



Responding to Complex Diversity in Europe and Canada

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Religion Freedom in the Age of Identity Politics: From Choice to Identity

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Shift from choice to identity

A shift from interpreting disputed laws as potential obstacles to individual choice...

...to courts assessing whether disputed laws are obstacles which prevent groups from enjoying equal citizenship because the laws disrespect and marginalize groups

Choice perspective

The sovereign value of religious freedom is the freedom to follow the dictates of one's deepest and most personal religious commitments and thereby to decide for oneself what ought to guide one's conscience.

Choice perspective

‘The economic harm suffered by a Saturday observer who closes shop on Saturdays ...results from the deliberate choice of a tradesman who gives priority to the tenets of his religion over his financial benefit’

Dissenting opinion, R v Edwards Books and Art Ltd., [1986] 2 SCR para 168

Identity perspective

The unequal treatment of religious belief and practice may be experienced by the individual as a failure to treat her/him with equal respect and as creating a climate that exposes her/him to disadvantage.

Identity perspective

‘In proclaiming the standards of the Christian faith, the [Lord’s Day] Act creates a climate hostile to, and gives the appearance of discrimination against non-Christian Canadians’

Majority opinion, Big M Drug Mart [1985]1
SCR para 134)

The age of identity politics

The codification of identity based rights

In the last 30 years, 'identity' or 'cultural rights' have been entrenched in the constitutions of Argentina, Belize, Bolivia, Brazil, Bulgaria, Croatia, Ecuador, Guatemala, Kosovo, Mexico, Nicaragua, Panama, Paraguay, Peru, Poland, Romania, Slovakia, Slovenia, Venezuela, as well as statutes passed regionally in Italy, Spain and Germany, to name a few.

The age of identity politics

Increase in group mobilization for the recognition and protection of identity

- linguistic groups
 - national minorities
 - Indigenous peoples
 - ethnic minorities
 - religious groups
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The age of identity politics

Shift in the language of public policy and scholarly debate

from 'antidiscrimination' ...

to 'differentiated citizenship' (Canada/US)

or 'parity of esteem' (Northern Ireland)

The Canadian Charter of Rights in this historical context



S2(a) Freedom of Religion

S15.1 Equality Rights

15.2 Programmes for the 'Amelioration of Disadvantage'

S27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the **multicultural heritage** of Canadians.

Lautsi and Others v Italy, ECHR 30814/06, 2011

‘Freedom of religion, and freedom from religion, in substance, consist in the rights to profess freely any religion of the individual's choice, the right to freely change one's religion, the right not to embrace any religion at all, and the right to manifest one's religion by means of belief, worship, teaching and observance.

...with or without a crucifix on a school room wall, the Lautsis enjoyed the most absolute and untrammelled freedom of religion...’

Concurring opinion Judge Bonello

Lautsi and Others v Italy, ECHR 30814/06, 2011

‘That provision can be interpreted as conferring on States a positive obligation to create a climate of *tolerance* and *mutual respect* among their population.

Can it be maintained that the States properly comply with that positive obligation where they mainly have regard to the beliefs held by the majority? ... I do not think so.’

Dissenting opinion Judges Malinverni and Kalaydjieva

Implications

1. Disputes about religious freedom are reframed as disputes about religious equality and claims made by religious minorities are about 'renegotiating the terms of citizenship'; the aim is to track and expose social exclusion and historical injustice

Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256

‘If some students consider it unfair that G may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to instill in their students this value that is at the very foundation of our democracy. ...

Accommodating G and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities.’

Majority decision

Implications

2. Shift from individual focus to group focus

Connects individuals to groups through collective practices and, through these practices, to a history of structural injustices embedded in histories of exclusion. Exposes structural injustice which would otherwise be obscured by focusing on the individual in the here and now

R. v. N.S., 2012 SCC 72

A line of questioning that seeks to establish sincerity of religious belief in this context carries a real danger of facilitating yet another form of 'virtue testing' in cases about sexual assault.

Sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a niqab, which may be no meaningful choice at all.

LEAF Factum and Dissenting opinion

Implications

3. Courts must sometimes assess claims groups make about their identities

In the absence of requiring individuals to choose between participating as citizens and adhering to deeply held religious commitment , courts must sometimes assess the importance of a practice to the religious identity of a claimant

Risks

1. Distortion of claims and identities
 - reinforces group stereotypes
 - encourages groups to 'self-essentialize'
i.e. to present themselves as united, as adhering to stable practices, and to choose leaders who will present the group in these ways
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Risks

2. Co-optation

Minority groups may accept minor concessions (e.g. cultural recognition and protection) while deeper problems remain (e.g. poverty, racism, illiteracy, colonial dispossession)

3. Entrenches elite hierarchies

4. Social fragmentations

Responses to challenges:

- Democratic engagement and 'Effective Participation'
 - International influences
 - Institutional reflexivity
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