

DRAFT PAPER – DO NOT QUOTE

Religious Norms in Public Sphere
UC, Berkeley, May 2011

Catholic Rituals and Symbols in Government Institutions: Juridical Arrangements, Political Debates and Secular Issues in Quebec

By

David Koussens
Max Weber Fellow
European University Institute
david.koussens@eui.eu

Although Quebec's government institutions are secular, some symbols and practices inherited from the province's Catholic history remain in many of them, such as the National Assembly, hospitals and city halls. While the Supreme Court of Canada has long defined the principle of separation between Church and state, the presence of crucifixes or Catholic rituals within these institutions certainly challenges the reality of State neutrality. Drawing upon juridical and political data (i.e. jurisprudence and public reports such as the Bouchard-Taylor report), I propose to examine the dialectic relationship between juridical reasoning and the recent political debates about the visibility of Catholic religious symbols and practices in government institutions. In so doing, I propose to show how the most recent jurisprudence questions the equilibrium between the historical heritage of the majority of the population and openness to religious diversity in the Province of Quebec.

I will more precisely focus on two issues in this paper: first, the legality of prayers being recited at the beginning of municipal council meetings; and second, the legality of crucifixes hanging in government institutions.

Concerning the prayers in Quebec Government institutions, the only existing legal text is a rule dated 1st April 1972 abolishing the recitation of a prayer before the opening of working sessions of members of parliament in the National Assembly. In spite of this text, members of parliament perpetuated this practice, and it was only in 1976 that the prayer was substituted with a moment of silence. If the recitation of prayers is now only a memory in the Quebec National Assembly, these rituals are nevertheless still practised in certain municipal council meetings, thereby questioning the neutrality of the management of municipal affairs. In the absence of a formal prohibition, the courts therefore had to pronounce on the legality of these prayers in Government institutions.

In a verdict on 22nd September 2006, the Quebec Human Rights Tribunal based its argumentation on the principle of equality between citizens and on the freedom of conscience and religion, both of which are guaranteed by the Canadian and Quebec *Charters of human rights*, to ban the recitation of prayers at the council meetings of the city of *Laval* in the suburbs of Montreal. In this case, the plaintiff, Madame Payette, argued that the *Laval* council was interfering in a discriminatory manner with her right to the recognition and exercise of her freedom of religion and conscience by beginning

the public sittings of the City Council with these ritual practices. The Human Rights Tribunal judged that:

the practice of reciting a prayer at the public sittings of the City Council of the City of *Laval* impairs Madame Payette's right to the recognition and exercise of her convictions as a non-believer, and the right not to be forced to take part in a religious observance in which she does not believe and to which she does not adhere.

In this decision, State neutrality is thus an implicit result of the constitutional guarantee of freedom of conscience and religion. In fact, the tribunal added that "the recitation of the prayer imposes a religious atmosphere and tone that produces a form of coercion contrary to the spirit of the *Charter of human rights* and the dignity of non-believers or people who do not adhere to that religious ideal". This argumentation directly referred to a Supreme Court of Canada decision of 24th April 1985¹, a decision which ruled that:

Freedom of conscience and religion can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.

The public report presented by Gérard Bouchard and Charles Taylor on 22nd May 2008 during the controversy around practices of reasonable accommodation in Quebec, made the government institution's obligation of neutrality more explicit. The report recalled that neutrality is a normative requirement imposed on the state, thereby limiting the reasons that can be invoked to justify policies adopted. However, the report added that it would be too restrictive to impose on believers, whose faith must be expressed in ritual or symbolic practices and behaviour, a duty of neutrality by avoiding displays of their faith when they use public institutions. Indeed, the report found that the individual and collective expression of freedom of conscience and religion must be authorized in Government institutions (schools, prisons, hospitals for instance). But these institutions cannot embrace any of the numerous religious convictions, nor limit the expression of any of them. For this reason, the report recommended avoiding maintaining the recitation of a prayer at the public sittings of City councils simply because this now seems to have only heritage value. It argued that these practices clearly identify the State with a religion, usually that of the majority... and should be abandoned because the appearance of neutrality is a guarantee of the citizen's – and notably members of religious minorities' – confidence in the institutions.

The Quebec Commission on Human Rights quickly endorsed the Bouchard-Taylor Report's position. First, in a letter sent on 15th May 2008 to the *Fédération québécoise des municipalités* and to the *Union des municipalités du Québec*, the Commission clearly affirmed that the recitation of the prayer at the public sittings of city councils was a threat to the principle of State neutrality. Second, the Commission had to give a verdict on whether or not this practice in the city council of *Trois-Rivières* was compatible with the Quebec Charter of Human Rights. In a decision of 17th December 2008, the Commission ruled that the recitation of the prayer by the mayor of *Trois-Rivières* constituted the exercise of a religious practice which is incompatible, on one hand, with respect for the freedom of conscience and religion of citizens, and on the other hand with the obligation of State neutrality. With this decision, state neutrality expressly became the ground for the prohibition of a practice qualified as religious, and in a decision dated 9th February 2011 the Human Rights Tribunal judicially

¹ *Q. v. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295

reaffirmed this position in a case relative to *Saguenay* in the North of Quebec. In this case, which was widely debated in the Quebec media, the plaintiff, Mr. Simoneau, asked the tribunal to convict the mayor of *Saguenay* for reciting prayers at the city council meetings. He argued that these prayers were not cultural, but religious practices infringing his right to be an atheist. In framing the decision, after deducing from the text of the prayer (“God, Guide us... God, Help us...”) that it was calling for divine intervention in the governance of the city, the tribunal also argued that it would be insulting for the mayor to deny the religious character of the prayer... because the mayor himself was justifying the practice as a necessary “fight for Christ”. It is thus precisely because the recitation of prayers is not a cultural but a religious practice that it threatens the principle of State neutrality.

Unfortunately, the decision of the Human Right Tribunal did not put an end to the mayor of *Saguenay*’s “fight for Christ”. On the contrary, the controversy quickly overflowed beyond the limits of the city. In February and March, the Mayor collected donations from across the country and decided to appeal against the tribunal’s verdict. In the context of an increasing visibility of minority group religious practices, and after the heated debates around practices of reasonable accommodation in Quebec, a number of individuals – mostly cultural Catholics – consider cultural diversity an affront to the Catholic heritage and its historical prerogatives. They associate secularism with shared values, which would include the secularized Catholic heritage. While it is certainly difficult to include prayers in this category, the question is nevertheless still asked and the Quebec Court of appeal will have to come to a decision before the end of the year. Not only will it have to decide on the prayers, but also on another litigious question: the legality of crucifixes in government institutions.

The question of the legality of crucifixes in government institutions is absent from the law. It was therefore the responsibility of the tribunals to evaluate, on a case by case basis, if the conditions in which crucifixes were installed in government institutions were compatible with the freedom of conscience and religion guaranteed in the Charters of Rights.

In the first cases relating to the crucifixes on the walls of the audience rooms of tribunals, the judges did not directly found their reasoning on the freedom of conscience and religion and on state neutrality, but on another principle guaranteed by the Charters of Rights: the citizen’s right to a fair hearing before an independent and impartial tribunal.

In a decision dated 5th December 1991², the Supreme Court of Canada specified that “the requirement of impartiality has both an individual and an institutional aspect and both aspects are encompassed by the constitutional guarantee of an “independent and impartial tribunal”. Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, “if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met”.

The Quebec Commission on Human Rights, in a decision dated 21st December 1994, directly referred to the Supreme Court of Canada’s argumentation to pronounce on the legality of a crucifix on the wall of the audience room of a tribunal in Quebec. The Commission ruled that, even if there is no discrimination, the presence of a crucifix in the audience room of a tribunal may limit the citizen’s confidence in the impartiality of the Quebec juridical system. In this reasoning, the Commission avoided pronouncing itself on the principle of state neutrality that should be required of the juridical system, but it may nonetheless have made such a pronouncement implicitly by ruling that it is the requirement of the

² Q. v. Lippé, [1991] 2 S.C.R. 114

appearance of impartiality that imposes that certain traces of the religion of the majority must be abandoned.

The question of the legality of a crucifix in a city council meeting room, in this case in that of the borough of Verdun in Montreal, was asked for the first time on 11th June 2008 to the Quebec Commission on Human Rights. In this case, the Commission considered that the relevant criterion for assessing the incompatibility of a religious symbol with the Charters of Rights was that of coercion. The Commission affirmed that “the single presence of a religious symbol in a government institution is not in itself incompatible with the Charters of Rights, unless this symbol acquires a coercive character because of the context of vulnerability of the persons who are exposed to it”. The Commission thereby validated the legality of the presence of the crucifix in the city council meeting room by considering that no vulnerable person attended the deliberations of the council meeting. It defined ‘vulnerable persons’ as “captive, young or impressionable persons”. It can be inferred from this reasoning that religious symbols installed in institutions frequented by persons of this kind, that is to say prisons, schools or hospitals, could be qualified as coercive symbols incompatible with the Charters of Rights.

The same reasoning was endorsed by the Bouchard-Taylor report in 2008, which considered that a religious symbol, for instance a crucifix, is thus compatible with secular principles “when it is a historic reminder rather than a sign of religious identification by a public institution”. It added that “a symbol or ritual stemming from the religion of the majority does not infringe basic freedoms if it is not accompanied by any restriction on individuals’ behaviour”. In promoting such compatibility, the Bouchard-Taylor report proposed a form of compromise which has a number of traits in common with the concept of the “secular pact” initiated by French sociologist Jean Baubérot. Using this concept, Jean Baubérot described how the French law on the Separation of Church and State in 1905 permitted the State to overcome the conflict between the “Two Frances”, that is to say between the Catholic tradition and the secular movement, by taking into account the old – and notably the Catholic – heritage to build the new.

Why transpose this concept of the “secular pact” to the Bouchard-Taylor report proposal? Let us remember that the Commission was working in a very tense context. The Commission itself recalled that during the controversy around practices of reasonable accommodation in Quebec, accommodations were perceived as one-way processes. It was always the immigrants, who were regarded as the main requesters, who won. They were therefore perceived as people endangering Quebec’s culture and calling into question Quebec’s Christian foundations. In order to overcome the conflict, the Bouchard-Taylor report avoided ignoring these popular representations and preferred to integrate elements of the religion of the majority, which can be qualified as secularized elements, into the secular model proposed for the Province of Quebec.

But at the same time, the Bouchard-Taylor report also proposed removing the crucifix above the chair of the president of the National Assembly of Quebec – certainly the very embodiment of the constitutional state – and relocating this symbol in the Parliament building in a place that emphasizes its meaning as cultural heritage.

This proposition was immediately rejected by the National Assembly, which unanimously passed a motion affirming Quebecers’ “attachment to their religious and historic heritage represented by the crucifix.” Nevertheless, the permanence of the crucifix in the Quebec National Assembly is no longer guaranteed and the most recent jurisprudence now refuses to consider that crucifixes still hold heritage value that prevails over their religious character.

The case dated 9th February 2011 relative to the prayer in *Saguenay* has previously been mentioned. In the same case, the Human Rights Tribunal also ruled that even if the exhibition of crucifixes may be considered a cultural tradition, this does not have the effect of removing their religious character from these symbols or of guaranteeing that the institution does not impose a particular religious morality. By deducing an infringement of the freedom of conscience and religion of unbelievers or atheists from the religious character of the crucifix, the tribunal clearly affirmed that *Saguenay* did not respect the principle of state neutrality. With this decision, the law relative to religious symbols in Quebec government institutions was clarified and, according to the Human Rights Tribunal's argumentation, it cannot be doubted that the crucifix installed in the National Assembly also falls under the category of religious symbol. However, the law has only been temporarily clarified. The Tribunal's decision was appealed against by the Mayor of *Saguenay* and also criticized in political circles.

And, it should also be mentioned, by way of a conclusion, that on 9th February 2011, that is to say the day of the Human Rights Tribunal's decision relative to the prayer and the crucifix, the National Assembly unanimously adopted a motion to block members of the Sikh community, who wanted to testify on a project of law relative to practices of reasonable accommodation, from entering the Assembly after they refused to remove their kirpans. While the deputies justified this motion with security considerations, they also argued that the wearing of the kirpan in the National Assembly was an infringement on the principle of neutrality.

Two unanimously adopted motions then: the first one in 2008 relative to the crucifix installed in the National Assembly and interpreted by the deputies as a symbol of Quebec's cultural heritage; the second, banning a religious symbol – the kirpan – in the same Assembly in the name of state neutrality. The question of equilibrium between the historical heritage of the majority of the population and openness to religious diversity in Quebec is thus obviously still open.