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THE RIGHT TO REFUSE TO BAKE: RELIGIOUS FREEDOM AND LGBTQ+ EQUALITY IN THE MASTERPIECE CAKESHOP AND GARETH LEE CASES

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Abstract. This paper analyses the legal and moral tensions between religious rights and the rights of sexual minorities, focusing on two cases: Masterpiece Cakeshop v. Colorado Civil Rights Commission before the United States Supreme Court and Gareth Lee v. The United Kingdom (Application no. 18860/19) before the European Court of Human Rights (ECtHR). Both cases involve Christian-owned bakeries refusing to create cakes supporting same-sex marriage or the rights of sexual minorities, citing religious beliefs. By analysing these cases within a broader legal and societal context, this research aims to contribute to the ongoing discussion on how courts navigate tensions between religious freedom and LGBTQ+ rights. The methods of analysis of legal acts, comparative, logical, and summarising methods were used in this article. Results of research show that courts and international bodies of human rights in these cases must navigate complex intersections of freedom of expression, freedom of religion, and equality norms, while being mindful of the social and political contexts in which these disputes arise. Ultimately, the developing jurisprudence in this area suggests that no uniform solution is likely to emerge soon; instead, courts will continue to approach such conflicts on a case-by-case basis, weighing the competing rights at stake and the proportionality of any limitations imposed.

Keywords: Discrimination, Freedom of Religion, Public Accommodations, Sexual Minorities.

Introduction

Freedom of religion is one of the universal, fundamental human rights declared in most international legal documents and state constitutions. In a democratic society, it accords to every person to have, change, or to refuse his or her religion or belief. Freedom of religion ensures individuals have the right to practice their faith without interference, and protects them from state-imposed religious beliefs.

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Sexual minority rights are valued ambivalently. There is no general recognition of the rights of sexual minorities, specifically, to privacy, freedom of expression, right to identity, right to dignity, etc. Although substantial progress has been made in advancing these rights and freedoms over the past century, considerable challenges persist. From the decriminalisation of same-sex relationships to the legalisation of same-sex marriage in many countries, LGBTQ+ rights have expanded globally. Landmark legal victories, such as the repeal of discriminatory laws and the recognition of gender identity, have improved protections. Activism and social movements have played a crucial role in the push for equality. Therefore, the main principles underlying the approach to the rights of sexual minorities, which are related to equality and non-discrimination, are highlighted.

Freedom of religion and the rights of sexual minorities are two fundamental and often competing aspects of human rights discourse. The intersection of these rights has sparked significant legal, social, and ethical debates, particularly in contexts where religious beliefs are invoked to justify restrictions on LGBTQ+ rights, or conversely, where anti-discrimination laws are perceived as infringing on religious freedoms.

This paper explores the complex relationship between religious liberty and the rights of sexual minorities, focusing on two cases: Masterpiece Cakeshop v. Colorado Civil Rights Commission before the United States Supreme Court and Gareth Lee v. The United Kingdom (Application no. 18860/19) before the European Court of Human Rights (ECtHR).

Scientific research exists on these cases, mostly on the Masterpiece Cakeshop case, finding the decision of the Supreme Court important, but it is missing a wide comparative analysis of the decisions of different courts from different continents. This research tries to provide deeper insights by searching for the reasons for the decisions of these courts. A critical analysis of the Masterpiece Cakeshop case should be mentioned, where S. M. Feldman in the article "Having Your Cake and Eating It Too? Religious Freedom and LGBTQ Rights" (2018), argues about discrimination against same-sex couples and LGBTQ individuals, even if arising from religious beliefs, and that it cannot be deemed of constitutional value. G. Seaquist, M. Barken, and A. Bramhandkar, in the article "Discrimination at Places of Public Accommodation After MASTERPIECE CAKESHOP LTD v. COLORADO CIVIL RIGHTS COMMISSION" (2019), critically argue that the Court failed to answer the most important question at the heart of the case, namely, can places of public accommodation discriminate against protected classes.

Showing a more conservative position, in his article "Let Them Eat Cake: A Comparative Analysis of Recent British and American Law on Religious Liberty" (2020), G. H. Hornby tries to propose some solutions on how to protect the rights of sexual minorities, emphasising that the principles of tolerance are necessary for a free society to ensure that all interests are equally considered. In her study, "Business Owners' Religious Objections to Same-Sex Marriage: The American versus European Perspective" (2021), L. Krickova suggests general steps for courts to follow when dealing with LGBT rights and religious freedom issues in the future, while Ch. Elbin and J. R. Price contextualise these "competing rights" claims within a longer political and legal history in their analysis, "The Great American Rights Bake Off: Freedom of Religion v. Freedom from Discrimination" (2023).

The aim of this article is to analyse the complex relationship between religious freedom and the rights of sexual minorities by conducting a comparative legal analysis of the two landmark cases. It seeks to fill the gap in existing research by providing a broader cross-continental comparison of judicial decisions on these issues. By exploring these competing rights claims, the article aims to contribute to the ongoing discourse on equality, non-discrimination, and legal protections for sexual minorities in democratic societies. The methods of analysis of legal acts, comparative, logical, and summarising methods were used in this article. The comparative method was used to examine the cases and the relevance of the courts' decisions in them.

AI-assisted technology was used in the preparation of this article for checking grammar and language style.

1. The Case of the Masterpiece Cakeshop v. Colorado Civil Rights Commission

The case of Masterpiece Cakeshop, Ltd. et al. v. Colorado Civil Rights Commission et al., *certiorari* to the Court of Appeals of Colorado, No. 16–111, argued December 5, 2017—decided June 4, 2018, reflects that Masterpiece Cakeshop, Ltd., a bakery in Colorado, was owned and operated by Jack Phillips, a devout Christian. This dispute arose between important constitutional rights: freedom of religion, freedom of expression and nondiscrimination. In 2012, he refused to create a wedding cake for a same-sex couple, motivating his religious beliefs against same-sex marriage, which was not legally recognised in Colorado at the time (during the case investigation, it was found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis). However, he offered to sell them other baked goods, such as birthday cakes, cookies, and brownies. The couple then filed a complaint with the Colorado Civil Rights Commission (Commission) under the Colorado Anti-Discrimination Act (CADA), which prohibits discrimination based on sexual orientation in businesses that sell to the public or offer public services (public accommodation), excluding churches, synagogues, mosques, or other places that are principally used for religious purposes. The commissioner compared Phillips' invocation of his sincerely held religious beliefs to defences of slavery and the Holocaust.

As part of CADA's administrative process, the Colorado Civil Rights Division (Division) determined that there was probable cause for a violation and sent the case to the Commission. The Commission, in turn, referred it to a state Administrative Law Judge (ALJ) for a formal hearing. The ALJ ruled in favour of the couple, rejecting Phillips' claims that being required to make the cake violated his First Amendment (of the Constitution) rights; both his right to free speech, by forcing him to create a message he disagreed with, and his right to freely implement his religion. It is noteworthy that freedom of religion, as enshrined in the U.S. Constitution, was conceived by the Founding Fathers as a natural right inherent to the individual. They understood this right not as deriving from the authority of the state or the consent of society, but as grounded in human nature and the individual's relationship with the Creator. Accordingly, every person possesses the right to freely profess and practice religion in accordance with their conscience.

"The First Amendment, together with the Establishment Clause and the Free Exercise Clauses, ensures strict separation between church and state. Specifically, the First Amendment applies to Congress and it prohibits to establish a national church by erecting a high wall between church and government. In the context of religious liberty, governmental affiliations were prohibited with churches by the Constitution" (Yüksel, Ü., & Büyükbaş, H., 2023). Turning to the case, the Commission's decision was later upheld by the Colorado Court of Appeals. The arguments for this decision were related to the fact that the baker could not express his religious beliefs legitimately in the public sphere or commercial domain, that any message on the requested wedding cake would be attributed to the customer, not to the baker.

Phillips applied to the Supreme Court. Following the opinion of the Supreme Court of the United States, "Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case" (*Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission, 2018*). Separate opinions of the judges were presented here. Comparing with other similar cases that were under consideration of Division (*Jack v. Gateaux*, *Ltd.*, Charge No. P20140071X, at 4; featured "language and images [the baker] deemed hateful," *Jack v. Le Bakery Sensual, Inc*., Charge No. P20140070X, at 4; or displayed a message the baker "deemed as discriminatory, *Jack v. Azucar Bakery*, Charge No. P20140069X, at 4.), Justice Kennedy stated that "the treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections" (Opinion of Kennedy, *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission, 2018*). Justice Gorsuch, with whom Justice Alito joined, concurring, argued that it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever

survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise" (Opinion of Gorsuch, *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission, 2018*). For instance, in *Thomas v. Review Board* (1981), the U.S. Supreme Court considered the case of Thomas, a devout Jehovah's Witness employed in a steel mill, who was willing to work in the production of sheet steel — despite knowing it might ultimately be used in armaments — but who objected, on religious grounds, to being transferred to a fabrication line that manufactured tank turrets. Thus, the Court stated that "Mr. Thomas alone was entitled to define the nature of his religious commitments — and those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment" (Opinion of Gorsuch, *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission, 2018*). Justice Thomas (with whom Justice Gorsuch joined, concurring in part and concurring in the judgment) also emphasised that Phillips' statement about refusing to create a wedding cake is a fundamental principle of our free speech jurisprudence and could justify nearly any law that compels individuals to speak. Giving examples of other cases (*Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U. S. 557, 572 (1995); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U. S. 1, 16 (1986) (plurality opinion); *Brown v. Entertainment Merchants Assn.*, 564 U. S. 786, 792, n. 1 (2011)) Justice Thomas said that "public-accommodations laws do not "target speech" but instead prohibit "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services. But when a public-accommodations law "ha[s] the effect of declaring … speech itself to be the public accommodation," the First Amendment applies with full force" (Opinion of Thomas, *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission, 2018*).

It is emphasised that Phillips' behaviour was expressive, as he demonstrated this Christian faith by not working on Sundays, by not baking cakes with alcohol, cakes with racist or homophobic messages, cakes that criticise God, and cakes for Halloween (on his website he states, "Masterpiece Cakeshop will be happy to create custom cakes for anyone"). But like many cake artists, Jack cannot create all custom cakes. He cannot create custom cakes that express messages or celebrate events that conflict with his religious beliefs". It should be enough to defend your deep belief. Moreover, Justice Thomas stated that "states cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified" and "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (Opinion of Thomas, *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission, 2018*). It is considered that by comparing the statement in question to previous cases involving LGBTQ+ exclusion from parades, Boy Scouts, and hateful signage, Justice Thomas suggested that if those instances were deemed constitutionally protected, it is difficult to argue that the current statement is uniquely stigmatising. This reasoning underscores the legal principle that free speech protections extend even to controversial or harmful expressions, as long as they do not cross into direct harm or incitement. Also, it was noted that the First Amendment gives the right to disagree about the morality of same-sex marriage and protects the rights of those who wish to voice a different view about homosexuals. Justice Thomas stated that the decision of the Colorado Court of Appeals must be rejected in order to maintain the vitality of the freedom of speech, keeping it religiously neutral. It is noteworthy that in a democratic state governed by the rule of law, freedom of speech is considered one of the essential constitutional values, which creates the prerequisites for open discussion and competition of ideas. However, this freedom cannot be interpreted in a way that privileges certain religious or ideological positions over others. For example, Philip A. Hamburger analyses whether the Constitution of the U.S. actually grants a general right to religious exemptions (i.e., the right to disobey laws based on religious beliefs) from a historical perspective: "various state statutes (or even constitutions) expressly granted religious exemptions from military service and other specified civil obligations hardly suggests that such exemptions were rights under the United States Constitution — let alone that a general religious exemption from civil law was a right under any American constitution. Last but not least, the framers and ratifiers repeatedly said they were reluctant to leave the magnitude of individual freedom — including religious freedom — in the discretion of Congress or the federal judiciary" (Hamburger, 1992). He emphasises that in earlier legal practice, a general right to religious

exemptions did not exist. Laws were considered binding on all, even if they conflicted with religion. Religious exceptions existed, but they were rare, and granted by the decisions of legislators, not courts. A. Dorfman presents an idea regarding religious freedom, considering it less privileged — more privileged rights result in exceptions to the law. A. Dorfman emphasises that if in a democracy religious arguments are partially "excluded" from public decision-making, then religious people must be given compensation — the opportunity to obtain exemptions from the law. In this case, the author draws on political philosophy justified by religious exceptions: "The actual channel through which religious citizens can exercise their rights depends on the constitutional framework of the particular polity (and, therefore, deserves less attention at the conceptual level I am advancing at the moment)". For example, it can be introduced by court orders following the submission of a petition by the affected religious person. Another (non-exclusive) possibility is the enactment of statutory provisions exempting religious persons from the law's applicability. Note that statutory exemptions do not stand in conceptual conflict with the exclusion of religious arguments from the democratic process (Dorfman, 2008).

Justice Ginsburg, with whom Justice Sotomayor joined, expressed an opposing opinion arguing that the same-sex couple simply requested a wedding cake: they mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold. By comparison, in another case involving customer William Jack, several Colorado bakeries refused to produce cakes bearing anti-LGBTQ messages — not because of Jack's religious beliefs, but because they did not create cakes with messages they considered offensive or hateful. Justice Ginsburg emphasised that the crucial distinction in *Masterpiece* was that the same-sex couple was denied service because of who they were, whereas Jack was denied service because of the content of the message he requested. He also claimed, when a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating their wedding, not a cake celebrating heterosexual weddings or same-sex weddings, and that is the service Craig and Mullins were denied (Opinion of Ginsburg, *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission, 2018*). Justice Ginsburg's position emphasises that the couple was denied service because of their identity, regardless of how the grounds for refusal were formally framed. From this perspective, it is important to distinguish between personal status (who the person is) and expression (what message is being conveyed). This distinction is central to *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Discrimination based on personal status is generally prohibited under public service laws, whereas a refusal to create a particular expression may be protected as form of free speech under the First Amendment.

This issue may also be examined in the context of compelled expression, as the Supreme Court has repeatedly held that the state cannot force individuals to convey messages with which they disagree. A seminal example is *West Virginia State Board of Education v. Barnette* (1943*)*, in which the Court emphasised that the government cannot impose ideological expression ("Students may not be required to salute the American flag or recite the Pledge of Allegiance at public schools if it is contrary to their religious beliefs"). Another important question arises in this context: does the baker act as a public actor or as a private creator? By operating in the marketplace and offering services to the general public, a baker falls within the scope of "public accommodations", which are traditionally subject to anti-discrimination requirements.

Thus, the baker is required to provide services to all customers who request them. From this perspective, it may be argued that even if the baker's activity involves a creative element, his status as a business entity limits his ability to refuse to serve customers on the basis of their identity. This interpretation is consistent with the principle that participation in the public market entails an obligation to ensure equal access to services. In this case, Phillips sought to be recognised not merely as a service provider, but also as a creator, asserting a right to decline to convey a particular message under the First Amendment. These competing perspectives have led to divergent interpretations of the case, illustrating that the outcome depends on which status, commercial actor or expressive creator, is accorded greater legal significance.

Stephen M. Feldman, in his article "Having Your Cake and Eating It Too: Religious Freedom and LGBT Rights," agreed with the Commission's opinion, and emphasised that religion should not be used to justify discrimination. He supported Justice Ginsburg's distinction between a baker's refusal to create a cake because of a requested message, and a refusal to provide services based on a would-be customer's disability, race, creed, colour, sex, sexual orientation, marital status, national origin, or ancestry. G. Seaquist, M. Barken, and A. Bramhandkar argue against religion being a legitimate reason to discriminate with impunity: "One can imagine numerous scenarios in which business owners profess a religious belief to avoid serving any number of people. A dry cleaner who hates Muslims can claim his religion does not permit him to clean clothes of another faith; a doctor may refuse to treat a pregnant woman who is not married on religious grounds; the list is endless. Since the court provided no guidance on the issue, nor admonishment of Phillip's actions toward the gay men, there appears to be at least a tacit nod of approval for his role in violating the statute and blatantly discriminating" (Seaquist et al., 2019).

In the opinion of the authors, from the perspective of the first position, it can be argued that baker Jack Phillips had no viable alternative for safeguarding his religious convictions, whereas the same-sex couple had the option to seek services from another bakery for their wedding cake. This argument aligns with broader ethical debates regarding professional obligations and moral exemptions. For instance, a parallel can be drawn to the rights of obstetrician-gynecologists who may conscientiously object to performing pregnancy terminations due to deeply held moral or religious beliefs, except in cases where the procedure is necessary to preserve the woman's life. They do not have to prove their religious beliefs to the patient. Conversely, the argument that the same-sex couple could obtain the service elsewhere is unpersuasive, as it underestimates the fact that discrimination entails not only economic consequences but also significant dignitary harm (Giles, 2016). Finally, one must always remember the historical value of religious freedom in the US Constitution: "In the USA, freedom of religion is widely appreciated, not only as a foundational milestone, but as a colonial freedom of those who were persecuted for their religion, and also during the great wars and exterminations of the XX century (e.g. Jewish People, Armenian, Baha'is). So much so that it is the very first of the recognised liberties, and in addition, in a double way (with two protective clauses). What is more, a great part of the USA doctrine considers that it is the key piece, through which has been constructed the building of the rest of Civil freedoms" (Sánchez-Bayón, 2014).

A key question arising from these scenarios is the extent to which professionals providing public services can be exempted from standard obligations based on personal beliefs. In the *Masterpiece* case, religious freedom was ultimately afforded greater legal weight than the rights of sexual minorities, as the baker's refusal to create the wedding cake was considered an exercise of protected religious expression rather than unlawful discrimination. However, the Supreme Court did not establish a general rule according to which religious claims prevail; rather, it held that the Colorado authorities failed to maintain the requisite neutrality toward religion. This highlights a broader tension in legal and ethical discourse regarding the balance between individual conscience and anti-discrimination principles in public accommodations. This tension becomes even more pronounced when assessing whether such exceptions meet the requirements of neutrality and general application formulated, for example, in *the Case of Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872* (1990). In that case, the Supreme Court held that a law is consistent with the Free Exercise Clause if it is *Prima facie* neutral and generally applicable, even where it incidentally burdens religious practices. Accordingly, religious beliefs do not justify exemptions from compliance with neutral laws of general applicability, including those prohibiting the use of controlled substances. The recognition of broad exemptions on religious grounds therefore raises concerns regarding their potential precedential impact, as it risks undermining the effectiveness and coherence of anti-discrimination law within the public marketplace.

It is also possible to predict that perhaps the prevailing political attitudes at the time (D. Trump's governance) could have influenced the wording of the Court's decision, despite the fact that the courts formally remain neutral.

2. The Case of Gareth Lee v. the United Kingdom

The European Court of Human Rights (ECHR) handed down its decision in the case of *Gareth Lee vs. the United Kingdom*, declaring the application inadmissible, but the circumstances should be analysed. In this case, applicant Mr. Gareth Lee planned to attend a private event on 17 May 2014, shortly after the Northern Ireland Assembly had, by a narrow margin, rejected the third motion to introduce legislation enabling same-sex marriage in the jurisdiction. The event aimed to commemorate the conclusion of Northern Ireland's Anti-Homophobia and Transphobia Week and reflect the growing political support for same-sex marriage. He decided to purchase a cake, bringing it to the private event. He had previously purchased items at an establishment called "Ashers Baking Co. Limited" (Ashers) and was aware from a promotional leaflet they had published that they offered a service whereby a cake could be iced with a graphic of the client's own design. The promotional leaflet did not indicate that there was any limitation on the graphics that would be accepted. On May 8 or 9, 2014, he placed an order for a cake, providing an A4 sheet featuring an image of "Bert and Ernie" (well-known children's television characters), the QueerSpace logo, and the slogan "Support Gay Marriage." His order was accepted without objection, and he completed the purchase, receiving both a receipt and confirmation of payment.

But on 12 May 2014, Mr. Gareth Lee received a telephone call from Ashers indicating that the order could not be fulfilled. The reason given was that they were a Christian business and should not have taken the order. An apology and a refund were offered to the applicant. He was able subsequently to find another bakery to provide a cake with the required design.

Mr. Gareth Lee applied for legal advice and made a complaint to the Equality Commission for Northern Ireland. With their support, he filed a lawsuit in the County Court against Ashers for breach of statutory duty related to the provision of goods, facilities, and services. He alleged that he had been subjected to discrimination in violation of The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and/or The Fair Employment and Treatment (Northern Ireland) Order 1998. These domestic laws prohibit both direct and indirect discrimination based on sexual orientation, political opinion, or religious belief. In the proceedings of the County Court, Mr. Gareth Lee argued that the McArthurs (owners of Ashers Baking Co. Limited) "took exception to his sexual orientation, which they considered sinful; and that, in placing the order, he had not asked them to support or promote his cause, but rather to bake a cake. The McArthurs, on the other hand, argued that the order was refused not because of the applicant's sexual orientation, of which they had no knowledge, but rather because they believed that providing the cake would have promoted and supported the political campaign for legalisation of same-sex marriage in Northern Ireland, which they regarded as sinful and against their Christian beliefs. They would have supplied the cake to the applicant, absent the slogan, and they would have refused to supply a cake to a heterosexual or bisexual customer requesting the same or similar slogan" (*Application no. 18860/19, Gareth LEE against the United Kingdom, 2021*). The County Court found in the applicant's favour, stating that "the defendants had directly discriminated against the applicant on the ground of his sexual orientation contrary to the 2006 Regulations, for which there could be no justification. As Ashers was not a religious organisation, but rather a commercial business run for profit, notwithstanding the McArthurs' genuine religious beliefs, there were no exceptions available under the 2006 Regulations that applied to this case. In this regard, the court noted that Christian-owned businesses had been excluded from the exception in Regulation 16 of the 2006 Regulations" (*Application no. 18860/19, Gareth LEE against the United Kingdom, 2021*). The County Court recognised the right to manifest religion and the right to private life as competing rights under the European Convention on Human Rights (Convention), but the McArthurs could not do so in

the commercial sphere if this would be contrary to the rights of others. Insofar as the applicant's complaint was brought against Ashers, rather than its owners, the County Court found that as a limited company it could not itself invoke the protection afforded by Article 9 of the Convention.
The defendants appealed the decision to the Court of Appeal. This court found that there had been associative direct discrimination against the applicant on the ground of sexual orientation. According to J. Giles, "it then considers the case through a theological lens and suggests a way forward for Northern Ireland along the American model of exempting those seeking to exercise a religious conscience in the commercial context in certain limited circumstances" (Giles, 2016). The Supreme Court granted the defendants permission to appeal, finding that the act of refusing to bake the cake was not prohibited discrimination on grounds of sexual orientation, the objection was to the message and not to any particular person or persons: the matter was that by being required to produce the cake, they were being required to express a message with which they deeply disagreed. For the Supreme Court, it was acceptable evidence that the bakery had both employed and served gay people and treated them in a non-discriminatory way. "It did not, therefore, accept that the reason for refusing to supply the cake was that the applicant was thought to associate with gay people: the reason was the McArthurs' religious objection to gay marriage <...> The court further noted that the benefit from the message on the cake of support for gay marriage could accrue not only to gay people but also to the children, parents, families, and friends of gay people who wished to marry. It concluded therefore, that there was a lack of sufficiently close "association" in the circumstances for a finding of associative direct discrimination to be upheld" (*Application no. 18860/19, Gareth LEE against the United Kingdom, 2021*). The importance of Christianity in Northern Ireland also led to this decision: "Commercial enterprises do not on the face of it come within the definition of 'religious organizations' so that this would not assist in the assessment of proportionality in so far as it could not act as a trump card for the bakers in that test. However, in a country such as Northern Ireland where Christian values undergird much of public life it may be arguable that in a decision such as that in Lee the Courts should have 'particular' regard to the exercise by members of the churches of their convention right to freedom of thought, conscience and religion as members of the church acting collectively <...> Alternatively in order to accord particular regard to the religious freedom of the members of a particular religious organization it would be possible to look towards the USA model of exemption by building exemption for conscientious objection into the equality legislation" (Giles, 2016). The Supreme Court also recalled that Article 9 and 10 of the Convention are qualified rights which may be limited or restricted in accordance with the law and insofar as this is necessary in a democratic society in pursuit of a legitimate aim. It found that:

"*... The bakery could not refuse to provide a cake – or any other of their products – to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different – obliging them to supply a cake iced with a message with which they profoundly disagreed.*"

So, the Supreme Court (Lady Hale gave the leading judgment, with which Lord Kerr, Lord Hodge, Lady Black, and Lord Mance agreed) decided that there had been no discrimination against the applicant on grounds of sexual orientation. Meanwhile, in the case *Bull and another v Hall and another* (2013) UKSC 73, which concerned the refusal to provide hotel accommodation to a same-sex couple on religious grounds, the United Kingdom Supreme Court held that such refusal constituted unlawful discrimination. However, the circumstances of that case differ in a significant respect from those in *Lee v Ashers Baking Company Ltd.* In *Bull*, the provision of a double room does not inherently involve endorsement of conduct contrary to the providers' religious beliefs, whereas in Lee, the service requested arguably entailed the creation of an expressive product. This distinction highlights the varying degrees of proximity between the service provided and the expression perceived as conflicting with religious convictions. However, according to Giles, "In the Lee case the business owners were being asked to engage more directly with what they regarded as wrong doing. This does not mean that they were being asked to engage in same-sex marriage, but that they were being asked to write something on a cake which supported a position which was currently unlawful and which parliament and

potentially the community around them found to be so <...> It is this closer connection to the act to which the service provider objects in Lee that distinguishes it from Preddy and should have been taken into account in the Courts weighing up of the factors relevant to the proportionality exercise" (Giles, 2016). A similar situation was addressed in the case *Brennan v. Noel Tuite t/a Beulah Print (2018)*, where the Tribunal found that the complainant was discriminated against by the respondent on grounds of sexual orientation but was not discriminated against on the ground of religion (O'Halloran, 2020).

It was also mentioned in the case of *Masterpiece Cakeshop Ltd v. Colorado Civil Rights Commission,* highlighting differences between these cases — the content of the message on the cake, and the refusal to sell any cake at all.

Mr. Gareth Lee made an appeal to the European Court of Human Rights, complaining that this Supreme Court judgment allowing the defendants' appeal, and setting aside the declarations and order for damages made by the County Court, violated his rights under Articles 8, 9, 10, and 14 of the Convention. The ECtHR found that it was not clear that the facts of the present case, in which the applicant complains only about the judgment of the Supreme Court, fall within the ambit of Articles 8, 9, or 10 of the Convention. Second, the main argument was not about the effect on the applicant's private life or his freedom to hold or express his opinions or beliefs, but rather whether Ashers' bakery was required to produce a cake expressing the applicant's political support for gay marriage. "That is not to say that the facts of the case could not fall within the ambit of Articles 8, 9, and 10 of the Convention. However, the preliminary question of whether Article 14 of the Convention is applicable to the facts of the present case is a fundamental one. It is highly fact-sensitive, and to date, no similar issue has been addressed by the Court. By relying solely on domestic law, the applicant deprived the domestic courts of the opportunity to address this important issue themselves before he lodged his application with the Court" (*Application no. 18860/19, Gareth LEE against the United Kingdom, 2021*). Finally, according to the ECtHR, it was incumbent on the applicant, "to contend that 'reading down' or 'disapplying' the relevant provisions of the 2006 Regulations and the 1998 Order would violate his own rights under Articles 8, 9, 10, or 14 of the Convention. In choosing not to rely on his Convention rights, the applicant deprived the domestic courts of the opportunity to consider both the applicability of Article 14 to his case and the substantive merits of the Convention complaints on which he now relies. Instead, he now invites the Court to usurp the role of the domestic courts by addressing these issues itself" (*Application no. 18860/19, Gareth LEE against the United Kingdom, 2021*). This means that the ECtHR reaffirmed the principle of subsidiarity, emphasising that applicants must first raise their Convention rights explicitly or in substance before domestic courts. In this case, the applicant failed to invoke his Convention rights at the national level, relying instead on domestic anti-discrimination laws. In the opinion of T. Lowenthal, "It is difficult not to feel that a major factor motivating this decision was a desire not to have to engage with the difficult and political substance. There is an interesting analogy with the *Masterpiece Cakeshop* case (which received all too much acontextual citation in *Lee*) <...> The key practical point to take from *Lee* is that the requirement that the applicant raise the *"substance"* of the Convention complaint in domestic courts is to be treated strictly, notwithstanding that it is supposed to be applied with *"some degree of flexibility and without excessive formalism"* (see *Azinas v Cyprus*). If *Lee* is rightly decided (and inadmissibility decisions are final), it now seems that there is a requirement for express pleading of Convention rights" (Lowenthal, 2022). Similar opinions are held by C. Ryan, which viewed the ECtHR's admissibility decision in the *Lee* case as consistent with a trend towards higher procedural standards and narrow decisions on the issue of LGBTIQ rights (Ryan, 2022).

Probably, in other circumstances, if the case had been admissible, the ECtHR would have had to balance the applicant's rights (non-discrimination in access to goods and services) against the bakers' rights (freedom of religion). However, given previous rulings, the ECtHR might have leaned toward recognising the bakers' rights, as the UK Supreme Court did, arguing that the refusal was based on opposition to the message (support for gay

marriage) rather than discrimination against the applicant personally, because this case also closely parallels Masterpiece Cakeshop v. Colorado Civil Rights Commission.
Both in this case and *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* the subject of the dispute is the same — refusal to bake a cake. On the other hand, the Supreme Court's decision is based on the state's neutral position towards religion. Meanwhile, in the context of the European Convention on Human Rights and the dispute that arose, the issue is raised from a broader perspective, i.e., regarding the right to private life, religion and beliefs. In this case, the Supreme Court's approach is more absolutist towards one or another right, while the ECtHR usually seeks balancing decisions in the context of human rights. The jurisprudence of the Supreme Court of the US places greater emphasis on protection against forced speech, while the ECtHR prioritises proportionality and the assessment of real discriminatory impact. This shows that the direction of legal decisions depends not only on the factual circumstances but also on a broader constitutional approach to the balancing of rights.

Hornby, Gerard A.. in the article "Let Them Eat Cake: A Comparative Analysis of Recent British and American Law on Religious Liberty," concluded that, socially, a more productive dialogue is necessary; politically, a more embracing collective is needed; legally, a commitment in the vein of Justice Kennedy and Lady Hale to ensure that fundamental values are not sacrificed must be continued. Courts cannot change beliefs, no matter how discriminatory, intolerant, or unpopular. But they can — and, indeed, must — retain the principles of tolerance necessary for a free society to ensure that all interests are equally considered (Gerard, 2020).

Conclusions

Despite the criticisms of the *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* case, it is argued that it is not always possible to establish a proper balance between competing rights, as much depends on the validity of the evidence (Phillips presented a sufficient number of arguments to defend his religious beliefs), the context of the broader institutional and social environment and political tendencies. The decision of this case should also be assessed in terms of how many alternatives J. Phillips had in refusing to make the cake due to his religious beliefs, comparing it with the same-sex couple, who could order a cake in another shop. However, this factor alone cannot be determinative in establishing whether discrimination has occurred. Even if alternative services are available, the applicants' rights may still be restricted. Accordingly, the legal analysis must extend beyond the formal consideration of the "availability of alternatives," and assess whether the refusal contributes to structural inequality within the public marketplace. This case demonstrates that the conflict between religious freedom and the rights of sexual minorities in the context of anti-discrimination law cannot be resolved solely through abstract prioritisation; rather, it requires a contextual and proportionate assessment.

The European Court of Human Rights handed down its decision in the Gareth Lee v. United Kingdom case, declaring the application inadmissible because the applicant failed to invoke his Convention rights at the national level. But a few observations should be mentioned: First, the ECtHR mentioned the importance of resolving these disputes in a tolerant way (mentioning the Masterpiece case); second, considering the delicate nature of the balancing exercise within the specific national context, it admitted that the domestic courts were in a stronger position than the ECtHR to determine the appropriate balance between the applicant's and defendant's competing Convention rights. This means that states are left with a certain amount of discretion in dealing with sensitive moral and social issues. This raises concerns about the coherence and consistency of the application of human rights protection standards at the European level.

Furthermore, these two cases illustrate the broader challenges that courts face when determining whether refusals of service constitute discrimination based on identity or the permissible rejection of a specific message. Both decisions highlight a growing judicial tendency to distinguish between objections targeting a protected characteristic and objections aimed at the expressive content of a requested service. This distinction, however,

remains contested and may produce inconsistent outcomes across jurisdictions. The Masterpiece Cakeshop, Ltd and Gareth Lee cases demonstrate that domestic courts and international bodies of human rights alike must navigate complex intersections of freedom of expression, freedom of religion, and equality norms while being mindful of the social and political contexts in which these disputes arise. Ultimately, the evolving jurisprudence in this area suggests that no uniform solution is likely to emerge soon; instead, courts will continue to approach such conflicts on a case-by-case basis, weighing the competing rights at stake and the proportionality of any limitations imposed.

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