REASONABLE ACCOMMODATION: A TOOL IN THE DEVELOPMENT OF PLURALIST AND INCLUSIVE SCHOOLS?

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ABSTRACT

This article first presents the concept of reasonable accomodation as it was defined by the Canadian courts through various rulings, with a special focus on the guidelines that make adaptation to diversity a requirement for educational institutions as well as on the limits that decision-makers can invoke in this regard. In the second part of the article, the assets that reasonable accomodation represents for the development of inclusive schools are discussed, as well as some of the challenges of its implementation.

REASONABLE ACCOMMODATION IN THE CANADIAN CONTEXT

The concept of reasonable accommodation was progressively defined following the adoption of the Canadian Charter of Rights and Freedoms in 1982, through several judgments initially related to work relations and later to the delivery of services. The normative foundations of reasonable accommodation are based on the recognition that, even without the intent to discriminate, a rule or practice that *appears neutral* and that is applied equally to everyone may constitute an infringement on the right to equality. This is the case when such a rule or practice excludes or disproportionately puts at a disadvantage certain categories of citizens. Taking into account that many such apparently neutral rules are marked by Canada's dominant Catholic or Protestant heritage, courts have ruled that an infringement to the religious freedom of individuals in such situations constitutes a legitimate reason to render compulsory the search for an accommodation (*Commission des droits de la personne et de la jeunesse, 2005;* Bosset, 2007).

For a few years now, Canadian courts have suggested to corporate and public sector leaders that, once a rule or a practice within their institution or business has been established to have a discriminatory effect, a two-step plan be followed. The first question they must ask is whether the rule or practice is indeed well-justified and necessary to ensure that the institution or business can accomplish its mandate. If this is not the case, the course of action should be to abolish it, or to redefine it in a more inclusive manner. If it is clearly demonstrated that the rule or practice is essential, then there is an obligation to correct its discriminatory effect.

Reasonable accommodation, which corresponds to this second case, is therefore an exception granted to a person or group of persons for whom a universal rule or practice would have a discriminatory effect, on grounds set out by the Canadian Charter that it would infringe upon the exercise of fundamental rights.

Reasonable accommodation should not be considered as an obligation to accept all requests or even to find a solution to all potential cases of conflict between, on the one hand, norms and practices, and on the other hand, certain fundamental rights of individuals. The obligation is first and foremost that both sides search for a solution and negotiate in good faith. The main limit that can be invoked by the corporate or public sector leaders, either to justify the denial of certain requests or in a more positive manner to propose an alternative solution, is that of **undue hardship.** This is to demonstrate that the given request challenges the very capabilities of the institution to carry out its mandate. Early rulings stressed elements such as financial costs, organizational factors, or the magnitude of risks. More recently, the Court has started to analyze the question

of reasonable accommodation within institutions whose mandates are more complex than those of businesses, such as schools, day-care facilities, or social services providers. Indeed, such institutions cannot only reflect the values of their clientele, but usually aim to educate, transform, or defend them. In such cases, many argue that the concept of reasonability should extend to the compatibility of some requests with the given mandate (Mc Andrew, 2003; Gaudreault, 2007). Nevertheless, reflection in this regard is still very preliminary. Regarding schooling, for example, cases that have been brought to the Supreme Court have dealt only with dress code requirements, and not with requests to exempt students from parts of the curriculum based on established knowledge (for example, Darwinism vs. Creationism) or linked to civic skills (for example, the new Quebec course on Ethics and Religious Culture) (MELS 2007; Woehrling, 2008).

Nevertheless, regardless of such grey areas, courts have reiterated on many occasions that reasonable accommodation must be compatible with the respect of other rights of individuals requesting accommodation, or with the right of other individuals who could be affected. At a lower judicial level, the British Columbia Court of Appeal has ruled in the *Three Books Case* that reasonable accommodation[1] could not be invoked to allow one minority to censor another. It therefore nullified the decision of a school board which had withdrawn from the shelves of its school libraries three books that favoured homo-centric family models, as a means of responding to the sensibilities of certain religious communities (Tully, 2006).

RELIGIOUS ACCOMMODATION AND PLURALIST SCHOOLING: STRENGTHS AND LIMITATIONS

Reasonable accommodation can represent both a powerful theoretical concept and a relevant strategy in balancing three equally important social goals of modern society: the respect for diversity and for individual rights, the actualization of equity, and the promotion of social cohesion. In public debates, reasonable accommodation is often presented as favouring essentially the first objective, but one can easily demonstrate that it can also support in a very significant manner the other two. Indeed, the most important goal of reasonable accommodation is not to merely respect diversity, but to allow marginalized groups to equally participate in public and private institutions without having to renounce their values, as long as these are compatible with a minimal definition of legitimate claims in a democratic society. Contrasting a republican conception of integration — which requires students to choose between, on the one hand participation and equality, and on the other, their religious or cultural characteristics and identities — reasonable accommodation aims for a reciprocal adaptation. While educational institutions gradually modify their rules and practices to adjust to socio-demographic changes, individuals belonging to minorities also see some of their values or behaviours being transformed over time, through the social interaction created by their participation. Moreover, in cases where different rights seem to be in conflict with one another, it is obvious that by avoiding the exclusion and the marginalization of individuals that one aims to protect, these individuals are afforded much more opportunity to develop an autonomous choice between alternative values (MELS 2007; Milot, 2008).

Nevertheless, this positive impact of reasonable accommodation is only possible if the experience of negotiating such a compromise, regardless of its tensions and difficulties, is a positive one. This invites us to address some of the challenges linked to this demanding concept.

The main criticism directed at reasonable accommodation is its complexity (Fleury, 2008; Potvin, 2008). For a citizen who learns about it through the media, often in a very biased manner, and even for a school principal or a teacher who is more directly involved, it can appear rather chaotic. *Rationality*, which involves clear norms applied to everyone in the same manner without discussion, is often more comfortable than *reasonability*, which implies the acceptance of different compromises in different instances.[2] Moreover, even if reasonable accommodation involves a negotiation without an *a priori* defined result, this does not mean that it is without legal guidelines. At the end of the process, charters, laws, as well as school rules, sometimes impose their own preferred solutions. Therefore, the school principal is often under the impression that, on the one hand he is being told that school norms cannot be rigid (e.g., that he must adapt), but on the other hand that the compromises which he will finally take as admissible or refuse to comply with, can at any moment be nullified by the Courts, which are often considered to be biased in favour of minorities. Therefore, if reasonable accommodation is to play a positive role in the construction of an inclusive school, public authorities need to listen more carefully to the fears of school personnel in this regard. Better information and inter-cultural training directed to those working in school milieus must also be developed. In this regard, the *Consultation Commission on Accommodation Practices Related to Cultural Differences,* held in Quebec during Winter 2008, has represented a significant step in favour of the first objective, even if we can wonder whether its impact on the other two has been positive (Mc Andrew, 2007; CCAPRCD, 2008).

Reasonable accommodation is also criticized at both ends of the spectrum, by partisans of civic integration and by partisans of a more radical multiculturalism, as it is simultaneously said to "flirt" with communitarianism and assimilationism. In the first instance, some fear that while it is meant to apply only to individuals and be limited by the necessity of respecting individual rights, reasonable accommodation actually contributes to further empowering traditional ethnic or religious elites, while reinforcing orthodox definitions of religious practices. These criticisms have been voiced particularly since the Amselem ruling, which established that it was not the mainstream interpretation of religions that should be paramount in judging the infringement of religious freedom but the sincerity of individual beliefs. Although at first glance this seems like a liberal position, many analysts and school authorities have argued that such a ruling has had the perverse effect of limiting the moderating input of mainstream religious authorities, while it has given more power, within educational institutions, to marginal positions shared by traditionalist or orthodox militants (Lefebvre, 2008; Maclure, 2008). Nevertheless, other people have argued that the democratic exercise implied by the negotiation of an accommodation contributes to citizenship education among religious minority youth, and thus, it may help them to question the monopoly of religious authorities in their life choices (CCAPRCD, 2008).

At the other end of the spectrum, some partisans of a more radical conception of multiculturalism consider that all guidelines that constitute the framework for seeking reasonable accommodation in schools are actually much more favourable to a soft version of assimilationism than to a true recognition of diversity (Bourgeault & Pietrantonio, 1996). Schools would take into account only watered-down conceptions of minority cultures and religions, such as those which are compatible with the Western paradigm and the dominant culture. Reasonable accommodation would thus not live up to the expectation of true pluralism, which allows citizens in a democracy to hold radically different conceptions of "the good life." Nevertheless, this critique has some flaws. Indeed, while reasonable accommodation may favour minority participation in common institutions, it does not forbid some people or groups from choosing to attend ethno-specific institutions, or even within the limits defined by the law, to live their lives largely at the margins of the dominant society.

Finally, many worry that school principals — and even more so schoolteachers, who are sometimes also challenged by this task — are not adequately trained to define rules and practices, or their accommodations, to foster the equal participation of all students regardless of background (CCAPRCD, 2008; Mc Andrew, 2008). It is certainly easier for people who experience diversity daily than for ordinary citizens to resist the sensationalist treatment by the media of various cases of cultural or religious conflicts. Nevertheless, these individuals often lack the skills needed to adequately manage such a negotiation between values — which is not the only one they must address in today's schools, where they face many other competing challenges. In this regard, even if many training initiatives are carried out at the provincial, school board or NGO levels, one can doubt that current training is sufficient. This is because most training is aimed at school principals, while reasonable accommodation often elicits important resistance on the part of school teachers, and even more among students and parents — these last having significant power in decision-making processes at the school level. This is exemplified by the 2002 conflict surrounding the wearing of the kirpan by Sikh students. This case made it all the way to the Supreme Court in 2006 because, initially, parents of mostly French-Canadian background who were sitting in the governing body of a school refused a compromise that was negotiated by school authorities. Nonetheless, if one truly believes that the search for reasonable accommodation must be a reciprocal process, training should not be aimed at dominant society members alone. In this respect, public authorities should give greater support to NGOs who help in the establishment and integration of newcomers or who represent religious minorities, so that while the NGOs inform their clientele or members of their rights such organizations may also help newcomers to gradually develop a sense of *identity moderation.* A better understanding of the role of religion and of its limitations in a democratic society, and of the challenges experienced by children (who are often caught between two worlds) is especially needed.

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FOOTNOTES

[1] This dilemma happens most of the time when parents ask for an accommodation for their child. In the case of an adult, one can assume that the freedom to prioritize his/her different rights is a prerogative of that given individual.

[2] Even if everyone generally prefers to be subject to reasonability than to rationality when his/her own needs are at stake.