Religious Accommodation and its Limits: The Recent Controversy at York University[1]

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Introduction

A recent request for religious accommodation at York University has generated controversy not just about the merits of the particular claim but also about the general practice of religious accommodation under human rights codes and the *Canadian Charter of Rights and Freedoms*. I will argue that the York case highlights the difficulty in treating religion as a ground of discrimination and more generally in fitting religion into an equality rights framework. This difficulty stems from the complex character of religious adherence, which can be viewed as both a personal commitment to a set of claims about truth and right and as a cultural identity that is expressed in shared spiritual practices. When religion is viewed as a cultural identity, it seems right that it be accommodated, unless this would cause "undue hardship" to others. Yet when it is viewed as a set of beliefs about right and truth, particularly when those beliefs are inconsistent with public values, it is not clear why it ought to be accommodated.

What we do and do not know about the York University case

We know something but not everything about the accommodation request at York.[2] We know that a student in an on-line course asked to be excused from a component of the course, which required students to work on a project in groups. He asked to be excused from the project because, he said, his religious beliefs prohibited him from interacting with women. We know that the professor was disinclined to grant the exemption but referred the request to the university's administration, which ultimately decided that the accommodation should be granted. The university noted that another student in the course had been excused from the project because he or she was out of the country. In deciding that the student should be excused from the group project, the university pointed to its obligations under the *Ontario Human Rights Code*.[3] Although directed by the university to excuse the student from participation in the group project, the professor decided not to accommodate the student's request. The professor also asked students in another class for their views on the issue. Not surprisingly perhaps, a majority of them were opposed to the accommodation. In the end, the student decided to drop his request for exemption and participated in the project, meeting with both male and female students.

There are some things we do not know about the case that may be relevant. We do not know the religious community or tradition with which the student is associated, although it is generally assumed that he adheres to a version of either Judaism or Islam. We do not know much about

the content or character of his belief: What is his objection to meeting with women? What sort of interaction with women is unacceptable in his view? Touching? Direct conversation? Meeting in a non-public setting? Unless he is a recluse, we can assume that he comes into contact with women in other parts of his life. In that regard, we do not know anything about the student's general practices. Has he taken courses that were not on-line, with classes that included women? Does he eat in restaurants or shop in grocery stores where he would inevitably come into contact with women? We do not know whether the student was informed at the time he signed up for the course that it included a group project. The syllabus would ordinarily set out the course requirements, although perhaps it did not clarify that the group project would involve meeting with other students.

The Human Rights Code

The Ontario *Human Rights Code* prohibits discrimination based on creed (and other listed grounds) in the provision of services, goods and facilities.[4] Creed is understood to include religious beliefs and practices, although there is now some debate about whether it should also be read to include fundamental commitments that are non-religious in character.[5] The ban on discrimination includes what is sometimes referred to as "constructive discrimination" or "effects discrimination." Even when a requirement or qualification in a workplace or other institution does not directly discriminate on a particular ground, it may still breach the ban on discrimination if it has the effect of excluding the members of a religious group. However, an institutional requirement or qualification that has a discriminatory "effect" on the members of a religious group will not breach the *Code* if it is "reasonable" and "bona fide," and that in turn will depend on whether the needs of the religious group can be accommodated "without undue hardship" or, in other words, without too much cost difficulty to the institution.

Would accommodation cause undue hardship?

How might the *Code* apply to the York case? The issue under the *Code* is whether the course requirement (that students meet in groups of both men and women) had the effect of excluding or disadvantaging the student because of his religious beliefs and practices (his 'creed'), and if that was its effect, whether accommodating him would cause undue hardship to the institution. When the issue is framed in this way – as the law frames it – it is easy to see why the York administration decided that the student should be accommodated. It is not clear how the institution would be unduly burdened by exempting a student from the project.

If instead of asking to be exempted from the group project, the student had asked to be placed in an all-male group then the accommodation would certainly have had an impact – a negative impact one presumes – on the other students in the course who would have been placed in an all-male group or in a group with a disproportionate number of women. It may be possible to describe this "disadvantage" to the other students as an undue hardship, although that is not clear. I suspect that any negative reaction to such an arrangement would have been based not on the hardship it might cause to other students (because they were placed in either an all-male or predominately female group) but instead on the reason for the reorganization of the groups – that the student be allowed to avoid interacting with women. In any event, that is not the accommodation that was asked for. Instead the student asked simply to be exempted from the group project (and to be given other work) – an accommodation that at least on the surface would appear to have no negative impact on others in the course.

It was claimed, though, that the other students would be offended if they knew about the accommodation and the reason for it – that they would see the accommodation as the university condoning or acquiescing in a regressive view about the role of women in society. The university, of course, asked the professor not to inform the other students about the accommodation,

and indeed students are not generally informed about specific accommodations. But the fact that students are opposed to, or offended by, an accommodation is not itself a harm that could justify the refusal to grant an accommodation.

What then is the harm to the University, or to the community in accommodating the belief that men and women should not interact (or the practice of not interacting with women)? The concern of those who oppose the accommodation is not that it will cause a clear and tangible injury to the university or its students, but is instead that the accommodated practice is inconsistent with a basic public value, gender equality, or with the educational ethos of the university as an open and inclusive learning environment in which all members are treated with equal respect. Should the inconsistency of this religious practice with the public or institutional commitment to gender equality be regarded as undue hardship to the university?

The difficulty of fitting religion into an equality rights framework

The issue in this case, I think, exposes some of the tensions in our understanding of religious freedom and religious equality and, in particular, the requirement of religious accommodation.[6] I want to suggest that "religion" or "creed" (religious belief and practice) does not fit comfortably within the model of equality rights or anti-discrimination laws and seeing why this is so might help us to better understand the conflict in this case – the university's decision to accommodate and the public's reaction to that decision. The first difficulty is that religious adherence may be viewed as both an individual commitment and a collective identity. The second and related difficulty is that religious belief systems or traditions may be seen as both a set of practices and a set of beliefs about truth and right, which sometimes have public implications.

1. Religion as individual commitment or group membership

Discrimination under the *Human Rights Code* occurs when an institutional requirement has the effect of excluding "a group of persons" identified by their religion. However, the Supreme Court of Canada ("SCC") has said that a religious belief or practice should be protected even though it is not part of an established or widely-held religious belief system.[7] Freedom of religion, said the SCC, protects practices that have spiritual significance for the individual, "subjectively connecting" her/him to the divine. The test for deciding whether a practice ought to be accommodated (absent undue hardship) is whether the individual has a "sincere" belief in the spiritual significance of the practice.[8] The SCC adopted an individualized test for determining whether a practice falls within the scope of protection, because it recognized that religious beliefs are contestable and that religious belief systems or traditions may be interpreted by individual adherents in different ways. As a public/secular institution, a court is not in a position to decide what is required by a particular belief system or which interpretation of that system is the correct one.

Religion, however, can be seen as both a collective identity and an individual commitment. The courts' focus on individual beliefs raises the question of why religious or spiritual beliefs should be treated differently from non-religious beliefs – of why religious beliefs or practices should sometimes be accommodated. What is the particular value of a religious practice that justifies requiring an institution, such as a university, to make an accommodation and compromise its ordinary rules and requirements? From a secular or public perspective, a religious practice has no intrinsic value. The practice matters only because it is important to the individual; but there is no way to balance this subjective "value" against the value of the law or the policy of the institution. If the legislature, or an institution such as a university, has decided that a particular activity should be restricted or a particular policy should be supported in the public interest, why should the matter be revisited for an individual who holds a different view on religious grounds? Why should the government or a university be expected to compromise its policies simply because an

individual holds a different view or adheres to a practice that conflicts in some way with institutional policy?

The accommodation requirement must rest to some extent on equality concerns. It must rest not on a concern about the impact of a rule or requirement on a particular individual but, rather, on a concern that religious groups not be socially excluded or economically marginalized. We may be aware that the interests of religious minorities are often undervalued in the political process, particularly if religion is regarded as a private matter. We may be conscious of the fact that many of our social practices either reflect or take account of the religious practices of the historically dominant Christian or Protestant communities. We may be concerned that minority religious groups will be socially or economically marginalized if they are excluded from certain benefits or burdened by particular public norms. Or our concern may be that if religious adherents are required to act in a way that is contrary to what they believe is right or necessary they will engage in acts of civil disobedience. Each of these reasons rests on the idea of religion as a cultural identity and religious communities as identity groups.

We don't know whether the York student is a member of a larger religious group and whether his belief (that he cannot meet with women) is shared by others. The professor said that he spoke to spiritual leaders from both the Islamic and Jewish communities who confirmed that even the conservative versions of their faith would not prohibit a man from meeting with women for a school project.[9] It may be then that the student's belief is personal to him.

The problem, once again, is that religion can be understood in law as both a collective identity and an individual commitment. While the justification for accommodation rests on a concern about religious communities, the definition of the protected activity (the activity that should be accommodated) focuses on individual belief or practice with no (practical) requirement that this practice be tied to a community or tradition. It is not clear why the religious practice of the individual student should be accommodated, or why a university should be required to alter or compromise its course requirements), if this practice is not part of an established or shared belief system.

2. Religion as a set of practices or values

This takes me to the second and more basic difficulty in fitting religion into an equality rights framework and that is that religion may be viewed both as a set of practices (an identity) that should be treated with equal respect and as a set of beliefs about what is right and true (a judgment) that should be open to debate (and acceptance or rejection) in the public sphere. While it might sometimes be appropriate for the state or a university to accommodate the practices of a religious community (provided this will not cause undue hardship to others), it is not clear why they should be expected to accommodate beliefs (related to civic matters) that are inconsistent with public or institutional policies. In most cases where a religious belief or practice is inconsistent with public values, it will have a negative impact on others and so will not be accommodated. The York case, however, is complicated. The requested accommodation is not necessarily harmful to others, at least not in a direct way; yet it may be incompatible with an important public value – gender equality.

The different reactions to the accommodation request in the York case may rest on different views about the nature of the student's claim. Those who oppose the accommodation think that the student's belief relates to the status or position of women in society. In their view, it involves a value judgment that is inconsistent with the public commitment to gender equality. The university, however, in agreeing to accommodate the student's request, treated the requirement that he not interact with women as simply a religious practice. The difficulty is that we can see the requirement through two lenses, as both a value-judgment and a spiritual practice.

If I were to say to a Muslim or Jew who believes that pork should not be consumed, that they should not feel bound by this requirement

because pork consumption is not a health risk, they would, I assume, say to me that this is beside the point – that they do not eat pork because that is what God commands or scripture requires. They do not look behind the command. It is in that sense a religious practice – a way of worshipping or honouring God. Perhaps that is how the individual in the York case views the requirement that he not interact with women – as a religious practice – and not as the expression of a more general belief about the status or role of women in society. Should we then make some effort to accommodate this practice as we would with the practice of not eating pork?

Some spiritual commitments, such as a duty to pray or to refrain from eating pork, may be viewed as practices that ought to be accommodated (absent undue hardship), while other commitments that relate to, or touch on, the rights and interests of others may be viewed as political/moral judgments, which if rejected by the state or institution ought not to be accommodated. Whether labeled a judgment or a practice, the York student's belief seems to conflict with the University's commitment to inclusion and equal participation. Because it concerns how others should be viewed or treated, I am inclined to think the belief/practice ought not to be accommodated, regardless of how the individual understands it. If someone wishes to study at a university they must conduct themselves in a way that is consistent with gender equality. Whether this is what the *Code* requires, however, is not clear to me.

A consideration of other cases – other beliefs or practices – might help to clarify what is at issue in the York case. What if the group project required the students not just to meet and talk, but to physically interact with one another (to have physical contact of some kind) and a particular student said that his faith prohibited him from having any physical contact with women to whom he was not related? Is that just a practice, or does it reflect a view about women (that they are inferior or a source of temptation) that might be seen as inconsistent with the public commitment to gender equality? Would it matter whether it was a woman who sought to avoid physical interaction with a man?

What about the case of a woman who wears a headscarf? There are those who argue that this religious practice reflects a view about women that is inconsistent with gender equality. Most people however, now recognize that women wear hijab for many reasons related to modesty or identity or simply because it is what their faith requires of them, and that it ought not to be viewed as a symbol of gender inequality. Yet if the headscarf is viewed as a manifestation of gender inequality, there is a risk that the argument against accommodation in the York case might be used to justify a decision not to accommodate the headscarf and perhaps even to ban it.

There are, however, important differences between the practice of the student in the York case and the practice of wearing hijab. The individual in the York case sought to avoid contact with women – to segregate himself – and to follow a practice that (regardless of his personal understanding) could be seen as part of a historical pattern of marginalizing women. A decision not to accommodate his practice might have resulted in his withdrawal from the course (although in fact it did not) but it would at least have affirmed the importance of gender equality and the inclusion of women in the University. A ban on the headscarf, however, would have the opposite effect. It would exclude women from the public sphere. This has been the effect of the French ban on headscarves in the schools.[10] While some girls have removed the headscarf and attended public schools, others have dropped out of school or entered private religious schools. In Quebec, the effect of the proposed ban on civil servants wearing "conspicuous" religious symbols will be to exclude those who wear hijab (as well as others) from working in the public sector. It will marginalize women who wear the headscarf and prevent them from participating fully in the larger society. If religious equality (and the right to accommodation) is about ensuring social inclusion, political membership, and economic fairness, then civil servants ought not to be prevented from wearing the headscarf and other symbols.

Conclusion

Religion does not fit easily into the framework of equality rights because religion is not simply a cultural identity -- a set of shared practices that one simply follows. It is also a personal commitment to a set of claims about right and truth that sometimes concern the rights and interests of others and sometimes conflict with important public values. When we see religious belief through the lens of group identity and cultural practice, accommodation seems like an appropriate response, to prevent the exclusion or marginalization of minority groups. However, when we see religion as a set of beliefs about right and wrong, it is not clear why it should be accommodated. Such beliefs should be open to debate and should not be accommodated when they are inconsistent with basic public values such as gender equality.

Notes

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1 Richard Moon, "Religious Accommodation and its Limits: The Recent Controversy at York University," (lecture delivered at the Noor Cultural Centre in Toronto, 30 January 2012). (This article is a text of the lecture).

2 This account is based on statements made by the University and the professor to the media. See Graham Slaughter, "York University's religious accommodation decision the correct one, dean writes," *Toronto Star* (13 January 2014) online: Toronto Star <http://www.thestar.com/news/gta/2014/01/13/york_universitys_religious_accommodation_decision_the_correct_one_dean_writes.html>; and Tristan Hopper, "York University professor who refused student's request to be separated from female classmates broke 'obligation to accommodate': officials," *National Post* (8 January 2014) online: National Post <http://news.nationalpost.com/2014/01/08/york-university-professor-who-refused-students-request-to-be-separated-from-female-classmates-broke-obligation-to-accommodate-officials/>.

3 *Human Rights Code*, RSO 1990, Chapter H19.

4 1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. RSO 1990, c H19, s 1; 1999, c 6, s 28 (1); 2001, c 32, s 27 (1); 2005, c 5, s 32 (1); 2012, c 7, s 1.

Constructive discrimination
11 (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. RSO 1990, c 19, s 11 (1).
Idem
(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. RSO 1990, c H19, s 11 (2); 1994, c 27, s 65 (1); 2002, c 18, Schedule C, s 2 (1); 2009, c 33, Schedule 2, s 35 (1).

5 See Ontario Human Rights Commission, *Human Rights and Creed: Research and Consultation Report* (Toronto: Queen's Printer, 2013).

6 In the discussion that follows I will not distinguish between freedom of religion claims and religious equality claims since, for the most part, the courts have not distinguished them. They have held, for example, that freedom of religion requires the state to remain neutral in matters of religion – to treat different religious groups or belief systems in an equal or even-handed manner -- and prevents the state from restricting a religious practice unless it has a compelling public reason to so. I will simply acknowledge that the relationship between these two rights is a complicated issue that I cannot address here.

7 *Syndicat Northcrest v Amselem*, , 2004 SCC 47, [2004] 2 SCR 557 at para 46 [*Syndicat* cited to SCR].

8 However, I have elsewhere argued that in the application of s 2(a) of the *Charter of Rights and Freedoms*, despite the courts' formal declaration that the state must justify any non-trivial restriction of a religious practice (or reasonably

accommodate the practice), they have given this requirement little substance. The courts appear willing to uphold a legal restriction, if it has a legitimate objective (that is, an objective other than the suppression of an erroneous religious practice) that would be noticeably compromised if an exception were made. In other words, even though the courts have structured their approach to section 2(a) so that it has the form of an equality right, they have adopted in practice a very weak standard of justification under section 1, so that the right protects only a limited form of liberty. See Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin, 2014).

9 See Hopper, *supra* note 2.

10 For a discussion of the French ban, see Joan Wallach Scott, *The Politics of the Veil* (Princeton: Princeton University Press, 2007); and John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton: Princeton University Press, 2007).