

Confectionery Excellence in the Flow of Religion and Politics

Cakes and Constitutional Rights before the British and American Supreme Courts

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I Introduction: Christianity and freedom of speech

The expression of religious belief is simultaneously protected by the right to freedom of religion and the right to free expression. Both rights are relied on, for example, by those who protest against the banning of full-face covering Muslim headscarves by certain states.¹ Both rights were similarly invoked by applicants whose employers had prohibited the wearing of a crucifix in their workplace.² Furthermore, freedom of expression also includes the right to remain silent; that is by default, no one can be compelled to express their opinion or the views of others. The question has also been raised before the courts of the United Kingdom and the United States as to whether making a cake constitutes speech and whether the baker may refuse it on the grounds of freedom of religion. The problem that arises is complex and, in addition to freedom of religion and expression, it also raises issues related to ensuring equal treatment for all and even to protecting human dignity. This paper will review these cases and the decisions taken (section II) and analyse them from the points of view of freedom of expression (section III), non-discrimination (section IV), protection of human dignity (section V) and freedom of religion (section VI). It will then briefly address the specific situation of legal entities (section VII) and provide a summary before arriving at conclusions (section VIII).

¹ *Dakir v Belgium* no 4619/12; *SAS v France* no 43855/11; *Dahlab v Switzerland* no 42393/98, admissibility decision; *Sahin v Turkey* no 44774/98.

² *Exweida and Others v the United Kingdom* nos 48420/10 and 59842/10.

II The facts of the cake cases and the decisions of the Supreme Courts

*A Masterpiece Cakeshop, Ltd and Others v Colorado Civil Rights Commission*³

A United States case involved Mr Jack Phillips, the owner and operator of a Colorado-based company called Masterpiece Cakeshop Ltd, who is a master baker and a committed Christian. In 2012, Phillips told a same-sex couple that he was not prepared to make them a wedding cake for their wedding, because he was religiously opposed to same-sex marriage, which was not recognised in Colorado at the time, but that he would be prepared to make other types of cakes, for them, such as a birthday cake. The couple lodged a complaint with the Colorado Civil Rights Commission on the basis of the Colorado Anti-Discrimination Act (CADA), pursuant to the provisions of the act prohibiting businesses selling goods or providing services to the public from discriminating on the basis of sexual orientation. The Commission instituted administrative court proceedings, and the justice hearing the case ruled in favour of the couple. In the proceedings, the justice rejected Phillips's argument based on the First Amendment that it would violate his right to free speech if he were obliged to make a wedding cake for the marriage of a same-sex couple, as he would have to use his artistic skills to convey a message with which he disagreed, and which would also violate his right to practice his religion freely. The Commission and the Colorado Court of Appeals upheld the decision of the court of first instance.

According to the decision of the US Supreme Court, delivered on 4 June 2018, the Commission's proceedings in the case violated the right to the free practice of religion. According to the majority opinion of the Court, written by Justice Anthony Kennedy, the Constitution and various laws can, and in some cases must, ensure the free exercise of rights for gays and gay couples, while at the same time opposing gay marriage on religious or philosophical grounds qualifies as a protected opinion and in some cases as a protected expression of opinion. While it is not surprising that Colorado law provides for gays to have access to goods and services on equal terms with other members of the population, the law must be applied in a religion-neutral manner. Phillips argued that for him his right to freedom of speech under the First Amendment, on the one hand, and his deep and sincere religious convictions when he uses his artistic abilities and his own unique inspiration when making a statement – in this case a wedding greeting – on the other hand, are of particular importance. The dilemma that arose was understandable in 2012, when the state of Colorado had not yet recognised the validity of gay marriages in the state. In the light of the State's position at that time, Phillips's argument that he considered his own decision to be lawful on reasonable grounds is not entirely unfounded.

³ *Masterpiece Cakeshop, Ltd and Others v Colorado Civil Rights Commission* 138 SCt 1719 (2018) [or: 584 US ____ (2018)].

The legislation of the State of Colorado at the time allowed traders a degree of discretion as to whether they could refuse to formulate certain messages that they found offensive. This is underpinned by the fact that, during the proceedings in question, the Colorado Civil Rights Division, which had acted prior to the Commission's proceedings, found in at least three other cases that a baker had acted lawfully in refusing to make cakes decorated with ornaments *insulting* gays or gay marriages. Phillips was also entitled to have his allegations considered in a neutral and respectful manner, taking all the circumstances of the case into account.⁴ (As the Civil Rights Division found the complaint in the *Phillips* case to be well-founded, it referred the matter to the Commission for a decision.)

The Commission's conduct in the *Phillips* case, however, in which there were clear and unacceptable signs of hostility to his religious beliefs in support of his protest, was incompatible with such a neutral assessment. According to the available documents, during a formal and public meeting of the Commission, some members supported the view that religious belief could not legitimately appear in the public sector or in commerce, denigrated Phillips's faith and described it as superficial, and likened his reference to true religious beliefs to a defence of slavery or the Holocaust. No Commissioner objected to such comments, nor were these comments addressed in the subsequent judgment of the national court or in the documents submitted to this Court. These comments call into question the fairness and impartiality of the Commission's conduct in the *Phillips* case.

Another sign of hostility is that the *Phillips* case was treated differently from the cases of other bakers who had previously been successful before the Commission in protesting against anti-gay messages. The Commission ruled against Phillips, in part, on the theoretical basis that any message on the wedding cake that had been ordered could not be attributed to the baker but to the customer. However, this consideration did not arise in other cases heard by the Civil Rights Division concerning orders for cakes bearing symbols of gay marriage. The Civil Rights Division also noted that the other bakeries were willing to sell other products to prospective customers, while the Commission considered Phillips's willingness to do the same to be irrelevant. Concerns raised by Phillips about the State's practice of rejecting a religious protest are not addressed by the circumstance that the Court of Appeal of the State of Colorado briefly addressed the differences in treatment that arose.⁵

For the above reasons, the Commission's procedure in the *Phillips* case infringed the State's obligation under the First Amendment to refrain from applying legislation or regulations based on religion or hostility to religious views. The state may not, in accordance with the constitutional guarantees of the free exercise of rights, make regulations hostile to the religious beliefs of the citizens concerned, nor act in a manner that condemns or presupposes the illegality of religious beliefs

⁴ Ibid. 1727–1729.

⁵ Ibid. 1729–1731.

or practices.⁶ Factors relevant to an assessment of the State's neutrality include 'the historical background to the contested decision, the specific sequence of events leading to the adoption of the legislation in question or official policy, and the legislative and administrative background, including contemporary statements by members of the decision-making body'.⁷ On the basis of these factors, the available documents show that the Commission's conduct was neither tolerant nor respectful of the religious beliefs of the person concerned. The state cannot take – or even suggest – a position on whether the religious basis of Phillips's conscience-based protest is legitimate or unjust.

It follows, therefore, that Phillips's religion-based protest was not examined with the neutrality required by the rules on the exercise of freedom of justice. It would have been possible to weigh the interests of the State against Phillips's genuine religious protest in such a way as to meet the requirement of strictly applicable religious neutrality. The blatantly anti-religious statements in certain Commissioners' remarks do not meet this requirement, however, and a similar conclusion can be drawn from the fact that the Commission acted differently in the *Phillips* case than it did in those connected with other bakers.⁸

*B Lee v Ashers Baking Company Ltd and Others*⁹

A similar case from the United Kingdom involved Mr Daniel McArthur and his wife, Amy – the owners of a bakery in Northern Ireland called Ashers – who are Christians and whose religious belief is that only a marriage between a man and a woman is in line with the teaching of the Bible and the will of God. The cake-making service of Ashers allows customers to ask for a picture or caption to be placed on the cake made for them. In May 2014, a homosexual man, Mr Gareth Lee, wanted to take a cake to an event hosted by supporters of same-sex marriage in Northern Ireland. Lee therefore ordered a cake from Ashers featuring the puppet figures Bert and Ernie and requested that the phrase 'Support gay marriage' be displayed on the cake. Mrs McArthur accepted the order, but later informed Lee that she could not make such a cake with a clear conscience and refunded the amount already paid.

Lee filed a lawsuit against the McArthurs and Ashers Bakery for direct and indirect discrimination based on religious beliefs or political opinions prohibited under the Northern Ireland laws on equality¹⁰ and sexual orientation, as well as

⁶ *Church of Lukumi Babalu Aye, Inc. v Hialeah* 508 US 520.

⁷ *Ibid.* 540.

⁸ *Masterpiece* (n 3) 1731–1732.

⁹ *Lee v Ashers Baking Company Ltd and Others* [2018] UKSC 49.

¹⁰ Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (hereinafter: SORs).

on the right to fair treatment.¹¹ The action was also supported by the Equality Commission for Northern Ireland. The acting district court found that the refusal to fulfil the order constituted direct discrimination on all three grounds. The McArthur couple appealed to the Court of Appeal, arguing that the provisions of the Fair Employment and Treatment Order (FETO) and Equality Act (Sexual Orientation) Regulations (SORs) were incompatible with their rights under the European Convention on Human Rights. The Attorney General also intervened in the proceedings. On 24 October 2016, the Court of Appeal dismissed the appeal and found that Lee had been directly discriminated against on the basis of his sexual orientation, on the one hand, and that there was no need to interpret the provisions of the SORs to take into account McArthurs' rights under the European Convention on Human Rights, on the other hand.

The Supreme Court unanimously held that it had jurisdiction to hear an appeal against any part of the judgment of the Court of Appeal. The Supreme Court allowed the plaintiffs to file an appeal and found that neither the SORs nor the FETO gave rise to civil law liability on the part of the appellants for refusing to express a political opinion contrary to their religious beliefs. The discriminatory part of the judgment was drafted by Lady Brenda Hale, and the jurisdictional part was presented by Lord Jonathan Mance. According to the district court, the appellants did not refuse to fulfil the order because of Lee's perceived or actual sexual orientation. Their protest was against the message expressed on the cake, rather than focusing on the personal qualities of the messaging party¹² or another person related to him.¹³ The message was not inseparable from the client's sexual orientation, as support for gay marriage is not necessarily inherent in any particular sexual orientation.¹⁴ The benefits of the message can be enjoyed not only by gays and bisexuals but also by their families, friends and members of the public who recognise the social benefits of such a commitment.¹⁵ There was therefore no discrimination on grounds of sexual orientation in this case.

In Northern Ireland, protection against direct discrimination based on religious beliefs or political opinions rests on constitutional grounds.¹⁶ Discrimination must be based on the religion or belief of a person other than the person accused of discrimination.¹⁷ Since the appellants' protest was not against Lee but against the promotion of the message to be placed on the cake, the situation is not the same as a refusal to establish an employment relationship or to provide a service based solely

¹¹ Fair Employment and Treatment (Northern Ireland) Order 1998 (hereinafter: FETO).

¹² *Ashers* (n 9) para 22.

¹³ *Ibid.* paras 33 and 34.

¹⁴ *Ibid.* para 25.

¹⁵ *Ibid.* para 33.

¹⁶ *Ibid.* para 37.

¹⁷ *Ibid.* paras 43–45.

on the religious beliefs of the person concerned; rather, that message was an integral part of Lee's political opinion. It was therefore necessary to examine the effect of Mr and Mrs McArthur's rights under the European Convention on Human Rights on the interpretation and scope of FETO.¹⁸

The case clearly concerned the right to freedom of thought, conscience and religion (Article 9) and to freedom of expression (Article 10).¹⁹ These rights include guarantees that no one should be obliged to express a belief that he or she does not profess.²⁰ While the McArthurs would not have been permitted to refuse to sell their product to Lee because of his homosexuality or gay marriage, the situation in this case is different since the couple were being asked to make a cake that displays a message they have fundamentally rejected.²¹ FETO cannot be interpreted or enforced in such a way as to oblige them to do so without due cause, as in the present case.²²

III Issues of freedom of expression

A Cakes as opinions

The categories of speaking and action are, in a sense, inseparable. Almost all our actions carry expressive content: Through an action we can express a certain statement or opinion, and this does not necessarily require either verbal or written text. Certain signs and symbols may in themselves constitute speech in terms of the protection of freedom of expression. An action itself may also be speech, but the boundary must be drawn somewhere for the purposes of granting protection. Even so, we cannot state clearly, for example, that an assassination attempt on a politician is the exercise of free speech, although it undoubtedly carries a message.

Several ways of setting a boundary are possible. We can examine whether the act promoted an interest that can be accepted as a justification for free speech. Has it contributed to democratic decision-making or to the exercise of individual autonomy? We can also examine the act specifically from the perspective of its executor. Did he intend to express something with his action? We may assess the significance of the effect the expression may have; is it necessary for its defence for someone to understand the opinion expressed by the action, or at least to identify it as 'speech'? In one case, a US district court, for example, did not accept the defendant's argument that parking a wrecked car in front of his own house was not illegal because he wanted to express his protest against the police proceedings that had caused the

¹⁸ Ibid. para 48.

¹⁹ Ibid. para 49.

²⁰ Ibid. para 52.

²¹ Ibid. para 55.

²² Ibid. paras 56 and 62.

damage to the car. According to the court, not many people would interpret this act as an expression of opinion.²³ Damage to a public monument may be inflicted as a political expression of opinion, but still be banned by a legal system on valid grounds. Furthermore, it can be argued, as Robert Post has, that speech is not valuable in itself and can only be granted legal protection if it has some constitutional value (be it the service of democracy or the autonomy of the individual).²⁴

In the *United States v O'Brien* case,²⁵ the US Supreme Court ruled that burning a military draft notice, although it may undoubtedly be considered an expression of opinion, violates the state interest in the order and integrity of recruitment. Therefore, the rule that the destruction or damage to draft papers may be sanctioned, and under which Mr David O'Brien was convicted, is not specifically aimed at restricting the freedom of expression but protects other legitimate public interests, hence the verdict was legitimate and the underlying law was not unconstitutional.

In the *Tinker v Des Moines School District* case,²⁶ the Supreme Court found that punishing high school students for wearing black armbands at school in protest against the Vietnam War was not constitutionally permissible because their actions did not interfere with education and did not conflict with the rights of other students. The denigration or burning of the national flag may also constitute speech, which may be covered by the protection of freedom of expression.²⁷ The boundaries of symbolic speech, that is, the expression of opinion without spoken, published words or images, have been extended in recent decades. The increasingly broad interpretation of free speech is well illustrated by the practice of the US Supreme Court, which referred to the striptease presented in night bars and other dances with naked ladies as belonging to the conceptual scope of free speech.²⁸ Theoretical support for this interpretation – although members of the court drew their inspiration from elsewhere – can surprisingly be found in the works of John Milton, who wrote that if censorship was to be reinstated, '[t]here must be licencing dancers, that no gesture, motion, or deportment be taught our youth but what by their allowance shall be thought honest'.²⁹ Naked dance is just one example of the type of actions which may be included in the scope of free speech. In another case, for example, the Supreme Court found that sleeping in a park *en masse* for demonstrative purposes is also 'speech', although another issue is that the interest of maintaining the cleanliness and orderliness of the park is stronger.³⁰ In the *Hurley v Irish American Gay, Lesbian,*

²³ *Davis v Norman* 555 F2d 189 (8th Cir, 1977).

²⁴ Robert C Post, 'Recuperating First Amendment Doctrine', *Stanford Law Review* 47, no 6 (1995), 1249.

²⁵ *The United States v O'Brien* 391 US 367 (1968).

²⁶ *Tinker v Des Moines School District* 393 US 503 (1969).

²⁷ *Street v New York* 394 US 576 (1969); *Texas v Johnson* 491 US 397 (1989); *the United States v Eichman* 486 US 310 (1990).

²⁸ *Barnes v Glen Theatre* 501 US 560 (1991); *City of Erie v Pap's AM* 529 US 277 (2000).

²⁹ John Milton, *Areopagitica*. Ed. by Edward Arber (London: Edward Arber, 1868), 50.

³⁰ *Clark v Community for Creative Non-Violence* 468 US 268 (1984).

and *Bisexual Group of Boston* case,³¹ the ruling mentioned that abstract works of art such as Jackson Pollock's paintings or Arnold Schönberg's atonal musical works, as well as Lewis Carroll's playfully meaningless poems, also fall within the scope of free speech.³² Baking a cake may therefore, in principle, stand a chance of being considered speech in certain circumstances.

In the *Masterpiece Cakeshop* case, Justice Clarence Thomas argued in his concurring opinion that the wedding cake constitutes speech.³³ In his view, if an average person enters a room and sees a white, multi-storey cake, he will know immediately that he has arrived for a wedding. The message of the cake is celebration, and the expressive behaviour of making the cake deserves constitutional protection. In the course of the procedure, the opinion was expressed that making a special wedding cake is akin to traditional sculpture, only with different ingredients.³⁴ Phillips's legal representative also argued during the proceedings that the cakes made by his client were his artistic expressions, through which he communicated. The cake expresses that we are at a wedding, the couple's relationship is 'marriage', and that it all constitutes a reason to celebrate.³⁵

The question, of course, is that even if we accept that, in the specific situation of the example, the cake is speech, whose speech do we think it is? Is it the speech of the cake's maker, or rather that of the couple getting married? (This issue also arises in the next section.) Furthermore, acknowledging the speech nature of the cake raises another difficult issue in the wedding context, the problem of drawing boundaries. If the cake is a speech at a wedding, is a chocolate fountain or an ice sculpture a speech? Does a flower arrangement also constitute speech, or a limousine service with music, or the wording of a greeting?

Another question is whether, in order for a wedding cake to carry a message, it is necessary for someone (anyone) present to understand that message or to view the cake as 'speech'. In other words, most guests – or an acquaintance looking at photographs of the event later – do not think of the wedding cake as an expression of opinion. Is it necessary for the audience to perceive expressive behaviour as speech, and thus as conveying an opinion, in order to recognise its speech nature? If the answer is in the affirmative, this implies that speech is only what its audience – or at least a part of it – considers as such. That is, if an expressive act is not perceived as an opinion by its audience, it cannot claim protection as free speech. In this case, it is also irrelevant whether the

³¹ *Hurley v Irish American Gay, Lesbian, and Bisexual Group of Boston* 515 US 557 (1995).

³² Ibid. 569. See Mark V Tushnet, Alan K Chen and Joseph Blocher, *Free Speech Beyond Words: The Surprising Reach of the First Amendment* (New York: New York University Press, 2017).

³³ *Masterpiece* (n 3) 1742.

³⁴ Richard F Duncan, 'A Piece of Cake or Religious Expression: *Masterpiece Cakeshop* and the First Amendment', *Nebraska Law Review Bulletin* (7 January 2019), 9.

³⁵ Ibid. 10.

audience understands it or, in accordance with the communicator's intentions, how it evaluates the content of the speech.

Pollock's paintings are little understood, but many recognise that they should be valued as works of art in terms of 'speech' and in terms of freedom of speech. If we were to expect the audience to understand the meaning of a given behaviour in order to recognise its speech nature, we would exclude abstract art or instrumental music from the scope of free speech in general. Evaluating a cake as speech is a borderline case, and one that is difficult to decide on. In this specific case, the works of the master baker Phillips represented the artistic level of gastronomy. However, on the basis of objective criteria, it cannot be judged whether we consider this to actually be 'art' – and Phillips as the 'Bernini of buttercream'³⁶ – or rather as the work of a master with a skilful hand who is truly creative but whose work cannot be valued as art. It may also be possible that even less is enough to acknowledge its nature as speech; that is, it is not necessary for the audience to view expressive behaviour as speech: The intention of the creator is sufficient.

If the cake ordered but ultimately not completed in this case constitutes speech, we face additional demarcation issues. According to Justice Neil Gorsuch's concurrent opinion, joined by Justice Samuel Alito, it would be irrational to distinguish between cakes with and without text inscriptions. The wedding cake carries a message without any additional text.³⁷ This message is presumably identical to the message conveyed by wedding cakes which do bear texts and is related to the acknowledgment and approval of the marriage. Nevertheless, there may certainly be a difference between cakes in other respects as well – which also affects issues of the scope of free speech. The intention of the author and the circumstances of use, that is, the context of the speech, determine its meaning and the content of the speech.³⁸ The statement of reasons in the *Masterpiece Cakeshop* decision notes that a refusal to make a cake with an inscription celebrating a wedding may be subject to a different assessment than if the baker generally refuses to sell his cakes to same-sex couples.³⁹

If a cake constitutes speech, it is considered to be speech regardless of whether it has any actual textual content on it. In the case of a text, which qualifies as a political opinion in the *Ashers* cake case, the speech nature of the cake bearing that text can be convincingly argued for. A cake with and without text will be similarly judged, that is, it falls within the scope of free speech (and the protection of free speech either extends to it or not, but that is another matter). However, if the cake is a 'work of art' and the baker is its creator, then not only the wedding cake but also the birthday

³⁶ Steve Sanders, 'Even the Bernini of Buttercream has to Serve Gay Couples', *NY Times*, 2 December 2017.

³⁷ *Masterpiece* (n 3) 1738.

³⁸ James Hart, 'When the First Amendment Compels an Offensive Result: *Masterpiece Cakeshop, Ltd v Colorado Civil Rights Commission*', *Louisiana Law Review* 79, no 2 (2018), 419, 429.

³⁹ *Masterpiece* (n 3) 1723.

cake he makes is a speech, also regardless of its possible textual content. We can go even further: If the cake as a special work of art *generally* constitutes speech, then any cake, regardless of the occasion it is made for or if it is intended for general use, may be speech, and the refusal to sell it – construed within the meaning of the right to free speech as the voluntary silence of its maker – must be treated similarly.

From the reference in the *Masterpiece* decision, we can conclude that the court saw this differently, but did not have to make a general statement on the speech nature of the cake based on the facts of the particular case. If we argue that not all cakes constitute speech, then it is necessary to judge under what circumstances the cakes ordered and completed are considered speech, and what design of cakes are considered speech. (Is a homemade cake for a Sunday lunch considered speech? After all, it carries a message: It expresses something about the value of the family table and togetherness.) In any case, if we argue in favour of extending the scope of free speech, it is hardly possible to draw the line consistently on cakes with a wedding-related message or an explicitly political message.

Due to the peculiarities of law enforcement, it would probably be reasonable to conclude that a cake cannot be considered speech, no matter how artistically designed, and no matter how special or unique the occasion it was made for. In addition, this approach is supported by the fact that a cake, including a wedding cake, is typically not interpreted by those present at the event as speech, and that in this way we can avoid almost unmanageable border-drawing problems. Because even if only cakes made for the said purpose and in the way mentioned are considered speech, we cannot justify in a reassuring way why other, similarly creative activities – from the bouquet of flowers to the ice sculpture – do not qualify as such. And if they do qualify as speech, we will also include activities in the scope of free speech, even outside the context of gay marriage that may ultimately devalue the protection of behaviours that truly constitute speech. If all expressive behaviour is to be regarded as speech, the protection of manifestations that are important to the democratic public sphere will inevitably be jeopardised, because it would not be possible to maintain strict protection for all acts falling within the scope thus extended to freedom of expression. However, the question of the cake as speech is only the starting point; its judgment alone does not decide the judgment of the specific case and similar ones. If the cake – the specific bakery product in the cases reviewed – is considered to be speech, the next question is whether it would infringe the prohibition on compelled speech if an authority or court obliges the baker to make it.

B Compelled speech

Under the freedom of expression, an individual has the right to refrain from expressing an opinion. Cases of compelled speech in violation of this right, when an individual is required to express an opinion, have been encountered by the

US Supreme Court on several occasions. In the *West Virginia State Board of Education v Barnette* case,⁴⁰ the Board ruled that the requirement that children in public school regularly saluted and pledged allegiance to the US flag was unconstitutional. The rule was challenged by Jehovah's Witnesses, who argued that it required students to express opinions, and, in some cases, opinions that did not conform to their conscience. In another case, the obligatory oath of allegiance to federal and state constitutions imposed on state employees, as well as to distance themselves from the Communist Party and other 'destructive' organisations, was similarly declared unconstitutional by the court.⁴¹

The Supreme Court ruling in the *Hurley* case mentioned above is seen as a milestone in the area of freedom of expression and, in particular, in the field of rights to define the messages conveyed to the public by the activities of groups.⁴² The Court ruled that organisers of private events were permitted to exclude groups advertising the opposite of the message the event organisers intended to convey, even if such public demonstrations had been organised and authorised. With regard to the specific issues of the case, the Court found that even if the State's aim was to prevent discrimination, citizens organising a public demonstration could not be obliged by the State to include groups conveying a message that the organisers did not wish to display at the demonstration. In the *Wooley v Maynard* case, the Supreme Court ruled that New Hampshire cannot constitutionally force its citizens to place the state motto ('Live free or die') on the licence plate of their car, if it is contrary to their individual moral convictions.⁴³

The compelled speech that appears in US practice can be divided into two types. One group includes cases in which an individual is required to communicate messages required by the state (the Government), such as in the *Wooley* and the *West Virginia State Board of Education* cases, and the other type involves cases in which the government does not specify the content of the message but obliges the speaker to accept and transmit the speech of another speaker, such as in the *Hurley* case. If a wedding cake is considered a speech act and the baker is obliged to make it, and if all this is considered to be compelled speech, then this requirement falls into the second category, as it is private parties who order the cake with a text they have specified or even without any text. The outcomes of the *Masterpiece* and the *Ashers* cases did not, in fact, depend primarily on the assessment of the prohibition on compelled speech, but it featured in the statement of reasons and its application may arise in other similar situations in addition to the specific facts.

The prohibition of compelled speech may be raised by those who, in the case of the cakes in these cases, should have been considered a speaker. The prohibition

⁴⁰ *West Virginia State Board of Education v Barnette* 319 US 624 (1943).

⁴¹ *Keyishian v Board of Regents* 385 US 589 (1967).

⁴² *Hurley* (n 31).

⁴³ *Wooley v Maynard* 430 US 705 (1977).

of compelled speech could, of course, have been limited to the baker, but would festive cakes really have appeared to the public as the baker's speech? If a cake displays an exhortation to 'Support gay marriage', to whom does the audience attribute this message? To the customer who ordered it or to the maker of the cake? Even if the customer is the primary speaker in this case, if the cake – its preparation and delivery to the customer – is considered speech then the baker must also be considered a speaker. Compelled speech may not be prohibited only if the audience that perceives the speech identifies the speaker with the speech, that is, thinks that the speaker agrees with or supports the content of the speech.⁴⁴ Freedom of speech may also be violated if the speaker is not linked to the content of the speech and the speaker does not appear in front of the audience, as in the case of the baker; the compelled 'utterance' of words alone – in this case, making the cake – may also be offensive. Even if a disclaimer statement made by the baker appears next to the cake, in which he distances himself from the message of the cake he made – which is not a very realistic prospect at a wedding – it does not alleviate the harm caused by the compelled speech. It is unacceptable that, while he is compelled by the law to state a message, the content of which he rejects, he may seek to remedy his grievance by giving him an opportunity to distance himself from it immediately.⁴⁵

The decision in the *Ashers* case suggests that, regardless of the content of the message in a particular order, the baker may have the right to refuse the order to convey any message whose content he does not agree with.⁴⁶ In the case of the inscription requested in the specific case ('Support gay marriage'), it may be said that the baker refused to make cakes with this message in general, that is not in view of the identity of the specific customers. But what happens when a Muslim customer asks for a cake bearing the message 'Happy birthday'? The reference in the *Ashers* decision may also be interpreted as meaning that the baker has the right to reject the order in this case, too. If the cake qualifies as speech, on what basis do we differentiate between these two cases? Nevertheless, it seems clear that, in the case of such a 'Muslim birthday cake', the reference to the baker's freedom of speech would hardly be a strong enough argument in court.⁴⁷

One possible answer to the problem of differentiation is to consider none of the cases to be manifestations of free speech. Another approach is that we may find more compelling arguments in favour of requiring the baker to make birthday cakes for all his customers than to make cakes in support of gay marriage.⁴⁸

⁴⁴ *Ashers* (n 9) para 54.

⁴⁵ Rex Ahdar and Jessica Giles, 'The Supreme Courts' Icing on the Trans-Atlantic Cakes', *Oxford Journal of Law and Religion* 9, no 1 (2020), 212, 216; *Pacific Gas Electric Co. v Public Utilities Commission* 475 US 1, 16 (1986), quoted by Justice Thomas in the *Masterpiece* case.

⁴⁶ *Ashers* (n 9) para 55.

⁴⁷ James M Oleske, Jr, 'The "Mere Civility" of Equality Law and Compelled-Speech Quandaries', *Oxford Journal of Law and Religion* 9, no 2 (2020), 288, 301–302.

⁴⁸ *Ibid.* 302–303.

On the one hand, if someone is not served in a shop or by a service provider that is otherwise accessible to anyone, because they are Muslim or because they are gay, this is direct discrimination, which can be prohibited even at the expense of freedom of expression. However, if someone refuses to convey a particular message, regardless of the identity of the customer, and his decision is closely linked to his religious beliefs, and the message in question clearly violates it, it is more difficult to argue that the customer's right to represent his religious beliefs is stronger than the interest of ensuring equal treatment for all. That is, no stronger argument can be made for refusing to make cakes in general with a message 'Happy birthday' than can be made for specifically refusing to make birthday cakes for Muslims.

Distinguishing between different cakes may still be difficult. The first question is that of which cakes are considered 'speech'. The cases of an obligation to make cakes with a caption bearing a political message is most easily classified in the category of compelled speech. However, if a cake with no text on it (such as the one in the *Masterpiece* case) is also considered speech – as a work of art – it may also be covered by the prohibition of compelled speech. And if we consider such cakes made for birthdays and not just for festive occasions, the baker's options for refusal are further expanded. In this case, we are again faced with issues related to discrimination. It is a question of whether, in such a case, the baker can select from among the customers he serves. If each cake is 'speech', then their maker and their seller, can in principle choose when he wants to 'speak' and when he does not. That is, he can say that he does not sell any cakes to gay couples but he does to straight ones. He may not sell birthday cakes to black people, but does to whites. Or simply he does not serve any Asian customers with any cakes. If all cakes are speech, then obligations regarding the general, non-discriminatory sale of goods and services do not apply to bakeries. If only the works of certain bakers are considered speech, anti-discrimination rules do not apply in places that sell their products. And if we apply the possibility of refusal only to certain types of cake, such as wedding cakes or cakes with a political message, judges would have to distinguish between some cakes and others in such cases, based on their message, quality and context of use (consumption).

It is important, however, to note that even if cakes or certain cakes are considered speech, and thus their compulsory sale is classified as compelled speech, it is not certain that this obligation constitutes a violation of freedom of expression. Compelled speech is permissible within the framework of the doctrine of restriction of freedom of speech. That is to say, it must be determined whether discrimination occurred when a baker refused an order and, if so, whether the application of the rules on the obligation of equal treatment in a particular life situation is more important than the baker's freedom of expression. If cakes are not considered speech at all, this consideration is devoid of purpose and the baker must find another good reason for refusing to bake certain cakes.

IV Discrimination based on sexual orientation or political opinion

Judge Hale's opinion in the *Ashers* case suggests that a general, universal refusal to make cakes with a specific message and the refusal of an order from specific individuals because of their characteristics should be judged differently.⁴⁹ In the former case, the refusal may be permissible in the light of the rules on non-discrimination, but not in the latter case. That is, had the cake in the *Ashers* been ordered for the wedding of a gay couple, the outcome of the case could have been different, provided that the reason for the refusal was justifiably the sexual orientation of the customers.⁵⁰

The prohibition of discrimination, also known as the requirement of equal treatment, prohibits both direct and indirect discrimination. Direct discrimination is when someone is treated less favourably than others in a similar situation, typically because of their racial or ethnic origin, religion or belief, disability, age or sexual orientation. Indirect discrimination occurs when a regulation or practice is universal, that is, it applies equally to a member of any social community, but the restriction affects the members of some groups in practice to a lesser extent than others. On that basis, in the *Ashers* case, at most, it is possible to posit the existence of indirect discrimination, since the baker in general would have refused to make a cake with the caption in question for anyone, regardless of their sexual preferences. At the same time, it can be argued that the restriction it applied put gays themselves at a disadvantage compared to others in terms of the provision of his services. However, given the widespread acceptance of gay marriage in the UK, it cannot be said that the sexual orientation of the person ordering the inscription is clearly visible from the content of the text.⁵¹ The inscription in support of gay marriage is a political opinion. Bakeries and other similar service providers should not be obliged to provide a service to any customer with a political opinion, but if they serve a representative of a particular position, they should do so in a non-discriminatory manner, that is, in a way that is open to anyone.⁵² Indirect discrimination is also prohibited as a general rule and is acceptable only if it can be justified by a legitimate purpose, such as the freedom of expression of a party who disregards the requirement of equal treatment.

The facts in the *Masterpiece* case are different. In the case of a gay couple ordering a cake for their wedding, direct discrimination can also be established, as the store sold the wedding cake to heterosexual couples without further ado. The violation of fundamental rights can also be brought about by the exercise of another fundamental right – freedom of religion and freedom of speech – but the US Supreme Court has

⁴⁹ *Ashers* (n 9) para 62.

⁵⁰ Andrew Hamblar, 'Cake, Compelled Speech, and a Modest Step Forward for Religious Liberty: The Supreme Court Decision in *Lee v Ashers*', *Law & Justice – The Christian Law Review* 181 (2018), 156, 169.

⁵¹ Eugenio Velasco Ibarra, '*Lee v Ashers Baking Company Ltd and Others*: The Inapplicability of Discrimination Law to an Illusory Conflict of Rights', *Modern Law Review* 83, no 1 (2020), 190, 196.

⁵² *Ibid.* 199.

avoided answering the question as to whether non-discrimination or baker's rights should be given priority in a particular case.

V Protection of human dignity

In the cases discussed, both parties may also rely on the protection of human dignity. Refusal to provide a service may be assessed not only as discrimination, but also as a violation of the customer's human dignity. However, as Christopher McCrudden points out, the excessive extension of the protection of dignity, including the right to respect and dignity as respect, is an illiberal move that supports moral populism, compromising the protection of the rights of the individual who is accused of the violation of the dignity of another.⁵³ Protection against offensive manifestations alone cannot be guaranteed in a social system based on respect for individual rights.⁵⁴

The baker also has human dignity. So far we have also identified two fundamental rights that may, in principle, be suitable for supporting his decision not to bake certain cakes. At some point, however, the protection of dignity may also play a role. Someone may think that an artistically made or labelled cake is 'speech', and that a cake presented to the public – served at a wedding or birthday – is not the baker's speech (because the wedding guests do not identify the cake with him; he is not present, no one but the customer knows him). In this case, the baker spoke in the solitude of his workshop when he made the cake (if the cake is speech, it is arguably the baker's speech during that time). In addition, it could be argued that the baker's solitary speech – and its avoidance, its silence, that is, his refusal to make the cake – is not protected by the freedom of expression, as this freedom only covers opinions disclosed and made public. Anyone may murmur whatever he wants to himself, and if he insults or slanders without an audience, he is not committing an offence. In this case, freedom of speech is in no hurry to protect the baker, but he can still rely on his human dignity. If a Christian baker is obliged, despite his convictions, to write a message in support of a gay marriage, making an artistic cake for such a wedding, his dignity would be violated, even if he makes it alone. However, this recognition has no particular practical use in recognising a violation of the baker's right to freedom of religion in the compelled performance of the order. In addition to a fundamental right with well-defined content, a separate reference to human dignity is unnecessary.

⁵³ Christopher McCrudden, 'The Gay Cake Case: What the Supreme Court Did, and Didn't, Decide in *Ashers*', *Oxford Journal of Law and Religion* 9, no 2 (2020), 238, 260.

⁵⁴ In the case of hate speech, too, the grievance must reach a degree of intensity that poses a danger or threat to members of the attacked community that justifies state action against that speech. See, for example, Section 5 of the British Public Order Act or the decision of the US Federal Supreme Court, *Brandenburg v Ohio* 395 US 444 (1969).

VI Protection of freedom of religion

In cases such as the one discussed, the baker may invoke the protection of his freedom of religion in addition to, or even instead of, the freedom of expression as a ground for refusing to make the cakes ordered from him. It is a widespread practice to refuse to provide certain services based on religious or conscientious beliefs. A Christian doctor is not required to perform any abortion surgery because he believes that human life begins with conception, so abortion is a murder. There is no question, however, that in the case of cakes, the connection between a religious belief and the act which is refused is much more distant, and more indirect.⁵⁵

According to Richard Moon, the refusal to make cakes is more of a political or civic position for Christian bakers than a conscientious objection.⁵⁶ By baking a cake, no one is compelled to engage in any activity that he deems immoral. According to Moon, regulation can be neutral in terms of religious beliefs and practices; that is, it may allow a conscientious exception to the general obligation to perform a given activity if the beliefs or practices underlying it can be viewed as personal or communal on the part of the person concerned. But the baker's view that same-sex relationships are a sin and should not be given legal recognition is not simply a private or personal matter. This is a position on the morality of the actions of others, a view that is undercut at the level of the legal system and society, as such relations can be freely established and are supported by a significant part of society, and it seeks to soften the obligation of non-discrimination under this social position through individual exceptions.⁵⁷ McCrudden, on the other hand, points out that forcing the baker to bake a cake would oblige the baker to behave in a way that he rejects on religious or moral grounds. The maker of the cake would act as an agent for those who support same-sex marriage and be obliged to express an opinion that he rejects.⁵⁸

If we accept that the right to refuse to bake a cake can be traced back to the right to freedom of religion then the scope of activities covered by freedom of religion must also be defined. Making a birthday cake ordered by a gay couple cannot be refused on the grounds of conscience because celebrating a birthday has nothing to do with religious beliefs. A baker cannot refuse to provide a service on the grounds of his general dislike of homosexuals. At the same time, to say that a cake to be made for a wedding is just like any other would be to ignore religious beliefs related to weddings and the institution of marriage.⁵⁹ Furthermore, if the refusal to bake a cake is not based on the protection of freedom of speech but on freedom of religion,

⁵⁵ McCrudden, 'The Gay Cake Case', 267.

⁵⁶ Richard Moon, 'Conscientious Objection and the Politics of Cake-Making', *Oxford Journal of Law and Religion* 9, no 2 (2020), 329, 331.

⁵⁷ Ibid. 334–335.

⁵⁸ McCrudden, 'The Gay Cake Case', 267.

⁵⁹ Opinions of Judges Gorsuch and Alito, *Masterpiece* (n 3) 1739–1740.

then similar undertakings providing services that are not necessarily expressive and which can be interpreted as an opinion may also claim the right to refuse to provide the service. In the case of same-sex couples' weddings and wedding receptions, the driver, taxi driver, waiter, porter, sound engineer and so on could in principle also refuse to work. We assume that, in these cases, the courts would find less grounds for their refusal to participate but, as outlined above, the line is not between expressive and non-expressive, but between behaviours that affect or do not affect religious beliefs.

VII Legal persons' freedom of opinion and religion

Moon questions that, since in the cases examined the parties are not litigating individuals (bakers) but legal persons (companies), is it at all possible to rely on freedom of opinion or religion in their case? Ashers Bakery Ltd had sixty-five employees at the time of the case. To what extent does placing a mechanically generated text message on a cake violate the owner's personal rights?⁶⁰ The issue of human rights for legal persons can indeed cause headaches. In the *Ashers* case, the Supreme Court made it clear that the company and the owners are alternatives to each other with regard to the present facts.⁶¹ Legal persons should also be guaranteed the exercise of human rights if their refusal would violate the rights of the human person behind the legal person.⁶² When we talk about a legal entity, we must not forget that it cannot exist without the humans behind it. Restrictions on the autonomy of a legal person affect the autonomy of the individuals behind it (owner, members or employees). An action brought by a legal person does not therefore in itself preclude it from relying on the protection of freedom of expression or religion.

VIII Conclusion

It is clearly unsatisfactory to suggest merely that the buyer could have received a cake to suit his taste in a number of other places. But, as Rex Ahdar and Jessica Giles note, there is something unrealistic about the fact that such an intense debate and long, complicated and expensive procedures have unfolded around a cake. The complainant (and frustrated cake buyer) did not, of course, want the cake, but used the procedure for political purposes, making his position public. This is no longer just a matter of law but a field of *Kulturkampf*.⁶³ The same is true of the other side: By refusing to fulfil the order for the cake, the baker is also sending a political

⁶⁰ Moon, 'Conscientious Objection', 348.

⁶¹ *Asher* (n 9) para 57.

⁶² McCrudden, 'The Gay Cake Case', 258.

⁶³ Ahdar and Giles, 'The Supreme Courts' Icing', 221–222.

message and expressing his opposition to gay marriage. The baker’s speech is not really the cake itself (which the judgments did not oblige him to ‘declare’), but this ‘silence’ (non-fulfilment of the order), which in this case is very eloquent.⁶⁴ The baker is also a participant in the *Kulturkampf*.

The question is whether there is a quibble from compliance with general, equal treatment laws by reference to the individual rights of the baker. Terri Day argues that, in the face of sincere religious beliefs, a compelled action (the obligation to make a cake) would be to compel political correctness, which is contrary to the First Amendment to the Constitution.⁶⁵ As she writes, public accommodation laws (laws ensuring equal access to services) became the new battlegrounds for religious conservatives after losing the battle over same-sex marriage.⁶⁶

As we have seen, a completely ordinary life situation – ordering a cake for a festive occasion – raised extremely complex legal issues. In the following, we will try to give a clear overview of these, not only with regard to the two specific cases but also with regard to the general issues that arise. The first question to be clarified is which cakes in the table below should be considered speech and are any of them protected by the freedom of speech, that is, the refusal to make or sell of which is thus protected.

Table 1 Cakes as speech

	Political goal	Wedding	Birthday	Weekday
Artistic, captioned	<i>Masterpiece</i>	<i>Asbers</i>		
Captioned, not artistic				
Artistic, not captioned				
‘Casual’				

Source: Compiled by the author

The table may be completed according to individual considerations for the sixteen possible cakes, depending on which cakes are considered to be covered by freedom of expression (the cakes in the two cases presented are listed in the table). I have argued before that none of the cakes should properly be considered speech, that is, the table should remain completely empty. This is without prejudice to the fact that making an inscription, regardless of its medium, be it a cake or otherwise, may be speech in itself. That is, in specific cases, I consider only the inscription assigned to the cake, but not the entire work speech.

However, if we consider a cake to be ‘speech’, additional questions arise. Is the protection of freedom of expression a strong enough counterweight to the rights of the

⁶⁴ Oleske, ‘The “Mere Civility” of Equality Law’, 304.

⁶⁵ Terri R Day, ‘Revisiting *Masterpiece Cakeshop* – Free Speech and the First Amendment: Can Political Correctness be Compelled?’, *Hofstra Law Review* 48, no 1 (2020), 47–80.

⁶⁶ Ibid. 79.

customer? Is it also strong enough that a baker refuses to provide services not only in general terms but also in the direction of individual customers? Does the protection of freedom of expression also justify direct discrimination? It can be argued that if a cake is a 'speech', then discrimination in connection with the preparation and sale of that cake is also allowed (due to the special protection of freedom of speech, the political nature of the speech and the easy availability of the cake elsewhere).

If the cake does not constitute speech, can any other argument justify the baker's rejection of the order? Is the reference to the protection of religious freedom strong enough? In that case, it is necessary to determine whether the protection of the latter right also gives rise to a refusal by the baker to provide services, not only in general terms but also directed towards individual customers. (That is, if one refuses to make or sell not only the captioned cake but any cake requested for a gay wedding.) In the case of a birthday cake for a gay customer, one certainly cannot rely on one's freedom of religion. It should also be clarified whether direct discrimination (that is, different treatment of gay and heterosexual couples) is also justified by the protection of religious freedom. I have argued above that if the cake is made for an occasion closely affected by religious freedom (such as a wedding or celebration of adoption), then yes, and the baker's freedom of religion overrides the right to equal treatment. However, in the case of gay couples, the same path should be followed.

It is difficult to establish universal approaches, and the courts have successfully avoided this. A number of serious fundamental rights issues need to be judged for this, and it is indeed more fortunate that decisions taken in specific cases will shape the applicable legal approach, provided that there is a coherent practice. Some general principles will crystallise out of this process, and this is what the present writing has tried to contribute to. These can be summarised as follows: The excessive extension of the scope of freedom of expression is dangerous precisely for the freedom of expression; the right to non-discrimination may be restricted in view of the direct effect of religious freedom and the protection of human dignity has no independent role in judging matters alongside these three fundamental rights. In both cases reviewed, it was clear that the baker's refusal was not directed against the buyers personally but against the nature of the event to be celebrated; furthermore, the buyers had easy access to the cake requested from elsewhere. This also raises an important question of principle in the protection of fundamental rights: To what extent is there scope for the recognition of their horizontal effect between private parties? In other words, if the satisfaction of the buyer's demand is not jeopardised by anything – due to its easy availability elsewhere – is state intervention in the relationship between the baker and the buyer justified at all?

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