THE MISSING LINK: TOLERANCE, ACCOMMODATION AND... EQUALITY[1]

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ABSTRACT

This paper encourages a rethinking of the ideas of tolerance and accommodation, suggesting that these concepts may be inappropriate for a country that has a history of diversity, multiculturalism and equality. The paper considers the contexts in which the language of tolerance and accommodation is located. It argues that tolerance and accommodation create hierarchies wherein majorities confer benefits on minorities. Although equality is the preferred framework, sufficient conceptual flexibility allowing for the inclusion of notions like 'respect' is required to ensure the most robust possible protection of creed. Finally, the paper suggests that there is a major stumbling block to identifying best practices both for day to day negotiations of religious difference, for policy and law makers, and for service providers. While there are persistent negative narratives, there are no similar persistent positive narratives that recover success stories of negotiation. It is only from such narratives, or ground up knowledge, that successful best practices and policies can be developed.

INTRODUCTION

Increased immigration, a renewed public discussion about the place of religion in society, and Canada and Ontario's commitment to multiculturalism require a careful crafting of policies and laws related to religious freedom. The language used in human rights protections, policies, and processes, as well as the conceptual frameworks within which disputes are resolved—both in law and in day to day life—convey important messages about the relative value of citizens' beliefs and practices to society.

This paper considers the accommodation of religious belief and practice in diverse contexts. Specifically it will encourage a rethinking of the ideas of tolerance and accommodation, suggesting that these concepts may be inappropriate for a country that has a history of diversity, multiculturalism and equality. The paper considers the contexts in which the language of tolerance and accommodation is located (law, interfaith dialogue and public discourse). It offers a critical exploration of the hierarchies created by the concepts of tolerance and accommodation, and proposes a rejuvenation of the idea of equality as the guiding framework for the negotiation of religious difference, while leaving open the possibility that there is conceptual room for accommodation and respect as important principles in conversations about diversity. Finally, I argue that a robust protection of creed can only be accomplished by drawing from the positive narratives gleaned from those who work out difference on a day to day basis. It is only from such narratives, or ground up knowledge, that successful best practices and policies can be developed. While law can set the standards for dispute resolution, respect for others and commitment to finding creative ways to achieve equality ultimately rest in the hands of those who encounter difference, sameness, and similarity in their day to day lives.

THE *ONTARIO HUMAN RIGHTS CODE* AND POLICY ON CREED AND THE ACCOMMODATION OF RELIGIOUS OBSERVANCES

The *Ontario Human Rights Code* begins with a preamble that reminds us of the equal and inalienable rights of all members of the human family emphasizing dignity, worth and the creation of a climate of "understanding and mutual respect" so that "each person feels a part of the community

and able to contribute fully to the development and well-being of the community and the Province". The *Code* goes on to prohibit discrimination on a number of grounds, including creed, in a number of areas, including employment, housing, contracts, and vocational organizations. The *Code* uses the language of equality to establish these rights, in each section beginning with "1. Every person has a right to equal treatment with respect to…"

Creed here is read as religion, although its exact meaning is not defined in the *Code*. The Ontario Human Rights Commission Policy on Creed and the Accommodation of Religious Observance attempts some clarification which somewhat tracks *Charter* based discussions of religion, including a subjective approach to the interpretation of what is encompassed under the *Code* protections and consideration, as long as the beliefs, practices and observances are, in the words of the Policy, sincerely held. While creed does not include secular moral, ethical beliefs or political convictions, according to the Policy, the protection of people from being forced to accept or comply with another's religious beliefs or practices implies a protection of those beliefs as well. Also interesting is the Policy's introduction of the idea of the "needs of the group", which is an explicit acknowledgement of the role of the religious group in this realm. Finally, the policy notes that freedom of religion is the 'basic principle' that informs the right to equal treatment on the ground of creed, and that that includes both the facilitation of religious observances as well as that no person can force another to comply with religious beliefs or practices.

Despite the *Code*'s emphasis on equality and dignity, the Policy implicates the language of accommodation in its clarifications. For example, under the section "Needs of the group" we see "The groups needs must be assessed to accommodate the individual"—which seems to be in tension and contradiction with the subjective approach. It also highlights the goal of establishing religious practice as being to 'accommodate' the individual rather than understanding how to shift policies, practices, and approaches that may create a 'less than' situation in which people feel disrespected and not, in fact, equal. Although the *Code* mentions the duty to accommodate only in relation to constructive discrimination (s. 11), the Policy introduces accommodation more broadly, when "a person's religious beliefs conflict with a requirement, qualification, practice" and further that 'accommodation may modify a rule or make an exception to all or part of it for the person requesting accommodation (7).

The duty to accommodate rested within the sphere of employment and disability until relatively recently, and while it has been criticized in that realm as well , there may be some good reasons to continue to use it to sort through employer-employee negotiations of religious needs. However, in instances like membership in community associations, for example, equality rather than an accommodation framework may be a better choice.

THE EQUALITY-ACCOMMODATION SLIDE: WHAT'S WRONG WITH ACCOMMODATION?

The Ontario Human Rights Policy on creed is in good company. Courts, including the Supreme Court of Canada, have struggled to develop a formula for the management of religious diversity.

Reasonable accommodation has infiltrated not only law and public policy, but public conversation and discourse about religious diversity as well. Because human rights regimes like that in Ontario are by and large more accessible to the general public than are the expensive and complex mechanisms of constitutional law and *Charter* protections, they represent amore permeable boundaries between law and society.

Although many people agree that the language of tolerance and to some extent accommodation can be problematic, they also insist that accommodation can imply or be part of equality. My worry is that these terms fix us in place in a way that does not ever quite reach equality. They don't force a rethinking of structural inequality in a way that laying bare difference and a requirement to achieve substantive equality may facilitate. The language of tolerance and, more recently, reasonable accommodation, has come to dominate popular and legal discourse related to the management or response to religious diversity. Although tolerance has been a bit less 'tolerated' recently, reasonable accommodation has gained status as the mode of framing any discussion of the everyday negotiation of religious diversity. What is wrong with 'tolerating' others as the basis for dialogue? Why is accommodating someone problematic?

In his 1689 "A Letter Concerning Toleration" John Locke advocated for toleration, except for atheists and Roman Catholics. This exemption illustrates the core problem with basing the negotiation of religious difference on tolerance or accommodation: both frameworks create a hierarchical positioning of 'us' and 'them' that is conceptually unavoidable. There have been some powerful challenges to the use of tolerance to negotiate difference by such scholars as Wendy Brown (2006, 2010) and Janet Jakobsen and Ann Pellegrini (2004). The latter state: "what does it feel like to be on the receiving end of this tolerance? Does it really feel any different from contempt or exclusion?" (14). Alan Wong (2011) has asked "reasonable according to whom?" Day and Brodsky (1996) wrote an insightful criticism of the legal use of reasonable accommodation almost 20 years ago. Since then reasonable accommodation has expanded rather than contracted in use in the context of law (and elsewhere).

Criticisms have also come from outside of the academic community as some religious leaders have called into question the use of tolerance as a beginning place for interfaith dialogue. Space does not permit a more detailed discussion of these concepts here, which I have written about more fully elsewhere (Beaman 2012).

While theoretical criticisms of accommodation are interesting for academics, those who work on the ground, such as the Ontario Human Rights Commission, the Tribunal and the people who come before them or seek their advice are perhaps more interested in concrete policies that can help negotiate difference on a day to day basis and clear guidelines to help to make fair and just decisions that ensure that the opening statement of the *Human Rights Code*, which emphasizes dignity, equality, respect and membership in community, can be achieved. There is a wide range of cases that come before the Commission and Tribunal, and one can find a variety of tools employed to interpret creed and its protection, including accommodation, tolerance, formal and substantive approaches to equality, as well as respect.

Although equality in a substantive or deep sense rather than formal sense is the ideal, it too may need to be supported by other conceptual tools in order to ensure that it remains flexible enough to ensure a robust protection of creed. The case *Modi v. Paradise Fine Foods Ltd.* illustrates this point. The complainant engaged in a discussion at a halal meat counter he frequently patronized. The discussion erupted into an altercation when he responded to the butcher's comment that Africa would soon be all Muslim by replying that that would be for Africans to decide. The evidence suggested that the butcher became angry, threw frozen chicken at the complainant and a fellow customer, and then the owner joined in and threw beer cans at the complainant. The tribunal found in the complainants favour, ordering damages be paid and that the butcher attend a training programme at his own expense. Neither the notion of accommodation or equality works particularly well in this case, thus leaving open the question of how to implement a public policy that incorporates the idea of respect. A similar challenge arises in *Yousufi v. Toronto Police Services Board,* a Toronto Police service case in which one officer played a practical "joke" on a Muslim colleague, calling in to report that he had been involved in the 9/11 attacks. It is difficult to make either an accommodation or equality framework work in a situation such as this, and it is respect that seems a more fitting ideal.

The range of situations that present before the Tribunal means that approaches and policies must both be clear in their protection of the parties as well as contain the flexibility required to guide employers, voluntary associations, and businesses in relation to creed.

CHALLENGES TO ACHIEVING AN EQUALITY MODEL

Although I have raised some of the problems with accommodation and argued for a language and conceptual framework of equality, I am admittedly a little thin on specificities. In my view there is a major stumbling block to identifying best practices both for day to day negotiations of religious difference, for policy and law makers, and for service providers. Specifically, there has been no systematic or social scientific study of the ways in which religious difference is successfully negotiated on a day to day basis. While there are persistent negative narratives, made public most famously by the Bouchard-Taylor Commission, there are no similar persistent positive narratives that recover success stories of negotiation. Further, it is only from such narratives, or ground up knowledge, that successful best practices and policies can be developed. What can the details of the minute practices in day to day negotiation of religious difference tell us? A systematic analysis might tell us how dialogue begins, how it is made possible, what are the conditions under which it empowers. It might reveal the ways in which religion is de-essentialized. How are individuals seen not only as individuals, but as members of religious groups who are themselves social actors in addition to being the context within which individuals sometimes frame their identities? While it is easy to talk about 'too much accommodation', 'too much equality' is less comprehensible in our current constitutional and social contexts. It is here, by tracing the successes of human interaction that we will find a better description and understanding of deep equality.

With these limitations and challenges in mind, what might be some helpful suggestions in thinking about policies related to discrimination on the basis of religion or creed? To some extent the *Code* and Policy already identify some of the key aspects for an approach that promotes fairness, justice, and equality:

First, *The duty to inform.* The current obligation on those who have needs related to their religious beliefs to inform those around them is a sensible approach to take. Although it can be criticized for placing the onus on the religious practitioner rather than on those around them, and this in turn can result in a privatization of religion, the research I've been involved in would suggest that this is the best approach. There are at least two reasons for this: i. religion is only one source of identity and for some people it is not one they wish to highlight, or they wish to retain control over when it is highlighted. ii. if we see religion as a subjective phenomenon, or 'lived', it is clear that not everyone practices in the same way. This leads to the second aspect.

Secondly, *Avoiding the assumption of orthodoxy.* There is a tendency when dealing with religious groups with which we are not familiar to essentialize them, often in orthodox ways. Thus, not all Muslims require prayer space, not all Sikhs wear kirpan, and so on. Religious groups and individuals themselves complain that such essentialization is pushing them toward an orthodoxy of practice that is inappropriate. Thus difference within groups and between groups of the same faith challenges a one size fits all approach. On the other end of the spectrum is the assumption that because some members of a group do not engage in a specific practice that no member of the group should, this type of generalizing also should be avoided.

Thirdly, *Developing a multi-layered approach.* It may be that 'reasonable accommodation' may be the most sensible approach in the employment context. However, given the emphasis on equality in both human rights codes and the *Charter*, it would seem to be imperative to ask whether equality can be better achieved in other types of situations with an alternative approach which avoids hierarchical language and promotes a deep sense of equality and respect for difference.

NOTES

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[2] Lois Wilson, for example, former moderator of the United Church of Canada, challenged the use of tolerance in her keynote address at the *Sacred and Secular in Global Canada* Conference held at Huron University College.

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CASE LIST

Modi v. Paradise Fine Foods Ltd., 2007 HRTO 12.

Yousufi v. Toronto Police Services Board, 2009 HRTO 351.

LEGISLATION

Human Rights Code, R.S.O. 1990, CHAPTER H.19.