Accommodating diversity in Quebec and Europe:

Different legal concepts, similar results?

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Introduction

Regulating multiculturalism, Cotterell and Arnaud recently wrote, requires those who practise different cultures that are in contact with each other to accept responsibility for a common approach[3]. The concept of reasonable accommodation is tied up with such an approach. It is particularly concerned with indirect discrimination in contemporary democratic societies where numerous groups and communities coexist, based on a substantive notion of equality, or real equality. This entails appropriate measures to prevent superficially neutral rules or standards from being discriminatory in effect, because their application is detrimental to particular categories of person.

The main idea underlying reasonable accommodation is that democratic states must allow everyone to participate fully in society on an equal footing, as far as possible while continuing to respect diversity. The aim is equality in diversity. In certain circumstances, achieving this aim may make it necessary to take account of individuals' specific features, such as their religion, language or culture, by treating them differently. Promoting the social inclusion of the maximum number of members of the community may sometimes entail a different approach that takes account of differences.

Whereas the notion of reasonable accommodation is already firmly rooted in the legal systems of the United States and Canada, where it originated, it has only very recently appeared in Europe, where it appears to be making an impact, albeit discreetly. The present publication is an illustration of this.

The European and North American approaches do nevertheless differ. This is what we shall be describing, very briefly, in the following pages. The aim is to compare

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3 Roger COTTERELL and André-Jean ARNAUD, "Comment penser le multiculturalisme en droit?" in *L'Observateur des Nations Unies* (special edition: 'Le Multiculturalisme', 2007, 2 (vol. 23), p. 24.

experience on either side of the Atlantic and the specific characteristics of each of the legal systems concerned.

In the first two parts we assess the notion of reasonable accommodation in its North American context, taking Quebec as the starting point. In particular we consider the contribution of Canadian and North American courts to the development of reasonable accommodation, especially its application to the public services. In the third part we look at the situation in Europe.

We hope that this comparative exercise will lead on to a much broader enterprise requiring more far-reaching research, namely a general debate on the possible benefits that European countries might gain from the systematic application of the principles of reasonable accommodation in their own domestic environments. Such a debate remains for the future. We confine ourselves in our conclusions to a number of questions that we feel should be the subject of such a debate.

I. The concept of reasonable accommodation in Quebec

It is unusual for concepts created by and for lawyers to find their way into everyday language, but this is the case with reasonable accommodation in Quebec. The original, modest legal aim was to find a practical way of dealing with certain problems of discrimination, but the concept was suddenly propelled into the heart of the debate on Quebec's identity, and the so-called "reasonable accommodation crisis"[4]. As was to be later established, this was much more a "crisis of perception[5]" than a real crisis.

At a time when Europe is casting curious and questioning glances at the notion of reasonable accommodation as it is practised in North America, particularly Quebec (see Part II), the Quebec experience highlights the need to dispel certain conceptual ambiguities. There was a certain confusion in the Quebec public debate on the possible meanings of reasonable accommodation, which at times could lead to misunderstanding. In the interests of an informed European debate, it is helpful to present the various levels of meaning of the notion in the form of concentric circles. As we shall see, the confusion is mainly the consequence of the different meanings that lawyers and non-lawyers give to it.

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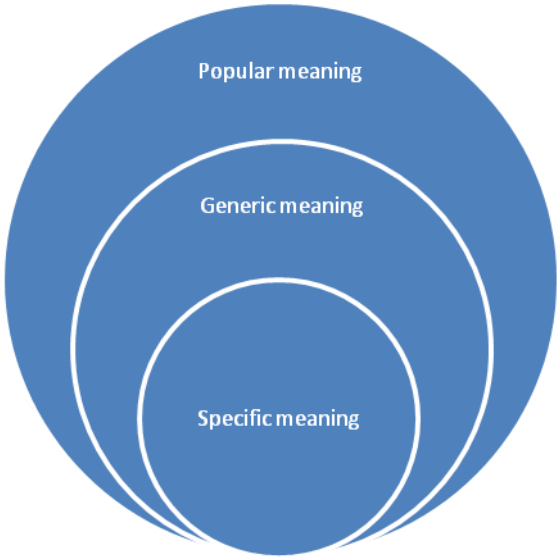
[4] The "reasonable accommodation crisis" reached its peak in 2006-2007, a period in which the Quebec media published frequent attacks on "unreasonable accommodations" (See: Maryse POTVIN, *La crise des accommodements raisonnables: une fiction médiatique?*, Montreal, Éditions Athéna, 2008). By winter 2007 it had become a political issue. As the election campaign loomed, the Quebec government set up a consultative committee on accommodation practices to deal with cultural differences, the Bouchard-Taylor commission. The commission's mandate was to conduct consultations on accommodation practices and make recommendations to ensure that they were compatible with the values of Quebec as a pluralist, democratic and egalitarian society. The commission held hearings in Quebec's 17 regions. They were broadcast live on television. The commission received no fewer than 901 submissions.

[5] See the report of the Bouchard-Taylor committee, *Building the Future: A Time for Reconciliation.* Montreal, 2008. The word "crisis" appears frequently in the report, but generally in inverted commas.

Reasonable accommodation:

Overlapping meanings



The popular meaning is the broadest in scope. It encompasses both legal and non-legal dimensions of the concept. It signifies any arrangements to which the management of conflicts – cultural, religious or other – might give rise. The case of a Montreal YMCA offers a symbolic illustration of this popular meaning of reasonable accommodation. In this incident, which became headline news during the reasonable accommodation "crisis", in order to "accommodate" the faithful at a neighbouring synagogue, who were apparently disturbed by the sight of women in sportswear, the YMCA agreed temporarily to frost some of its windows. This cannot be considered to be reasonable accommodation in the legal sense of the term. There was no discrimination or breach of human rights in this case, whether it be the right of the synagogue faithful to observe their religion or of members of the sports centre to use its facilities. Whether or not it was advisable, the decision to frost the windows was essentially aimed at maintaining good relations with the synagogue[6]. In the absence of any discrimination this type of "accommodation" does not reflect any legal obligation.

In a second, more restricted, sense, the term is sometimes used – incorrectly – to refer to adaptations or adjustments to legal rules, particularly legislation. We believe that this is often an abuse of language, since the legal grounds for such "accommodation" measures as constitutional exemptions[7] or cultural defence[8] are not necessarily the same as those

[6] Bouchard-Taylor report, p. 70. The YMCA finally retracted and reinstalled transparent windows.

[7] The possibility of a constitutional exemption as a remedy for a violation of a constitutional right was raised by the Supreme Court of Canada in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69. The Court now seems to be more reluctant. *R. v. Ferguson*, 2008 CSC 6.

applicable to reasonable accommodation in the legal sense, which is essentially based on the right to equality. Some have pushed this generic meaning of reasonable accommodation still further by associating it with certain demands for recognition of the existence and validity of parallel systems of rules to that of the state, particularly religious legal systems. This can be illustrated by reference to the controversy surrounding the possible application of religious law by the Ontario courts in family arbitration cases[9]. However this problem, which is linked to that of legal pluralism, must be distinguished from that of reasonable accommodation. Recognition of legal systems parallel to those of the state raises much more fundamental questions. It inevitably raises questions about the relationship between the law of the state and other systems of laws that also aspire to regulate social relations[10]. Even in the attenuated form of a simple dialogue between state and religious systems of rules, the issues raised by legal pluralism are quite distinct from those connected with the duty to accommodate, which in principle simply requires institutions' rules and practices to be adjusted in individual cases to redress established forms of discrimination. This does not imply the incorporation of the principles of religious law into the law of the land.

We are more concerned here with the specific, or technical, meaning of reasonable accommodation. In a contribution to this work, Myriam Jézéquel clarifies this technical

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[8] Cultural defence may be a ground of defence in the true sense or a basis for reducing the penalty. In both cases its use is controversial, because of the abuses that can arise. See: Pascale FOURNIER, "The Ghettoisation of Difference in Canada: 'Rape by Culture' and the Danger of a 'Cultural Defense' in Criminal Law Trials", (2002) 29 *Manitoba L.J.* 81; Marie-Pierre ROBERT, *La défense culturelle: un moyen de défense non souhaitable en droit pénal canadien*, Coll. "Minerve", Cowansville (Quebec), Éditions Yvon Blais, 2004. More recently, for a comparative study: Marie-Claire FOBLETS & Alison Dundes RENTELN (eds.), *Multicultural Jurisprudence. Comparative Perspectives on the Cultural Defense*, Oxford & Portland (Oregon), Hart, 2009.

[9] In 2004 a report to the Attorney General of Ontario was sympathetic to family arbitration based on the principles of religious law, though subject to various legal safeguards. See: Marion BOYD, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, 2004. The Ontario government finally opted for the opposite approach, and made the conditions under which family disputes could be submitted for arbitration much stricter. *Family Statute Law Amendment Act*, S.O. 2006, c. 1. In Quebec this debate has always remained purely theoretical since article 2639 of the Civil Code excludes family matters from the subjects that can be settled by an arbitrator.

[10] See in this context: Pierre BOSSET and Paul EID, "Droit et religion: de l'accommodement raisonnable à un dialogue internormatif?", in *Actes de la XVIIe Conférence des juristes de l'État*, Cowansville (Quebec), Éditions Yvon Blais, 2006, p. 63-95; Douglas FARROW (ed.), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy*, Montreal/Ithaca, McGill-Queen's University Press, 2004; Pauline COTÉ and T. Jeremy GUNN (eds.), *La nouvelle question religieuse: régulation ou ingérence de l'État?/ The New Religious Question: State Regulation or State Interference*?, Brussels/New York, PIE-P. Lang, 2006; Harm GORIS and Marianne HEIMBACH-STEINS (eds.), *Religion in Recht und Politischer Ordnung heute/Religion in Law and Politics Today*, Würzburg, Ergon, 2008. These are only a few of the many titles on this subject. Many of them have been published only very recently.

meaning with a legal definition of the duty of reasonable accommodation[11]. Reasonable accommodation in the technical sense stems from laws that in Canada prohibit discrimination both in the private sector and in the activities of the state[12]. The granting of religious holidays[13] and changing the duties of disabled persons[14] are typical examples of reasonable accommodation. In the *Bergevin* case the Supreme Court said that the duty of reasonable accommodation in the technical sense was an integral part of the right to equality[15]. As we will see later, this often leads the Court to require employers and others governed by human rights legislation in all cases to accommodate the characteristics of affected groups within their standards. Incorporating accommodation into the standard itself is meant to ensure that each person is assessed according to her or his own personal abilities[16].

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Depending on who is concerned, reasonable accommodation may be concerned with the rules laid down by private undertakings, legislation or quite simply practices connected with interpersonal relations or good neighbourliness. It is not always easy to say whether those taking part in the public debate on reasonable accommodation are referring to the concept in its popular, generic or technical sense, or a combination of all three. These debates are by no means always characterised by exemplary intellectual rigour[17].

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11 Myriam JÉZÉQUEL, "Reasonable accommodation: potential and limits for reconciling different norms and values in societies faced with managing diversity". Other theoretical contributions to this subject include José WOEHRLING, "L'obligation d'accommodement raisonnable et l'adaptation de la société canadienne à la diversité religieuse", (1998) 43 *R.D. McGill* 325-401, and Pierre BOSSET, "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable", in *Les accommodements raisonnables – Quoi, comment, jusqu'où?* edited by M. Jézéquel), Cowansville (Quebec), Éditions Yvon Blais, 2007, p. 3-28.

12 See Quebec's *Charter of Human Rights and Freedoms*, L.R.Q., c. C-12 and, at federal level, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, with modifications. There is equivalent legislation in all the Canadian provinces and the federal territories.

13 For example, *Commission scolaire régionale de Chambly* v. *Bergevin*, [1994] 2 R.C.S. 525 [hereafter Bergevin].

14 See: *Commission des droits de la personne du Quebec* v. *Emballages Polystar*, (1997) 28 C.H.R.R. D/76 (T.D.P.).

15 *Bergevin*, op. cit. (note 13), p. 544.

16 *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868, § 19.

17 For an attempted clarification see the Bouchard-Taylor report, pp. 63-65. For a criticism of this exercise: Stéphane BERNATCHEZ, "Un rapport au droit difficile – La Commission Bouchard-Taylor et l'obligation d'accommodement raisonnable", (coll.), *Droits de la personne - Éthique et droit: nouveaux défis. Actes des Journées strasbourgeoises 2008*; Cowansville, Éditions Yvon Blais, 2009, p. 69-92.

However, they do highlight the importance, if the debate is to continue in Europe, of separating the non-legal definitions of reasonable accommodation from those that are properly legal. It is the latter we will concentrate on here.

II. Reasonable accommodation in the public services: the North American experience

Although it is Quebec where debates on reasonable accommodation seem to have extended furthest beyond the legal fraternity, the concept first emerged elsewhere in North America. Reasonable accommodation made its first legal appearance in the early 1970s in American civil rights legislation. Title VII of the Civil Rights Act 1964 was amended to include specific reference to a duty of reasonable accommodation, applicable to both private and public employers, in matters of religion[18]. A similar obligation was later created in connection with discrimination on grounds of disability[19]. When it introduced the notion of reasonable accommodation into Canadian (and Quebec) law, the Supreme Court of Canada initially acknowledged this historical pre-eminence of American law[20]. Very quickly though, as we shall see, Canadian practice started to diverge from that of the United States.

We will consider here the impact of reasonable accommodation on North American public service provision, where necessary showing how Canadian and United States law and legal practice differ.

A. Reasonable accommodation and public services

In the United States, a certain generic duty to accommodate derives from the freedom of religion protected by the first amendment to the Constitution. "Accommodation" then takes the form of an exemption from the application of a rule of law, when the beneficiary of the exemption is the "recipient" of the law in question[21]. The legislative exemption, based on freedom of religion, highlights a possible overlap between the latter and the right to equality in the proper sense, an aspect to which we shall return when we

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[18] 1972 amendments to the *Civil Rights Act 1964*, 42 USC § 2000e(j): "The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business".

[19] *Rehabilitation Act 1973*, Public Law 93-112 93rd Congress, H.R. 8070; *Americans with Disabilities Act (1990)*, 42 U.S.C. § 12111(10).

[20] *Ontario Human Rights Commission (Theresa O'Malley)* v. *Simpsons-Sears*, [1985] 2 S.C.R. 536

[21] See, for example *Sherbert* v. *Verner*, 374 U.S. 398 (1963) [refusal to award unemployment benefit to a Seventh Day Adventist, because she was unavailable for work, for religious reasons]; and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) [exemption, on religious grounds, from the obligation to attend school to the age of sixteen].

consider Canadian law. However, such exemptions are now governed by legislation[22], and are only possible if there is a "substantial burden" on the exercise of religion. Moreover, such exemptions may not stand in the way of "a compelling governmental interest", which is a potentially significant restriction on any exemptions likely to be granted[23].

When there is no threat to religious freedom, the concept of reasonable accommodation is of fairly limited relevance for the delivery of American public services. Outside the employment relationship, United States anti-discrimination legislation does not impose any specific obligation on its public services to accommodate cultural diversity. The duty to accommodate only applies to two grounds of prohibited discrimination: disability and religion, and in the latter case, only in connection with employment[24].

In contrast, reasonable accommodation is considered to be an integral part of the right to equality in Canadian and Quebec law, which has significant consequences for public services. As a result, the duty to accommodate also applies to relations between the state and users of public services, since the latter are also covered by anti-discrimination legislation. Moreover, in principle the obligation is transversal, in other words reasonable accommodation is not confined to religious diversity (as is sometimes made out) and disability but can apply to all the grounds of discrimination, including particularly sex, pregnancy, age, civil status and national origin[25].

Canadian public services' legal duty to accommodate applies to all decisions, practices and rules that have a discriminatory effect on the exercise of a human right or freedom. Schools, hospitals[26], courts[27], municipalities[28] and other public services[29] are therefore

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22 *Religious Freedom Restoration Act*, 42 U.S.C. § 2000bb (1993).

23 E. BRIBOSIA, J. RINGELHEIM and I. RORIVE, *op. cit.* (note 21), p. 327-332 (and the jurisprudence cited).

24 See above notes 18 and 19.

25 See the cases cited in P. BOSSET, *op. cit.* (note 11), p. 13-14.

26 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [medical services must provide sign language interpreters for the deaf]. The accommodation of deaf people is generally seen to be based on disability. Within the deaf community, however, there are those who think that failure to provide sign language interpretation is a form of discrimination based on language. This brings us within the sphere of cultural difference. See in general: Mary Ellen MAATMAN, "Listening to Deaf Culture: A Reconceptualization of Difference Analysis under Title VII", (1996) 13 *Hofstra Labor L.J.* 269.

27 *Centre de la communauté sourde du Montréal métropolitain* v. *Régie du logement*, [1996] R.J.Q. 1776 (T.D.P.)

28 *Morel* v. *Corporation de Saint-Sylvestre*, [1987] D.L.Q. 391 (C.A.): “in certain circumstances, the Quebec Charter requires public bodies, including municipalities, like other bodies, to adjust aspects of their organisation and operating methods to the needs of persons with various forms of disability, to alleviate the consequences and facilitate their life and activities” (p. 393 of the judgment).

legally bound to reasonably accommodate members of the public who use their services. Although accommodation generally takes the form of individual and specific exemptions from rules or standards, in the *Meiorin* and *Grismer* cases the Supreme Court required the institutions concerned to take account of the situation of the affected groups when actually drawing up standards[30]. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities. To avoid discrimination proceedings, therefore, Canadian public institutions should, in principle, adapt their rules and standards even before receiving any individual requests for adjustments or exemptions. Thus, by influencing the actual formulation of standards, accommodation becomes less reactive and more structural[31]. It now plays a preventive and even proactive, rather than purely corrective, role and as such may take on a collective dimension that bears witness to the increasing importance of reasonable accommodation since its introduction into Canadian law in the mid-1980s.

Schools, where requests for accommodation are fairly frequent, offer a practical illustration of how the functioning or organisation of Canadian public services may be the target of such measures. They may concern standards and practices in such areas as:

- pupil admissions[32];
- course assessments[33];
- leave on religious grounds[34];
- dress rules[35];
- access to premises[36];

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29 *Canadian Association of the Deaf* v. *Canada*, [2007] 2 C.F. 323 [access to government services].

30 *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 para. 19 [*Grismer*]; *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3 [*Meiorin*].

31 See: Jean-Yves BRIÈRE and Jean-Pierre VILLAGGI, " L'obligation d'accommodement de l'employeur: un nouveau paradigme ", in *Développements récents en droit du travail (2000)*, Cowansville, Éditions Yvon Blais, 2000, p. 219.

32 *Commission des droits de la personne du Québec* v. *Collège Notre-Dame du Sacré-Cœur*, [2002] R.J.Q. 5 (C.A.) [admission of a disabled pupil capable of completing the school's academic syllabus, despite the latter's emphasis on sports].

33 *Commission des droits de la personne et des droits de la jeunesse* v. *Commission scolaire des Draveurs*, J.E. 99-1061; REJB 1999-12851 (T.D.P.) [recognition of stuttering as a form of disability].

34 *Commission scolaire régionale de Chambly* v. *Bergevin*, op. cit. (note 13) [leave taken by Jewish teachers over and above the days off specified in collective agreements].

35 QUEBEC (COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE), *Le port du foulard islamique dans les écoles publiques* (Islamic headdress in public schools), Montreal, 1994.

- documents required to enrol for a course[37].

However, the Supreme Court of Canada placed significant limits on the duty of reasonable accommodation in the *Hutterian Brethren of Wilson Colony* judgment of 24 July 2009, where it said the duty did not apply to parliament[38]. The case derived from regulations requiring all persons holding a driver's licence in the province of Alberta to have a photo attached. Members of the Wilson Hutterite Colony, who are forbidden by their religion from being photographed, challenged the constitutionality of this provision on the grounds that it was an unjustified breach of their freedom of religion and forced them to choose between the latter and their ability to move around autonomously by car. The lower courts[39] had upheld their challenge, and included a duty to accommodate in the proportionality test applicable to violations of constitutional rights[40]. However, a majority of four judges to three in the Supreme Court rejected this approach. The majority drew a distinction between the situation of the legislature and that of the parties subject to the duty to accommodate ("most commonly an employer and employee"[41]).

> By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized determination, and in many cases would have no advance notice of a law's potential to infringe Charter rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants before the court[42].

The stance taken by the majority in this case means that the nature of measures breaching the right to equality or freedom of religion must first be established. The duty of accommodation will apply when applicants can show that a government *action* or administrative *practice* infringes a fundamental right. However, if the validity of a *law* is

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36 QUEBEC (COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE), *Réflexion sur la portée et les limites de l'obligation d'accommodement raisonnable en matière religieuse*, Montreal, 2005, p. 11-12 [how far premises might be made available for religious purposes].

37 *Commission des droits de la personne et des droits de la jeunesse* v. *Collège Montmorency*, J.E. 2004-966 (T.D.P.) [need to take account of immigrants' potential difficulties in producing official documents from their country of origin].

38 *Alberta* v. *Hutterian Brethren of Wilson Colony*, 2009 CSC 37 (24 July 2009) [*Wilson Colony*].

39 See: 57 Alta. L.R. (4th) 300 (Q.B.); 77 Alta. L.R. (4th) 281 (C.A.).

40 See *R. v. Oakes*, [1986] 1 S.C.R. 103

41 *Wilson Colony*, § 68.

42 *Id.* (¶ 69).

being challenged, only the proportionality test can be applied, and according to the Court this involves not an individualised assessment of the sort applicable to reasonable accommodation, but a general assessment that takes account of "the broader societal context"[43]. This represents a change of perspective but – as the Court stresses – the legislature is still required to show that any particular law is rationally connected to a pressing and substantial goal, minimally impairs rights and is proportionate in its effects, which will involve a consideration of its impact on certain persons[44].

A final comment should be made on the application of the duty of reasonable accommodation to Canadian public services. Despite the transversal nature of the duty to accommodate, there are very few court decisions where this duty is relied on in conjunction with such grounds of discrimination as ethnic or national origin, language, race or colour, even though these grounds are also associated with "cultural diversity". It is as if cultural diversity was confined in some ways to religion. There are reasons to think that the omnipresence of religious grounds in applications for accommodation reflects, at least in part, Canadian courts' reluctance to require genuinely objective evidence to support demands based on religion, the test being rather that of the applicant's (subjective) sincerity[45]. This "subjective" approach to religion is open to dispute. Although in principle it shows due regard for individual autonomy (and the limitations of the courts, which are perhaps ill-equipped to settle disputes on such matters as the interpretation of sacred texts), it can be exploited in furtherance of political[46], or quite simply opportunistic or fraudulent requests. The Bouchard-Taylor commission considered this problem in its report but concluded that, all things considered, the courts were qualified to judge the sincerity of accommodation applications and that there was no need to re-examine the sincerity test[47]. At all events, we believe that the potential for reasonable accommodation to promote cultural diversity in the public services is far from being fully explored. Sooner or later, the courts are likely to be called on to consider requests for accommodation based on grounds of discrimination other than religion, particularly ethnic or national origin and language.

B. Undue hardship in the public services

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43 *Wilson Colony*, §§ 66-67. In this case, the Court considered that the regulation in question, which was aimed at minimising identity theft associated with driver's licences, met the proportionality test.

44 *Id.* (¶ 71).

45 *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47. The American courts show the same reluctance; see *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981).

46 See Sébastien LEBEL-GRENIER, "La religion comme véhicule d'affirmation identitaire: un défi à la logique des droits fondamentaux" in *Appartenances religieuses, appartenance citoyenne – Un équilibre en tension* (P. Eid, P. Bosset, M. Milot, S. Lebel-Grenier, dir.), Sainte-Foy, Presses de l'Université Laval, 2009, p. 123-139.

47 Bouchard-Taylor report, pp. 176-178.

Undue hardship, a notion inherent in the concept of reasonable accommodation, constitutes a limit on the duty to accommodate. The notion exists in both Canadian and American law, but has been interpreted in significantly different ways in the two countries. This is reflected in a legal duty to accommodate that, as we shall see later, is much more demanding in Canadian law.

The notion of undue hardship reflects a principle. As stated in the preamble to the Quebec Charter of Human Rights and Freedoms, the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being. The Canadian Supreme Court also stated when it gave the duty of reasonable accommodation its formal stamp of approval:

> In any society the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others[48].

The notion of undue hardship therefore calls for a balance to be struck between the right to accommodation and the interests of those concerned.

In the *Trans World Airlines* case, the United States Supreme Court applied the principle that anything more than a *de minimis* cost could be deemed excessive[49]. In this case, the Court considered it excessive to require an employer to waive unilaterally the provisions of a collective agreement to enable an employee to take leave for religious reasons. The notion of undue hardship is therefore interpreted fairly generously in American law, or at least in an accommodating way for the individual or body with the duty to accommodate.

In the *Renaud* case, the Canadian Court thought that the *de minimis* test applied by the American Supreme Court reduced the required hardship threshold to a minimum and virtually removed the duty to accommodate. The Court opted for a more rigorous test: «more than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test»[50].

What in practice does the undue hardship test add up to in the public services context?

Hitherto, the Canadian courts have applied three types of test to determine whether an accommodation request entails undue hardship: financial costs, impact on the organisation's functioning and infringement of other rights[51]. These tests have been

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48 *Simpsons-Sears*, op. cit. (note 20), pp. 554-555.

49 *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977).

50 *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970, p. 984.

51 Christian BRUNELLE, *Discrimination et obligation d'accommodement raisonnable en milieu de travail syndiqué*, Cowansville (Quebec), Éditions Yvon Blais, 2001, p. 248-252.

developed in the very specific context of employment relationships but they do offer a useful basis for applying the notion of undue hardship to the public services, a distinctive feature of which is their responsibility towards the entire community[52]. We will attempt here to explain what undue hardship means in the specific public service context[53].

- *The financial costs*

The financial test uses a simple indicator, namely how many dollars are involved, but its application is more complex. The size of the institution necessarily affects the judgment of what constitutes excessive cost[54]. The Supreme Court also accepts that what might be a reasonable financial cost at a time of prosperity could become excessive when budgetary restrictions are applied[55].

In the *Bergevin* case, for example, the Court allowed the request of three Jewish teachers who had taken a day off to celebrate Yom Kippur to receive a day's pay from their employer, the respondent school board. The Court stated that no evidence had been presented that payment for this day, which represented 1/200th of the teachers' yearly salary, would place an unreasonable financial burden on the school board.

- *The functioning of the institution*

To paraphrase the Supreme Court in the *Simpsons-Sears* case, what needs to be determined here is whether the reasonable accommodation requested would interfere with the smooth running of the organisation, which sometimes depends on fairly down-to-earth considerations. For example, tests of the smooth running of a school entail such factors as:

- the interchangeability of staff, for example when teachers request leave of absence for religious reasons;
- the availability and adaptability of premises, for example, when the accommodation would require a room to be made available;
- the number of persons affected;

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52 Pierre BOSSET, "Limites de l'accommodement raisonnable: le droit a-t-il tout dit?", *Éthique publique*, vol. 9, no. 1 (Spring 2007), p. 165-168.

53 We have based this on : Pierre BOSSET, "Les pratiques d'accommodement en éducation au Québec: aspects juridiques" (Legal aspects of accommodation practices in Quebec), to be published by Presses de l'Université Laval in 2010 in a joint work entitled *La diversité ethnoculturelle en éducation: contexte, tendances et réalités (*edited by Pierre Toussaint).

54 *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission),* [1990] 2 R.C.S. 489.

55 *Bergevin* judgment, op. cit. (note 13).

- the length of the accommodation;
- the time of the school year concerned;
- etc.[56]

However, these are not the only factor to be taken into account under the functioning of schools. Other, more substantive characteristics also need to be taken into account, relating to schools' actual purpose. In its opinion on religious pluralism, Quebec's Human Rights Commission identified various aspects that fell outside the scope of reasonable accommodation because of their fundamental nature, both in law and in accordance with the educational curricula in force, including compulsory school attendance, the number of school days and curriculum content[57].

- *Infringement of other rights*

The tests for infringement of rights take account of safety, compliance with collective agreements, the possible detrimental effect of accommodation on others and conflict with other fundamental rights[58].

As shown by the *Multani* case, which concerns the wearing of the kirpan in school, the application of the safety criterion must take account of the nature of each specific environment[59]. In this case, the Supreme Court ruled that the administrative ban on the kirpan, rather than subjecting it to conditions allowing it to be worn safely, was not proportional to the safety objective. The Court contrasted wearing kirpans in aircraft, a closed environment where emergency services are not immediately available, or courts, where the parties are opposed to each other in an adversarial setting, from wearing it in school, an environment where staff and students collaborate over a long period in furtherance of the school's educational aims. The Court considered that school was a unique environment that permitted relationships to develop among students and staff, which "make it possible to better control the different types of situations that arise"[60]. To summarise, in this case the Court acknowledged the importance of safety but also

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[56] Similarly, see the criteria applied in work places considered in: C. BRUNELLE, *op. cit.* (note 51), p. 250-251.

[57] QUEBEC (COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE), *Le port du foulard islamique dans les écoles publiques* (Islamic headdress in public schools), Montreal, 1995, p. 10.

[58] C. BRUNELLE, *op. cit.* (note 51), p. 250.

[59] *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.

[60] *Id.*, § 65.

recognised that schools were living communities, which meant that it could place the safety debate in a specific institutional context[61].

The adverse effect test, initially discussed in the *Central Alberta Dairy Pool* judgment, was reformulated in the *Renaud* judgment. The Court emphasised that this test must be applied "with caution". Legitimate fears that there will be interference with the rights of others need to be taken into account but attitudes inconsistent with human rights are irrelevant[62]. This principle is particularly applicable in the school context, in view of schools' educational role and, in particular, their responsibilities concerning education in human rights and freedoms. The Court has stressed this role, stating that "schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance.[63]" In *Multani* it drew this practical consequence:

> Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is .... at the very foundation of our democracy[64].

The potential conflict between reasonable accommodation and other fundamental rights, which is the final component of the test for infringement of rights, is sometimes the subject of furious debate. The charters of rights do not give precedence to reasonable accommodation if this is incompatible with other fundamental rights, such as the right to equality. More specifically, the relationship between religious accommodation and equality of the sexes can take the form of peaceful co-existence, and not raise any particular problems, tension, which calls for dialogue and vigilance, or finally conflict, which necessitates the mediation of the law[65]. In the last-named case, the notion of undue hardship and the limits generally applicable to freedom of religion[66] would probably

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61 The *Multani* judgment was concerned with constitutional provisions rather than the anti-discrimination legislation. However, the Court made it clear that "the analogy with the duty of reasonable accommodation is helpful to explain the burden resulting from the minimal impairment test". This is a good illustration of the possible overlap between freedom of religion and the right to equality.

62 *Renaud*, op. cit. (note 50), p. 987-988.

63 *Trinity Western University* v. *College of Teachers*, [2001] 1 S.C.R. 772 (§13)

64 *Multani*, op. cit.(note 59), § 76.

65 Pierre BOSSET, "Accommodement raisonnable et égalité des sexes: tensions, contradictions et interdépendance", in *Appartenances religieuses, appartenance citoyenne – Un équilibre en tension, op. cit.*, (note 46), p. 184.

66 See Article 9.1 of the Quebec Charter: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law."

suffice to refuse the granting of an accommodation that would interfere with another person's fundamental right or freedom[67].

C. A positive interim assessment

The Bouchard-Taylor report sought to place the legal duty of reasonable accommodation in a more ambitious social and political context, namely "the sociocultural integration model established in Québec since the 1970s"[68]. The Commission concluded – correctly we believe – that if reasonable accommodation is understood in its more specific or technical sense, it remained a concept whose legal limits were established or could be deduced from more general principles, and which could be adequately managed at ground level by those concerned, particularly if they were supplied with the relevant technical resources, with an emphasis on shared information on tried and tested practices[69].

The Commission's extensive discussions led to a whole series of recommendations on learning diversity, harmonisation practices (not restricted to reasonable accommodations), the integration of immigrants, interculturalism, inequality and discrimination, the status of the French language and secularism[70]. This ambitious approach did not receive unanimous support, including among lawyers, particularly in view of the risk of trying to take on too much and losing sight of accommodation practices properly speaking. With hindsight, though, we think that this approach has helped to defuse the reasonable accommodation "crisis" by showing that while such practices can be incorporated harmoniously into a cultural or multicultural approach to diversity[71], reasonable accommodation cannot, of itself, constitute a diversity policy. A genuine diversity policy must involve much more than simply managing individual examples of discrimination, the original objective of reasonable accommodation, and attack the institutional and systemic elements of racism and discrimination. By influencing the framing of standards, the Canadian version of reasonable accommodation undoubtedly goes beyond the reactive management of discrimination. It has acquired a

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67 For instance, in *Commission des droits de la personne et des droits de la jeunesse* c. *Hôpital général juif Sir Mortimer B. Davis*, TDPQ Montréal 500-53-000182-020, 2007 QCTDP 29 (CanLII), a case where jobs had been specified as being reserved for men and others for women, the Human Rights Tribunal stated that the employer had not shown sufficient evidence to support the measure. The Tribunal referred to s. 9.1 of the Quebec Charter of Rights and stressed that female staff were entitled to measures of accommodation. It was up to the hospital to show that this would involve undue hardship. The judgement can be interpreted as confirming the need to balance freedom of religion with women's right to equality.

68 Bouchard-Taylor report, p. 17.

69 *Id.*, p. 251-253.

70 *Id.*, p. 263-272.

71 See Pierre BOSSET and Paul EID, "Droit and religion: de l'accommodement raisonnable à un dialogue internormatif?", *op. cit.* (note 10).

collective dimension that it lacked at the outset, so long as it does not pose a challenge to the legislative process itself. Nevertheless, reasonable accommodation as currently practised in Canada in general and Quebec in particular is no panacea for dealing with all the social relationships linked to cultural diversity. For example, the affirmative action or positive discrimination programmes, which offer collective remedies to persons from discriminated against groups by granting their members temporary preferential treatment[72], do not come under the reasonable accommodation umbrella. Likewise, the reasonable accommodation approach has still failed to extend to the fundamentally political problem of the relationships that have always existed between the national groups that form Quebec: indigenous peoples, French-speaking majority and English-speaking minority. Because of the historical nature of these relationships, in Quebec they continue to be managed mainly through the political process[73].

Reasonable accommodation and its fundamentally pragmatic underlying approach reflect the Anglo-Saxon judicial philosophy and its inductive method. It is therefore understandable that there may be certain reservations about it in civil law jurisdictions, because of its casuistic and apparently un-Cartesian nature. It is perhaps not surprising that the concept emerged in a common law country, the United States, before migrating to Canada, where it has since seen major developments[74]. Nevertheless, we should not exaggerate the importance of legal cultures in the way a concept such as reasonable accommodation is received. Despite its civil law tradition, Quebec has adopted the notion without difficulty and incorporated it into its anti-discrimination legal armoury. We can perhaps hypothesise that legal systems' receptiveness to concepts such as reasonable accommodation may depend less on legal culture than on institutional factors, particularly the level of discretion of the courts in interpreting legislation or their powers to make reparation or impose sanctions.

III. The European context: a varied approach to reasonable accommodation

This brief overview of the situation in Canada and the United States has shown that lawyers have rapidly become convinced of the value of the jurisprudential concept of reasonable accommodation as a means of promoting pluralism in isolated situations. It now seems to be accepted that reasonable accommodation as a particular means of

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72 In connection with these programmes, see articles 86-92 in Part III of the Quebec *Charter of Human Rights and Freedoms*. See also paragraph 15(2) of the *Canadian Charter of Rights and Freedoms*.

73 In any case, the Bouchard-Taylor report excluded such relationships from its terms of reference (p. 34).

74 The expansion of the reasonable accommodation concept in Canadian law, in terms of grounds of discrimination and the areas of activity covered, and the different definition of undue hardship to that applied in American law, bear eloquent witness to the "acculturation" that may follow the migration of a legal notion from one country to another. Pierre BOSSET, "Droits de la personne et accommodements raisonnables: le droit est-il mondialisé?", (2009) 62 *Revue interdisciplinaire d'études juridiques* 1-32.

applying the equality principle may, in certain cases, entail an obligation to take various measures on such grounds as religion, ethnicity or sex. It is clear, as we have shown, that it is in Canadian law that the concept has been developed the furthest in practical terms, since all categories of protected persons may, in principle, benefit from it. Nor do the courts confine such obligations to public authorities/services. The whole of the economic community/actors, including the private sector, is covered. It is reasonable to speak of a general right to reasonable accommodation, as a corollary of the right to equality and religious freedom.

In Europe, setting aside the employment sector in the case of disabled persons[75], there is no general right to reasonable accommodation. The situation cannot therefore be compared with Canada, where recognition of such a right greatly strengthens individuals' situation *vis-à-vis* authorities or institutions faced with a duty to accommodate. They have no choice but to consider all requests for accommodation they receive and can only refuse them on grounds specified in law or by the courts. Nor is there any suggestion that such a broad interpretation is currently under consideration in Europe for grounds other than disability[76]. In fact, the issue remains largely unexplored.

Nevertheless, this does not mean that less attention is being paid to the challenge – sometimes posed dramatically – of how to respond legally to the growing diversity of groups and cultures in European society. This has led to a variety of approaches, some of which do resemble that of reasonable accommodation but all of which have their own distinctive features. How law in the different European countries offers the necessary legal guidelines to enable practitioners faced with practical situations requiring a balance between the obligation to treat people equally and respect of specific forms of diversity, varies according to whether these guidelines are on the European Convention on Human Rights and Fundamental Freedoms, the legal system of the European Union or the domestic legal systems of the various countries. In an excellent recently published article three Belgian legal specialists, Emanuelle Bribosia, Julie Ringelheim and Isabelle Rorive, turned their attention to reasonable accommodation and offered a detailed comparative analysis of its role in Canadian, American and European law, particularly in connection with the religious field[77]. The main focus of their analysis is the question that also concerns us here, namely whether the approach adopted in Canada and the United States offers the same potential in a European context and whether the concept of reasonable accommodation can be used to deal with indirect discrimination as effectively as the methods currently used. The article looks at the legislation and case-law in the different

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75 Cf. infra (note 78).

76 Some remain very sceptical and issue warnings about what they see as the potential risks of reasonable accommodation, such as the non-negligible risk of a fragmentation of society based on each individual's cultural affiliations. Nadia GEERTS " 'Raisonnables', les accommodements? " (Tribune), La Libre Belgique, 18 May 2009.

77 E. BRIBOSIA, J. RINGELHEIM and I. RORIVE, "Aménager la diversité: le droit de l'égalité face à la pluralité religieuse", *op. cit.* (note 21).

European countries that are currently the main points of reference in the religious and philosophical field and in connection with cultural affiliations. It is a very valuable piece of work. Following their analysis, we consider here the European context from the standpoint of A. European Union law; B the rights embodied in the European Convention on Human Rights; and C. the situation in different countries' domestic legal systems. Inevitably, we must be very brief.

A. European Union law

In 2000, the European Union issued a directive obliging employers to provide reasonable accommodation for people with disabilities[78]. In practice, the courts must decide on the extent of this obligation. The relevant case-law is not sufficiently developed at this stage to offer an initial assessment. It is not yet therefore possible to draw any lessons from European Union law about the possible shape of a policy for strengthening the equal treatment principle for disabled persons.

Nevertheless, in anticipation of clarification from the courts, several authors have expressed disappointment that the scope of the duty to accommodate is restricted to the employment sector and to disabled persons alone[79].

Bribosia, Ringelheim and Rorive share this regret. However, they do not exclude the possibility that the Court of Justice of the European Communities or the domestic courts of Member States might interpret the ban on indirect discrimination as justifying, in certain cases, a requirement that the authors of a general provision or standard amend it to avoid discriminating indirectly against certain individuals on account of their religion[80]. The Court is to some extent dependent on actual complaints eventually reaching it for a ruling on such a requirement. However, the three authors point out that, even before the directive was issued, the Court had implicitly acknowledged the reasonable accommodation principle in its *Vivien Prais* judgment[81]. The case, under the European public service disputes procedure, concerned a candidate in an open competition organised by the Council of the European Communities. The date of the examination coincided with a holy/religious day, which prevented the candidate from sitting it. Her request to sit the test on another day was rejected. She alleged discrimination. The Court did not accept this argument but instead considered that "*it is desirable that an*

78 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The directive draws substantially on the American legislation described in Part II.

79 Dajo DE PRINS, Stefan SOTTIAUX, Jogchum VRIELINK, *Handboek Discriminatierecht*, Malines, Kluwer, 2005, p. 538-541; 553-555; 1249-1269; 1440; Christian BAYART, *Discriminatie tegenover differentiatie. Arbeidsverhoudingen na de Discriminatiewet. Arbeidsrecht na de Europese Ras- en Kaderrichtlijn*, Bruxelles, Larcier, 2004, p. 896 sq.

80 *Cf. supra* (note 21), p. 371.

81 C.J.E.C., 27 October 1976, case. 130-75.

appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests" (§ 18). Such a reasoning is surprisingly close to the concept of reasonable accommodation. This position was undoubtedly a precursor for its time.

B. The European Convention on Human Rights: the proportionality test

Any attempt to provide an accurate description, with reference to reasonable accommodation in the specific sense given in Part I, of how the rights enshrined in the European Convention on Human Rights and Fundamental Freedoms (hereafter the Convention) can be used to enhance diversity and the specific differences on which it is based, in accordance with the equality principle, is likely to lead to confusion. This is because of the way the Convention promotes these values.

There are currently very few cases that offer an unequivocal parallel with the notion of reasonable accommodation. Bribosia, Ringelheim and Rorive refer to the *Thlimmenos v. Greece* judgment[82] of 6 April 2000 in which the Court held that, in accordance with the non-discrimination principle in Article 14 of the Convention, in certain circumstances states might be required to introduce appropriate exceptions into legislation to avoid penalising, with no objective or reasonable justification, persons practising a particular religion. The applicant, Mr Thlimmenos, had previously refused to perform military service on the grounds that, as a Jehovah's Witness, it would be contrary to his beliefs. He then received a criminal conviction. Several years later, this conviction was the ground for refusing to appoint him to a post of chartered accountant, since Greek law prohibited persons convicted of a serious crime from such appointments. The Court upheld Mr Thlimmenos' complaint. It stated that the Greek authorities should have provided for appropriate exceptions to ensure that persons such as Mr Thlimmenos were not discriminated against on account of their religious beliefs. The fact that he had exercised his freedom of religion did not make him a "dishonest" person. The ground of refusal specified in the legislation resulted in his suffering discrimination. The Court considered that provision should have been made for exceptions.

To achieve a better understanding of the ways in which Convention-based rights can be used to remedy the effects of direct or indirect discrimination, it is necessary to take a broader approach, by means of a more general examination of how the courts have interpreted the various provisions of the Convention over the years, in order to identify circumstances in which states party to the Convention might be required to take account of certain specific situations. In practice, it is the judicial authorities that are called on to find viable solutions. Such an approach is not without its problems[83]. In principle, the

[82] European Court of Human Rights (Grand Chamber), *Thlimmenos v. Greece*, 6 April 2000.

[83] See, in particular: Gérard GONZALES (ed.), *Laïcité, liberté de religion et la Convention européenne des droits de l'homme* (Proceedings of the colloquy organised on 18 November 2005 by the Institut européen des droits de l'homme), Brussels, Nemesis/Bruylant, 2006; Christelle LANDHEER-CIESLAK, *La religion devant les juges français et québécois de droit civil*, Cowansville (Quebec), Éditions Yvon Blais, 2007; Thierry MASIS and Christophe PETTITI (ed.), *La liberté religieuse et la Convention européenne des*

traditional notion that each individual should be free to demand respect for the exercise of his or her freedoms *and* be guaranteed equal treatment does not raise any difficulties. This might be interpreted as a right to be different. However problems do arise when, in actual cases, it has to be decided just how far persons demanding equal treatment can go in exercising their freedoms[84]. Of necessity, court involvement in such matters requires them to consider a specific context. The courts are then required to adopt an approach based on the obligation to protect rights and freedoms without unduly impinging on the rights and freedoms of others[85]. They must therefore determine the limits of the freedom in question. There are considerable variations in how courts define these limits. These differences of approach, and by extension treatment, in turn lead to considerable legal insecurity. They highlight the difficulties of securing the principle of equality in diversity by applying human rights standards. In certain areas, changes in case-law have made it possible to refine the applicable tests or criteria and clarify their extent, but hitherto it has not proved possible to incorporate the principle of equality in diversity into a clear line of argument that offers those concerned unambiguous guidelines.

In several cases, particularly ones concerning freedom of religion under Article 9 of the Convention, alone or in combination with Article 14, the European Court (and before it the Commission) have taken the position that if a law or regulation with an objective and legitimate purpose nevertheless restricts the liberty of certain individuals and that changes to it would avoid such interference without undermining this lawful aim, then this option should be chosen. In other words, in such cases, the least restrictive means should be adopted. This approach seems to us to resemble the arguments sometimes put forward by the American and Canadian courts when they apply the reasonable accommodation concept[86]. However, these resemblances should be considered in more detail. There is every reason to believe that the Court's requirement for proportionality between the means applied and the purpose sought when supervising the application of the Convention plays a role similar to that of reasonable accommodation. It determines the compatibility with the Convention of depriving someone of their liberty[87]. In several

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droits de l'homme (Proceedings of the colloquy organised on 11 December 2003 by the Institut de formation en droits de l'homme du Barreau de Paris and the Ordre des avocats à la Cour de Paris), Brussels, Nemesis/Bruylant, 2004.

84 For a practical illustration see Sandrine PLANA, *Le prosélytisme religieux à l'épreuve du droit civil*, Paris, L'Harmattan, 2006.

85 Emmanuel TAWIL, *Norme religieuse et droit français*, Aix-en-Provence, Presses universitaires d'Aix-Marseille, 2005; Renata UITZ, *Freedom of Religion in European Constitutional and International Case Law*, Strasbourg, Council of Europe Publishers., 2007.

86 See the use of reasonable accommodation by the Canadian Supreme Court in the kirpan case (*Multani*, see above, Part II).

87 See Eva BREMS, "The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity within Europe" in: David P. FORSYTHE, Patrice C. MCMAHON (eds.), *Human Rights and Diversity: Area Studies Revisited*, Lincoln/London, University of Nebraska Press, 2003, p. 81-110.

cases the Court of Human Rights has had to rule on measures introduced by governments to restrict liberties. When the restriction is general in application and in principle neutral, but may cause particular hardship for certain people, the question of indirect discrimination may arise and will then be subjected to the proportionality test. The proportionality test must prevent unjustified differences of treatment. At first sight therefore it shares the same objective as reasonable accommodation in Canadian and American law.

In practice, though, the Court of Human Rights appears to adopt a much more cautious approach than the Canadian Supreme Court to states' commitments and responsibilities with regard to equal treatment. As already seen, the latter has not hesitated on a number of occasions to infer from a specific case that a reasonable accommodation would help to avoid differential treatment and that government and/or the competent authorities had a duty to remedy the situation by altering the relevant rule or standard. The case-law of the European Court reveals a much more cautious position, with states being given a considerable margin of appreciation. The discretion granted to states party to the Convention reflects the Court's respect for the principle of democracy within a plural Europe. But offering states this margin means that the Court's ability to oversee governments' policies generally remains limited. In addition, the systematic application of the margin of appreciation principle also means that the effects of a Court judgment in a particular case will not necessarily be of any help to persons in a similar situation who have the misfortune to live in a country with a different policy. The example often cited concerns Muslim women and Islamic head dress, which has been the subject of various cases before the Court[88]. So we can only draw very limited lessons on this subject from the Strasbourg case-law, as situations have to be considered on a country by country basis and the Court scrupulously avoids any interference in countries' policy decisions. Restrictions on freedom of religion that are justifiable in one country and not necessarily so in another[89]. At first sight, therefore, it is difficult to compare the uncertain case-law of the European Court of Human Rights with the situations in Canada or the United States. This would require much more detailed analysis.

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[88] Malcolm D. EVANS, *Manual on the Wearing of Religious Symbols In Public Areas*, Leiden/Boston, Council of Europe, Nijhoff, 2009; Marianne HARDY-DUSSAULT, "Le port de signes religieux dans les établissements publics d'enseignement: comparaison des approches québécoise et française", in *Appartenances religieuses, appartenance citoyenne*, op. cit. (note 47), 75-121 ; David KOUSSENS, " Le port de signes religieux dans les écoles québécoises et françaises. Accommodements (dé)raisonnables ou interdiction (dé)raisonnée? ", *Globe – Revue internationale d'études québécoises*, 2008, 115-131; Françoise LORCERIE (dir.), *La politisation du voile en France, en Europe et dans le monde arabe*, Paris, L'Harmattan, 2005.

[89] Among the many commentaries on this issue, see Dominick MCGOLDRICK, *Human Rights and Religion: the Islamic Headscarf Debate in Europe*, Oxford & Portland, Oregon, Hart, 2006.

C. The national systems of various countries

Finally, European countries have the option of introducing into their domestic law, on their own initiative, a duty to accommodate and/or specific arrangements for ensuring fully equality in the different sectors of society, with no distinction of race, religious, sex, affiliation and so on. In fact, legislation to impose accommodations in specific areas remains proportionally fairly rare.

The only real obligation that binds the European Union member states and requires them to pass legislation granting a right to reasonable accommodation derives from the aforementioned Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[90]. The Flemish parliament has extended this obligation. Employers' responsibilities are not confined to persons with disabilities but apply equally to all forms of discrimination. We are not aware of any other European legislation extending the requirements of the directive beyond disability[91].

More generally, there has been growing awareness of these issues over the years and governments are now much more prepared to introduce relevant legislation or regulations in certain areas. For example, several countries have passed laws or introduced regulations on adjustments to working hours and/or annual leave. Others have changed their legislation on the slaughtering of animals to allow religious communities to comply with the rituals by which they are bound. Space prevents us from presenting here an exhaustive list of such laws and regulations in the different countries of Europe. We believe that such an inventory has not yet been drawn up. This could be an extremely interesting exercise as it would cast much more light on which areas legislators in European countries have considered to require some form of intervention in recent years to limit the risks of indirect discrimination and to offer more legal security to some of the most vulnerable individuals in Europe. It would also be interesting to consider the particular wording of such legislation or regulations to see how, in different real-life settings, the relevant authorities ensure that the principles of law underlying reasonable accommodation are effectively applied.

This would necessitate a very thorough examination of the various European countries that took account both of the obligations imposed in legislation and regulations and adjustments that have been conceded on the ground, as a result of either court decisions or new practices arising from decision making powers conferred on a particular authority, in accordance with democratic and previously laid down criteria. Such an inventory would undoubtedly provide a rich and varied source of information.

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90 Cf. supra (note 78).

91 Decree of 8 May 2002 on proportional participation in the labour market (*Moniteur Belge*, 26 July 2002), on which the authors cited in note 80 have commented. See also the decree of 10 July 2008 on the Flemish equal opportunities and treatment policy (*ibid*., 23 September 2008).

Conclusion: the lessons to be drawn from a comparison of the Canadian and American situation and European experience

Reasonable accommodation is based on a legal approach to diversity that transfers or shifts, at least in part, individual responsibility to society and institutions, in other words not just the state but also all the bodies with the power to manage diversity, whether these be businesses, government departments or other types of establishment. As such, up to a certain point reasonable accommodation frees individuals whose personal characteristics prevent them from benefiting from a particular job or service from the need to adapt or integrate and places the duty of adaptation on the shoulders of society as a whole. Underlying the notion of reasonable accommodation is the idea that the factors that together form an obstacle to individuals' access to certain services or jobs are to be sought in the social environment rather than in those individuals themselves. Clearly such an approach has great potential. So long as it is properly applied, it can make society more inclusive *vis-à-vis* persons whose minority status and/or personal characteristics leave them particularly vulnerable. Now perhaps more than ever, the role of the law in a plural society is to establish the necessary parameters to ensure a unified society while continuing to encourage diversity.

Could Europe adopt the concept of reasonable accommodation, with all that that implies from a legal standpoint? Possibly, but the right questions need to be asked. As already noted, one key difference between the Canadian and European situations is that in Europe, setting aside disabled persons' employment, there is currently no general principle governing reasonable accommodation for the whole of society. The result is that there are far fewer requests for its application or assessments of its potential. However, Canadian experience shows how hard it is in practice to determine where the responsibilities lie in specific cases. It is very likely therefore that reasonable accommodation as a concept will undergo further changes in the years to come. Before any decision is taken to introduce into Europe a genuine right to reasonable accommodation, which signifies acceptance of its wide-scale application, it needs to be determined how exactly it could offer significant advantages over the proportionality test, by offering ways of overcoming some of the shortcomings in that test.

We have outlined in parts I and II some of the problems that the application of reasonable accommodation, as it has been developed by the American and Canadian courts, has encountered in real life. Certain pitfalls may emerge when it becomes necessary to respond to individual requests by identifying the responsibilities of each of the parties and determining their boundaries. There is no shortage of such difficulties. For example, what actually constitutes a compelling governmental interest (United States) or a legitimate and compelling objective (Canada) that is sufficient to justify refusing a request for an exception? What is meant by "undue hardship" and how to decide whether the cost to the individual or body asked to make a particular accommodation is too high or that an exception would unduly infringe the rights of others? How far should the duty to accommodate extend to the legislative power? All these questions show that in each individual case implementing reasonable accommodation in the technical sense of the term requires all interests involved to be weighed in the balance and that the challenge for

the courts is to draw up a more precise definition of accommodation that is consistent and yet sufficiently flexible and open to reasonable requests. Diversity is daily becoming an increasing feature of life and the demands that accompany it are giving a new significance to the possible role the law can play in this process. The challenge is enormous. Reasonable accommodation and potentially equivalent legal approaches raise the fundamental issue of just how far democratic societies should go in recognising differences.