Immigration, Religion and Human Rights

State Policy Challenges in Balancing Public and Private Interests

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Abstract

Three regions of the world – Western Europe, North America, and Australia – are probably the most popular options when families of emerging countries decide to emigrate in order to better their economic future. As the flow of immigrants establishing themselves in the receiving societies allows for these countries to get culturally richer, it creates, on the other hand, legal tensions as to the extent religious practice is to be accommodated by the governments of secular societies so as to facilitate the insertion of the newcomers into the workplace, social networks, and education system. In order to eliminate or diminish the effect of legal provisions that cause an indirect harm to religious minorities, several countries have taken steps aimed at "reasonably accommodating" them. This paper looks at these efforts made by receiving States, taking into account both the legislative aspect and the interpretation of the statutes and constitutional provisions by national as well as international tribunals; it also gives a critical appreciation of the results that have been obtained in the societies that have implemented those shifts in their legal system.

Keywords: globalization, religious symbols, reasonable accommodations, comparative law, immigration, burqa, human rights.

A. Introduction

Because of the different migration flows that have occurred in the last century, very few societies are nowadays homogeneous as far as language, race, and religion. The dominant cultural, religious and social traditions have often shown strong difficulties in accepting the change in the cultural thread, and have been faced with increasingly demanding petitions for accommodation by groups of immigrants. Usually, those requests are based on the exercise of religious practices or the use of religious symbols in three main domains – education, work-

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place, and healthcare; currently, the most emblematic societal debate among countries with a diversified cultural thread is probably the one surrounding the use of the *burqa* – the full Islamic veil – in the public space, although other related topics come to mind, such as the debate regarding *halal* meat which slipped into the French election campaign of 2012.

In the context of globalization, the general crisis of post-modern societies, characterized by the growth of immigration and an exponential increase in the sense of social insecurity constitutes a fertile ground for fundamentalism in all religions, looking to impose religious claims which are more and more restrictive. The fear experienced in a number of countries of witnessing the fragmentation of the society, or the loss of essential aspects of the identity and culture of origin is difficult to eradicate;[1] this is fuelled in part by the worry of Islamist terrorism as it has appeared for several years in different parts of the world. Among the countries that have already experienced this shift, we find the United Kingdom, the Netherlands, Denmark, Norway, France, Germany, Belgium, Austria, Australia, the United States and Canada. This explains, in part, the famous minaret controversy in Switzerland: National cultures are afraid of being destabilized, and this *malaise* is such that some States are in the process of reengineering their immigration system, and – as we shall see – redesigning their legislation.

Even when they are perfectly legitimate from the believers' standpoint, these claims evidently cause tensions and conflicts in pluralistic and secular societies. In this context, *orthodoxy*, which seeks to establish some kind of enclave within which the believers can experience their faith away from modern society, must be separated from *fundamentalism*, whose main objective is to manipulate religion in order to achieve political goals by opposing itself to secular power; this in turn causes a menace to freedom of expression in the societies where fundamentalism flourishes.

Under this paradigm, one of the questions that need to be addressed is how our Western societies, which are more and more culturally plural, can accept all citizens equally, while recognizing their diversity, thus allowing a better harmony. Using key examples as illustration, this paper looks at the different strategies States are implementing, as neutral parties, to balance individual versus collective rights.

In order to fully grasp the extent of the problem at hand, we shall, at first, address the phenomenon of migration as the root of the issue; we then explore the models adopted by the countries receiving the flows of migrants, to deal with the situation – this will lead us to analyze the answers those States have devised, through their legislation, policies, and case law; the interpretation given to international human rights treaties by supranational jurisdictions, especially the Euro-

1 Commission de consultation sur les pratiques d'accommodement reliées aux differences culturelles, *Building the Future. A Time for Reconciliation – Report*, Québec City, Government of Québec, 2008, available at <www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>, p. 192.

pean Court of Human Rights, will be the object of the last part of this article. All of the foregoing will enable us to formulate concluding remarks.

B. Migration

Although immigration is not a new phenomenon, is has taken new proportions and created new challenges to the States who receive the newcomers, who do not always blend in the host country as well as the local authorities would like. Given that the host countries vary greatly in several aspects, it is understandable that the policies implemented by the different countries receiving immigrants vary quite a bit from one to the other. After the attacks of September 11, the debate over how better to integrate immigrating communities has been at the forefront of immigration policies, as a fear of Islamic fundamentalism slowly gained momentum, thus fueling prejudice and hostility towards Muslim communities.

I. Historical Evolution

Migration is an unavoidable feature of our contemporary world. Migratory flows have existed throughout human history, often triggered by wars or the need to find a better future. In modern times, the development of transportation has highly facilitated human movement. The Second World War is considered to be a turning point in the history of migrations; the devastation created in Europe by the war had the consequence of creating the necessity for many communities to look for a better future.

Countries like the United States, Canada, Australia, and Argentina adopted immigration programs with the idea of enlarging their population and increasing the work force capabilities, thus taking advantage of the post-war economic boom. This effort was carefully orchestrated, with promotion and recruitment industries, reception centers, and training programs to facilitate the settlement of migrants.[2] It was evidently easy for the host countries to integrate the immigrants, given the fact that this wave came from Europe, and therefore shared the same values as the communities that received them.

In the post-war period, millions of immigrants entered receiving countries, which did not perceive themselves as countries of immigration; they regarded the newcomers as simple visitors, temporary workers who, in exchange for the wages that they could not obtain in their own country, carried out tasks that locals were unable or did not wish to perform, under the assumption that the workers would one day return to their country of origin. In general, the immigrants could never accumulate the savings necessary to do so, and their children did not want to leave a country that had become their own.

Starting in the 1960s, the legal framework of the receiving countries, which allowed up to that point for a mainly European immigration, was adjusted in order to receive applications from non Europeans. This way, the policies were no

2 International Organization for Migrations, *Migration in History*. Available from <www.iom.int/jahia/Jahia/about-migration/migration-management-foundations/migration-history/developments-challenges/cache/offonce/>.

longer focused on origin but on qualifications, skills and work experience of the immigration candidates. It cannot be forgotten also that the second part of the twentieth century has been marked by civil wars, belligerence, and oppression, often coupled with intensifying religious and ethnic conflict, causing millions of individuals to seek refuge in adopting countries.[3]

In the meantime, little has been done in many of those countries to integrate the immigrants, and allow their children to learn the host society's language and receive the proper tools in order to obtain a better future. For example, in Germany, foreigners had to wait until 1992 to be able to seek naturalization, with the exception of those of German ethnic origin. The pattern is still true today (for example, the case of Latin Americans in the United States). As a consequence, in certain major German and French cities, among others, the young generations who have lost a good part of their culture of origin without being able to integrate into the host country show frustration, as they live in prosperous consumer societies in which they are not welcome to participate, creating a fertile ground for isolated incidents such as the blazing in Paris suburbs in 2005. These uprisings understandably irritate the more privileged classes and undermine the majority's goodwill, thus fueling strong xenophobic right-wing movements.[4]

II. Integration

The incorporation of immigrants into the society is done according to four main theories: Assimilation, two-way integration (also known as the melting pot approach), multiculturalism, and segregation. The first approach is based on the migrants adjusting entirely to the values and the rights system of the receiving society; they are expected to blend within the population, forget their past and build a new life in the host society, becoming indistinguishable from its majority. The two-way integration is based on the premise that both the migrants and the host society have to adjust to each other, and therefore contribute to a common culture while at the same time allowing the migrants to retain a certain cultural heritage. The multicultural approach stems from a set of common, non-negotiable core values – like democracy, gender equality and the rule of law – with a chief importance given to the values of diversity and respect for differences. In the last model, the migrants are not expected to assimilate into the culture of the receiving society, and so the value system of the host society is not affected by the presence of the migrants, as they are required to adjust to it.[5]

The effectiveness of integration policies can be determined according to six main areas. The first is the language, since it represents a basic tool in order for a migrant to interact in the host society. The adaptation to the education system is also a fundamental condition for the migrants to obtain a certain economic well

3 J. Witte and M.C Green, 'Religious Freedom, Democracy, and International Human Rights', *Emory International Law Review*, Vol. 23, 2009, p. 586.

4 Commission de consultation sur les pratiques d'accommodement reliées aux differences culturelles, 2008, pp. 190-191

5 International Organization for Migration, *Determining the Goals of Immigration*. Available from <www.iom.int/jahia/Jahia/about-migration/managing-migration/integration-of-migrants/determining-goals-of-integration/cache/offonce/>.

being. The participation of migrants in social life is the next factor, with such criteria as inter-group marriages between migrants and nationals being indicators of social acceptance and inclusion. A further ambit of social integration is the political level, which includes membership in associations, political parties, participation in elections and political representation. The participation in the work market is another key area of integration; indicators that can be considered in this case are unemployment among migrants compared with the national average, as well as the distribution of the migrants in the different employment sectors, which can identify possible segregation tendencies. The last criteria is residential integration, which takes into account the nature and quality of the housing, as well as the area of settlement, that can conversely show a sign of 'ghettoization', and thus separation from the receiving society.[6]

An aspect which must not be forgotten is the fact that receiving societies depend on immigration for their own development. The context of immigration is highly influenced by the fact that host societies usually have fertility rates well under the 2.1 rate necessary for the population to regenerate. In that sense, it has been asserted that the aging in rich countries will force them to compensate the decline in the workforce population with the immigration of a young population of foreign origin, which will allow the refinancing of the pension system; some experts are not convinced that the equation is that simple, as these workers will in turn require the system to work for them in the following decades[7].

C. Human Rights and State Policies

Several instruments have been adopted – both at the regional and international levels – which seek to uphold freedom of religion. At the international level, beside the 1948 Universal Declaration of Human Rights which provided the foundation for religious freedom as a human right, subsequent documents supplied the framework. In particular, worth mentioning are the International Covenant on Civil and Political Rights, the United Nations Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the Concluding Document of the Vienna Follow-up Meeting of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities. On a more local scheme, we can recall that the European, American, and African continents have adopted binding documents as well. In the case of countries pertaining to the European Union, two Directives were also adopted in 2000, which are applicable to the issue of freedom of religion.

6 International Organization for Migration, *Integration Measures*, <www.iom.int/jahia/Jahia/about-migration/managing-migration/integration-of-migrants/integration-measures/cache/offonce/>.

7 A. Furcht, 'Demografia, immigrazione, delinquenza, terrorismo islamico: i luoghi comuni del terzomondismo', *in* C. Moffa, *Lamerica. Ideologie e realtà dell'immigrazione*, Rome, Aracne, 2005. Available at <www.furcht.it/andrea/a-teim.pdf>, p. 3.

The intensity of the obligation for the State to ensure freedom of religion can conceptually be construed under three different perspectives: In the 'negative' conception, the State must not limit religious practice; under the 'positive' stance, the State must actively allow religious freedom; in the 'differentiated' conception, State authorities must actively promote freedom of religion and allow derogations to some laws in order not to discriminate against those who practice a certain religion. International organs strongly insist on the first point, and encourage States to try to carry out the second. The third point, however, is a lot more controversial, and has not reached international consensus.[8] It is important to note that the expression of freedom of religion can be limited, depending on the jurisdiction, for reasons having to do with such subjects as security, communication or identification.

As to the relationship between State, religion and society, it can be classified according to three main categories. In the first one, we find countries which have adopted the system of State religion - like several Islamic countries, but also European nations such as the United Kingdom, Greece, and Norway. The second category includes all countries which have adopted a strict secularism, the best examples being France, Spain, Sweden and Turkey. Finally, the third category consists of mixed or hybrid systems granting an official recognition to certain religions, without elevating them to a State religion status (Germany, Austria, and Luxemburg).[9]

The concept of secularism started to develop when States decided to tolerate other religions than the State religion, going against the practice that had prevailed since the beginning of the 16th century, according to which each territory had to adopt the faith of the sovereign. It is based on three core values: freedom of conscience, legal equality of religious or spiritual options, which forbids any kind of discrimination, and the neutrality of the State. Democratic countries, even if they have not formally adopted the principle of strict secularism – as in the case of Canada – and in some cases continue to have a State religion – as in the United Kingdom – respect the liberty of conscience and the principle of non-discrimination, and do apply a distinction between the religious and political spheres.[10]

I. Strict Secularism

It is important, from the outset, to stress that simple secularism is distinguishable from *laïcité*: while the latter is a politically motivated choice made by the State as it tries to limit the scope and visibility of religion, secularism can be understood as the process through which religion stops being the centre of the

8 F. Megret, 'Le Canada à la pointe de la tolérance?: l'accommodement raisonnable à l'aune du droit international des droits de la personne', *in* Gaudreault-Desbiens, Jean-François (Ed.), *La religion, le droit et le raisonnable*, Montréal, Ed. Thémis, 2008, p. 3

9 *Id*.

10 Y. Geadah, *Accommodements raisonnables: droit à la différence et non différence des droits*, Montréal, VLB, 2007, pp. 32-33.

social life of man; it is not a political choice, nor does it imply the disappearance of religion altogether.[11]

1. France

The case of France is emblematic since the principle of *laïcité* was already present in Article 10 of the Declaration on the Rights of Man and the Citizen of 1789. Nevertheless, the Revolution was not able to implement the principle, and Napoleon signed a treaty with the Vatican by which the priests and the Bishops would be considered civil servants of the State. A law adopted in 1905, separating Churches from the State, formalized the adoption of the principle, giving it a positive content: it ensures the liberty of conscience and guaranties the freedom to exercise a religion as long as public order is observed. At the constitutional level, the principle was enshrined for the first time in the 1946 Constitution and confirmed in Article 2 of the current Constitution of the Fifth Republic.[12]

France, because of its large Muslim population has been forced to establish strong public policies aimed at coping with this reality. For that reason, it has a rich array of jurisprudence cases that specify the rules to be followed. Starting in 1989, the *Conseil d'Etat* – the highest administrative tribunal – was faced with the task of determining if young Muslim girls should be allowed to go to school wearing the *hijab*, a veil covering their hair. The ruling, considered to be ambiguous, allowed for the French government and public schools to apply their own interpretations as to when the wearing of the veil could be forbidden.

In March 2004, the French National Assembly enacted a law that banned religious symbols from being used in the public school system, the wearing of which leads to immediate identification of an individual's religious affiliation – such as the Islamic headscarf, the Jewish *kippah*, or a cross of clearly excessive dimensions. As concrete examples in the French practice of interaction between immigrants and public institutions, and the upholding by French authorities of the concept of *laïcité*, a juror was dismissed of wearing a *hijab* based on the fact that it could be perceived her point of view could be influenced by her religious convictions; also, women insisting on wearing their veil to naturalization ceremonies have been excluded from them, as it was considered that they displayed attitudes contrary to the values of the republic.[13]

The issue of the *burqa* in France deserves a special mention, as it constitutes the latest legislative development in the field. It has to be recalled that the veil can take many declinations, ranging from a simple headscarf covering the hair, to a full-body gown that covers the woman from head to toe, only allowing an opening for the eyes. Several countries have carried out societal debates in order to determine the fittest way to address the issue; France stands out for its stance,

11 C. Arciprete, 'La nuova frontiera della globalizzazione: L'Islam. Una riflessione a partire da due libri di Olivier Roy', *Jura Gentium, Rivista di filosofía del diritto internazionale e della política globale*, 2009. Available from <www.juragentium.unifi.it/it/surveys/islam/europe/arcipret.htm>.

12 Geadah, 2007, pp. 34-35.

13 L. Barnett, *Freedom of Religion and Religious Symbols in the Public Sphere*, Parliamentary Information and Research Service, Ottawa, 2004, pp. 20-21.

crystallized in a law which landed the approval of the body in charge of testing the constitutionality of French norms – the *Conseil Constitutionnel* – in early October 2010, causing much controversy in various forums. The French legislators overwhelmingly gave their backing to the law, invoking the need to propose an answer to an increasing number of practices that carry the potential of jeopardizing State security, clash with minimal standards of social interaction, and are not compatible with the constitutional principles of liberty and equality, as they place women in a situation of exclusion and inferiority. In its decision, the *Conseil Constitutionnel* states:

> 5. Given that, with regards to the objectives it has assigned itself, and considering the nature of the penalty mandated in the case of disregard of the rule it has established, the legislative branch has adopted provisions which ensure, between the safeguard of public order and the guarantee of the rights constitutionally protected, a conciliation that is not manifestly disproportionate; that, nevertheless, the prohibition to conceal one´s face in the public space cannot restrict the exercise of the freedom of religion in temples open to the public, without excessively infringing on Article 10 of the Declaration of 1789; that, barring this reservation, Articles 1 through 3 of the remanded law are not contrary to the Constitution;
>
> 6. Given that Article 4 of the remanded law, which mandates a one-year imprisonment sentence and a € 30 000 fine for the person who imposes on someone else the concealment of their face, and that its Articles 5 to 7, related to its entry into force and its application, are not contrary to the Constitution,
>
> DECIDES:
>
> Article 1.- With the exception of the reservation mentioned in the fifth paragraph, the law forbidding the concealment of the face in the public space is consistent with the Constitution.
>
> Article 2.- This decision shall be published in the Official Gazette of the French Republic.[14]

It can also be pointed out that the use of the 'burkini' or 'hijood' adds a twist to the plot: Some women have indeed started to wear, on European beaches and in pools, a full-body swimsuit which allows them to bathe while staying truthful to their convictions. This has caused isolated incidents in France and Italy, where the women have been asked to refrain from using these bathing suits – for health concerns – as they do not allow responsible authorities to ensure the bathers are exempt from skin diseases.

14 Conseil Constitutionnel, 'Décision no. 2010-613 DC du 7 octobre 2010 (Loi interdisant la dissimulation du visage dans l'espace public)'. Personal translation.

Finally, a mention must be made here regarding the *halal* meat controversy,[15] which has existed now for a few years, but was reignited by Marine Le Pen, Chief of the right-wing *Front National* party, during the election campaign of 2012. The media reported that many slaughter houses in France practice only *halal* killing methods since it is too expensive to carry out both, and they do not want to miss out on the large Muslim market present in major French cities. Madame Le Pen expressed her deep concerns regarding the fact that, because of the mislabeling of products sold in super markets, non-Muslim French citizens are placed in the situation of unwittingly eating *halal* meat, which she contended comes from animals that are being inhumanely slaughtered. Though European law mandates that animals be stunned unconscious before being killed, it makes an exception for religious slaughter, where the animal's throat is slit while it is alive.

Although the ritual method through which *halal* meat is obtained (as with *kosher* meat, using a single incision to the jugular) is legal in France, Le Pen maintained that *halal*'s 'horrible cruelty' warrants special condemnation, arguing that French people who do not want to eat *halal* should have the same rights as Muslims who do. Trailing in the polls during the campaign for his re-election, and in an effort to reel in the country's right-wing base, President Sarkozy called for stricter meat labeling and reiterated his position that serving *halal* meat in school cafeterias goes against French secular values. His Prime Minister, Francois Fillon, exacerbated the controversy when he suggested on a radio programme that Muslim and Jewish ritual slaughter traditions were outdated and incompatible with today's state of science and hygiene.

It should be added that a German study published in the 1970s by veterinarian Wilhelm Schulze concludes that, if performed properly, religious slaughter is no less humane than captive bolt stunning. Religious leaders also argue that the swift cut to the jugular required in *halal* and *kosher* methods acts as its own stunning sedative, rendering the animal unconscious almost instantly.

2. *Turkey*

Turkey adopted the first secular constitution in the Muslim world in 1921, and continues to be the only State in the community of Islamic States with such a characteristic. However, the concept of *laïcité* is not based, as in France, on the principle of separation, as the State continues to dictate the rules in religious matters, including the control over mosques, the appointment and destitution of imams, etc. It can be added that the Turkish government even forbade a political party, the *Refah*, as it considered the ideals it embodied too dangerous for the rights and freedoms guaranteed by the Turkish Constitution.[16] As we shall see ahead in this article, a case arising in Turkey gave the European Court of Human Rights the opportunity to establish jurisprudence on the interpretation of the very concept of freedom of religion.

15 For a thorough analysis on this issue, see Alex Bruce's article: 'Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of Religious Slaughter of Animals', *University of New South Wales Law Journal*, Vol. 34(1), 2011, pp. 351 *et seq*.

16 Geadah, 2007, pp. 44-45.

II. 'Accommodating' Societies

We shall now briefly refer to three States which have adopted a very different approach to dealing with the integration of their immigrants. Just as people with disabilities expect to be treated differently in a given society, and be accommodated in such a way that they can have access to housing or transportation, and participate in the work force, the countries we will allude to have understood the need for minorities that are in a disadvantaged position to be treated in a way that allows them to fully partake in the everyday life of their host societies. As professor Mendes puts it, the paramount concern to be considered when reasonable accommodation is sought, has to be the concept of human dignity.[17]

It is important to recall that the concept of reasonable accommodation is not that new; it has been used as an effective tool to allow vulnerable or under-represented segments of society to be better integrated within it. For example, it has enabled women to be better represented in the police force, trough the elimination of height requirements; the same goes for disabled people that were banned for a long time from certain public places because they could not enter with their dog; people living in common law marriages or homosexual couples can now benefit in many countries from the same rights granted to married couple; hiring conditions in certain professions are also being reviewed in order to help women access to those occupations.[18] Actually, if we want to go further down in history, it is safe to say that reasonable accommodation was indeed used by, for instance, the Europeans in their intent to facilitate the relations with the aboriginal people in English and French speaking America.[19]

Likewise, it seems relevant to point out that all intercultural or interreligious conflicts which lead to arrangements do not necessarily fall within the definition of reasonable accommodation: All of these conflicts have to do with different visions of the world, but they do not necessarily translate into outright discrimination. When no right is being affected in a discriminatory fashion, it is more accurate to refer to a conflict of values. [20]

An important concept related to reasonable accommodation is that of *indirect* discrimination. While direct discrimination has to do with an outright motive of distinction, indirect discrimination has to do with a 'neutral' rule, meaning that it applies in the same way to all the members of a given society, but has, however, a discriminatory effect on one specific group of people, by imposing on them a series of restrictive obligations or conditions. A norm or policy considered directly

17 E.P. Mendes, 'Being Reasonable about Reasonable Accommodation of Minority Religious Practices and Symbols; A Global Challenge in an Era of Diversity', *in* C. Brunelle & P.A. Molinari (Dir.), *Accommodements raisonnables et rôle de l'État: un défi démocratique*, Canadian Institute for the Administration of Justice/Institut canadien d'administration de la justice, Montréal, 2009, p. 207.

18 R. Azdouz, 'Les conflits de valeurs et de droit dans le secteur de la santé et des services sociaux', *in* M. Jézéquel (Dir.), *Les accommodements raisonnables : quoi, comment, jusqu'où? Des outils pour tous*, Cowansville, Editions Yvon Blais, 2007, p. 355.

19 I. Binnie, 'Putting Reasonnable Accommodation in Historical Perspective', *in* Brunelle & Molinari, (Dir.), 2009, pp. 7-8.

20 P. Bosset, 'Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable', *in* Jézéquel (Dir.), 2007, p. 20.

discriminatory will usually be invalidated unless it can be proven that it is reasonable. A norm which is indirectly discriminatory will usually be considered reasonable, so that there will be no reason to strike it. The corollary of the prohibition of indirect discrimination will be an obligation for accommodation, *i.e.* an obligation for the person responsible for the discrimination to take all means reasonable to subtract the victims of indirect discrimination from its effects.[21]

Analytically, the issue of reasonable accommodation entails both vertical and horizontal dimensions. At the vertical level, the individual claims the existence of a right against the State, or the State wishes to implement a policy without the individual's approval; the horizontal level refers to the impact the exercise of freedom of religion by a few may have on the right of others.[22] Therefore, reasonable accommodation poses the question as to the intensity of the obligation that lies with the State in its task to ensure freedom of religion.

1. Canada

Canada, as a multicultural society, has adopted constitutional norms that provide a positive as well as a negative aspect in the duty to accommodate minority religious symbols and practices; Articles 2 and 15 of the Canadian Charter of Rights and Freedoms – which is part of the Canadian Constitution – are the most relevant. The positive right has to do with the practice of the religion one has chosen in the manner that person genuinely believes to be the best. The case law of the Supreme Court of Canada indicates that there is a negative duty, preventing the State or its organs from indirectly or directly forcing a person to follow a religious practice which is not his or hers, or forcing them to act in a manner that is contrary to their genuinely held religious beliefs, as stated in the landmark case of *R. v. Big M. Drug Mart Ltd.*[23]

The central issue in the reasonable accommodation debate is well summarized by Justice McIntyre in *Ontario Commission of Human Rights v. Simpson-Sears Ltd.*, known as the *O'Malley* case[24]:

> (...) No problem is found with the proposition that a person should be free to adopt any religion he or she may choose and to observe the tenets of that faith. This general concept of freedom of religion has been well-established in our society and was a recognized and protected right long before the human rights codes of recent appearance were enacted. Difficulty arises when the question is posed of how far the person in entitled to go in the exercise of his religious freedom. At what point in the profession of his faith and the observance of its rules does he go beyond the mere exercise of his rights and seek to enforce upon others conformance with his beliefs? To what extent, if any, in the exercise of his religion is a person entitled to impose a liability upon

21 J. Woehrling, 'L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse', *McGill Law Journal*, Vol. 43, 1998, p. 332.

22 Megret, 2008, p. 3.

23 [1985] 1 S.C.R. 295

24 [1985] 2 S.C.R. 536, para. 21.

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

The criteria used to limit the obligation of reasonable accommodation of religious minorities is 'undue hardship', which occurs when an employer or a service provider cannot sustain the economic or efficiency costs of the accommodation; the duty to ponder if the undue hardship criteria is met on a case by case basis, is left to the courts.

Some of the examples of problems created by the interaction between host societies and immigrants illustrate the susceptibilities of some communities. These include the Hassidic community asking municipal authorities to put translucent windows in the YMCA so that the boys and men would not be allowed to see the women training in the gym; men being excluded from pre-natal classes because of the religious beliefs of certain people participating in those classes.[25] Within the healthcare system, requests for accommodation mostly have to do with female patients or their family members refusing interventions by male personnel (physicians, interns, administrators); refusal by a patient to apply a treatment needed during the holy days of his or her religion, with this resulting in an infection taking more time to heal; refusal to receive house calls because the medical personnel will not remove their footwear at the entrance; request by a dying patient that is his or her body not be moved during a period of at least nine hours after his or her death; request by a patient to modify the treatment schedule, so that he or she can carry out some religious rituals; request by employees to wear a *kippah* or an Islamic veil in the operating room, etc.[26]

Aside from the topic of the Islamic veil, a specific case, which received its final decision in 2006, has had great impact in Canada. When Gurbaj Singh Multani, a 12-year-old from Montreal dropped his *kirpan,* a ceremonial dagger that he wore under his clothing, a controversial debate started. After climbing all the jurisdictional steps, the case reached the supreme court, which decided that the Canadian constitution protected the boy's rights to wear that religious symbol. The court stated that a total prohibition of the *kirpan* would send students the message that

25 S. Bernatchez, 'Les enjeux juridiques du débat québecois sur les accommodements raisonnables', *Revue de droit de l'Université de Sherbrooke*, Vol. 38, 2007, p. 238.

26 D. Roigt, 'L'obligation d'accommodement dans le milieu de la santé et des services sociaux: moins d'accommodements et plus de personnalisation', *in* Brunelle & Molinari, 2009, pp. 326-327. Several other examples can be found in the Report commissioned by the Government of Québec, a Canadian province of French heritage marked by a strong history of Catholicism and a different approach to multiculturalism and immigration, compared to the rest of Canada. The Commission was created in order to establish viable alternatives to facilitate the integration of immigrants establishing themselves in Québec, after varied requests for accomodation had been filed by religious communities (see note 1).

some religious practices do not deserve the same protection as others. It added that many objects in schools could be used to commit violent acts (scissors and pencils), and that no evidence had been presented showing a single violent incident related to the presence of *kirpans* in schools. In the words of the Court:

> The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism.[27]

It should be pointed out that, through the process of so-called 'judicial fertilization', some tribunals from other countries have turned to Canadian courts for inspiration, and incorporated in their case law the criteria adopted by those courts in dealing with issues related to constitutional interpretation involving religious rights; South Africa is one notable example.[28]

Three relatively recent developments in the field should be described at this point. The first one has to do with the filing of a controversial bill,[29] still being discussed in the Quebec National Assembly at the beginning of 2011, and which would mandate any civil servant or individual to whom services that are funded by the Provincial Government are being provided, to show their face during the delivery of such services; this would effectively forbid the wearing of the *niqab* – a garment worn by some Islamic women that covers the entire face save for the eyes – or the *burqa*. According to the wording of the bill, accommodation should not be granted if reasons of security, communication or identification are at stake. If approved, this piece of legislation will be the first in North America to place a *de facto* ban on any religious face coverings in any government building – including every government-subsidized high school and university, or hospital in Quebec. Many Muslims in that province feel targeted by the scope of the bill, and consider that the proposed law is disproportionate to the small number of *niqab* wearers.

Although the bill enjoys a strong support both in Quebec and in the rest of Canada, it is unclear what percentage of the population supports it primarily because they believe that face coverings are sexist and retrograde, thus relegating the security aspect to a second place. It is however clearer that the constitutionality of its provisions would undoubtedly be challenged if it were to become law, as it

27 [2006] 1 S.C.R. 256, paras. 70-71.

28 See H.-M.Th.D. ten Papel and F.H.K. Theissen, 'The Judicial Protection of Religious Symbols in Europe's Public Educational Institutions: Thank God for Canada and South Africa', *Muslim World Journal of Human Rights*, Vol. 8, Issue 1, 2011, pp. 15 *et seq*.

29 "An Act to Establish Guidelines Governing Accommodation Requests within the Administration and certain Institutions"; the text of the bill is available on the Quebec National Assembly website, at: <www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-94-39-1.html>.

can be construed as potentially violating a fundamental freedom of expression enshrined in the Charter.

The second update has to do with case law, and involves the conflicting constiutional rights of a witness and those of the accused in a criminal proceeding. In its decision,[30] the Ontario Court of Appeal considered that the order, by a preliminary inquiry judge to a woman, to remove her *niqab* for her testimony should have been preceded by a proper study of the woman's religious freedom claim, in order to determine the sincerity of her belief in her decision to wear the veil. The Court also ruled that if, in specific circumstances, the defendant's right to a fair trial can only be honored by requiring the witness to remove the *niqab*, then this requisite should be met. The tribunal added that, in a trial by jury where the credibility of the witness is virtually determinative of the outcome, denying the jury full access to that witness' demeanor could be seen as detracting from the right of the accused.

Finally, mention should be made of the campaign undertaken by the left-wing *Parti Québécois* in early 2012 – and fueled by the controversy initiated in France – to prevent unsuspecting citizens from eating *halal* against their will, as the leaders of said party consider the slaughter method is incompatible with Québec values. The party is demanding a report on *halal* practices, and requesting that all consumers be informed about the slaughter methods used to make the meat sold in the province of Québec available to the public.

2. The United States

In the United States, as in France, the idea of secularism also appears in the Constitution, but its practical application is quite different. No reference to God is made either in the Constitution or in the Bill of Rights - the first ten amendments to the fundamental law listing the freedoms and rights granted to the American people. Indeed, the first amendment officially separates religion from State, and clarifies that no religion is recognized officially by the State. There is no doubt, however, that Christian values are highly present in American society, and references to God are omnipresent in political speeches. In this sense, it can be said that the United States is secular in its Constitution, but religious in its practices. The well organized Christian fundamentalist groups appear as a strong lobby able to mobilize masses and raise impressive funds for their cause; the election of President George W. Bush was strongly helped by such backing. Based on this election, the White House was able to financially help faith-based programs.[31]

The American approach can be summarized as based on the need to accommodate religious expression and practices in the absence of overriding concerns for public safety and order. In that sense, the Religious Freedom Restoration Act allows for example students to use religious symbols or head coverings.

As far as the workplace is concerned, it is established that if a rule has caused discrimination, it is incumbent upon the employer to make a reasonable effort to

30 *R. v. N.S.*, [2010] ONCA 670.
31 Geadah, 2007, pp. 42-43

accommodate the religious needs of the employee, short of undue hardship to the employer in the conduct of his business. In 1977, the United States Supreme Court coined the doctrine, in the *Trans World Airlines v. Hardison* case, according to which any effort above minimal or negligible is considered excessive.[32]

The most delicate issues have arisen where the wearing of a uniform for certain jobs, is required. For instance, a Sikh traffic officer was threatened with dismissal for wearing a turban; the employee was however allowed to continue working since the situation did not compromise public safety.[33]

3. The United Kingdom

One of the last significant decision taken by the House of Lords as a judicial body – before it was reincarnated into the United Kingdom Supreme Court in 2009 – was *R. (On the Application of Begum by Her Litigation Friend Rahman) v. Head Teacher and Governors of Denbigh High School*,[34] in which the Law Lords established that a school had the right to prohibit the *jilhab* – the full-length Islamic dress – even though it allowed the wearing of the *sahalwar kameeze* – a combination of pants and tunic worn by Muslims, Hindus and Sikh. The Court found that the school had made acceptable efforts to accommodate religious minorities, and that school personnel were the best placed to appreciate the accommodations required.

D. Supranational Jurisdictions

It has to be recalled here that France, Turkey, and the United Kingdom – along with 44 other countries that are members of the Council of Europe and have ratified the European Convention on Human Rights – are under the scrutiny of the European Court of Human Rights, which has been called upon in several occasions to interpret the application by States of Article 9 of the Convention, which encompasses freedom of thought, conscience and religion.

The leading case which stresses the legal posture of the Court as to the interpretation of the mentioned provision is *Sahin v. Turkey*,[35] which to this date constitutes the cornerstone of the jurisprudence of the Court on that topic.[36] In its decision, rendered in 2005, the Grand Chamber reminded its central thesis according to which it is proper to grant the States a significant margin of appreciation, as they are considered to be in the perfect position to decide how best to comply with the obligations undertaken with regards to the European Convention:

32 Bosset, 2007, pp. 23-24
33 Barnett, 2004, p. 15.
34 [2006] UKHL 15.
35 App. No. 44774/98, 44 *Eur. H. R. Rep*. 5.
36 I. Rorive, 'Religious Symbols in the Public Space: in Search of a European Answer', *Cardozo Law Review*, Vol. 30, 2009, p. 2677.

> The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (...) and that it requires the State to ensure mutual tolerance between opposing groups. (...)[37]

More recently, a Chamber of the Court held that the displaying of the crucifix in Italian public schools was a violation of Article 2 of Protocol No. 1 (right to education), taken together with Article 9, thus rejecting the argument made by the State that the crucifix was a little more than a cultural symbol that transcended or marginalized its religious significance.[38] Italy lodged an appeal to the Grand Chamber of the Court, and the judgment, which was anxiously awaited by several organizations and the authorities of the States parties to the Convention – as the challenged decision had been strongly criticized in several circles – was finally rendered in March 2011. In it, the Court reached the conclusion that, although the crucifix was above all a religious symbol, it had not been proven that the display of such a symbol in the classroom might have an influence on students. Furthermore, according to the Court's reasoning, the State had acted within the limits of the margin of appreciation allowed in the context of its obligation to respect, in the subject-matter of education, the right of parents to ensure such education be offered in conformity with their own religious and philosophical convictions; thus, no violation of Article 2 of Protocol No. 1 had occurred.

The discrepancy between the decisions rendered in the two instances probably has to do with the starting point considered by both panels of judges; the Chamber judgment initiates from the State's duty of neutrality and impartiality with regards to religious matters, while the Grand Chamber takes as a staring point the margin of appreciation granted to States.[39] In that sense, few experts consider the Grand Chamber ruling to be flawless; some argue for example that the judges did not take into account the relatively small number of States that provide for the presence of religious symbols in State schools.[40]

With regards to the other regional tribunals in charge of enforcing human rights treaties – the Inter-American and the African Courts – it should be noted in the first situation that the judicial institution of the Organization of American States has issued few judgments related to freedom of religion, due in part to the fact

37 Para. 107.

38 J. Weiler, 'Editorial – Lautsi: Crucifix in the Classroom Redux', *European Journal of International Law*, Vol. 21, No. 1, 2010, p. 3.

39 K. Henrad, 'Shifting Visions about Indoctrination and the Margin of Appreciation Left to States', *Religion and Human Rights*, Vol. 6, 2011, *passim*.

40 W. De Been, '*Lautsi*: A Case of «Metaphysical Madness»?', *Religion and Human Rights*, Vol. 6, 2011, p. 233.

that the countries which recognize its jurisdiction have mostly homogeneous populations with regards to religion. Also, Canada is not a signatory to the American Convention on Human Rights, and the United States, although it has signed it, has not ratified it; therefore, neither of these countries is subject to the jurisdiction of the Inter-American Court, although their record on respect for human rights is periodically reviewed through multilateral mechanisms. In the second case, the African Court has delivered very few rulings so far in its short history, and none of them have to do with freedom of religion.

E. Conclusion

The entire debate we have described stems from an irrefutable premise: While in Western societies, religion is mostly a private matter, many immigrant communities consider the sheer idea of separating the private from the public dimensions of religion as a non-sense.[41]

Forbidding the wearing of religious symbols undoubtedly poses practical problems. It is, indeed, difficult if not impossible to differentiate in some cases a religious symbol from a cultural one: for instance, we can well ask ourselves if the *bindi* – the dot Hindu women wear on their forehead – is of a religious or a cultural nature; the same reflection goes for the beard, which can be considered a Muslim or rabbinical symbol, or plainly an esthetic statement. This issue of perception is best exemplified by the Islamic veil debate: while some human rights activists and unaffiliated individuals alike view the *burqa* or the *niqab* as examples of submission of women, regression, and subjugation of freedoms, a good proportion of Islamic women willingly wear face coverings as a demonstration of modesty, piety and subservience to God.

There is no adequate universal solution regarding the treatment of religious minorities, as each case is different, taking into account both the traditions and the historical evolution of the receiving country, as well as the origin of the immigrants. It can be said that France and the United Kingdom are really the two emblematic extremes;[42] values of the French Republic are more based on the general will of the State, the way Rousseau defined it, as opposed to the political philosophy of John Locke which was based on the inalienable rights of the individual.[43]

All of the countries faced with the challenge of coping with increased immigration flows have adopted the strategies they consider better fit their needs and realities, including affirmative action, or the implementation of special courts to solve civil disputes in Muslim communities, such as the ones that have existed in the United Kingdom for decades with some degree of effectiveness.[44] It seems that,

41 C. Cardia, 'Libertá religiosa e multiculturalismo', *Stato, Chiese e pluralismo confessionale*, May 2008, available at <www.statoechiese.it/images/stories/2008.5/cardia_libert.pdf>, pp. 2-3.
42 Rorive, 2009, p. 2670.
43 Mendes, 2009, p. 228.
44 Binnie, 2009, p. 18

with regards specifically to reasonable accommodations in societies which allow them – since the concept of reasonable accommodation has a strong common law root and logic, it is used mostly in countries that share that legal tradition and is difficult to transplant in countries that belong to the civil law tradition – religious communities sometimes forget that this is a two-way process which requires that they be reasonable about the accommodations they seek to obtain, if harmony is to be achieved. Indeed, there seems to be a growing sentiment that the accumulation of reasonable accommodation cases has been eroding the belief that multiculturalism can provide unity through diversity, as governments are expected to provide more and more parallel services to accommodate only a few.

Some observers consider there is a paradox in the idea according to which, in the name of religious neutrality, public institutions should refrain from endorsing or promoting certain religious practices, while they are forced to respect religious demands coming from the citizens, this time by means of reasonable accommodation. Actually, this apparent contradiction can be transcended if we consider that the State's obligation of religious neutrality and the obligation of reasonable accommodation have the same objective, which is to allow the exercise of the fundamental freedom of conscience and religion, in the first case by refraining the State from putting its authority at the service of a specific religious expression, and in the second by allowing individuals to express freely their faith in the public sphere without being penalized.[45]

A very important component of the problem – and probably of the solution as well – seems to be the role played by the media, as they can easily exacerbate and polarize the debate over immigration, thus complicating the integration of immigrants. For instance, strangely enough, and contrary to the image generated by some media outlets, the societies where conflicts of religion arise often only have a relatively small percentage of immigrants that actually identify themselves as members of a minority religion. Indeed, according to statistics published in Québec, where the debate over reasonable accommodation has taken huge proportions, claims of discrimination based on religious grounds account for a relatively small percentage, long after the ones based on handicap, race or age; with regards to the origin of claims, contrary to the importance given in the media to requests for accommodation coming from the Muslim and Jewish communities, it seems that the highest proportion of requests indeed comes from individuals identifying themselves as Protestant, a group which can in no way be associated with recent flows of immigration.[46]

Media outlets have also fueled the controversy surrounding the case of persons that represent public authority, and that request a specific accommodation: Religious symbols have the same connotation if they are associated with State institutions, or if they are worn by individuals, and it is understood that employees must carry out their duties in strict neutrality. In that sense, several groups in

45 Bosset, 2007, p. 18.

46 Statistics available from the web site of the Québec Human Rights and Youth Rights Commission (Commission des droits de la personne et des droits de la jeunesse du Québec), <www.cdpdj.qc.ca>.

Canada were not, for instance, too keen on seeing Royal Mounted policemen of belonging to the Sikh faith allowed to wear turbans along with the traditional red serge uniform, and the press was quick to take advantage of those feelings of anger and fear. With regards to the *halal* meat controversy, polls seem to indicate that most French citizens are more concerned by the price of the product they purchase than the way it was processed.

The societies that are made up of several different cultures have also had to face, in the last few decades, a new phenomenon, the crime of honor, which is often based on trivial behaviors on the part of the victim – usually a woman – such as exchanging words with a neighbor, receiving phone calls from men, etc., leading to accusations of extra-marital sexual relationships, or refusal to participate in an arranged marriage. The crime of honor is not usually carried out as a result of anger but rather as a premeditated decision often involving the family, for whom the only acceptable answer to the behavior of the female relative, is death. A recent case taking place in Canada serves to illustrate the matter; in it, a father and son of Pakistani origin were sentenced to life in prison for murdering the father's sixteen year old daughter, because she refused to wear the *hijab*. Although crimes of honor are not confined to minority cultures in multiethnic societies, as this practice is also carried out in traditional communities in Italy and Greece for example, these episodes, when they occur in countries of immigration undoubtedly express the need for a heightened sensitization of the actors making up the legal system (lawyers, judges, etc…).

One thing seems clear: given the patterns of immigration and ageing, it is foreseeable that countries with characteristically somewhat homogeneous populations, will probably be confronted sooner or later with the same issues discussed in this paper, and will hopefully learn from the pitfalls as well as the wise strategies already adopted in other countries, in order to design their own policy aimed at tackling the situation at hand.

The ultimate question arising from the whole debate over religious freedom in multiethnic States probably has to do with the ability of the law to maintain its stability, which is one of the conditions of its efficacy, while at the same time allowing enough room to carry out the necessary adjustments needed to keep up with the rapid evolution of our societies.