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REASONABLE ACCOMMODATION

*Religion, Secular Law and the
Limits of Multiculturalism*

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Religion, Secular Law and the Limits of Multiculturalism

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The *Tabah Analytical Briefs series* aims to empower Tabah clientele – Shari’ah scholars and Muslim opinion leaders – with background information and critical analysis of contemporary events and debates. Each brief is a report of three to five pages, and concisely introduces a concept or topic relating to culture and socio-political change in the global community. The purpose of this series is to provide vital information that will assist scholars and policy makers in formulating a clear conception of the “Shared Public Space”, developing an informed discourse, and mediating the challenges facing the Muslim world today.

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REASONABLE ACCOMMODATION

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Executive Summary

The term “Reasonable Accommodation” has nothing to do with affordable places to stay when traveling in a foreign country. Rather, it is the title of a two-member Commission in the Canadian province of Quebec, and more importantly, it is the subject of a divisive debate that could alter the legal foundation of liberal secular democracies with vibrant minority faith communities.

This is how it got started. Quebeckers were growing increasingly alarmed at the demands by members of minority faith communities, particularly Muslims, to be accommodated in the public sphere. It is important to point out that while Canadians value religious rights, they generally frown on any public display of religion, except perhaps Christianity. Quebeckers sensed that by encroaching on public space, minority faiths would eventually alter the shared legal framework that defines the character of liberal secular societies.

The situation reached critical mass when the small town Herouville in Quebec adopted a Code of Conduct in early 2007 banning cultural practices perceived to be associated with Islam. There was not a single Muslim living in Herouville. When Muslims did show up bearing gifts and freshly baked Middle Eastern pastries as a sign of goodwill, the residents of Herouville were not sure whether to welcome them or bar them from entering the city.

Sensing a legal storm brewing, the government of Quebec appointed Dr Charles Taylor, a world-renowned philosopher and author of *A Secular Age*, and Dr Gerard Bouchard, a reputable Canadian sociologist, to carry out a series of public consultations and submit concrete recommendations on how best the government should deal with an apparently never-ending stream of demands from faith communities for accommodation in the public realm.

The commission was dubbed “Reasonable Accommodation” and it is expected to submit its report in May 2008.

REASONABLE ACCOMMODATION

Religion, Secular Law and the Limits of Multiculturalism

The Social and Political Context of “Reasonable Accommodation”

In order to appreciate the relevance of “Reasonable Accommodation”, it is necessary to situate it in the context of four main challenges now confronting liberal and constitutional democracies. These challenges have put a strain on the state’s ability and perhaps its willingness to extend to newcomers who adhere to a faith other than the dominant Judeo-Christian tradition, the full rights and privileges that come with citizenship.

1. The Legal Challenge

As the numerical strength of religious minorities increases and they demand their rights as citizens, the liberal state is coming under intense pressure to accommodate a large and diverse number of religious practices in the public realm while trying to preserve the legal parameters of the secular state.

In the Canadian province of Ontario a 39-year-old Sikh man recently challenged a \$110 traffic ticket because the legal requirement for him to wear a helmet while riding his motorcycle meant he had to remove his religiously ordained turban. The judge found that while the man’s religious reasons for wearing a turban were by no means trivial, he ruled against allowing him to ride without a helmet on grounds that if he was injured, it would result in an “unreasonable public cost” to the health-care system.

In a 1990 case, a Sikh Royal Canadian Mounted Police (RCMP) won the right to wear his religiously ordained turban instead of the unique Stetson felt hat worn by the RCMP. This case had nothing to do with public safety and the objections were mostly about altering the uniform of the RCMP to accommodate a religiously ordained practice.

After winding itself through the legal system for four years, the Supreme Court of Canada ruled in 2006 in favor of a 12-year-old Sikh student in Quebec to carry his Kirpan to school. [The Kirpan is a 10-centimeter long ceremonial dagger that is an article of faith in the Sikh religion and must remain wrapped at all times, never to be unsheathed]. This was a clear violation of the School Board’s regulation that disallows weapons on school grounds on account of public safety. The Supreme Court accepted the argument that the rights of religious minorities enshrined in the Charter took precedent over arguments of public safety advanced by the board of education. The point here is that there is no uniformity in the way the law handles the same issue even within a single faith community.

2. The Challenge of Faith in the Public Realm

In the United States and Canada, moderate and fundamentalists religious communities believe they can save secular society from its own demise by providing it with a moral and spiritual

compass. The resignation of New York's Governor, Eliot Spitzer, on grounds he had illicit liaisons with a high-priced prostitute, fuels a belief that secularism breeds a climate of hedonism, greed, corruption and despair.

Despite the many shortcomings of its followers, religion, on the other hand, presents itself as a cherished ideal. For example, when seven young Amish girls from West Nickel Mines, Philadelphia were shot and killed in 2006 by a crazed gunman, the Amish community's immediate and only response was to forgive the killer and extend a helping hand to his wife and children. The media spent days admiring and trying to figure out the source of the Amish's spirit of forgiveness and spiritual healing.

In a recent book, *Religion: the Missing Dimension of Statecraft*, the authors demonstrated the overwhelmingly positive role that religion has and can continue to play in ending violence and bringing peace to war zones.

On the other hand, Esther Kaplan's book *With God On Their Side: How Christian Fundamentalists Trampled Science, Policy, and Democracy in George W. Bush's White House* demonstrates how the Christian right elected a president and then cheered while he embroiled his country in two seemingly unending wars.

If this is not confusing, consider Rev Jeremiah Wright's use of "Black liberation theology" to condemn the United States for the way it has treated Aboriginal and Black people, and how his theology nearly derailed the presidential candidacy of Senator Barack Obama.

3. The Challenge of Multiculturalism

There is a widespread perception in right-wing media and academic circles that the policy of multiculturalism, whether official (Canada) or unofficial (Western Europe), has allowed newcomers to exploit liberal societies in the name of mutual tolerance.

Canada has the enviable position among Western countries because of multiculturalism. Canada is recognized as the first "post-multiculturalism state" for enshrining the policy in its Charter of Rights and Freedom and for establishing a federal department of Multiculturalism.

However, since September 11, 2001 the official policy of multiculturalism has come under intense attacks from neo-conservatives for allowing religious extremists to preach an ideology of hate and violence and raise funds for extremist organizations in foreign lands.

Unfortunately, current political leaders in Canada, the UK and France, see multiculturalism—premised on the idea that social identity is plural, open and fluid, rather than singular, closed and fixed—as detrimental to a climate of national unity.

The perception in Europe of "reasonable accommodation" is that if this sort of debate can take place in the most robust of multicultural societies, then "we would be wise to avoid going down that road ourselves."

4. The Challenge posed by Islam and Muslims

Post 9/11 Muslims and Islam are perceived and often portrayed as a dangerous and menacing threat to liberal secular societies. More than Sikhs, Hindus and other faith communities, there is a distinct perception that Muslims are dangerous and if the liberal state continues to

acquiesce to their demands for religious accommodation, they will eventually take society back to an age of religious tyranny.

Whenever the extreme right in America wishes to smear Barack Obama, it needs only use his middle name—Hussein—to suggest that he might be a Muslim and thus part of a terrorist sleeper cell trying to infiltrate the White House.

With the attacks of 9/11 lurking in the shadows, here are a few examples of how the public perception of Muslims as intolerable gets fueled:

- Muslim women want the husbands of non-Muslim wives prevented from attending their prenatal courses.
- Muslims demand that *The Three Little Pigs* children storybook be banned from public libraries.
- Muslim families demand that their hospitals make available a female doctor to assist wives in childbirth.
- Students at a university campus demand that the local pub stop serving alcohol.
- A Muslim woman demands that Toronto's international airport authority provide space beyond an existing interfaith room for her to offer prayers.
- Muslim taxi drivers refuse to pick up passengers with dogs citing legal rulings that a dog's saliva is impure.
- Female primary school teachers insist on the right to wear the niqab while teaching.

When these cases appeared before the court of public opinion they were deemed to be unreasonable demands for accommodation. What would be the outcome if a judge was asked to adjudicate whether they qualified as reasonable forms of religious accommodation? To find out, it is necessary to define these two terms.

The Meaning of Accommodation

The brilliant Harvard scholar and a philosopher many describe as the most important western political thinker of the 20th century, John Rawls, outlined a theory of a "Just Society" in his 1971 book *A Theory of Justice*. According to Rawls, justice entailed that each citizen "*receive an equal guarantee under law to as many different liberties and as much of them as can be guaranteed to every other citizen at the same time.*"¹

The liberties he was referring to include voting, seeking public office, freedom of speech and assembly. It also meant freedom of conscience and thought, along with the right to hold private property, and freedom from arbitrary arrests and seizure.

The dominant faith communities in the West—Christians and Jews—adopted a shared common law framework by which all citizens can aspire for a "Just Society". However, as minority faith communities began demanding their rights as equal citizens, governments were pressed to explain why Christians and Jews enjoy privileges and are assigned public functions denied to others. That didn't appear to be fair, i.e. just.

The Canadian and European approach to multiculturalism—the legal and social accommo-

dation of cultural diversity—emerged precisely because it best fulfilled the liberal definition of what a “Just Society”, consisting of diverse minority groups, might look like.

By embracing multiculturalism and acquiescing to all sorts of demands for religious accommodation from various faith communities, liberal governments managed to avoid charges of racism, prejudice and bigotry by cultural newcomers against the state. However, if one examined the kinds of accommodation that were approved and often funded, they would find them in the category of cultural tolerance, or what I prefer to call “cheap accommodation”. By cheap accommodation I mean things that have absolutely no impact on the legal or political character of the secular state.

A Muslim woman wearing the hijab or niqab to work, or the image of minarets and halal butchers springing up on every street corner might cause a shift in the norms and cultural standards of secular societies and might even offend some people, but they have a positive—not a negative—impact on our commitment to a “just society”. In other words, the legal embrace in Canada of multiculturalism is an indication that differences in culture do not detract from the rights and obligations of citizenship.

Governments were, however, careful not to give the impression that what they were in essence doing with multiculturalism was operating a two-tier system of cultural practices. The upper tier was reserved for established cultures and religions, while the lower tier was reserved for newcomers with their exotic customs, cuisine, music, and religion. So long as the lower tier was allowed to set up a curry shop on every street corner, shout from a minaret five times a day, and dress in long flowing white robes, they posed no threat to the upper level and the system remained intact.

Post September 11, 2001 the forces of a radically conservative movement (Neo-Cons) charged that minority communities, particularly Muslims, had exploited multiculturalism to such an extent that they posed a threat to the national security of liberal society from within.

The term “accommodation” was introduced in order to extract religion from multiculturalism and address faith as a distinct category from culture. Since the term “accommodation” required clarification, the concept of “reasonable” entered the framework.

The Meaning of Reasonable

The Archbishop of Canterbury, Dr Rowan Williams, tried to avoid the term “reasonable” and stepped into a bog nevertheless when he suggested that a process of “constructive accommodation” between British law and aspects of the Shari’a, particularly areas of Muslim personal law such as marriage, divorce and inheritance, was “unavoidable”.

Dr Williams should have also known that substituting “constructive” for “reasonable” changes nothing because someone still has to decide what is constructive or destructive about a religious practice.

To understand what reasonable means in this context we have to return to Professor Rawls once again. In his essay entitled “The Idea of Public Reason Revisited” (1997), Rawls makes an important distinction between a public and a non-public reason.² By “reason” Rawls does not mean it with a capital “R”, nor does he mean “rational” or “logical” as these terms are used in

the physical sciences. By “reason” he means a publicly or privately accessible explanation for doing something.

A non-public reason for not consuming alcohol, for example, would be the Qur’anic and Prophetic reasons for prohibiting of all forms of intoxicants because consumption opens the door to many social evils, earns the displeasure of God, and paves the road to one’s place in the hellfire. Public reason, on the other hand, is the explanation one offers beyond one’s faith community that a belief or practice is good for all citizens, believers as well as non-believers. There is no recourse to Scriptural arguments, God or the Afterlife, in putting forward a public reason.

According to Rawls, what is “reasonable” must also be what is “good,” i.e. what is just and fair for all citizens. Christian fundamentalists often respond by saying that “God is Just” and therefore what God commands us to do in the Bible can only be just and good for all people, privately as well as publicly.

Secular societies, however, were built on the foundation of “the Great Separation” between Church and State. This means that when it comes to administering the affairs of the state and public life, citizens prefer to exercise their own individual judgments—imperfect as they are—instead of submitting to the authority of revelation. To them, personal choice results in a politically stable and a potentially Just Society.

The irony, however, is that the “Great Separation” does not exclude non-public reasons from entering the public realm. That would be impossible to prevent and preventing it would give the impression that a basic freedom is denied to people of faith. Therefore, when a non-public reason is articulated at the public level, the demand of secular societies is that it be “translated”.

The Role of Translation

Translation occurs when faith leaders take religious reasons designed to function in a private system of natural or positive law, and adapt them to a system grounded in common law.

Translators are required to refrain from using debate-stopping arguments such as “the Bible or the Quran says ...” Instead, translators are required to present “reasons” that any ordinary citizen might accept as serving a public good minus the baggage of persuasion, conversion and the promise of salvation or damnation. For example, Muslim families wishing to have a female-only gynecologist present at childbirth would be required to offer reasons why a hospital should accommodate the family’s request. The medical system, which is already stretched to the limit, was not designed to offer such accommodations.

Hospital management will say that there is always a competent male or female gynecologist on call and a family gets whichever one is available at the time of childbirth. Anything more than that, other than an emergency, would place an unreasonable financial burden on the system. Some Muslim families can afford a midwife, but the majority cannot, and even if they could, many worry about medical complications and prefer a hospital which has the facilities to respond promptly.

There are hundreds of issues like these facing Muslim families in Canada, the United States

and Western Europe. The way Muslims have been dealing with them so far has been to seek out dispensations from favorable scholars. But given the numerical growth of Muslims in the west, a multitude of dispensations could eventually reduce the religion to a mixed bag of practices with no internal legal cohesion.

It is impossible to put forward public reasons if there are no private ones left.

Conclusion

Whichever way you slice this pie, “reasonable accommodation” means that religious practices will no longer be sheltered under the umbrella of multiculturalism. Further, it imposes a limitation on the engagement of faith in the public realm by stipulating a condition of “reasonable proof” on religion. Questions for consideration:

- Will this limitation stifle the religious engagement of Muslims or will it suffocate only the religious extremists while allowing the fruits of the Islamic intellectual tradition to be relished by believers and non-believers alike?
- By accepting a common-law framework, will Muslims be made to believe that they have to compromise the fundamental principles of their religion?
- How should Muslims respond to laws or policies that are in complete opposition to natural or positive law, as outlined by the Qur’an and the Prophetic example? For example, how should Muslims react to legislation in Canada that approved same-sex marriages, the opening of gambling casinos, or enacting foreign policies that involve the nation in wars abroad?
- Muslim discourse in the West has been built on a Da’wa model that is obsessed with conversion. Reasonable Accommodation will force a shift in the current discourse away from the impulse to convert and more towards building a common ethical platform. Is that a desirable outcome?
- Reasonable Accommodation may mean accepting the proposition that people of faith and those of no outward faith are equal and that none has an advantage over the other in law. Could Muslims accept this?

If it is not yet evident, “reasonable accommodation” gives secular law, customs and norms an advantage over faith and religious practices. This is an important point which begs two strategic questions:

- Are Muslims better off negotiating independently with the state for a place at the public table?
- Should Muslims create alliances with minority faith communities within the dominant Judeo-Christian culture?

Answers to the last two questions may depend on where Muslims reside and what tradition of secularism their country practices. Muslims in Canada have had their own unique experience both with the government and with the dominant faith traditions.

When a handful of Muslim leaders, representing an estimated 400,000 Muslims in Ontario, Canada requested that faith-based arbitration, established to handle marriage, divorce, and inheritance, be extended to them as it was to members of the province's Christian and Jewish communities, the media raised the mantle of fear, dubbing the request "Shari'a law". Instead of extending to Muslims what other faith groups already had, the government bent to pressure and threatened to revoke the decade-old legislation that allowed faith-based tribunals to be established in the first place.

On the other hand, when a multi-faith coalition consisting of Jewish and Muslim leaders clamored for public funds for their private schools, a concession enjoyed by the province's Catholic community, the answer was a blunt no. This time, though, the provincial government did not threaten to take away public funds for Catholic schools. No one of religious authority in the Catholic community has ever spoken up in support of other faith communities' entitlement to public funds.

NOTES

¹ See John Rawls, *A Theory of Justice*, Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1999 [1971], p.60.

² See John Rawls, "The Idea of Public Reason Revisited," *Chicago Law Review*, 64:3, 1997, pp.765-807.

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The Canadian Charter of Rights and Freedoms is also known as The Charter of Rights and Freedoms or simply the Charter. It is a bill of rights entrenched in the Constitution of Canada. It forms the first part of the Constitution Act of 1982. The Charter guarantees certain political and civil rights of people in Canada from the policies and actions of all levels of government. It is designed to unify Canadians around a set of principles that embody those rights. <http://laws.justice.gc.ca/en/charter/>

The **Reasonable Accommodation Commission (Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles)** official web page is <http://www.accommodements.qc.ca/commission/index-en.html>

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