d'accommodement dans l'Administration gouvernementale et dans certains établissements), présenté en mars 2010, l'une des nombreuses interdictions au port du niqab en Occident. Citant l'importance « du droit à l'égalité entre les femmes et les hommes et du principe de la neutralité religieuse de l'État », le projet de loi n° 94 souligne la nécessité, au Québec, d'avoir le « visage découvert » lorsqu'on fournit ou reçoit des services publics offerts, notamment, par le gouvernement, des garderies, des hôpitaux et des organismes de services sociaux et de santé. Aux termes de l'article 6 de la Loi, « lorsqu'un accommodement implique un aménagement à cette pratique, il doit être refusé si des motifs liés à la sécurité, à la communication ou à l'identification le justifient. » Bien qu'il soit quasi neutre, ce projet de loi a nettement un effet disproportionné sur les femmes pratiquantes qui portent le niqab. En fait, il aura probablement pour résultat direct de faire disparaître les musulmanes de la sphère publique et de les confiner à leur foyer, où elles devront probablement laisser les hommes faisant partie de leur famille occuper leur place sur le marché. S'inspirant de l'ouvrage *A Secular Age*, de Charles Taylor, l'article porte sur les conséquences distributives de l'interdiction de porter le niqab, phase critique des relations entre l'État et la religion au cours de laquelle, au Québec, le religieux est de plus en plus relégué au domaine privé. On y traite du projet de loi n° 94 afin d'examiner cette manifestation particulière de la laïcité et l'existence parallèle de la gouvernance féministe. En d'autres termes, on y étudie de quelle façon la privatisation du religieux va de pair avec un discours colonial sur l'égalité des sexes et, d'une manière perverse, est renforcée par celui-ci, phénomène qui soustrait au regard public des femmes déjà marginalisées. L'exigence législative du visage découvert est-elle vraiment la suite logique d'un mouvement féministe couronné de succès (comme certains l'affirment) ou cet effacement de femmes pratiquantes constitue-t-il en fait le nouveau voile du patriarcat?*

"Please do not impose on us the manner in which we liberate ourselves."¹

I. INTRODUCTION

In the West and in several Middle Eastern countries, states are actively and legally intervening to regulate Muslim women's liberty to wear the *niqab*, a full veil covering the face and the body. Despite the fact that the actual number of women choosing the *niqab* is often quite low², public reactions to this piece of clothing tend to be vigorous and passionate.³ Québec is no exception. Recently, with the drafting of Bill 94, a woman's right to participate in public life with her *niqab* has been severely limited.⁴ The proposed legislation emphasizes the necessity of "*un visage découvert*" or "naked face" when giving or receiving a broad range of provincial public services in Québec, including government services, childcare centres, hospitals, and health and social service agencies. The *niqab* prohibition is said to be justified on the basis of state neutrality and gender equality. Ironically, both proponents and critics of the *niqab* rely on gender equality to articulate their claims: some portray the *niqab* as a woman's right to freely express her religious convictions in the public sphere, including Amnesty International⁵, while others, including the *Collectif citoyen pour l'égalité et la laïcité*,⁶ view it as a symbolic act of submission to men which projects the image of women as trapped in what Catherine Mackinnon would call a "false consciousness".⁷ Against this backdrop, the place of religion in the public sphere stands as a key factor in the acceptance or rejection of the *niqab* by institutional structures.

Borrowing from Charles Taylor's, *A Secular Age*, this paper focuses on the importance of Bill 94 in negotiating the relationship between religion and the state in modern Québec. In particular, it will evaluate the paradoxical ways in which Taylor's scholarship fails to address the political and ideological alliance between the manifestation of secularism, on the one hand, and the emergence of

¹ This quote is from a young Muslim women testifying before the *Commission de Consultation sur les pratiques d'accommodement reliées aux différences culturelles* (November 29, 2007) Gérard Bouchard & Charles Taylor, *Building the Future: A Time for Reconciliation* (Full Version) (Quebec: Quebec Publications, 2008) at 234 fn 77 (*Bouchard-Taylor Report*).

² Michael Adams, *Unlikely Utopia* (Toronto: Viking Canada, 2007) at 93. Adams estimates the actual number in Quebec to be lower than 100.

³ Edward Cody, "France moves to fine Muslim Women with Full-Face Islamic Veils" (20 May 2010), online: *The Washington Post* <www.washington-post.com/w-p-d-y-n/content/story/2010/05/19/ST201006212.html?sid=ST-20100-5190-6212>.

⁴ Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 1st Sess, 39th Leg, Quebec, 2010 ("Bill 94, 2010").

⁵ Amnesty International, "Belgium Votes to Ban Full-Face Veils" (30 April, 2010) online: Amnesty International <www.amnesty.org/en/news-and-updates/belgium-votes-ban-full-face-veils-2010-04-30>.

⁶ Collectif citoyen pour l'égalité et la laïcité, (May, 2010) *Mémoire sur le projet de loi no. 94, "Pour une gestion laïque des services publics"*.

⁷ Catherine A. Mackinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8:4 *Signs* 635.

“governance feminism”,⁸ on the other. Drawing on legal realist interventions, the article will argue that the privatization of belief in Québec goes hand in hand and is perversely reinforced by a colonial discourse on gender equality, leaving some already marginalized women out of the public gaze. Is this legislated demand for a “naked face” truly the logical outcome of a successful feminist movement (as some have asserted) or is this erasure of religious women in fact the latest veil of patriarchy?

II. BILL 94 IN CONTEXT

A. Comparative Law: A Global Trend Towards Banning the *niqab*?

Québec’s Bill 94 arrives in a political milieu in which veiling is being challenged in many parts of the world and in a variety of legal contexts: legislative, judicial, and in the public eye. France is, at the moment, perhaps the most widely known example of this line of debate. In July, 2010, the French National Assembly passed a bill which makes it an offence to wear a full-face veil at any public area in France,⁹ and this bill received the almost unanimous approval of the French Senate in September, 2010.¹⁰ The French Justice Minister Marie Alliot-Marie indeed proclaimed: “The full veil dissolves a person’s identity in that of a community. It calls into question the French model of integration, founded on the acceptance of our society’s values”¹¹. A similar piece of legislation has recently passed parliamentary approval in Belgium¹² and the Danish government is considering a ban on the “burka”¹³. In Italy, old but previously unenforced legislative bans on covering the face (stemming back to a period of civil unrest in the mid-1970’s) have now started to be enforced against Muslim women who wear the *niqab*.¹⁴ In the United States and in Germany, Muslim women have asked the courts to recognize their right to wear the *niqab* in the school context and for purposes of obtaining a driver’s license photo.¹⁵ In Spain, several cities have expressed their intentions to ban the *niqab* in some public places.¹⁶ *Niqab* bans are

⁸ Janet Halley et al, “From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism” (2006) 29:2 Harv J L & Gender 335.

⁹ Décision no. 2010-613 DC, “Loi interdisant dissimulation du visage dans l’espace public” (passed into law on October 7, 2010 after the September 14, 2010 approval of the French Senate).

¹⁰ Lizzy Davies, “France: Senate votes for Muslim Face Veil Ban”, *The Guardian* (14 September 2010) online: The Guardian <www.guardian.co.uk/world/2010/sep/14/france-senate-muslim-veil-ban>.

¹¹ *Ibid.*

¹² Vanessa Mock & Josh Lichfield, “Belgium passes Europe’s first ban on wearing burka in public”, *Independent News Service* (1 May 2010) online: *The Independent* <www.independent.co.uk/news/world/europe/belgium-passes-europes-first-ban-on-wearing-burka-in-public-1959626.html>.

¹³ Danish Conservative Policy Paper (18 August 2009) online: Konservative <www.konservative.dk/nytogdebat/nyheder/2009/august/sider/integrationsudspil.aspx>.

¹⁴ Richard Owen, “Italian police fine woman for wearing burqa in public”, *The Times* (5 May 2010) online: The Times <www.timesonline.co.uk/tol/news/world/europe/article7115756.ece>.

¹⁵ Robert A. Kahn, “The Headscarf as Threat: A Comparison of German and American Legal Discourses” (2007) 40 Vand J Transnat’l L 417.

¹⁶ Islamic Human Rights Commission, “Action Alert: Spain – Barcelona Niqab ban” (15 June 2010) online: Islamic Human Rights Commission <www.ihrc.org.uk/activities/9339-action-alert-spain>.

being put in place by smaller scale institutions, such as colleges in the United Kingdom. In Syria and in Egypt, *niqab* bans have been adopted as testaments to the secular nature of the government or as a symbol of intolerance to religious extremism.¹⁷

The Canadian government has also recently placed limits on the ability of women to wear the *niqab*. Jason Kenney, the Minister of Citizenship, Immigration, and Multiculturalism, announced on December 12, 2011 that women may not wear the *niqab* while taking the oath of citizenship.¹⁸ Kenney stated, "The citizenship oath is a quintessentially public act. It is a public declaration that you are joining the Canadian family and it must be taken freely and openly".¹⁹ This statement came just days after the Supreme Court heard oral arguments of an Ontario sexual assault case on the right of a witness to testify while wearing a *niqab*.²⁰

Québec is yet another manifestation of this global trend, although in a different guise. In March 2010, the Québec government introduced Bill 94 (*An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 2010), a piece of legislation which was deemed necessary to "balance individual freedoms with the values of Québec society, including the equality between men and women and secular public institutions."²¹ Like its counterparts in France and Belgium, Québec's Bill 94 is neutral on its face. It consciously avoids words such as "*niqab*" or "*burqa*", although these were the exclusive and explicit *raison d'être* of the Bill.²² In fact, many advocates for the Bill within the National Assembly have stridently argued that religious freedom is not a concern because the Bill merely offers a "code of conduct" for religious people of any persuasion to guide participation in secular society.²³

III. THE IDEOLOGICAL UNDERPINNINGS OF BILL 94 AND THE PUBLIC REACTION TO THE BILL

A. The Foundation of Québec's Bill 94

barcelona-niqab-ban>; Debbie Parker, "Burqa and Niqab Ban in Spain Increased Political Pressure", *Spanish News* (25 June 2010), online: *Spanish News* <www.spanishnews.es/20100625-burqa-and-niqab-ban-in-spain-increases-political-pressure/id=2739>.

¹⁷ "Syria bans face veils at universities", *BBC News* (19 July 2010) online: BBC <www.bbc.co.uk/news/world-middle-east-10684359>.

¹⁸ Kim Mackrael & Les Perreux, "Muslim women must show faces when taking citizenship oath", *The Globe and Mail* (12 December 2011) online: The Globe and Mail <<http://www.theglobeandmail.com/news/politics/muslim-women-must-show-faces-when-taking-citizenship-oath/article2267972>>.

¹⁹ *Ibid.*

²⁰ Teresa Smith, "Alleged abuse victim forced to choose between faith and justice by courts' niqab rule: lawyer", *The National Post* (8 December 2011) online: The National Post <<http://news.nationalpost.com/2011/12/08/banning-niqabs-on-the-witness-stands-forces-alleged-abuse-victim-in-an-impossible-situation-lawyer/>>.

²¹ "Québec will require bare face for service", *CBC News* (24 March 2010) online: CBC <www.cbc.ca/canada/montreal/story/2010/03/24/quebec-reasonable-accommodation-law.html>.

²² Québec, *Journal des débats* 39th legislature, 1st session, 2009-2010, Vol. 41 No. 69 (18 May, 2010)

²³ Québec, *Journal des débats*, 39th legislature, 1st session, 2010-2011, Vol 41 No. 116. (November 26, 2010) at 2 (Hon. M. Fortin)

In his defense of the Bill, Québec Premier Jean Charest emphasizes the need to strike a balance between the values of Québec society and the desire for individual freedoms: *This is not about making our homes less welcoming, but about stressing the values that unite us...An accommodation cannot be granted unless it respects the principle of equality between men and women, and the religious neutrality of the state*²⁴ Bill 94 heavily relies on “the right to gender equality” and “the principle of religious neutrality of the State” to justify its existence; such mention appears not only in the explanatory notes but in section 4 as well. It emphasizes the necessity of “*un visage découvert*” or “naked face” when giving or receiving (sec. 6) a broad range of provincial public services in Québec, including government services (sec. 2(1)), schools (2(2); 2(5); 3(1)), childcare centres (sec. 3(3)), hospitals (sec. 2(2); 2(5)), and health and social service agencies (sec. 3(2)).²⁵ In addition to denying veiled women access to courts and government buildings, it has the effect of preventing even the most banal activities such as going to the local office of the electric company to enquire about charges or picking up a child from a government-funded daycare. The Bill stands not only as a policy for standards around service to the public but also as an employment policy for Québec government employees and employees of institutions that receive funding from the Québec government. According to section 6 of the Act, any accommodation of the “naked face” principle must be denied if “reasons of security, communication or identification warrant it”²⁶

Unlike its counterparts in Europe, the Québec bill uses the subtler venue of restrictions on requests for “reasonable accommodation”.²⁷ The Bill strategically avoids a “ban” on people who wear the *niqab* but instead severely limits the situations whereby government institutions and several provincially-funded bodies can accommodate differences in dress. Although the Bill’s title suggests the implementation of innocuous “guidance” on accommodation, it is in fact introducing the “naked face” concept as a basic social “truth” into Quebecois legislative discourse.²⁸ This juxtaposition of a general social “truth” severely curtails the ability to make a case-by-case “reasonable accommodation” determination, as is normally the practice in this peculiar legal domain.

Ironically, although superficially limiting the situations in which a request for accommodation must be denied, it is difficult to imagine a use of public resources that would not demand communication with someone and/or the confirmation of identity.²⁹ The extremely broad reach of Québec public funding would effectively force the *niqab*-wearing woman to research and plot out the few public locations where she could possibly receive treatment equal to her “naked faced” sisters. Ironically, the indirect narrowing of access to “reasonable accommodation” is

²⁴ *CBC News*, *supra* note 21.

²⁵ Bill 94, 2010, *supra* note 4.

²⁶ *Ibid* at sec. 6.

²⁷ *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 S.C.R. 256 at para 131 [*Multani*].

²⁸ Katherine Wilton, “Second niqab-wearing woman forced out of Quebec class”, *The Montreal Gazette* (13 April 2010) online: *Montreal Gazette* <<http://www.montreal-gazette.com/life/Second+niqab+wearing+woman+forced+Quebec+class/2875421/story.html>>.

²⁹ Nathalie Des Rosiers, “Projet de loi 94 – Port du niqab: une loi inutile”, *Le Devoir* (3 April 2010) online: *Le Devoir* <<http://www.ledevoir.com/politique/quebec/286333/projet-de-loi-94-port-du-niqab-une-loi-inutile>>.

actually a more comprehensive and insidious means of limiting the practice than a more direct ban of the practice under criminal law legislation. Whereas someone may be able to challenge a criminal conviction or pay a fine, limiting the places one is permitted to enter with a "visage découvert" is a persistent condition rather than the one-time event associated with a criminal sanction. This is not at all to suggest, however, that a criminal sanction against the wearing of the face veil would be a preferable circumstance to a civil action. Indeed, as Janet Halley et al. discuss in the context of criminalizing prostitution, criminal sanctions bring another host of problems.³⁰

B. Public Reaction to Bill 94

The introduction of Bill 94 was heralded by organizations such as the publically-funded Québec Council on the Status of Women, which saluted the actions of the government as "avant-gardiste".³¹ The Canadian Muslim Congress also expressed support for the Bill, stating the wearing of a full-face veil is not an Islamic religious requirement but, rather, an example of "Saudi-inspired" religious extremism.³² In a press release regarding reasonable accommodation on religious grounds, le Mouvement laïque québécois situates religion as inherently irrational and therefore not reasonable grounds for accommodation.³³ Many scholars have argued that the Bill is not really harming anybody because it does not add to the existing body of legal literature on reasonable accommodation.³⁴ Its purpose, in fact, is said to merely list "the conditions under which an accommodation may be made".³⁵

However, the reaction to Bill 94 was not universally positive. In a brief to the National Assembly, the Canadian Council of Muslim Women argued that a legislated ban would be unnecessary in Québec if a properly worded reasonable accommodation policy were put in place to exclude the narrow set of circumstances where it would be reasonable to expect an individual to show her face to access services.³⁶ The Canadian Council on American-Islamic Relations took the more direct view that the law was designed with specifically

³⁰ Halley et al, *supra* note 8 at 337.

³¹ Conseil du statut de la femme, (May, 2010) Mémoire sur le projet de loi no. 94, "Loi établissant les balises encadrant les demandes d'accommodement dans l'Administration gouvernementale et dans certains établissements" at 17.

³² Canadian Muslim Congress, Press Release, "Muslim Canadian Congress wants Canada to Ban the Burka" (8 October 2009) online: Canadian Muslim Congress <<http://www.muslimcanadian-congress.org/20091008.html>>.

³³ Mouvement laïque québécois, Press Release, "Une laïcité interculturelle: le Québec, avenir de la France?" (May 2010) online: Mouvement laïque québécois <http://www.mlq.qc.ca/vx/6_-dossiers/accommodement/accommodement_position_en.html>.

³⁴ Georges Leroux & Jocelyn Maclure, "Enjeux de la laïcité" (Fall 2010) 234 *Spirale*, online: *Spirale* <<http://www.spiralemagazine.com/parutions/234/textes/dossier.html>>.

³⁵ Bill 94, 2010, *supra* note 4, "Explanatory Notes".

³⁶ Canadian Council of Muslim Women, "Brief to the National Assembly of Quebec, Committee on Institutions to provide General Consultation on Bill 94 – An Act to establish guidelines governing accommodation requests within the Administration and certain institutions" (submitted 7 May 2010) at 2,4.

discriminatory intent based on stereotypes about Muslims.³⁷ Kathy Malas, spokeswoman of the Canadian Muslim Forum, stated: “In Québec, people have the right to wear what they want. It’s not a question of reasonable accommodation at all”.³⁸ The Québec Bar’s submission analyzed the Bill from a legal drafting standpoint, noting its potential for vast application and the vagueness of the wording.³⁹

C. Constitutional Vulnerability

While not the primary focus of this article, it is obvious that Bill 94, with its wide-ranging application to Québec public life, is vulnerable to a constitutional challenge on the basis of Canadian *Charter*’s section 7 (overly broad application), as well as section 2 (violation of freedom of religion).⁴⁰ The constitutional vulnerability of the Bill has been argued in more detail by several of the organizations who submitted briefs to the National Assembly, including the Canadian Council on American-Islamic Relations .

More specifically, section 6 of the *Act* is particularly problematic in the potential breadth of its application. It cites “reasons of security, communication or identification” to justify refusing to accommodate the needs and rights of Muslim women who are giving or receiving state services while wearing the *niqab*. This may well encompass a broad range of actions and is likely to be considered, in our opinion, as constitutionally overly broad under Section 7 of the *Charter*.⁴¹ The Bill may also be attacked for its unconstitutionality on the basis of freedom of religion under the Canadian *Charter*’s Section 2⁴² and the *Quebec Charter of Human Rights and Freedoms*’s Section 3 due to its disproportionate impact on some Muslim women.⁴³ The 2004 Supreme Court case of *Syndicat Northcrest v Amselem* affirmed that the measure of an allegedly violated religious belief is not whether the belief is held by all members of the religion but, rather, whether the belief is “sincerely held” by the person alleging the breach. The court in *Amselem* found:

freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or

³⁷ Canadian Council on American-Islamic Relations, (May, 2010), “Brief Concerning Bill 94: An Act to Establish Guidelines Governing Accommodation Requests Within the Administration and Certain Institutions” at 3, 9.

³⁸ The Canadian Press, “Quebec government forced Egyptian immigrant from classroom for refusing to remove face veil” *Islamization Watch* (3 March 2010), online: Islamization Watch <islamization-watch.blogspot.com/2010/03/quebec-government-forced-egyptian.html>.

³⁹ Barreau du Québec, Letter addressed to Madame Kathleen Weil, Minister de la Justice du Québec (30 April 2010)

⁴⁰ *The Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (“*The Canadian Charter*”)

⁴¹ *Ontario Human Rights Commission v Simpsons- Sears Limited (O’Malley)* [1985] 2 S.C.R. 536 *R v Nova Scotia Pharmaceuticals*, [1992] 2 S.C.R. 606 [Nova Scotia Pharmaceuticals]; *Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486

⁴² *R v NS*, 2010 ONCA 670, 102 O.R. (3d) 161 [R v NS]; *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551 [Amselem]; *Multani*, *supra* note 27.

⁴³ *The Quebec Charter of Human Rights and Freedoms*, R.S.Q. ch. C-12 (“*The Québec Charter*”)

is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.⁴⁴

Outlining a subjective rather than an objective analysis of a religious belief or practice is particularly relevant in the present case of the wearing of the *niqab*, mainly because it puts to rest the assertions that the wearing of the face veil is not drawn from the Quran. A recent decision by the Ontario Court of Appeal (*R. v. N.S.*) illustrates the focus on “sincerely held belief” as a basis for analysis.⁴⁵ The case dealt with the right of a woman to testify in a criminal trial while wearing her *niqab* against two men who allegedly sexually assaulted her. Despite arguments that testifying while wearing a face veil would deny the accused the right to “face” his accuser, the court found in favour of the woman. The Court stated:

If a witness establishes that wearing her *niqab* is a legitimate exercise of her religious freedoms, then the onus moves to the accused to show why the exercise of this constitutionally protected right would compromise his constitutionally protected right to make full answer and defence.⁴⁶

In its reasoning, the court focused on the exclusionary effect of denial rather than an ideologically-driven analysis of whether face coverings are appropriate in public settings. It thus introduced a contextual lens to balance opposite constitutional rights, one which accounts for the fact that the individual behind the *niqab* is both a woman and a racialized member of society:

N.S. is a Muslim, a minority that many believe is unfairly maligned and stereotyped in contemporary Canada. A failure to give adequate consideration to N.S.’s religious beliefs would reflect and, to some extent, legitimize that negative stereotyping. Allowing her to wear a *niqab* could be seen as a recognition and acceptance of those minority beliefs and practices and, therefore, a reflection of the multi-cultural heritage of Canada recognized in s. 27 of the Charter. Permitting N.S. to wear her *niqab* would also broaden access to the justice system for those in the position of N.S., by indicating that participation in the justice system would not come at the cost of compromising one’s religious beliefs. (...) Adjusting the process to ameliorate the hardships faced by a complainant like N.S. promotes gender equality.”⁴⁷

⁴⁴ *Amselem*, *supra* note 42 at para 46.

⁴⁵ *R v NS*, *supra* note 42.

⁴⁶ *Ibid* at para 98.

⁴⁷ *Ibid* at paras 79, 80.

Such contextual analysis is far from the intent or the application of Bill 94, which not only stigmatizes Muslim women as a social and religious group but also puts them at a serious disadvantage in terms of gender equality. Assuming that the Bill violates freedom of religion, the government will have to demonstrate under section one of the *Canadian Charter* and section 9.1 of the *Québec Charter* that the legislation is “justified in a free and democratic society”. To be successful, the following elements will need to be present: the Bill has a justifiable purpose; it is proportional⁴⁸; and it only constitutes a “minimal impairment” to religious freedom.⁴⁹ In our opinion, Bill 94 is unlikely to overcome this high threshold.⁵⁰ Moreover, a state-sanctioned division between religion and the state (similar to the “Establishment Clause” concept in U.S. Constitutional law) is absent from the *Canadian Charter* and the *Québec Charter*. Instead, as mentioned previously, the provisions touching on religion in both of these key documents reinforce the primacy of freedom of religion and the need for the law to treat individuals equally and without discrimination on the basis of religion.⁵¹

IV. CHARLES TAYLOR AND THE PRIVATIZATION OF BELIEF

Contemporary public spaces in the West have been “emptied of God, or any reference to ultimate reality”.⁵² Charles Taylor’s *A Secular Age* investigates how this process of secularization occurred.⁵³ In tracing the circuitous journey of religion in relation to public life in Western societies, Taylor outlines three understandings/venues by which the secular and the religious have been framed as sharp dichotomies.⁵⁴ The emergence of “a secular age” took place, he argues, with a concurrent shift at an individual level from a position of “theistic construal” to one where “unbelief has become the major default option”.⁵⁵ In this secularized context, “believers and unbelievers can experience their world very differently”.⁵⁶

Once cast out from the public sphere, religion becomes lodged in the private sphere, along with the home and the family. For Taylor, the privatization of religion is a logical outgrowth of a “social imaginary” whereby the social life has shifted from one of a shared religious existence to one giving “unprecedented primacy to the individual”.⁵⁷ This new “buffered identity”,⁵⁸ producing the individual as “impervious to the enchanted cosmos”, put new focus on personal devotion and discipline.⁵⁹

⁴⁸ *R v Oakes*, [1986] 1 S.C.R. 103 at para 69 [Oakes]; *Multani*, *supra* note 27.

⁴⁹ *Nova Scotia Pharmaceuticals*, *supra* note 41.

⁵⁰ *Oakes*, *supra* note 48.

⁵¹ *The Canadian Charter*, *supra* note 40 at sec. 15(1); *The Québec Charter*, *supra* note 43 at sec. 10.

⁵² Charles Taylor, *A Secular Age* (Cambridge, Mass. (USA) and London: The Belknap Press of Harvard University Press, 2007) at 2.

⁵³ *Ibid* at 187.

⁵⁴ *Ibid*.

⁵⁵ *Ibid* at 14.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at 147.

⁵⁸ *Ibid* at 156.

⁵⁹ *Ibid* at 146.

A *Secular Age*, with its emphasis on religion as outside of the public sphere, provides key theoretical insights to shed light on Québec's urge to relegate the *niqab* to the private sphere. Set in a context of a "social imaginary" of a "secular state", the requirement for a "naked face" is in fact revealed as a proxy for a wider discomfort with new forms of public displays of religious devotion. Taylor's text has much to offer to explain how the principle of religious neutrality has grown to be seen as a core legal value despite its absence from the Canadian and Québec Charters. However, it suggests no guidance on how the shift from the "secular public" to the "religious private" is carried out when dealing with the clearly gendered subject matter of the *niqab*. We are left with no insights, on a philosophical or political level, to help us understand the twinning of gender equality with religious neutrality in laws of this type. To better understand the role of gender in this issue, one must ask how feminism, particularly what Janet Halley terms "governance feminism", conveniently came to be an intimate and powerful ally in the "tool box" of secularism.⁶⁰

V. THE GENDERED SUBJECT BEHIND THE VEIL IN QUEBEC

What does gender equality entail under the proposed legislation? What are the distributive consequences of advocating for this particular vision of gender equality? Can one be at once a religious woman and a feminist? Is secularism inclusive of diversity? Can it be? One thing is clear: Bill 94's emphasis on "equality between men and women" is largely driven by a "secular social imaginary" of Québec society in which overt forms of religious belief are sequestered from the public sphere. In this context, the *niqab* is viewed as a visibly gendered and almost aggressive form of religiosity from which Québec as a whole has decided to move away. For the Muslim women involved, equality is conceptualized as the physical ability to meet the metaphorical demand of a "face to face" encounter. In other words, the fact that women who veil their faces are not within the class of people who can greet the "face" of the public sphere in an identical manner to men means that they fail in a gender equality calculus that non-*niqab* wearing women pass. The effect of this positioning is that women who choose to wear the *niqab* are denuded of their agency and their legitimacy as gendered subjects.

One of the most troubling paradoxes of this discourse is the dialogue around whether veiled women are capable of 'choosing' to take off the veil in a given circumstance. Advocates for the Bill point out that a woman need only temporarily remove her face veil in order to receive the same level of service enjoyed by her fellow Québécois. If one believes that wearing a face-covering veil is a manifestation of a woman's oppression, then one must also believe the woman is powerless to correct her situation. Co-existing with the belief in the "false consciousness" of this veiled woman is the ironic belief that she is stubbornly refusing to remove her veil even in the most mundane circumstances. Hence, women who wear the *niqab* are simultaneously seen as trapped by the limits of deep-set patriarchy and free agents who are failing to make the best choice for themselves and for society. Is there a way out?

⁶⁰ Halley et al, *supra* note 8.

A. Religious Freedom and Gender Equality

Another consequence of the linking of secularity and gender equality is that religion is seen as an inappropriate subject matter for the public sphere. Not only is religion relegated to the private sphere, but so is “the family”. Frances E. Olsen’s landmark article, “The Family and the Market: A Study of Ideology and Legal Reform”, outlines a dichotomous “world view that perceives social life to be divided between market and family”.⁶¹ This is in line with Taylor’s descriptions of the public realm as a “marketplace” where ideas are exchanged and discourses of power are played out. Critical legal scholars have long asserted the logical faults of such dichotomous rhetorical structure.⁶² Commenting on the dualist treatment of public and private, Angela P. Harris writes: “(...)no dichotomy between the public and the private exists: the state, the market, and the family are each a complex network of institutions and practices governed by both state and non-state forms of power”. As a garment exclusively worn by women and inextricably linked to religion, the decision of some Muslim women to wear the *niqab* in public defies this dichotomy by placing women and religious belief in the public sphere.

This tension between religious freedom and gender equality is part and parcel of the urge to “universalize” women’s rights,⁶³ articulated at an international level in the United Nations’ *Convention on the Elimination of All Forms of Discrimination Against Women* [CEDAW].⁶⁴ While laudable in intent, CEDAW employs a language of rights and equality that assumes and relies on a commonality of oppression that is not, in fact, universal. Michelle Brandt and Jeffrey Kaplan describe the convention as a problematic microcosm of the codification of a Western vision of “universal” women’s rights.⁶⁵ The implied universality of the *Convention*’s understanding of women’s rights is belied by the high numbers of states signing it with reservations, many of which are based on religious grounds.⁶⁶

The second-wave feminist movement, the version of feminism being institutionalized through structures like CEDAW, has been largely articulated through discourse around the “rights” of women. This notion of “gender equality” is one largely focused on, and driven by, white middle-class women in Western countries who wanted equal right to pay, legislative non-discrimination, and access to contraceptives.⁶⁷ Recent feminist scholarship has critiqued “rights talk” as unable to account for specific political contexts, instead dwelling in an

⁶¹ Frances E. Olsen, “The Family and the Market: A Study of Ideology and Legal Reform” (1983) 96 Harv L Rev 1497.

⁶² Angela P. Harris, “Theorizing Class, Gender, and the Law: Three Approaches” (2009) 72 Law & Contemp Probs 54.

⁶³ Michelle Brandt & Jeffrey A. Kaplan, “Tension between Women’s Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh, and Tunisia” 12 JL & Religion 105

⁶⁴ *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1979), GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193; UN Doc. A/34/36; 1249 UNTS 13 [CEDAW].

⁶⁵ Brandt & Kaplan, *supra* note 63 at 106.

⁶⁶ *Ibid.*

⁶⁷ Chandra Talpade Mohanty, “Under Western Eyes: Feminist Scholarship and Colonial Discourses” (1988) 30 Feminist Review 61 at 64.

ahistorical and acultural vacuum.⁶⁸ The "gender equality" ideal is neither realistic nor inclusive of the wide array of circumstances experienced by real people.

Bill 94 exists at a crossroads between a "social imaginary" of a secular state paired with a "governance feminist" move to institutionalize the ideal of "gender equality". With its origins in the second wave feminist movement in the West, the idea of "governance feminism" (although not the term itself) is an institutionalization of a Western feminist vision of women's rights. The term "governance feminism" was developed by Janet Halley to describe the "incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power".⁶⁹ She uses this phrase to describe the effort on the part of some Western feminists to "download their international law reforms into domestic legal regimes" without being cognizant of divergent national realities.⁷⁰

Bill 94's professed grounding in "gender equality between men and women" positions it as entrenchment of second wave feminist ideals failing to consider the circumstances of all women. Through this grounding, the ideal of the "naked face" is characterized as a feminist ideal to which Québec society has signed onto through the Québec *Charter*. When combined with the disparate impact of this legislation on Muslims, the Bill takes on an Orientalist tone which contributes to portraying *niqab*-wearers as the ultimate exotic "Other".⁷¹ Unfortunately, institutional efforts to codify women's rights have not kept pace with more recent feminist scholarship in which the concept of feminism and norms of womanhood are seen within an intersectional framework of class, ethnicity, race, religion, and sexual orientation (among others). Bill 94's efforts to institutionalize "gender equality" at a national level mirrors the myopic faults of international efforts such as CEDAW, each reflecting a deep lack of intersectional understanding of the circumstances of a largely non-white, non-middle class population of women.

B. Substantive Equality versus Formal Equality

Part of the difficulty in the Bill's understanding of "secularism" and "gender equality" as they relate to issues of religious expression is the conflation of the need for "formal equality" with the need for "substantive equality". In her article analyzing the European Court of Human Rights' recent decisions on Turkey's ban on Islamic headscarves in public places, Rachel Rebouché discusses the distinction between substantive equality and formal equality and the distributive outcomes each produces. She writes: "In brief, substantive equality is a departure from classic or formal equality (or treating likes alike) and from equal treatment (ensuring that laws or policies apply to everyone in the same way). Substantive equality, by contrast, is concerned that laws and customary practices do not diminish women's access to societal goods or perpetuate discrimination".⁷²

⁶⁸ Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press: 1995) at 97.

⁶⁹ Halley et al, *supra* note 8 at 340.

⁷⁰ *Ibid* at 346.

⁷¹ Edward W. Said, *Orientalism* (London: Penguin Books, 1978).

⁷² Rachel Rebouché, "The Substance of Substantive Equality: Gender Equality and Turkey's Headscarf Debate" (2009) 24 Am U Int'l L Rev 711.

Bill 94 reflects a “formal equality” emphasis on removal of certain religious markers from the public view and attempting to erase differences between men and women in the rendering of services. If men and women appear identically bare-faced before social service providers, so the logic goes, the danger of unequal treatment is diminished. Women who differentiate themselves as distinct and different through a face veil threaten to undermine this goal of “formal equality”. As a result, Bill 94 attempts to prevent the need for recognition of certain religiously-framed gender differences through a blanket opposition to face veils. Bill 94 would look quite different if “equality between men and women” were understood in the more operational “social equality” sense, i.e. espousing access to justice considerations.

VI. CONCLUSION

The issue of “reasonable accommodation” in Québec has been a political focal point for many years. Prior to the drafting of Bill 94, the 2008 *Bouchard-Taylor Report* was mandated to explore the practice of reasonable accommodation relating to religious/cultural differences in Québec. It found that “Muslims, and in particular Arabo-Muslims are, with Blacks, the group hardest hit by various forms of discrimination”.⁷³ The Report also affirms that girls and women who wear the Islamic headscarf attach different meaning to it and warns against a blanket prohibition on the practice.⁷⁴ In its conclusion, the Bouchard-Taylor Commission urges taking measures to foster Muslims’ participation in society, rather than furthering measures to exclude segments of the population. The Commissioners write: “In short, the way to overcome Islamophobia is to draw closer to Muslims, not to shun them. In this field, as in others, mistrust engenders mistrust.”⁷⁵

Despite common roots in an effort to correct systemic discrimination, “gender equality” as a legitimate state goal is being pitted against certain reasonable accommodation requests on the basis of religion in cases involving Muslim women’s religious dress. Specifically, the Québec’s *niqab* ban is a demonstration of the troubling outcomes resulting from a confluence between secularism and a narrowed understanding of who can be a feminist and what constitutes feminist principles.

The passage of this Bill will have immediate and dramatically harmful effects on religious women who wear the *niqab*. Although not mentioned by name, Muslim women are clearly the target of this piece of legislation and it is they exclusively who will be denied their rightful participation in public services. The result of this denial and its chilling effect is a further marginalization of this population of women. Religious women will likely disappear from the public sphere and be indelibly relegated to the private home, where they might effectively be dependent on male family members to navigate the public realm on their behalf. Is the true legacy of a century of feminist efforts to place women into the public realm a damning of certain religious women back to the shadows of the private realm? With the passage of Bill 94, it seems the answer will be a sad “yes”.

⁷³ Bouchard-Taylor Report, *supra* note 1 at 234.

⁷⁴ *Ibid* at 235.

⁷⁵ *Ibid*.