

# The Dispute about a Wedding Cake – Homosexuality v. Freedom of Expression and Religion in a Pluralistic Society

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## I. Pluralistic Societies as Risk Societies

Modern Western societies are pluralistic: They are composed of many groups of different cultural, ethnic and social origins with different sexual orientations as well as secular or religious creeds and political opinions. Just because of that diversity our societies are risk societies in the sense that conflicts between those different groups are likely. I will try to demonstrate how such conflicts can be solved in a way that is appropriate for a constitutional state I will try to demonstrate using the example of a dispute about a wedding cake. The initial case is set in the U.S.A.

## II. The Initial Case in the United States of America

### 1. The U.S. Supreme Court Introduces Same Sex Marriage by Re-interpreting the Constitution

It came as a real bombshell when the U.S. Supreme Court decided three years ago in *Obergefell v. Hodges*<sup>1</sup> by five votes to four that same-sex couples had a fundamental right to marry guaranteed by the U.S. Constitution. Consequently, the States were henceforth obliged to offer the possibility of marriage to same-sex couples and to recognise same-sex marriages validly concluded in another State.

For the time being, this judgment constitutes the culmination of the struggle for equal rights of homosexuals in the U.S. In Germany, we took a different path. Same-sex marriage was introduced by a federal statute in 2017<sup>2</sup> and since then there has been a discussion as to whether that statute is compatible with the German constitution (the Basic Law [BL]).<sup>3</sup> As a matter of fact, Art. 6(1) BL places 'marriage' under the special protection of the state but does not define 'marriage'. I do not expect the Federal Constitutional Court to strike down the same-sex marriage statute. This is because the Court has decided in several cases that the discrimination of registered partnerships entered into by homosexuals in comparison with marriages entered into by heterosexuals violated the equal treatment provision in Art. 3(1) BL.<sup>4</sup> It would be surprising if that same Court now found that the final step towards equal treatment of homosexual and heterosexual couples by offering the possibility of marriage to the former was unconstitutional.

Interestingly, the majority of the U.S. Supreme Court derived the new fundamental right to marry for same-sex couples from both the Due Process Clause and the Equal Protection Clause of the XIVth Amendment.<sup>5</sup> That dual constitutional basis has a liberty and an equality component which interlock and produce synergetic effects.

1 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015).

2 Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts of 20 July 2017 (BGBl. I, p. 2787).

3 See the extensive discussion in *Wollenschläger/Coester-Waltjen*, *Ehe für alle*, 2018.

4 BVerfGE 124, 199; 131, 239; 133, 59; 133, 377.

5 '... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'.

The fundamental liberties protected by the Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs, such as marriage irrespective of sexual orientation. The Equal Protection Clause prohibits discrimination based on sexual orientation regarding the exercise of the fundamental right to marry. The majority also underlined that the Constitution did not require the affected persons, who constituted a small minority, to postpone the exercise of their fundamental rights and suffer pain and humiliation until the democratic process succeeded in rallying the necessary political majority for legislative action to remedy their situation.

The four dissenting Justices sharply rebuked the majority for what they considered as a distortion of the Constitution and an attack on democracy in America. The majority had replaced the rule of the people and of law by the rule of a small unelected judicial elite amounting to a coup. The majority on their part was well aware that they had engaged in the progressive development of the Constitution in a hotly disputed area. In order to appease critics, they pointed out the limits of their decision: The Constitution did oblige States to provide homosexual couples with access to marriage on equal terms with heterosexual couples. However, by its First Amendment<sup>6</sup> it also ensured that those who opposed same-sex marriage for religious or secular reasons could continue to do so.

How far the rights of those opponents extend was the subject-matter of the Colorado wedding cake case.

## **2. Conflict between State Antidiscrimination Laws and the Freedoms of Expression and Religion of the U.S. Constitution**

### **a) The Wedding Cake Case of the Colorado Court of Appeals Concerning the Application of the Colorado Anti-Discrimination Act**

Two men wanted to order a wedding cake at the Masterpiece Cakeshop in Colorado for the celebration of their same-sex marriage. The owner Phillips refused to produce a wedding cake for them and invoked his sincerely held Christian-conservative religious conviction that marriage was open only to heterosexual couples. He offered to provide the couple with other bakery products, but not a wedding cake. The couple thereupon lodged a complaint with the Colorado Civil Rights Commission accusing the shopkeeper of violating the Colorado Anti-Discrimination Act. CADA prohibits businesses engaged in sales and the offering of services to the public from denying to anyone the full and equal enjoyment of their goods and services because of sexual orientation. The Commission allowed the complaint.

6 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press ...'.

The action brought by the Masterpiece Cakeshop and its owner against the decision of the Commission was dismissed by the Colorado Court of Appeals.<sup>7</sup> The CCA found that neither the freedom of expression nor the freedom of religion of the plaintiffs was violated.

Regarding the freedom of expression, plaintiffs argued that the decision of the Commission compelled them to convey a celebratory message about same-sex marriage in the form of a wedding cake which they opposed for religious reasons. The production of a wedding cake amounted to symbolic speech. The Commission had tried to compel expressive conduct from them in violation of their freedom of expression under the First Amendment. While it is well established that nobody may be compelled to disseminate the government's message, the CCA determined that the production of a wedding cake for a same-sex marriage was not sufficiently expressive to be covered by the First Amendment's prohibition of compelled speech.

The CCA also denied any violation of plaintiffs' freedom of religion protected by the Free Exercise Clause of the First Amendment. Since the *Peyote* case of 1990, the U.S. Supreme Court uses no more than a rational basis test when scrutinising interferences with the free exercise of religion by neutral laws of general applicability.<sup>8</sup> Where such laws are rationally related to a legitimate governmental interest, they survive a constitutional challenge. Nobody may excuse illegal practices because of their religious beliefs. 'To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.'<sup>9</sup> It is within the discretion of the legislature to determine whether exceptions to statutory precepts should be permitted to accommodate opposition based on religious beliefs. There is no constitutional duty to do so.

In the eyes of the CCA, CADA easily survived the rational basis test. The State of Colorado obviously had a legitimate interest in eliminating discrimination by businesses engaged in sales and the offering of services to the public. This interest was promoted in a reasonable way. All in all, the action by the cake-shop and its owner was ill-founded.

The homosexual couple who had been refused service could only rely on CADA. They did not have any fundamental rights-based claims either against Masterpiece Cakeshop and Phillips or against the State of Colorado for being protected from discrimination on grounds of sexual orientation.<sup>10</sup> In this regard, the constitutional situation in the United States is not only different from that in Germany.<sup>11</sup> Rather, U.S. constitutional law has not followed developments in regional and global international

7 Colorado Court of Appeals, No. 14CA1351, 370 P.3d 272, *Craig and Mullins v. Masterpiece Cakeshop, Inc. and Phillips*, decided on 13 August 2015, , <http://www.scotusblog.com/wp-content/uploads/2016/08/16-111-op-bel-colo-app.pdf> (12/10/2018).

8 US Supreme Court, 494 U.S. 872 (1990), *Employment Division, Department of Human Resources of Oregon v. Smith*.

9 US Supreme Court, 98 U.S. 145, 167 (1879), *Reynolds v. United States*.

10 See US Supreme Court, 545 U.S. 748 (2005), *Town of Castle Rock, Colorado v. Gonzalez*.

11 On the fundamental rights based protective duty of the state in Germany, see Calliess, Schutzpflichten, in: Merten/Papier (eds.), *Handbuch der Grundrechte* vol. II, 2006, § 44, pp. 963 ff.

human rights law either, where a protective duty of States has become well-established.<sup>12</sup>

**b) The Certiorari Procedure in the U.S. Supreme Court against the Judgment of the CCA: Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission**

Plaintiffs petitioned the U.S. Supreme Court for a purely discretionary writ of certiorari.<sup>13</sup> In this case, the Court granted the petition which it rarely does. The question to be decided was formulated thus: ‘Whether applying Colorado’s public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.’

While a number of civil rights organisations supported the homosexual couple, the U.S. Department of Justice sided with the cakeshop owner. This was in accordance with a Memorandum on federal law protections of religious liberty of 6 October 2017 which the Attorney General had addressed to all executive departments and agencies upon an instruction by President Trump. In that Memorandum, the Attorney General emphasised the importance of religious liberty and directed that to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity.<sup>14</sup> This constituted an about-face compared with the Obama Administration that had instead emphasised the necessity of protecting homosexuals.

The oral proceedings before the U.S. Supreme Court on 5 December 2017 lasted longer than usual and were quite turbulent, with Justices frequently interrupting counsel and each other.<sup>15</sup> In the Masterpiece Cakeshop case the Court could have handed down a landmark decision, but it missed that opportunity. On 4 June 2018, the U.S. Supreme Court reversed the judgment of the CCA by seven votes to two because the Colorado Civil Rights Commission had violated the freedom of the cake shop owner to exercise his religion.<sup>16</sup> The majority initially stated that the case presented difficult questions as to the proper reconciliation of two principles. The first was the authority of a State to protect the rights and dignity of gay persons who are,

12 Because of the events in Castle Rock which were the subject-matter of the U.S. Supreme Court decision in fn. 11 the Inter-American Commission on Human Rights determined that the U.S. had violated its protective duty pursuant to the American Declaration of the Rights and Duties of Man of 2 May 1948 (Report No. 80/11 of 21 July 2011, Case 12.626 [Merits], *Jessica Lenahan [Gonzalez] v. United States*, [www.oas.org/en/iachr/decisions/2011/uspu12626en.doc](http://www.oas.org/en/iachr/decisions/2011/uspu12626en.doc) (12/10/2018)).

13 28 U.S. Code § 1257; Rule 10 of the Rules of the Supreme Court of the United States of 27 September 2017, <https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf> (12/10/2018).

14 <https://www.justice.gov/opa/press-release/file/1001891/download> (12/10/2018).

15 [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16-111\\_f314.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf) (12/10/2018).

16 US Supreme Court, 584 U.S. \_\_\_, 138 S. Ct. 1719 (2018), *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.

or wish to be, married but face discrimination when they seek goods or services. The second was the right of all persons to exercise the freedoms of expression and religion under the First Amendment, as applied to the States through the Fourteenth Amendment. The majority also pointed out that the free speech aspect of the case was difficult.

Ultimately, however, the majority avoided a clear answer to the fundamental questions involved and settled for a narrow decision based on the particular facts of the case: 'Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality.' The majority found that the Commission decision had been based on inadmissible religious hostility towards the shop-owner. Whatever the outcome of some future controversy involving facts similar to these, the Commission's failure to preserve neutrality had violated the Free Exercise Clause in the instant case.

It is immediately obvious that the narrow majority decision will not terminate the discussion in the U.S. on how the freedom of religion can be reconciled with the protection of sexual minorities against discrimination. The 'culture war' between the religious conservatives and the liberals has not been ended. Striking a proper balance between the two conflicting interests amounts to the squaring of the circle. In all this, the necessary synthesis must be based on a rather simple rule whose application in future cases is reasonably foreseeable. Otherwise legal certainty will be compromised, and a surge of cases will overwhelm the judiciary. The majority of the U.S. Supreme Court has simply postponed the solution to these problems and thereby done a disservice to legal certainty.

### III. Comparative View on the Legal Situation in Germany

#### 1. Statutory Framework: General Equal Treatment Law (*Allgemeines Gleichbehandlungsgesetz*)<sup>17</sup>

If a commercial bakery in Germany refused delivery of a wedding cake to a same-sex couple because the owner opposed same-sex marriage for religious reasons, it would violate the prohibition of discrimination on grounds of sexual identity pursuant to Section 19(1) of the General Equal Treatment Law.<sup>18</sup> That law goes beyond the EU

17 Art. 1 of the Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung of 14 August 2006 (BGBl. I, p. 1897), as amended, <https://www.gesetze-im-internet.de/agg/AGG.pdf> (12/10/2018).

18 Section 19: Prohibition of Discrimination Under Civil Law

(1) Any discrimination on the grounds of race or ethnic origin, sex, religion, disability, age or sexual orientation shall be illegal when founding, executing or terminating civil-law obligations which ... typically arise without regard of person in a large number of cases under comparable conditions (bulk business) or where the regard of person is of subordinate significance on account of the obligation and the comparable conditions arise in a large number of cases ..., translation available at [https://www.gesetze-im-internet.de/englisch\\_agg/englisch\\_agg.html#p0101](https://www.gesetze-im-internet.de/englisch_agg/englisch_agg.html#p0101) (12/10/2018).

antidiscrimination Directives which it undertakes to transpose into German law because the Directives do not include any general prohibition of discrimination on account of sexual orientation. If the couple brought an action against the bakery for an injunction and damages on the basis of Section 21 of the General Equal Treatment Law<sup>19</sup> and won, the bakery owner could lodge a constitutional complaint with the Federal Constitutional Court against that judgment.<sup>20</sup>

How would the FCC decide, provided that it considered the statutory introduction of same-sex marriages to be constitutional? The FCC would probably allow the civil courts a certain margin in balancing the conflicting fundamental rights positions. It would thus only intervene if the balance struck by the challenged judgment was fundamentally flawed.<sup>21</sup>

## **2. Conflict between the Freedoms of Profession and Religion of the Bakery Owner and the Non-discrimination Claim of the Homosexual Couple**

### **a) Freedom of Profession of the Bakery Owner**

The shop owner's decision to refuse delivery of a wedding-cake would be protected by his freedom of profession pursuant to Art. 12(1) BL<sup>22</sup> which is not guaranteed in the U.S. Constitution. In contrast to the Masterpiece Cakeshop in Colorado, the German baker would not need to take the detour via the freedom of expression. The prohibition of discrimination set forth in the General Equal Treatment Law and its judicial implementation would constitute interferences in the freedom of profession. But that interference could be justified by overriding requirements in the public interest provided that the interference was proportional.<sup>23</sup>

In the instant case, such overriding requirements in the public interest would be easily identifiable. By enacting the enforceable prohibition of discrimination, the German State fulfilled its obligation to protect individuals against discrimination by busi-

19 Section 21: Enforcement

(1) Where a breach of the prohibition of discrimination occurs, the disadvantaged person may ... demand that the discriminatory conduct be stopped. Where other discrimination is to be feared, he or she may sue for an injunction.

(2) Where a violation of the prohibition of discrimination occurs, the person responsible for committing the discrimination shall be obligated to compensate for any damage arising therefrom. This shall not apply where the person committing the discrimination is not responsible for the breach of duty. The person suffering discrimination may demand adequate compensation in money for non-pecuniary damage. ... (For the source, see the preceding fn. 18; translation of last sentence corrected by the author).

20 Art. 93(1) no. 4a BL; Sections 13 no. 8a, 90 – 95 of the Law on the Federal Constitutional Court.

21 See Federal Constitutional Court (Chamber), Order of 30 July 2003 (1 BvR 792/03), margin note 17.

22 Art. 12(1) BL: All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law. ....

23 See BVerfGE 95, 173 (183).



nesses that are inconsistent with Art. 3(1) or (3) BL.<sup>24</sup> These protective duties of Germany regarding discrimination by private persons<sup>25</sup> in particular with regard to distinctions prohibited by Art. 3(3) BL can also be derived from various international treaties.<sup>26</sup> In the instant case, there is no doubt that the German State is subject to a constitutional and international obligation to protect the homosexual couple from discrimination by the bakery owner.

### b) Freedom of Religion of the Bakery Owner

Since Art. 12(1) BL provides only limited protection to the bakery owner, he would also invoke his freedom of religion pursuant to Art. 4(1) BL to justify his refusal of delivery.<sup>27</sup> The German Basic Law does not expressly subject the fundamental freedom of religion to any limitation provided by law. According to the settled case-law of the FCC, that freedom is subject only to limitations implicit in the BL as such which derive from conflicting principles of constitutional law such as the fundamental rights of others.<sup>28</sup> These limitations which are inherent in the BL as a consistent body of law can be retraced and concretised by the legislature in the form of a declaratory enactment but they cannot be redrawn in accordance with their own legislative discretion. If interferences with the freedom of religion are to be justified on the basis of limitations inherent in the BL, these limitations must have been concretised by a statute in order to fulfil the requirement that limitations of fundamental rights must be provided by a parliamentary enactment.<sup>29</sup>

The refusal of a bakery owner to deliver a wedding cake to the homosexual couple because he opposes homosexual marriage for religious reasons is squarely covered by his freedom of religion under Art. 4(1) BL. The fundamental right of equality of the couple under Art. 3(1) BL in conjunction with the State's protective duty constitute limitations of the baker's freedom of religion inherent in the BL. These limitations have been concretised by §§ 19, 21 of the General Equal Treatment Law.

Since the limitation of the bakery owner's freedom of religion for reasons inherent in the BL has to be proportional, the case boils down to a balancing of the conflicting fundamental rights positions derived from Art. 4(1) BL and Art. 3(1) BL. According to German constitutional doctrine, the goal of that balancing process is to establish a

24 Art. 3 BL: (1) All humans are equal before the law. ... (3) Nobody shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. ....

25 See BVerfG, order of 11 April 2018 (1 BvR 3080/09), margin notes 31 f.

26 See, e.g., Art. 2(1), 26 of the International Covenant on Civil and Political Rights of 16 December 1966 (UNTS vol. 999, p. 171); Art. 2, 5 of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (UNTS vol. 660, p. 195); Art. 2 of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (UNTS vol. 1249, p. 13).

27 Art. 4(1) BL: Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable. ....

28 BVerfGE 52, 223 (246 f.); 93, 1 (21); 108, 282 (297).

29 BVerfGE 108, 282 (297).



practical concordance, *i.e.* a synthesis of the conflicting rights in the sense of a gentle reconciliation so that each of them is brought to bear as much as possible.<sup>30</sup> The freedom of religion and the right to equality are basically of equal value because they embody different aspects of human dignity that is the linchpin of German constitutionalism guaranteed in Art. 1(1) BL.<sup>31</sup> With regard to the right to equality, this holds particularly true with regard to personalised differentiation criteria which are close to the criteria expressly prohibited by Art. 3(3) BL, such as sexual orientation.<sup>32</sup> The discrimination of persons because of their sexual orientation infringes the human dignity core of the right to equality that all public authorities have the duty to protect pursuant to Art. 1(1) sentence 2 BL.

It cannot be anticipated with any kind of certainty what the result would be if the FCC was called upon to balance the freedom of religion and the right to equality in such a wedding cake case. The Court has in some cases determined that the State was obliged to grant exceptions from general laws to accommodate religious beliefs. But none of those general laws had such a firm constitutional basis as in the wedding cake case – the fundamental right of equality. In the wedding cake case, the FCC would presumably give primacy to the general interest in eliminating discrimination of homosexuals in public life over the freedom of religion of the bakery owner. It would probably determine that the obligation of the bakery to deliver a wedding cake to the homosexual couple was not a grave interference in the baker's freedom of religion.

#### IV. European Perspective: Northern Irish Case Brings the European Convention on Human Rights into Play

##### 1. The Belfast Cake Case in the Courts of Northern Ireland

A legal dispute similar to the Masterpiece Cakeshop case has just been decided by the UK Supreme Court. It originated in Northern Ireland. There a homosexual activist of the QueerSpace organisation which advocates the rights of the LGBT community of lesbians, gays, bisexuals and transgender people had ordered a cake from a Belfast bakery. The cake he ordered was not a wedding cake but a cake which should bear the QueerSpace logo and the caption 'Support Gay Marriage'. The bakery refused delivery. The owners claimed that they were running a Christian business and opposed same-sex marriage for religious reasons. This incident took place at a time when the Northern Ireland Assembly was debating ultimately unsuccessful motions to intro-

30 *Kommers/Miller*, The Constitutional Jurisprudence of the Federal Republic of Germany, 3<sup>rd</sup> ed. 2012, pp. 67 f.

31 BVerfGE 33, 23 (28 f.) on Art. 4(1) BL. On the human dignity content of the general principle of equality see *Kirchhof*, Allgemeiner Gleichheitssatz, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, vol. VIII, 3<sup>rd</sup> ed. 2010, § 181, margin notes 51 f.

32 See BVerfGE 124, 199 (220); 133, 377 (408).

duce same-sex marriage. The judicial evaluation of that case requires inclusion of the European Convention on Human Rights.<sup>33</sup>

The turned-away customer brought an action against the bakery and its owners for discrimination and prevailed in the first- and second-instance courts in Northern Ireland. The unsuccessful defendants appealed to the UK Supreme Court posing the following questions:

1. Whether the Appellants directly discriminated against a customer on the grounds of sexual orientation and religious and political belief, contrary to various Northern Ireland regional laws by refusing to make a cake decorated with the words 'Support Gay Marriage'.

2. Whether the relevant provisions of Northern Ireland law breached the Appellants' rights under Article 9 and/or 10 of the European Convention on Human Rights, separately or together with Article 14 of the Convention.

Art. 9 ECHR protects the freedom of religion, Art. 10 ECHR the freedom of expression and Art. 14 ECHR prohibits discrimination in the enjoyment of the rights and freedoms set forth in the Convention, including discrimination based on sexual orientation.<sup>34</sup> Pursuant to the Human Rights Act 1998,<sup>35</sup> the Convention provisions are directly applicable in the UK with the force of an Act of Parliament, in lieu of the inexistent constitutional human rights catalogue.

Since the Belfast cake should bear an explicit message, in contrast to the Colorado cake, the negative freedom of expression (prohibition of compelled speech) is applicable. The question is, however, whether the message iced on the cake was attributable only to the customer or also to the shop owners. The Northern Irish Court of Appeal denied the attributability to the shop owners and accordingly found that there was no interference with their freedom of speech.<sup>36</sup> As far as the freedom of religion is concerned, the two cases are similar. In this regard, the Court of Appeal had decided that the interference with the shop owners' freedom of religion was justified on the basis of Art. 9(2) ECHR: It was provided by regional law, necessary in a democratic society for the protection of the rights of others and in accordance with the principle of proportionality. If businesses were free to deny their services to homosexuals for religious reasons, there would be a clear risk of arbitrary abuse. In this regard, the regional law set forth that only religious organisations were exempted from the prohibition of discrimination based on sexual orientation. That exemption was exhaustive, and it was reasonable to limit it to religious organisations.

33 Of 4 November 1950 (ETS No. 5), consolidated version with later amendments available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005> (12/10/2018).

34 According to the settled case law of the European Court of Human Rights, discrimination based on sexual orientation falls under the prohibition set forth in Art. 14 ECHR (ECtHR, Appl No. 40016/98, *Karner v. Austria*, judgment of 24 July 2003).

35 [https://www.legislation.gov.uk/ukpga/1998/42/pdfs/ukpga\\_19980042\\_en.pdf](https://www.legislation.gov.uk/ukpga/1998/42/pdfs/ukpga_19980042_en.pdf) (12/10/2018).

36 Northern Irish Court of Appeal, [2016] NICA 39, *Lee v. McArthur*.

## 2. UK Supreme Court Quashes Lower Court Decision

On 10 October 2018, the UK Supreme Court handed down its unanimous judgment allowing the appeal.<sup>37</sup> The Court firstly held that there was no sexual orientation discrimination of the person who ordered the cake because the bakery did not refuse to fulfil the order because of his actual or perceived sexual orientation but because the owners did not agree with the message on the cake. That message was dissociable from the sexual orientation of the customer because it was intended to benefit not only gay and bisexual people but also their families and friends as well as the wider community who recognise the benefits of gay marriages.

While this reasoning initially appears to be plausible, it is not entirely convincing at closer inspection. Since it is much more likely that homosexuals would order a cake with an iced-on message supporting gay marriage, the viewpoint discrimination engaged in by the bakery amounts to an indirect discrimination on the basis of sexual orientation. According to the definition commonly used in EU law, 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having ... a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary ...'<sup>38</sup> The European Court of Human Rights also extends Art. 14 ECHR to indirect discrimination.<sup>39</sup> The UK Supreme Court should therefore not have denied sexual orientation discrimination but enquired whether it was objectively justified.

Turning to the customer's claim of having been discriminated against because of his political beliefs, the UK Supreme Court found that the message on the cake was arguably indissociable from the customer's political belief so that in this regard they had to enquire whether the direct discrimination against him based on that ground was justified because of the bakery owners' opposing rights, namely their freedom of thought, conscience and religion (Art. 9 ECHR) and their freedom of expression (Art. 10 ECHR). These provisions included the (negative) right not to be obliged to manifest beliefs one does not hold. While the owners could not refuse to sell a cake to the customer because he was gay or supported gay marriage, they could refuse to supply a cake iced with a message with which they profoundly disagreed.

In other words, the UK Supreme Court resolved the conflict between the right not to be discriminated against on the basis of one's political beliefs and the negative freedom of religion and expression entirely in favour of the latter. They should at least have asked the question whether there was a less absolute way to reconcile the two opposing rights, taking into consideration the fact that one of the parties was a business

37 UK Supreme Court, [2018] UKSC 49, *Lee v. Ashers Baking Company Ltd.*

38 See, e.g., Art. 2(2) lit. b of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 02/12/2000, p. 16.

39 ECtHR, Appl. No. 58641/00, *Hoogendijk v. The Netherlands*, decision of 6 January 2005; Appl. No. 57325/00, *D.H. v. Czech Republic*, judgment of 13 November 2007.

offering goods to the general public and can thus be made subject to stricter antidiscrimination rules than private citizens. Thus, the bakery owners could have been referred to the possibility of publicly dissociating themselves from the messages iced on their cakes by displaying a sign to that effect in their shop and posting a pertinent notice on their website. The right to refuse selling a cake because of the iced-on message could have been limited to extreme cases in which the content of the message was criminal (such as an incitement to commit genocide or the display of Nazi symbols<sup>40</sup>) so that the bakery owners would run the risk of becoming themselves criminally liable for aiding and abetting their customer.

### 3. Possible Sequel before the European Court of Human Rights

It is almost certain that the losing party will lodge an individual application with the European Court of Human Rights in Strasbourg pursuant to Art. 34 ECHR. There is one Strasbourg precedent, the 2013 Chamber judgment in the case of *Eweida and others v. UK*.<sup>41</sup> Two of the applicants in that case were Ms. Ladele and Mr. McFarlane. Ms. Ladele was a Christian who was employed as a registrar of marriages by the London Borough of Islington. In 2004, the registration of same-sex civil partnerships was introduced. When Ms. Ladele refused to conduct these partnerships because of a sincerely held objection that they were contrary to God's law she was dismissed. Mr. McFarlane also was a Christian who held a deep and genuine belief that the Bible states that homosexual activity is sinful and that he must not endorse such activity. He was employed by a private organisation which provided a confidential sex therapy and relationship counselling service. When he refused to counsel homosexual couples, he was dismissed. In both cases, the dismissal was upheld by the UK courts.

Ms. Ladele and Mr. McFarlane thereupon lodged individual application with the European Court of Human Rights claiming violations of their freedom of religion under Art. 9 ECHR, taken alone or in conjunction with Art. 14 ECHR. The Strasbourg Court held that Ms. Ladele's dismissal by a public authority constituted a governmental interference in her freedom of religion, whereas regarding Mr. McFarlane, who had been dismissed by a private employer, the State's positive obligation to secure his rights under Art. 9 ECHR was involved. However, the Convention standards to be applied in both cases were similar. In both contexts regard must be had in particular to the fair balance that had to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the wide margin of appreciation enjoyed by the State when it came to striking a balance between competing Convention rights. The Strasbourg Court found in both cases that the precedence given by the national courts to the interests of the community as a whole in

40 These two messages would be criminal pursuant to German law (Sec. 130(I), 86(I) no. 4, 86a Criminal Code). The 'direct and public incitement to commit genocide' is also a crime under international law (Art. III lit. c of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, UN General Assembly Resolution 260(III)A).

41 ECtHR, Appl. Nos. 48420/10, 59842/10 und 36516/10, *Eweida and others v. UK*, judgment of 15 January 2013.

bringing discrimination of homosexuals to an end over the freedom of religion of the applicants was within the UK's margin of appreciation so that the applicants' Convention rights had not been violated.

In the Belfast cake case, the European Court of Human Rights will certainly allow the UK Supreme Court a wide margin of appreciation and only determine whether a fair balance has been struck between the opposing freedoms of gay rights activists and of religious believers. The Strasbourg Court will probably uphold the somewhat tilted balance struck in the Belfast cake case, but its judgment will not be unanimous.

## **V. General Laws and Societal Diversity in the Liberal Constitutional State**

In recent years, the religious and philosophical diversity has increased considerably, in particular in Western immigrant societies. The determination of members of religious or philosophical minorities to demand conscience-based exceptions from general laws of all kinds has also increased. The liberal constitutional order must go far to accommodate them if it wants to do justice to its liberal foundations because freedom is most relevant to those who deviate from the attitudes of the majority. Taking freedom seriously means allowing it precisely to dissenters. In this context, religious and secular dissenters need to be treated alike because in questions of conscience there may not be any discrimination based on the degree of religious motivation.

On the other hand, special caution is advised when people claim that their religion or philosophy commands them to disprove of or despise their fellow humans because of certain inalienable characteristics, or even hate them just as in the age of the religious wars in 16<sup>th</sup> and 17<sup>th</sup> century Europe. Demands for exemptions from laws protecting religious, sexual or other minorities that are made on this basis pose a particular challenge to a state founded on the rule of law. This is because such a state must ensure that the equal dignity and rights of all humans remain inviolable. For the sake of maintaining societal peace, the constitutional state must not grant a general licence to discriminate for religious or philosophical reasons. Otherwise, it would not only surrender its protective laws but ultimately also human dignity to the uncontrollable arbitrariness of private individuals and organisations.

