GOOD INTENTIONS GONE AWRY: LIMITING TOLERATION AND DIVERSITY THROUGH BILL 44

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ABSTRACT

This article is an examination of the newly enacted *Alberta Human Rights Act.* A number of concerns will be highlighted that give rise for consternation both on a practical and theoretical level. The intent of the *Alberta Human Rights Act* to provide more protections against discriminatory behaviour in public institutions is undermined by section 11.1, which both places a duty on schools to inform parents when issues of religion, human sexuality, and sexual orientation are discussed and allows parents to exempt their children from participating in those discussions. It further creates a complaints procedure whereby teachers may be held accountable by the Alberta Human Rights Commission to defend their cases.

INTRODUCTION

The *Alberta Human Rights Act* aims to reduce discriminatory practices—in particular, discrimination on the basis of sexual orientation—in public institutions across Alberta.[1] The preamble to the *Alberta Human Rights Act* includes the following statement:

> *WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation.*
>
> (Alberta Human Rights Act)

Much of the Act reflects this inclusion and attempts to reduce inequalities, particularly those related to sexual orientation. For this reason it is both inconsistent and disconcerting that Section 11.1 is added to the Act, which states:

> *A board as defined in the* School Act *shall provide notice to a parent or guardian of a student where courses of study, educational programs or instructional materials, or instruction or exercises, prescribed under that Act include subject-matter that deals primarily and explicitly with religion, human sexuality or sexual orientation.*
>
> (Ibid, Section 11.1).[2]

The justification for this Section is to provide transparency between schools and parents when controversial and sensitive issues are discussed. Yet, in its transparency it creates a number of practical challenges and concerns, and, at a more theoretical level, challenges some of the fundamental aims and purposes of public education. I will briefly raise the practical challenges with enforcing the parental opt-out clause and how it has significant implications for teachers in addressing issues of religion, sexuality, and sexual orientation. However, the main focus of this article examines the broader implications of this clause in terms of the fundamental aims of public education around issues of toleration and inclusion within a democratic context.

THE PRACTICAL CHALLENGES

Religion, human sexuality, and sexual orientation arise in the conversations of children in myriad ways. Arguably,

teachers have a duty to respond to situations as they occur; to ignore a situation when something arises would seem both odd and negligent. Herein lies the difficulty. Section 11.1 requires that teachers receive prior consent before addressing issues of religion, sexuality, and sexual orientation. Failure to do so may result in the teacher being held before the Human Rights Commission if a parent makes a complaint.[3] The new legislation attempts to mitigate such unplanned, incidental situations by including the following subsection:

> *This section does not apply to incidental or indirect references to religion, religious themes, human sexuality or sexual orientation in a course of study, educational program, instruction or exercises or in the use of instructional materials.*
>
> (Ibid, Section 11.3)

Despite the attempt to protect teachers from incidental moments that are initiated by students, this subsection does little to distinguish between moments of informal and formal teaching. The difficulty is that should a teacher address the issue in a substantive way, it is unclear whether and when the incidental or indirect reference becomes a formal, planned teaching moment. The teacher has to make a choice. The first is to make a judgment call and state that her acknowledgement of an arising issue remains an incidental moment and will not receive a formal complaint from a parent. The second is to refrain from addressing the issue until she has notified the parents. In adhering to the latter option, the teacher loses the 'teachable' moment when the children initially raised the issue.[4]

Most would agree that teachers cannot foresee all possible conversations that will be initiated by children, including those of a sexual or religious nature, and that this as an unavoidable part of the teaching profession. Also unavoidable is the possibility that a parent could make a formal complaint with a teacher for addressing an issue related to religion, human sexuality, or sexual orientation without their prior consent and make a complaint based on Section 11.1 of the Act. This creates a difficult scenario for teachers, who will feel compelled to terminate the discussion for fear of potential legal repercussions. This results in a classroom chill on teaching certain 'taboo' topics. As Honourable Member Mason, Opposition member of the Alberta legislature, points out:

> *... even if the Human Rights Commission makes reasonable interpretations of the act when charges are brought, it will have a profound effect on the education of our children because teachers will never know what it is that they can talk about if issues relating to sexuality, sexual orientation, or religion come up spontaneously in a classroom outside of their lesson plan. So they will adjust their behaviour accordingly. You could call it self-censorship.*
>
> (The 27th Legislature Second Session, Alberta Hansard, May 13, 2009, Issue 41e, 1163)

The fear of reprisal and being brought before a human rights tribunal creates undue tension for teachers in classrooms and, in not knowing where the reasonable parameters of discussion may be extended, causes greater self-censorship. How religion or human sexuality are addressed in the curriculum in areas of science, history, politics, and English, to name a few, will have an adverse effect on students' understanding of the society in which they live.

FUNDAMENTAL AIMS OF EDUCATION CHALLENGED

The daily challenges and obstacles that Section 11.1 places on teachers and schools are notable. On a more fundamental level, the repercussions of implementing this Act undermine some of the primary aims of education in liberal pluralist societies, namely, fostering personal autonomy and developing the civic attitudes necessary in civil society. The fostering of personal autonomy is compromised in that every individual should be exposed to a diversity of perspectives in order to be able to make informed judgments about how they wish to lead their life. Denying them of this process has negative repercussions from a societal perspective in that it compromises individuals' ability to deliberate and live together amongst other members of society who may have vastly different lifestyles and perspectives. Let us address each issue in turn.

The autonomy argument focuses primarily on the concern that parents may not want to expose their children to alternative ways of life that are counter to their upbringing. Allowing parents to have the primary say in a child's upbringing may limit significantly their exposure to alternative values, beliefs and experiences. This includes challenging the assumed beliefs and values of one's own family, and deciding for oneself whether that is the way they wish to lead their life.

A primary aim of education is to provide a multitude of opportunities that both support and challenge one's assumptions. Harry Brighouse argues:

> *Autonomy-facilitation requires a modicum of discontinuity between the child's home experience and her school experience, so*

> *that the opportunities provided by the home (and the public culture) are supplemented, rather than replicated, in the school.*
>
> (Brighouse, 2006, pg. 22.)

For Brighouse, the role of schools is not just to support and extend the family's belief system, but to provide opportunities for deliberation of different perspectives, particularly those that are incongruent with one's own family values. Children's critical judgement and informed decisions rely on the ability to understand and pursue various experiences that may not be afforded to them within the family unit. Levinson more boldly states that:

> *... it is difficult for children to achieve autonomy solely within the bounds of their families and home communities – or even within the bounds of schools whose norms are constituted by those held by the child's home community. If we take the requirements of autonomy seriously, we see the need for a place separate from the environment in which children are raised, for a community that is defined not by the values and commitments of the child's home, whatever they happen to be, but by the norms of critical inquiry, reason and sympathetic reflection.*
>
> (Levinson, 1999, p. 58)

It is not a mere preference that children be exposed to different experiences in order to secure autonomy, but a necessity. This exposure must take place in a school that challenges the established values and norms of the community. While it is not the state's role to assimilate and inculcate certain values that may be hostile to particular communities, the state ought to expose children to ideas, particularly when it concerns their well-being relating to their human sexuality and sexual orientation.[5] If we consider a person who is homosexual in a closed religious community, the lack of understanding and acknowledgement of different sexual orientations will fundamentally impede on that particular individuals' freedom. Lest we be too quick to protect community values, we ought to attend to those individuals in communities that may be marginalized, oppressed, or abused.

Participation in varied experiences and alternative ways of living helps to ensure children's capacity to live as independent adults later in life. If left to parents, children will have differing levels of exposure and opportunities. While schools will not level these differences, providing a school system that attends to a range of experiences will reduce the potential for inequalities. If a primary aim of education is to promote autonomy in children, then arguably it is essential that a school system be developed that supports this aim. The Alberta Education Commission for Learning Report clearly states these aims in its preamble:

> *[E]ducation is the most important investment we can make as a society. Our education system not only shapes individual students' lives, it shapes the very nature of our society. A strong and vibrant public education system - a system that values each and every individual, instills positive values, and builds tolerance and respect - is critical to develop social cohesion and the kind of civil society Albertans want for the future.*
>
> (Alberta Commission for Learning, 2003, p. 4)

If the goal of Alberta Education is indeed to foster these aims, then Section 11.1 is in direct contravention in its allowing of parents to exempt their children from lessons dealing with religion, human sexuality and sexual orientation. In order to ensure children's ability to make informed judgments and choices about how they wish to lead their lives, both in the present and in the future, it seems misguided to assume that all parents will provide sufficient exposure to alternative lifestyles, or conversely, that parents should have the right to limit the exposure to such essential topics (albeit potentially controversial and sensitive) under the guise of protecting their personal belief system.

Rather than broadening discussions to include discussions about religion, human sexuality, and sexual orientation, the *Alberta Human Rights Act* reduces this possibility. It takes a regressive step towards developing dispositions of inclusion and toleration for individuals in a pluralistic society, and reduces the ability of students to make informed judgements about how to lead flourishing lives as adults.

DEMOCRATIC DISPOSITIONS

Not only should schools serve the purpose of helping children to develop their autonomy, it also has the duty to foster civic virtues that are necessary for the sustainability of a vibrant political society. The vitality of a democratic state depends on, "an education adequate to participating in democratic politics, to choosing among (a limited range of) of good lives, and to sharing in the several sub-communities, such as families, that impart identity to the lives of its citizens" (Gutmann, 1987, pg. 42). Amy Gutmann argues that developing civic virtues in children

is not a mere ideal or preference, but is vital if we are to preserve and foster democratic sovereignty. Letting parents and families cultivate such virtues is problematic because the human tendency is to have natural biases towards certain preferences and orientations which ultimately lead to creating prejudices in their children. Schools have the ability to provide a political education that can impart to all children the civic virtues necessary to participate in and shape the political structure and stability of society as future adults and citizens.

As institutions, schools are integral to preserving the political culture necessary for a liberal democracy to thrive. Understanding and participating in a political culture is not something one just comes to know; it encompasses certain habits, skills and dispositions that each individual must be inducted into in a meaningful way. Eamonn Callan makes this point when he states that public institutions play a vital role in the way that we induct individuals into the larger political sphere:

> *…it is a shared way of public life constituted by a constellation of attitudes, habits, and abilities that people acquire as they grow up. These include a lively interest in the question of what life is truly and not just seemingly good, as well as a willingness both to share one's own answer with others and to heed the many opposing answers they might give; and active commitment to the good of the polity, as well as confidence and competence in judgement regarding how that good should be advanced; a respect for fellow citizens and a sense of common fate with them that goes beyond the tribalisms of ethnicity and religion and is yet alive to the significance these will have in many people's lives.*
>
> (Callan, 1997, p. 3)

Taken together, this encompasses a demanding type of education, not left to chance by parents. It requires a logical and coherent political education, deliberately considered and developed in children not through mere osmosis or exposure, but through active and deliberate thought processes and engagement about civic virtues and the political structures in society. It is not simply a dilemma between parental choice and civic education, but parental choice and the basic individual interests of the child. "Success in state-sponsored civic education depends crucially on the broad diffusion of public virtue and understanding throughout the citizenry and across the major cleavages of interest that might divide some groups from others" (Callan, 2006. 266). Schools have a duty to develop particular dispositions that will foster the ability of individuals to deliberate, critically engage, and respect those who may have drastically different moral, religious or political viewpoints.

Discussions about religion or human sexuality are integral to the way in which people live their lives. Potentially removing these debates from the classroom minimizes the way in which individuals are able to address substantive pressing issues that are relevant in society. Furthermore, discussing the different perspectives and values inherent in religion and human sexuality provides an educational opportunity for teachers (and schools) to critically debate and model the approaches needed to address such issues as future citizens.

If educators are sincere about developing a sense of justice in children, limiting discussion or avoiding potentially contentious issues seems antithetical to fostering attitudes of inclusion and toleration. Learning how to contend with substantive issues such as religion and human sexuality that are present and real in students' day-to-day lives is something schools should address and confront rather than shy away from. To be a good citizen also requires inculcating a notion of respect for oneself and for others. In addition, learning how to critically and rationally debate the merits and complexities of issues of human sexuality and religion is central to the development of a sense of justice and the skills and habits it requires. Section 11.1 places unwarranted authority and decision-making in the hands of parents. Unfortunately, such parental discretion not only has repercussions for the children of those parents but for the stability and cohesiveness of civil society.

CONCLUSION

The newly enacted *Alberta Human Rights Act* has inadvertently pushed back the rights of children (and citizens) in real and troubling ways. By catering to the demands of parents who want more control in their children's schooling, a number of concerns arise that compromise both individual students' well-being and teachers' ability to address relevant discussions initiated by children. Section 11.1 creates a chill in the classroom by curtailing discussions related to religion, human sexuality, and sexual orientation. It gives parents incredible discretion in their ability to exempt their children from *any* discussion related to religion and human sexuality, at the expense of those particularly at risk within their families' closed belief systems, and, even more detrimentally, of those living in sexually abusive domestic situations. Furthermore, the new legislation limits the ability of children to have access to information and issues that are

timely, relevant, and essential to their personal decision-making needs. It further compromises individuals' ability to understand, acknowledge and respect others who may have drastically different perspectives than their own. In its attempts to concede to greater parental discretion, the Alberta provincial government has compromised human rights both on an individual and societal level.

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FOOTNOTES

[1] Vriend v. Alberta (1998) addresses the problematic nature of previous legislation in Alberta that did not attend to sexual orientation. The Supreme Court of Canada determined that a legislative omission can lead to a Charter violation; in this particular case the dismissal of a lecturer at a private religious college due to his sexual orientation. Vriend successfully argued that his dismissal was in direct violation of s.15 of the Charter.

[2] It might be argued that this legislation overlaps the pre-existing legislation found in the *School Act* regarding parental consent; however, two fundamental differences exist. The first is that the new legislation places the burden on teachers to inform parents when religion, human sexuality or sexual orientation lessons are to be taught. Previously, the burden was on the parents to make a written request to schools.

The second difference is the procedural changes in which a complaint can be made differ greatly between the *School Act* and the *Alberta Human Rights Act* in that the teacher will be held accountable before the Alberta Human Rights Commission. This is troubling given that the Alberta Human Rights Commission receives, investigates and carries forward complaints, which may then be adjudicated by a Human Rights Tribunal, which is not fully independent of the Human Rights Commission. The blurring of roles within the Commission's role as an advocate for human rights and an arbitrator for complaints through the tribunal process undermines people's protections toward fair due process.

[3] For a more expansive perspective on the problematic legal aspects in the way individual teachers will be held accountable before the Human Rights Commission rather than through the normal legal processes, please see: Sheldon Chumir Foundation in Ethics in Leadership (2008) *Toward Equal Opportunity for all Albertans: Recommendations for Improvement of the Alberta Human Rights Commission.* Report written. Accessed February 2, 2010. http://www.chumirethicsfoundation.ca/files/pdf/Toward-Equal-Opportunity_SCF.pdf

[4] The author already has heard of a parent threatening to make a formal complaint against a teacher who had taught the prescribed curriculum that was to talk about the extinction of mammoths. The parents complained that in doing so, the teacher was advocating an evolutionary perspective that was against their religious beliefs. The incident never went to a formal complaints procedure, but the teacher did have to justify her actions in stating that she was not promoting a particular secular belief, but that it was part of a larger component found in the prescribed curriculum.

[5] Due to the limits of this article, I cannot fully expand on this point. See:

Canadian Centre for Justice Statistics. (2002). *Family violence in Canada: A statistical profile 2002.* Catalogue, 85-224-XIE. Government of Canada, Ottawa.

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