ACCOMMODATION AND COMPROMISE: WHY FREEDOM OF RELIGION ISSUES CANNOT BE RESOLVED THROUGH BALANCING

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ABSTRACT

Chief Justice McLachlin has said that while "reasonable accommodation" may be the appropriate "analysis" in private sector freedom of religion/religious discrimination cases, it is not appropriate in *Charter* cases in which the restriction on religious freedom is imposed by statute. I think the Chief Justice is right that there are important differences between these two kinds of restriction on religious practices – private sector/human rights code and legislative/*Charter.* I will argue, though, that her alternative approach, the balancing of interests under s.1 *Charter*, is either inappropriate or unworkable.

In the case of *Alberta v. Hutterian Brethren of Wilson Colony,*[2] Chief Justice McLachlin said that while "reasonable accommodation" may be the appropriate "analysis" in freedom of religion/religious discrimination cases under human rights codes, it is not appropriate in *Charter*[3] freedom of religion cases, or at least in *Charter* cases in which the restriction on religious freedom is imposed by statute. Her rejection of "reasonable accommodation analysis" in *Charter* cases surprised many people. I think the Chief Justice is right, though, that there are important differences between these two kinds of restriction on religious practices – private sector/human rights code and legislative/*Charter*. She may also be right that "reasonable accommodation" is not the best way to describe the courts' approach to the justification of statutory limits on religious practices; although I am inclined to think that the term is sufficiently open that it may still be appropriate in these cases. I will argue, however, that her alternative approach, the balancing of interests under s.1 of the *Charter*, is either inappropriate or unworkable.

The "religious accommodation" issue (i.e. whether the state should be required to adjust the law to make space for religious practices) is complicated for reasons that relate both to the function of law and the nature of religion. Laws seek to advance public interests – the rights and welfare of community members – and are framed in general terms. And while religion is often concerned with what might be described as personal/spiritual matters, it sometimes addresses matters of civic concern. Religious beliefs sometimes have something to say about the rights and interests of others and about the way in which society should be organized.

The conflict between religion and law may be described as indirect (or incidental), when the religious practice conflicts with the means chosen to advance public policy (the way in which a policy is advanced) and not with the policy itself.[4] For example, the government may have decided on a particular route for a new highway, only to discover that its preferred route runs through an area that is sacred to an aboriginal group.[5] In such a case it may be possible for the state to advance its purpose in a different way, through different means, so that it does not interfere (at least to the same degree) with the religious practice or space. The law-makers ought to have taken into account the interests and circumstances of the different religious (and other) groups in the community and designed the law so as to avoid unnecessary conflict. Indeed, it may reasonably be asked in such a case whether the state would have enacted the same law (adopted the same means) had the religious practices of a more politically-influential group been similarly affected. It is important to recognize, though, that even in the case of what might be described as an indirect conflict between law and religion, the adoption of different means will often detract to some extent from the law's

ability to advance a particular policy. In the example given, an alternative route may add to construction costs or detract from ideal road conditions.

In the case of an indirect or incidental conflict between law and religious practice, "reasonable accommodation" is an appropriate response (or an appropriate way to describe the response), even though in practice the state may be asked to do very little accommodating. "Reasonable accommodation" analysis asks whether the law (the way in which it advances its policy) can be adjusted so that it does not interfere (to the same extent) with the religious practice, without compromising the law's public purpose in any significant way. When applying this test, and determining whether a religious practice should be accommodated, there may be disagreement about the extent to which government policy should be compromised. And I would note here simply that the courts have not been willing to require the state to compromise its policies in any serious way.[6]

Sometimes, though, the conflict between religious practices and public policy is more direct, in the sense that the law is pursuing a policy (a public value) that is directly at odds with the religious practice. In such a case the conflict between the law and religious practice cannot be avoided or reduced by the state simply adjusting the means it has chosen to advance its public purpose. If law-makers have decided, for example, that corporal punishment of children is wrong and should be banned or that sexual orientation discrimination is wrong and ought to be prohibited, how is a court to decide whether an exception to these norms or requirements should be granted to a religious individual who believes that corporal punishment is mandated by God or that same-sex relationships are sinful and should not be supported? The issue for the court in the first example is not whether physical discipline is effective or whether the value or utility of physical discipline outweighs its physical and emotional harm to children. Nor is the issue whether parents should have the right to make judgments about the welfare of their children without state interference, which if resolved in favour of parental autonomy would result in the striking down of the ban and not just the creation of an exception for some parents. In other words, the court is not questioning the public norm and considering whether physical discipline is in fact sometimes right or justified. Instead, the issue is whether some parents — *religious* parents — should be exempted from an otherwise justified ban on physical discipline because they believe that God has mandated them to discipline their children in a way that the law has forbidden. The court must decide whether space should be given to a different normative view – a view that the legislature has rejected.

In such a case then, the courts task is not to decide the proper balance or trade-off between competing interests or values (in accordance with the ordinary justification process under s.1 of the *Charter*). Their task instead is to determine whether a religious individual or group should be exempted from the law. But if, as a democratic community, we have decided that a particular activity should be restricted as harmful or a particular policy should be supported in the public interest, why should the issue be revisited for an individual or group who/which holds a different view on religious grounds?

From a secular/public perspective a particular religious practice has no intrinsic value; indeed, it is said that the court should take no position concerning its truth. The practice matters because it is significant to the individual — because she/he believes it is required by God or will bring her/him closer to the divine. However, the importance of the religious practice to the individual may not be enough to justify the creation of an exemption to a democratically-mandated norm. The willingness to exempt a religious practice may also be based on an awareness of the practical limits of state authority. More particularly, accommodation may be based on a recognition that political decision-makers are fallible and that some respect should be paid to the traditional or evolving responses of different religious communities to fundamental moral issues. It may also rest on a concern that if religious adherents are required to act in a way that is contrary to what they believe is right or necessary, they will become alienated from the political order and may even engage in civil disobedience. Accommodation then may be intended to prevent the marginalization of minority religious groups and the possibility of social conflict – concerns we associate with equality rights.

A court's willingness, in a particular case, to exempt a religious individual or group from a public norm – to treat the individual's/group's practice as part of the "private" sphere — may depend on two related considerations. The first is whether the practice has an impact on the rights or interests of others in the community, or whether it is simply personal to the individual or internal to the religious group. There is plenty of room for debate and disagreement about the public/private character of a religious practice. For example, while the education of children may be seen as principally the concern of parents, there is also a public interest in how children are educated. As well, the community may have some responsibility to children to ensure they are properly educated. Another example involves the performance of a marriage ceremony by a religious authority, which is generally viewed as a private matter, even though it has civic or legal consequences. The point here is simply that there is no bright line between public/civic and private/personal activities.

The second (but related) consideration is whether membership in the religious group is seen as voluntary. The internal operations of a group will be exempted from public norms (for example anti-discrimination rules) only if the members of the group have a meaningful right or opportunity to exit the group and are not thought to require protection from intra-group oppression. In this short paper I can do little more than acknowledge that the 'voluntariness' of group membership is a complicated matter. An individual's identity may be tied in a deep way to her/his religious group; and so exit from the group may be difficult even when there are few material barriers. The individual's exit from her/his religious community may be difficult for the very same reason that community autonomy is important. Exit is difficult precisely because religious community plays a central role in the individual member's life and identity – because it is the source of meaning and significance for her/him.

The difficulty in determining when an exemption should be granted is nicely illustrated by the superficially simple case of a claim to exemption from a paternalistic law. A religious exemption may be appropriate in the case of paternalistic laws that preclude individuals from engaging in "risky" activities that are required by their faith: for example, an exemption for Sikh men from a law that requires everyone to wear a helmet when riding a motorcycle or bicycle. Paternalistic laws are intended to protect individuals from their own bad decisions. A commitment to religious freedom may at least limit the state's power to treat "self-regarding" religious practices as unwise – as something against which the individual needs to be protected. Yet, even in the case of apparently paternalistic laws, the courts have been hesitant to recognize exceptions – to treat the practice as a private matter.[7] The reluctance to recognize a religious exception in such cases appears to be based on a realization that no law is simply paternalistic (a private matter) and that any time an individual is injured there will be an impact on others, including friends and family members, employers, co-workers, and of course the general community, which must cover the injured person's medical costs.

At issue in these "religious accommodation" cases then is the line between the political sphere (of government action) and the private sphere (of religious practice). The courts may sometimes draw the line in a way that exempts a religious practice from the application of an otherwise justified law. In this way they may create some "private" space for religious practice, without directly challenging the state's authority to govern in the public interest and to establish public norms. This, of course, will depend on whether the courts are willing to view the practice as sufficiently private – as not impacting the rights and interests of others in any real way. Accommodation, though, will not be extended to beliefs/practices that explicitly address civic matters (the rights or welfare of others in the community) and are directly at odds with democratically adopted public policies. When religious beliefs address civic matters they will be treated as political judgments that may be rejected (and perhaps accepted) in the political process.

While the courts do not engage in anything that could properly be described as the "balancing" of competing public and religious interests (in which the state's objectives might sometimes be subordinated to the claims of a religious community), they have sometimes sought to create space for religious practices at the margins of law. First, accommodation may sometimes be given in the case of a religious practice that conflicts indirectly with the law. In such a case the court may require the state to compromise, in a minor way, its pursuit of a particular objective to make space for the religious practice. Second, in the case of a more direct conflict between a religious practice and a public norm, the court will require the state to exempt (accommodate) a religious individual or group from the law only if this will have no real impact on others in the community. In such a case the practice will be treated as private and insulated from the application of the law.

There is no principled way for the courts to determine the appropriate 'balance' between democratically chosen public values or purposes and the spiritual beliefs/practices of a religious individual or community (an alternative normative system). A judgment about whether to create space for a religious practice at the margins of law must be both pragmatic and contingent. The courts' ambivalence about religious accommodation stems I suspect from the belief that when adjudicating rights claims, they should be principled – that they should be balancing values. A pragmatic response to the claims of legal policy and religious practice does not fit well with the court's commitment to resolve issues in a principled way, a commitment that underpins the legitimacy of judicial review.

NOTES

[1] Faculty of Law, University of Windsor. This paper is a modified version of a talk given at the Multi-Faith Centre, University of Toronto, Jan. 2012.

[2] *Alberta v. Hutterian Brethren of Wilson Colony,* 2009 SCC 37. The adoption of a common approach to private and state restrictions on religious freedom might seem to follow from the conceptual links between human rights codes and the *Charter*. The courts' initial interpretation of equality rights under the *Charter* (s.15) drew heavily on the anti-discrimination case-law developed by human rights commissions and tribunals. And the Supreme Court of Canada in its early freedom of religion cases under the *Charter* interpreted the freedom not simply as a liberty to practice one's religion but as a form of equality right.

[3] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982.*

[4] In the discussion that follows I have drawn a distinction between indirect and direct restrictions on religious practice. I recognize though that these two "categories" are sometimes difficult to distinguish and might more accurately be viewed as part of a continuum.

[5] Such a claim was rejected in the U.S. Supreme Court judgment of *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439 (1988).

[6] See for example *Multani v. Commission Scolaire Marguerite-Bourgeoys,* [2006] 1 SCR 256, *Amselem*, note 2 and *Wilson Colony,* note 2.

[7] *R. v. Badesha,* 2008 ONCJ 94; 2011 ONCA 601.

TAKING A FRESH LOOK AT CREED

From the very beginning 50 years ago, Ontario's *Human Rights Code* included protection from discrimination because of creed. Half a century later, creed continues to be an area of discussion and sometimes conflict in communities across Ontario and across Canada.

In our 1996 *Policy on creed and the accommodation of religious observances*, we interpreted creed to mean "religious creed" or "religion." Under this policy, religion was defined as a professed system and confession of faith, including both beliefs and observances or worship.

A belief in a God or gods, or a single supreme being or deity was not required. So the definition of creed included non-deistic bodies of faith, such as the spiritual faiths and practices of First Nations, Inuit and Métis cultures. As well, it could include new and emerging religions, which were assessed on a case-by-case basis.

But this interpretation of what creed means in the *Code* may be outdated, since many things have changed in the past 15 years. That's why we are in the early stages of drafting a new policy on creed that reflects today's beliefs, issues, challenges and society.

In our new policy, we will take another look at defining the ground of creed in the *Code*, and we will offer updated ways for respecting and advancing creed rights in our increasingly complex world.

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