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(2014)

“After the Bouchard-Taylor Commission.
**Religious Accommodation
and Human Rights in Quebec.**”

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Introduction

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The issues surrounding secularism and the management of religious diversity in contemporary societies gain from being approached from a contextual and comparative perspective. Liberal democracies come to these thorny issues from very different historical pathways, but they all have to grapple with the challenges raised by moral and religious diversity. My own contribution to this comparative research agenda is to talk about the Quebec experience with a particular emphasis on Quebec's *Consultation Commission on Accommodation Practices Related to Cultural Differences* (CCAPRC), and its aftermath.

Quebec and Canada are highly stimulating contexts for those who study questions related to identity and diversity. The issues that were mainly debated until perhaps 2006 were nationalism and the right to self-determination, federalism, and immigration and integration models such as multiculturalism and interculturalism. Since 2006, these issues were overshadowed by the debates around secularism and the management of religious diversity, including the issue of religious accommodations.

In 2007, a high-profile public commission - the CCAPRCD ¹ - was put together by the Government of Quebec. The Commission was co-chaired [88] by the philosopher Charles Taylor and the historian Gerard Bouchard. Its mandate was fourfold: first, to take stock of accommodation practices in Quebec; second, to analyze the attendant issues, bearing in mind the experience of other societies; third, to conduct an extensive public consultation on this topic; and fourth, to formulate recommendations to the government to ensure that accommodation practices conform to the values of Quebec society as a pluralistic, democratic, and egalitarian society.

The co-chairmen quickly decided to opt for a wide interpretation of their mandate. Rather than focusing strictly on the legal obligation to accommodate as it was defined in the jurisprudence, they chose to tackle the related but larger issues raised by citizens, such as the meaning of secularism, the place of religion in the public sphere, immigration and integration, and the fate of Quebec identity. Addressing all these issues in a comprehensive fashion was of course not possible, but it is doubtful, however, that the Quebec public would have been satisfied with a narrow and legalistic interpretation of the mandate.

In this paper, I will first zero in on the debate over "reasonable accommodation". I will try to define the legal obligation to accommodate and specify what are its limits. I will then try to pinpoint the meaning of secularism and defend what I will call a liberal and pluralist conception of secularism. Finally, I will discuss the main piece of legislation that was passed in the aftermath of the Bouchard-Taylor Commission, viz. Bill 94.

¹ Bouchard, Gérard and Charles Taylor, *Building the Future: A Time for Reconciliation: Report, Consultation Commission on Accommodation Practices Related to Cultural Differences*, Les Publications du Quebec, 2008.

1. Reasonable Accommodation

1.1. The Definition of a Reasonable Accommodation

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The legal norm of "reasonable accommodation" was at the heart of the debate in Quebec, as an important number of citizens felt that the accommodation of religious diversity was going too far and that it was threatening basic public values. The concept of a "reasonable accommodation", though, was not very well understood. One of the positive contributions of the CCAPRCD was that the media and members of the public came to a better understanding of the legal duty to accommodate.

In the Canadian jurisprudence, reasonable accommodation is a rather well defined and circumscribed legal norm that stipulates that there is a duty on the part of an employer or an institution to offer accommodation measures to someone who is adversely affected by a rule or a policy that seems *prima facie* neutral, but that indirectly discriminates against the members of a group. The discriminated individual can be a part of a religious group, but it can just as well consist of, for instance, people living with disabilities or pregnant women. The notion of reasonable accommodation was thus [89] conceived as a way to correct indirect and involuntary discrimination, i.e. cases when a norm of general application can be shown to be discriminatory against members of a group on the basis of some their attributes, such as their physical condition, gender, age, ethnicity, language, or religion. For example, there is no explicit discrimination in a rule prohibiting headgear at a school, for it does not target any particular group. In its application, however, the rule constrains those whose faith requires wearing headgear, while those whose conscientious convictions do not include the wearing of headgear can more easily harmonize their freedom of religion and their right to a public education. This does not mean that the rule itself cannot be legitimate. Maybe it would not be a good idea, generally speaking, to allow high school students to wear headgear in class. But a religious obligation (or any other deeply-held, meaning-giving belief) is not the

same thing a personal preference², and this is why accommodation measures are sometimes necessary. Similarly, it is easy to understand why prisons or hospitals have rules that prevent patients or detainees from choosing their meals - this would be too costly and impractical. However, few people believe that vegetarians (either for religious or secular reasons) should not benefit from an exception³. This is why fairness sometimes requires a differential treatment even if the rule does not explicitly discriminate against anyone⁴.

The duty to accommodate is thus a jurisprudential creation. It originates from the interpretive work of the courts rather than from an explicit legislative act. It is not explicitly stated in the *Canadian Charter of Rights and Freedoms*⁵. But the courts established that the norm of [90] reasonable accommodation is a logical corollary of the equality rights and freedom of religion that are enshrined in the *Charter*⁶. It stems from a material, rather than a purely formal,

² For a defense of that argument, see the second part of Maclure, Jocelyn and Charles Taylor, *Secularism and Freedom of Conscience*, Cambridge, Harvard University Press, 2011.

³ See, for instance, the decision by the Federal Court of Canada in the case *Maurice v. Canada (Attorney General)*, 2002 FCT 69, [2002] 2 FC. D-47, 186.

⁴ The Supreme Court of Canada explicitly formulated the legal obligation of reasonable accommodation for the first time in 1985 in the *Simpson-Sears* ruling. As a member of the Seventh-Day Adventist Church, the plaintiff had to keep Sabbath, which for this Church extends from sundown Friday to sundown Saturday. This entailed that she could not work on Friday evenings as well as on Saturdays. Arguing that her religious obligation was incompatible with the employment policy of the company for full-time sales clerks, *Simpson-Sears* discharged the plaintiff on the basis of her refusal to work on Saturday. The Supreme Court claimed that the refusal on the part of *Simpson-Sears* to take "reasonable steps to accommodate the complainant" constituted a form of indirect discrimination. See *Ontario Human Rights Commission (O'Malley) v. Simpson-Sears* [1985] 2 S.C.R. 536.

⁵ Canadian constitutional culture, I think, partly vindicates Ronald Dworkin's interpretive theory of constitutional adjudication. When it is confronted with hard cases, such as claims for accommodations, end of life issues or the right of a province to secede, it readily invokes implicit principles of political morality.

⁶ Woehrling, José, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse", *McGill Law Journal*, vol. 43, n° 2, 1998, pp. 325-401.

conception of equality ; its purpose is generally to enable a member of a minority or a vulnerable individual to take advantage of an opportunity or of a public good⁷. For example, accommodation measures can remove the obligation to choose between two basic human rights, such as having an equal right to apply for a position and practicing one's religion, or having access to a public good (such as education, health care, or all kinds of permits) and respecting the prescriptions of one's faith.

One misunderstanding that the CCAPRCD Report helped correct was that the duty to offer reasonable accommodation measures was thought by many to apply in all possible cases of accommodation claims. What needed to be reminded is that there has to be discrimination for the duty to accommodate to apply. As the Report suggested, "reasonable accommodation" ought to be distinguished from "concerted adjustment". The former is derived from more general human rights, whereas the latter is the result of voluntary negotiations between consenting parties who wish to cooperate, to live together peacefully as neighbors or to establish a business relationship.

In order to illustrate this distinction, consider one of the cases that was at the origin of the reasonable accommodation controversy : the so-called "YMCA case". The YMCA is a sport center located in a neighborhood of Montreal where an important Hassidic Jewish community lives. The YMCA is right next to a Hassidic primary school. The pupils, when they were playing in the school's yard, could see inside the gym where people, including women, worked out. The school board asked the YMCA whether they would mind frosting the windows so that the young children would not see inside, and offered to pay for the new windows. The board of the YMCA agreed. But when some clients of the YMCA heard about the deal, they expressed their discontent and reported it to the media. The YMCA's decision was widely criticized. Many citizens thought that this was a clear demonstration that the accommodation of religious diversity was going

⁷ Bosset, Pierre, "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable" in Myriam Jézéquel (ed.), *Les accommodements raisonnables : quoi, comment, jusqu'où ? Des outils pour tous*, Cowansville, Editions Yvon Blais, pp. 3-28.

too far and the norm of reasonable accommodation was in fact unreasonable.

This case, however, had nothing to do with the legal obligation to offer accommodation measures. There was no indirect discrimination involved [91] and the YMCA was consequently under no obligation to frost its windows. This was a case of "concerted adjustment". The media were unfortunately not quick enough to correct the misperception. Combined with other cases, this fueled the public outcry with regard to the accommodation of religious diversity.

1.2. The Limits to the Duty to Accommodate

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That being said, one of the main concerns expressed by citizens with regard to the legal duty to accommodate concerned the limits of such an obligation. Many feared that freedom of religion, as interpreted by the Court, would end up trumping other fundamental values such as gender equality, or the religious neutrality of the State, or fairness among coworkers. That fear was compounded by the "personal and subjective" conception of freedom of religion found in the jurisprudence. Before I get back to the question of the limits of the obligation to accommodate, I shall say a few words on the subjective conception of freedom of religion and, more generally, on how rulings of the Canadian Supreme Court are often perceived in Quebec.

In Canada, as well as in the U.S., the claimant requesting an adjustment or an exemption is not expected to demonstrate the objectivity of his or her belief. In the Canadian Supreme Court 2004 *Amselem* decision, the majority established that the claimants "need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion" ⁸. For the Court, the crucial point is that the belief held by the claimants has "a nexus with religion", and that the petitioner sincerely believes that his or her faith prescribes a given practice or act. No authorized religious representatives or experts need to confirm the existence of the precept invoked for a request for

⁸ *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 55 at 4, 37.

an accommodation to be taken under advisement. The criterion used by the Supreme Court is thus that of the *sincerity* of belief : the petitioner must demonstrate that he or she truly believes he or she is obligated to conform to the religious precept in question.

The chief advantage of a personal and subjective conception of freedom of religion is that it spares the courts from having to act as interpreters of religious dogma and as arbiters of the inevitable theological disagreements that divide all religious communities. In relying on personal belief, they avoid having to choose between the contradictory interpretations of religious doctrines. They also circumvent the danger of falling back on the majority opinion within the religious community and thereby contributing to the marginalization of minority voices.

[92]

The downside, however, is that this very broad conception can end up opening the door, first, to an excessive number of accommodations - this is the problem of proliferation - and, second, to the strategic or manipulative invocation of freedom of conscience and religion and of the legal obligation to accommodate - this is the problem of instrumentalization

At this juncture, and this is probably something relevant in other multinational political associations such as Spain, the debate about the status of Quebec within the Canadian federation interfered with the debate about religious accommodations. Even if the support for the separation of Quebec is not particularly strong nowadays, there is a strong subset of the Quebec population which believes that some basic federal institutions and policies suffer from a legitimacy deficit. This mainly goes back to the events of 1981-82 when the new *Constitution Act* was passed without the consent of Quebec, when the *Canadian Charter of Rights and Freedoms* was designed and constitutionalized, and judicial review imported to Canada. Many believe, rightly or wrongly, that the Canadian Supreme Court cannot or will not properly

recognize Quebec's rights and interests, and that many of its rulings prove it ⁹.

For instance, most observers agree that it was the Supreme Court's decision in the Multani case in March 2006 that kick-started the reasonable accommodation debate in Quebec. In that case, the Court allowed the young Multani, a Sikh schoolboy who wanted to bear a kirpan - the Sikh ceremonial dagger - at school, to do so under strict conditions. Up to this day, even though the Supreme Court said that the kirpan had to be worn under the shirt, placed in a case and wrapped and sewn in a cloth envelope that itself needed to be sewn to the shirt, more than 90% of the Quebec population believes that the Supreme Court was wrong. The decision was widely interpreted as another symptom of the Supreme Court's propensity to overrule legitimate laws passed by the Quebec legislative assembly (judicial activism), and of the imposition of Canadian-style multiculturalism in Quebec, a policy which is seen as encouraging ghettoization and fragmentation, and as conflicting with Quebec's own integration policy, that is, "interculturalism" ¹⁰.

This perception that the Canadian *Charter* and the Supreme Court, as well as the multiculturalism policy, go against the grain of Quebec's interest heightened the crisis. It did not create the crisis, but it amplified it. As I [93] pointed out, many feared that religious accommodations were threatening fundamental rights or public values. As a consequence of that fear, the idea of institutionalizing a formal hierarchy within fundamental rights gained some traction ; many thought that gender equality, for instance, needed to trump freedom of religion in cases of collision between the two rights. But the answer to this fear, as it should become clear, lies not in the philosophically and morally unsustainable proposal to hierarchize basic human rights but in the notion that the accommodation claims ought to be "reasonable".

⁹ See Tully, James, "Introduction" in James Tully and Alain-G. Gagnon (eds.). *Multinational Democracies*, Cambridge, Cambridge University Press, 2001 pp. 1-34.

¹⁰ For a critical discussion of the alleged difference between multiculturalism and interculturalism, see Maclure, Jocelyn, "Multiculturalism and Political Morality" in Duncan Ivison (ed.), *The Research Companion to Multiculturalism*, Ashgate Publishing Limited, Farnham, 2010, pp. 39-56.

Courts have indeed specified that accommodation claims ought to be "reasonable". Courts can assess not only the sincerity of the claimant but also the effects of the desired accommodation measure on the rights of others and on the capacity of the institution to function efficiently and achieve its goals. We are moving here into the terrain of the "undue hardship" or, better still, "excessive constraint" (*contrainte excessive*) set of criteria that can be reconstructed from case law. The content of the excessive constraint set of criteria is not fixed and immutable, for it must always be specified with reference to the facts of the matter. But looking at a wide range of cases involving both public and private organizations reveals some general and transversal criteria. An accommodation claim cannot (1) create excessive functional constraints (in terms of cost and functioning), (2) compromise the ends of the institutions (making profits, educating, or providing health care or social services), or (3) infringe upon the rights and freedoms of coworkers or fellow citizens¹¹. As is well known, individual rights were never seen as absolute by liberal philosophers from Locke to Kymlicka and through Mill and Dworkin ; basic human rights can legitimately be restricted in the name of the rights of others or of compelling public interests¹². Accommodation claims must be reasonable because exemptions, compensations, or adaptation measures modify, to varying degrees, the prevailing terms of social cooperation. The obligation to accommodate is meant to redress an injustice by correcting indirect discrimination ; logically, it should not do so by creating new situations of unfairness. Yet, for an accommodation claim to be turned down, it must be shown that its deleterious effects are real and significant. Dissociating itself from its US counterpart, the Canadian Supreme Court points out in [94] *Central Okanagan School District N° 23 v. Renaud* that a minimalist and insufficiently demanding notion of excessive constraint would amount

¹¹ Bosset, Pierre, "Limites de l'accommodement : Le droit a-t-il tout dit ?", *Éthique Publique*, vol. 9, n° 1, 2007, pp. 165-168.

¹² The "excessive constraint" set of criteria is thus consistent with s. 1 of the 1982 Constitution and with the Oakes Test, which is applied by Canadian courts to assess when a law can legitimately restrict individual rights. See *ft. v. Oakes*, [1986] 1 R.C.S. 103. Since the limits to the duty to accommodate include not only deontological reasons (the rights of others must be respected), but also functional considerations, "excessive constraints" is more appropriate than the narrower "undue hardship."

to a removal altogether of the legal duty to accommodate ¹³. The burden of proof, in the Canadian jurisprudence, is placed upon the party who claims that a norm is reasonable *even* if it restricts the religious freedom of another party.

Accommodation claims can thus in some cases be legitimately turned down. For instance, a Canadian provincial Court of Appeal recently denied the right to civil marriage commissioners to decline to solemnize same-sex marriages even if doing so would be contrary to their religious beliefs ¹⁴. The majority's *ratio* was that, although the freedom of conscience of the marriage commissioners was genuinely infringed by the obligation to solemnize same-sex marriages, the stakes of allowing them to opt out were too high. This would amount, according to the Court, to "perpetuate a brand of discrimination which our national community has only recently begun to successfully overcome" ; this would have "genuinely harmful impacts", the refusal on the part of commissioners being perceived by gays and lesbian, as well as by other citizens, as an act as offensive as any racist or sexist one ; and it would "undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis" ¹⁵. Consequently, the deleterious effects of the accommodation have been judged, in that case, to outweigh the positive ones.

As the Canadian jurisprudence testifies, the notion of "reasonableness" that delineates the obligation of the accommodation measures is flexible enough to adapt to a wide variety of empirical situations but yet sufficiently well defined and robust to safeguard basic rights and common public values ¹⁶.

¹³ *Central Okanagan School District N° 23 v. Renaud*, [1992] 2 R.C.S. 970.

¹⁴ The Court of Appeal for Saskatchewan, [2011] SKCA 3.

¹⁵ *Ibid.*, at 17-18 and 40-42.

¹⁶ For other cases where accommodation claims were turned down by Canadian courts. see Maclure, Jocelyn, "Reasonable Accommodation and the Subjective Conception of Freedom of Conscience and Religion" in Avigail Eisenberg and Kymlicka, Will (ed.). *Identity Politics in the Public Realm*, Vancouver, University of British Columbia Press, 2011, pp. 260-280.

2. Secularism

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The management of religious diversity also raises the question of the appropriate place of religion in the public sphere and of the relationship between public institutions and religious practice. All democracies, notwithstanding the fact that they are officially secular such as France [95] or Turkey or that they have a "separation" clause enshrined in their constitution, such as the U.S., or that some form of official recognition is granted to one or more religions, such as Denmark or the U.K., have to deal with religion and cope with the challenges raised by religious diversity.

France, for instance, is often thought to be the most secular society, but we know that 85 percent of the funding for private religious schools comes from the state (as opposed to 60% in Quebec) ; that the French state maintains and preserves Catholic and Protestant churches and Jewish synagogues built before the 1905 Law on the Separation of the Churches and State ; that six Catholic holidays (Easter, Ascension, Pentecost, Assumption, All Saints' Day, and Christmas) are legal holidays ; and that a concordat granting privileges to the Catholic, Protestant, and Jewish religions is maintained in Alsace-Moselle. Separation and neutrality, as the example of France attests, are never fully realized in practice.

Fully excluding religion from the public space is not, even in the most secular regimes, a real option. On the one hand, freedom of religion includes the freedom to act on the basis of one's beliefs, within reasonable limits. This is what the Americans call the "free-exercise of religion", which cannot be strictly confined to the private sphere. On the other hand, we cannot extract a society from its cultural and historical context. We will not require that churches stop ringing their bells ; that all the villages or streets that borrow their names from saints be renamed ; or that the cross that stands on top of the Mount-Royal in Montreal be taken down. No one seriously asks that we eliminate all the statutory Holidays that come from Christianity and design a deculturalized calendar like the French revolutionaries tried to do. Very few would suggest that spaces such as hospitals, prisons and armies stop offering religious or spiritual counseling.

A theory and practice of secularism that allow us to arbitrate the dilemma related to the presence of religion in the public sphere are thus needed. Elements for such a model were gathered in the CCAPRCD Report ¹⁷, and Charles Taylor and I further developed it in *Secularism and Freedom of Conscience* ¹⁸. The Commission recommended that the government drafts and submits to the Quebec legislative assembly a "white paper" or a Policy statement on secularism. This formal recommendation was alas disregarded.

[96]

The CCAPRCD Report defended what Taylor and I called a liberal and pluralist conception of *laïcité*. It is liberal because it is a human rights-based conception. It primarily seeks to protect the equality and freedom of conscience of all. It is pluralist because it does not believe that a "difference-blind" conception of liberalism is appropriate under conditions of deep moral and religious diversity.

This model is called in the Quebec political culture "*laïcité ouverte*" (or open secularism). It is a model of *laïcité* that recognizes that strictly confining religion to the private sphere is a not real option and that is thus "open" to some forms of reasonable presence of religion within the public sphere. I now want to go over a few general guidelines that were sketched out regarding the place of religion in the public space and in public institutions.

¹⁷ See Bouchard and Taylor, *op. cit.*, chapter 5.

¹⁸ Maclure, Jocelyn and Charles Taylor, *Secularism and Freedom of Conscience*, Cambridge, Harvard University Press, 2011. Originally published in French in 2010 under the title *Laïcité et liberté de conscience*, Boreal/La Découverte, Montreal/Paris. See also the Spanish translation *Laicidad y libertad de conciencia*, Madrid, Alianza Editorial, 2011.

2.1. Distinction between Institutions and Individuals

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Broadly speaking, secularism requires that there is no organic connection between the state and religion. The secular state must take its orders from the people through their elected representatives and not from religion. But the state's religious neutrality demands that *public institutions* favor no religion, not that the *individuals* who find themselves in these institutions privatize their religious affiliation. What I mean is that there is an important difference between, on the one hand, allowing citizens, for instance, to display religious symbols in public institutions and, on the other hand, favoring a particular religion through public interventions.

For example, we must contrast the act, by a student, of wearing a religious symbol in class to parochial teaching or to the recitation of a prayer before the beginning of classes in public schools. The essential point, if we wish to grant students equal respect and protect their freedom of conscience, is not to remove religion in all its manifestations from school but rather to ensure that the school does not espouse or favor any religion. The same distinction applies to other public institutions such as municipalities or courts.

2.2. Should Public Officials Be Allowed to Wear Visible Religious Signs ?

At this point, one obvious question that this theory raises is about the implications of the state's religious neutrality for state officials, that is, for those who represent it and allow it to perform its functions. In some countries, such as France and Turkey, civil servants cannot display religious symbols when they are on duty. The reason most often mentioned for prohibiting state officials from wearing religious symbols [97] is that they represent the state and must consequently embody the values it promotes. Since the state is in theory neutral toward citizens' various religious affiliations, its representatives must exemplify that neutrality.

At first sight, that position seems reasonable and legitimate. As individuals, citizens are free to display their religious affiliations both in the private sphere and in the public sphere, understood in the broad sense. But as state officials, they must agree to embody or personify the state's neutrality toward religions. A state employee wearing a visible religious symbol might give the impression that he is serving his church before serving the state, or that there is an organic link between the state and his religious community, whereas a uniform rule prohibiting the wearing of such religious symbols avoids the appearance of a conflict of interest.

That being said, it is important to be aware that prohibiting public officials from wearing religious symbols bears a cost, namely, either the restriction of the freedom of religion or of the equal access to positions in the public administration. No right is absolute, but a liberal democracy must always have strong reasons for restricting fundamental rights and socio-economic opportunities. So the question is : Does the appearance of neutrality, which is the objective of the rule prohibiting the wearing of visible religious symbols by public officials, constitute a strong reason ?

Although the appearance of neutrality is important, the Commissioners Gerard Bouchard and Charles Taylor did not believe that it justifies a general rule prohibiting public officials from wearing conspicuous religious symbols. What matters above all, according to them, is that such officials demonstrate impartiality in the *exercise* of their duties. State employees must seek to perform the mission attributed by lawmakers to the institution they serve ; their acts must be dictated neither by their faith nor by their philosophical beliefs but rather by the will to accomplish the tasks associated with the position they hold.

But why think that the person who wears a visible religious symbol is less liable to demonstrate impartiality, professionalism, and loyalty to the institution than the person who wears none ? Why, in that case, stop at external manifestations of faith ? Logically, should not state employees be required to renounce all convictions of conscience, thus instituting a modern version of the Ironclad Test Oath that Catholics needed to take in order to have a public office after England took New

France in 1760 ? ¹⁹ That would obviously be absurd. It is unclear why we should think *a priori* that those who display their religious affiliation are less capable of being professional and loyal to their employer than those whose convictions of conscience are not externalized or are so in a less conspicuous manner [98] (the wearing of a cross, for example). Why deny the presumption of impartiality to one and grant it to the other ?

Public officials must be evaluated in light of their actions. Do they display impartiality in the exercise of their duties ? Do their religious beliefs interfere with the exercise of their professional judgment ? It is possible to evaluate the neutrality of the actions performed by state officials without systematically restricting their freedom of conscience and religion. For example, when an employee wears a visible religious symbol and proselytizes at work, what would need to be proscribed is the proselytism and not the wearing of the religious symbol, which is not in itself an act of proselytism.

The position just outlined does not mean, however, that the wearing of all religious symbols by all public officials must be accepted. Rather, it implies that wearing a religious symbol ought not to be prohibited simply because it is religious. Other reasons may justify the prohibition, however. Here, we go back to the reasonable limits on freedom of religion that I sketched out in section 1.2. The wearing of a religious symbol must not interfere with the performance of one's duties. A teacher or a nurse, for example, could not wear a burqa or niqab at work and still adequately discharge her duties since the full veil hinders communication and raises security issues.

2.3. Heritage vs. Establishment

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Another source of discontent about measures of accommodation for religious minorities has to do with the perceived asymmetry between what is required of members of the majority and what is required of members of minority groups. Some have trouble understanding why

¹⁹ Milot, Micheline, *La laïcité*, Ottawa, Novalis, 2008, p. 99.

accommodations must be granted to individuals belonging to minority religious groups so that they can practice their religion in the public space, whereas the majority must accept, in the name of secularism, the privatization of some of their religious symbols and rituals.

Does secularism indeed require the sacrifice of a society's religious heritage ? In particular, must public institutions and public places be purged of any trace of religion, and especially, that of the majority ? Would that not amount to obliterating the past, severing ties between the past and the present ?

An adequate conception of secularism must seek to distinguish what constitutes a form of establishment of religion from what belongs to a society's religious heritage. In Canada, the old Lord's Day Act, the privileges granted not long ago to Catholics and Protestants in the teaching of religion in public schools, the recitation of a prayer before the beginning of sessions of municipal councils, and the obligatory use [99] of the Bible to swear an oath in court constituted forms of establishment of the majority religion. In all these cases, practicing Christians were favored and non-Christians compelled to respect a law or a norm that was at odds with their conscience. To put it differently, Christian beliefs were directly turned into positive law. But some practices or symbols that may have originated in the religion of the majority do not truly constrain the conscience of those who are not part of that majority. Such is the case for practices and symbols that have a heritage value rather than a regulatory function. The cross on Mount-Royal in Montreal, for example, does not signify that the City of Montreal identifies itself as Catholic, and it does not compel non-Catholics to act against their conscience. It is simply a symbol that attests to an episode in Quebec's history.

A religious symbol is thus compatible with secularism when it is a reminder of the past rather than a sign of religious identification on the part of a public institution. As the Quebec Human Rights Commission points out, a symbol or ritual stemming from the religion of the majority "does not infringe on fundamental liberties if it is not accompanied by any constraint on individuals' behavior" ²⁰.

²⁰ Bosset, Pierre, *Les symboles et rituels religieux dans les institutions publiques* [Cat. 2.120-4.6], Commission des droits de la personne et de la jeunesse du Québec, Québec, 1999, p. 10. My translation.

As always, there will be limit cases. Religious symbols in public institutions, like crosses in public schools, do not constrain individual behavior, but they do entail that there is a special link between the school and the religion of the majority ; it creates a form of symbolic inequality, and for that reason I think they should be removed. It is necessary to keep practices that do constitute a form of identification on the state's part with a religion - usually that of the majority - from being preserved on the pretext that they now have only a heritage value ²¹.

3. The Aftermath of the Bouchard-Taylor Commission : Quebec's Bill 94

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The post Bouchard-Taylor Commission debate was predominantly focused on religious signs in the public sphere. Some wished that the Quebec legislative assembly would follow Belgium and France and ban the burqa and niqab in the public space. This was not really taken up by legislators of the different parties. The more heated debate had to do with religious signs in the public administration. A majority among the public [100] thinks that public officials should not be allowed to wear visible religious signs, an opinion voiced in parliament by the official opposition.

However, the government decided otherwise. In March 2010, it introduced "Bill n° 94 : An Act to establish guidelines governing accommodation requests within the Administration and certain institutions" ²², that it saw as its main legislative response to the CCAPRCD Report and to the ongoing debate on secularism and

²¹ The European Court of Human Rights succumbed, I think, to this fallacy in *Lautsi and Others v. Italy*, Application no. 30814/06, 18 March 2011, Strasbourg, [Online] :

<http://cmiskp.echr.coe.int/tkpl97/view.asp?item=1&portal=hbkm&action=html&highlight=30814/06&sessionid=71434273&skin=hudoc-en>

²² National Assembly of Quebec, 2010, Bill n° 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, [Online] : <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-94-39-1.html>.

reasonable accommodations. Despite the political rhetoric of the government, the scope of the bill is fairly limited. For the main part, the bill gives an explicit legislative status to already existing positive legal norms. Articles 1, 4 and 5, for instance, simply reaffirm the duty to accommodate within reasonable limits as it was already defined in the jurisprudence. In addition, article 4 enunciates the principle of the "religious neutrality" of the State, which was until then indirectly inferred from the rights and freedoms granted to all citizens. The element of novelty in the bill is contained in article 6 :

6. The practice whereby a personnel member of the Administration or an institution and a person to whom services are being provided by the Administration or the institution show their face during the delivery of services is a general practice.

If an accommodation involves an adaptation of that practice and reasons of security, communication or identification warrant it, the accommodation must be denied.

The main target of this norm is to ban the wearing of the burqa and the niqab by public officials and to require women who wear such kinds of veils to remove them while they are transacting with a civil servant. The second paragraph of the article is a restatement that there are reasonable limits to freedom of religion, i.e., that motives related to security, communication and identification can justify turning down accommodation requests. Finally, article 7 stipulates that "the highest administrative authority of a department, body or institution is responsible for ensuring compliance with this Act", under the final authority of the Minister of Justice.

One of the positive effects of this bill is that all departments and bodies now have a legal duty to adopt guidelines related to the management of religious diversity and to monitor the practices of accommodation and non accommodation that are taking place on the ground. However, many, including the official opposition, think this bill does not go far enough.

[101]

Conclusion

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The debate in Quebec between the competing models of secularism is not settled yet. The Parti Québécois, the sovereigntist party which currently is the official opposition in the parliament, is now preparing legislation on *laïcité* - that will perhaps take the form of a charter (*charte de la laïcité*) inspired by the *Charter of the French Language*²³. The current liberal government maintains that Bill 94 testifies to their endorsement of *laïcité ouverte*. This where we are now in Quebec.

One of the pending issues in the current context is that more coercive rules regulating religious practice could easily be challenged before the courts and ultimately struck down by the Supreme Court of Canada. Going back to the intersection between the debate over the status of Quebec within the Canadian federation and the debate within Quebec on religious diversity, such an outcome could in turn fuel the resentment against Canadian federalism and the Supreme Court of Canada in particular. This is very speculative but, if the PQ defeats the currently very unpopular Liberal Party in the next provincial election, the internal debate over secularism and religious accommodation could lead to another round of constitutional debate over the future of Canadian federalism.

Fin du texte

²³ R.S.Q., chapter C-11, April 2011 [2010]. The Parti Québécois formed a minority government in September 2012 and embarked on such a project.