

BANNING SEXISM: HOW HARASSMENT LAW MAY THREATEN FREEDOM OF EXPRESSION AND UNDERMINE ANTIDISCRIMINATION POLICIES

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On 26 September 2007, the Brussels' Court of Commerce banned a sexist commercial and convicted its maker for violating several provisions of the federal Antidiscrimination Act. This contribution analyses the ruling and places it in a broader context. First, the facts of the case and the content of the judgment are presented. We then offer a closer inspection of the Court's reasoning and argue that the ruling is legally flawed and raises serious free speech concerns. To conclude, we consider some troubling implications the case may have for the fight against discrimination in Belgium.

THE CASE: RENTAWIFE.BE

The “rentawife” case originated from an action brought by the Belgian Institute for the Equality of Women and Men (hereafter: “Institute” or “IEWM”).¹ The latter was established in December 2002, as a federal government institution with a broad mandate “to ensure and promote equal opportunities for women and men and to combat any form of discrimination and inequality based on gender”.² To this end, the Institute is authorised, among other things, to handle complaints on the basis of the federal antidiscrimination legislation and to institute court proceedings if it considers that legislation to be breached.³ The main legal instrument relating to sex discrimination in Belgium is the 2003 Act to combat discrimination, which was replaced by the 2007 Act to combat discrimination between women and men.⁴ Both Acts implement the EU sex discrimination directives.⁵

What were the facts of the case? In 2007 a DVD-company and a web agency launched an advertising campaign for the products of the former. The central platform of the campaign was a website – www.rentawife.be – where one could supposedly rent women, which was intended to be a humorous analogy for the rental of DVDs. Through the site, customers were able to choose from more

than 9,500 ‘women’, with the help of a search-engine. The engine allowed visitors to make a selection on the basis of the following characteristics: hair colour, measurements, age, eye colour and ‘type’ (ethnicity). The site further detailed that if and when the customer had “seen enough”, the ‘women’ could be “exchanged at any time”. A video-clip on the site demonstrated how everything worked. It depicted a woman being tied and wrapped up in a box by a man. In the next scene, a postman passed by to pick up the woman, at the same time delivering a new one to the man’s doorstep.

After the Institute had become aware of the campaign it issued a statement, in which it deplored the stereotypical portrayal of the subordinate role of women.⁶ What it found most reprehensible was that “women are depicted as mere merchandise, that can easily be exchanged, with men as their users”.⁷ It considered the website to be “discriminatory” and “sexist” and demanded that it be taken offline.⁸ When the companies failed to comply with this demand, the Institute, joined by the president of an umbrella organisation of women’s interest groups, filed suit to obtain an injunction against the website.

In its decision of 26 September 2007, the Brussels’ Court of Commerce ruled in favour of the plaintiffs. Finding a violation of several provisions of the 2003 Act, it granted an injunction and imposed a fine as well as additional damages in case of non-compliance. The Court further ordered the publication of the judgement on the defendants’ websites for a period of 6 months. A final measure consisted in the plaintiffs being provided with the opportunity to hold a press conference at the expense of the defendants, something which is virtually unprecedented in Belgian law.

The Institute enthusiastically welcomed the judgement as “unique” and “of great importance”.⁹ Its implications would extend not only to Belgium, but “possibly to the whole of Europe”, since it partly involved the application of provisions derived from the European directives.¹⁰ Upon closer examination, however, it becomes clear that the ruling rests upon a misinterpretation of the 2003 Act and consequently amounts to a bad precedent for (European) discrimination and harassment law.

THE JUDGEMENT: A MISINTERPRETATION OF HARASSMENT AND HATE SPEECH LAW

The Court qualified the commercial expression involved as harassment on the ground of sex on the one hand, and public incitement to hatred, discrimination and violence on the other hand.¹¹ We shall consider each of these qualifications in turn.

Harassment law

Article 2, §6 of the 2003 Act defined harassment as “unwanted conduct [connected to *inter alia* a person’s sex] with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.¹² This provision is a literal transposition of the language of the various EU equality directives.¹³ Where the Belgian legislation and the EU framework differ, however, is in their respective fields of application. Whereas the scope of Directive 2004/113/EC (goods and services), which is most closely related to the facts of the present case, is limited to publicly available goods and services, Belgian antidiscrimination legislation extends to, *inter alia*, the exercise of any economical, social, cultural, and political activity, which is accessible to the public.¹⁴ Moreover, the exclusion from the scope of Directive 2004/113/EC of the “content of media and advertising”, which was inspired by an effort to avoid infringements of the right to freedom of expression, was not incorporated into Belgian law.¹⁵

Applying article 2, §6 to the present case, the Court first observed that the website and the video-clip, as well as its dissemination by the defendants, could be qualified as an economical activity accessible to the public. Having recalled the definition of harassment – every violation of the dignity of a person, in particular where it creates an offensive and humiliating environment – it concluded that the rentawife campaign constituted “a scenario of which no sensible person can gainsay that it (...) satisfies this provision”. There had accordingly been a violation on the harassment provision.

The Court’s reasoning disregards both the spirit and language of article 2, §6 of the 2003 Act and European harassment law more in general. Drawing on the North American experience, European harassment law was designed for the workplace and closely related contexts, such as “access to employment, vocational training and promotion”.¹⁶ The prohibition’s general aim – in the context of sex and gender – is to remove “an obstacle to the proper integration of women into the labour market”.¹⁷ As mentioned, in later developments the EU broadened protection against intimidation also to cover interpersonal situations in the context of goods and services. In Belgium, the prohibition of harassment has been extended even further, covering the entire scope of the 2003 Act. However, and this is essential, the provisions – in line with EU discrimination law – still require the violation of the dignity of one or more *concrete persons*, and not of an abstract group such as women or men in general. The text of article 2, §6 (and the various EU directives) explicitly refer to “a person”. Clearly, this language was not intended to cover broad and impersonal types of ‘group defamation’ through the

(mass) media. It is limited to (anti-)social situations in which someone is the direct and personal object of unwanted conduct with the “purpose or effect” of affecting one’s dignity. This was not the case here.¹⁸

In fact, what the Court did was to rewrite the harassment provision into an open-ended hate speech prohibition – the violation of the dignity of a person or a group. Given the high number of discrimination grounds, the very broad scope of the Belgian antidiscrimination legislation and the lack of a *mens rea* requirement in the harassment provision, such a move may amount to unprecedented restrictions on the right to freedom of expression.¹⁹ Moreover, the Court’s approach has the effect of circumventing the more narrowly tailored hate speech provisions, which were designed precisely to strike a balance between the right to freedom of expression and the principle of non-discrimination.

Hate speech law

The latter point brings us to the second legal issue raised by the rent-a-wife decision, i.e. the alleged violation of the hate speech provision in the 2003 Act. As noted, article 6 made it a crime to publicly “incite to discrimination, hatred or violence against a person, a group or a community or the members thereof”, on the basis of *inter alia* sex. Without further explanation, the Court decided that the defendant’s expression constituted incitement within the meaning of article 6. It seemingly subscribed to the Institute’s reasoning that “the entire discourse of the website treats women as merchandise, as sexual objects”, which is “moreover emphasized by their exchangeability”.

There are several problems related to the application of the incitement provision in this case. Firstly the interpretation of the Court does not correspond to the customary or proper meaning of the terms of article 6: ‘incitement’ cannot be equated or reduced to ‘insulting’ or ‘offending’. ‘Incitement’ presupposes – as the Belgian Constitutional Court expressly determined in 2004 – actively ‘urging’, ‘stimulating’ or ‘instigating’ third parties to undertake certain actions.²⁰ Apparently finding the term ‘hatred’ too vague and subjective in its generic meaning, it even specified that only incitement to hateful *acts* could be considered unlawful; thereby excluding incitement to merely negative *attitudes* or *feelings* from the realm of the hate speech provisions.²¹ Finally, the Constitutional Court required the presence of a specific intent for the application of the incitement clause.²² In other words, aside from the requirement that, given the content and the context of the words used, the impugned expression must incite or provoke hatred and discrimination, it must also be

demonstrated that the latter was the defendant's conscious and malicious intention. The ruling does not attempt to show anything of this sort. As a result, the constitutional requirements were not satisfied.

BROADER IMPLICATIONS

Turning to the broader implications of the case, it is clear that the Court's approach may have some troubling consequences. To start with, it fails to offer clear and demarcating criteria to draw the line between protected and unprotected speech. In the absence of such criteria, the application of the harassment and incitement provisions in the advertising context may result in unnecessary and highly unpredictable convictions. A closer look at some other Belgian commercials may serve to illustrate this. For example, a main beer brand has used the slogan 'Les Hommes Savent Pourquoi!' ('Men Know Why!') for years as its commercial motto. Another illustration concerns a consciously misleading advertisement for a TV-show that was indistinguishable in every respect from a sexist car commercial, stating that 'It's Prohibited For Women to Drive a Hyron'. As opposed to the rentawife website, the fact that it concerned a hoax was not apparent in either the print or the television commercial: for more information readers and watchers were directed to a website (www.hyron.be) or a phone line. Only there did it become clear that it concerned a fictitious car and that the advertisement was in fact an announcement for a new television program, reporting on the prejudices concerning the Islamic world. And what to think about the information campaign that was recently launched by a regulatory body of the Belgian advertising world, the Jury for Ethical Commercial Practices (JEP)?²³ As an eye catcher the JEP used the question 'Why Can't Women Put On Mascara With Their Mouths Closed?', with an accompanying image of a young woman putting on mascara with an open mouth.²⁴ The rentawife approach remains completely silent about how such types of commercial expression should be treated under the antidiscrimination legislation, the result of which is a high degree of uncertainty and an intolerable chilling effect on legitimate speech.

That such a threat may be real is illustrated in the following new episode. In the wake of the rentawife campaign, the Institute objected to a television ad for *Kasteelbier* ('Castle Beer'), a traditional strong Belgian beer. In the commercial, an older man is reading by the fireplace and says: "Wife, I don't know what it is, but something's missing." Instantly a woman appears with a glass of beer, uttering the words: "Your *Kasteelbier* of course". "That's

it!", the man responds. He starts to drink while the voice-over closes: "*Kasteelbier*, pleasure at home". The Institute took issue with this advertisement, its response being as follows: "Such a commercial of barely half a minute, in which the old, stereotypical role patterns between men and women are expressly portrayed, nullify much of our sensitisation campaigns. We are looking into ways in which we can tackle such advertisements. If we receive an official complaint, we shall undertake further steps."²⁵ After censuring a sexist commercial in which women were compared to merchandise, 'the portrayal of stereotypical role patterns' is apparently considered to be unlawful as well. Clearly, such an approach is particularly vulnerable to slippery slope arguments.

In addition to traditional free speech concerns, there is a strong argument to be made against these types of cases as they tend to erode public support for anti-discrimination policies in general. A study commissioned by the (former) Equal Opportunities Commission,²⁶ the closest British equivalent of the IEWM, demonstrated that the general public is rather dismissive of equality claims that are perceived as trivial or overly 'politically correct'. The report in question, entitled *Talking Equality*, concluded that cases that are regarded and experienced as insufficiently serious have a significant adverse impact on the public support for the legal struggle against discrimination.²⁷ The case at hand may serve to illustrate this point: the Court's ruling gave rise to considerable derision in the mainstream media and on the internet in particular, leading to a small backlash. It even ended up with the campaign winning an advertising award.²⁸ These adverse side effects should be duly considered by those responsible for enforcing antidiscrimination legislation. It is no coincidence that opponents of discrimination legislation have become specialized in consciously advancing similar kinds of petty and futile cases. In other words, agencies such as the IEWM should choose their battles carefully. Sex discrimination is still prevalent in Belgium, and cases such as these may give the false impression that issues like the rentawife website are the most significant problem, thereby playing into the opponents' hands, undercutting support for discrimination law in general.

Finally, both the complaint and the ruling in the rentawife case do not appear to give the average citizen much credit. The Institute, for example, questioned the capacity of the recipients to understand that the website was in fact a (humorously intended) DVD commercial: "That this commercial intends to convince people to rent DVDs online is not clear initially and the alleged ironic nature of the site will therefore escape many".²⁹ "It appears to really be about renting women", the director of the Institute further explained.³⁰ This line of reasoning is also apparent in the ruling. In the Court's opinion,

the “contested commercial was liable to mislead the public because the offer consists in female companions (...) while in reality it concerns renting DVDs”. The image that emerges is that of a citizenry which is easily manipulated and requires protection against itself, since it is hard to imagine anyone really taking the campaign seriously. To the extent that the complaint and the decision suggest the opposite, this is arguably as offensive to the intelligence of the average person, as the campaign was to women.

This does not mean to say that commercials such as rentawife are tasteful or contribute to a better society with their gender stereotypes. Such questions are food for lengthy discussion. Courts, however, are not the appropriate fora for this debate.

NOTES

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1 Brussels, President of the Court of Commerce, 26 September 2007, *Rechtskundig Weekblad* 2007–2008, 1212–1216.

2 See article 3, Act of 16 December 2002 concerning the establishment of the Institute for the Equality of Women and Men, *Bulletin of Acts*, 31 December 2002.

3 See article 4, 6°, Act of 16 December 2002.

4 Act of 25 February 2003 to combat discrimination, *Bulletin of Acts*, 17 March 2003; Act of 10 May 2007 to combat discrimination between women and men, *Bulletin of Acts*, 30 May 2007.

5 See Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) and Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

6 IEWM, *Press release*, 4 April 2007, <http://www.iefh.fgov.be/>

7 IEWM, *Press release*, 19 April 2007, <http://www.iefh.fgov.be/>

8 IEWM, *Press release*, 4 April 2007.

9 See e.g. IEWM, *Press release*, 2 October 2007, <http://www.iefh.fgov.be/>

10 IEWM, *Press release*, 2 October 2007.

11 At least as far as discrimination was concerned. Besides elements having to do with anti-discrimination law, infractions on the basis of the Act of Commercial Practices and the Act concerning Electronic Commerce were established. For the current purposes however, these will for the most part remain undiscussed.

- 12 The 2003 Act only covered harassment on the grounds of sex and not sexual harassment. The 2007 Act includes a separate prohibition on sexual intimidation. *See supra* note 5. For more information, *see* Bayart (2004) and De Prins, Sottiaux and Vrielink (2005).
- 13 The European directives make harassment an unlawful act in its own right, that is, distinct from direct or indirect discrimination. *See*, concerning harassment on the grounds of sex and sexual harassment respectively: articles 2(1) sub c and 2(1) sub d Directive 2006/54/EC. For harassment in EU-law on other grounds, *see* article 2(3) Directive 2000/43/EC Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin and article 2(3) Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation. *See also* Barnard (1999), Waddington and Bell (2001) and MacCradden (1987).
- 14 Article 2, § 4 Act of 25 February 2003; Article 6, § 1, sub 8 Act of 10 May 2007.
- 15 Article 3 (3), Directive 2004/113/EC. Although the Commission recognised the “serious questions about the protection of the dignity of men and women” posed by the representation of the sexes in the media and advertising, it nevertheless excluded these matters from the scope of the Directive in order to safeguard the right to freedom of expression. *See* Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services presented by the Commission, COM(2003)657 final at 5. For more information, *see* Krois (2005–2006).
- 16 Preamble no. 6, Directive 2006/54/EC.
- 17 *See*: Commission Recommendation 92/131/EEC of 27 November 1991 on the protection of the dignity of women and men at work. Compare: Rubenstein (1988).
- 18 If however a person were to show the site or the video-clip (unasked) in certain contexts – such as the work place – it might well amount to sexual harassment if another person was to experience such as constituting unwanted conduct violating their dignity. Compare the ILO’s vision in that regard: article 2(9) sub b Collective Agreement on the Prevention and Resolution of Harassment-Related Grievances, 26 February 2001.
- 19 The impact of harassment law on freedom of expression has received little attention in the European context so far. For an introduction to the debate in the United States, *see* Volokh (1992).
- 20 Constitutional Court, no. 157/2004, 6 October 2004, B.51.
- 21 Constitutional Court, no. 157/2004, 6 October 2004, B.49 and B.50.
- 22 *Ibid.*, B.51.
- 23 *See*: www.jep.be. *See on the JEP*: Voorhoof (2003).
- 24 Translation of: ‘Pourquoi les Femmes ne Peuvent pas se Mettre du Mascara la Bouche Fermée?’.
- 25 Quoted in: De Grove (2007).
- 26 On 1 October 2007 the different British equality commissions (Commission for Racial Equality; Disability Rights Commission and

- Equal Opportunities Commission) merged into the new Equality and Human Rights Commission. See: www.equalityhumanrights.com.
- 27 Howard and Tibballs (2003).
- 28 It concerned the Mixx Awards (URL: <http://www.mixx-awards.be>). The rentawife campaign won the third place in the category 'brand awareness'.
- 29 IEWM, *Press Release*, 4 April 2007.
- 30 Quoted in: Lesaffer (2007).

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