

CANADIAN RACE RELATIONS FOUNDATION

“IT DOESN’T WORK!” THE SYMBOLIC ASPECT OF LAW, FROM THE CRIMINAL LAW TO BILL 21

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DIRECTIONS

“IT DOESN’T WORK!”

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This article uses an analytical framework from the criminal law to analyse Quebec’s Bill 21. It analyses denunciation, an important principle in the criminal law, and describes its analytical framework. It then applies this framework to Bill 21. From a historical analysis of the importance of state secularism in Quebec, it reframes the debate regarding Bill 21 and paints Bill 21 as a symbolic and constitutive act. Bill 21 allows Quebecers to break free from an oppressive past defined by the confluence of church and state. As a symbolic act, it constitutes and consolidates a shared identity. It is underlain by shared anxieties regarding potential threats to this identity. By developing a criminal law framework, this article suggests, although tangentially, that the importance of the symbolic and constitutive aspects of law transcends the criminal law.

Keywords: Quebec, Bill 21, secularism, state secularism, discrimination, Islam, religion, law and religion, hijab, criminal law, Quiet Revolution, Grande Noirceur

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INTRODUCTION

Bill 21 was tabled by the newly elected Coalition avenir Québec government in March 2019 and enacted into law in June 2019.² It appears to end a long-standing debate in Quebec over the presence of religious symbols in the public service – and, perhaps, in society more broadly. This debate was most notably shaped through the Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles de 2007-08 (best known as the Bouchard-Taylor Commission). The Commission's report recommended forbidding certain public servants from wearing religious symbols.³ The debate also defined several prior election campaigns. During the 2012 election, identity politics played a role in the Parti Québécois' victory.⁴ Following the election, the newly formed government tabled its Charte de la laïcité, whose objectives were similar to those of Bill 21.⁵ The Charte was never enacted into law, yet state secularism continued to play a key role in the public debate.

Bill 21 forbids public servants in positions of authority from wearing religious symbols while discharging their duties.⁶ Unlike in the Charte formerly proposed by the Parti Québécois, this restriction is not

² Bill 21, *An Act respecting the laicity of the State*, 1st Sess, 42nd Leg, Quebec, 2019 (assented to 16 June 2019), SQ 2019, c 12 [*Bill 21*]. It is worth mentioning in passing that the nomenclature which I adopt here, because it has been widely used in the public conversation regarding Bill 21, is inaccurate. Bill 21 became *An Act respecting the laicity of the State*. As such, referring to the *Act* as “Bill 21” is no longer appropriate (see Phil Lord, “What Is the True Purpose of Quebec's Bill 21?” (2020) 9:3 *Directions* 1 at 2).

³ Quebec, Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, *Fonder l'avenir : Le temps de la conciliation* (Gérard Bouchard & Charles Taylor) [Bouchard-Taylor Commission] (“[e]n ce qui concerne le port de signes religieux par les agents de l'État, nous recommandons qu'il soit interdit à certains d'entre eux (magistrats et procureurs de la Couronne, policiers, gardiens de prison, président et vice-présidents de l'Assemblée nationale). Mais pour tous les autres agents de l'État (enseignants, fonctionnaires, professionnels de la santé et autres), nous estimons que le port de signes religieux devrait être autorisé. Ces deux dispositions nous semblent dictées par la règle d'équilibre qui inspire toute notre démarche” at 260).

⁴ See e.g. Alec Castonguay, “Les neuf vies de Pauline Marois”, *L'actualité* (7 March 2014), online: <lactualite.com/politique/les-neuf-vies-de-pauline-marois/> and Mélanie Marquis, “Loi sur la laïcité de l'État: ‘J'en prends un peu le mérite’, dit Marois”, *La Presse* (2 July 2019), online: <www.lapresse.ca/actualites/politique/201907/01/01-5232343-loi-sur-la-laicite-de-letat-jen-prends-un-peu-le-merite-dit-marois.php> .

⁵ Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess, 40th Leg, Quebec, 2013 (never assented to).

⁶ *Bill 21*, *supra* note 2, s 6.

limited to “ostentatious” religious symbols.⁷ The definition of persons in a position of authority is also particularly broad, as it notably includes teachers.⁸ Bill 21 also mandates that public services be given and received “with face uncovered.”⁹

Even though it is a provincial law, Bill 21 played a role in the last federal election, during which all parties (except for the Bloc Québécois) opposed it.¹⁰ The Liberal Party, which won the election, even stated that it might participate in an eventual challenge before the courts.¹¹ Even after its enactment into law, Bill 21 continues to divide the country. A strong majority (64%) of Quebecers support it, while a majority (59%) of Canadians of other provinces and territories oppose it.¹² Although Bill 21 uses the notwithstanding clause to override sections of the *Canadian Charter of Rights and Freedoms*,¹³ it is already the subject of two court challenges.¹⁴

In a recently published article, I argued that Bill 21 is a symbolic and constitutive act.¹⁵ In doing so, I attempted to reframe the public debate, which had thus far been focussed on the effectiveness of Bill 21 in achieving its main stated objective of furthering the equality of men and women. I argued that this debate and its positions, which at first seem contrasting, are rather underlain by the assumption that the bill is a tool to effect social change and that it should, therefore, be judged on whether it

⁷ See generally Bill 60, *supra* note 5.

⁸ *Bill 21*, *supra* note 2, Schedule II, s 10.

⁹ *Ibid*, s 7—10.

¹⁰ See e.g. Radio-Canada, “Le débat des chefs fédéraux 2019” (11 October 2019), online (video): *YouTube* <www.youtube.com/watch?v=68hBSrw_qvw> .

¹¹ *Ibid*.

¹² See Philip Authier, “Majority of Canadians Disapprove of Bill 21, but Quebecers Are in Favour: Poll”, *The Montreal Gazette* (6 August 2019), online: <montrealgazette.com/news/local-news/a-new-poll-shows-support-for-bill-21-is-built-on-anti-islam-sentiment> .

¹³ s 33(1), Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹⁴ As of early 2020. See e.g. Guiseppe Valiante, “La Cour supérieure entend la contestation de la Loi sur la laïcité de l’État”, *Le Soleil* (9 July 2019), online: <www.lesoleil.com/actualite/politique/la-cour-superieure-entend-la-contestation-de-la-loi-sur-la-laicite-de-letat-e1e20798ed9f78bb7c98e881d5891657> and Judith Lachapelle, “Loi sur la laïcité : une seconde contestation déposée en Cour supérieure”, *La Presse* (27 September 2019), online: <www.lapresse.ca/actualites/justice-et-faits-divers/201909/26/01-5243014-loi-sur-la-laicite-une-seconde-contestation-deposee-en-cour-superieure.php> .

¹⁵ Lord, *supra* note 2. See also Phil Lord, “Quelle est la réelle raison d’être de la loi 21?” (2020) 9:3 *Directions* 1. The article was written and published in French and English.

effectively achieves such social change. I presented the historical context, unique to Quebec, which could explain the importance that Quebecers afford to state secularism. Finally, I argued that this historical context suggests that Bill 21 is a way for Quebecers to break free from an oppressive past defined by the confluence of church and state. This perspective leaves little importance to the issue of the effectiveness of Bill 21 as a tool to effect social change.

I did not extensively analyse the taxonomy I proposed, which distinguishes the symbolic aspect of law from its instrumental aspect. I do so here, using as my anchor an analytical framework from the criminal law. I still argue that Bill 21 should be construed as a symbolic and constitutive act. However, I approach this statement from a different perspective, focussing on concepts and an analytical framework from the criminal law. As the symbolic and constitutive aspects of law are legitimised and given much importance in the criminal law, I argue that the analytical framework I present can help us better understand Bill 21. In doing so, I argue, although tangentially, that the symbolic and constitutive aspects of law are relevant to our understanding of non-criminal laws.

The first section presents certain concepts and an analytical framework of the criminal law. The second section applies them to Bill 21.

I. ANALYTICAL FRAMEWORK

Bill 21 is, needless to say, not a criminal law. It was adopted by the National Assembly of Quebec, and infringing it does not carry penal consequences. In this article, I seek to use some concepts of the criminal law, less used beyond it, to better understand Bill 21. The divisions between the various areas of law are not watertight,¹⁶ and the concepts and analytical frameworks which define them are yet more permeable. The symbolic aspect of law is uniquely legitimised in the criminal law. I use the analytical framework and historical context of this aspect in my analysis of Bill 21. In doing so, I argue, although tangentially, that it is also relevant to our understanding of non-criminal laws.

¹⁶ See e.g. Thomas A Cowan, “Contracts and Torts Should Be Merged” (1955) 7:3 J Leg Educ 377 at 379 and George K Gardner, “An Inquiry into the Principles of the Law of Contracts” (1932) 46:1 Harv L Rev 1.

We can use as our starting point section 718 of the *Criminal Code*, which lists the objectives of sentencing. It reads as follows:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.¹⁷

The objective which is most relevant to our analysis is the first one. It introduces a symbolic aspect of law, through the principle of denunciation. Unlike the other objectives listed in the section, this aspect is not instrumental: it does not help reduce crime rates. Deterrence and isolation, mentioned in the following two objectives, ostensibly serve to, respectively, deter potential offenders from committing a crime and isolate the offender who remains likely to reoffend. The last objective also likely serves to deter the offender from committing another crime. Finally, the penultimate objective is quite explicit. Unlike the other objectives, the first one (which denounces unlawful conduct) does not seek to achieve an objective related to the offender, the victim, or others who are likely to commit a crime. Denunciation is the objective *in itself*.

Professor Richard Dubé similarly argues as follows:

Lorsqu’on parle de « dénonciation » en matière de droit criminel, on se réfère à des objectifs qui ne sont pas empiriques mais bien *symboliques*. Les peines afflictives constituent un des symboles ou un des signes à travers lesquels se communique socialement l’atteinte que représente le

¹⁷ RSC 1985, c C-46.

crime contre les valeurs fondamentales de la société [emphasis in original].¹⁸

If we construe crime as an infringement upon the community or its values, it is unsurprising that the criminal law is the tool available to eradicate it. The criminal law is ostensibly our most powerful tool. It carries significant consequences for the offender, including the loss of her fundamental freedoms. Although this tool may at first seem overly powerful to simply denounce behaviour which society abhors (but which does not necessarily affect third parties), it appears upon closer analysis, as a public law tool, to be the most relevant one available to the legislator. If the legislator instead created a private law right of action, citizens would have to use it.¹⁹ Public law allows the state to ensure that the law is applied and is not subject to the extrinsic considerations which are inherent to private law recourses, such as their cost.²⁰

Although many have criticised the relevance of denunciation in sentencing,²¹ its importance does not seem to have waned over time. Many recent amendments to the *Criminal Code* further entrench its importance when certain crimes have been committed. This is true regarding offenses against children,²² peace officers and other justice system participants,²³

¹⁸ Richard Dubé & Sébastien Labonté, “La dénonciation, la rétribution et la dissuasion : repenser trois obstacles à l’évolution du droit criminel moderne” (2016) 57:4 C de D 685 at 691—92. See also Bill Wringe, “Rethinking expressive theories of punishment: why denunciation is a better bet than communication or pure expression” (2016) 174:3 Philosophical Studies 1 and Lisa L Sample, Mary K Evans & Amy L Anderson, “Sex Offender Community Notification Laws: Are Their Effects Symbolic or Instrumental in Nature?” (2011) 21:1 Crim Justice Policy Rev 27. *Contra* Kenworthy Bilz & Janice Nadler, “Law, Moral Attitudes, and Behavioral Change” in Eyal Zamir & Doron Teichman, eds, *The Oxford Handbook of Behavioral Economics and the Law* (New York: Oxford University Press, 2014) 241; Phil Lord, “The Social Perils and Promise of Remote Work” (2020) 4:S J Behavioral Economics Policy 63 and Richard H Thaler & Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New York: Penguin, 2009).

¹⁹ See generally Charles E Clark, “Law Enforcement and Public Administration” (1935) 30:3 Illinois L Rev 273 (on the responsibility of the state regarding the enforcement of public law).

²⁰ See generally LCB Gower, “The Cost of Litigation: Reflections on the Evershed Report” (1954) 17:1 Mod L Rev 1 and John C Kleefeld, “Class Actions as Alternative Dispute Resolution” (2001) 39:4 Osgoode Hall LJ 817.

²¹ See e.g. *ibid* and Michael Cavadino & James Dignan, *The Penal System: An Introduction*, 4th ed (Thousand Oaks: Sage, 2007) at 35—65 (which criticises denunciation as an independent objective of sentencing).

²² *Criminal Code*, *supra* note 17, s 718.01 (enacted into law in 2005).

²³ *Ibid*, s 718.02 (enacted into law in 2009).

certain animals,²⁴ and, since 2019, Aboriginal women.²⁵ This objective is also specifically mentioned in many criminal laws.²⁶

It therefore becomes clear that denunciation plays a significant role in the criminal law. This objective legitimises the fact that the law may seek to achieve non-instrumental objectives. It recognises that what Professor Dubé calls the “empirical” cannot fully explain the law. That is particularly true in the criminal law, which applies to often repugnant situations which shock the public conscience. Denunciation legitimises our often-intuitive aversion to these situations. It justifies the criminalisation of certain behaviour, even when this criminalisation does not achieve any instrumental objective and may even leave us, at times, in a worse predicament.

We cannot, for instance, justify the criminalisation of drug possession for personal consumption based on so-called empirical reasons.²⁷ Statistics rather suggest that the criminalisation of possession for personal consumption of all types of drugs does not decrease consumption rates, leads to the overincarceration of certain marginalised groups, and may even indirectly cause an increase in crime rates.²⁸ In contrast, decriminalisation does not appear to cause an increase in consumption rates. Where it has been enacted, mortality rates related to drug consumption and drug use by vulnerable segments of the population (such as teenagers) have decreased.²⁹ That being said, voters would likely be strongly opposed to the decriminalisation of drug possession for personal consumption, especially for so-called hard drugs. During the last federal election, this position was depicted as radical. After many members of his party argued in favour of such decriminalisation, outgoing Prime Minister Justin Trudeau felt the need to reiterate his opposition to it several times.³⁰ Criminalisation is

²⁴ *Ibid*, s 718.03 (enacted into law in 2015).

²⁵ *Ibid*, s 718.04.

²⁶ See Dubé & Labonté, *supra* note 18 at 692.

²⁷ See e.g. Desmond Manderson, “Possessed: Drug Policy, Witchcraft and Belief” (2005) 19 *Cultural Studies* 36. See also James C Weissman, “Drug Control Principles: Instrumentalism and Symbolism” (1979) 11:3 *J Psychedelic Drugs* 203. The author also notes that certain objectives, which at first seem instrumental, are actually symbolic (*ibid* at 207).

²⁸ See Brian Stauffer, “Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States” (12 October 2016), online: *Human Rights Watch* <www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states> (a recent, detailed report which catalogs the relevant data).

²⁹ *Ibid*.

³⁰ See Radio-Canada, “Le débat des chefs fédéraux 2019”, *supra* note 10 and Rachel Browne, “Trudeau confirms that the Liberals are not looking to decriminalize drugs”,

therefore justified by non-empirical concerns and, here, even has significant financial and human costs. It denotes a shared anxiety regarding certain drugs.³¹ We could, for instance, think of the fear that this decriminalisation will mark the start of a broader movement of decriminalisation of other behaviour we find abhorrent.

Similarly, a historical analysis of the criminalisation of homosexuality in Canada, painstakingly performed by Dean Robert Leckey, shows the collective anxiety which underlaid the criminalisation of homosexuality.³² It is indeed quite hard to think of an instrumental objective that could have justified this criminalisation. Unlike other criminalised behaviour, homosexuality does not affect third parties. It only concerns its consenting participants. We can instead intuitively assume that this criminalisation was meant to eradicate, in whole or in part, behaviour which the population abhorred. The criminal law was the most effective tool to do so. (There is, of course, no empirical evidence to that effect.) Leckey analyses the parliamentary debates which preceded the decriminalisation of homosexuality. He states:

The Parliament of Canada partially decriminalized homosexual conduct in 1969. Keeping buggery and gross indecency as offences, the reform carved an exception for consensual acts committed in private by husband and wife or by two persons 21 years of age or older. [...] As rapidly becomes plain, the reform’s opponents wore their homophobia on their sleeves. They expressed a sense of insecurity, anxiety, and even panic: Canadian society was under threat; heterosexuality and the family were fragile. Strikingly, though, even the leading reformers insisted that homosexuality would remain illegal, laboriously affirming their disgust for it.³³

The shared anxiety which Leckey describes brings me to my last point regarding the analytical framework relevant to my analysis. It contextualises the symbolic aspect of law. This aspect indeed often exists in a broader shared anxiety regarding both the behaviour we denounce and its

Global News (24 September 2019), online: <globalnews.ca/news/5946329/trudeau-liberals-decriminalize-drugs/> .

³¹ See e.g., Manderson, *supra* note 27 and Weissman, *supra* note 27 at 208.

³² Robert Leckey, “‘Repugnant’: Homosexuality and Criminal Family Law” (2020) 70: __ *UTLJ* __ (forthcoming), online: *SSRN* <ssrn.com/abstract=3447301> . A third example of criminal laws whose objectives are chiefly symbolic, which I do not exhaustively analyse here, are laws which create a registry of offenders, see Sample, Evans & Anderson, *supra* note 18. In Canada, such a registry exists for sex offenders, see *Sex Offender Information Registration Act*, SC 2004, c 10.

³³ *Ibid* at 1—2.

impact on our shared identity.³⁴ The behaviour is not only abhorrent: it also infringes upon a value which defines our shared identity. Our anxiety is therefore less about the behaviour we criminalise and more about the threat it poses to the survival of our shared identity. The symbolic denunciation which occurs in the criminal law has no instrumental objective such as retribution or rehabilitation. Its objective is the protection of our shared identity.

This section has described the analytical framework from the criminal law, within which denunciation of certain behaviour is a legitimate and common objective. This objective is one that is solely symbolic. The next section applies this analytical framework to Bill 21, to argue that Bill 21 should also be construed as a symbolic and constitutive act.

II. BILL 21

I mentioned in the introduction the divide in the public opinion which defines Bill 21. A strong majority (64%) of Quebecers support it, while a majority (59%) of Canadians of other provinces and territories oppose it. In my first article on Bill 21,³⁵ I analysed the historical context, unique to Quebec, which could explain this divide. I begin with the law’s preamble, which reads as follows:

[T]he Québec nation has its own characteristics, one of which is its civil law tradition, distinct social values and a specific history that have led it to develop a particular attachment to State laicity[.]³⁶

I then trace the history of Quebec until the Quiet Revolution of the 1960s. I note that Quebec was founded as a Catholic colony and that the Church played a key role in Quebec society until the Quiet Revolution. Historian Robert Choquette describes the Church’s role in public affairs as follows:

This establishment included government subsidies of many kinds, in the form of land grants, direct subsidies, and salaries. It also included direct and indirect control of the established churches by government, in the form of nomination bishops, approval of pastoral appointments, approval of church budgets, or of monitoring clerical pronouncements.

³⁴ See e.g. Manderson, *supra* note 27; Weissman, *supra* note 27 at 208 and Sample, Evans & Anderson, *supra* note 18.

³⁵ Lord, *supra* note 2.

³⁶ *Bill 21*, *supra* note 2.

[...] The established [Catholic] churches became, for all practical purposes, departments of state and their clergy public functionaries.³⁷

Until the Quiet Revolution, the Church effectively administered healthcare and education in the province.³⁸ We now know the period which preceded the Quiet Revolution as the “Grande Noirceur.” This conservative period was defined by almost unconditional support of the Church by the state (and conversely). State secularism played a key role in the Quiet Revolution. It is during this important period that it became enshrined in the collective identity of the Quebec people. The Quiet Revolution allowed Quebec to break free from the influence of the Catholic Church and of a past which, by then, felt oppressive.³⁹

Bill 21 is an additional step in affirming the importance of state secularism. Like the Quiet Revolution, it is a constitutive and symbolic act. By affirming the contemporary importance of state secularism, Bill 21 continues to define the identity of the Quebec people. It serves to “complete the unfinished business of breaking free from the oppressive historical influence of the confluence of religion and state.”⁴⁰

This analysis reframes the debate regarding Bill 21. This debate had thus far been largely focussed on the effectiveness of Bill 21 in achieving its main stated objective of promoting the equality of men and women, and more specifically on the hijab, a veil worn by some Muslim women.⁴¹ State secularism was considered to be a legislative tool to promote the equality of men and women. Bill 21 forces Muslim women not to wear their hijab, which some consider to be a symbol of gender disenfranchisement.⁴² For supporters of Bill 21, it is an effective tool. For opponents, it is not. The latter argue that Bill 21 will force women to choose between their religion and public service (and access to essential public services). They believe that these women will choose their religion, which will accelerate their marginalisation.⁴³ Although both positions are contrasting, they are fully commensurable. They are indeed built upon a consensus regarding the fact

³⁷ Robert Choquette, *Canada’s Religions* (Ottawa: University of Ottawa Press, 2004) at 223.

³⁸ See Donald Cuccioletta & Martin Lubin, “The Quebec Quiet Revolution: A Noisy Evolution” (2003) 36 *Quebec Studies* 125 at 126-127.

³⁹ Lord, *supra* note 2 at 6.

⁴⁰ *Ibid* at 7.

⁴¹ *Ibid* at 4. See also Radio-Canada, “Le débat des chefs fédéraux 2019”, *supra* note 10.

⁴² Lord, *supra* note 2 at 4.

⁴³ *Ibid*.

that the law is a tool to promote the equality of men and women and that it should, therefore, be judged on its effectiveness in doing so.⁴⁴

The analytical framework presented in the previous section supports the conclusions drawn in my first article. It suggests that the debate regarding Bill 21 might ignore its true purpose – its symbolic aspect. Indeed, this analytical framework legitimises the symbolic aspect of law. It can at first seem surprising, even peculiarly bold, to assert that the public debate ignores the law’s true purpose and that the law has no instrumental purpose. Nonetheless, the criminal law offers a different analytical framework, which supports this conclusion. In this framework, the symbolicity of law is important and legitimate. It would be unsurprising to see a criminal law which prioritises it. Such is indeed the case for many criminal offenses, mentioned in the previous section, which prioritise this objective in sentencing.⁴⁵

As mentioned in the previous section, denunciation is prioritised as an objective *in itself*. The criminal law seeks to denounce the seriousness of the offense, without seeking to achieve any other instrumental objective related to the offender or the mitigation of crime. Here, the analytical framework from my previous article leads us to stop looking for Bill 21’s instrumental objective and instead accept that the law might simply seek to affirm the importance of a shared value, i.e. state secularism. The historical context, unique to Quebec and defined by an oppressive confluence of church and state, contextualises and explains that state secularism is a value which we pursue *in itself*.

Additionally, in both cases, the affirmation of the importance of a value is not only a symbolic act but also a constitutive one. This act contributes to the creation and consolidation of a shared identity. In the criminal law, Professor Dubé (cited above) speaks of denunciation as a symbolic objective, through which a society socially communicates the infringement upon this identity which a crime represents.⁴⁶ The communication of the value (through its infringement) constitutes and consolidates a shared identity, defined by the same value. We, for instance, affirm its importance by subjecting the offender to a more serious form of punishment. The communication of the value enhances social cohesion by

⁴⁴ *Ibid.*

⁴⁵ The relevant offenses mentioned in the first section are those committed against children, peace officers and other justice system participants, certain animals, and Aboriginal women. I also mention the historical criminalisation of homosexuality and of drug possession for personal consumption.

⁴⁶ Dubé & Labonté, *supra* note 18 at 691—92.

asserting a common characteristic of members of a society. Through Bill 21, we affirm the importance of state secularism. This affirmation is constitutive in that it asserts the contemporary importance of this value in the post-Quiet-Revolution identity of the Quebec people.⁴⁷ It also furthers, as mentioned above, the perceived purification of the public service by eliminating the vestiges of religion. In doing so, the affirmation of the importance of state secularism allows Quebecers to break free, symbolically and actually, from the oppressive historical influence of the Catholic Church.

The affirmation of the importance of state secularism is contextualised by a shared anxiety similar to that described in the previous section (with regards to the criminal law). I mentioned above the anxiety which underlaid the criminalisation of homosexuality and drug possession, two examples from the criminal law. This anxiety is less about the behaviour we criminalise and more about the threat it poses to our shared identity. Bill 21 similarly springs from a shared anxiety. First, the anxiety related to a traumatic past where the Catholic Church had considerable power and influence remains. Our continual breaking free from this past in part results from our fear that it might define our society again. Some could suggest that the focus of the public debate on the hijab springs from an anxiety regarding Muslim individuals. I rather believe that it is the same anxiety. The fear of the hijab is truly a fear that a religious group – any religious group – will gain too much importance in our society and threaten our collective identity.⁴⁸ It is the fear of a multiculturalism allegedly taken too far. To that effect, the Bouchard-Taylor Commission, which played a key role in the evolution of the debate regarding state secularism, concerned reasonable accommodations. It was contextualised by a majority opinion

⁴⁷ This constitutive aspect of law is the subject of extensive analysis, see e.g. James Boyd White, “Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life” (1985) 52:3 U Chicago L Rev 684. White argues that the communication of values through the law is not static. It is, rather, constitutive of our perceptions and of our shared identity. The law and this identity are therefore mutually constitutive. Regarding the criminal law more specifically, see e.g. Stuart Henry & Dragan Milovanovic, “Constitutive Criminology: The Maturation of Critical Theory” (1991) 29:2 Criminology 293. The example used by these authors is one, perhaps like Bill 21, where the communication of a value arguably furthers negative behaviour (crime). Regardless, it is ostensibly the fluidity of our identity and its relationship to the law which lead us to constantly reassert the importance of certain values through laws – even when these values already form part of our shared identity.

⁴⁸ Fear of the unknown generally, and of certain ethnic minorities in particular, also underlies many criminal laws, notably those regarding drugs mentioned in the previous section, see e.g. Weissman, *supra* note 27 at 207.

that the accommodations offered to certain religious groups had been taken too far.⁴⁹

In the criminal law, as with regards to Bill 21, we see an impact on third parties. In the criminal law, the affirmation of the importance of a value happens most notably through sentencing. It has an impact on the offender, who receives a more serious punishment even when this punishment does not further her rehabilitation. Society also pays a price, as other, more instrumental objectives which could further its protection or prioritise the victim give way to the objective of denunciation. As for the consequences of Bill 21, Muslim women are forced to choose between public service (and access to vital public services) and wearing a religious symbol they afford great importance to. They pay the price for the affirmation of the importance of state secularism.

This impact on third parties allows me to reiterate my earlier statement that the symbolic aspect of law is intrinsically important. In the criminal law, this statement is somewhat intuitive (notably as it is explicitly mentioned in many laws). It causes the offender to go through a more serious punishment. The importance of the affirmation of a value is proportional to this cost. With regards to Bill 21, the symbolic aspect is less explicit. Nonetheless, if we accept the thesis I have proposed here, the impact on Muslim women is significant and achieves no instrumental objective. If we are willing to pay this price, the symbolic aspect of law is surely very important outside of the criminal law.

Overall, this section applied the analytical framework from the criminal law, presented in the previous section, to Bill 21. From a historical analysis of the importance of state secularism in Quebec, it depicted Bill 21 as a constitutive and symbolic act. It then applied the various aspects of the analytical framework presented in the first section to Bill 21.

CONCLUSION

This article has been defined by a bipartite effort. First, it sought to enrich our understanding of Bill 21. Bill 21 being a very recent law, there have been few articles analysing it. Additionally, as I argued in my first article on Bill 21, the public debate regarding Bill 21 had thus far been largely limited to its effectiveness in achieving its main stated aim of

⁴⁹ See generally Bouchard-Taylor Commission, *supra* note 3.

furthering the equality of men and women. This article argued, as did my first article, that Bill 21 is best understood as a symbolic and constitutive act. It innovated by using an analytical framework from the criminal law, which adds further depth to my position and supports it with a richer theoretical framework. Second, this article sought to enrich our understanding of law. Even though the criminal law is defined by a plurality of legitimised and common objectives, some of these objectives are ignored when we seek to understand non-criminal laws. This article therefore developed an analytical framework from the criminal law. The applicability of this framework to Bill 21 with regards to the many aspects analysed above leads us to conclude that the symbolic aspect of law is quite important to our understanding of non-criminal laws. It will be interesting to see future research apply this aspect of law, and its analytical framework, to other laws.

Those who oppose Bill 21 had thus far argued that Bill 21 “does not work,” asserting that it fails to achieve its main stated aim of furthering the equality of men and women. They will now, I hope, benefit from a more sophisticated understanding of Bill 21. To state that Bill 21 does not work is likely to ask the wrong question. It is to assume that laws must necessarily seek to achieve an instrumental goal. Some laws do not “work,” they speak. They communicate values which are important to a society, thereby constituting and protecting a shared identity. They express and channel our anxieties. Before we take a position regarding Bill 21, we should seek to understand it. In doing so, we learn a great deal about ourselves.

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