Short Symposium

Discrimination Based on Sexual Orientation and Religious Freedom in European Contract Law

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Abstract

The recent case of *Lee* v *Ashers Bakery* has raised the question of whether or not freedom of religion may justify a provider's refusal to serve a customer because of his sexual orientation. Businesses and, in general, all activities that involve relationships with the public at large are a crucial touchstone for the non-discrimination principle. Under European law, people engaged in the public offering of goods, services and employment are not entitled to discriminate, not even on religious grounds. Accommodation of religious belief would bring about disquieting consequences relating to the equality and dignity of vulnerable minorities. No distinction can be drawn between status and conduct, and the forced speech argument seems to have a very different scope of application.

I. Setting the Scene

Belfast, May 2014. Mr Lee, a gay activist volunteering for QueerSpace, an organization supporting the recognition of same-sex marriage,[1] was planning to attend an event to mark the end of Northern Ireland's International Day Against Homophobia and Transphobia and the political momentum towards acceptance for same-sex marriage.

Mr and Mrs McArthur had run Ashers Bakery since 1992. The bakery's name came from a passage in the Genesis 49:20: 'Out of Asher his bread shall be fat, and he shall yield royal dainties'. The McArthurs were devout Christians and believed that homosexuality was a sin and marriage should be only between a man and woman. They were determined to run their business according to biblical teachings. However, they offered a 'Build-a-Cake' service, which let customers have their cakes iced with the images and slogans which they wanted.

Mr Lee had purchased cakes from Ashers Bakery on several occasions. The owners and staff did not know about his sexual orientation and his support for

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[1] Northern Ireland is the only country in the British Isles which does not recognize same-sex marriage. For a detailed account of the peculiar political and legal context in which the decision developed, see E. Fitzsimons, 'A Recipe for Disaster? When Religious Rights and Equality Collide Through the Prism of the *Ashers Bakery* Case' 15 *Hibernian Law Journal*, 66-67 (2016). Before 2015, the Northern Ireland Assembly had already voted against same-sex marriage on five occasions.

same-sex marriage. One day, he placed an order for a cake to be decorated with Bert and Ernie (two fictional puppet characters from a popular US tv show, rumored to be gay), the QueerSpace logo, and the slogan 'Support Gay Marriage'. He paid for the cake and was issued with a receipt.

A few days later, he received a call from Mrs McArthur, informing him that they had to cancel the order because of the bakery being a Christian business but were willing to offer a full refund. Mr Lee was outraged by Ashers Bakery's denial but was able to order a similar cake with another bakery and take it to the event. However, he refused to put it all aside and decided to sue Ashers Bakery on grounds of discrimination based on sexual orientation and/or religious belief and/or political opinion.[2]

In finding for the plaintiff, the County Court held that Ashers Bakery had discriminated on all three grounds and awarded five hundred pounds in damages. The Court of Appeal dismissed an appeal, considering Ashers Bakery's conduct to be associative direct discrimination on ground of sexual orientation, and refused to read the legislation in force in light of the rights and freedoms established in the European Convention of Human Rights (hereinafter, ECHR). The case went all the way to the Supreme Court which, in a long-awaited decision handed down on 10 October 2018, ruled that there had been no discrimination based on sexual orientation and had there been discrimination on grounds of political opinion, the plaintiff should have provided justification to force Ashers Bakery to express an opinion with which it did not agree.

In phrasing its contentious arguments, the Court engaged with several issues of anti-discrimination law: the dividing line (if there is and should there be any) between status and conduct, the forced speech doctrine, the impact of religious freedom on running a business. Against this background lies the more comprehensive question of whether or not party autonomy is endowed with constitutional status or if limitations on the party's freedom to choose a contractual partner must be drawn. These issues have been framed in different ways in common law and civil law jurisdictions. While in Italy a lively debate has arisen over the extent to which anti-discrimination rules should apply to transactions other than those concluded in the context of an offer to the public at large, in common law jurisdictions, recent landmark cases, such as the aforementioned *Lee* v *Ashers Baking Company Ltd*[3] and in the United States, *Masterpiece Cakeshop Ltd* v *Colorado Civil Rights Commission*,[4] have wrestled with the

[2] The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 prohibit direct and indirect discrimination based on sexual orientation in the provision (for payment or not) of goods, services or facilities to the public. The Fair Employment and Treatment Order 1998 makes it illegal to discriminate on grounds of religious belief or political opinion. Note that the UK Equality Act 2010 does not apply to Northern Ireland. It contains a far-reaching provision forbidding all forms of discrimination in the provision of services to the public (section 29).

[3] [2018] UKSC 49.

[4] 584 US (2018). The facts are similar though not the same. In *Masterpiece,* a Christian

question of whether or not freedom of religion might justify a supplier's refusal to serve a customer, or to negotiate at arm's length,[5] because of his sexual orientation or other protected characteristics.

The aim of this article is to discuss the struggle between the right not to be discriminated against because of sexual orientation and the religious freedom of businesses involved in the supply of goods and services to the public, from the standpoint of European contract law. Part II disputes the law and economics of non-discrimination on grounds that markets are not always effective in destroying or minimizing discriminatory conduct on their own. While non-discrimination was originally enacted to combat market failures, it has grown into a general principle of EU law, designed to protect human rights. Part III contends that freedom to choose a contractual partner is constrained by respect for equality and dignity. It is argued that discrimination does not always entail comparison and it may be upheld when it is justified by legitimate aims. Part IV explores the issue of whether or not religious freedom may exempt a business from anti-discrimination legislation. Providers of goods and services to the public at large are not allowed to discriminate on the basis of sexual orientation, nor even on religious grounds. The distinction between status and conduct has no currency in European contract law and the forced speech doctrine has a different scope of application.

II. The Law and Economics of Non-Discrimination

The prohibition on discrimination in contract law is a concept of relatively recent vintage and a peculiar outcome of EU law.[6] EU secondary legislation encompasses a variety of forms of discrimination. Directive 2000/43/EC promotes equal treatment between persons irrespective of racial or ethnic origins; Directive 2004/113/EC prohibits discrimination between men and women in the access to and supply of goods and services; Directive 2006/54/EC targets discrimination between men and women in matters of employment and occupation. The directives are not concerned with any characteristics which may trigger

baker refused to serve a gay couple with a wedding cake because he opposed same-sex marriage. There was no evidence, however, that the couple wanted the cake to be decorated with any particular message. The baker's refusal invites suspicion that it was grounded on his opposition to a status, rather than a message. Nevertheless, the US Supreme Court opined that the Colorado Civil Rights Commission had lacked religious neutrality in dealing with the case.

[5] P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 534, points out that discrimination occurs even where a seller accepts a process of negotiation but charges the buyer at a higher price. Under these circumstances, the buyer will have to bear the cost of the purchase as well as that of his social position.

[6] See D. Maffeis, 'Il divieto di discriminazione', in G. De Cristofaro ed, *I «princípi» del diritto comunitario dei contratti.* Acquis communautaire *e diritto privato europeo* (Torino: Giappichelli, 2009), 267.

discrimination in the supply of goods or services; hence they do not concern sexual orientation.[7] At first blush, it appears that EU law is aloof from discrimination in contracts on grounds other than gender and ethnicity.[8]

However, on closer inspection, this conclusion would be sound only if the analysis were carried out with a view that is limited to secondary legislation. For there to be discrimination in cases other than those provided for by law, it is not strictly necessary to deploy the tools of interpretation by way of analogy.[9] Indeed, the prohibition on discrimination is now enshrined in general principles of EU law: Art 19 of the Treaty on the Functioning of the European Union (TFEU);[10] Art 21 of the Charter of the Fundamental Rights of the European Union (CFREU);[11] Art 14 of the European Convention on Human Rights (ECHR).[12] These principles mandate that the grounds for discrimination can

[7] Long before the directives came into force, it was believed that insofar as a supplier could discriminate based on his idiosyncrasies, he was entitled to discriminate based on any protected characteristics. See G. Pasetti, *Parità di trattamento e autonomia privata* (Padova: CEDAM, 1970), 16, contending that if a supplier can treat two male buyers differently, then he can treat even a man and a woman, a Catholic or a Protestant differently, in much the same way as a testator might prefer a liberal over a communist, an Indian over a Chinese person. However, see P. Femia, n 5 above, 540, fn 843, arguing that the categories of protected individuals should be articulated according to axiology, not logic. The reason why discrimination against women, Catholics or Chinese people is prohibited, while another form, based on an idiosyncrasy, is not, is that the former runs contrary to constitutional values.

[8] A Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM/2008/0426) was presented on 2 July 2008 but has not yet been approved. The CJEU in case, C-303/06 *Coleman* v *Attridge Law*, [2008] ECR I-05603, addressed discrimination by association perpetrated against the mother of a disabled child. The case is relevant not only because the Court considered disability as a protected characteristic but because it paved the way for actions to be brought by people who are treated unfavorably on grounds of their association with a protected person. On the matter, see L.B. Weddington, 'Protection for Family and Friends: Addressing Discrimination by Association' *European Anti-Discrimination Law Review*, 13 (2007).

[9] M. Mantello, 'La tutela civile contro le discriminazioni' *Rivista di diritto civile*, 449-451 (2004), argues that analogy might stretch the protected characteristics to cover cases not provided for by legislation, namely sexual orientation.

[10] Art 19 TFEU reads that the Council, without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, may take appropriate action to combat discrimination. This has led to speculation on whether or not Art 19 contains an original assignment of competences or rather only expands accessory competences. Cf J. Neuner, 'Protection Against Discrimination in European Contract Law' *European Review of Contract Law*, 49 (2006). However, M. Barbera, 'Il nuovo diritto antidiscriminatorio: innovazione e continuità', in M. Barbera ed, *Il nuovo diritto antidiscriminatorio* (Milano: Giuffrè, 2007), XLII, points out that the equality principle is not a 'competence' but a general principle which runs across the whole system.

[11] While Art 21 CFREU is a 'negative' provision, prohibiting several forms of discrimination, Art 19 TFEU entails a 'positive' obligation for the Council to fight discrimination: A. Celotto, 'Art 21', in Id, R. Bifulco and M. Cartabia eds, *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea* (Bologna: il Mulino, 2001), 173.

[12] H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner' 76 *Law and Contemporary Problems*, 85 (2013), contends that it is true that Art 14 ECHR is not restricted

stretch far beyond those considered by domestic statutes or directives. Still, different treatments based on subjective idiosyncrasies must pass muster, otherwise any interpreters' (courts and scholars) reasons will annihilate those of the parties.[13]

The principles do cover the most invidious forms of discrimination, such as those based on a party's sexual orientation, his religious belief or his social and financial resources.[14] Therefore, it is not appropriate to advocate that contractual differentiation is forbidden only insofar as it is grounded on an unalterable characteristic.[15] For even a characteristic which is dependent on an individual choice may be protected.

The prohibition on discrimination is thus cast in the form of rules *and* principles, laid down in secondary and primary legislation. The transition from a protection confined to secondary legislation in the form of rules to one established in primary legislation in the form of principles epitomizes an evolution in the purposes underlying the prohibition. When anti-discrimination provisions were initially enacted, it was thought that they were instrumental in tackling market failures and enhancing free movement of goods and services.[16] Discrimination generates costs because, when suppliers do not wish to do business with people having given characteristics, the total amount of transactions tends to decline. When these transactions involve several Member States, discrimination

to a finite list of protected characteristics but it does not confer a free-standing action because, to invoke protection, it is necessary to show interference with some other convention rights.

[13] E. Navarretta, 'Principio di uguaglianza, principio di non discriminazione e contratto' *Rivista di diritto civile*, 563-564 (2014), makes the point that discrimination based on a characteristic which is not covered by constitutional principles is permitted and reasonable but it might be exceptionally prohibited when it amounts to an affront to dignity. Others believe that the notion of unfair discrimination is dependent on social context, so protection can be afforded only to those characteristics which are associated with a history of subjugation and disadvantage, like race and gender: J. Gardner, 'Liberals and Unlawful Discrimination' 9(1) *Oxford Journal of Legal Studies*, 7-8 (1989).

[14] On discrimination against the poor, see M. Fabre-Magnan, 'What Is a Modern Law of Contracts?' *European Review of Contract Law*, 381 (2017), praising its inclusion within Art 21 CFREU (which mentions 'property', '*fortune*' in the French translation), while the French Labor Code says nothing about it. However, he concedes that 'it is hardly ever appealed to, especially as the EU Court of Justice has done its utmost to make this Charter toothless'. But see J. Neuner, n 10 above, 44-45, arguing that differentiation based on economic inequality is permitted and quite inexorable in a free market economy. The poor pay more and a universal prohibition would turn the system into a freedom-hostile egalitarian régime. However, the Author seems to overlook the wording of Art 21 or, more likely, denies the provision a horizontal effect.

[15] Arguing this way: J. Neuner, n 10 above, 46, on grounds that an alterable characteristic is 'protected in principle by respect for the idea of self-determination and is therefore potentially justifiable as an ethical or moral guide to action'. This concept, however, is at variance with Art 21 CFREU, which clearly encompasses alterable characteristics as grounds for prohibited discrimination, such as religion or belief, property and language. The same holds true for Art 14 ECHR (religion, political or other opinion, property or other status) and Art 19 TFEU (religion or belief).

[16] D. La Rocca, *Eguaglianza e libertà contrattuale nel diritto europeo* (Torino: Giappichelli, 2008), 58.

curtails economic integration.[17] Parties' decisions, taken out of bias against, for example, sexual orientation are irrational because they neglect the most material factors in contract performance, ie price and quality.[18]

However, legal and economics scholars lament that a legal ban on discrimination is inefficient and unnecessary because competitive markets can create mechanisms that, in the long run, eliminate or minimize discrimination. When a discriminatory seller declines to deal with a buyer, he will experience a cost from the denied transaction. The discriminatory seller will have to charge more than non-discriminatory sellers for the same good or service but the buyers will obviously purchase from sellers with the lowest prices. Perfect competition eradicates discrimination by squeezing prejudiced sellers out of the market.[19]

With respect, this view suffers from three infirmities.[20]

Firstly, markets are not always effective in hampering discrimination; this is a result when monopolies taint competition.[21] Under these circumstances, discrimination brings about higher costs than non-discrimination. A customer discriminated against by a monopolist cannot turn to a different supplier for the same goods or service; he is simply denied access to the goods or service in question. A non-competitive market does not manage to thwart discrimination on its own and anti-discrimination legislation is not only necessary but is also efficient in impairing monopoly power.

Conversely, when the cost of non-discrimination is higher, the discriminatory practice should be upheld.[22] This happens when a seller bears different costs in

[17] F. Zoll, 'Non-Discrimination and European Private Law', in C. Twigg-Flesner ed, *The Cambridge Companion to European Union Private Law* (Cambridge: Cambridge University Press, 2015), 298.

[18] M.F. Starke, 'Fundamental Rights Before the Court of Justice of the European Union: A Social, Market-Functional or Pluralistic Paradigm?', in H. Collins ed, *European Contract Law and the Charter of Fundamental Rights* (Cambridge-Antwerp-Portland: Intersentia, 2017), 107.

[19] Cf G. Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1973); R. Posner, *Economic Analysis of Law* (Boston: Little, Brown and Company, 1992), 651, arguing that anti-discrimination laws generate non-pecuniary and psychic costs on discriminators who are averse to associating with minorities; R. Cooter, 'Market Affirmative Action' 31(1) *San Diego Law Review*, 140-141 (1994); and with regard to the provisions against employment discrimination in the Civil Rights Act, see R. Posner, 'The Efficiency and the Efficacy of Title VII' 136(2) *University of Pennsylvania Law Review*, 513-522 (1987).

[20] As illustrated by A.S. Vandenberghe, 'The Economics of the Non-Discrimination Principle in General Contract Law' 4 *European Review of Contract Law*, 415-419 (2007). See also J.J. Donohue III, 'Is Title VII Efficient?' 134(6) *University of Pennsylvania Law Review*, 1411-1432 (1986), contending that, by adding a legal penalty to the market penalty, anti-discrimination legislation facilitates the process of driving discriminators out of the market and maximizing profits.

[21] R. Epstein, *Forbidden Grounds* (Cambridge MA: Harvard University Press, 1992), 85, remarks that 'the use of the anti-discrimination provision (…) has powerful justification whenever practical or legal circumstances prevent the emergence of a competitive market'.

[22] See A.S. Vandenberghe, n 20 above, 428-429, articulating a balancing test to assess whether or not discrimination shall be permitted or prohibited. Pointing out that discrimination is not *per se* objectionable, see J. Neuner, n 10 above, 44-45, who contends that discrimination

selling to different customers and price discrimination prevents costly customers from being unjustifiably subsidized by the economical ones. Take car insurance companies charging male drivers more, on grounds that, statistically, they have more accidents than female drivers. The reason behind discrimination is that insurance companies know very little about their customers at the time the policy is signed. Thus, they rely on statistical data to avoid the costs that distinguishing a particular male driver from the average male driver would entail.[23] However, what is commonly overlooked by this cost-benefit analysis is that discrimination trumps human dignity and equality even when its costs are lower than those connected with anti-discrimination legislation.[24] Moreover, when information is ascertained that the insured male customer is actually a very responsible driver, the insurance premium should be reduced or statistical discrimination will no longer be justified.

Secondly, where prejudice is widespread, business owners will tend to comply with it, in order to maximize profits or avoid bankruptcy. Sellers assume that given consumer groups, on average, are less solvent, less patient in carrying out negotiations, more willing to access goods and services usually associated with culturally dominant groups and thus willing to pay more. Sellers do not shy away from their bias but go along with it. The market does not eradicate discrimination but rather internalizes it for the sake of its own survival.[25]

Last but not the least, anti-discrimination law can be used to revise and reshape cultural preferences, in much the same way as education does.[26] Law is

optimizes offers, improves individual elements of performance and contributes to a diversified market.

[23] On statistical discrimination, see I. Ayres, 'Fair Driving: Gender and Race Discrimination in Retail Car Negotiations' 104(4) *Harvard Law Review*, 843 (1991), showing that in Chicago's retail car market, black and women are charged more than white men. Statistical discrimination can be cost-based, when certain customers tend to impose additional costs on a dealership, eg they pose greater credit risks. Revenue-based statistical discrimination stems from sellers' inferences that certain customers on average are willing to pay more. Protected characteristics, such as race and gender, serve as proxies to inform sellers about how much individual consumers would be willing to pay for a car.

[24] It is often the case that markets advance purposes which run counter to the purposes furthered by legal systems. See F. Criscuolo, *Diritto dei contratti e sensibilità dell'interprete* (Napoli: Edizioni Scientifiche Italiane, 2003), 31, arguing that market purposes consist in profit maximization, wealth concentration, subjugation and exploitation of individuals. Law should take a stance and use coaction to facilitate mandatory purposes. See also L. Ciaroni, 'Autonomia privata e principio di non discriminazione' *Giurisprudenza italiana*, 1819 (2006), stressing the concept of free market as *ordo legalis*, governed by public regulation, as opposed to *ordo naturalis*, held together by endogenous forces.

[25] Cf P. Femia, n 5 above, 535.

[26] See R. Post, 'Law and Cultural Conflict' 78(2) *Chicago Kent Law Review*, 488-489 (2003), citing the Civil Rights Act 1964 as a means by which to 'reshape the repressive norms of race that characterized the American workplace'. However, A.S. Vandenberghe, n 20 above, 418-419, cautions that the preference-shaping role of private law is weak because courts dislike interfering with subjective preferences and the remedies against violations of contract law consist of compensatory damages, which do little or nothing to wipe out bias and hatred.

understood as a means by which to reflect the norms of a pre-existing culture but also to displace individual preferences which are at odds with human dignity and equality. Predicating the preference-shaping role of law is tantamount to acknowledging its superior moral authority.[27] Law aspires to a perfectionist model of freedom of contract, whereby the interference with the contracting party's choices is not warranted by his inability to identify and pursue his interests but by his judgment being clouded by a wrong set of preferences which the law seeks to amend by relying on absolute, transcendent, politically-neutral principles, namely human dignity and equality.[28]

This evidence lends support to the conclusion that anti-discrimination law is essential and that a cost-effective analysis of discriminatory actions is unconvincing; bias, mischief and economically irrational factors are not the only reasons behind discrimination.[29] In a case heard by the Court of Padua in 2005,[30] a bar had charged black and Albanian customers twice as much as other customers in order to keep unpleasant individuals at bay. The Court ordered the bar to stop the discriminatory conduct and awarded non-pecuniary damages in the sum of one-hundred euros for each plaintiff. There seems little doubt that the bar's decision was economically sound, ie pursuing profit maximization but still the Court found it to be discriminatory.

Casting non-discrimination in general principles and framing it as a 'right not to be discriminated against' (as in II. – 2:101 Draft Common Frame of Reference) has contributed to endowing it with an axiological nature. Originally envisaged with a view to preventing market failures, the prohibition on discrimination now tends to be instrumental in protecting human rights.[31] Still,

[27] 'Where the legal system over-rides my right to make autonomous choices, or to act on my personal preferences, with respect to my contracting partners or the terms on which I choose to interact, it is unavoidably making a moral judgement about the quality of my preferences': M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge MA and London: Harvard University Press, 1997), 188.

[28] Comparing the paternalist model and the perfectionist model, M.R. Marella, 'The Old and the New Limits to Freedom of Contract in Europe' 2 *European Review of Contract Law*, 269 (2006), contends that 'while paternalism restricts our bargaining freedom only in the name of satisfying our deepest set of preferences, the perfectionist is a moralist who is prepared to ignore our deepest wishes when these are deemed unworthy'. It appears that anti-discrimination law is in line with the perfectionist model.

[29] U. Breccia, 'Il contratto in generale', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 1999), XIII, 203.

[30] Tribunale di Padova 19 May 2005, *Giurisprudenza italiana*, 949 (2006).

[31] See E. Navarretta, n 13 above, 548-549, defining non-discrimination in contract as the epitome of the new constitutional objectives advanced by the European Union, which tend to protect fundamental rights and not only economic freedoms. Therefore, it is not accurate to state that a general principle of non-discrimination in contract law exists insofar as the discriminatory conduct is not isolated but widespread because only in this case does discrimination prevent the customer from accessing the goods or service in the market. This view was taken by D. Maffeis, 'Il contratto nella società multietnica: è un atto illecito la determinazione di un prezzo doppio per i clienti extracomunitari' *Giurisprudenza italiana*, 962 (2006).

the human rights discourse should not be over-emphasized because prohibition secures the right of vulnerable groups to conclude contracts but says nothing about its substance.[32] Moreover, the Court of Justice of the European Union (CJEU) has so far been reluctant to acknowledge the horizontal direct effect of the non-discrimination principle within private relations.[33]

III. The Fettered Freedom to Choose a Contractual Partner

The reasons behind non-discrimination are not to be conflated with market failures. That a gay customer who is denied a cake, could just leave and purchase from another seller, is *not* a sound argument for upholding discriminatory conduct.[34] In fact, the UK Supreme Court did not deploy this argument when it found for the baker. Yet, the non-discrimination principle interferes with a tenet of party autonomy, ie the freedom to choose a contractual partner.[35] While

[32] A. Somma, 'Social Justice and the Market in European Contract Law' 2 *European Review of Contract Law*, 185-186 (2006), warns that under EU law (including the Nice Charter), market regulation merely seeks to avoid its collapse, not promote social justice. The 'social market economy' model does not encourage solidarity between individuals and is at variance with the national constitutions of several Member States. The bans on contract discrimination do not alter the picture because they apply 'exclusively to the contracting parties, and nothing is said of the dealings between them. That is to say, it is an ideal way of eliminating hurdles to the free movement of goods, but it will do nothing at all about social deprivation'. Non-discrimination exemplifies *formal* equality, rather than *substantive* equality: E. Navarretta, n 13 above, 549-550.

[33] Cf case C-144/04 *Werner Mangold* v *Rüdiger Helm*, [2005] ECR I-9981 and case C-555/07 *Kücükdeveci* v *Swedex GmbH & Co*, [2010] ECR I-365, wherein the CJEU instructed German courts to disapply national laws governing the contract of employment that permitted age discrimination, in light of the general principle of non-discrimination. Some scholars claim that this is an example of horizontal direct effect: C. Favilli, 'Il principio di non discriminazione nell'Unione europea e l'applicazione ai cittadini di paesi terzi', in D. Tega ed, *Le discriminazioni razziali ed etniche. Profili giuridici di tutela* (Roma: Armando, 2011), 59. Yet, it is true that the Court ordered to disapply national discriminatory laws because they infringed a general principle but, strictly speaking, this line of reasoning conforms to the weaker model of horizontal *indirect* effect, whereby contract law must be interpreted and applied in light of a fundamental right: M. Stürner, 'How Autonomous Should Private Law Be?', in H. Collins ed, *European Contract Law* n 18 above, 39.

[34] It is not accurate to claim that the prohibition on discrimination cannot apply when the single seller's prejudice does not correspond to a widespread prejudice because the discriminated party can turn to other sellers for the same goods or service. This stance is taken by D. Maffeis, 'Discriminazione (diritto privato)' *Enciclopedia del diritto* (Milano: Giuffrè, 2011), 498-499. A discriminatory conduct transgresses human dignity and equality, even when it is isolated. See also N. Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' 5 *Oxford Journal of Law and Religion*, 425 (2016), pointing out that the narrow view that the right of religion in the employment context could be well-protected by the fact that an employee whose religious freedom was impaired could leave and find another job, does not receive support from current European jurisprudence.

[35] See V. Roppo, 'Il contratto', in G. Iudica and P. Zatti ed, *Trattato di diritto privato* (Milano: Giuffrè, 2001), 79, contending that, as long as contract is the realm of freedom, it is also the realm of inequality and discrimination, stemming from parties' freedom to choose their contract partners. In a similar vein: A. Galasso, *La rilevanza della persona nei rapporti privati* (Napoli: Jovene,

individuals have the right to choose whether or not to enter into a contract at all, they also have the right to choose with whom to contract and this aspect allows them to fit their negotiations into their schemes of values and preferences.[36] This general rule suffers no exception in the commercial context.[37] However, there is a sufficiently broad consensus that party autonomy does not come down to negative freedom from State authority[38] but it involves the duty to refrain from unjustifiable interference with the rights of others. Most importantly, the choice of a contractual partner should not override individuals' rights to take pride in their identities.[39]

Some argue that a prohibition on a decision to discriminate does not even amount to a state interference because parties remain free to choose with whom to contract and are not required to justify their choices. The prohibition tackles the refusal to contract (or the negotiation on worse terms), not the freedom to pick a contractual partner.[40] However, what this view overlooks is that freedom of contract embraces freedom *not* to contract and *not* to justify the refusal to contract. So, it appears that the prohibition to discriminate does undermine the sanctity of contract but a limitation of this magnitude is accepted either because party autonomy is not vested with constitutional status[41] or because it is, yet it

1974), 44; G. Oppo, 'Eguaglianza e contratto nelle società per azioni' *Rivista di diritto civile*, I, 635 (1974); P. Barcellona, *Formazione e sviluppo del diritto privato moderno* (Napoli: Jovene, 1987), 274, illustrating that freedom to determine contract terms postulates freedom to choose a partner; U. Breccia, n 29 above, 200; C. Camardi, 'Integrazione giuridica europea e regolazione del mercato. La disciplina dei contratti di consumo nel sistema del diritto della concorrenza' *Europa e diritto privato*, 716 (2001); F. Galgano, 'Il negozio giuridico', in A. Cicu, F. Messineo and P. Schlesinger eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2002), 53, arguing that party autonomy encompasses the right to say 'no', without having to justify the refusal.

[36] H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner' n 12 above, 77, citing, for instance, freedom to choose 'a more expensive airline offering a worse deal simply on the ground that its rival has a poor reputation in respect of matters which concern us personally, such as its refusal to recognize a trade union for the purposes of collective bargaining or its poor record on environmental matters'. Cf also E. Picker, 'L'antidiscriminazione come programma per il diritto privato' *Rivista critica del diritto privato*, 701 (2003), contending that non-discrimination is a foreign body within the system of private law, tending to jeopardize its fundamentals, namely the freedom to choose a contractual partner. Picker suggests limiting its operation to exceptional circumstances, like violations of public policy.

[37] Cf Baroness Hale's remarks in *Bull* v *Hall* [2013] UKSC 73: 'The general rule is that suppliers of goods and services are allowed to pick and choose their customers'.

[38] Negative freedom is a cornerstone of liberal thought. See I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 124, arguing that 'there ought to exist a certain minimum area of personal freedom which must on no account be violated (…) A frontier must be drawn between the area of private life and that of public authority'.

[39] H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner' n 12 above, 74, elucidating that 'liberty is not limited to negative freedom from interference, but requires the law to promote the positive freedom or autonomy of all members of a society'.

[40] G. Carapezza Figlia, 'Il divieto di discriminazione quale limite all'autonomia contrattuale' *Rivista di diritto civile*, 1402 (2015).

[41] See P. Rescigno, 'L'autonomia dei privati', in Id et al, *Studi in onore di Gioacchino Scaduto* (Padova: CEDAM, 1970), II, 539-540. Rescigno's theory revolves around the wording of Art 2

needs to be accommodated with other fundamental values,[42] such as dignity *and* equality.

That both these values make the underlying purposes of the prohibition is a matter of dispute. Some scholars hold the firm view that framing the policy behind non-discrimination in terms of substantive equality would replace the fundamental choices made in a market economy with Catholic solidarism, socialism or Marxism.[43] They censure the attempt to implant personal values into contract law, which would result in entrusting the judiciary with the power to safeguard socially and economically weak individuals. Yet, distributive justice should lie with the legislature.[44] The policy behind non-discrimination is, rather, found in an American-style 'equal opportunity', which pursues the narrower aim of safeguarding customers' self-expression and the efficiency of market exchange.[45]

Some examples may shed light on the issues at stake. They would include a railway company providing separate cars for whites and blacks;[46] a restaurant providing separate tables and crockery for citizens and foreigners; a realtor

Constitution, which reads: 'the Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social organizations wherein his personality is developed and it requires the performance of fundamental duties of political, economic, and social solidarity' (translation by M. Cappelletti et al, *The Italian Legal System. An Introduction* (Stanford, CA: Stanford University Press, 1967), 281). He argues that the provision does not guarantee the development of personality but the protection of social organizations and rejects the view that construes this as protection of the contract which originated them. Rescigno's theory reflects the concerns with making party autonomy a fundamental right, which would turn any contract into the realm of unfettered freedom from public authority. See also G. Alpa, 'Libertà contrattuale e tutela costituzionale' *Rivista critica del diritto privato*, 49 (1995), contending that freedom to conduct a business is not a fundamental right because the Constitution subordinates it to social utility and respect for human dignity. In a similar vein, see F. Galgano, 'Artt. 41-44', in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli-Foro italiano, 1982), 26; P. Perlingieri, 'Mercato, solidarietà e diritti umani' *Rassegna di diritto civile*, 101 (1995).

[42] In contrast to Rescigno, see P. Femia, n 5 above, 498-503, who argues that Art 2 Constitution prioritizes personality, so the analysis should not start with social organizations but with personality unfolding itself in legal relations, namely in contracts. Party autonomy is not a fundamental right *per se* but displays of it are covered by a web of constitutional principles needing to be balanced against each other and adjusted to each particular case. Consequently, the constitutional reasons behind party autonomy differ. Where party autonomy affects non-pecuniary values, what is at stake is the personality principle under Art 2 Constitution. Instead, where it concerns production and transfer of wealth, its cornerstone is Art 41 Constitution, securing freedom to conduct a business. For similar remarks see P. Perlingieri and M. Marinaro, 'Art 41', in P. Perlingieri ed, *Commento alla Costituzione Italiana* (Napoli: Edizioni Scientifiche Italiane, 2001), 286; C. Donisi, 'Verso la depatrimonializzazione del diritto privato' *Rassegna di diritto civile*, 655 (1980); A. Lener, 'Violazione di norme di Condotta e tutela civile dell'interesse all'ambiente' *Foro italiano*, 105 (1980).

[43] D. Maffeis, 'Il contratto nella società multietnica' n 31 above, 955-956.

[44] E. Navarretta, n 13 above, 565-566. This point was previously made by R. Sacco and G. De Nova, 'Il contratto', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 2004), I, 38, contending that social issues left unsolved by the market must be solved with measures other than contract law (such as fiscal aids or public services).

[45] D. Maffeis, 'Il contratto nella società multietnica' n 31 above, 956.

[46] See *Plessy* v *Ferguson* 163 US 537 (1896).

differentiating offers for 'normal' and 'different' people. No unequal treatment results from these cases, because customers receive the same service but these hideous forms of discrimination are outwith the law due to their affront to human dignity. Consequently, it is argued that the essence of discrimination does not lie in inequality but in its affront to dignity.[47]

However, this appears to be a narrow view, which construes the concept of unequal treatment in its mere 'quantitative' dimension (whites and blacks travel under the same conditions; citizens and foreigners have the same meal) but downplays its 'qualitative' aspects (whites and blacks are accommodated in separate cars; citizens and foreigners sit in separate areas and use separate crockery).

A dignity-only concept of discrimination tarnishes the variety of purposes underlying the prohibition and narrows the remedy for its violation down to the compensation of damages, while contractual remedies (such as those invalidating the unlawful refuse to contract or amending the discriminatory agreement) stay out of the picture.[48] Besides, for the dignity-based theory not to be one-sided, it

[47] For these examples, see A. Gentili, 'Il principio di non discriminazione nei rapporti civili' *Rivista critica del diritto privato*, 228-229 (2009), who argues that discrimination is, above all, an affront to human dignity; any other consequences (such as denial of access to a good or service) are not the essence of discrimination because they may not occur under the circumstances. Other scholars connect non-discrimination with dignity: D. Maffeis, 'La discriminazione religiosa nel contratto' *Osservatorio delle libertà ed istituzioni religiose*, May 2008, 20-24, claiming that non-discrimination does not prevent a party from treating a partner differently from any others, but prevents a party from treating a partner worse because of prejudice; C.M. Bianca, 'Il problema dei limiti all'autonomia contrattuale in ragione del principio di non discriminazione', in Id et al, *Discriminazione razziale e autonomia privata. Atti del Convegno di Napoli del 22 marzo 2006* (Roma: Unar, 2006), 64; M.R. Marella, 'Il fondamento sociale della dignità umana. Un modello costituzionale per il diritto europeo dei contratti' *Rivista critica del diritto privato,* 87 (2007); P. Morozzo della Rocca, 'Gli atti discriminatori e lo straniero nel diritto civile', in P. Morozzo della Rocca ed, *Principio di uguaglianza e divieto di compiere atti discriminatori* (Napoli: Edizioni Scientifiche Italiane, 2002), 38; D. Strazzari, *Discriminazione razziale e diritto. Un'indagine comparata per un modello «europeo» della discriminazione* (Padova: CEDAM, 2008), 258. In US case law, see the Appellate Division of the New York Supreme Court in *Gifford* v *McCarthy*, 137 AD 3d 30 (2016), holding that 'discriminatory denial of equal access to goods, services and other advantages made available to the public not only deprives persons of their individual dignity, but also denies society the benefits of wide participation in political, economic, and cultural life'.

[48] G. Carapezza Figlia, *Divieto di discriminazione e autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2013), 182-185, contending that the dignity-based argument would approximate discrimination to the traditional model of tort built on compensation. A similar line is taken by B. Troisi, 'Profili civilistici del divieto di discriminazione', in Id et al, *Il diritto civile oggi. Compiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 297, equating discrimination with different treatment; P. Femia, n 5 above, 521-522, who advances the plea for a diversified application of equality to party autonomy and highlights that equal treatment is just a possible but not inevitable outcome of equality, which may also justify different treatments. Equal treatment is required only where inequalities cannot be justified. On a more abstract level, see V. Crisafulli, 'Diritti di libertà e poteri dell'imprenditore' *Rivista giuridica del lavoro e della previdenza sociale*, I, 70 (1954), claiming that party autonomy cannot infringe constitutional provisions securing individual freedoms; P. Perlingieri, 'Principio di uguaglianza e istituti di diritto

should take into account the hurt sustained by the seller while being forced to engage in a sale which he finds to be contrary to his conscience.[49] The discriminatory refusal to contract may be respectful of the seller's dignity but still run counter to the equality principle.

These remarks elucidate that non-discrimination can be rooted in dignity *and/or* equality. It might be the case that discrimination frustrates dignity but not equality, as in the aforementioned cases involving railway companies and restaurants. There are further illustrations of the point; the firm addressing the public at large with an invitation to offer and then turning down the first offer because of a protected characteristic of the offeror or the private club seeking to ward off certain groups of aspiring members and, to that end, adopting detrimental application conditions for anyone and for a limited period of time.[50]

Yet, it might also be the case that discrimination frustrates equality, while the individual is not hindered in the exercise of his dignity. *Lee* v *Ashers Bakery* is precisely illustrative of this antinomy. Central to the Supreme Court's reasoning was that the bakery had not objected to a personal status but had refused to approve of a (seemingly anti-Christian) message conveyed by a cake.[51] The bakery claimed that its conduct had not offended the gay customer's dignity, although he could not access the service on an equal footing to a heterosexual customer; indeed, the bakery would have had no trouble with a 'Support Heterosexual

civile', in Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), II, 459. At the other end lies the theory that the equal treatment principle clashes with freedom of contract. See: L. Paladin, 'Eguaglianza (diritto costituzionale)' *Enciclopedia del diritto* (Milano: Giuffrè, 1965), 532; P. Rescigno, 'Sul cosiddetto principio di uguaglianza nel diritto privato' *Foro italiano*, I, 665 (1969), claiming that equal treatment and distributive justice in private law presuppose either a community of people (such as a company) or state interference in the economy (as per the duty to contract upon the monopolist); G. Pasetti, n 7 above, 14, arguing that the equality principle is binding only upon the legislature; D. Carusi, *Principio di uguaglianza, diritto singolare e privilegio. Rileggendo i saggi di Pietro Rescigno* (Napoli: Edizioni Scientifiche Italiane, 1998), 34. Statements to this end can also be found in Corte di Cassazione-Sezioni unite 29 May 1993 no 6031, *Foro italiano*, I, 1794 (1993). Within this narrative, the legal provisions imposing on businesses an obligation to treat equally (eg Art 2597 of the Italian civil code, concerning the monopolist operator) shall be considered exceptions and construed restrictively: C. Grassetti, 'Patto di boicottaggio e concorrenza sleale' *Rivista di diritto industriale*, I, 17 (1959).

[49] D. Laycock, 'Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel' *The Yale Law Journal Forum*, 378 (2016), points out that the dignitary harm must be acknowledged on the religious sellers' part too because those seeking a religious exemption from anti-discrimination law 'believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their fates'.

[50] D. Maffeis, 'La discriminazione religiosa nel contratto' n 47 above, 24.

[51] § 23 of the judgment: 'the reason for treating Mr Lee less favourably than other would-be customers was not his sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way'. Therefore, 'direct discrimination is treating people differently' and not necessarily affronting their dignity.

Marriage' slogan. Still, the Court accepted this submission and found no relevant discrimination in the bakery's conduct, thereby apparently (though not explicitly) embracing the view that only a conduct harmful to human dignity is tantamount to unlawful discrimination.

In a nutshell, discrimination is prohibited: i) when it affronts human dignity, even though the discriminated is treated equally; ii) when it results in an unjustified different treatment, without impinging on human dignity; iii) when it infringes both equality and human dignity. This variety of articulation points to the shortcomings in the conventional wisdom that scrutiny of contractual discrimination is threefold. According to several scholars, that scrutiny does not have a twofold structure (comparing fact and norm) but a threefold one (comparing fact, norm and *tertium comparationis*).[52] In the case at hand, the relevant comparator is the heterosexual customer ordering a cake decorated with a 'Support Heterosexual Marriage' message.[53]

However, this view is misguided for two reasons.

Firstly, it identifies prohibited discrimination with different treatment and is silent as to the cases in which the individual is treated in the same way but his or her dignity is compromised. It is not accurate to say that, where no comparison between different situations is feasible, then discrimination is permitted.[54] No wonder the directives equate discrimination with harassment, ie any unwanted conduct related to a protected characteristic, taking place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Harassment does not entail comparison because its prohibition tends to safeguard the right not to be

[52] In the Italian literature see: M.V. Ballestrero, *Dalla tutela alla parità, La legislazione italiana sul lavoro delle donne* (Bologna: il Mulino, 1979), 250; B. Troisi, n 48 above, 297; D. Izzi, 'Discriminazione senza comparazione? Appunti sulle direttive comunitarie di seconda generazione' *Giornale di diritto del lavoro e di relazioni industriali*, 425 (2003); D. La Rocca, n 16 above, 175; L. Sitzia, *Pari dignità e discriminazione* (Napoli: Jovene, 2011), 249. See also M. Banton, 'Discrimination Entails Comparison', in P.R. Rodrigues and T. Loenen eds, *Non-Discrimination Law: Comparative Perspectives* (The Hague: Brill, 1999), 107.

[53] This was the relevant comparator according to the County Court of Northern Ireland and the Court of Appeal in *Lee* v *Ashers Bakery*. Conversely, M. Arnheim, 'Lee v McArthur: The Gay Wedding Cake Revisited' *Law & Religion UK*, 18 December 2017, argues that a better comparator would have been the Christian bakers themselves, in that they were being forced to treat *themselves* less favorably than they treated a prospective customer. He then criticizes the baker's lawyers for not making this point. With respect, it appears that this view misunderstands the role of the comparator, who cannot but be *tertium*, ie a party other than the discriminated or the discriminator.

[54] The CJEU's caselaw on gender discrimination clearly exemplifies this point. Consider the cases in which the Court ruled that the employer's refusal to enter into a contract of employment with a pregnant woman or her dismissal, was unlawful discrimination: Case C-177/88, *Dekker* v *VJV-Centrum*, Judgment of 8 November 1990; Case C-32/93, *Webb* v *EMO Air Cargo (UK)*, Judgment of 14 July 1994, all available at www.eur-lex.europa.eu. In these cases, no relevant male pregnant comparator could be identified; still the Court was ready to strike down the discriminatory conduct.

disadvantaged, not the right not to be *more* disadvantaged.[55]

Secondly, assuming that discrimination may be banned in cases in which a different treatment occurs, the threefold review says nothing of the reasons behind differentiation.[56] In other words, the *tertium comparationis* does not reveal why the discriminated individual is treated differently and does not differentiate cases in which this can be justified by a worthwhile aim pursued by the supplier or cases in which it is grounded in his bias against individuals bearing given protected characteristics. Certainly, Mr Lee was not treated on an equal footing with any heterosexual customers placing an order for a cake emblazoned with 'Support Heterosexual Marriage' but the adjudication on a discriminatory refusal to contract would end with that finding and the supplier's religious beliefs would be immaterial.

It may be the case that forms of discriminatory conduct are upheld, no matter how hideous the underlying reasons may be because otherwise a legitimate aim may not be attained.[57] In other cases, unequal treatment is warranted as a

[55] Cf M. Barbera, n 10 above, XXXII; C. Favilli, *La non discriminazione nell'Unione Europea* (Bologna: il Mulino, 2008), 253; A. Gentili, n 47 above, 215-216.

[56] See G. Carapezza Figlia, 'Il divieto di discriminazione quale limite all'autonomia contrattuale' n 40 above, 1408-1410, citing ethical banks as an example of justified discrimination. Ethical banks do not engage in financial activities with businesses that hamper human rights. These differences in treatment do not amount to prohibited discrimination, if justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (eg refusing to finance businesses which produce and sell weapons or use child labor). Another example of justified discrimination is a body of rules for tenants requiring that common parts of a building be not used for activities associated with a particular cultural group, for health reasons. On the general defense of justification, which is available to indirect discrimination claims, see also C. Fenton-Glynn, 'Replacing One Type of Oppression with Another? Same-Sex Couples and Religious Freedom' 73(1) *The Cambridge Law Journal*, 31 (2014); F. Zoll, n 17 above, 306. To the contrary see D. Maffeis, *Offerta al pubblico e divieto di discriminazione* (Milano: Giuffrè, 2007), 193, arguing that the legitimate aims pursued do not make ethical banks lawful.

[57] Cf Art 4 of the Anti-Racism Directive 2000/43/EC, which allows Member States to provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate; Art 4, para 5, of the Equal Access Directive (2004/113/EC), which does not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary; Art 20, para 2, of the Services Directive 2006/123/EC, which stipulates that Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria. On the objective justification of indirect discrimination see case C-127/07, *Arcelor Atlantique et Lorraine and others*, Judgment of 16 December 2008; Case C-236/09, *Test-Achats*, Judgment of 1 March 2011; Case C-20/12, *Giersch and others*, Judgment of 20 June 2013, all available at www.eur-lex.europa.eu. The ECtHR follows suit, claiming that 'a difference of treatment is discriminatory if it has no objective and reasonable justification, that is if it does

means by which to ensure equality for minorities. This is the 'positive action' doctrine, which allows Member States to adopt or maintain specific measures to prevent or compensate for disadvantages linked to a protected characteristic.[58]

Two conclusions can be drawn from these remarks. Firstly, a finding of discrimination does not always require identification of a relevant comparator because evidence of unfavorable treatment resulting from the possession of a protected characteristic may suffice. Secondly, the principle of equality demands justification of any differences in the conditions of access to goods or services. Equal treatment is just a possible and not inevitable outcome of equality. It is required when discrimination has no objective and reasonable justification, that is, discrimination does not pursue a legitimate aim and the means of achieving that aim are not appropriate and necessary.

This is not to say that the legitimacy of the aim lies with the lawyers and the courts' subjective preferences and idiosyncrasies[59] because the criteria justifying discrimination can be found in fundamental rights and freedoms, which are sourced either in a Constitution or in international conventions, particularly the ECHR and the CFREU. So, when the Italian Football Federation sought to refuse to license non-EU football players whose residence permit expired before the end of the season, the Tribunal of Lodi decisively replied that the alleged 'protection of football nurseries' amounts to ethnocentricity, which is an unacceptable social model.[60] But what about religious freedom? Can it justify discrimination? Is a Christian baker entitled to decline service to a gay customer because entering into the contract would compromise his most intimate religious beliefs?

not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised': Eur. Court H.R., *Karlheinz Schmidt* v *Germany*, Judgment of 18 July 1994; most recently, Eur. Court H.R., *Petrov and X* v *Russia*, Judgment of 23 October 2018, all available at www.hudoc.echr.coe.int.

[58] Examples of positive action doctrine can be found in Art 5 Anti-Racism Directive 2000/43/EC; Art 7, para 2, Equal Treatment Directive 2000/78/EC; Art 6 Equal Access Directive 2004/113/EC; Art 3 Equal Opportunities Directive 2006/54/EC. For further discussion see F. Zoll, n 17 above, 309.

[59] Arguing thus: D. Maffeis, 'Il diritto contrattuale antidiscriminatorio nelle indagini dottrinali recenti' *Le nuove leggi civili commentate*, 179 (2015). He contends that the claim to draw a hierarchy of values is essentially ahistorical, because a multi-ethnic and multi-cultural society mixes up a variety of ethical, religious, political, social principles, preferences and models. Who is to say if gambling is right or wrong or if an ethical bank has the right to refuse to deal with a fur trader? *Contra* G. Carapezza Figlia, 'Il divieto di discriminazione quale limite all'autonomia contrattuale' n 40 above, 1410, who correctly appeals to the hierarchy of interests in the Constitution, which disapproves the trade of weapons, the exploitation of child labor, the use of technology which endangers the environment, etc.

[60] Tribunale Lodi, 13 May 2010, available at https://tinyurl.com/ybfhj68f (last visited 27 December 2018).

IV. Doing Business Without Religion

The right to freedom of religion is recognized by Art 9 ECHR and Art 10 CFREU. Both provisions include the right to change religion, either alone or in community with others and in public or private, to manifest religion, in worship, teaching, practice and observance. However, Art 9 ECHR adds that limitations can be prescribed by law insofar as they are necessary in a democratic society for the protection of the rights and freedoms of others.

Now, the question is whether or not the bakery's refusal to ice a cake or, generally speaking, a supplier's refusal to provide any goods or services to a customer because of his sexual orientation can be protected under those conventions, although the wording itself of Art 9 ECHR seems unmistakably to suggest that freedom of religion can be constrained by the right of others to express their identities and not be discriminated against because of them.

If we look at the other hemisphere, there is unequivocal Australian authority for the proposition that an action can be protected as a religious manifestation so long as there is no alternative for the believer but to act in that way. The Supreme Court of Victoria embraced this approach in *Christian Youth Camps Limited* v *Cobaw Community Health Service Limited*.[61] Cobaw, a charitable organization concerned with LGBT youth suicide prevention, contacted CYC, a Christian camping organization, to run a two-day program at a CYC-owned and operated camp. CYC provided information that it could not allow an organization advocating for homosexual lifestyle to use its premises, due to its view that homosexuality was not a valid expression of human sexuality. In ruling against CYC, the Court of Appeal relied on section 77 of the Equal Opportunity Act 1995 (Vic), which exempted from anti-discrimination legislation those acts which were *necessary* for a person in order to comply with his genuine religious beliefs or principles.[62] The Court took the view that Christian doctrine could not have *required* denying a booking request and there was indeed an alternative for CYC to comply with its religious beliefs, which was to advertise that sex outside marriage was forbidden on the campsite.

If this reasoning were to be applied to the case at hand, it would transpire that Christianity certainly does not require a refusal to bake a cake with a 'Support

[61] [2014] VSCA 75.

[62] A similar provision is now enshrined in the Equality Opportunity Act 2010 (Vic), section 84, the only piece of legislation in Australia which protects religious freedom of general citizens, as opposed to religious organizations and professionals. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, instead, only exempts religious organizations, whose sole or main purpose is not commercial. Being an entirely commercial enterprise, Ashers Bakery could not avail of the exemption. In terms of legislative reforms, E. Fitzsimons, n 1 above, 83, advises against the extension of the tightly drafted and narrow exception to any business, because this would undermine the rule of law: 'consumers cannot reasonably be expected to discern which providers of goods and services may discriminate against them when entering the normal transactional discourse'.

Gay Marriage' slogan. There is no rule in Christian doctrine that not only recommends against but prevents believers from doing business with homosexual people or couples alike.

Yet, the view that a manifestation of religion is protected only insofar as there is no alternative but to act in that way seems to be too narrow. The European Court on Human Rights (ECtHR) took a different stance in the case of *Eweida* v *United Kingdom*,[63] wherein the Court held that 'in order to count as a manifestation within the meaning of Article 9, the act in question must be intimately linked to the religion or belief' and continued that 'there is no requirement on the applicant to establish that he or she acted in the fulfilment of a duty mandated by the religion in question'. So, for there to be a protected manifestation of religion, it is not necessary that the act in question be compulsory.[64] Specifically, British Airways' policy that prevented its employees from displaying a cross could not be supported on the ground that Christian doctrine does not mandate wearing a cross. However, it is difficult to argue that refusing to serve a gay customer, which is not required by Christian doctrine, is as intimately linked to religion as wearing a cross or a *niqab* or having a *payot*. These are clear-cut religious symbols that anyone, on objective grounds, would associate with Christianity, Islam and Judaism respectively.

It is true that the ECtHR has stretched the protection of religious freedom to cover acts that do not constitute *generally recognized forms* of worship or devotion but it has also demanded that a *sufficiently close and direct nexus* exists between the act and the underlying belief, which remains with the courts to determine on the facts of each case. With these requirements in mind, forms of conduct bearing merely personal and subjective religious meanings, which clash with the rights of others, must be denied enforcement *vis*-à-*vis* third parties, otherwise law would turn individual bias into rights to discriminate.[65] A supplier's

[63] [2013] ECHR 37. The judgment considered a quartet of cases concerning the religious rights of UK employees. In one of them, *Ladele*, a Christian civil registrar refused to register same-sex partnerships. In another, *McFarlane*, a Christian sex therapist and relationship counsellor, working for a private organization, refused to work with same-sex couples. They were dismissed by their employers. The ECtHR accepted there had been a *prima facie* interference with the workers' rights to religious freedom but then considered that the aims pursued by the employers 'aimed to secure the rights of others which are also protected under the Convention' and were 'intended to secure the implementation of its policy of providing a service without discrimination'. The ECtHR did acknowledge religious freedom but also required that it be weighed against the rights of innocent third parties. Although the case did not directly concern service providers, it appears that the Court's reasoning can apply to cases involving contractual discrimination based on sexual orientation.

[64] See N. Foster, n 34 above, 418, applauding the wider reading of the provisions on religion offered by the ECtHR.

[65] The Italian caselaw on the right to wear a kirpan is illustrative of this analysis. See Corte di Cassazione, 31 March 2017, *Cassazione penale*, 616 (2018), wherein the Court held that no religious belief can justify possession of weapons in public places because religious freedom is restricted by public policy, which calls for safety and peaceful coexistence. On the contrary, in Canada, see *In Multani* v *Commission scolaire Marguerite-Bourgeoys* (2006) 1 SCR 256, wherein

refusal to deal with a gay customer is not recognized by the general community of believers and non-believers as a Christian manifestation, is in no way required or recommended by Christian doctrine, and is not directly and closely associated with it (like going to mass on Sunday, wearing a cross, abstaining from meat on all Fridays of Lent). Any Christian business owner has the right to believe, privately, that same-sex marriage is a sin but cannot claim to substantiate that belief in commercial conduct which interferes with the rights of others.[66]

Businesses and, in general, all activities that involve permanent relationships with the public are a crucial touchstone for the non-discrimination principle. Under European law, people engaged in the public offering of goods, services and employment are not entitled to discriminate,[67] not even on religious grounds. It does not matter if the supplier is a person operating as a business or a private individual; what matters is that the goods or service are available to the public at large. The non-discrimination principle applies to bakeries selling cakes, B&Bs offering accommodation, Airbnb hosts, taxi drivers supplying rides, private individuals advertising items on a website or in a local newspaper and so forth.

the Supreme Court upheld a Sikh student's right to wear a kirpan to school, without investigating the centrality of kirpans to the Sikh faith. The Court was satisfied with the finding that the claimant's personal and subjective belief in the religious significance of the kirpan was sincere.

[66] This is why, in *Christian Youth Camps Limited* v *Cobaw Community Health Service Limited* n 61 above, the Victoria Court of Appeal considered that the rule that sex shall only be between heterosexual married couples, was one of 'private morality' for those within the church and did not have to be applied to those outside it who chose to behave otherwise. This is a far cry from intending religious freedom as 'merely dealing with what goes on in church meetings', as critically claimed by N. Foster, n 34 above, 424. What is at stake here is the balance of religious freedom with the rights of non-believers and people who hold different faiths.

[67] This view has gained consensus in European anti-discrimination literature. Cf D. Maffeis, *Offerta al pubblico e divieto di discriminazione* n 56 above, 42-43, contends that only discrimination connected with offers to the public harms the efficiency of the market; Id, 'Il diritto contrattuale antidiscriminatorio nelle indagini dottrinali recenti' n 59 above, 166; P. Morozzo della Rocca, 'Gli atti discriminatori nel diritto civile, alla luce degli artt. 43 e 44 del t.u. sull'immigrazione' *Diritto di famiglia e delle persone*, 43 (2002), claiming that the protection of a privacy interest ceases where the goods or service are offered to the public; N.M. Pinto Oliveira and B. MacCrorie, 'Anti-Discrimination Rules in European Contract Law', in S. Grundmann ed, *Constitutional Values and European Contract Law* (Alphen aan den Rijn: Kluwer Law International, 2008), 121; C. Barnard and A. Blackham, 'Discrimination and the Self-Employed', in H. Collins ed, *European Contract Law and the Charter of Fundamental Rights* n 18 above, 197, contending that anti-discrimination rules also apply to those offering access to services in their own private home (eg Airbnb); E. Navarretta, n 13 above, 560-562, claiming that non-discrimination applies only to offers to the public because law cannot sacrifice the multitude left out of the market and uphold the discriminator's bias, the only exception being individual negotiations carried out in restricted markets over fundamental services (such as housing). For the same conclusion but using different arguments, see *Christian Youth Camps Limited* v *Cobaw Community Health Service Limited* n 61 above, wherein the Court of Appeal of Victoria held that 'where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs in the context of worship or other religious ceremony. That is because a person engaged in commercial activities can continue to manifest their beliefs in the religious sphere'.

The only exclusions from the non-discrimination principle concern: i) transactions that are not concluded in the context of an offer to the public; ii) transactions that are concluded in the context of private life; iii) transactions that are concluded in the context of family life.[68] The scope of application of European anti-discrimination directives is clearly limited to the provision of goods and services 'available to the public' and 'outside the area of private and family life'.[69] Sellers and buyers of goods and services through individual negotiations, sellers and buyers of goods and services in the context of their private and family lives, are exempted. A domestic householder is entitled not to hire a Muslim plumber, a man can lawfully decide to sell his vineyard to his nephew rather than his niece because he believes that men make better wine, a prospective hotel guest can decide to go elsewhere because he dislikes black owners, a person seeking work can refuse to apply to a Christian organization. The reason behind the exclusion is that the law safeguards privacy interest, that is, the most intimate choices concerning whom I allow in my home, to whom I turn to purchase goods or services, which must remain free from state intervention and in which the non-discrimination principle must yield to self-determination.[70]

An argument to the contrary has been made that the prohibition on discrimination shall apply also to individual negotiations, ie transactions that are conducted outside the scheme of an offer to the public or an invitation to offer. Otherwise, the legislative exclusion of transactions in the area of private and family life would be redundant. In this area, it is impossible for the party to make an offer to the public at large and he or she addresses his/her offer to a given individual, whose choice is not justified by economic reasons (but by

[68] H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner' n 12 above, 83: 'there appear to be three overlapping categories of exclusions: (1) transactions that are not concluded in the context of an offer to the public; (2) transactions in the context of private life; (3) transactions in the context of family life'.

[69] See, in the Anti-Racism Directive 2000/43/EC, Art 3 ('access to and supply of goods and services which are available to the public') and recital no 4 ('It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context'); Art 3 of Equal Access Directive 2004/113/EC ('this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context').

[70] C. Barnard and A. Blackham, n 67 above, 214-215. However, they contend that the exception of private customers acting as potential recipients/purchasers of services shall be limited to decisions taken in the most narrow, private, domestic context. Anti-discrimination legislation should still apply to private customers acting in a commercial context. In German literature, see K.H. Ladeur, 'The German Proposal of an "Anti-Discrimination" Law: Anticontitutional and Anti-Common Sense. A Response to Nicola Vennemann' 3 *German Law Journal*, 2002, available at https://tinyurl.com/y8x66mop (last visited 27 December 2018), supporting the view that a liberal theory of rights and privacy, in particular, makes it unacceptable to force private individuals to make decisions of which they disapprove.

friendship and kinship).[71]

The exclusions from anti-discrimination legislation cover transactions carried out in the context of family life *and* private life but this theory seems to have only the former in mind; also, its premise appears to be ill-advised. Indeed, in the context of private and family life, it is *possible* for the individual to look for goods or services within the public community of providers/suppliers and make biased decisions. Consider a Christian householder advertising in a local newspaper that he is seeking a plumber. As a private customer and potential *purchaser* of services in the context of his own home, he is entitled to discriminate against a Muslim or Hindu plumber. Here, party autonomy prevails over the non-discrimination principle. Transactions carried out in the area of private and family life, even where they follow an invitation to offer addressed to the public at large, are exempted from the non-discrimination principle.[72]

These brief remarks show that the UK Supreme Court's conclusion that a bakery offering its goods and services to the public is entitled to discriminate against homosexuals, is at variance with EU legislation. The decision draws on two controversial arguments that have no currency in European contract law; i) the distinction between status and conduct; ii) the forced speech doctrine. On the first argument, the Court accepted that the McArthurs did not cancel the order because of Mr Lee's sexual orientation but because they opposed same-sex marriage. They would not have taken issue with supplying Mr Lee with a cake without that message. The objection was to the message, not the messenger.[73]

[71] G. Carapezza Figlia, *Divieto di discriminazione e autonomia contrattuale* n 48 above, 105-107. In a similar vein, see B. Checchini, 'Eguaglianza, non discriminazione e limiti dell'autonomia privata: spunti per una riflessione' *La nuova giurisprudenza civile commentata*, 193, fn 39 (2012), arguing that, if non-discrimination is a principle, it should apply to any negotiations, regardless of the ways the contract is concluded.

[72] Cf C. Barnard and A. Blackham, n 67 above, 214-215: 'equality law does not, and in our view should not, apply to decisions made by private parties (purchasers) in the domestic context as to whose services to hire (…) This means that individuals are free to make their own choices without the risk of being sued, and the courts are not put into the invidious position of having to scrutinize private choices in the domestic setting'; H. Collins, 'The Vanishing Freedom to Choose a Contractual Partner' n 12 above, 83-84: 'as a private individual looking for a service, there remains an unfettered freedom to choose a contractual partner, even if the choice is exercised on such proscribed grounds as race, sex and religion'. However, the ECtHR has, at least on one occasion, applied the non-discrimination principle to a will, ie an act drawn up in the context of private and family life. See *Pla and Puncernau* v *Andorra*, Judgment of 13 July 2004, available at www.hudoc.echr.coe.int, concerning a will, dated 1939, in which the testator had stipulated that her son and heir was to pass on his inheritance to a 'child or grandchild from a legitimate and canonical marriage'. The issue arose whether an adopted son could inherit the property, at a time when Andorra did not have a law on adoption. The ECtHR held that an interpretation of domestic law should be adopted that avoided discrimination between adopted and biological children. But see D. Maffeis, 'Discriminazione (diritto privato)' n 34 above, arguing that a testator is free to discriminate, even explicitly, on any grounds, because a testament is not an offer to the public.

[73] § 22 of the judgment. See also R. Ahdar, 'Is Freedom of Conscience Superior to Freedom of

This argument is demonstrably flawed. It is true that advocating for same-sex marriage is not indissociable from homosexual orientation; people of all orientations can and do support same-sex marriage.[74] However, distinguishing a person's identity and his or her actions and consequently permitting discrimination against the actions, means denying the right to accept and enjoy that identity.[75] Individuals would be entitled to have a homosexual orientation but not to fulfill their identity through relationships with others of the same or different orientation. Besides, it is quite challenging to conjure up a baker who earnestly refuses to make a cake with a 'Support for Gay Marriage' message but harbors warm feelings for the LGBT community.

Religion?' 7 *Oxford Journal of Law and Religion*, 140 (2018), provocatively asking: 'Can one still hate the sin and not the sinner?'. Ahdar draws on Harold Berman's statement in *Faith and Order: The Reconciliation of Law and Religion* (Grand Rapids: Eerdmans Publishing, 1993), 16: 'it is a cardinal principle of the Western religious tradition (both in its Christian and Judaic aspects) to "hate the sin and love the sinner" '. In Italian literature, see D. Maffeis, 'Discriminazione (diritto privato)' n 34 above, 499, drawing on criminal jurisprudence to argue that there is no discrimination where a party refuses to contract because of the other's party behavior (eg, during negotiations, the other party turns out to be dirty, villainous, drunk, loud or a thief; for the same reason, a bank can decline to give a badly-dressed customer a loan or an employer can say 'no' to a potential employee who clumsily reacts to coffee being spilled over the table). The criminal case quoted is Corte di Cassazione 13 December 2007 no 13234, *Giurisprudenza italiana*, 164 (2009), in which the Court held that discrimination amounting to crime must be based on status (gypsy, black, Jewish etc) and not on conduct, so discrimination based on others' diversity is a far cry from discrimination based on others' criminal attitudes.

[74] But see J. Seglow, 'Same-Sex Wedding Cake: The Supreme Court's Lee v. Ashers Ruling Explained' *The Conversation*, 11 October 2018, contending that 'while support for gay marriage is not a proxy for a person being gay, many gay and lesbian people do identify – and perhaps uniquely identify – with the cause of same-sex marriage, so there is a strong association for them at least'.

[75] 'To distinguish between an aspect of a person's identity and conduct which accepts that aspect of identity or encourages people to see that part of identity as normal or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity': *Christian Youth Camps Limited* v *Cobaw Community Health Service Limited* n 61 above, § 57. American courts too do not support the distinction between status and conduct. In the US, see: *Elane Photography* v *Willock* 309 P3d 53 (NM 2013), in which the New Mexico Supreme Court upheld a fine levied on a photographer who had declined to provide services for a same-sex wedding; *State of Washington* v *Arlene's Flowers Inc* 389 P.3d 543 (Wash 2017), concerning a florist's refusal to supply flowers to a same-sex wedding, the Washington Supreme Court rejected the distinction between conduct and orientation, holding that same-sex marriage is inextricably tied to sexual orientation; *In the Matter of Klein dba Sweet Cakes by Melissa*, Commissioner of the Bureau of Labor and Industries, State of Oregon, case nos 44-14, 2 July 2015, 2015 WL 4868796, in which a cake shop which had declined to make a same-sex wedding cake was ordered to pay one-hundred thirty-five thousand dollars in damages, with the Commissioner holding that refusal to provide a wedding cake because of an opposition to same-sex marriage was tantamount to refusing to provide a cake because of the customers' sexual orientation. In Canada, see *Saskatchewan (Human Rights Commission)* v *Whatcott* 2013 SCC 11, in which the Supreme Court of Canada upheld a fine imposed on an activist for distribution of pamphlets against homosexuality, claiming that 'where the conduct that is the target of speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself'.

On the second argument, the Court applied the forced speech doctrine to uphold Ashers Bakery's refusal to provide a cake emblazoned with a message with which they profoundly disagreed. Developed in the US First Amendment jurisprudence, the forced speech doctrine demands that no one be compelled to have or express an opinion in which he does not believe. The Court drew on precedents of the ECtHR and the Privy Council to support its view. In *Buscarini* v *San Marino*,[76] the ECtHR unanimously held that requiring members of the legislature to take an oath on the Holy Gospels was not compatible with Art 9 of the Convention. The second case quoted is *Commodore of the Royal Bahamas Defence Force* v *Laramore*,[77] in which the Privy Council held that a Muslim soldier had been hindered in the enjoyment of his freedom of conscience, when he was forced to attend Christian prayers on parade and take off his cap.

The forced speech argument is not alien to European law. However, the facts of cases relied on by the Court in support of its reasoning are very different from the position of Ashers Bakery.[78] Swearing a Christian oath and attending Christian prayers are objectively manifestations of belief, with which adherents of other religions are not concerned. The same does not hold true for offering a 'Build-a-Cake' service to the public, an activity in which people of any faith and any political opinions may be engaged. No one could reasonably understand baking a cake as being communicative of an anti-Christian message.[79]

Also, if we turn the forced speech argument upside down, it must be so that whenever a provider readily delivers goods or services, then he implicitly agrees

[76] (1999) 30 EHRR 208.

[77] [2017] UKPC 13. The UK Supreme Court quotes many other cases, including one of its own: *RT Zimbabwe* v *Secretary of State for the Home Department* [2012] UKSC 38, in which it held that an asylum seeker who has no political views and therefore does not support the persecutory regime in his home country, is entitled to claim asylum when the alternative is to lie and feign loyalty to that regime in order to avoid ill- treatment. Thus, the doctrine of forced speech applies to political opinions and religious beliefs alike.

[78] See J. Rowbottom, 'Cakes, Gay Marriage and the Right Against Compelled Speech' *UK Constitutional Law Association Blog*, 16 October 2018, also pointing out that Ashers Bakery is a business involved in the provision of goods and services, whose underlying purpose is not religious. This is why the analogy with the Christian printing business being required to print leaflets with an atheist message, which the Court used, is misguided, because 'the Christian book publisher exists for a particular expressive purpose, while the baker does not'.

[79] Cf C. Chandrachud, 'Bittersweet Judgment: The UK Supreme Court in the Ashers Baking Case' *UK Constitutional Law Association Blog*, 15 October 2018, accusing the UK Supreme Court of stretching the notion of forced speech to the breaking point; C. Stoughton, 'Case Comment: Lee v Ashers Baking Company Ltd & Ors' *UK Supreme Court Blog*, 15 October 2018, claiming that labelling messages on cakes as expressions of the baker's conscience is a misunderstanding of the forced speech doctrine. On the difference between protected speech and conduct, see Justice Ginsburg's dissenting opinion in *Masterpiece Cakeshop*: 'for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative… (the baker) submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's'.

to endorse or facilitate that message.[80] But a Naples supporter agreeing to bake a cake celebrating a Juventus success cannot really be seen as rooting for Juventus; a party planner being required to organize a Hallowe'en party cannot really be seen as endorsing pagan idolatry.[81]

V. Conclusion

The essay has aimed to show that the prohibition to discriminate in European contract law serves multiple purposes. Originally thought to fight market failures, non-discrimination has since been cast as a general principle and proven to be instrumental in the protection of fundamental values. Fulfillment of equality, in particular, does not prevent suppliers of goods and services from discriminating, so long as any differentiation is justified by a legitimate aim. Religious freedom, however, is not an excuse for discrimination; the distinction between status and conduct has no currency in European contract law and the forced speech doctrine seems to have a very different scope of application.

Accommodation of religious beliefs in the commercial context would bring

[80] This point was made by the Court of Appeal in Northern Ireland [2016] NICA 39, § 67. See also E. Fitzsimons, n 1 above, 83. The Supreme Court dismissed the Court of Appeal's argument and went so far as to say 'there is no requirement that the person who is compelled to speak can only complain if he is thought by other to support the message, (…) what matters is that by being required to produce the cake they were being required to express a message with which they deeply disagreed'. The consequences of this line of reasoning may be disquieting. See J. Rowbottom, n 78 above, arguing that this view would make it legal to raise forced speech allegations in relation to warnings on cigarette packets, the publication of defamation rulings or replies to attacks in the media or the teaching of mainstream science by a teacher who is skeptical of climate change.

[81] The Hallowe'en cake and the football team cake examples can be found in the Court of Appeal's judgment, n 77 above, § 67. But see M. Arnheim, n 53 above, contending that this is a false analogy. Hallowe'en does not have a religious meaning anymore, so 'nobody would take a Hallowe'en cake to be an inducement to adopt any particular belief, and the same applies to a cake for a sports team'. On the contrary, a cake with a 'Support Gay Marriage' slogan does send a political message at a time when Northern Ireland was still discussing the legalization of same-sex marriage. However, these appear to be value and context-specific judgments. In Italy, for example, many Catholics oppose Hallowe'en because they associate it with pagan idolatry. Consider the rivalry between Celtic FC and Rangers FC in Glasgow; support for either of these teams is traditionally associated with Catholicism and Protestantism respectively. Unfortunately, several commentators have promoted the forced speech argument too far. See C. Murphy, 'Let Them Eat Cake?' *Trinity College Law Review*, 8 March 2017, considering whether or not the law might compel a Jewish baker to decorate his cakes with swastikas or a homosexual baker may be forced to produce cakes with homophobic slogans; similarly see R. O'Dair, ' "Gay Cakes" and Human Rights: The Ashers Case' *Lawyers' Christian Fellowship*, 27 October 2016, listing Muslim printers being obliged to publish cartoons of Mohammed, Jewish ones being obliged to publish the words of a Holocaust denier, gay bakers accepting orders for cakes with homophobic slurs. Yet, it seems inappropriate to compare supporting same sex-marriage and celebrating Nazism, offending homosexuals, advocating for historical revisionism. Some of these activities (eg Holocaust denial) may be a crime in some countries.

about disproportionate consequences.[82] Firstly, it would impose an excessive burden on the individual in relation to the aim sought to be achieved. In fact, unlike the wearing of religious clothes or symbols, religious accommodation in the supply of goods and services disrupts the dignity and equality of the customer who is denied the goods or service.[83] Secondly, letting providers of goods and services in the commercial context take their (often archaic and bigoted) prejudices out on innocent customers is a measure which is unsuitable and unnecessary to protect their right to religious freedom. The scope of the non-discrimination principle is not to prioritize one protected characteristic over another, which would occur if service providers were allowed to invoke their religious beliefs to obtain an exemption and thus be treated differently from any other providers but to foster mutual tolerance between opposing groups.[84] Accommodation of religious belief would ignite a culture war between discriminated gay customers and zealot providers,[85] and force the courts to take

[82] Cf E. Fitzsimons, n 1 above, 82, comparing reasonable religious adjustment in the employment context (eg the right to have a neutral prayer room), where employees are in a more vulnerable position than their employers, while a similar power disparity does not characterize the supply of goods and services. On the principle of proportionality in EU law see P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials* (Oxford: Oxford University Press, 5th ed, 2011), 526. The principle requires a three-prong test of EU action and national action falling within the sphere of EU law, which must: i) be suitable to achieve the desired end; ii) be necessary to achieve the desired end; iii) not impose a burden on the individual that is excessive in relation to the objective sought to be achieved. However, balancing tests are sometimes met with skepticism. See: K.H. Ladeur, n 70 above, claiming that it would be hard to envisage a court scrutinizing the motives underlying contract refusals; M. Cousins, 'Sexual Orientation, Equal Treatment and the Right to Manifest Religion: Lee v McArthur' 28(3) *King's Law Journal*, 443-444 (2017), preferring specific legislative exemptions to judicial individualized balancing tests.

[83] R. Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others' 77(2) *Modern Law Review*, 228-229 (2014), articulates a three-prong test for assessing whether or not religious accommodation is justified: '(i) the particular manifestation of religious beliefs itself causes no direct harm to others; and (ii) the requested accommodation involves minimal cost, disruption or inconvenience to the accommodating party; and (iii) the requested accommodation will (upon further examination) cause no indirect harm to others'. Applying this test, a religiously motivated refusal to serve others should not be tolerated because it would cause harm to others, despite involving minimal cost, disruption or inconvenience (the customer could easily obtain the same goods or services elsewhere with little or no difficulty). But see J. Gardner, n 13 above, 6, making the point that discrimination remains unlawful even when the victim has not suffered any psychological injury or has not realized that the discrimination has occurred; M. Cousins, n 82 above, 443, lamenting that the harm-based approach is fact-specific and highly subjective, and quoting the *Baby Loup* case decided by the French *Cour de Cassation*, in which the court prevented a crèche worker from wearing an Islamic garment because this might encroach on the children's freedom of conscience, thought and religion.

[84] See E. Fitzsimons, n 1 above, 78, contending that anti-discrimination law should operate in an even-handed way across individuals exposed to discrimination. On the purposes of anti-discrimination law, see also the Eur. Court H.R., *SAS* v *France*, Judgment of 1 July 2014, available at www.hudoc.echr.coe.int: 'ensure mutual tolerance between opposing groups (…). Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other'.

[85] Cf D. NeJaime and R.B. Siegel, 'Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics' 124 *The Yale Law Journal*, 2520 (2015), arguing that complicity-based

sides with the knights rather than the villains.[86]

conscience claims, ie requests to be exempted from being complicit in the assertedly sinful conduct of others, 'provide an avenue to extend, rather than settle, conflict about social norms in democratic contest'.

[86] Cf Justice Scalia's dissenting opinion in *Romer* v *Evans*, 517 US 620 (1996), in which the majority of the US Supreme Court held that a state constitutional amendment in Colorado, preventing any city, town, or county in the state from taking any legislative, executive, or judicial action to recognize homosexuals or bisexuals as a protected class, did not satisfy the Equal Protection Clause. In dissent, Justice Scalia argued that it is no business of courts (as opposed to the political branches) to take sides in culture wars. 'When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains – and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn' (§§ 652-653).