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DISCRIMINATION AND REASONABLE ACCOMMODATION: “INSIGHTS” FOR A (NON) ZERO SUM GAME

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DISCRIMINATION AND REASONABLE ACCOMMODATION: INSIGHTS FOR A (NON) ZERO SUM GAME¹

by

Giovanni Comandé ♦

“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.”²*

Abstract:

Modern societies are becoming increasingly multicultural due to intensive migration as well as free internal circulation of people in specific regional areas such as the EU. This circulation of people from different cultural and legal backgrounds is both reviving old legal issues and raising new ones, thereby calling for a better understanding of the interplay between individual and group protections in light of fundamental rights and non discrimination principles. Indeed, no matter the characteristics of the group (e.g. gender, ethnicity, health...) there is always the risk that, while attempting to protect it from external discrimination, the measures serve to perpetuate individual discrimination within it. Usually these issues are mainly targeted from a mere public law perspective. In this article the author lays down the grounds for more extensive research aiming to study the impact that the circulation/migration of individuals is having on private law adjudication, and the techniques through which it occurs in modern times. In order to set the boundaries of the research the author selects examples of impact from the areas of family, property and contract law and uses the Canadian approach as a litmus test for spotting the relevant legal problems. Further, the selection of Canada as a target of study, with a closer focus on Québec and Ontario, sets the basic elements for further investigating eventual variances in approaches among civil and common law systems.

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² *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, at para 22.

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Introduction

Globalization stirs both old and new issues. Modern societies are becoming increasingly multicultural due to intensive migration as well as free internal circulation of people in specific regional areas such as the EU. This circulation of people from different cultural and legal backgrounds is both reviving old legal issues and raising new ones, thereby calling for a better understanding of the interplay between individual and group protections in light of fundamental rights and non discrimination principles. Indeed, no matter the characteristics of the group (e.g. gender, ethnicity, health...) there is always the risk that, while attempting to protect it from external discrimination, the measures serve to perpetuate individual discrimination within it. Usually these issues are mainly targeted from a mere public law perspective. In this article the author lays down the grounds for more extensive research aiming to study the impact that the circulation/migration of individuals is having on private law adjudication, and the techniques through which it occurs in modern times. In order to set the boundaries of the research the author selects examples of impact from the areas of family, property and contract law and uses the Canadian approach as a litmus test for spotting the relevant legal problems. Further, the selection of

Canada as a target of study, with a closer focus on Québec and Ontario, sets the basic elements for further investigating eventual variances in approaches among civil and common law systems.

The physical circulation of people is an increasing occurrence concerning several countries. Furthermore, motivations for migration have altered, shifting States' concerns on the flows of circulation of people. For example, in Italy which until recently was more affected by the phenomenon in the form of tourism than by the presence of large numbers of non-citizens permanently residing on their territory,³ concerns regarding the coexistence of different cultures are rather recent.

The permanent presence of non-citizens on national soil is a complex issue when the enjoyment of civic rights is considered, particularly in relation to the risk of discrimination.

Clearly enough then, discrimination and the actual application of the equality principle are also at stake when non-citizens are involved.

In European Union private law evolutionary trends, the non-discrimination principle is fully present both in the Principles of the Existing EC Contract Law, so called Acquis Principles, whose Chapter 3, is entirely devoted to "Non-discrimination", obviously with express reference to the language of directive 2000/43/EC, and in the Draft Common Frame of Reference which, after ample recalling in the introductory remarks, dedicates Book II Chapter 2 to non-discrimination with useful proxies regarding the relevance of the principle of non-discrimination with reference to the principle of equal treatment⁴.

Last but not least, as emphasized by the ECJ⁵, Articles 52 and 59 of the Treaty prohibit any restrictions on the freedom of establishment and the freedom to provide services. Any measures which prohibit, hinder or makes less attractive the exercise of these liberties must be considered as restrictions to them⁶.

In this process of continuous innovation a pivotal role has been afforded to judicial decision-making which, while primarily aiming to coordinate different jurisdictional levels (national vs. European mainly), has rendered any unreasonable discrimination increasingly difficult, often by reference to fundamental freedoms protection. In Europe, this willingness to protect the fundamental rights of

³For instance, according to official data (available on www.istat.it) in Italy there are to date about 4 millions of resident foreigners. See ISTAT: Rilevazione sulla "Popolazione residente comunale straniera per sesso ed anno di nascita". More than half a million of them were born in Italy. Foreign citizens come from about 254 areas in the world with communities of different dimension varying from 1 individual (Tuvalu, Kiribati) to more than 796.477 (for instance Rumenian). See also OECD Statistical Profile for Italy, available at: <http://stats.oecd.org/Index.aspx?DatasetCode=CSP2009>

⁴ O. LANDO and H. BEALE (eds.), *Principles of European Contract Law Parts I and II*. Prepared by the Commission on European Contract Law (The Hague 1999); Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds.), *Principles of European Contract Law Part III* (The Hague, London and Boston 2003). Outline Edition of DCFR available online at <https://portal.law-net.eu/home/start.php?part=3902&showart=3902&gruppe=4>

⁵ See Judgment of the ECJ (Grand Chamber) of 16 December 2008, *Heinz Huber v Bundesrepublik Deutschland*, Case C-524/06, ECR 2008 I-09705 and Judgment of the ECJ (Second Chamber) of 5 June 2008 *James Wood v Fonds de garantie des victimes*, Case C-164/07, ECR 2008 I-04143

⁶ See Judgment of the ECJ (Sixth Chamber) of 30 March 1993, *Christos Konstantinidis v Stadt Altensteig* Case C-168/91 ECR 1993 I-01191 at 15, and Judgment of the ECJ of 20 February 2001, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Anafir) and Others v Administración General del Estado*. Case C-205/99, ECR 2001 Page I-01271 at 21.

individuals from unlawful discrimination has also been bolstered by reference to common constitutional traditions and indeed the case law of the European Court of Human Rights in Strasbourg⁷. Often, from judicial arguments, both at national and international level, one can even identify patterns of indirect impact of fundamental rights protection, embedded in national constitutions and binding international conventions, on private relations⁸.

All of the processes referred to above are incorporated by legal systems according to both the protections afforded and limits imposed by fundamental rights protection in private law rules. In other words, fundamental rights protection is at the heart of the extension of the civil rights enjoyed by citizens, while also going to the core of their limitation and the possible (to some extent even legitimate) discrimination by legislators amongst citizens and between citizens and non-citizens..

Canadian multiculturalisms and the crossroads of private law: reasons of (European) interest

As anticipated, the increased circulations of people and recent migration trends have rendered the situation more complex, as we have just summarized.

Sometimes cultural, religious, ethnic, and disparate behaviours in our societies generate new phenomena which require either the incorporation of new legal institutions and norms, known or unknown to our systems, or their consideration as part of the process of accommodating different interests.

Occasionally they necessitate the tackling of old issues from a different angle, as in the so called Wood case heard before the ECJ⁹ or likewise in a case heard in the Tribunale di Milano where the amount of non-pecuniary damages suffered by relatives of a fatal car accident were at stake¹⁰ and questioned on the grounds of different country of residence and culture.

⁷ The ECtHR has taken huge strides in its understanding of the ECHR's Art 14 anti-discrimination provisions in recent years so it now extends to the spheres of social security and arguably employment. This is despite the it often being derided and underestimated, see further R. O'CONNELL, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR* Legal Studies, Vol. 29 No. 2, June 2009, pp. 211–229.

⁸ See, for instance, G. Brüggemeier, A. Colombi Ciacchi, G. Comandé eds., *Fundamental Rights and Private Law in the European Union. Vol. I: A Comparative Overview and Fundamental Rights and Private Law in the European Union. Vol. II.: Comparative Analyses of Selected Case Patterns*, Cambridge University Press, 2010. See also Cherednychenko, O.O. (2010). *Fundamental Rights, Policy Issues and the Draft Common Frame of Reference for European Private Law*. *European Review of Contract Law*, 6(1), 39-45

⁹ See Case C-164/07 *James Wood* as above in fn 8, at para. 16. The Court of Justice held that EC law precludes legislation of a member State which excludes nationals of other member States who live and work in its territory from the grant of compensation intended to make good losses resulting from offences against the person where the crime in question was not committed in the territory of that State, on the sole ground that they do not have the nationality of that State.

¹⁰ See G. COMANDÉ, *La legge è uguale per tutti: il risarcimento tra "gabbie risarcitorie" e reciprocità*, in *Danno e Responsabilità*, 2009, 1135ff. Tribunale di Milano, Sent. n. 12099, 18 dicembre 2008, available at http://www.liderlab.sssup.it/odp_pdf/immagine/milano_5-2008.pdf. The Tribunale recognised the principle of compensating aliens for damage to health resulting from an accident stranger, even apart from assessing the condition of reciprocity, for non-pecuniary damage, such as the loss resulting from killing of the spouse.

These phenomena are inevitably bound to increase both in number and complexity, thereby eventually affecting all areas of private law. Indeed, they seem to already be significantly infiltrating family law, contracts and the law of obligations in general specifically evoking so-called anti-discriminatory law.

Finally, when taken together the establishment of a European private law, of fundamental rights protection, of fundamental freedoms (of circulation) enforcement and the creation of an internal market by their very nature place distinct limits on the possibility of disparity of treatment¹¹.

Despite the fact that some EU Member States have long experience in receiving immigrants (e.g. UK, France, and the Netherlands) and in developing multicultural models¹², it is undeniable that contrasts of values and tensions among fundamental rights and freedoms are escalating¹³. For this reason a further analysis of the Canadian experience would provide a useful benchmark¹⁴ and might provide inspiring solutions or, at least clear interpretative patterns for phenomena some European countries have not experienced before. After all Canada “openly promotes the values of diversity as a necessary, beneficial, and inescapable feature of Canadian society”¹⁵.

Indeed, the choice of Canada to center the study has several justifications. Primarily, we should mention that Canada participates in the Council of Europe¹⁶. The Canadian multicultural tradition is by itself an analytical model for EU Member States. Moreover, the Canadian experience allows us to begin testing whether common and civil law systems use different approaches and techniques in private law when dealing with issues of migration and their interplay with private law¹⁷. Civil law and common law coexist in a unique constitutional setting in Canada and this experience can offer useful hints in the unifying “constitutional” framework of the Lisbon treaty.

¹¹ See for instance and with referencereference to family the contributions in P. DE CESARI (ed.), *Persona famiglia, Trattato di diritto privato dell'Unione Europea*, Torino, Giappichelli Editore, 2008.

¹²See J. BERRYMAN, *Accommodating Ethnic and Cultural Factors in Damages for Personal Injury*, 40 U.B.C. Law rev., 2007, 1, at 24, affirming that “Multiculturalism is a value not a right”.

¹³ Fundamental rights and the protection of those rights should operate as an intersection and consolidation as a guarantee of harmonisation of the Community’s social tissue and, on the other, as a guarantee for the different identities that exist therein. See further E. D’ORLANDO, *Fundamental Rights and New European Constitutionalism: an Italian Approach*, *Transition Studies Review* (2006) 13 (1): 201–209. In European integration law human rights are recognized as empowering citizens, as constitutionally limiting national regulatory powers, and as requiring governments to protect and promote human rights in all policy areas across national frontiers. See further E. PETERSMANN, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, *European Journal of International Law* 2002 13(3):621-650.

¹⁴ Canada has expressly devoted a law to the issue: Canadian Multiculturalism Act (1985, c. 24 (4th Supp.)). In general see the Canadian Charter of Rights and Freedoms 1982 to which we will refer later on in the text.

¹⁵ S. V. WAYLAND, *Citizenship and Incorporation: How Nation-States Respond to the Challenges of Migration* (1996) 20-FALL Fletcher F. World Aff. 35 at 46.

¹⁶ The Government of Canada started participating in CoE activities in the 1960s, but was not granted official observer status with the Committee of Ministers until 1996. In 1997, Canadian parliamentarians were granted official observer status with the Parliamentary Assembly of the CoE. Canada has helped develop and signed several Council of Europe conventions, including the those on the Transfer of Sentenced Persons and on Cybercrime. See <http://www.canadainternational.gc.ca>

¹⁷ Specific mention should be made to the Quebec’s *Charte des droits et libertés de la personne*, L.R.Q., which expressly extends its reach to private law. See further, e.g. P.O. LAPORTE, *La Charte des Droits et Libertés de la Personne et son Application dans la Sphere Contractuelle*, 40 R.J.T. n.s. 287 (2006)

Also for this reason we will focus on the Canadian experience as such, but we will refer more in detail to the Québec and Ontario experience in order to contemplate both legal families. The specific policy in Québec, centered on the sharing of the French language and the respect of diversity, offers further insights¹⁸. In fact, countries where emigration traditionally occurred (such as Italy or Ireland) and which had a rather homogenous society (in relation to language and religion for instance) are amongst today's new-found 'immigration countries' adapting to migrants of diverse social, cultural, religious, and legal backgrounds (Asia, Latin America, Africa and Eastern Europe)¹⁹ so the Canadian legal accommodation experience could prove useful at least to understand the issues we are facing. For these European countries, the way in which Canadian common/civil law has reacted in dealing with accommodating various cultures would offer a set of solutions tested in private law systems theoretically compatible with their own which could potentially be transplanted²⁰. In addition, the way rather culturally uniform legal systems (as Québec) have faced the challenges of multiculturalism in the interplay with private relationships is a useful source of inspiration.

On the other hand, the traditional multicultural nature of Canadian society, by definition a country whose population was amassed through immigration and integration, and the coexistence of both civil and common law traditions in one institutional setting offers a potentially keys field-study both for EU Member States and the EU itself.

More precisely, in the growing common context of a "quasi" constitutional setting (for the EU treaties and the Lisbon treaty in particular), linked with an increasing interventionist European Court of Justice in defence of the fundamental rights protection of EU citizens²¹ and of the ECtHR in the framework

¹⁸ BARREAU DU QUÉBEC, *Mémoire du Barreau du Québec présenté à la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles* « Les droits fondamentaux : Une protection pour toutes et tous », Décembre 2007, at 17: "Les droits de la personne représentent un ensemble cohérent, indivisible et universellement reconnu qui garantit le respect de la dignité humaine. Tous les droits de la personne ont donc une égale valeur en droit, bien que certains reçoivent une attention plus soutenue que d'autres dans le libellé des chartes nationales, et notamment dans celui de la *Charte canadienne des droits et libertés* et de la *Charte des droits et libertés de la personne* du Québec. L'énonciation variable des droits de la personne dans les documents constitutionnels ou quasi-constitutionnels nationaux n'altère toutefois pas le principe de leur indivisibilité et de leur interdépendance. Tous les droits ont la même valeur et la dignité de chacun dépend du respect de tous les droits de la personne."

²³For OECD International Migration Statistics, see http://titania.sourceoecd.org/vl=20201853/cl=12/nw=1/rpsv/statistic/s12_about.htm?jnlisn=16081269.

²⁰ See A. WATSON, *Legal Transplants and Law Reform*, (1976) 92 *Law Quarterly Review*, p. 79: "...whatever their historical origins may have been, rules of private law can survive without any close connection to any particular people, any particular period of time or any particular place" (p. 81). But see K. ZWEIGERT and H KÖTZ, *Introduction to Comparative Law*, 3rd ed, Clarendon Press, Oxford, 1998, p. 17: "The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden."

²¹ Although reluctant to take on an overtly constitutional role, as seen recently in *Ayadi v. Council*, Case T-253/02 [2006] E.C.R. II-2139 and *Panayotova v. Minister voor Vreemdelingenzaken en Integratie*, Case C-327/02 [2004] E.C.R. I-11055, the ECJ has for some time referred to fundamental rights in dicta in *Stauder v. City of Ulm*, Case 29/69, [1969] E.C.R. 419, at 7, and *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, at 4 and in *Nold v. Commission* Case 4/73 [1974] E.C.R. 491 it confirmed that respect for fundamental rights forms an integral part of the general principles of Community law.

of the Council of Europe, the approaches developed in Canada could be a source of inspiration for policies aimed at balancing diverse legal frameworks, political agenda(s) and legal tools²².

In addition, one of the main aims of the Canadian multiculturalism model is to reduce the pressure to assimilate by the majoritarian groups by way of recognizing «droits différenciés»²³; it does not prevent integration but it redefines its conditions in a more equitable way. This does not contradict the fact that regular normativity adopts as its own the predominant groups' vision of the world (e.g. male, heterosexual, Christian, middle class, etc)²⁴. On the contrary, the acknowledgment that the “predominant view” is already a partial one will help in the search for social justice and in reconciliation of the majority's view with the cultural models emerging from the immigrant and non-predominant groups.

Note also that this integration model does not lead to auto-determination in the sense of communities within State organizations²⁵ but offers a set of flexible tools to accommodate differences without, possibly, disrupting the social structure altogether²⁶: a so called more “partaken citizenship”.

The underlying idea is to empower the legal and regulatory framework of the majorities to accommodate social pluralism²⁷ (not necessarily only the ethno-religious one). Yet, as we shall see accommodation of group cultures should keep in mind the protection of vulnerable individuals²⁸ within the groups, either minority or majority ones. “This framework is thought to be a way in which minorities can retain cultural distinction without compromising their social equality”²⁹.

A specific reference might be necessary for the Quebec experience³⁰ which, it has been said, borrows both from the Anglo-Saxon multiculturalism and from the French republicanism in which plurality is

²² See P. NOREAU, « *Le droit comme vecteur politique de la citoyenneté* », in M. Coutu, P. Bosset, C. Gendreau et D. Villeneuve, « *Droits fondamentaux et citoyenneté. Une citoyenneté fragmentée, limitée, illusoire* », Onati/Montréal, Thémis/Institut international de sociologie du droit, 2000. pp. 323-359.

²³ W. KYMLICKA, *Multicultural Citizenship : A Liberal Theory of Minority Rights*, Oxford, Oxford University Press, 1995; W. KYMLICKA, *La voie canadienne. Repenser le multiculturalisme*, Montréal, Boréal, 2003, p. 95.

²⁴ See I. M. YOUNG, *Polity and Group Difference : A Critique of the Ideal Universal Citizenship*, (1989) 99 *Ethics* 250-274. Of course this view does not buy agree with the normative neutrality argument as pretended defended by J. RAWLS, *A theory of justice*, Cambridge, Ma., 1971.

²⁵ In the Canadian experience reference is often made to native americans people and Québec people. See among several, P. BOSSET and P. EID, *Droit et religion : de l'accommodement raisonnable à un dialogue internormatif*, Commission des droits de la personne et des droits de la jeunesse, Cat. 2.500.127, 2006, 9.

²⁶ Indeed, the limits to the notion of duty to reasonable accommodation reflect this spirit.

²⁷ See J. WOEHLING, *L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse*, (1998), 43 *McGill L.J.* 325, at 398-401. With specific reference to religion see A. SARIS, *Les tribunaux religieux et le droit étatique*, Textes du Congrès 2005 du Barreau du Québec, 2005, p. 402-403.

²⁸ See on the issue S. M. OKIN, *Is Multiculturalism Bad for Women*, in J. COHEN, M. HOWARD et N. NUS SBAUM (eds.), *Is Multiculturalism for Women? Susan Moller Okin with Respondents*, Princeton, Princeton University Press, 1999, p. 1-24; N. BAKHT *Arbitration, Religion and Family Law: Private Justice on the Backs of Women*, at http://www.nawl.ca/ns/en/documents/Pub_Report_ReligArb05_en.rtf.

²⁹ N. BAKHT, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women*, National Association of Women and the Law, 2005, at p.36.

³⁰ See BARREAU DU QUÉBEC, *Mémoire du Barreau du Québec présenté à la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles « Les droits fondamentaux : Une protection pour toutes et tous »*, Décembre 2007, at 33: “Le Québec de part son histoire est une terre d’immigration. On a qu’à se rappeler l’arrivée des premiers colons il y a 400 ans. Le respect de la diversité a toujours été essentiel pour maintenir une cohésion sociale. Considéré comme un facteur

not permitted as such³¹. The Québec resolutions talk in term of a “moral contract” between the Québec society and immigrants according to which French language is imposed but Québec acknowledges its pluralistic cultural identity and the heterogeneity of the Québec nation³². Nevertheless, the final outcome is not a sort of archipelago of groups in which a plurality of legal orders operates because the Québec charter defines the limits for the accommodation of groups in light of fundamental rights protection. Once again, the majoritarian and minoritarian views as well as individual rights are accommodated pragmatically in light of fundamental rights protection, equality and non discrimination. This continuously evolving equilibrium would, for instance, prevent any form of legal segregation which would ensue from the application of private (i.e. non State) family law regimes. Having established a set of reasons for the work we can now turn to building up the analysis.

Background information: establishing what is problematic

Digging deeper in the matter of diversity and equal treatment the first issue that comes up is citizenship and different treatment of citizens versus non-citizens. Citizens are persons who have been recognized by a State as having an effective link therewith³³. International law generally leaves the authority to each State to determine who qualifies as a citizen. Citizenship can ordinarily be acquired by being born in the country (known as *jus soli* or the law of the place), being born to a parent who is a citizen of the country (known as *jus sanguinis* or the law of blood), naturalization or a combination of these approaches.

According to international instruments, all persons should, by virtue of their essential humanity, enjoy all human rights. Exceptional distinctions, for example between citizens and non-citizens, can only be made if they serve a legitimate State objective and are proportional to the achievement of that objective or if they have been linked by the European Court of Justice (within the EU) to the protection of fundamental rights and their role in limiting fundamental freedoms³⁴: the equality principle admits exceptions contrasting citizens and non-citizens but these exceptions are strictly scrutinized under fundamental rights protection. Indeed, all national constitutions drawn up after WWII limit the

important pour le développement du Québec, l'immigration répond principalement et concrètement à des enjeux majeurs d'ordre démographique et économique.”

³¹ See in an historic perspective D. SCHNAPPER, *La citoyenneté : perspectives historiques et théoriques. La conception de nation, Citoyenneté et société, La documentation française, Les Cahiers Français, mai-juin 1997, no 281*. Sometimes the Québécois policy is termed “interculturalism”.

³² See literally DES COMMUNAUTÉS CULTURELLES ET DE L'IMMIGRATION (MCCD), *Au Québec pour bâtir ensemble. Énoncé de politique en matière d'intégration et d'intégration*, Gouvernement du Québec, 1990, p. 16-19: « À l'opposé de la société québécoise traditionnelle qui valorisait le partage d'un modèle culturel et idéologique uniforme par tous les Québécois, le Québec moderne s'est voulu, depuis plus de trente ans, résolument pluraliste [...]. La possibilité de choisir librement leur style de vie, leurs opinions, leurs valeurs et leurs appartenances à des groupes d'intérêts particuliers, à l'intérieur des limites définies par le cadre juridique, constitue d'ailleurs un des acquis de la Révolution tranquille [...]. La culture québécoise est ainsi une culture dynamique qui, tout en s'inscrivant dans le prolongement de l'héritage du Québec, se veut continuellement en mutation et ouverte aux différents apports. La Charte des droits affirme, de plus, « que les personnes ont le droit de maintenir et de faire progresser leur propre vie culturelle avec les autres membres de leur groupe.».

³³ The Nottebohm Case (Liechtenstein v. Guatemala) International Court of Justice April 6, 1955, 1955 I.C.J. 4.

³⁴ See, Judgment of the Court (First Chamber) of 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02 ECR 2004 p I-09609.

possible legitimate disparity of treatment between citizens and non-citizens. Moreover, in more expansive supranational communities (such as the EU) the possible different treatment of citizens of a different Member State is made increasingly problematic through the intervention of the courts³⁵.

Additionally, international courts (e.g. the ECHR, the ECJ) are increasingly ready to protect individuals' fundamental rights against illegitimate discrimination. Areas of judicial intervention can be easily found in labour law, family law and contract law, in which it is rather easy to find case law³⁶.

Judicial arguments often proceed along the lines of highlighting indirect impact on the fundamental rights protection of private relations, as embedded in either constitutions or binding international conventions. One alternative route expressly followed in some legal systems, such as the Canadian Provinces, includes looking to the equality principle as commanding a reasonable accommodation to avoid discrimination³⁷.

Against this legal background, social science literature³⁸ notices, on the one hand, a different attitude of migrants in modern globalized societies who enjoy access to enhanced long-distance communications and, on the other hand, a societal attitude more open to accommodating diversity, and managing it with social and legal tools (e.g. reasonable accommodation)³⁹.

Indeed, immigrants usually bring their traditions with them (e.g. cultural, legal, and religious). Furthermore, due to improved information and communication technology, modern immigrants are better able to maintain frequent contact with their original community and might be more reluctant to dismiss their practices and traditions for the sake of quicker and deeper integration into the host country. In short, in sub-local communities linked to their home country and through similar communities within the host country, they often replicate an insular society closely related to their original culture. This is also the case when dealing with matters governed by private law and this sort of insularity might enhance the tension between the respect of minority rights and cultures and fundamental rights protection within them.

It is rather intuitive that the maintenance of traditions and habits either unknown or at least "strange" to the local host community (e.g. Canada or Italy) might interfere with the actual enjoyment of rights

³⁵ See for instance the contribution on citizenship from A. IANNIELLO SALICETTI in P. De CESARI (a cura di), *Persona e famiglia*, quoted, *passim*. See J. L. MURRAY, *Fundamental Rights in the European Community Legal Order*, 32 *Fordham Int'l L.J.* 531 (2008-2009), and J. H. WEILER, *Eurocracy and Distrust: Some Questions Concerning the role of the ECJ in the Protection of Fundamental Human Rights within the Legal Order of the European Communities* 61 *Wash. L. Rev.* 1103 (1986).

³⁶ See, for instance, G. BRÜGGEMEIER, A. COLOMBI CIACCHI, G. COMANDÉ eds., *Fundamental Rights and Private Law in the European Union. Vol. I: A Comparative Overview and Fundamental Rights and Private Law in the European Union. Vol. II: Comparative Analyses of Selected Case Patterns*, Cambridge University Press, 2010.

³⁷ *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, at para 22: "While no right can be regarded as absolute, a natural corollary to the recognition of a right [to equality] must be the social acceptance of a general duty to respect and to act within reason to protect it." 554.

³⁸ Information Communication Technologies are used in both regular and irregular migration, in maintaining family relations, sustaining cultural identities, and supporting dependents from abroad so governments and civil society are seemingly working to increase access and use of ICTs. See, e.g. J.-Y. HAMEL, (2009): *Information and Communication Technologies and Migration*. Published in: Human Development Research Paper (HDRP) Series, Vol. 39, No. 2009.

³⁹ See *infra* in the text for the notion.

and interests within the private domain. In addition, the expansion of multicultural societies commands more respect for individual attitudes different from those which can be defined as mainstream or majority ones in any given country. This “novel” respect for diversity might in turn create tensions for the protection of individuals within the minority community. One clear example, often quoted in literature⁴⁰, is the protection of women in discrete communities which maintain their right to cultural, religious or legal diversity⁴¹.

One could point, for example, to the recent debate in several western legal systems about establishing (or in some cases simply legally acknowledging the already operating) religious courts for family or contractual matters; or to the need to permit an *effet utile* of legal institutions generally prohibited in the host country (e.g. polygamy) in order to grant minimal protection to the weaker party in the relationship (e.g. the subsequent wife or the children technically born out of wedlock in the host country).

Consider also the “Kafalah” of Islamic legal tradition and its application in non-Islamic countries when deciding on the custody of children⁴², or the use of rituals or the wearing of clothes contrary to public order or private agreements, or the closing/opening of shops, or the request of holydays contrary to work agreements in order to fulfil religious belief – the list is potentially endless.

All the above mentioned examples hinge upon the enjoyment of fundamental rights and liberties which have different legal and social relevance in any given legal system and require the adoption of a variety of balancing techniques when they conflict amongst themselves or indeed with the general legal framework (e.g. collective agreements, public offer settings, self-regulation, adhesion contracts...).

While all human beings are entitled to equality in dignity and rights, States may narrowly draw distinctions between citizens and non-citizens with respect to political rights explicitly guaranteed to citizens and their freedom of movement. Finally, we must contemplate, that in principle a non-national immigrating to any given country can acquire the local nationality. This is important to remember because, once citizens, their "different" treatment according to their legal, cultural or religious tradition

⁴⁰ See, e.g. the debate in India: K. SANGARI, *Politics of Diversity: Religious Communities and Multiple Patriarchies* Economic and political weekly, Vol. 30, No. 51, December 23 1995. See generally, for instance, S. BENHABIB *The claims of culture: equality and diversity in the global era*, (2002) Princeton University Press.

⁴¹For instance, one reference could be to the permission of arbitration in family matters and the risk of undermining women rights in doing so. See as favourable to permitting religious arbitration the report to the Ontario General Attorney by M. BOYD, *Résolution des différends en droit de la famille : Pour protéger le choix, pour promouvoir l'inclusion*, 2004. The final outcome was rather different: see *Family Statute Law Amendment Act*, S.O. 2006, c. 1. In Québec in principle all private arbitration is forbidden « dans toute autre matière qui intéresse l'ordre public ». See *Code civil du Québec*, art. 2639.

One other example is the interplay between religious rules and privately agreed upon clauses in agreements related to family matters and divorce to the extent these are permitted in a given country. See *infra*.

⁴² For an Italian example see, Corte di Cassazione, Sezione Prima Civile, Sentenza del 20 marzo 2008 n. 7472. Text available (in Italian) at http://www.programmaintegra.it/modules/dms/file_retrieve.php?function=view&obj_id=1868

raises a rather different set of issues in terms of equal treatment which can be permitted by constitutions for non-citizens but deemed illegal when citizens form part of the picture⁴³.

Furthermore, different groups of non-citizens can be identified, including permanent residents, migrants, refugees, asylum-seekers, victims of trafficking, foreign students, temporary visitors, other kinds of non-immigrants and stateless people. While each of these groups may have rights based on separate legal regimes, the problems faced by most, if not all, non-citizens are very similar when their choices effectively concerning daily life and ordinary activities are at stake⁴⁴.

In this study our main aim is to go in more depth into the impact that the circulation/migration of individuals is having on private law adjudication and through which techniques it occurs. To investigate the subject we will leave aside whether or not the individuals involved in a case are citizens or immigrants.

A sub-goal, capable of offering further policy guidelines, is the search for possible different techniques used by courts adjudicating in a common law or in a civil law legal system. It is for this reason that Canada is again a natural target of research. Indeed, once this initial research scope is ascertained it will be possible to investigate to what extent, how and to which level of impact the processes of circulation and migration have influenced and/or can influence the evolution of private law rules by posing new problems and issues, arising not only from economic asymmetries but also from social, education, cognitive, cultural, religious, linguistic asymmetries, to name but a sample. Indeed, this analytical process could well be of use in analyzing the anti-discrimination protections in national private laws.

Against this bedrock several problematic issues emerge as crucial in our societies and challenging for the legal systems that regulate them. In short, a map emerges when tackling:

1. the impact of the multiculturalism in some ways necessitated by the circulation of people⁴⁵ on private law rules and the potential tensions ensuing among liberties (e.g. freedom to dispose and contract);
2. the legal instruments used to foster integration in a given society without imposing full homologation (fundamental rights protection vs. reasonable accommodation according to the equality principle and non/discrimination)
3. the potential contrast between protection of minorities (as opposed to majorities) and the protection of individuals within the minorities;
4. the tensions, both new and old, in private law rules in light of the increase of intercultural changes (e.g. refusal to lease; ethnocultural arguments in litigation)⁴⁶.

⁴³The investigation of the actual levels of different treatments between citizens and non-citizens in private law regulated relationships is not the aim of this article. Yet occasionally we will need to face this issue.

⁴⁴ These common concerns affect approximately 175 million individuals worldwide – or 3 percent of the world's population (“World demographic trends: report of the Secretary-General” (E/CN.9/2003/5, para. 53).

⁴⁵ A different pattern of this issue is due to the EU freedoms of circulation and will be dealt within a different article: G. COMANDÈ, *EU freedoms of circulation, multiculturalism and fundamental rights at the intersection of private law*, on file with author.

The four issues listed in the previous paragraph require further investigation and cannot be fully examined in their entirety in this contribution. Here we will confine ourselves to attempting to individuate the main problematic issues and to define a general overview of the avenues of solutions emerging by the analysis of some cases in the Canadian federal and provincial experiences. To do this we shall clarify some notions and the actual references to constitutional or quasi constitutional instruments.

Filling the notions: reasonable accommodation/accommodement raisonnable and its limits

As anticipated, a major technique used in Canada to deal with the problematic we have just outlined is the notion of *accommodement raisonnable* or reasonable accommodation for which in Canada a specific date can be found for its first clear acknowledgement⁴⁷. Scholars⁴⁸ and courts refer to the so called *Simpsons-Sears*⁴⁹ case in which the judges found an instance of indirect discrimination⁵⁰ deriving from the right not to be discriminated against under the general duty to take reasonable steps to reach an agreement with the claimant, short of undue hardship in the regular course of the business⁵¹.

In the words of the court: “The question [of the duty to accommodate] is not free from difficulty. No problem is found with the proposition that a person should be free to adopt any religion he or she may choose and to observe the tenets of that faith. This general concept of freedom of religion has been well-established in our society and was a recognized and protected right long before the human rights codes of recent appearance were enacted. Difficulty arises when the question is posed of how far the person is entitled to go in the exercise of his religious freedom. At what point in the profession of his faith and the observance of its rules does he go beyond the mere exercise of his rights and seek to enforce upon others conformance with his beliefs? To what extent, if any, in the exercise of his religion is a person entitled to impose a liability upon another to do some act or accept some obligation he

⁴⁶See art. 12 and 13 of Quebec Charter of Human Rights and freedoms, available at <http://www.cdpcj.qc.ca/en/commun/docs/charter.pdf>

⁴⁷ Similar notions can be found in Directive 78/200CE.

⁴⁸See, for instance, S. BERNATCHEZ, « Les enjeux juridiques du débat québécois sur les accommodements raisonnables », (2007), 38 R.D.U.S. 233 – 286., 235.

⁴⁹ *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (Appellant O'Malley alleged discrimination on the basis of creed against her employer, a retailer, because she was periodically required to work Friday evenings and Saturdays as a condition of her employment. Appellant's religion required strict observance of the Sabbath from sundown Friday to sundown Saturday. Given this conflict, appellant accepted part-time work because a full-time position not involving work on Saturday was not available to a person with her qualifications. Both the Divisional Court and the Court of Appeal upheld a Board of Inquiry's decision to dismiss the complaint. At issue was whether or not a work requirement imposed on all employees for business reasons discriminated against appellant because compliance required her to act contrary to her religious beliefs and did not so affect other members of the employed group.). See also, P. BOSSET, *Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable*, Commission des droits de la personne et des droits de la jeunesse, Cat. 2.500.128, 1997, 20ff and ID., *Réflexion sur la portée et les limites de l'obligation d'accommodement raisonnable en matière religieuse*, Commission des droits de la personne et de la jeunesse, Cat. 2.120-4.20.1, 2005, 19.

⁵⁰ C. MASSE, *Le critère unifié de l'affaire Meiorin dans le contexte de la défense prévue à l'article 20 de la Charte québécoise*, dans *Les 25 ans de la Charte québécoise* (coll.), Barreau du Québec, Service de la formation permanente (no 142), Cowansville, Éditions Yvon Blais, 2000, p. 74.

⁵¹*Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 *Ibid.* at 555.

would not otherwise have done or accepted? ...To put the question in the individual context of this case: in the honest desire to exercise her religious practices, how far can an employee compel her employer in the conduct of its business to conform with, or to accommodate, such practices? How far, it may be asked, may the same requirement be made of fellow employees and, for that matter, of the general public?”⁵².

In synthesis the court established that “Accepting the proposition that there is a duty to accommodate imposed on the employer, it becomes necessary to put some realistic limit upon it. The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer”.⁵³

Technically speaking, reasonable accommodation accords an individual remedy. Yet, the individual decision has a clear impact on others in similar situations regulating the entire subject.

It is worth noticing that the Canadian Supreme Court did not conceive the notion of reasonable accommodation from scratch. Indeed references are found in several American legislations before the 1980s⁵⁴ and several Canadian Provinces have integrated the notion in general or specific legislations against discrimination without adding very much to it. Among these, we could mention for their importance two statutes, *the Ontario Human Rights Code R.S.O. 1990*⁵⁵, CHAPTER H.19 (art. 11), the Québec *Charte des droits et libertés de la personne (Charter of Human Rights and Freedoms)*,⁵⁶ one of which comes from a civil law system and the other from a common law environment, and to which we should add the federal *Loi canadienne sur les droits de la personne* (art. 15).

The duty of reasonable accommodation⁵⁷ has been qualified as “*obligation juridique*, applicable dans une situation de *discrimination*, et consistant à aménager une norme ou une pratique de portée universelle dans les limites du *raisonnable*, en accordant un traitement différentiel à une personne qui, autrement,

⁵² *Ibid.* at para 21.

⁵³ At para 23.

⁵⁴ There are precedents in US legislation. See also the amendments to the 1972 *Civil Rights Act* (duty to accommodate religious practices), and the *Rehabilitation Act* of 1973 (handicap).

⁵⁵ See for the historical background of one of the oldest Canadian legislation on the issue I. A. HUNTER, *The Development of the Ontario Human Rights Code: A Decade in Retrospect*, (1972) 22 *Univ. T.L.J.* 237.

⁵⁶ *Charte des droits et libertés de la personne*, L.R.Q., c. C-12 (Québec). At federal level see *Loi canadienne sur les droits de la personne*, L.R.C. (1985).

⁵⁷ In Québec see the *Charte des droits et libertés de la personne*, L.R.Q., c. C-12, art. 10. for an application of the duty in relation to sex see *Colombie-Britannique (Public Service Employees Relations Commission) c. B.C.G.S.E.U.*, [1999] 3 R.C.S. 3; for pregnancy see *Commission des droits de la personne c. Lingerie Roxana*, [1995] R.J.Q.1289 (T.D.P.); for the ageing criteria see *Desroches c. Commission des droits de la personne du Québec*, [1997] R.J.Q. 1540 (C.A.); for handicap see *Colombie-Britannique (Superintendent of Motor Vehicles) c. Colombie-Britannique (Council of Human Rights)*, [1999] 3 R.C.S. 868; *Commission des droits de la personne du Québec c. Collège Notre-Dame du Sacré-Cœur*, [2002] R.J.Q. 5 (C.A.); *Centre de la communauté sourde du Montréal métropolitain c. Régie du logement*, [1996] R.J.Q. 1776 (T.D.P.); *Commission des droits de la personne du Québec c. Emballages Polystar*, (1997) 28 C.H.R.R. D/76 (T.D.P.); *CEGEP John-Abbott c. Blouin*, C.S. Montréal, n° 500-17-018750-045, 10 June 2004.

serait pénalisée par l'application d'une telle norme."⁵⁸. Under its auspices we find an obligation "qu'on peut qualifier d'accessoires ou de procédurales, dont celle de faire des efforts « significatifs, sérieux et sincères » en vue de trouver un accommodement et celle, pour la partie qui réclame l'accommodement, de donner à l'autre partie le temps nécessaire pour ce faire"⁵⁹.

The notion is related to the principle of equality; a principle of equality which refuses equal treatment at all costs and fosters differential treatment for different situations to fulfil its goal⁶⁰. To use a metaphor, the notion of reasonable accommodation is the offspring of both the notion of equality and the notion of discrimination⁶¹. It appeared on the Canadian legal scene during the 1980s within the discussion already raised by the enactment in the 1970s of the the *Loi canadienne sur les droits de la personne*, L.R.C. (1985) and of the Québec *Charte des droits et libertés de la personne*⁶². Yet these charters do not mention expressly the concept of reasonable accommodation.

Having thus been first established in the Canadian legal system in the 1980s, the duty of reasonable accommodation was then extended to all forms of prohibited, direct or indirect, discriminations the 1990s⁶³ consolidating a cultural tension which found its origins in the first antidiscrimination statutes during the course of the early sixties of last century.

According to the by now extended notion, the duty of reasonable accommodation works as a sort of objective element in finding a case of discrimination: discrimination can even be unintentional, what counts is the result of discriminatory exclusion⁶⁴. In this sense it is a purely objective notion. Reasonable accommodation serves to take into account any previous disequilibria which possibly have been historically present among different groups of individuals and for which legal norms or socially acknowledged practices constitute a form of crystallization of a *status quo* which is only in appearance neutral⁶⁵. Indeed, an apparently neutral rule can produce discriminatory effects on members of specific groups which have been the subject of historical or systematic biases: – a concept which has been clearly affirmed by the courts⁶⁶.

⁵⁸ P. BOSSET, *Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable*, Commission des droits de la personne et des droits de la jeunesse, Cat. 2.500.128, 2007 p.4.

⁵⁹P. BOSSET, *Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable*, Commission des droits de la personne et des droits de la jeunesse, cit., at 4. recalling *Autobus Legault c. Commission des droits de la personne et des droits de la jeunesse*, T.D.P. *Abitibi* n° 615-53-000001-945, J.E. 94-1965 (T.D.P.), p. 26.

⁶⁰ P. BOSSET, *Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable*, cit., p.1 noticing that also for « l'accommodement raisonnable fait appel à l'esprit éthique: il suppose le respect d'autrui tel qu'il est, mais tient aussi compte d'un tissu social sans lequel il ne saurait exister de communauté humaine. »

⁶¹ Ibid. at 4.

⁶² Charte des droits et libertés de la personne, L.R.Q., c. C-12 (Québec). At federal level see *Loi canadienne sur les droits de la personne*, L.R.C. (1985).

⁶³ See *Colombie-Britannique (Public Service Employees Relations Commission) c. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3.

⁶⁴ On the issue see P. BOSSET, *Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable*, Commission des droits de la personne et des droits de la jeunesse, cit., p. 3 and W. BLACK, *From Intent to Effect: New Standards in Human Rights*, (1980) 1 C.H.R.R. C/-C/6. Note, however, that under the Québec charter intention remains a condition for awarding punitive damages according to art. 49, al. 2. of the Charte.

⁶⁵ See e.g. G. BALFOUR, *Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women*, *Feminist Criminology*, Vol. 3, No. 2, 101-120 (2008)

⁶⁶ See *Commission des droits de la personne et des droits de la jeunesse c. Kayode*, 2007 QCTDP 25.

Such a notion results in the expansion of the reach of the equality principle so as to become larger and more profound than a simple reference to specific prejudices because it is able to embrace the entire institutional setting in which the unequal treatment takes place.

This duty and its realistic limits⁶⁷ are derived from the anti-discrimination charters⁶⁸.

Today's notion⁶⁹ of equality applies to any motive and to any individual. It covers grounds from disability⁷⁰ to religion, from sex discrimination⁷¹ to pregnancy⁷², from age⁷³ to national origin,⁷⁴ especially in work-related matters⁷⁵. With reference to individuals, it applies to anyone and can impose, for example on hotels⁷⁶, restaurants⁷⁷ or bars,⁷⁸ a duty to provide for access for people in wheelchairs or with guide-dog. The surrounding contexts may also be very different: covering public offices such as tribunals⁷⁹ and public school boards⁸⁰ or private institutions as schools⁸¹.

(CanLII), *Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU*, [1999] 3 R.C.S. 3. See in general BARREAU DU QUÉBEC, *Mémoire du Barreau du Québec présenté à la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles « Les droits fondamentaux : Une protection pour toutes et tous »*, *cit.*, at 18.

⁶⁷ *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536: "Accepting the proposition that there is a duty to accommodate ..., it becomes necessary to put some realistic limit upon it." at para 23.

⁶⁸ It is worth asking ourselves if we can find similar principles at EU law arising from antidiscrimination directives and at 13 of the treaty.

⁶⁹ See *infra* the discussion about the *get*.

⁷⁰ *Colombie-Britannique (Superintendent of Motor Vehicles) c. Colombie-Britannique (Council of Human Rights)*, [1999] 3 R.C.S. 868; *Commission des droits de la personne du Québec c. Collège Notre-Dame du Sacré-Cœur*, [2002] R.J.Q. 5 (C.A.); *Centre de la communauté sourde du Montréal métropolitain c. Régie du logement*, [1996] R.J.Q. 1776 (T.D.P.); *Syndicat des employés de techniques professionnelles et de bureau d'Hydro-Québec c. Hydro-Québec*, [2006] R.J.Q. 426 (C.A.), on appeal (C.S.C. no 31395); *Syndicat des infirmières du Nord-Est québécois c. Sylvestre*, [2003] R.J.Q. 1392 (C.A.); *Commission des droits de la personne du Québec c. Collège Notre-Dame du Sacré-Cœur*, [2002] R.J.Q. 5 (C.A.); *CEGEP John-Abbott c. Blouin*, C.S. Montréal, no 500-17-018750-045, 10 juin 2004; *Québec (Procureur général) c. Commission de la fonction publique*, J.E. 2003-259 (C.S.); *Association internationale des machinistes et des travailleurs de l'aéronautique c. Hamelin*, [2002] R.J.Q. 168 (C.S.); *Commission des droits de la personne et des droits de la jeunesse c. Québec (Procureur général)*, J.E. 2005-780, [2005] R.J.D.T. 1110 (T.D.P.); *Commission des droits de la personne et des droits de la jeunesse c. Centre hospitalier de l'Université de Montréal, Pavillon Notre-Dame*, J.E. 2000-1914 (T.D.P.); *Commission des droits de la personne du Québec c. Emballages Polystar*, (1997) 28 C.H.R.R. D/76 (T.D.P.); *Centre de la communauté sourde du Montréal métropolitain c. Régie du logement*, [1996] R.J.Q. 1776 (T.D.P.). 28.

⁷¹ *Colombie-Britannique (Public Service Employee Relations Commission) c. BCGSEU*, [1999] 3 R.C.S. 3; *Commission scolaire des Rives-du-Saguenay c. Rondeau*, J.E. 2002-2147, REJB 2002-35373 (C.S.). On the impact on handicapped individuals and women in Québec see M. GARON - P. BOSSET, *Le droit à l'égalité: des progrès remarquables, des inégalités persistantes*, in *Après 25 ans, la Charte québécoise des droits et libertés*, vol. 2 (*Études*), Commission des droits de la personne et des droits de la jeunesse, 2003, pp. 81-82 and 91-92.

⁷² *Commission des droits de la personne c. Lingerie Roxana*, [1995] R.J.Q.1289 (T.D.P.); *Commission des écoles catholiques de Québec c. Gobeil*, [1999] R.J.Q. 1883 (C.A.); *Commission des droits de la personne et des droits de la jeunesse c. Société de l'assurance automobile du Québec*, [2003] R.J.Q. 1737 (T.D.P.). See also M. DRAPEAU, *La discrimination fondée sur la grossesse mettant en cause la sécurité au travail : une solution s'impose, l'obligation d'accommodement*, (1997) 57 R. du B. 1047.

⁷³ *Commission des droits de la personne du Québec c. Compagnie minière Québec-Cartier*, [1994] R.J.Q. 2729 (T.D.P.), appeal accorded on other reasons J.E. 99-211 (C.A.); *Desroches c. Commission des droits de la personne du Québec*, [1997] R.J.Q. 1540 (C.A.).

⁷⁴ *Commission des droits de la personne et des droits de la jeunesse c. Collège Montmorency*, J.E. 2004-966 (T.D.P.).

⁷⁵ C. BRUNELLE, *Discrimination et obligation d'accommodement raisonnable en milieu de travail syndiqué*, Éditions Yvon Blais, 2001.

⁷⁶ *Commission des droits de la personne et des droits de la jeunesse c. Hôtel Villa de France*, T.D.P. Montréal, 1998 IIJCan 43.

⁷⁷ *Commission des droits de la personne du Québec c. Restaurant Scampinata*, (1996) 23 C.H.R.R. D/392 (T.D.P.).

⁷⁸ *Commission des droits de la personne du Québec c. Bar La Divergence*, [1994] R.J.Q. 847 (T.D.P.).

⁷⁹ *Centre de la communauté sourde du Montréal métropolitain c. Régie du logement*, précitée. Imposing to offer an interpreter to deaf defendants.

⁸⁰ See *Multani c. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 R.C.S. 256 in which a kirpan was allowed into school as long as normal safety exigencies were respected (note that the decision was taken on freedom of religion grounds and reasonable accommodation was only quoted by analogy). See on the issue also: COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Le port du foulard islamique dans les écoles publiques*, Montréal, La Commission, 1994; G.

The duty of reasonable accommodation encounters both internal and external limits. Regarding these latter ones we should mention the distinction between reasonable accommodation and the acknowledgement of other parallel legal orders of the State⁸². The duty of reasonable accommodation indicates the way in which to satisfy the legal rules or social/institutional practices in order remedy a discrimination which would otherwise ensue but without incorporating within State law, for instance, religious principles or ethnical practices.

Similarly, reasonable accommodation is not present any time there is a conflict of values (cultural or religious ones, for instance). In truth, it enters in the picture only when a discriminatory exclusion is present and this exclusion can be linked to one of the motives forbidden by specific legislation⁸³: unless rights are affected there can be no reasonable accommodation issue⁸⁴.

Internal limits remain regarding the respect of the rights of others and, notably, on general welfare protections. These limits must be read as forbidding excessive restrictions (as expressed in *Simpson Sears*) to rights or general welfare⁸⁵.

The elements to be taken into consideration are many and varied. Broadly speaking they encompass amongst other things, the costs⁸⁶ and complications to the duty bearer.

OTIS – C. BRUNELLE, *La Charte des droits et libertés de la personne et la tenue vestimentaire à l'école publique : faut-il un accommodement sur mesure ?*, (1995) 36 *C. de D.* 599-643.

⁸¹ *Commission des droits de la personne du Québec c. Collège Notre-Dame du Sacré-Coeur*, quoted obliging to grant admission to handicapped students able to follow the education programs established by the institution.

⁸² See in Québec with reference to the duty to reasonable accommodate: P. BOSSET - P. EID, *Droit et religion : de l'accommodement raisonnable à un dialogue internormatif?*, dans *Actes de la XVIIe Conférence des juristes de l'État*, Cowansville, Editions Yvon Blais, 2006, p. 63-95.

⁸³ E.g. the Québec charter.

⁸⁴ P. BOSSET, *Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable*, in M. JÉZÉQUEL (edt.), *Les accommodements raisonnables : quoi, comment, jusqu'où?*, Cowansville, Yvon Blais, 2007, 3 at 20.

⁸⁵ See *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, 520-521 for the majority: "I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the Board of Inquiry in the case at bar -- financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case".

⁸⁶ The Commission des droits de la personne et des droits de la jeunesse (P. BOSSET – P. EID, *Droit et religion : de l'accommodement raisonnable à un dialogue internormatif*, Commission des droits de la personne et des droits de la jeunesse, Cat. 2.500.127, 2006, 6-7) summarizes as follows the elements to be taken into account: 1) Les limites des ressources financières et matérielles : le coût réel de l'accommodement demandé; les sources extérieures de financement (prêts, subventions, crédits d'impôts et déductions fiscales, régime gouvernemental d'aide ou d'indemnisation, contribution personnelle de la victime de discrimination...); la nature de l'entreprise ou de l'institution (taille, composition de la main-d'œuvre, structure organisationnelle, structure de production, nature privée ou publique...); le budget d'opération total de l'entreprise (mère et filiales réunies) ou de l'institution; la santé financière de l'entreprise ou de l'institution; la conjoncture économique. 2) L'atteinte aux droits: les risques pour la santé ou la sécurité du salarié, de ses collègues ou du public en général; la convention collective; l'effet préjudiciable de l'accommodement sur les autres employés; les conflits de droits. 3) Le bon fonctionnement de l'entreprise ou de l'institution: l'interchangeabilité relative des employés; l'adaptabilité des lieux, installations et équipements de travail; l'effet sur la productivité de l'entreprise; le nombre d'employés affectés par la mesure d'accommodement envisagée; l'effet bénéfique de l'accommodement sur les autres employés; la durée et l'étendue de l'accommodement".

In principle, potential limitations of the duty should be analyzed in the given social, economic and legal context. Therefore, the specific aims of a public institution shall be taken into account. For instance, in the *Multani* case⁸⁷ (where forbidding the wearing of a kirpan was found to be discriminatory and requiring reasonable accommodation) the court stressed several times the “unique environment” of school institutions, describing them as “living communities which, while subject to some controls, engage in the enterprise of education in which both teachers and students are partners”⁸⁸.

Similarly, according to an important Québécois statute (art. 2 *Loi sur les services de santé et les services sociaux*, L.R.Q., c. S-4.2)⁸⁹, the specificities of individual functional limitations and geographic, linguistic or ethno-cultural characteristics all have to be accounted for in organizing an health care institution providing service.

In addition, the status of the interacting individuals could be of importance – especially where goods and services are offered to the public and, for example, the discriminated persons are “captive” clients (such as in prisons) or incapable of searching for alternatives (e.g. the case of non autonomous individual hosted at health care facilities).

Note that, while the reasonable accommodation duty arises from the reading of the equality principle as explained above, the definition of reasonableness in its application leaves room to take into account the social context in which the duty arises in order to avoid excessive modification in any given social environment and thereby helps in tackling the integration process. This is a key feature which finds its widest implications in the interplay with private law instruments enabling mechanisms for adapting the socio-legal context to the actual factual discrimination without disrupting the context as such, especially when discrimination is indirect or non voluntary.

The political choice to preserve the social structure is the inspiration of the principle⁹⁰ and this characteristic avoid opening the door to every peculiarity or particularism⁹¹ but continuously requires a balancing of general and special interests with the situation to be accommodated.

⁸⁷ *Multani c. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 R.C.S. 256.

⁸⁸ *Ibid.* at para 65.

⁸⁹ « [L]a présente loi établit un mode d'organisation des ressources humaines, matérielles et financières destiné à [...] : 5° tenir compte des particularités géographiques, linguistiques, socio-culturelles, ethno-culturelles et socio-économiques des régions; 6° favoriser, compte tenu des ressources, l'accessibilité à des services de santé et à des services sociaux selon des modes de communication adaptés aux limitations fonctionnelles des personnes; 7° favoriser, compte tenu des ressources, l'accessibilité à des services de santé et des services sociaux, dans leur langue, pour les personnes des différentes communautés culturelles du Québec ».

⁹⁰ M. GARON - P. BOSSET, *Le droit à l'égalité : des progrès indéniables, des inégalités persistantes*, dans *La Charte québécoise des droits et libertés après 25 ans* (Vol. 2), Montréal, Commission des droits de la personne et des droits de la jeunesse, 2003, p. 64: “L'égalité n'est [...] pas un simple objectif idéaliste, il s'agit bien au contraire d'un champ de lutte idéologique particulièrement féroce. L'égalité met en péril les avantages. Sous sa forme la plus radicale, elle déstabilise tout ce qui est familier, place chacun face aux risques personnels que les transformations requises lui feraient courir : son statut, ses pouvoirs, ses biens matériels, ses habitudes. Même sous ses formes plus réduites ou partielles, les arguments contre tel ou tel objectif d'égalité ne manquent pas : on invoque la liberté des choix, le poids à porter par des personnes qui ne sont pas responsables des inégalités observées, ou plus prosaïquement les coûts”.

⁹¹ See the COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Le pluralisme religieux, un défi d'éthique sociale – Document soumis à la réflexion publique* (1995), at 14: “À cet égard, nous semble-t-il, aucune

As we have just seen, this continuous accommodation of the system evolves at the intersection of Charters' rights, specific pieces of legislation and judicial interventions⁹². While we deal with specific legislation in discussing our examples, it is important to give a brief overview of the charters we have been mentioning so far and their interplay.

Applicable charters and the particularity of the Québec Charter of human rights and freedoms

Before the main charters we have already mentioned were enacted, there were several legislative interventions, such as the 1960 Canadian Bill of Rights⁹³ which, in addition to the main protected rights also enumerates protections against some forms of discrimination. Nevertheless, this statute only applies to Canadian laws, tribunals and federal administrations and it has received a rather loose application from judges despite its quasi constitutional qualification⁹⁴.

At the federal level, for our purposes the most important sections of the *Canadian Charter of Rights and Freedoms* are sections:

- 1, 2, 15 (right to the equal protection and equal benefit of the law without discrimination and, in particular, free from discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, without prejudice to any “law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”),
- 26 (“The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.”) and
- 27 (“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”).

solution valable, juste et réaliste à des conflits de droits ne saurait émerger de la tendance actuelle qui consiste à réclamer pour soi tous les droits et toutes les libertés, que l'on soit individu ou institution, sans se reconnaître aussi responsable d'aménager un espace commun, de renouer le lien social, afin d'en favoriser l'exercice pour tous. [...] S'agissant de religion, les droits et libertés peuvent rapidement se retrouver érigés en absolus sacrés qui imposeraient des contraintes à l'ensemble de la société. Or, si les limites des choix privés et les exigences du lien social de réciprocité ne sont pas affirmées, pratiquées, gérées par des citoyens et des institutions capables de consentir à des aménagements du quotidien sans s'abîmer dans d'interminables procès, il y a fort à parier que nous y perdrons au change. C'est pourquoi nous croyons que le pluralisme religieux doit être traité comme toutes les autres formes de pluralisme et soumis aux limites fixées par les exigences de la vie en société”. Similarly the Canadian Supreme Court in *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para 22: “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. This will be especially important where special relationships exist, in the case at bar the relationship of employer and employee. In this case, consistent with the provisions and intent of the *Ontario Human Rights Code*, the employee's right requires reasonable steps towards an accommodation by the employer”.

⁹² Note that specific adjudicating institutions are created by statutes and charters to deal with discrimination: See the Commission des droits de la personne et des droits de la jeunesse in Québec and the Ontario Human Rights Commission for instance.

⁹³ L.R.C. (1985), App. III.

⁹⁴ *Authorson c. Procureur général du Canada*, 2003 CSC 39 (CanLII, [2003] 2 R.C.S. 40 (par. 31), REJB 2003-44762).

Also, we must keep in mind that this Charter does not apply to private law, at least, not directly. Nevertheless, it is of valuable interest to our work, since the Canadian Charter, as a part of the Constitution, is the “supreme law” of Canada. In other words, “human rights legislation must conform to constitutional norms, including those set out in the Canadian Charter”. Thus, all specific Charters from the different Provinces must abide by its principles as they emerge from case law⁹⁵. On this account it is worth noticing that Québec never agreed to the repatriation of the Constitution to which the Canadian Charter is included. Nevertheless, Québec citizens also enjoy the protection of the Canadian Charter⁹⁶ which is, in several directions, less extended than the one offered by the Québec Charter itself.

The Canadian Charter of 1982 was preceded by the Canadian Human Rights Act⁹⁷, which came into force in 1978 and outlaws discrimination in specific areas (employment and delivery of goods and services) with a list of grounds larger than the one contained in the Canadian Declaration: race, national or ethnic origin, colour, religion, age, sex, marital status, family status, pardoned conviction, disability, and sexual orientation. Similarly to the Québec Charter⁹⁸ the Canadian Human Rights Act established The Canadian Human Rights Commission (C.C.D.P.) and conferred upon it the role of hearing complaints of discrimination. It is worth noting also that the statute applies amongst private parties operating under federal law, and in this regard it enjoys a quasi-constitutional status⁹⁹.

Québec adopted its *Charte des droits et libertés de la personne (Charter of human rights and freedoms)*¹⁰⁰ in 1975 (it entered into force on June 28th 1976). The *Charte Québécois* enumerates a large range of rights and

by the Canadian Supreme Court).

⁹⁵ See, for instance with reference to the Québec charter Québec (Commission des droits de la personne et des droits de la jeunesse) c. Montréal (Ville); Québec (Commission des droits de la personne et des droits de la jeunesse) c. Boisbriand (Ville), [2000] 1 R.C.S. 665, par. 42: “...While there is no requirement that the provisions of the [Québec] Charter mirror those of the Canadian Charter, [...] they must nevertheless be interpreted in light of the Canadian Charter. Thus, when a statutory provision is open to more than one interpretation, it must be interpreted in a manner consistent with the provisions of the Canadian Charter”. See also: N. HOLMES, *Les lois sur les droits de la personne au Canada et la Charte : Guide comparatif*, Ottawa, Bibliothèque du Parlement, Service de recherche, 1992, c1997, at 7. More recently and for an overview see H. BRUN, *Chartes des droits de la personne*, 17^e édition, Montréal, Wilson et Lafleur Ltée, 2004, p.839-855; C. BRUNELLE, *Les droits et libertés fondamentaux*, dans ÉCOLE DU BARREAU DU QUÉBEC, Volume 7 - *Droit public et administratif*, Cowansville, Éditions Yvon Blais, 2009, 125; Nancy HOLMES, *Human rights legislation and the Charter : A comparative Guide*, Ottawa, Parliament library, Law and Government Division, 1992, c1997, at 7, available at: <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/MR/mr102-e.htm>

⁹⁶ *Re : opposition à une résolution pour modifier la Constitution*, 1982 CanLII 219 (C.S.C.), [1982] 2 R.C.S. 793, 806; *Renvoi relatif à la sécession du Québec*, 1998 CanLII 793 (C.S.C.), [1998] 2 R.C.S. 217, REJB 1998-07695 (par. 47). For the interplay between the different legal instruments and their application in Québec see generally A.R. NADEAU, *La Charte des droits et libertés de la personne: origines, enjeux et perspectives*, in *Revue du Barreau/ Numéro thématique hors série*, 2009, 1, 8ff and pertinent footnotes. Federal courts have ignored the Québec Charter for several years. See for the first application *Forget c. Québec*, [1988] 2 R.C.S. 90. See also N. HOLMES, *Les lois sur les droits de la personne au Canada et la Charte : Guide comparatif*, cit., 7.

⁹⁷ [L.R.C. \(1985\), c. H-6](#).

⁹⁸ See *infra*.

⁹⁹ *Canada (Chambre des Communes) c. Vaid*, 2005 CSC 30 (CanLII) [2005] 1 R.C.S. 667, EYB 2005-90618 (par. 81).

¹⁰⁰ [L.R.Q., c. C-12](#). It is worth noticing that the expression “droit de la personne” to refer to fundamental rights which raise from civil law finds its origins in the idea to proclaim in the civil code those fundamental rights which have a role in the interplay among private individuals. See. P. MOREL, *La Charte québécoise: un document unique dans l'histoire législative canadienne*, (1987) R.J.T., 1 5-6. See generally A.R. NADEAU, *La Charte des droits et libertés de la personne: origines, enjeux et perspectives*, in *Revue du Barreau/ Numéro thématique hors série*, 2009, 1, 7ff (criticizing the reductionist approach to the Québec Charter).

liberties and institutes a *Commission des droits de la personne et des droits de la jeunesse* (C.D.P.D.J.) whose “jurisprudence” has been highly influential in the actual evolution of the protection offered by the equality principle. The goal of the Commission is mainly to promote the Québec *Charte* and to watch over the respect of the equality right. In 1982, the Charter experienced an enlargement of the list of discriminative motivations and the affirmation of its substantial preponderance on all laws of Québec¹⁰¹. The one just mentioned is a key reform which coincided with the entering into force of the *Canadian Charter of Rights and Freedoms* which is adopted as Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

Note that Québec was among the last Provinces to adopt comprehensive antidiscrimination laws, while the first was certainly Ontario which adopted such a legislation in 1962 to protect people against discrimination in employment¹⁰², accommodation¹⁰³, goods, services and facilities¹⁰⁴, and membership of vocational associations and trade unions¹⁰⁵. The Ontario Human Rights Code today includes fifteen grounds of discrimination: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed (religion), sex (including pregnancy), sexual orientation, disability, age (18 and over, 16 and over in occupancy of accommodation), marital status (including same sex partners), family status, receipt of public assistance (in accommodation only) and record of offences (in employment only).

The various instruments we have mentioned very often overlap in the protection they offer. Overall, a large array of discriminatory motivations are listed. In our further analysis we will refer mainly to the application of the Ontario and Québec antidiscrimination charters concentrating on the latter because of its special (and explicitated) relation with the Québec civil code.

The Québec Charter and its interplay with private law

The Québec *Charter of human rights and freedoms*, which applies in both private and public law contexts, was interpreted by the Canadian Supreme Court in a way which excluded the autonomous creation of a system of liability for its infringement¹⁰⁶. Case law established that in order to receive compensation all the elements of liability required by the civil laws had to be shown (negligence, damages, causation).

¹⁰¹ The Québec *Charter* has a chapter of more than 20 articles devoted to «Droit à l'égalité dans la reconnaissance et l'exercice des droits et libertés».

¹⁰² Including recruiting, application forms, interviews, office dress codes and shift schedule promotions.

¹⁰³ Including rental accommodation such as condominium apartments, college residences, hotel/motel facilities and housing.

¹⁰⁴ Schools, school boards, shops, restaurants, hospitals, schools, correctional facilities and insurance services.

¹⁰⁵ See *Policy on creed and the accommodation of religious observances*, Ontario Human Rights Commission, ISBN – 0-7778-6518-1, 1996, 1.

¹⁰⁶ See *Béliveau St-Jacques c. Fédération des employées et employés de services publics Inc.*, (1996) 1 R.C.S. 345; *Curateur public c. Syndicat national des employés de l'Hôpital St-Ferdinand*, [1996] 3 R.C.S. 211.

Indeed, in the *Béliveau* case, the court interpreted art. 49 of the Charter (permitting compensatory and punitive damages) as excluding any autonomy for the rule¹⁰⁷.

In the *Curateur public c. Syndicat national des employés de l'Hôpital St-Ferdinand* the Canadian Supreme Court took the opportunity to specify the notions of integrity and dignity. Justice l'Heureux-Dubé specified that "The common meaning of the word "inviolability" suggests that the interference with that right must leave some marks, some sequelae which, while not necessarily physical or permanent, exceed a certain threshold. The interference must affect the victim's physical, psychological or emotional equilibrium in something more than a fleeting manner."¹⁰⁸. Also, referring to dignity, the court clarified that "Having regard to the manner in which the concept of personal "dignity" has been defined, and to the principles of large and liberal construction that apply to legislation concerning human rights and freedoms, I believe that s. 4 of the *Charter* addresses interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself.... because of the underlying concept of respect, the right to personal dignity, unlike the concept of inviolability, does not require that there be permanent consequences in order for interference with that right to be found. Thus, even a temporary interference with a fundamental attribute of a human being would violate s. 4 of the *Charter*. This interpretation is also based on the nature of the other rights protected by s. 4 -- honour and reputation: *noscitur a sociis*. It is not necessarily a requirement, in order for there to be a violation of these guarantees, that there be permanent effects, although the effects may be permanent"¹⁰⁹. Despite this broad definition, the court clarified that compensatory damages are linked to the presence of all elements of illegality according to *jus commune* while punitive damages under art. 49 are mainly related to the intentional character of the violation of the right. The language used is rather clear: "there will be unlawful and intentional interference within the meaning of the second paragraph of s. 49 of the *Charter* when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause. This test is not as strict as specific intent, but it does

¹⁰⁷ Yet, there was a strong dissenting on the autonomy of punitive damages from the justices Heureux-Dubé and La Forest) according to which punitive damages compensation under art. 49 of the Charter presents an exception to *droit commun*. See *Béliveau St-Jacques c. Fédération des employées et employés de services publics Inc.*, cit., 411

¹⁰⁸ *Curateur public c. Syndicat national des employés de l'Hôpital St-Ferdinand*, [1996] 3 R.C.S. 211, 253. Similar arguments have been used in Italy to define the boundaries of compensable non-economic losses by the Supreme Court. See. For references A. D'Angelo, G. Comandé, D. Amram (eds), *La liquidazione del danno alla persona. Riflessioni e prospettive ad un anno dalle SS.UU. nn. 26972-26975 del 2008*, Milano, Il sole 24 ore, 2010.

¹⁰⁹ *Curateur public c. Syndicat national des employés de l'Hôpital St-Ferdinand*, cit., 211.

go beyond simple negligence. Thus, an individual's recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test"¹¹⁰.

Only two years later the court sustained that an infringement of the Charter is not sufficient to trigger compensation: "Where extrapatrimonial damages are concerned, we agree with Baudouin J.A. that the infringement of a right guaranteed by the *Québec Charter* is in itself insufficient to establish that damage has been sustained. Nor is an award of symbolic damages justified when the courts wish to punish the infringement of a right that will, in most cases, result in minimal injury. This would be contrary to the principles of civil responsibility. The damages must, therefore, be proven"¹¹¹. Compensation (or more precisely non-economic damages) are not *in re ipsa, per se* in the violation of the Québec Charter. Damages must be proved and beyond a certain degree of tolerance otherwise the continuous threat of an action for damagers could have overreaching effects.

In dealing with discrimination based on disabilities the court stated in the *Boisbriand* case that "The objectives of the *Charter*, namely the right to equality and protection against discrimination, cannot be achieved unless we recognize that discriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. Since the very nature of discrimination is often subjective, assigning the burden of proving the objective existence of functional limitations to a victim of discrimination would be to give that person a virtually impossible task. Functional limitations often exist only in the mind of other people, in this case that of the employer"¹¹². As we anticipated, the above examples and excerpts from several Canadian Supreme Court decisions show a clear trend from the Supreme Court to reduce the impact of the Québec Charter and to equate its notions to those included in the Canadian Bill of Rights and Charter and to conform the impact of damages compensation encompassed in the Québec Charter to the general rules provided for by the civil code.

Yet, the Québec Charter applies among private subjects and has a provision (art. 52) which proclaims for it a higher status than the civil code¹¹³ and the *jus commune*: "No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter." This provision and the obsequy paid by Québec's courts casts the Quebec Charter at a sort of quasi constitutional status able to invalidate (better: to force a non discriminatory interpretation of the norm) any (even subsequent)

¹¹⁰ *Curateur public c. Syndicat national des employés de l'Hôpital St-Ferdinand*, cit., 262, referring to *West Island Teachers' Association v. Nantel*, [1988] R.J.Q. 1569 (C.A.).

¹¹¹ Contrary to several scholars' opinion (see, among several, L. PERRET, *De l'impact de la Charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec*, 12 *Rev. Gen.* 122 1981). See *Aubry v. Éditions Vice-Versa*, [1998] 1 S.C.R. 591 at para 68-69.

¹¹² *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665 at para 39.

¹¹³ In addition see the preamble to the Québec civil code quoted in the text.

Québec law in contrast with it. Of course, this state of the art might create tensions with the Canadian charter.

In addition, a special link with (and role for) the civil code is expressly acknowledged. The Preliminary Provision to the civil code provides that “ The Civil Code of Québec, in harmony with the Charter of Human Rights and Freedoms and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.” Because of this role, and recalling an old expression referred to in the French civil code¹¹⁴, the Québec civil code has been referred to as the “civil constitution” (of Québec)¹¹⁵. Nevertheless, case law has not always been coherent with these premises¹¹⁶.

The actual status of the interplay between the Québec Charter and the civil code as *jus commune* was clarified by the Court in the case *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*¹¹⁷: “Despite occasional disagreements over the appropriate means of redress, the case law of this Court, although the law is undoubtedly still in its early stages of development in this area, stresses the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights [..]”¹¹⁸. We should also not lose sight of the fact that enactments such as the *Quebec Charter* occasionally require interventions that are in no way related to the law of civil liability. It is sometimes necessary to put an end to actions or change practices or procedures that are incompatible with the *Quebec Charter* even where there is no fault within the meaning of the law of civil liability. The law of civil liberties may draw upon the law of civil liability where circumstances warrant. The law of delict does not set limits on the enforcement of the law of civil liberties. Thus, in the context of seeking appropriate recourse before an administrative body or a court of competent jurisdiction, the enforcement of this law can lead to the imposition of affirmative or negative obligations designed to correct or bring an end to situations that are incompatible with the *Quebec Charter*.” In this way the Charter has an impact which goes beyond tort law and varies according

¹¹⁴ J. CARBONNIER. *Le code civil*, in P. NORA (edt.), *Le lieux de la mémoire*, t. II, La Nation, 1986, Paris, Gallimard, 1986, 309.

¹¹⁵ See P.-A. CRÉPEAU, *La réforme du droit civil canadien. Une certaine conception de la recodification 1965-1977* in S. LORTIE, N. KASIRER, J.-G. BELLEY (dir.), *Du Code civil du Québec* (Montréal: Thémis, 2005), 23-25.

¹¹⁶ Please refer again to the cases quoted above. See generally for a synthesis F. ALLARD, *La Charte des droits et libertés de la personne et le Code Civil du Québec : deux textes fondamentaux du droit civil québécois dans une relation d'«harmonie ambiguë»*, in *Revue du Barreau/ Numero thématique hors série*, 2009, 33, 66ff.

¹¹⁷ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789 at para 26.

¹¹⁸ Citation omitted in the text. See *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 CSC 62, at paras. 24-25 and 94.

to the rights brought to the courts' attention¹¹⁹. Yet the potential availability of compensation remains one of the key enforcing instruments of the Charter¹²⁰.

Keeping this in mind we will further investigate case law (both in Québec and Ontario) without referring to the issues of tort compensation the Charter(s) since our restricted goal is now to ascertain some implications of the interplay between the Charters and private law at a larger scale.

Drawing from cases, designing from principles

A. The example of religious accommodation between secularization and multiculturalism in private law.

Section 3 of the Quebec *Charter*, which applies in both the private and public law context, states: "Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association."

The impact of the duty to reasonably accommodate when religious matters are involved is directly related to the notion of religion as adopted, and it is sometimes confused or mixed with the interplay with the freedom of religion¹²¹.

The subjective definition¹²² of creed built, for example, by the Ontario Human Rights Commission on previous decisions is a rather broad one. In practice it excludes the requirement of any official or institutional endorsement by a religious group or establishment:

¹¹⁹ See next paragraphs for examples and in general F. ALLARD, *La Charte des droits et libertés de la personne et le Code Civil du Québec : deux textes fondamentaux du droit civil québécois dans une relation d'«harmonie ambiguë»*, *cit.*, 73ff. For the understanding that civil law is somehow subordinated to the charter see M. DRAPEAU, *La responsabilité pour atteinte illicite aux droits et libertés de la personne*, (1994), 28 R.J.T. 31.

¹²⁰ See L. LALONDE, *L'application de la Charte des droits et libertés de la personne dans le monde vécu, de la protection civiliste à la promotion des droits fondamentaux - Réflexion sur le rapport entre la Charte et le monde vécu* in *Revue du Barreau/ Numéro thématique hors série*, 2009, 321ff. See also S. GAGNON, *Quelques observations critiques sur le droit à une réparation selon la Charte des droits et libertés de la Personne*, in TRIBUNAL DES DROITS DE LA PERSONNE ET LE BARREAU DU QUÉBEC, *dir.*, *La Charte des droits et libertés de la personne : pour qui et jusqu'où?*, Cowansville, Cowansville, Yvon Blais, 2005, 269.

¹²¹ See J. WOEHLING, *L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse*, (1998) 43 *Revue de droit de McGill* 364.

¹²² See *Syndicat Northcrest c. Amselem*, [2004] 2 R.C.S. 551. The court said literally: « only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith. » (*Amselem*, par. 39). According to scholars virtually every judicial decision based on s. 2(a) of the *Canadian Charter* or s. 3 of the *Quebec Charter* concerns freedom of religion. However, it would appear that these decisions stress the subjective aspect of the believer's personal sincerity rather than the objective aspect of the conformity of the beliefs in question with established doctrine. See almost literally J. WOEHLING, *L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse*, (1998), 43 *McGill L.J.* 325 at 385.

“Creed is interpreted to mean “religious creed” or “religion.” It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite.

Religion is broadly accepted by the Commission to include, for example, non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures, as well as bona fide newer religions (assessed on a case by case basis).

The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed”¹²³.

Clearly enough, this notion reaches out for practices we would possibly classify as customs or cultural practices not related to religion and it does not take into account previous behaviours or practices of the claimant. Nevertheless, for the Canadian Supreme court “claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make...a person must show “[s]incerity of belief” and not that a particular belief is “valid””¹²⁴.

Put otherwise: “[The] Court’s past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials”¹²⁵. Consequently, “both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) Charter. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection”¹²⁶.

¹²³See *Policy on creed and the accommodation of religious observances*, Ontario Human Rights Commission, ISBN – 0-7778-6518-1, 1996, 2. See also cases emphasizing the sincerity as an element important and sufficient to qualify something as a religious belief. See R. c. *Big M Drug Mart*, [1985] 1 R.C.S. 295; R. c. *Edwards Books and Arts*, [1986] 2 R.C.S. 713; R. c. *Jones*, [1986] 2 R.C.S. 284. Note that also in the US a subjective, personal and deferential definition of freedom of religion, centred upon sincerity of belief has been adopted in several cases. See, for instance, *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), in which Justice Burger stated that “. the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. ... Courts are not arbiters of scriptural interpretation”. see also *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), at p. 834 in which the court unanimously rejected “the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization”; it was satisfied that claimant’s action “was based on a sincerely held religious belief”.

¹²⁴ *Syndicat Northcrest c. Amselem*, [2004] 2 R.C.S. 551at para 43 (quotations omitted).

¹²⁵ *Syndicat Northcrest c. Amselem*, *cit.*, at para 46.

¹²⁶ *Syndicat Northcrest c. Amselem*, *cit.*, at para 47.

In short it “protects personal religious beliefs, practices or observances, even if they are not essential elements of the creed”¹²⁷ but it “does *not* include secular, moral or ethical beliefs or political convictions”¹²⁸ and does not cover religions which incite to violence or odium. Conversely refusal to participate in religious practices or beliefs is protected¹²⁹. This leads to an obligation to be tolerant towards different religious practices¹³⁰.

On these premises any behaviour or rule which denies equal treatment and does not pass any statutory justification test¹³¹ amounts to discrimination¹³² be it either direct or indirect.

Discrimination is direct, for example, in giving preference to a prayer over another in opening schools¹³³. Discrimination is indirect, for example, in case of refusal to sublet because the landlord prefers to rent to people sharing her own religious beliefs¹³⁴. Discrimination can also be constructive, if no justification for it applies, “*Where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member*”¹³⁵.

The Ontario *Human Rights Code* notion of duty to accommodate arises “when a person's religious beliefs conflict with a requirement, qualification or practice”¹³⁶.

In dealing with the need to accommodate religious belief it is noteworthy to discuss whether potential discriminatory factors which originally were born as clearly religiously oriented have now been secularized¹³⁷. The issue has been posed clearly dealing with Good Friday as a now secularized

¹²⁷ See *Singh v. Workmen's Compensation Board Hospital & Rehabilitation Centre* (1981), 2 C.H.R.R. D/549 (Ontario Board of Inquiry); *Bhinder v. Canadian National Railway Co.* (1981), 2 C.H.R.R. D/546 (Cdn. Human Rights Tribunal), reversed [1983] 2 F.C. 531, affirmed [1985] 2 S.C.R. 561.

¹²⁸ But see *Obdeyn v. Walbar Machine Products of Canada Ltd.* (1982), 3 C.H.R.R. D/712 (Ont. Bd. of Inquiry) at D/716 - D/717-. However it covers atheists and agnostics when the targeted individual does not share the same religious belief. It covers also autochthon spiritualistic beliefs. See P. BOSSET, *Réflexion sur la portée et les limites de l'obligation d'accommodement raisonnable en matière religieuse*, Commission des droits de la personne et de la jeunesse, Cat. 2.120-4.20.1, 2005, 8.

¹²⁹ See in the Charter context *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536.

¹³⁰ See P. BOSSET - P. EID, *Droit et religion : de l'accommodement raisonnable à un dialogue internormatif*, Commission des droits de la personne et des droits de la jeunesse, Cat. 2.500.127, 2006, 5.

¹³¹ For instance, S. 24(1)(a) of the Ontario Human Rights Code permits to an institution primarily serving the interests of an identifiable religious group (so called special interest organizations) to prefer their members as job applicants.

¹³² See *Dufour v. J. Roger Deschamps Comptable Agréé* (1989), 10 C.H.R.R. D/6153 (Ont. Bd. of Inquiry) at 6170, establishing that “[h]arassment or discrimination against someone because of religion is a severe affront to that person's dignity, and a denial of the equal respect that is essential to a liberal democratic society”.

¹³³ See *Opening and Closing Exercises for Public Schools in Ontario* (Ministry of Education and Training, 1993). See also *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (Ont. C.A.).

¹³⁴ S. 9 of the Ontario Human Rights Code.

¹³⁵ Section 11(1) of the Ontario Human Rights Code.

¹³⁶ It applies also in case of constructive discrimination. “Subsection 11(2) of the *Coe* imposes the duty to accommodate in cases of constructive discrimination: Subsection 11(2) OHRC. *The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any*”.

¹³⁷ For similar arguments used by a European court see the Dutch case *HR 30 March 1984, NJ 1985, 350 (Suikerfeest)*, with a comment by ALKEMA. In general see C. MAK, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Kluwer International, 2008.

holiday¹³⁸. Yet, deciding the issue, the court went along in stating that “Here the schedule of work is based upon the Catholic calendar of holidays. Nonetheless, I think the calendar should be taken to be secular in nature and thus neutral or non-discriminatory on its face. It will be remembered that the majority of the Court of Appeal determined that since the calendar did not have any religious aims, it was not discriminatory. With respect, I think this was an erroneous conclusion. It is true that this approach can properly serve to determine that there has been no direct discrimination. However, the analysis cannot stop there. Consideration must still be given to the effect of the calendar in order to determine if there is indirect or adverse effect discrimination”¹³⁹.

The final outcome is that “secularization” of originally religious factors can impact on direct discrimination but it does not eliminate the threat of indirect discrimination¹⁴⁰. Indeed, the notion of religion which is retained tries to take into account the changes in values experienced in modern western societies¹⁴¹ and the fragmentations of religions¹⁴² and more than secularity of the State we should talk about State neutrality¹⁴³.

The debate on reasonable accommodation relative to discrimination based on religious grounds (in the broad sense described) has a clear impact on private law matters. For instance, although the main grounds for the decision was freedom of religion, the judgment in the *Amselem* case remains a landmark

¹³⁸ *Commission scolaire régionale de Chambly v. Bergevin* (1994) 22 C.H.R.R. D/1 (S.C.C.) [three Jewish teachers employed by a Catholic school board were denied access to the special purpose paid-leave provisions in the collective agreement so that they could observe Yom Kippur, unless they took a day off without pay]. As established per Mr. Justice Cory “... Christian holy days of Christmas and Good Friday are specifically provided for in the calendar. Yet, members of the Jewish religion must take a day off work in order to celebrate Yom Kippur. It thus inevitably follows that the effect of the calendar is different for Jewish teachers . . . [t]hey . . . must take a day off work while the majority of their colleagues have their religious holy days recognized as holidays from work. In the absence of some accommodation by their employer the Jewish teachers must lose a day's pay to observe their holy day. It follows that the effect of the calendar is to discriminate against members of an identifiable group because of their religious beliefs. The calendar or work schedule is thus discriminatory in its effect”.

¹³⁹ Emphasis in original.

¹⁴⁰ The Ontario Human Rights Commission derived from *Chambly* a set of principles useful to remember: “i) The employer has a duty to consider and grant requests for religious leave, including paid religious leave, unless to do so will cause undue hardship. ii) Equality of treatment requires at a minimum that employees receive paid religious days off, to the extent of the number of religious Christian days that are also statutory holidays, namely two days (Christmas and Good Friday). iii) The number of paid days may be three under some collective agreements which also make Easter Monday a holiday. iv) Beyond this point, *i.e.*, two or three days, individuals may still seek accommodation. For example, measures might include additional paid leave days such as floating days or compassionate leave days, if such exist under company policy or collective agreements, or through unpaid leave. v) The standard for *all* accommodation requests is undue hardship, which places a specific burden on the employer to produce evidence to the standard of undueness of the hardship and of its effect”. See *Policy on creed and the accommodation of religious observances*, Ontario Human Rights Commission, ISBN – 0-7778-6518-1, 1996, 12.

¹⁴¹ See F. FOURNIER - M. COUTU, *Le Québec et le monde 1975-2000 : mutations et enjeux*, in *Après 25 ans, la Charte québécoise des droits et libertés de la personne*, (vol. 2), 2003, at 7-10.

¹⁴² By the early 1990s Québec was already home to more than a thousand new religious or spiritual groups. See L. GAGNÉ, « Nouvel âge, nouvelles croyances », *Santé Société*, vol. 12 (1990), n° 4, p. 43. See also M. MILOT, *Laïcité dans le Nouveau Monde : le cas du Québec*, Éditions Brepols (Belgique), 2002, at 116.

¹⁴³ See J. WOEHLING, *Neutralité de l'État et accommodements : convergence ou divergence?*, *Options politiques*, septembre 2007: “Il serait sans doute plus à propos de parler de la neutralité de l'État, comme principe voulant que «l'État se comporte de la même façon à l'égard de toutes les religions et qu'il n'en privilégie ou n'en défavorise aucune par rapport aux autres, de même qu'il ne privilégie ou ne défavorise pas les convictions religieuses par rapport aux autres attitudes à l'égard de la religion”.

one and an important example of the ethnic-religious issues on private law. In *Amsalem*¹⁴⁴ permission for the temporary building in his own balcony of a “succah” necessary for the purposes of fulfilling a biblically mandated obligation during the Jewish religious festival of “Succot”¹⁴⁵ was denied by the syndicate of co-owners in light of the declaration of co-ownership, which amongst other things forbade any alteration of the balcony itself since “a) On porches, an area at least as wide as is required under fire safety by-laws must be kept free of garden furniture and other accessories, as the porches serve as emergency exits. b) No owner may enclose or block off any balcony, porch or patio in any manner whatsoever or erect thereon constructions of any kind whatsoever.” In addition “nothing other than usual outdoor furniture may be left or stored on a balcony or porch without first obtaining permission in writing from the Board of Directors. Under no circumstances may balconies or porches be used for drying laundry, towels, etc. No balcony or porch may be decorated, covered, enclosed or painted in any way whatsoever without the prior written permission of the co-owners or the Board of Directors, as the case may be.”

Despite all these prohibitions, none of the co-owners, all Jewish observants, had read the declaration of co-ownership before purchase. The building administration proposed to accommodate the Succot requirements by permitting a common “succah” in the common area. One of the co-owners disagreed assuming this would not fulfil the biblical requirements. Hence, the issue of defining the relevant notion of “religious belief” showed its potential to become decisive.

In defining what is religion the court, per Iacobucci J., assumed the reasoning of Dickson J in *Big M Drug Mart Ltd.*¹⁴⁶ stating that a “... truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that. . . . Freedom means that . . . no one is to be forced to act in a way contrary to his beliefs or his conscience. . . With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be. . .”¹⁴⁷.

¹⁴⁴ Relevant law for the case was 18 *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. Relevant provisions from the Civil Code of Québec were articles 1039, 1056, 1063.

¹⁴⁵ According to *Syndicat Northcrest c. Amsalem*, [2004] 2 R.C.S. 551 at para 7: “Technically, a succah must minimally consist of a three-walled, open-roofed structure which must meet certain size specifications in order to fulfill the biblical commandment of dwelling in it properly according to the requirements of the Jewish faith. While a succah is usually festively decorated interiorly, there are no aesthetic requirements as to its exterior appearance.”

¹⁴⁶ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para 40-41.

¹⁴⁷ Emphasis added in J. Iacobucci quote.

According to Dickson J.¹⁴⁸: “Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.”

In the *Anselem* case, despite the clear wording of the declaration of co-ownership the court maintained a judgement of discrimination on grounds of religion for not accommodating the need of a individual “succah”. Again the main grounds of the decision remained the freedom of religion while the duty of reasonable accommodation was only recalled by analogy. Yet, a private agreement freely entered into by consentient adults did not resist the proof of accommodation.

It is therefore worth investigating further this example to gain more insights on the issue of the interplay between reasonable accommodation and private law¹⁴⁹.

B. The interplay between religious norms and State private law: some remarks and examples on marriage, divorce and damages.

Accommodating religious beliefs does not mean, in automatic terms, integrating religious norms into State law¹⁵⁰. In reality, specific legislation exists which in various ways force us to take into account religious norms within the application of private law. Notably, in the domain of family law and divorce, the issue has been raised a number of times. According to some scholars¹⁵¹ and some case law¹⁵² there is not a complete ban, deriving from State religious neutrality, towards a normative pluralism in society¹⁵³ leading to the possibility of ascertaining on a case by case basis the compatibility with the State legal order of the ethical-normative content of norms deriving from moral or religious norms.

¹⁴⁸ In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para 346.

¹⁴⁹ On the interplay between civil rules and religious rules in the recent Canadian debate see R. LECKEY, *Profane Matrimony*, *Canadian Journal of Law and Society*, Vol. 21, No. 2, pp. 1-23, 2006.

¹⁵⁰ On the obligation of full religious neutrality for modern Canada and Quebec see José WOEHLING, *L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse*, (1998) 43 *Revue de droit de McGill* 370-375.

¹⁵¹ B. BERGER, *The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State*, (2002) (17)1 *Revue canadienne Droit et Société* 39-68.

¹⁵² *Contra* see *Levitts Kosher Foods Inc. c. Levin et al.* (1999) 175 D.L.R. (4th) (O.S.C.J.); *Kaddoura c. Hammoud*, (1999) 168 D.L.R. (4th) 503 (O.C.); *Marcovitz c. Brucker*, [2005] QCCA 835 (C.A.). But see *Chamberlain c. Surrey School District No. 36*, (2000) 191 D.L.R. (4th) 222 (B.C.C.A.), voided on: [2002] 4 R.C.S. 710.

¹⁵³ “Freedom of religion is not absolute. It is only those manifestations of religious conscience that advance and protect human dignity, autonomy, and security – those manifestations of religious conscience that are resonant with civic values – that find protection under the Charter”. See B. BERGER, *The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State*, (2002) (17)1 *Revue canadienne Droit et Société* 67-68.

Is it possible to advance an inter-normative¹⁵⁴ dialogue between the State legal order and the set of norms emerging in religions without renouncing the supremacy of State law and the paramount protection of fundamental rights and liberties? In a sense the entire contractual law is already the production of private individuals, but this fact does not limit the unifying (and limiting) role of State law on it¹⁵⁵.

From the private law standpoint, acceptance of non-State norms (legal pluralism) is acceptable and workable as long as they can be “reduced” to the language of State law¹⁵⁶. This can happen by way of open concepts (e.g. good faith, public order, moral customs, wrongfulness,...) and their use in the judicial process or the requalification of “external” norms in light of the constitutional (or Provincial Charters in the case of Canada) values.

In those contexts in which even the contract has an important relational component this process would require an even larger sensibility¹⁵⁷. These inter-normative dialogues will often need to be expressly framed by the law.

A significant example is the Canadian legal provision to avoid blackmailing or abuses which can be found in contractual agreements, apparently neutral and fair, related to divorce by spouses who according to religious norms can maintain barriers to remarriage. In these instances Canadian law¹⁵⁸ permits the judge to “subject to any terms that the court considers appropriate, dismiss any application filed by that spouse under this Act, and strike out any other pleadings and affidavits filed by that spouse”¹⁵⁹.

The rule clearly applies in the example of the Jewish religious divorce. Under Jewish religious norms divorce is a mutual contract but to be valid the husband should formally (in front of a commission of three rabbis) convey to his wife the act of divorce (*Get*) and she should accept it for a valid divorce to

¹⁵⁴ M.M. KLEINHANS – R. MACDONALD, *What is a Critical Legal Pluralism*, (1997) 12(2) *Revue canadienne Droit et société* 39. For an early reflexion on the issue and reference to XX century legal theorists see J.G. BELLEY, *L'État et la régulation juridique des sociétés globales. Pour une problématique du pluralisme juridique*, (1986) 18(1) *Sociologie et sociétés* 11-33.

¹⁵⁵ See in this directions M. COUTU, *Le pluralisme juridique chez Gunther Teubner : La nouvelle guerre des dieux?*, (1997) 12(2), *Revue Canadienne Droit et Société* 103-104.

¹⁵⁶ M. COUTU, *Contrat et autoréférence en droit suivant Gunther Teubner : une “méprise constructive”*, (1998) 40 *Revue interdisciplinaire d'études juridiques*, 1-46: « le système juridique connaît [...] un conflit permanent entre le droit étatique et les ordres juridiques pluriels de la société [...]. La conciliation des conflits de rationalité liés au déploiement du pluralisme juridique nécessite leur recomposition préalable en référence à la logique systémique spécifique [...] à laquelle se rattachent les ordres juridiques autonomes » (at 17).

¹⁵⁷ A. ROY, *Le contrat en contexte d'intimité*, (2002) 47 *Revue de droit de McGill* 861, at 874: « sensible aux phénomènes d'internormativité, le professionnel du droit [...] ne trouvera plus exclusivement les réponses aux problèmes qui lui sont soumis dans la loi et la doctrine officielle; il les repérera à travers le vécu des partenaires, leurs coutumes, leurs valeurs et leur environnement ».

¹⁵⁸ One example is the Canadian Divorce Act 1985 (art. 21.1) which enters indirectly on the religious divorces by establishing that (3) Where a spouse who has been served with an affidavit under subsection (2) does not (a) within fifteen days after that affidavit is filed with the court or within such longer period as the court allows, serve on the deponent and file with the court an affidavit indicating that all of the barriers referred to in paragraph (2)(e) have been removed, and (b) satisfy the court, in any additional manner that the court may require, that all of the barriers referred to in paragraph (2)(e) have been removed, the court may, subject to any terms that the court considers appropriate, (c) dismiss any application filed by that spouse under this Act, and (d) strike out any other pleadings and affidavits filed by that spouse under this Act”.

¹⁵⁹ See on the issue B. MOORE, *Le droit de la famille et les minorités*, (2003-4), *Revue de droit de l'Université de Sherbrooke* 238-239, and B. MOORE, *Contrat et religion - À la volonté de Dieu ou des contractants ? Commentaire sur l'affaire Marcovitz c. Bruker*, (2009) 43 *R.J.T.* 219 – 241.

materialize. Without this formality the woman remains married; she cannot remarry; she is *Agunah*; in case of cohabitation with another man she will be considered adulterous and their children and all their discendence will be considered *mamzerim* (bastards) and they will be able to marry religiously only with other *mamzerim*¹⁶⁰. The husband does not suffer the same effects (e.g. his cohabitation will not, with exceptions, be considered adulterous). The Act permits, at the request of the spouse, the forced elimination of any religious remarriage impediments to avoid their “misuse” in forcing contractual terms (ostensibly freely accepted) upon the divorcing wife¹⁶¹.

This interplay between State law and religious norms is even more evident under some State laws. Consider the Ontario [Family Law Act](#)¹⁶² which authorizes the court to “set aside all or part of a separation agreement or settlement, if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in the making of the agreement or settlement”. The rule also allows “to consent orders, releases, notices of discontinuance and abandonment and other written or oral arrangements” and regardless of any contrary agreement (sub-section 7).

The rule is not a unique one. For instance, New York State law¹⁶³ goes even further. It allows the court to suspend divorce proceedings until any barrier to religious remarriage is removed and (since 1992)¹⁶⁴ permits an increase in the maintenance allowance payable by the spouse as a punishment for those who refuse to remove barriers to religious remarriage¹⁶⁵.

Yet these interplays remain problematic and open to questionable issues, especially in considering the jurisprudence which defend the freedom of religion. In an attempt to protect the freedom of religion of the husband the Québec Court of Appeal has refused compensatory damages to a wife for the fifteen-year-long refusal of her husband to fulfil the contractual obligation to convey the *Get*¹⁶⁶ on the basis of

¹⁶⁰ For these informations see A. BARNETT, *Getting a “Get” – The Limits of Law’s Authority? N. v. N. (Jurisdiction : Pre-Nuptial Agreement)* [1999] 2 F.L.R. 745, (2000) 8(2) *Feminist Legal Studies* 241-254. See also B. MOORE, *Contrat et religion - À la volonté de Dieu ou des contractants ? Commentaire sur l'affaire Marcovitz c. Bruker*, cit., 219– 241.

¹⁶¹ As clearly stated by Judge Tannenbaum after remembering the religious rules in *Droit de la famille – 2296*, [1995] R.D.F. 728-731: “It is not too difficult to imagine that the above situation has, over the years, led to many instances where the treat [sic] of withholding consent has forced many women into accepting unfair agreements with respect to either custody, access, or financial arrangements in the civil divorce. With respect to people of the Jewish faith who are divorcing, section 21.1 of the Divorce Act is a way of levelling the playing field. The Jewish husband who threatens to withhold consent is subject to being denied the right to petition for corollary relief or even a civil divorce itself (p. 730-731).” The case has been followed by several decisions in the same line. See in *Québec H. (K.) c. S. (J.)*, REJB 2000-17013 (C.S.) and A.D. c. J.P., C.S. Montréal, n° 500-12-25913-017, 5 février 2004, j. Hurtubise, at : <http://www.jugements.qc.ca/php/decision.php?liste=13806290&doc=57455A59561B0219>.

¹⁶² Ontario Family Law Act R.S.O. 1990, CHAPTER F.3 56(5) and subsequent.

¹⁶³ *N.Y. Dom. Rel. Law*, art. 236 B5 (5) (h) et 6 (d).

¹⁶⁴ *N.Y. Dom. Rel. Law*, art. 236 B5 (5) (h) et 6 (d).

¹⁶⁵ See in general M. GREENBERG-KOBRIN, *Civil Enforceability of Religious Prenuptial Agreements*, (1999) 32(4) *Columbia Journal of Law and Social Problems* 359-399.

¹⁶⁶ The case is *Marcovitz c. Bruker*, [2005] R.J.Q. 2482 (C.A.) revising *Marcovitz c. Bruker* [2003] R.J.Q. 1189 (C.S.) according to which “In Quebec, the object of a contract can be anything that is not contrary to public order (Article 1425 C.c.Q.). Since in this case there are no public order issues, the contract is valid. Simply put, a valid civil obligation with religious undertones was created. Since Defendant breached this obligation, Plaintiff is entitled to seek damages before a civil court.” (par. 20, *Marcovitz c. Bruker* [2003] R.J.Q. 1189 (C.S.)). *Marcovitz c. Bruker*, [2007] 3 R.C.S. 607. See also See also B. MOORE,

the argument that “the substance of the . . . obligation is religious in nature, irrespective of the form in which the obligation is stated” and therefore it is a moral obligation not enforceable by a civil court¹⁶⁷.

The Canadian Supreme Court on appeal reversed the verdict¹⁶⁸. Considering that “The judicial role in balancing and reconciling competing interests and values when freedom of religion is raised, is one that protects the tolerance Quebec endorsed in the *Québec Charter*. Section 9.1 states that in exercising their fundamental freedoms and rights — including freedom of religion — persons “shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec”. This provision is a legislative direction that the courts are to protect the rights of Quebec’s citizens in a way that is balanced and reconciled with other public values.”¹⁶⁹.

In para 16 Justice Abella for the majority continues that “an agreement between spouses to take the necessary steps to permit each other to remarry in accordance with their own religions, constitutes a valid and binding contractual obligation under Quebec law” and applying the balancing mandated by s. 9.1 of the *Quebec Charter*, “any harm to the husband’s religious freedom in requiring him to pay damages for unilaterally breaching his commitment, is significantly outweighed by the harm caused by his unilateral decision not to honour it”¹⁷⁰.

“Despite the moribund state of her marriage, Ms. Bruker remained, between the ages of 31 and 46, Mr. Marcovitz’s wife under Jewish law, and dramatically restricted in the options available to her in her personal life. This represented an unjustified and severe impairment of her ability to live her life in accordance with this country’s values and her Jewish beliefs. Any infringement of Mr. Marcovitz’s freedom of religion is inconsequential compared to the disproportionate disadvantaging effect on Ms.

Contrat et religion - À la volonté de Dieu ou des contractants ? Commentaire sur l'affaire *Marcovitz c. Bruker*, cit., 219 – 241 and R. JUKIER – S. VAN PRAAGH, *Civil Law and Religion in the Supreme Court of Canada: What Should We Get Out of Bruker V. Marcovitz?*, (2008) 43 S.C.L.R. (2d) 381. Note that the French courts (e.g. Trib. civ. Seine, February 22, 1957, *Gaz. Pal.* 1957.1.246), the French Cour de Cassation (Civ. 2^e, December 13, 1972, *D.* 1973.493 and Chambre civile 2, 15 juin 1988, no. 86-15476, Publié au Bulletin C34882), the European Commission of Human Rights (*D. v. France*, Application No. 10180/82, December 6, 1983, D.R. 35, p. 199) found in the refusal to convey the *Get* a delictual fault awarding damages. Similarly in *Brett v. Brett*, [1969] 1 All E.R. 1007, the English Court of Appeal ordered an additional lump sum spousal support payment by the husband if he refused to deliver a *get* by a certain date. The Family Court of Australia awarded the wife a greater amount of spousal maintenance in order to “encourage” the husband to give her a religious divorce in *In the Marriage of Steinmetz* (1980), 6 F.L.R. 554. For American cases see *Waxstein v. Waxstein*, 395 N.Y.S.2d 877 (Sup. Ct. 1976) (aff’d 394 N.Y.S.2d 253 (App. Div. 1977)); *Rubin v. Rubin*, 348 N.Y.S.2d 61 (Fam. Ct. 1973); and *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981). Of course similar decisions emphasizing the risks of imbalances between the spouses are found under Israeli law and indeed in the landmark case of *Bavli v Bavli* (1992), where the Israeli High Court commanded the rabbinical court to reverse its decision and to divide property in accordance with principles of egalitarian community property rule the rabbinical courts simply refused. See further: Bogoch and Halperin-Kaddari, *Divorce Israeli Style: Professional Perceptions of Gender and Power in Mediated and Lawyer-Negotiated Divorces* Law & Policy, Vol. 28, No. 2, April 2006

¹⁶⁷ *Marcovitz c. Bruker*, [2005] R.J.Q. 2482 (C.A.) at par. 76. See to the contrary Freedman C.J.M. dissenting in *Re Morris and Morris* (1973), 42 D.L.R. (3d) 550 (Man. C.A.) and quoted by the majority of the Supreme Court of Canada in *Marcovitz*: “That the [marriage] contract is deeply affected by religious considerations is not determinative of the issue. That is the beginning and not the end of the matter. Some contracts rooted in the religion of a particular faith may indeed be contrary to public policy. Others may not. Our task is to determine whether the rights and obligations flowing from the . . . contract — specifically, the husband’s obligation to give and the wife’s right to receive a *Get* — are contrary to public policy.”

¹⁶⁸ *Marcovitz c. Bruker*, [2007] 3 R.C.S. 607.

¹⁶⁹ *Marcovitz c. Bruker*, cit., at para 15.

¹⁷⁰ *Marcovitz c. Bruker*, cit., at para 17.

Bruker's ability to live her life fully as a Jewish woman in Canada"¹⁷¹. Therefore the husband's refusal to provide a *Get* was not acceptable and thus recognized that the inability to remarry within one's religion represents a serious compensable injury¹⁷²

In short, the lessons drawn from the case is that in "...deciding cases involving freedom of religion, the courts cannot ignore religion. To determine whether a particular claim to freedom of religion is entitled to protection, a court must take into account the particular religion, the particular religious right, and the particular personal and public consequences, including the religious consequences, of enforcing that right." (para 18)¹⁷³.

Using other case law as a reference, courts are not asked to determine if a good Catholic should not work on Sundays¹⁷⁴ or if a good Sikh must wear the kirpan¹⁷⁵; what they are asked to do is to ascertain in the eyes of the law if the violation of an obligation or a duty due to religious freedom is justifiable or not. It is not the business of the court to enter in religious interpretations or disputes.

C. Insights on discrimination, multi-culturalism and their interplay with contracts and property.

Canadian experiences in dealing with discrimination in contracts (especially tenancy contracts) is rather ample and linked to various situations. Reference should be made, for example, to the Ontario Human Rights Code whose application is mandated since 2003¹⁷⁶ in rental related cases when a cooperative arrangement is also involved¹⁷⁷.

¹⁷¹ *Marcovitz c. Bruker*, cit., at para 96.

¹⁷² *Marcovitz c. Bruker*, cit., at para 20 : "The Court is not asked to endorse or apply a religious norm. It is asked to exercise its responsibility, conferred by the Quebec *Charter*, to determine whether the husband is entitled to succeed in his argument that requiring him to pay damages for the breach of a legally binding agreement violates his freedom of religion. No new principle emerges from the result in this case. Courts are routinely asked whether a contract is valid. And the inquiry under the Quebec *Charter* is the application of a classic and cautious balancing that courts are required to undertake in determining whether a particular claim to religious freedom is sustainable, one case at a time, attempting always to be respectful of the complexity, sensitivity, and individuality inherent in these issues."

¹⁷³ *Marcovitz c. Bruker*, cit., at para 51: "...there is nothing in the *Civil Code* preventing someone from transforming his or her moral obligations into legally valid and binding ones. Giving money to charity, for example, could be characterized as a moral and, therefore, legally unenforceable obligation. But if an individual enters into a contract with a particular charity agreeing to make a donation, the obligation may well become a valid and binding one if it complies with the requirements of a contract under the C.C.Q. If it does, it is transformed from a moral obligation to a civil one enforceable by the courts". To the contrary per dissenting judge DESCHAMPS "Civil rights arise out of positive law, not religious law. If the violation of a religious undertaking corresponds to the violation of a civil obligation, the courts can play their civil role. But they must not be put in a situation in which they have to sanction the violation of religious rights. The courts may not use their secular power to penalize a refusal to consent to a *get*, failure to pay the Islamic *mahr*, refusal to raise children in a particular faith, refusal to wear the veil, failure to observe religious holidays, etc. Limiting the courts' role to applying civil rules is the clearest position and the one most consistent with the neutrality of the state in Canadian and Québec law." (*Marcovitz c. Bruker*, [2007] 3 R.C.S. 607 at para 184).

¹⁷⁴ *Smart c. T. Eaton Ltée*, (1994) 19 C.H.R.R. D/446 (T.D.P.).

¹⁷⁵ *Commission scolaire Marguerite-Bourgeoys c. Singh Multani*, [2004] R.J.Q. 824 (C.A.), requête pour permission de pourvoi à la Cour suprême du Canada. See also *Pandori c. Peel Board of Education*, (1990) 12 C.H.R.R. D/364 (Ont. Bd. Inq.).

¹⁷⁶ *Walmer Developments v. Wolch* (2003), 67 O.R. (3d) 246 (Sup. Ct. (Div. Ct.)).

¹⁷⁷ *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which a co-op sought to evict an occupant for failing to perform the two hours of volunteer work each month required by the co-op's by-law, despite the fact that she had provided a doctor's note that she was incapable of performing the volunteer work for medical reasons.

With reference to actual situations, they can arise from cultural practices of ethnically diverse tenants, for instance. In several jurisdictions cooking odours have been the subject of court decisions. In Ontario¹⁷⁸ a Tribunal found “that South Asian tenants were denied an apartment because of stereotypes regarding cooking odours”¹⁷⁹. In a subsequent case¹⁸⁰ discrimination was found in the ordering of a tenant to either cease producing odours by cooked foods in her home that were an expression of her ethnicity and ancestry or face being evicted¹⁸¹.

From the above examples it is clear that discrimination can arise after a contract has been entered. A good illustration of this is the emotional and physical impact on a tenant resulting from racial slurs evidenced by tapes and testimonies which led to compensation¹⁸².

Indirect discriminatory treatment can ensue as well. Consider the case of a tenant discriminated against for her association with a racialized person¹⁸³. This was the case of *John v. Johnstone*¹⁸⁴ (eviction of a White woman, after she had a Black friend over for dinner) or of *Hill v. Misener* (No. 1)¹⁸⁵ in which condition of occupancy was the non-association of the tenant with “coloured” people and the complainant was a White woman with two bi-racial children. Note that she never rented the apartment because she was profoundly offended. Yet, the court still found actionable discrimination and awarded compensation.

Stereotypes can often form the basis of a discrimination, not least in the pursuit of housing accommodation. So it was in the case of the refusal to rent to a woman “in part because there was no man in her family to do the yard work”¹⁸⁶.

In other types of contract the duty to accommodate arises routinely as well. Consider the employment contracts in which the school was required to accommodate the shift hours of a Seventh Day Adventist to accommodate participation in religious practices if this does not create undue hardships¹⁸⁷. Note that the burden of proving undue hardship remains on the person required to accommodate¹⁸⁸ in order to ease protection against discrimination.

According to the court the co-op could have accommodated the claimant by assigning her tasks she could perform. In any event, the cost of accommodating with an exemption from the volunteer work requirement would have been unlikely to impose an undue hardship.

¹⁷⁸ *Fancy v. J & M Apartments Ltd.* (1991), 14 C.H.R.R. D/389 (B.C.C.H.R.).

¹⁷⁹ See *Human rights and rental housing in Ontario: Background paper*, Ontario human rights Commission, ISBN: 978-1-4249-4275-6, 2007, 26p.

¹⁸⁰ *Chauban v. Norkam Seniors Housing Cooperative Association* (2004), 51 C.H.R.R. D/126, 2004 BCHRT 262.

¹⁸¹ This was understood by the court as an attack to elements central to one’s dignity.

¹⁸² See *King v. Bura* (2004), 50 C.H.R.R. D/213, 2004 HRTO 9.

¹⁸³ Note that the Ontario human rights code offers specific protection: Art. 12: “Discrimination because of association A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 12.”

¹⁸⁴ *John v. Johnstone*, (September 16, 1977), No. 82, Eberts (Ont. Bd. Inq.).

¹⁸⁵ *Hill v. Misener* (No. 1) (1997), 28 C.H.R.R. D/355 (N.S. Bd. Inq.).

¹⁸⁶ *Conway v. Koslowski* (1993), 19 C.H.R.R. D/253 (Ont. Bd. of Inquiry).

¹⁸⁷ See *Central Okanagan School District No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425, Supreme Court of Canada. Note that this is a decision of the Supreme Court of Canada on a British Columbia case. It establish a general principle for all Provinces. In French the expression used is «contrainte excessive».

¹⁸⁸ Contrast this with the EU directive and the Italian legislation quoted before in the text.

What is considered undue hardship has also been clarified. In establishing undue hardship, the costs and health and safety risks to the person requesting accommodation¹⁸⁹ and/or to the general public are taken into account with reference “to the size of the organization and its operations, the nature of its business, and its financial capabilities”¹⁹⁰. The mentioned criteria render the notion of undue hardship relative and context-sensitive,¹⁹¹ showing once again a tendency to define legal tools in a way working towards a balance of interests in discrimination cases which search for accommodation more than a zero-sum outcome

D. Ethnicity and the law: again contract, property and torts at issue but without adverse discrimination.

Discriminating criteria can have a positive role posing a different set of problematic issues.

For instance, ethnical reasons, not necessarily discriminatory ones, have proved to have a role also in property related cases. For instance, in *Urano v. Urano*¹⁹² the court established a equal joint ownership among three Japanese brothers taking also into account that “the nature of the family and cultural relationship” would suggest property was held in trust for the three brothers and that “the family followed a traditional Japanese view and all would share in the bounty generated by the farming operation”.

In *Soulos v. Korkontzilas*¹⁹³, the court held in trust the property disputed by the plaintiff and his broker, who broke his fiduciary duties towards his principal. The plaintiff wanted to buy a specific property because it was leased to his banker and to be the landlord of one’s own banker would have brought him great prestige in the Greek cultural community. The court took into account this fact in deciding for the trust and selecting a property remedy instead of damages.

Also, differences in cultures can be reflected across the countries in a variety of criteria for assessing damages¹⁹⁴. The increasing movement of people of different traditions and cultures paired with their maintenance of original traditions and customs may enhance the issues raised by the impact of these clear ethnical factors on purely private law issues. Specific physical injuries, for instance can be of higher social and cultural impact on some individuals than on others.

In a 1998 case of a 28-year-old Muslim woman, who was awarded damages after her obstetrician and gynaecologist negligently sterilized her without her consent, the court acknowledged on the doctor a

¹⁸⁹ This argument was not accepted in cases discussing the use of a kirpan at schools, for instance. See *Sehdev v. Bayview Glen Junior Schools Ltd.* (1988), 9 C.H.R.R. D/4881 (Ont. Bd. of Inquiry); *Pandori v. Peel Board of Education* (1990), 12 C.H.R.R. D/364, aff’d (1991), 14 C.H.R.R. D/403 (Ont. Div. Ct.), leave to Ont. C.A. refused.

¹⁹⁰ See *Policy on creed and the accommodation of religious observances*, Ontario Human Rights Commission, ISBN – 0-7778-6518-1, 1996, 8ff.

¹⁹² *Urano v. Urano* 2005 ABQB 237, 15 E.T.R. (3d) 138, 138 A.C.W.S. (3d) 983.

¹⁹³ *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

¹⁹⁴ See H. Mc GREGOR, *Personal injury and death*, in *International Encyclopedia of Comparative Law*, 1972, Parigi-New York - Tubinga, ch. 9, vol. XI.

duty to be ‘sensitive to cultural issues’¹⁹⁵. At time of the operation the woman did not speak, read, or write English. Her friend acted as an interpreter during the doctor’s appointment after which the doctor performed a permanent sterilization procedure, which she thought was only a procedure to remedy her infection. The court, taking into account that “Ms’Adan’s Somalian culture placed enormous significance on the ability to give birth which created an almost insurmountable barrier to prospect of remarriage”¹⁹⁶, warranted a substantial sum in compensation.

This example shows the existence and use of ethnical arguments to justify increases¹⁹⁷ in damages awards and points to the impact (a new duty on doctors, for instance) circulation of people and multiculturalism sustained by liberal theory have on various areas of private law even without touching the issue of discrimination or reasonable accommodation¹⁹⁸.

Investigating a little further on this issue, we find other cases already decided in court. For instance, the Chinese filial piety tradition (so called “Bau-Da”) according to which the eldest son takes care of parents has been used to increase an amount for damages for the death of the son¹⁹⁹. Similarly, the reduced prospects of remarriage for cultural reasons led to an increase in loss of dependency in *Buphal v. Connolly*²⁰⁰, while the scare on a face of a young Korean boy was accepted, according to Korean cultural values, as a source of “shame and embarrassment to him and his family”²⁰¹.

¹⁹⁵ *Adan v. Davis* (1998), 43 CCLT (2d) 262 (Ont. Gen. Div): “Ms Adan is a Muslim woman who had never used any form of birth control and whose reproductive capacity is fundamental to her status in society. Sterilization is not permitted under Islamic law. Although the observance of Islamic law can vary, I accept the plaintiff’s evidence that, despite Islamic law, she was never prepared to be sterilized. Dr Hinnawi [expert witness], who trained as a physician in Jordan and who has a large practice of Muslim patients, testified that he had never known a Muslim woman to undergo a sterilization. I do not suggest that Dr Davis knew or ought to have known anything about Islamic law or about the plaintiff’s particular religious practices. But, we live in a multicultural country where conformity to values and norms is variable and where careful inquiry must be made to ensure that our own values and norms are not inadvertently imposed on those who do not subscribe to them. It cannot be assumed that a 28 year-old woman with four children who are very close in age, and who has had a recent delivery by cesarean section, does not want any more babies. There was no careful inquiry here” (at p. 278).

¹⁹⁶ J. BERRYMAN, *Accommodating Ethnic and Cultural Factors in Damages for Personal Injury*, 40 U.B.C. Law rev., 2007, 1, at 2.

¹⁹⁷ What if arguments were used to lower compensation? See for the analysis of such an attempt under Italian law

G. COMANDÉ, *La legge è uguale per tutti: il risarcimento tra “gabbie risarcitorie” e reciprocità*, cit., *passim*.

¹⁹⁸ Note that sometimes the influence of these cultural-ethnic factor can appear as blind guessing, but this is not different from those guessings made by courts when awarding future losses of earnings or actualizing the amount of damages estimating future inflation rate. See J. BERRYMAN, *Accommodating Ethnic and Cultural Factors in Damages for Personal Injury*, cit., at 4.

¹⁹⁹ See *Lai v. Gill*, (1978) 28 B.C.L.R. 21 (B.C.S.C.), rev’d (1978) 28 B.C.L.R. 17 (B.C.C.A.), rev’d [1980] 1 S.C.R. 431; *Fong Estate v. Gin Bros. Enterprises Ltd.*, [1990] W.D.F.L. 760, B.C.J. No. 1138 (S.C.); *Lian v. Money*, [1994] 8 W.W.R. 463, 93 B.C.L.R. (2d) 16, appeal allowed in part, [1996] 4 W.W.R. 263, 15 B.C.L.R. (3d) 1, 28 C.C.L.T. (2d) 301 (C.A.); and *Sum Estate v. Kan* (1995), 8 B.C.L.R. (3d) 91, appeal dismissed, (1997), 100 B.C.A.C. 17, 163 W.A.C. 17, 44 B.C.L.R. (3d) 250 (C.A.). One can argue whether it would be the same if the argument is used, without claimant imput, by the defendant in order to reduce damages according to the very same custom. See arguing for the negative, J. BERRYMAN, *Accommodating Ethnic and Cultural Factors in Damages for Personal Injury*, cit., at 29-30. The author (at 31) mentions other cases in which the filial piety argument was used: *Arruda v. Scarborough Hospital*, [2005] O.T.C. 639, 141 A.C.W.S. (3d) 134 (Ont. Sup. Ct.) (Portuguese parents); *Ayoub v. Dreer*, [2000] O.T.C. 538, 24 C.C.L.I. (3d) 96, 99 A.C.W.S. (3d) 360 (Ont. Sup. Ct.) (Palestinian parents).

²⁰⁰ *Bhupal v. Connolly*, (1994) 49 A.C.W.S. (3d) 283 at para. 38. See also *Chui Estate v. Lang* [1993] O.J. No. 79 (Gen. Div.) (Q.L.) in which an increase in compensation was argued on the basis of cultural isolation of a close-knit Chinese family living in a small town in Northern Ontario.

²⁰¹ *Lee v. BCSC* 2003, 1012 17 B.C.L.R. (4th) 80, at 17.

In using such “stereotypes” or cultural-ethnic arguments it is rather different if it is the plaintiffs who present evidence on why their own damages should be increased on ethnical-cultural grounds or if it is the defendant who autonomously uses them. In this latter case it might be said that the defendant is, somehow, imposing on the plaintiff the duty to abide by a practice or custom that is ethnically or culturally (or religiously) grounded²⁰². Similarly, courts have refused to impose *prima facie* such a duty on a son²⁰³. Note the contradiction for the fact that other social-economic factors are permitted routinely in court: such as, for instance, criminal records and unstable family life or family life style and parental work status or the “vow of poverty”²⁰⁴, to reduce future lost earning of a plaintiff while ethnical arguments are still disputed ones²⁰⁵.

To the above considerations it can be added that, according to scholars and cases, the evidence requested of plaintiffs is rather “paltry”²⁰⁶.

Concluding remarks

This rapid trip through the interplay among federal and provincial legal instruments of protection of fundamental rights and freedoms against discrimination has offered several useful insights to the European viewer of the cathedral. The notion of reasonable accommodation in Canadian case law would prove a useful benchmark for the implementation of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation²⁰⁷.

²⁰² Yet the instance of defendants raising the issue by themselves is not unknown in the courtroom as Tribunale Milano and Venezia in Italy or in Canada show.

²⁰³ *Newson v Newson* 99 BCLR 2d 197 (1994, BCSC); 35 BCLR 3d 341 (1997, BCCA); 53 BCLR 3d 191 or 1998 BCJ. 751 (1998, BCSC); 39 RFL 4th 410 (1998, BCCA) and 65 BCLR 3d 22 (1998, BCCA).

²⁰⁴ *Turenne v. Chung*, (1962) 36 D.L.R. (2d) 197, 40 W.W.R. 508 (Man. CA) but the court refused the argument.

²⁰⁵ See the argument of McKenzie J. talking about phylial piety in *Fong Estate v. Gin Bros. Enterprises Ltd.*, [1990] W.D.F.L. 760, B.C.J. No. 1138 (S.C.): “As the family members tell it this tradition prevails in Canada, whether the parents are rich or poor, as strongly as in Hong Kong. Need is not a governing consideration. To the contrary, there is evidence that the younger generations of oriental families have been influenced by North American standards and no longer adhere rigidly to the customary ways that prevail or prevailed in Hong Kong. This family moved to Canada in 1973 when the girl was a babe in arms”.

²⁰⁶ See J. BERRYMAN, *Accommodating Ethnic and Cultural Factors in Damages for Personal Injury*, cit., 10-11, quoting *Osman v. Ontario Ltd.*, [2005] O.T.C. 555, 140 A.C.W.S. (3d) 291 (Ont. Sup. Ct.); *William v. Mould*, [1991] 3 C.N.L.R. 187, 29 A.C.W.S. (3d) 1165 (B.C.S.C.); *Chitale v. Sanford* (1980), 1 F.L.R.A.C. 614, 3 Fam. L. Rev. 147 (Ont. H.C.); *Sum Estate v. Kan* (1997), 100 B.C.A.C. 17, 44 B.C.L.R. (3d) 250.

²⁰⁷ These preliminary remarks on EU law and its impact in Italy should have already clarified that communitarian law is of paramount importance for our research (the devotion of the EU to non-discrimination is exemplified by art. 13 TUE, former art. 6A; art. 21, in part III of the Charter of Nice which, after the Lisbon Treaty entering into force, as gained a larger importance and in close connection with the decisions of the ECtHR which has been willing to accept that many situations fall within the ‘ambit’ of a right, thus allowing Art 14 ECHR’s anti-discrimination clause to bite even though the substantive Article may not have been violated, e.g. *Stec v United Kingdom* (2005) 41 EHRR SE18 at para 47–55).

The Canadian experience shows, overall, a tendency to integrate differences by way of policies in primary instruments, thereby leaving only an ancillary role to litigation. Nevertheless, as the interplay between freedom of religion and private law matters and the application of the examined antidiscrimination charters to ethnical or cultural biases show, the threat of litigation, especially when assisted by a sanctioning feature (whether or not punitive damages are available) has an important role to play and it would be important to foster research in this direction. In further comparative research it would be interesting to deepen the analysis and search for cases in European countries in which the content and value of compensatory damages has an actual role in terms of deterring discriminatory behaviours or at least sanctioning them with a sufficient incentive to sue.

In this view a significant role can be played by motives. Indeed, intention and *bona fide* have a significant role in driving findings of discrimination and/or violations of the duty to accommodate. In the occupational area, for instance, the Ontario Human Rights Commission has established clear principles for requirements, qualifications or factors that are neutral or non discriminatory on their face : “i) The requirement in question must be established in good faith with the intention of achieving its stated business objective, and not as a means to avoid the purpose of the Code; ii) The requirement must be objectively connected to its stated business purpose. iii) The requirement should be the least discriminatory alternative available, other things being equal”²⁰⁸.

In Canada, both common law and civil law systems have faced in similar ways the interplay between protection of minority rights and the majority’s view. This is already an interesting aspect for European Union countries where antidiscrimination framework has to be applied to Member States belonging to both legal families, as well as countries not necessarily sharing the same or even similar cultural settings. This first analysis of the Canadian experience shows similar patterns in both common and civil law systems. Yet, Canadian provinces share a common constitutional framework while the EU member states do not share such an uniform constitutional bedrock. With respect to this feature, an interesting pattern of research should be the potential impact of the Treaty of Lisbon in the interpretation of the non discrimination principle within the EU.

In our analysis, in both kinds of systems (common and civil law), the protection of fundamental rights and freedoms has played a crucial role and this is a confirmation that the patterns followed by Member States’ courts and by the European Court of Justice are promising. Yet, all the investigated legal systems, regardless of whether they belong to common or civil law, have been struggling to create a balanced system in which there is not an automatic open doorway to individual or minority idiosyncracies nor a prevalence of one view over the others. Notwithstanding, tensions can remain between the individual protection of fundamental rights and freedoms, on the one hand, and the

²⁰⁸ See *Policy on creed and the accommodation of religious observances*, Ontario Human Rights Commission, ISBN – 0-7778-6518-1, 1996, 16.

reduction of direct and indirect discrimination created by the apparent impermeability of State (private) law towards various religious creeds, for instance, as the Jewish divorce cases dealing with the interplay of private law and religious beliefs and freedom in Québec have shown.

In this case, as in others, a principle of tolerance and proportionality in the exercise of fundamental freedoms and rights was used by the Canadian Supreme Court in reversing the Québec Court of Appeal judgement, but its application is far from clear and easy, and thus requires further research and certainly more precise fine-tuning by the courts.

The special respect paid by the reasonable accommodation techniques to the preservation of the social environment is a key feature of the Canadian experience which should be taken into account in the European experience. It could be a flexible instrument which can be adopted in case law attempting to adapt different legal cultures to the general European (Union) framework and the persistence of different cultural preferences and perhaps of different reading of the same blurry notions of fundamental rights²⁰⁹. Yet, as mentioned in the previous paragraph this technique might enter into tension with individual fundamental rights and freedoms (either within a minority or not) and this phenomenon would require further attention and sensibility by policy makers and courts. Indeed, after all, “...les chartes des droits de la personne sont des arbres vivants. Autrement dit, par leur interprétation judiciaire, les droits fondamentaux sont appelés à évoluer afin de tenir compte des changements sociaux.”²¹⁰

²⁰⁹ BARREAU DU QUÉBEC, *Mémoire du Barreau du Québec présenté à la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles « Les droits fondamentaux : Une protection pour toutes et tous »*, Décembre 2007. p 17-18 : “L'imprécision apparente de certains droits, tel le droit à l'égalité ou la liberté de religion et de croyance, est notamment contrebalancée par l'interprétation des tribunaux. Ils participent à l'élaboration d'une compréhension concrète des droits de la personne dans un contexte précis.” . On the European situation see (G. Brüggemeier, A. Colombi Ciacchi, G. Comandé eds.) *Fundamental Rights and Private Law in the European Union. Vol. I: A Comparative Overview*, Cambridge University Press, 2010; ID, *Fundamental Rights and Private Law in the European Union. Vol. II.: Comparative Analyses of Selected Case Patterns*, Cambridge University Press, 2010 *passim*.

²¹⁰ BARREAU DU QUÉBEC, *Mémoire du Barreau du Québec présenté à la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles « Les droits fondamentaux : Une protection pour toutes et tous »*, cit., at 18.