Reasonable Accommodation in a Democratic Society

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1. Introduction

It is now virtually a cliché that Canada is a "multicultural" society. To many observers, and certainly in the opinion of the Canadian Supreme Court, *see Amselem v. Syndicat Northcrest*, [2004] 2 S.C.R. 551 at p. 87, Canada is exemplary in its ability to balance the recognition of "difference." The unique of Canada in this regard is manifested, *inter alia*, in its official commitment to multiculturalism proclaimed in Article 27 of the Charter of Rights and Freedoms, a provision which instructs courts to construe the Charter in a fashion consistent with "the preservation and enhancement of the multicultural heritage of Canadians," and the Charter's universal provisions, such as Articles 15(1) and 28, which guarantee that all individuals have an entitlement to equal protection and benefit of the law. While it is not clear what the legal content of "multiculturalism" is, the Supreme Court of Canada has made clear in various statements that it means, at a minimum, that the government must take the concerns of minorities seriously, even, or perhaps especially, in circumstances where it unintentionally infringes their "fundamental rights." At the same time, however, because the Charter also provides for a legal system based in the concept that individuals have fundamental rights that belong to them simply by virtue of being a person, regardless of ethnic or religious identity, multiculturalism under Canadian law cannot be used to justify each and every minority practices; even practices that are central to a minority's identity could legitimately be restricted by law if necessary to fulfill the Charter's aspiration to establish a democratic society of free and equal

persons. Indeed, as I will argue, multiculturalism is not a source of legal rights so much as it is an interpretive guide to applying the Charter.

My presentation will first begin with a discussion of the basic points of Canadian jurisprudence with respect to balancing the competing claims of difference and universality in the context of religious freedom. In other words, I will try to lay out the general legal framework which Canadian courts use to assess claims for an "accommodation," i.e., an exemption from an otherwise applicable law, arising out of a claim of religious freedom. After having marked out the Canadian terrain of religious rights, so to speak, I will then discuss Islamic conceptions of the relationship of law and individual conscience. I will then discuss particular questions that arise out of Islamic commitments and how those relate to the Canadian framework for accommodation of minority claims, i.e., "reasonable accommodation." My conclusion will focus on why reasonable accommodation has become so controversial in Canada in recent years, and what Muslims can do to further entrench not only their own rights as Canadian citizens, but also the freedom of all Canadian citizens to live their lives in accordance with the principles of a free and democratic society.

As a relatively recent arrival from the United States, I am happy to add my voice in praise of the Canadian model of liberal democracy. As I will discuss below, the Canadian approach to minority rights, especially minority religious rights, is substantially different, and I believe superior to, the U.S. approach. The Canadian Muslim community, in turn, has a grave responsibility in accepting the demands of living in a democratic society by internalizing the values of a democratic society in the institutions they build in a free and democratic Canada.

1. The Canadian Constitutional Framework

The basic structure for the adjudication of claims of difference against the general backdrop of Canada's universalist legal ethos is the interaction between Article 1 of the Charter and Article 2. Article 1 states simply that "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be *demonstrably justified* in a free and democratic society." The structure of the Charter is radically unlike that of the United States constitution: while the Charter vests rights in individuals, and permits the government to limit those rights only when it is "demonstrably justified" in so doing, the United States constitution recognized individual rights virtually as an afterthought to the constitution itself, as evidenced by the fact that they were only incorporated as amendments to the original constitutional text.

Moreover, and perhaps more fundamentally, many of these amendments functioned as limitations on governmental powers rather than affirmations of individual rights. The First Amendment of the United States Constitution, for example, famously declares "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;". The focus of the First Amendment's language is negating a governmental power to regulate religion, *not* the right of the individual to freedom of religion. Contrast that language with Section 2 of the Charter's explicit grant of religious freedom to Canadians:

Everyone has the following fundamental freedoms . . . freedom of conscience and religion;

Section 2 of the Charter, unlike the First Amendment of the United States Constitution, places rights front and center of the constitutional text. Article 1 does more, however, than declare the centrality of individual rights to the Charter; it also states that these rights may be subject only to "reasonable limits"; these limits must be prescribed by law; and, in any case, that such limits must be justified in some "demonstrable" fashion as consistent with the values of a "free and democratic society." In conjunction with Article 15's equality requirement, Canadian courts have interpreted this provision, correctly I believe, to mean that governmental action that results even in unintentional limitations on the exercise of fundamental rights requires proof that the means chosen by the government are sufficiently narrow so as not to deprive individuals of their Charter rights unnecessarily. What this means in practice is that Canadian law must be applied with an eye to preserving the freedoms of *all* Canadian citizens equally, not just the freedoms of a majority of its citizens. In sharp contrast to the United States, then, otherwise lawful governmental policies that have a discriminatory effect on a group of people, i.e. a law that interferes with their ability to exercise their fundamental rights to the same extent as other individuals in society, are prima facie invalid – at least as applied to individuals sharing the relevant characteristic – until the government can demonstrate that the means it chose was, as a practical matter, the most practicable choice available to it.

In the United States, however, the discriminatory effect of general legislation is constitutionally insignificant. Only expressly discriminatory legislation, or facially-neutral legislation passed with discriminatory intent, offends the First Amendment's guarantee of religious freedom. Accordingly, in the United States, minorities are

generally vulnerable to the possibility that legislative majorities may pass legislation that has a substantial impact on their fundamental rights without the benefit of a judicial remedy. Instead, they are expected to obtain relief from the legislative branch of government which, purely in its discretion, may, but is not required, to provide relief. The leading modern US case on religious freedom, *Employment Division v. Smith*, laid out this approach: in that case, two employees of the State of Oregon were terminated for ingesting peyote mushrooms in connection with a religious ritual of the Native American tribe of which they were members. They were subsequently denied unemployment benefits on the ground that they were terminated for violations of the criminal law. The Supreme Court upheld the denial of unemployment benefits in this case on the ground that there was no violation of the claimants' religious freedom, arguing that the mere fact that generally applicable legislation – in this case the criminalization of peyote – interfered with their religious freedom was insufficient to state a claim for the violation of the right to free exercise of religion.

The Canadian legal commitment to equal enjoyment of rights has resulted in a jurisprudence that imposes upon the government an obligation to tailor its legislative policies narrowly so as to avoid unnecessarily burdening individual liberties. The U.S. Supreme Court, by contrast, elevated the principle of legislative efficiency over individual rights. It concluded that, in a religiously pluralistic society such as the United States, it would be impracticable and overly-burdensome to require the government to justify its policy choices whenever its laws incidentally interfered with the religious rights of some group in society; in such circumstances, the Supreme Court concluded, the absence of a discriminatory intent was sufficient to satisfy the First Amendment's

requirement. Again, the text of the amendment seems to make a difference: the First Amendment is concerned with government action in the first instance, not the rights of individual citizens. In the Supreme Court's analysis, having acted in a manner that did not target religion, the law could not be said to either "establish" a religion or "restrict the free exercise thereof."

The Supreme Court of Canada, however, in similar circumstances, took an approach that was virtually the opposite of that adopted in *Employment Division*. In the 2006 landmark case of *Multani v. Commission*, the Canadian Supreme Court was faced with a classic case of a generally applicable law that was neutral on its face but substantially interfered with the religious freedom of a member of a minority faith, in this case, the Sikh religion. The defendant school board had promulgated a rule prohibiting students from carrying weapons and other dangerous objects on school property. Male Sikhs, however, are required by their religion to wear a kirpan – a metal object resembling a dagger – at all times. When the school discovered that the student wore a kirpan to school, he was told that he would not be allowed to return to school unless he agreed to stop wearing the kirpan. Although the student and his parents had agreed with local school officials that the boy could continue wearing the kirpan subject to certain conditions, the governing board of the school district rejected the compromise and insisted on expelling the student until he agreed not to bring his kirpan to school.

While the Canadian Supreme Court affirmed the legitimacy of the policy as a general matter, it nevertheless struck it down as applied to the plaintiff on the grounds that the defendant failed to prove that an absolute ban on kirpans was the only reasonably available means to protect students from the risk posed by Sikh students wearing kirpans.

Remarkably, the Canadian Supreme Court of Canada showed very little deference to the state actor's interpretation of what it thought was necessary. It pointed out, for example, that there had been no evidence of a Sikh student ever using the kirpan as a weapon in a school, even though Sikhs had a long standing presence in Canada. Moreover, other objects could be easily found on school premises that, as an objective matter, presented an even greater safety threat to other students than that of the kirpan – especially in light of the agreement reached between the boy and the local school regarding how he would wear it – such as baseball bats or scissors. Yet, the school board had not attempted to ban *those* items, despite the threat they posed to the safety of school children. In short, the Charter, because of its focus on individual rights, forces state actors to take into account the subjective characteristics of its citizens – including their religious beliefs and practices – in a manner that results in a broad duty to make "reasonable" accommodations to minority religions, including, Islam.

Another way to express this point is that Canadian law requires the relevant governmental body, when making a law, to consider other points of view than that of the majority, and when it fails to do so, courts are permitted, indeed required, to step in and correct an otherwise valid law that had negligently failed to consider how it would impact minorities. This approach is very clear in *Multani*: the policy goal – having a safe school – while perfectly legitimate, was pursued using means that was unjustifiably *majoritarian*: it was under-broad insofar as it tolerated dangerous objects that the majority had come to tolerate as representing "reasonable" risks, but it was also overbroad insofar as it excluded objects that the majority "unreasonably" classified as "dangerous" based solely on its *understanding* of the object. This can be understood as a

requirement that governmental decision-makers accept the claimant's own account of the meaning of a certain practice to her or him, and that it is not within the legitimate power of the majority to resolve conclusively the meaning of a minority practice. Accordingly, the majority could not resolve the meaning of the kirpan without taking into account the meaning of the kirpan to Sikhs themselves. This principle has important implication for many practices that involve Muslims which many non-Muslims find unusual, oppressive, or even dangerous, such as the hijab or the niqab. *Multani* establishes clearly that the majoritarian processes of democracy are not entitled to resolve the meanings of such practices conclusively without regard to their meaning for those who adhere to those practices.

Accordingly, Canada provides a very hospitable legal environment for accommodating Islamic doctrine and practice. The hospitality of the Canadian constitutional framework, however, is not without its own limits, an issue I will turn to below.

2. Islamic Conceptions of Law and Conscience

Islam is a comprehensive theistic system a central dogma of which is human accountability for their conduct to God in the next life. This concept of divine judgment immediately creates the potential for conflict between individual Muslims' conceptions of their moral obligations and the state's conceptions of those obligations. While this tension is perhaps more acute when Muslims find themselves living in a jurisdiction that is not organized around principles of Islam, it remains only a matter of degree. In other words, at least for Sunni Muslims ever since the death of the Prophet Muhammad, and for Twelver Shi'a Muslims after the disappearance of the last imam, there is no temporal

authority with the power to resolve conclusively matters of moral controversy. Accordingly, even an Islamic state cannot purport to act as an infallible interpreter of religious commands. Muslim theologians accommodated this problem by establishing a system of intra-Muslim normative pluralism pursuant to which, aside from a few doctrines, moral disagreement was considered legitimate, both empirically and theoretically. Muslim theologians asserted a distinction between a conviction – *i'tiqad* – and a political command (*amr*). In general, it was expected that people out to act in conformity with their own convictions as well as comply with lawful commands of the government. But, what about situations where a legal command conflicted with an individual's moral convictions? How did Islamic thought accommodate this conflict? Islamic law and theology had both principled and pragmatic responses to this basic dilemma: first, to the extent that the government's command involved a morally controversial area of law (as most were), the government need only have good-faith grounds for believing its command was lawful. If the government did, as evidenced by a formal legal opinion (*fatwa*) declaring the policy to be licit, Muslim jurists believed that individual Muslims had a moral duty to obey the command as well as a prudential one to comply with that command. An exception was made, however, in circumstances where an individual Muslim's subjective convictions led him to believe that compliance with the state's command would require him to disobey God. In this circumstance, his moral obligation to comply lapsed (although the prudential obligation might survive). By contrast, if the state had no good faith grounds for believing its command was lawful, individual Muslims had no moral obligation to obey the rule, although they might be subject to a prudential obligation to obey.

Just as subjective moral convictions were relevant to determining an individual Muslim's obligation to obey governmental commands, it was also relevant to the adjudication of private claims. Accordingly, a judge's decision did not have any moral relevance if it was procured either by fraudulent testimony, or if the prevailing party relied on a rule of law that, as a subjective matter, he rejected. While such judgments were politically salient insofar as they were operative in the secular order, they were damning in the next life, as evidenced by the statement attributed to the Prophet Muhammad in which he warned his followers not to present false claims to him, lest he rule in their favor falsely, in which case their ultimate reward would be divine punishment.

In interactions with non-Muslim states, Muslims could enter into morally binding agreements, known as *amân*, whose terms would govern their rights and obligations to the non-Muslim polity, but here to, Muslim ethical norms placed certain conditions on such agreements. For example, the non-Muslim state had to permit the open practice of Islamic rituals (*izhâr al-sha'â'ir*), but Muslims did not necessarily have to enjoy the right to live their lives entirely under Islamic law for their residence in a non-Islamic state to be Islamically permissible. In other words, certain obligations that would otherwise apply, lapsed when Muslims found themselves living in a non-Muslim polity.

3. The Interaction Between Islamic Norms and Canadian Legal Norms

Both Canadian legal norms and Islamic norms contain universal norms, and accordingly, there is the possibility that they may, from time to time, conflict. I am optimistic, however, that both Canadian jurisprudence and Islamic theological and legal principles provide sufficient resources to solve most issues in a manner that is both reasonable from

the perspective of the Canadian legal system, and morally satisfactory from the perspective of Islam.

As a general matter, one can identify two sources of conflict: doctrinal, meaning, the specific content of Canadian legal doctrines as opposed to Islamic doctrines, and practical, meaning, the specific content of Canadian law with respect to commanding or prohibiting certain acts in contrast to the specific content of Islamic law's commands or prohibitions. I will try to give a couple of examples of how I believe such conflicts can be mitigated, but in so doing I want to provide an important caveat: I will be discussing classical Islamic positions as illustrations of potential sources of conflict without making any claims about the extent to which actual Muslims in Canada adhere to these doctrines, or without discussing the plausibility of reformist Muslim doctrines that reject historical Muslim doctrines. In all likelihood, substantial numbers of Muslims no longer adhere to the classical Islamic positions I will describe here. Nevertheless, they are useful to think about because to the extent a credible case can be made that such positions can be made compatible with Canadian law, one should gain comfort that actual Canadian Muslims' views – which will more likely than not be closer to the moral convictions of their fellow Canadians than they are to pre-modern Muslims – should also be compatible with Canadian law.

I will begin with an example of doctrinal conflict. One clear area of substantive doctrinal content relates to gender and sexuality. Islam, like many traditional religions, has a relatively rigid conception of gender roles and what constitutes legitimate sexuality. The Canadian constitution, however, rejects such norms, even recognizing the legitimacy of same-sex marriages and striking down indecency legislation as applied to an adult

group sex club. Islam, in addition to rejecting such norms as immoral, also encourages its followers to take strong stands against this and other kinds of immorality through the doctrine known as "commanding the good and forbidding the evil." Classical Islamic doctrine recognizes three forms by which this duty can be fulfilled: politically, by suppressing immoral conduct; morally, by speaking out against immorality; and finally, silently, by condemning immorality in one's heart. Does the fact that Canadian law permits conduct deemed by Muslims to be immoral mean that an irreconcilable conflict between Islam and Canadian law exists? Hardly. Canadian law, while it permits such conduct, does not require its citizens to endorse such conduct as moral. Accordingly, the Canadian Supreme Court, in the case of *Trinity Western University v. British Columbia College of Teachers*, held that the British Columbia College of Teachers did not have the right to deny accreditation to TWU's teacher training program based solely on the grounds that its commitment to traditional Christian teachings regarding sexuality – including the condemnation of homosexuality as a grave sin – precluded it from graduating teachers who would respect the human rights of students who were homosexual. In this case, the Canadian Supreme Court upheld the distinction between belief and conduct, stating that "[t]he freedom to hold beliefs is broader than the freedom to act on them." In short, it would be a violation of the religious freedom rights of graduates of TWU to deny them the right to work as teachers based on their religious beliefs that condemn homosexuality as immoral. It is perfectly conceivable that a teacher can, as a doctrinal matter, believe that homosexuality is sinful, yet respect the civil rights of homosexual students and treat them fairly. Only when an individual, motivated by religious doctrine, interferes with the legal rights of a homosexual does the issue of

discrimination arise. I submit that the belief/conduct distinction recognized by the Supreme Court of Canada in TWU can go a long way in resolving many potential conflicts between Canadian norms and Islamic norms, especially given that the Islamic norm of commanding the good and forbidding the evil can be fulfilled by teaching, an activity that falls squarely within the right to religious freedom protected by the Charter.

An example of a practical conflict might be a co-ed physical education class or swimming class in which a Muslim student – male or female – wishes to excuse himself or herself on the grounds that it would violate her standards of modesty. This is simply another iteration of the *Multani* problem: the requirement of physical education is no doubt a legitimate public purpose, but must it be pursued through co-ed instruction? Is the pedagogical goal in so doing to have boys and girls comfortable with one another or instead to encourage them to exercise regularly and adopt a healthy lifestyle? It seems most likely that the goal of physical education is the latter, not the former, and accordingly, having co-ed physical education classes does not appear to be necessarily related to the legitimate political purpose. Accordingly, in a school where there is sufficient demand for single-sex physical education programs, it is hard to see a good reason to deny such a request. Where such a demand does not exist, it might not be "reasonable" under Canadian law to accommodate that request.

If that is the case, what should the Muslim response be? I suggest that, in cases where it would be unreasonable under Canadian law to provide an accommodation for a Muslim, it will likely be the case that the Islamic principle of rafʿ al-haraj (removal of hardship) should be deemed to apply to grant her an Islamic "exemption" from the normally applicable rules of Islamic dress to permit her to participate in the physical

education class after her good faith attempt to obtain an accommodation, but failing. What this suggests that reasonable accommodation in a democratic society not only requires a more searching inquiry into the ordinary democratic rule-making process to insure that majorities do not inadvertently and arbitrarily interfere with the rights of minorities, but also that minorities need to undertake, from the perspective of their own beliefs, a good faith attempt to conform their beliefs and ways of life to the reasonable requirements of living together in a democratic society.

4. Why is Reasonable Accommodation Controversial?

It is not a secret, however, despite the success of the Canadian model, reasonable accommodation has proven to be controversial among large sectors of the Canadian populace. A few years ago, hardly a day seemed to go by without a controversy regarding "reasonable accommodation," particularly in Quebec. Indeed, things became so ugly in that province that the Quebec premier, Jean Charest, appointed two prominent academics, the philosopher Charles Taylor and the sociologist Gerard Bouchard, to investigate the controversies surrounding "reasonable accommodation" that had engulfed public discourse in Quebec.

One of their findings was that opposition to "reasonable accommodation" was often the result of wildly inaccurate reports of accommodations whose supposed scope suggested that minorities were routinely exempted from wide swaths of the law in the name of "multiculturalism" or "reasonable accommodation." In many of these cases, the alleged accommodation was never requested, much less granted. In a smaller number of cases, the scope of the accommodation actually granted was much narrower than popularly understood. Finally, they also found that the public did not understand that the

obligation to provide an "accommodation" is limited to those instances when the demand was limited to an "accommodation" that was objectively "reasonable."

A great many of these controversies then were genuinely and innocently the result of sincere misunderstanding; nevertheless, we would be naïve if we were to deny that much of the public was willing to credit bizarre claims of *unreasonable* accommodation only because of a deep and profound suspicion of *religious* minorities. This was manifested most clearly in the proposals of several Quebec politicians who, in the wake of the findings of the Taylor-Bouchard Report, and its balanced recommendations of an "open secularism," proposed amending Quebec's constitution to make certain rights, e.g., gender equality, superior to other rights, e.g., religious freedom, on the grounds that the "open secularism" advocated by the Taylor-Bouchard Commission did not go far enough in protecting Quebec values, such as gender equality.

So, one important cause of discomfort with reasonable accommodation is the perception that it allows individuals or groups with beliefs that are non-conforming with certain values embedded in public law to exempt themselves from the applicability of public law in the name of another value, e.g., religious freedom. In many cases, appeals to values such as gender equality are clearly a subterfuge masking a deeper bigotry; however, in at least some cases, the concerns are genuine. Take, for example, the Shariʿa Arbitration Controversy in Ontario in 2005. I do not doubt that the most vocal critics of this proposal were in fact bigoted, but that does not mean that this proposal did not raise genuine concerns. Likewise, the recent opposition to organized Muslim prayers in Ontario high schools is no doubt led and instigated by anti-Muslim bigots, but again, that does not mean that genuine concerns do not exist.

From the legal perspective, I have complete confidence in the legal system to apply the principles of "reasonable accommodation" with integrity, and thereby preserve the rights both of minorities (in these cases, Muslims) to reasonable accommodations, and the rights of the majority as embodied in the democratic rule-making process. What Muslims need to do, however, is to show greater internal conformity with democratic values to dispel the claim that Muslims wish to exempt themselves from general laws not to further their religious freedom, but rather to deny Muslims their rights as citizens and subject them instead to a religious system of governance that in many cases is opposed to public laws and values.

In the case of the Shariʿa Arbitration Controversy, for example, had the individuals proposing to engage in this procedure involved Muslim women from the beginning in order to get their input into the design of such an institution so that it would reflect Islamic and Canadian values, much of the controversy could have been pre-empted. So too, if Muslim institutions pro-actively included women in decision-making positions in their organizations criticisms of Muslim demands for gender-based accommodations would appear to be much more consistent with public values of individual freedom than is the case now. Likewise, when Muslims organize Friday prayers for high school students in the Toronto-area school system, they should take steps to insure that performance of this ritual takes place on terms that are as consistent with public norms as possible. This means not only choice of topics for the khutba (over which there have been no complaints) but also in organizing the prayer space to dispel the notion that female participation is a secondary concern. This latter concern, for example, could be addressed by, for example, dividing the prayer space into two side-by-

side sections for the boys and girls rather than dividing it, as is done traditionally, into a front and a back. While such a change is hardly an Islamic requirement, it is nevertheless permissible, and it would dispel unfounded criticisms of Muslim ritual practices as devaluing females. Another practical step would be to include Muslim female students in selecting both the khatib and the topics of the khutba.

In short, reasonable accommodation is a two-way street: it not only requires the majority to respect the freedom of minorities, it also requires minorities to recognize the claims of democratic society in the way they organize their own affairs. Muslim organizations need to do a better job demonstrating, objectively, their internal adherence to democratic norms in order to dispel the ugly and pernicious claims of Islamophobes that Muslims are only interested in rights to the extent they can use those rights to subvert the political order. Accordingly, we should always ask ourselves, whenever we establish a practice or institution, what can we change in our practices to make them more in conformity with democratic practices, even if we believe there is nothing inherently wrong with the traditional practice. In short, we should place a thumb on the scale in favor of all practices that further greater equality within the community, even if such practices are not religiously obligatory in any traditional sense, so long as such practices are not evidently haram. By acting proactively and internally, Muslims will be in a much stronger position to demand public accommodations without raising they eyebrows of a suspicious public.