






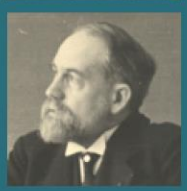


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When non-discrimination law struggles with the "conscience" of companies

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In liberal democracies, controversies related to freedom of religion, come not so much from the will of the state to promote any particular religion, but from rules adopted by the state, which interfere with the practice of believers although they do not concern the religious sphere in the first place. Exemption, accommodation or derogatory status, all claimed in the name of religious convictions, are at the core of vivid debates. [5]

These exceptions adopted to promote freedom of religion can generate conflicts with other fundamental rights, among which the principle of equality and non-discrimination features prominently. In some cases, the legislator establishes guidelines to enable first line actors or the judge to solve or to decide these conflicts. [6] An extensively discussed example in EU law is the exception to the prohibition of direct discrimination based on religion or belief enshrined in Article 4, § 2 of the directive 2000/78/EC. Churches and "other public or private organizations the ethos of which is based on religion or belief" (in short, "ethos-based organizations") are allowed, under certain conditions, to treat someone differently because of her religious beliefs (refusal to hire, dismissal, etc.). This provision has its counterpart in US and Canadian law. It aims to favour religious freedom when it conflicts with the right to equality. [7]

In recent years, on both sides of the Atlantic, litigation of a different nature is taking place. Profit companies, and not merely churches or religious organizations, are claiming the benefit of exemptions based on religious freedom. In the name of their "conscience", and through the voice of their leaders, these companies refuse to comply with the obligation to subscribe to group insurance contracts paying the "morning after pill" or to provide services to people because of their sexual orientation. These cases, which disclose an enlarged notion of "conscience" or ethos, lead to (re) think the foundations of the right to equality and non-discrimination to avoid its unravelling or instrumentalization.

At the same time, other companies or associations include the respect of neutrality in their brand. In this line, neutrality justifies the dismissal or the refusal to hire workers wearing the *hijab*, or the prohibition addressed to their staff to wear a visible Christian cross on a necklace. If such a trend is slightly different from the first one, both obey a similar logic. Indeed, in both cases the companies raise a form of "conscience" broadly understood, so that the rights *of* the company prevail over the rights *in* the company. In this scenario, the convictions of the employer might overcome the rights of the employees. [8]

In our paper, we intend to consider emblematic cases decided on both sides of the Atlantic to assess how anti-discrimination law is shaken and questioned when companies raise their "conscience". National and supra-national legal cases are providing an insight of what is happening on the ground. They are indicative of some salient European legal battles, which are

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[5] J. Woehrling, "Aménagement de la diversité religieuse et conflits entre droits fondamentaux. Le contexte juridique canadien", in E. Bribosia et I. Rorive (dir.), *L'accommodement de la diversité religieuse. Regards croisés – Canada, Europe, Belgique*, P.I.E. Peter Lang, 2015, pp. 135-136.

[6] E. Bribosia et I. Rorive, "Les droits fondamentaux, gardiens et garde-fous de la diversité religieuse en Europe", in E. Bribosia et I. Rorive (dir.), *L'accommodement de la diversité religieuse. Regards croisés – Canada, Europe*, Belgique, P.I.E. Peter Lang, 2015, pp. 171-202.

[7] J. Woehrling, « Aménagement de la diversité religieuse et conflits entre droits fondamentaux. Le contexte juridique canadien », *op. cit*., pp. 155.

[8] J. Morri, "Une pilule dure à avaler : La Cour suprême des Etats-Unis consacre l'entreprise de tendance à but lucratif", *La Revue des droits de l'homme* [Online], Actualités Droits-Libertés, 10 Septembre 2014. URL : http://revdh.revues.org/871.

taking a global turn in a climate of "conscience wars". Our approach is based on the assumption that the traditional segregated approach, studying different courts and legal orders in isolation from one another, no longer provide adequate conceptual and normative tools to fully grasp the current evolutions and challenges in this domain. There is a genuine need for a global approach to anti-discrimination law in which comparative law plays a central role.[9]

1. When for-profit companies wave their "conscience"

- The *Hobby Lobby* case (USA)[10] – According to the Supreme Court of the US, a for-profit private company can claim the benefit of the *Religious Freedom Restoration Act* (1993) to escape its legal obligation to subscribe for group health insurance policies covering contraceptives which include the morning-after pills.

- *Bull v. Hall* (United Kingdom)[11] and *Eadie v. Riverbend Bed and Breakfast* (Canada)[12] – Both the UK Supreme Court and the British Columbia Human Rights Tribunal ruled that it was discriminatory for a B&B to refuse to lend a double bed bedroom to a same-sex couple.

- *Ontario Human Rights Commission v Brockie* (Canada)[13] – The Ontario Superior Court of Justice condemns the refusal of a print shop to provide envelopes and business cards to a LGBT organization.

- *Lee v. Ashers Baking Co Ltd* (United Kingdom)[14] – A first instance court in Northern Ireland, in a highly publicized case, condemned a large bakery for refusing to make a cake with a slogan supporting the gay cause. Similarly for a wedding cake, see the decision of the Colorado Court of Appeals in *Charlie Craig and David Mullins v. Masterpiece Cakeshop* (2015).

- *Elane Photography v. Willock* (USA) [15] – The Supreme Court of New Mexico sentenced a professional studio for refusing to photograph the wedding ceremony of a couple of women.

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[9] E. Bribosia, I. Rorive, "Antidiscrimination law in the global age", *European Journal of Human Rights*, 2015/1, pp. 3-10.

[10] Burwell v. Hobby Lobby, 573 U.S. (2014).

[11] Bull & Bull v. Hall & Preddy [2013] UKSC 73.

[12] Eadie & Thomas v. Riverbend Bed and Breakfast and others (No. 2), 2012 BCHRT 247.

[13] Ontario Human Rights Commission v. Brockie (No.2), (2002) 222 D.L.R. (4th) 174.

[14] Lee v. Ashers Baking & Anor [2015] NICty 2.

[15] Elane Photography, LLC v. Willock, 309 P.3d 53 (2013).

2. When excluding religious symbols is part of the "ethos" of a company

- *Baby Loup* saga (France)[16] – Lawfulness of the dismissal of a nursery employee, working in a private organisation subsidized by the government, who refused to remove her *hijab* and to conform to the new internal rules requiring that the staff conform to the principle of secularism and neutrality.

- The *Club*[17], *Hema*[18], *Ashbita*[19] and *Carrefour*[20] cases (Belgium) – Lawfulness (subject to the ECJ ruling in the *Ashbita* case) of the dismissal of Muslim workers because their *hijab* is contrary to the neutral image that these companies want to convey.

- The *Eweida* case[21] (UK – European Court of Human Rights). Unlawfulness, based on the circumstances of the case, of the dismissal of an employee of British Airways who refused to remove a visible Christian cross necklace that deviated from the « neutral » dress code of the company.

- The *Abercrombie Fitch* case[22] (USA) – The refusal to hire a woman wearing the *hijab* on behalf of the dress policy (Look Policy) of the company was unlawful.

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[16] Labour Court (*Conseil de prud'hommes*) of Mantes La Jolie, 13 December 2010, no. 10/00587; Court of Appeals of Versailles, 27 October 2011, no. 10/05642; Court of Cassation (Soc.), 19 March 2013, no. 11-28.845; Court of Appeals of Paris, 27 November 2013, no. 13/02981; Court of Cassation (*en banc*), 25 June 2014, no. 13-28.369.

[17] Labour Court of Brussels (4th Ch.), *E.F. c. s.a. Club*, 15 January 2008, R.G. no. 48.695, *Journal des tribunaux du travail*, 2008, p. 140.

[18] Labour Court of Tongres, 2 January 2013, no. 11/2142/A.

[19] Labour Court of Appeals of Antwerpen, 23 December 2011, no. 2010/AA/453. Pending case before the Court of Cassation and the Court of Justice of the European Union (request for a preliminary ruling launched on 3 April 2015, aff. C-157/15).

[20] Labour Court of Brussels, 18 May 2015, no. 14/5803/A.

[21] ECtHR, Ladele and Others v. The United Kingdom (15 January 2013). Contra: Eweida v British Airways Plc [2008] UKEAT 0123_08_2011 (20 November2008); Eweida v. British Airways plc [2010] EWCA Civ 80 (12 February 2010).

[22] Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc., 575 U. S. (2015).