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**Brief reflections on *Burwell v. Hobby Lobby, inc.*
(Supreme Court of the United States, June 30, 2014)
from an Italian Corporate Law Scholar's perspective ***

SUMMARY: 1. Foreword - 2. The issue(s) raised by *Burwell v. Hobby Lobby, inc.* - 3. *Burwell v. Hobby Lobby, inc.* main arguments - 4. Conclusions.

1 - Foreword

Falling within the wider issue of the legal capacity – understood, in particular, as the capacity to be the holder of subjective legal positions typical of the so-called rights relating to the personality (or individual rights) – of legal entities, the queries raised by *Burwell v. Hobby Lobby, inc.* are interesting and prominent (to a certain extent) also for Corporate Law and, more in general, Civil Law scholars. Even if we were not to refer to a “partial capacity” of legal entities (partial if compared with that of natural persons), but, more precisely, to the lack – in legal entities – of some “of the necessary *de facto* prerequisites to take on certain types of rights”, it has sometimes been pointed out that the capacity of legal entities to take on rights relating to the personality has experienced, throughout the years, “a positive extended trend”¹ (see the data protection instance, under article 4, first paragraph, letter *b*), of Italian Decree Law No. 196/2003²).

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¹ **M. BASILE, A. FALZEA**, entry «*Persona giuridica (dir. privo)*», in *Enc. dir.*, vol. XXXIII, Giuffrè, Milan, 1983, p. 234, p. 246. See also **A. ZOPPINI**, *I diritti della personalità delle persone giuridiche (e dei gruppi organizzati)*, in *Riv. dir. civ.*, 2002, p. 851 et seq., *ibidem* p. 860, footnote 37.

² Notwithstanding, with this regard it must be mentioned that the cross-reference to “legal entity, body or association” was removed, following amendments introduced by



Having said that, it is worth highlighting that, in the overall examination of the judgment of the Supreme Court, the issue raised by the possible title to 'individual rights' by a legal entity has to be addressed earlier than any evaluation of the questions posed by the implementation of the RFRA (Religious Freedom Restoration Act); that is to say, earlier than any evaluation aimed at checking whether the obligation weighed upon closely held corporations, such as Hobby Lobby, effectively amounts to a substantial burden to the exercise of religion and whether such a burden is the least restrictive (interfering) means of furthering a compelling governmental interest.

Indeed, it is the case of ascertaining: *i*) whether a legal entity – such as, in the case at issue, a for-profit corporation (but the matter could be faced in wider terms) – has full legal capacity, also in connection with the possible title to the so-called rights relating to the personality, amongst which, one may also find the right to religious liberty; or, put it another way (and as per the viewpoint embraced by the Supreme Court), *ii*) whether the shareholders of a for-profit corporation may exercise their own religious liberty (also) through the corporation's collective organization.

2 - The issue(s) raised by *Burwell v. Hobby Lobby, inc.*

The solution to the queries described just now – which actually overlap each other, representing a one and only query, but structured in a different manner depending on whether the focus is to be put *i*) on the legal entity's formal standpoint, (precisely) as a separate person from the shareholders; or *ii*) on the substantial (real) standpoint, thus highlighting the essence of the legal entity as an aggregation, in any event, of human beings who are associated with each other in a joint endeavour (*i.e.* the corporation) – needs to be deemed indifferent to the choice between real (or organic) theories and denying or reductionist (legal fiction) theories, upon which the above mentioned different approaches are grounded.

Notwithstanding the merely descriptive difference between the two issues (that is *i*) whether "a corporation may be the holder of an own right to religious liberty" or *ii*) whether "the shareholders may exercise their own religious liberty (also) through the collective organization in which they hold an interest"), on one hand, even amongst those who do not



abandon the idea of acknowledging a certain extent of real prominence to legal entities, the belief that

“legal entities and non-recognized bodies are entitled to the rights relating to the ‘personality’ to the extent in which the category has historically taken shape and may be reconstructed positively and, mind you, provided that the special nature of such bodies allow so”,

is in any event widespread. Accordingly, “the rights assuming the physical individuality and the spiritual freedom typical of the human being” are excluded³.

On the other hand, as we will see in detail, the denial of any real substratum to legal entities (and, therefore, the overcoming of the distinction between legal entity and its members from a legal standpoint) – in light of the clear remark, also embraced by the Supreme Court, according to which, in any event, an “established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another”⁴ – does not entail the automatic transfer, as a result of a mere transposition, of the subjective legal positions recognized to the legal entity, if any, to and in favour of the natural persons holding an interest in the (or, in any event, involved in the) legal entity itself.

3 - *Burwell v. Hobby Lobby, inc.* main arguments

Therefore, I will now briefly examine the different arguments advanced by the Supreme Court to support its own conclusions; by inverting the

³ P. RESCIGNO, entry «*Personalità (diritti della)*», in *Enc. giur.*, Treccani, Rome, p. 7. See also A. DE CUPIS, *Diritti della personalità*, in *Trattato dir. civ. e comm.*, directed by A. Cicu and F. Messineo, vol. IV, t. 1, Giuffrè, Milan, 1973, p. 41 *et seq.*: “The principle pursuant to which they are entitled to legal personality to the same extent as natural persons are entitled thereto finds a limitation in the same essence of legal entities, the natural substratum of which deeply differs from that of natural persons. This limitation is not capable of restricting the capacity of legal entities to the mere patrimonial sphere, pursuant to a trend typical of the upholders of the old *legal fiction* theory, but has its own value which, provided that correctly considered, cannot be set aside. The limitation of capacity coincides with the limitation of the ownership of the rights. As regards the rights relating to the personality, it needs to be clarified that legal entities are *not* entitled to *all* of them (...) Therefore, the extension of the rights relating to the personality to legal entities may be *limited*, yet not totally excluded”.

⁴ *Burwell v. Hobby Lobby, inc.*, p. 18.



framework followed by the Court, I will however leave as last the main argument according to which

“A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the privacy interests of employees and others associated with the company”⁵.

To the extent relevant herein, we may totally leave out the issue – even if it was widely dealt with by the Court⁶ – related to the possibility to recognize the nature of ‘person’, as per the expression used by the RFRA, to corporations or not. Indeed, it is clear that the issue raised by the cases ruled in *Burwell v. Hobby Lobby* is not whether the corporation is a ‘person’ or not – which it is undoubtedly in the eyes of the law⁷ – but, more exactly, whether the *person*-corporation may exercise (profess) a religion pursuant to the RFRA or not⁸.

According to the Court, neither *i*) the corporate form, nor *ii*) the corporation’s profit-making objective represent an obstacle to the recognition of the protection foreseen by the RFRA also to for-profit corporations.

As a matter of fact, the Supreme Court underlines that the Department of Health and Human Services (HHS) itself has (expressly) released some non-profit collective organizations (associations, etc.) with clear and declared religious aims from the obligation to provide their own employees with full insurance coverage in the event of any conflict with certain religious conventions. The reasoning followed by the Court is not totally persuasive, even from a strictly methodological standpoint. The

⁵ *Burwell v. Hobby Lobby, inc.*, p. 18. The implied reference to a view of corporations as a nexus of contracts (nexus of contracts theory) clashes with the importance acknowledged by the judgment to the religious tendencies of the shareholders. This point is well grasped by the Justice Ginsburg dissenting opinion: “Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations”.

⁶ *Burwell v. Hobby Lobby, inc.*, at p. 19 *et seq.* The question is pointed out also by L. JOHNSON, D.K. MILLON, *Corporate Law After Hobby Lobby*, 70 *Bus. Lawyer*, 1, 8 (2015).

⁷ A.J. MEESE, N.B. OMAN, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 *Harv. L. Rev. F.*, pp. 273, 275-277 (2014).

⁸ L. JOHNSON, D.K. MILLON, *Corporate Law After Hobby Lobby*, quoted, p. 10.



creation of a system fit to grant the employees of a non-profit religious association with full insurance coverage, as an alternative to laying a specific obligation upon the association itself, does not amount, indeed, to a recognition of the privileges under the RFRA to the aforesaid organizations, but, more simply, represents (as a result of a precise choice of the legislator) a limit of its obligation to provide its own (female) employees with the proper and full health insurance coverage foreseen by the Patient and Affordable Care Act of 2010. The creation of an alternative coverage system for non-profit organizations confirms, contrary to what seems to be held by the Court, the general impossibility to attribute the exercise of a religious liberty (pursuant to the RFRA) to corporations.

Furthermore, the Supreme Court excludes that a for-profit corporation's profit-making objective may prevent such corporation from exercising religion. Precisely, on one hand, as pointed out by the Court, the profit-making objective does not preclude entrepreneurs from exercising religious liberty: entrepreneurs, even if driven by profit-bearing selfish objectives, may benefit from the protection offered by the RFRA. On the other hand, the for-profit corporation is, in any event, not prevented from pursuing objectives other than the maximization of profit for its own shareholders. For-profit corporations, with ownership approval, may support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives⁹.

Both remarks seem to be off the mark.

With regard to the first argument, as also stressed in Justice Ginsburg's dissenting opinion, in a sole proprietorship it is not possible to make any distinction between the natural person acting as such and the natural person acting as entrepreneur: the business and its owner "*are one and the same*"¹⁰. This remark is relevant not only with reference to the rights relating to the personality of the entrepreneur, but also with reference to the business conducted by the latter, since the entrepreneur is liable for the obligations undertaken in conducting his/her business with all his/her assets, even with those not allocated in the business¹¹.

⁹ *Burwell v. Hobby Lobby, inc.*, p. 22 *et seq.*; **A.J. MEESE, N.B. OMAN**, *Hobby Lobby*, quoted, pp. 278-279.

¹⁰ **J. GINSBURG**, *Dissenting opinion*, at p. 19.

¹¹ In this respect, the remark pursuant to which the "*different aspects of the protection of the individual have an existential value for the human being only*" is immediate, **C. PERLINGIERI**, *Enti e diritti della persona*, Esi, Naples, 2008, p. 23.



As far as the second argument is concerned, the Court fails to consider that, whilst natural person, even if within the general limits set forth by the legal system (by foreseeing criminal, mandatory, or public order provisions), enjoys maximum freedom in establishing the respective objectives; the same may not be stated for legal entities, which are limited both by the choices made by their own founders (and by the corporate form chosen) and by the external restrictions imposed by the legislator¹².

Even though the issue of a greater corporate social responsibility – which would imply an obligation on corporations to take into account interests other than those typical of their shareholders – has been discussed among Italian Corporate Law Scholar for a long time as well, the ultimate objective of a corporation still remains only the maximization of the interest of its own shareholders, the so called shareholder value (*i.e.*, profit-making objective). Corporations are incorporated with the precise and characteristic objective of creating profits for the shareholders¹³: this clearly does not prevent corporations from protecting and pursuing other objectives, but provided that such targets are instrumental and functional to (or, in any event, not incompatible with) the profit-making objective (v. articles 2247 and 2249 of the Italian Civil Code)¹⁴.

Therefore, it is not a surprise that legal entities, unlike natural persons, receive a protection, either wider or narrower, of their own subjective legal situations in light of the aims for which they were created: “social groups are protected if and to the extent that they are fit to allow the development of the personality of individuals”¹⁵. Besides, it is not by chance that, in the Italian legal system, the recognition of subjective rights of natural persons is grounded in article 2 of the Italian Constitution whilst, instead, the attribution of (partially) similar privileges to legal

¹² In supporting *Burwell v. Hobby Lobby* statement, the issue is sharply addressed by **L. JOHNSON, D.K. MILLON**, *Corporate Law After Hobby Lobby*, quoted, at pp. 8-10.

¹³ **J. GINSBURG**, *Dissenting opinion*, at 18. The truth be told, this conclusion has been recently questioned among U.S. Corporate Law Scholars (see **L. JOHNSON, D.K. MILLON**, *Corporate Law After Hobby Lobby*, quoted, p. 11-15; for a contrary analysis in defense of the so called shareholders primacy, see **S.M. BAINBRIDGE**, *Does Hobby Lobby Sound a Death Knell for Dodge v. Ford Motor Co.?*, available at <http://www.professorbainbridge.com>); **S.M. BAINBRIDGE**, *Corporate Social Responsibility in the Night-Watchman State*, 115 *Colum. L. Rev. Sidebar*, 39 (2015).

¹⁴ Likewise the reflections of **C. PERLINGIERI**, *Enti e diritti della persona*, quoted, p. 146, according to whom “the needs for protecting entities must be connected with the pursuit and with the achievement of the economic and non-economic aims underpinning the activity for the carrying out of which they were created”.

¹⁵ **C. PERLINGIERI**, *Enti e diritti della persona*, quoted, p. 58.



entities is grounded in article 18 of the Italian Constitution (freedom of association) or, depending on the corporate form chosen, in article 41 of the Italian Constitution (freedom of economic enterprise)¹⁶: the “subjective condition of non-human entities is [thus] different since it is only attributed in view of certain aims”, with the consequence that the “needs for protecting entities must be connected with the pursuit and achievement of the economic and non-economic aims, underpinning the activity for the carrying out of which they were created”. Therefore, there still remains the need for ensuring “the protection, not of the entity as such, but of the carrying out of the activity for which the entity was created”¹⁷. The main issue therefore is still whether corporate law authorizes business corporation to exercise religion.

4 - Conclusions

The main argument referred to by the Supreme Court is that one, already mentioned, according to which

“A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the privacy interests of employees and others associated with the company”¹⁸.

The fact of recognizing the protections ensured by the RFRA also to corporations would grant the interests of the natural persons of their shareholders as precisely the RFRA is willing to protect¹⁹.

¹⁶ C. PERLINGIERI, *Enti e diritti della persona*, quoted, p. 29.

¹⁷ Likewise C. PERLINGIERI, *Enti e diritti della persona*, quoted, pp. 96 and 146. Upon the objection pursuant to which in no way can general business corporations profess a religion (“General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion”, Third Circuit, 724 F. 3d, at 385), therefore, it is not possible to limit oneself to merely reply that “corporations, separate and apart from the human beings who own, run, and are employed by them, cannot do anything at all” (*Burwell v. Hobby Lobby*, p. 19).

¹⁸ *Burwell v. Hobby Lobby*, p. 18.

¹⁹ L. JOHNSON, D.K. MILLON, *Corporate Law After Hobby Lobby*, quoted, p. 15 *et seq.*; A.J. MEESE, N.B. OMAN, *Hobby Lobby*, quote, pp. 294-295.



Therefore, U.S. Supreme Court seems to agree with the so-called reductionist theories of legal entities, through what is usually identified with an

“indirect attribution”: “there is a group of rules for each single legal entity (...) which precisely foresee the individuals in the flesh who must actually hold the behaviour prescribed to the legal entity, or the exercise of the right or power granted thereto. The attribution to the legal entity is thus an incomplete attribution. It entails the material element of the behaviour at issue, but not that of personal nature. As regards the latter, the rule aimed at legal entities has solely a preliminary role, thus rendering it determinable, but not yet determined”²⁰.

If we share the argument according to which the

“nature of the simplicity or complexity, individuality or collective nature, unity or plurality, is understood not so much as a way of being of a certain object, but as a way of being thereof considered within the scope of a certain language”²¹,

it is possible to reach the conclusion according to which the indirect attribution mechanism leads, through a merely linguistic mechanism, to a clear and likewise useful simplification of the legal reality. The

“rules of the domestic legal system (...) allow to reduce, or to transfer, or to dismantle the propositions including the name of a legal entity, even before having interpreted them, into propositions having an equivalent meaning, but in which the name of the legal entity does no longer appear”: the “names of legal entities are *incomplete symbols*”²².

Having stated the above, however, one cannot make the mistake of ascribing the legal situations typical of legal entities directly to the shareholders. Indeed, it is necessary to bear in mind – and this is a key point which does not allow to reduce the so-called reductionist theory to a mere denial of legal entities – that

“the duty of domestic law, or of the rules of the organization, is not exhausted by simply transferring (...) rules referred to legal entities to natural persons [in the case at issue, the shareholders (only)], but also refers to such rules, the content of which is analysed and fragmented

²⁰ F. D’ALESSANDRO, *Persone giuridiche e analisi del linguaggio*, in *Studi in memoria di Tullio Ascarelli*, I, Giuffrè, Milan, 1969, p. 243 et seq., *ibidem* p. 280 et seq.

²¹ F. D’ALESSANDRO, *Persone giuridiche*, quoted, p. 293.

²² F. D’ALESSANDRO, *Persone giuridiche*, quoted, p. 286 et seq.



in order for it to be then distributed amongst each single individual”²³.

Put it another way,

“the subjective situations directed at legal entities are *different* from those directed at natural persons, in view of the fact that they do not coincide and they cannot be compared with those attributed to the shareholders or to the directors”²⁴.

For instance, a corporation’s right of ownership over a certain good cannot be split into a right of ownership (totally in compliance with the former) held by each single shareholder: such alleged right of ownership clearly differs (and is thus different) from that attributable to the corporation if we were to only consider that the individual shareholder is not entitled to directly enjoy or to sell the goods owned by the corporation (the argument used by the Supreme Court to totally overcome the corporation’s subjective alterity, however, attempts too much: indeed, there are clearly interests of personal nature that can certainly not be fulfilled by the shareholders through the corporate organization such as, for instance, the possibility to marry: if it may be agreed that corporation is simply a form of organization used by human beings to achieve desired ends and, accordingly, that all corporation’s powers and rights are exercised by the board of directors, it appears to be far less convincing that “the board of directors as a collective body can, of course like a group of persons, pray together, engage in worship, and observe sacraments together”, acting “in their representative corporate role and corporate capacity”²⁵).

From the remarks above it emerges that, whilst according to the traditional approach typical of the organic theories the issue is focused on the choice of the subjective legal situations which may also be attributed to legal entities, from the standpoint at issue herein (of the piercing of the corporate veil), instead, it is necessary to carry out a check which is not linked with the features of the real substratum of reference (of legal entities and of natural persons), but with the possibility to subject the right to individual personality to collective discipline and management special rules²⁶.

²³ F. D’ALESSANDRO, *Persone giuridiche*, quoted, p. 282.

²⁴ A. ZOPPINI, *I diritti della personalità delle persone giuridiche*, quoted, p. 872 *et seq.*

²⁵ L. JOHNSON, D.K. MILLON, *Corporate Law After Hobby Lobby*, quoted, p. 17; see also A.J. MEESE, .B. OMAN, *Hobby Lobby*, quoted, pp. 294-295.

²⁶ A. ZOPPINI, *I diritti della personalità delle persone giuridiche*, quoted, p. 859.



Accordingly, it may be doubted “that a nexus of derivation of the ‘collective’ constitutional rights with individual rights” may be found,

“that is that private law entities are entitled to constitutional rights based on the assumption that the natural persons who submit to the collective entity are entitled to any such rights. The fact of ascribing a right vested with the greatest protection to collective entities may in actual fact entail the sacrifice of those having equal rights falling with the individual: the freedom *of the* association inevitably suppresses the freedom *in the* association and, therefore, the freedom and the rights of the individual; likewise the freedom to express one’s own thoughts of an association sacrifices the concurrent freedom of members”²⁷.

The full (and necessary) protection of religious liberty of individuals therefore does not seem to be totally consistent with the extension of a similar protection also to the collective organization.

It seems clear at this point that the reference made by the Supreme Court to the typical features of Hobby Lobby and of the other corporations involved as closely held corporations (characterized, amongst others, by a substantial coincidence between shareholders and directors) is not as much useless but rather totally irrelevant²⁸. The corporate form encapsulated in legal personality excludes, also following a reduction process (even if relative) of the legal entity itself, a collective attribution of a liberty (or right) which has (even if on a non-exclusive basis) individual roots. Even if we were to assume, following the Court’s reasoning, that the rights of a corporation turned into the rights of the shareholders, the consequence would be that such rights would in any event be subject to the rules of attribution and exercise typical of the corporate form chosen, as acknowledged by the Court itself²⁹.

²⁷ A. ZOPPINI, *I diritti della personalità delle persone giuridiche*, quoted, p. 873 *et seq.*

²⁸ As a matter of fact, as clarified by Justice Ginsburg in the respective dissenting opinion, “Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private” (p. 19); see also L. JOHNSON, S. BAINBRIDGE, R. COLOMBO, B. MCDONNELL, A. MEESE, N. OMAN, *Comments on the HHS’ Flawed Post-Hobby Lobby Rules*, on SSRN. The repeated reference made by the Supreme Court to the features of Hobby Lobby actually seems to weaken the Court’s reasoning. Indeed, the Court stresses a series of *de facto* elements which, depending on the circumstances, may entail the liability of the controlling shareholder or, moreover, the piercing of the corporate veil, thus excluding, even if impliedly, that the shareholders may exercise their own religious liberty through the corporation.

²⁹ The Court is aware of the fact that the corporate form of the corporation would be



The exercise of the corresponding right of the individual shareholders or not would be entrusted to the directors of the corporation, whose choices and assessments are (must be) driven by the maximization of the corporate interest (shareholder value), and to the operation of the majority rule³⁰. Accordingly, following the reasoning of Court, the exercise of a personal (and, thus, individual) right, such as that to the freedom and expression of religion³¹ would be left to the discretionary assessment of a separate and different person from the respective alleged holder and, above all, conditioned to the maximization of the shareholder value (*i.e.* the profit-making objective)³².

entrusted with the resolution of individual conflicts in connection with the exercise of religion through the corporation itself, with the consequence that, as already clarified, the prominence given to the individual exercise of religious liberty would be removed: it is well clear for the Court that there may be conflicts amongst the shareholders in connection with the claimed exercise of religion, by making reference to the laws of each single state, which may provide ready means for resolving any conflicts by, for instance, dictating “how a corporation can establish its governing structure” (p. 30 *et seq.*).

³⁰ As pointed out also by **L. JOHNSON, D.K. MILLON**, *Corporate Law After Hobby Lobby*, quoted, p. 27.

³¹ The issue lies outside the author's province, but it seems possible to deem that article 19 of the Italian Constitution, in entitling anyone to the “right to freely profess their religious belief in any form, individually or with others”, if it confirms the possible exercise of religious liberty with others, it recognizes at the same time the need for its own individual extent (which, actually, is the former's condition), thus excluding that the exercise of religious liberty may be solely collective. For an in-depth examination on the issue above mentioned, it is possible to make reference to: **A. RAVÀ**, *Contributo allo studio dei diritti individuali e collettivi di libertà religiosa nella Costituzione italiana*, Giuffrè, Milan, 1959, pp. 12 ss., 53 ss., 151 ss., 157-158; **M. CROCE**, *La libertà religiosa nell'ordinamento costituzionale italiano*, ETS, Pisa, 2012, p. 94 ss.

³² The view of corporate law held by *Burwell v. Hobby Lobby* (“While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else”) “is at odds with traditional conservative thought”, according to which “for-profit corporations should be governed with one end in mind: the generation of the most profit for their stockholders”, **L.E STREIN JR, N. WALTER**, *Conservative collision course? The tension between conservative corporate law theory and Citizens United*, 100 *Cornell L. Rev.* 335 (2015).