

# The gay cake controversy in the United Kingdom and Italian inertia

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## Abstract

In *Lee v. United Kingdom*, the European Court of Human Rights left gay people partially unprotected against discrimination in commercial transactions in the United Kingdom and, by analogy, in other legal systems, such as the Italian system, where such protection is absent. In this article, it will be argued that the lack of substantive engagement by the European Court of Human Rights should be considered a missed opportunity for the development of European legal systems that do not grant full anti-discrimination protection to gay people.

## Keywords

UK law, Italian law, EU law, LGB rights, discrimination based on sexual orientation, *Lee v. Asher*, *Lee v. United Kingdom*

## Introduction

On 9 January 2022, the European Court of Human Rights (ECtHR) rejected Mr Lee's appeal.<sup>1</sup> The ECtHR did not discuss the claim made by Mr Lee that the UK law engaged Articles 8, 9 and 10 of

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1. ECtHR, *Lee v. United Kingdom*, judgment of 6 January 2022, Application No. 18860/19, para. 68–75. 'It is axiomatic that the applicant's Convention rights should also have been invoked expressly before the domestic courts, even if the alleged breach was contingent on the outcome of their assessment [...] the Court considers that the applicant has failed to exhaust domestic remedies in respect of his complaints under Articles 8, 9 and 10 of the Convention, read alone and together with Article 14. Accordingly, these complaints must be rejected as inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention' (*ibid.*, para. 78).

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the Convention because Mr Lee failed to exhaust domestic remedies.<sup>2</sup> During the domestic proceeding, the ECtHR noted, quite rightly, that the applicant did not refer to his Convention rights during the review of his claim in the UK domestic courts.<sup>3</sup> That is not to say that Mr Lee's claim was void, but there are no sufficient indications that British courts could review or balance Mr Lee's or the McArthurs' Convention rights. This is unfortunate for many reasons.<sup>4</sup> The lack of a ruling, for instance, indicates the possibility that service providers in signatory states such as Italy can discriminate against individuals by association based on their sexual preferences.<sup>5</sup> This stance is, it will be explained, antithetical to a general principle of non-discrimination deduced from the Convention, Article 21 of the Charter of Fundamental Rights of the European Union (CFREU)<sup>6</sup> and Article 19 of the Treaty on the Functioning of the European Union (TFEU).<sup>7</sup> It is also conducive to undignified working conditions for gay people. For instance, an Italian business whose recruitment policies cannot be discriminatory based on sexual preference might mandate its gay employees to refuse services to lesbians.<sup>8</sup> This article will argue that it is an incoherent state of affairs that is out of tune with the equality principle that ought to support a modern European legal system.

Most EU legal systems have eliminated all discriminatory legislation against gay people.<sup>9</sup> Yet, a few legal systems, including the Italian legal system, allow discriminatory practices to linger.<sup>10</sup> Italian businesses outside of cases in which service providers are dealing with an individual with protected characteristics (for example, gender and race) can select with whom they decide to form a contractual relationship.<sup>11</sup> The Constitution provides a list of protected characteristics that might limit such freedoms. This includes linguistic minorities (Article 6), religious associations

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2. *Ibid.*, para. 69.

3. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49.

4. L.R. Helfer and E. Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68 *International Organization* (2014).

5. M. Connolly, 'The "Associative" Discrimination Fiction: Part 1', 72 *Northern Ireland Legal Quarterly* (2021), p. 29–60; M. Connolly, 'The Myth of Associative Discrimination and the Court of Justice's Great Vanishing Act: Part 2', 72 *Northern Ireland Legal Quarterly* (2021), p. 510–541.

6. The CFREU [2012] OJ C 326/391 and the related Article 6 of the Consolidated version of the TEU [2008] OJ C 115/1 and the TFEU [2012] OJ C 326/1.

7. Consolidated versions of the TEU and the TFEU [2016] OJ C 202/1; Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22.

8. Note that the issue of demanding employees to discriminate against gay people in service sector has been squarely engaged by the UK's Employment Appeal Tribunal (EAT) in *Lisboa v. Realpubs Ltd & Ors* [2011] 1 WLUK 52, para. 26. The EAT considered the case, among other elements, as an instance of discrimination by association.

9. For a recent review of the effects EU law in altering anti-discrimination law see: L.R. Helfer and E. Voeten, 68 *International Organization* (2014). An analysis of the debate over marriage equality is also in D.V. Kochenov and U. Belavusau, 'After the Celebration: Marriage Equality in EU Law Post-Coman in Eight Questions and Some Further Thoughts', 27 *Maastricht Journal of European and Comparative Law* (2020), p. 549, 555. For a recent general review of the level of protection granted to gay people across Europe and beyond, see: ILGA-Europe's *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia* (ILGA-Europe, 2022).

10. ILGA-Europe's *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia*, p. 80. See for instance: A. Tryfonidou, 'Case C-507/18 NH v Associazione Avvocatura per i Diritti LGBTI – Rete Lenford: Homophobic Speech and EU Anti-Discrimination Law', 27 *Maastricht Journal of European and Comparative Law* (2020).

11. D. Maffei, 'Libertà Contrattuale e Divieto Di Discriminazione', 2 *Rivista Trimestrale di Diritto e Procedura Civile* (2008), p. 401–408.

(Article 19), and women who work (Article 37).<sup>12</sup> Even if Article 3 prohibits discrimination based on ‘personal conditions’, sexual orientation, for historical reasons, is not an explicitly protected characteristic.

In relation to the protection of gay people in Italy, the legal situation might be described as a result of the culpable inertia that resides in the interstices of EU law.<sup>13</sup> However, cases such as *Lee v. Ashers Baking Company Ltd and others*<sup>14</sup> (hereafter, *Lee v. Ashers*) and *Lee v. United Kingdom*<sup>15</sup> might bring about a series of fresh debates over the role of the equality principle in commercial transactions in Italian courts. Italy, for historical reasons, adopts a monist system and judges can insert foreign legal principles automatically into Italian law.

One of the many questions that a decision such as *Lee v. Ashers* seeks to clarify is whether refusing a service might be construed as a form of unlawful discrimination (ex Articles 8, 9 and 10 of the European Convention).<sup>16</sup> The UK Supreme Court answered in the negative to the two questions for different reasons. One of these reasons is the remoteness of the relationship between Mr Lee as a gay individual and the nature of the message that he requested to have printed on the cake.<sup>17</sup> In *Lee v. Ashers*, the UK Supreme Court ruled that printing a political message that supports gay marriage on a cake cannot be strictly associated with gay people. This point is not under contention in this article.

It follows that Mr Lee will not be able to claim the protection that Northern Irish law grants to gay people because the message ‘Support Gay Marriage’ cannot be closely associated with the features that make him part of a protected category.<sup>18</sup> The point is delivered in a succinct narrative: ‘In a nutshell, the objection was to the message and not to any particular person or persons [...] there was no discrimination on the grounds of sexual orientation in this case.’<sup>19</sup> The case, even after the failed appeal to the ECtHR, has multiple ramifications in Italy and in other signatory states that do not provide complete protection to gay people against discrimination.<sup>20</sup>

Northern Ireland, for historical reasons, has extensive anti-discrimination protection in commercial practices that is directly derived from an attempt to reduce sectarianism.<sup>21</sup> The details of this legislation will be discussed later. At this point, it is important to note that the Equality Act (Sexual Orientation) Regulations 2006 (hereafter, SOR 2006) lists gay people as a category of individuals who can claim civil damages for discriminatory commercial activities.<sup>22</sup> In the past, the Italian Parliament could have passed an analogous regulation on multiple occasions but refused

12. The Constitution of the Italian Republic Article 41(2) provides that private economic enterprise ‘may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity’.

13. In relation to denigratory statements made against gay people, a similar conclusion is in A. Tryfonidou, 27 *Maastricht Journal of European and Comparative Law* (2020), p. 520.

14. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49.

15. ECtHR, *Lee v. United Kingdom*.

16. The European Convention on Human Rights (ECHR), 4 November 1950.

17. M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 29–60; E.V. Ibarra, ‘*Lee v Ashers Baking Company Ltd and others*: The Inapplicability of Discrimination Law to an Illusory Conflict of Rights’, 83 *The Modern Law Review* (2020).

18. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49, para. 43–45.

19. *Ibid.*, para. 34.

20. ILGA-Europe’s *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia*, 2022; L.R. Helfer and E. Voeten, 68 *International Organization* (2014).

21. M. Duggan, *Queering Conflict: Examining Lesbian and Gay Experiences of Homophobia in Northern Ireland* (Routledge, 2016), p. 47–49.

22. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

to do so.<sup>23</sup> However, the lack of explicit protection is likely immaterial because medium-sized Italian businesses, like the Ashers Baking Company Limited, typically cannot revoke contractual obligations by claiming the firmly held directors' opinions, as appears to have occurred in the United Kingdom.<sup>24</sup>

This could also be the end of this comparative assessment of *Lee v. Ashers*. That is, in Italy, the pre-contractual set of assumptions held by company directors (for example, strongly held religious beliefs or the perception that their freedom of speech is related to the freedom of enterprise of the company they work for) cannot normally be alleged as a reason to curtail a perfected contract because they are not compatible with one of the elements (for example a message printed on a cake) of such a contract.<sup>25</sup> This eventuality is not covered by the Civil Code's list of reasons for voiding a contract.<sup>26</sup>

However, it will be argued that a richer comparative analysis of the role of sexual preferences in Italian law might be drawn from an evaluation of *Lee v. Ashers*, in which it is assumed that the management of the Ashers Baking Company Limited had refused to provide a service before the contract was perfected. In this modified scenario, the current lack of statutory protection in the area of sexual orientation might give any Italian company the discretion to refuse services to gay individuals.<sup>27</sup> Mr Lee's arguments, in this hypothetical scenario, would lean on two self-standing theses. First, a deductive reading of constitutional principles might prevent companies from damaging his human dignity. Second, the automatic implementation of commonly accepted international law values indicates that gay people are already a protected category for which Italian judges should provide a remedy to Mr Lee.<sup>28</sup> It will be explained that for Italian judges, it would be extremely difficult to accept either, but in doing so, we will argue that such a lack of protection is due to cultural legacies rather than rational reasons.

In relation to the right to access services, in a hypothetical Italian *Lee v. Ashers* case, Mr Lee would have the possibility of linking the message he asked to have written on the cake, 'Support Gay Marriage', to his constitutionally protected interaction within the gay community within which he forms his identity as a gay person.<sup>29</sup> Article 2, for instance, protects the relationship between individuals and the community in which they develop their personalities.<sup>30</sup> The issue is whether this communal exercise of rights creates an obligation on businesses such as a hypothetical Italian Ashers Baking Company.<sup>31</sup> Yet, it will be argued that a claim based on Article 2 would have

23. Bill No. 404/2013 (Lo Giudice et al.); Bill No. 569/2018 (Zan et al.).

24. M. Ciancimino, 'La discriminazione contrattuale: profili rilevanti per la tutela della persona. Note a margine di un recente dibattito dottrinale', 2 *Il diritto di famiglia e delle persone* (2018).

25. Civil Code (Italy), Royal Decree No. 262/1942, Article 1429.

26. *Ibid.*, Articles 1425, 1427, 1434, 1436, 1439, 1441–2, 2597.

27. Bill No. 404/2013 (Lo Giudice et al.); Bill No. 569/2018 (Zan et al.).

28. 'The Italian legal system conforms to the generally recognised principles of international law' (Article 10 (1) of the Constitution of the Italian Republic); 'Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations [emphasis added]' (Article 11 of the Constitution of the Italian Republic); 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations [emphasis added]' (Article 117(1) of the Constitution of the Italian Republic).

29. *Ibid.*, Article 3.

30. *Ibid.*, Article 2.

31. *Ibid.*, Articles 2–4, 8, 19, 20, 36(1), 41(1,2).

to be balanced with a constitutionally entrenched freedom of enterprise,<sup>32</sup> and the Italian Parliament has, on several occasions, refused to extend such protection to gay people.<sup>33</sup>

Before our argument is developed, a series of introductory narratives need to be discussed. Firstly, in this article, we are interested only in the substantive claims of the case, which was engaged by Lady Hale's decision.<sup>34</sup> In *Lee v. Ashers*, the UK Supreme Court executed two distinctive activities. This qualified the competence of the Court over Northern Irish laws.<sup>35</sup> The debate over the UK Supreme Court's competence to decide over SOR 2006 and the Fair Employment and Treatment (Northern Ireland) Order 1998 (hereafter, FETO 1998) is covered by Lord Mance's judgment, and it will not be discussed in this article.<sup>36</sup> In relation to the substantive element of the case, the Supreme Court decided that the relationship between the message and the status of Mr Lee was not sufficiently close to trigger the protection of SOR 2006.<sup>37</sup> Such a right is also not covered by FETO, which protects individuals against discrimination based on their political opinions.<sup>38</sup>

Secondly, one of the most concise and clear analyses of the case can be found in Velasco's *Modern Law Review's* case notes.<sup>39</sup> The most extensive analysis of the implications of the case on associative discrimination is, instead, in the first part of a two-part essay by Michael Connolly.<sup>40</sup>

Discrimination by association or 'discrimination by relationship', as it is sometimes referred to, indicates a case in which an individual is victimized because of her relationship with an individual who bears a protected feature.<sup>41</sup> For instance, a white woman is sacked from her job because she married an African-American man. The structure and its legal implications of discrimination by association are explained by Connolly in a straightforward narrative: 'The white person can sue for discrimination because the treatment as based on her association with a black person. The principle is not confined to race; it applies to the Equality Act 2010 (EA 2010) protected characteristics (or "suspect classes") of age, disability, gender reassignment, religion or belief, sex and sexual orientation.'<sup>42</sup> A victim of an illegal discriminatory conduct does not need a personal relationship between herself and the protected category.<sup>43</sup> For instance, the Employment Appeal Tribunal in *Showboat Entertainment Centre v. Owens* ordered compensation for a Caucasian employee who lost his job for not implementing a company policy that prevented young black individuals from using the company's services.<sup>44</sup> In *Lee v. Ashers*, there is a narrow construction of the relationship

32. *Ibid.*, Article 42.

33. Bill No. 404/2013 (Lo Giudice et al.).

34. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49, para. 1–61.

35. E.V. Ibarra, 83 *The Modern Law Review* (2020).

36. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49, para. 63–90. Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/3162 (NI 21)).

37. *Ibid.*, para. 36–47; E.V. Ibarra, 83 *The Modern Law Review* (2020), p. 190.

38. Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/3162 (NI 21)).

39. E.V. Ibarra, 83 *The Modern Law Review* (2020).

40. 'In this more open legislative context, associative discrimination has more in common with other extended forms of discrimination, whose recognition seems to be a policy commitment to outlawing the "evil" of discriminatory conduct per se. Nonetheless, there are strong doctrinal reasons not to treat "associative" discrimination as a term of art' (M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 37).

41. V. Schwartz, 'Title VII: A Shift from Sex to Relationships', 35 *Harvard Journal of Law & Gender* (2012), p. 209, 215.

42. M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 29.

43. [1984] ICR 65 (EAT).

44. *Showboat Entertainment Centre Ltd v. Owens* [1984] 1 All ER 836 842; M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 33, 40, 45–46, 59, 516–533; [1984] ICR 65 (EAT).

between Mr Lee and the QueerSpace community, which allowed the Supreme Court to focus on the message rather than on the people who would be affected by it. Connolly argued that discrimination by association should not be construed as a technical device to limit or expand the legal implications of a protected characteristic.<sup>45</sup> The UK Supreme Court in the *Lee v. Ashers* case, by restricting the protection for associative discrimination, is potentially retrograding the level of protection against discrimination in all areas of law.<sup>46</sup> The general implications of this deduction are engaged by Connolly and they do not need to be reproduced here because in Italian law the connection between a group and an individual is constitutionally protected independently from the sociological features that distinguish such a group.<sup>47</sup> Whether that general protection does make a difference in a hypothetical Italian *Lee v. Ashers* case is discussed later, but we can anticipate that it does not.

Thirdly, this article discusses a series of fictitious comparative scenarios that speculate on the judicial handling of a hypothetical Italian *Lee v. Ashers* case. It is axiomatic that we cannot be certain about the conduct of Italian judges. The article uses the term ‘hypothetical’ to distinguish these speculative scenarios from a real Italian case. It is part of the nature of such a speculative analysis that terms such as ‘in all probability’, or ‘it is reasonable to assume’, or ‘there are indications’ are used in this article. Such notices are wearisome, and we have tried to reduce them to a minimum. Readers should assume that such qualifications are silently inserted into all our speculative narratives.

### **Lee v. Ashers: A case analysis**

On either the 8th or the 9th of May 2014, Mrs McArthur, one of the directors and owners of the Ashers Baking Company Ltd, accepted an order for a cake that included the printing of decorations scanned from a drawing provided by Mr Lee. Mr Lee is a gay man and a lesbian, gay, bisexual, and transgender rights (hereafter LGBT) promoter. The cake was ordered for a small gathering of people who wanted to celebrate the end of Gay Pride week in Belfast. The pictures also included a text that read ‘Support Gay Marriage’ and the logo of QueerSpace, which was the group within which the cake would have been shared.<sup>48</sup> It was already mentioned that the sharing of the cake and its message might have legal implications in Italy, where these types of communal activities can be legally protected.<sup>49</sup>

Both the graphic and the text would have been printed using a printer specifically designed to produce eatable designs by either Mr or Mrs McArthur, who jointly own the Ashers Baking Company Ltd, or any of their employees. Who would have operated the machinery was not relevant for the Equality Commission for Northern Ireland because the refusal to provide a service to an individual who defined himself as a gay individual was sufficient to engage Regulation 3(1) and 5 of SOR 2006.<sup>50</sup>

45. M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 33–34, 510–541.

46. ‘In this more open legislative context, associative discrimination has more in common with other extended forms of discrimination, whose recognition seems to be a policy commitment to outlawing the “evil” of discriminatory conduct per se. Nonetheless, there are strong doctrinal reasons not to treat “associative” discrimination as a term of art’ (M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 37).

47. Article 2 of the Constitution of the Italian Republic.

48. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49, para. 10.

49. Articles 2 and 3 of the Constitution of the Italian Republic.

50. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

Printing a message was, if it had occurred, a mechanical activity that could be conducted by any qualified individual working for the Ashers Baking Company Ltd.<sup>51</sup> The Ashers Baking Company Ltd manages multiple shops in Belfast and employed several gay individuals who presumably would not have objected to operating the scanner and the printing machine required for fulfilling Mr Lee's order.<sup>52</sup> This is of relevance because if the Ashers Baking Company consisted of a sole baker, her Convention rights might not be readily trimmed by a wilfully acquired contractual obligation. This is not the case here.

After accepting the order, Ashers Baking Company Ltd contacted Mr Lee, informing him that the bakery would not carry out the request because it was a Christian business and it would not print the message 'Support Gay Marriage', as had been requested.<sup>53</sup> It is clear, however, that Ashers Baking Company Ltd is not a religious organization. It is also reasonable to assume, from the narrative presented to the Supreme Court, that the Ashers Baking Company Ltd would have sold a cake to Mr Lee with all the graphics, including the QueerSpace logo, but without the text message on the frosting. It additionally claimed that a request by a heterosexual individual to have the words written 'Support Gay Marriage' on one of the company products would have met with a similar denial.<sup>54</sup>

As mentioned earlier, this is an incidental narrative in a comparison between the United Kingdom and Italy because the relationship between an individual and a group like QueerSpace is constitutionally protected, but the relevance of the sexual orientation of potential customers is strictly related to the type of relationship between a protected category and a victim who is not part of a protected category.<sup>55</sup> Baroness Hale, in writing the unanimous opinion of the Supreme Court, construed the concept of discrimination by association narrowly this had a limiting effect on the logic that underpins the decision. For instance, she accepted that Ashers Baking Company Ltd was not directly discriminating against gay people. The company was instead refusing to print a message on one of its cakes for religious reasons.<sup>56</sup> For Mr Lee's claim to be successful, the Court explained that it had to prove first that the refusal to have message on the cake had the effect of victimizing gay people, then prove that he had a relationship with such a group.<sup>57</sup> However, the opposite appears to be true. The company employed several individuals who were part of the LGBT community.<sup>58</sup> The issue was, according to the UK Supreme Court, whether the refusal to print a message requested by an individual (the sexual orientation of whom was irrelevant) was triggering the liability set in Regulation 3(1) and 5 of SOR 2006 by association.<sup>59</sup> The answer was 'no'.<sup>60</sup> The UK Supreme Court also, as mentioned earlier, could not find a strong relationship between the refusal to print the message and Mr Lee, which prevented him from claiming the protection set in Regulation 3(1) and 5 of SOR 2006 by association.

As we have already stated, the negative implications of such a decision are well explained in Connolly's articles.<sup>61</sup> He concluded that the UK Supreme Court erred in qualifying the concept

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51. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49.

52. *Ibid.*, para. 28.

53. *Ibid.*

54. *Ibid.*, p. 22.

55. M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 45.

56. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49.

57. *Ibid.*, p. 22.

58. *Ibid.*, p. 28.

59. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

60. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49, para. 34.

61. M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 29–60, p. 510–541.

of discrimination by association: ‘Lady Hale’s reasoning demonstrated much that could go wrong when associative discrimination is treated as a term of art [...] This facilitates a unilateral choice of associates, allowing a court to pick the remotest, or closest, depending on the desired outcome.’<sup>62</sup> This is a powerful critique of Baroness Hale’s deductive reasoning, but it is not the aim of this article to engage with such a narrative. However, one of the many derivations of Connolly’s critique is that *Lee v. Ashers* was written too quickly.

Eugenio Velasco Ibarra, in his case notes for the *Modern Law Review*, also shows that there are multiple indications that Baroness Hale might have lost track of the separation between the corporate entity that is the Ashers Baking Company Ltd and the strongly held beliefs of its directors, Mr and Mrs McArthur.<sup>63</sup> This casuistry is evident in multiple passages of the decision.<sup>64</sup> The narrative that the Ashers Baking Company did not discriminate against gay people and therefore did not engage Regulation 3(1) and 5 of SOR 2006 does not need to have a supporting reason.<sup>65</sup> It could be argued that we are discussing a supernumerary, but the careless use of words is seldom an indication of cogent analysis.

It is also worth considering in this comparative analysis that Northern Irish society, for historical reasons, is divided along sectarian lines.<sup>66</sup> The level of complexity of the peace process in Northern Ireland cannot be represented in a few lines.<sup>67</sup> It is, however, important to understand that SOR 2009 is part of a series of historically statutory measures aimed at reducing the level of discrimination in a deeply divided society where minorities like gay people can be used as a reason to incite sectarian violence.<sup>68</sup> Twenty-four years after the Good Friday Agreement, which ended the civil war between religious factions, the rate of sectarian and terrorist-related crimes is still, by a large margin, the highest in Europe.<sup>69</sup> One of the numerous effects of this level of societal animosity is the economic compartmentalization of the market for goods or services.<sup>70</sup> Villages and suburbs where two religious sides share an area tend to have two pubs, two bakeries and so on.<sup>71</sup> One is owned by a Protestant and the other is owned by a Catholic; everyone living in the area knows which shops they are supposed to support.<sup>72</sup>

62. M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 46.

63. E.V. Ibarra, 83 *The Modern Law Review* (2020).

64. *Ibid.*, p. 200; *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49, para. 40, 42, 50, 52.

65. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

66. The literature on the Northern Ireland peace process is extensive. These are a series of titles that focuses on recent developments: C. Kennedy-Pipe, *The Origins of the Present Troubles in Northern Ireland* (Routledge, 2014); F. Cochrane, *Northern Ireland: The Reluctant Peace* (Yale University Press, 2013); P. McLoughlin, ‘Brexit and Northern Ireland: The Latest Commitments Explained’, *The Conversation* (2020), <https://theconversation.com/brexit-and-northern-ireland-the-latest-commitments-explained-109669>; D. Morrow, *Sectarianism: A Review* (Ulster University, 2019).

67. C. Kennedy-Pipe, *The Origins of the Present Troubles in Northern Ireland*.

68. M. Duggan, *Queering Conflict: Examining Lesbian and Gay Experiences of Homophobia in Northern Ireland*.

69. PSNI Statistics Branch, ‘Police Recorded Security Situation Statistics’ (Northern Ireland Statistics & Research Agency PSNI Statistics Branch, 2017); Northern Ireland Statistics and Research Agency, ‘Police Recorded Security Situation Statistics 1 December 2020 to 30 November 2021’ (PSNI Statistics Branch, 2021).

70. N. Brennan, ‘A Political Minefield: Southern Loyalists, the Irish Grants Committee and the British Government, 1922–31’, 30 *Irish Historical Studies* (1997); K. Boyle and T. Hadden, ‘The Peace Process in Northern Ireland’, 71 *International Affairs* (1995); J. Coakley, ‘Adjusting to Partition: From Irredentism to “Consent” in Twentieth-Century Ireland’, 25 *Irish Studies Review* (2017); B. Hughes, ‘Loyalists and Loyalism in a Southern Irish Community, 1921–1922’, 59 *The Historical Journal* (2016).

71. D. Morrow, *Sectarianism: A Review*.

72. *Ibid.*



The de facto sectarian separation of the two communities might be morally troublesome, yet it is stoically accepted by most Northern Irish residents.<sup>73</sup> It is, however, problematic when two businesses that are on opposite sides of the religious divide must work in tandem, so to speak. A Protestant dairy farmer, for instance, might need to be certain that her perishable milk will be collected, without question, by a Catholic dairy cooperative. In the period that followed the 1920 Home Ruling, the UK Government subsidized businesses both in the South and North of Ireland that claimed to be affected by sectarian boycotts.<sup>74</sup> It was an expensive and cumbersome scheme that was, over the years, substituted by policies such as FETO 1998. An individual or a business affected by economic sectarianism might trigger a process that led to immediate civil penalties.<sup>75</sup> The *quasi-automaticity* is important because a delay in providing a service, such as the collection of perishable milk, might be sufficient to produce the effect of an embargo and the sectarian cleansing of a region. SOR 2006, which seeks to prevent discrimination based on the sexual orientation of customers, follows a similar *quasi-automatic* process.<sup>76</sup> This type of legal regime of civil penalties is unique in Europe.

## Equality, sexual orientation and freedom of expression in Italy

In the previous section, it was explained that the *Lee v. Ashers* case had been subjected to scrutiny and that, in turn, might have revealed several internal errors. This is, among others, one of the unfortunate elements of the case, but it should not obfuscate a comparative debate over the protection against discrimination directed at gay people in Europe.<sup>77</sup> This section explores the potential effects of *Lee v. Ashers* in Italy by providing a comparative analysis of a hypothetical Italian *Lee v. Ashers* case.<sup>78</sup> The hypothetical scenario is presented to show the incoherent situation of anti-discrimination law in Italy.

As mentioned at the start of this article, after a contract has been perfected, the beliefs of the managing directors in medium-sized businesses, such as a hypothetical Italian Ashers Baking Company, cannot be used as a reason to void a contract.<sup>79</sup> The comparison proposed here will focus instead on the pre-contractual right to refuse to do business with a gay individual. Cases like a hypothetical Italian *Lee v. Ashers* case are expected to engage Article 41 of the Constitution, which states: 'Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity.'<sup>80</sup> The dilemma for judges is to balance the freedom of enterprise of the individuals who own a hypothetical Italian Ashers Baking Company and the damaging consequences that such freedom might have on individuals, similar to Mr Lee, who are members of a historically discriminated-against minority.<sup>81</sup> There is

73. Ibid.

74. B. Hughes, 59 *The Historical Journal* (2016), p. 1084.

75. Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/3162 (NI 21)).

76. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.

77. ILGA-Europe's *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia*, 2022.

78. Mainly considering Articles 2–4, 8, 19, 20, 36(1), 41(2).

79. Civil Code (Italy), Royal Decree No. 262/1942, Article 1429.

80. Constitution of the Italian Republic Article 41(1,2). One of the limits is statutory limits set in the case of a monopoly, such as water utilities. Civil Code (Italy), Royal Decree No. 262/1942, Article 2597.

81. C.P. Pelullo et al., 'Frequency of Discrimination, Harassment and Violence in Lesbian, Gay Men and Bisexual in Italy', 8 *PLoS ONE* (2013), p. 1–6.

a consensus among scholars that human dignity is one of the axiological elements of Italian anti-discrimination law.<sup>82</sup> Article 3(1) of the Constitution asserts that formal equality is one of the fundamental principles of the Republic.<sup>83</sup> Formal equality is seldom enough to protect discriminated-against communities.<sup>84</sup> The protection of human dignity includes the distinctive interaction that individuals might have with other identity group members, as asserted in Article 2 and qualified in Article 3 of the Italian Constitution.<sup>85</sup> In particular, Article 3 imposes a positive duty on public institutions to remove the obstacles that reduce the freedom and equality of its citizens. The text of the article is normatively poignant: 'It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.'<sup>86</sup> The commitment to fostering social engagement and human dignity is also in Article 36 and Article 41, respectively.<sup>87</sup>

The gamut of references to the concept of human dignity has, at least at first sight, multiple implications for our analysis of a hypothetical Italian *Lee v. Ashers* case. Firstly, the Fundamental Principles of the Italian Constitution (listed in Articles 1 to 12) and Rights and Duties of Citizens (covered in Articles 13 to 54) support the notion that judges should consider respect for human dignity as one of the implicit aims of all Italian rules and regulations.<sup>88</sup> This practice is, however, problematic when such a protection engages the list of inviolable rights, such as freedom of speech (Article 21) and its articulation in the areas of the freedom to manifest religious beliefs (Article 19).<sup>89</sup>

A decision based on such a scenario is likely to verge exclusively on the interplay between the freedom of enterprise, as manifested by the management of the Ashers Baking Company, and its implications for the dignity of Mr Lee.<sup>90</sup> There is reasonable agreement among Italian constitutional

82. G. Ferrara, 'La pari dignità sociale (appunti per una ricostruzione)', in G. Abbamonte et al. (eds.), *Studi in onore di Giuseppe Chiarelli* (Giuffrè, 1974), p. 1089–1105; A. Pace, *Problematica delle libertà costituzionali. Parte generale* (Cedam, 1992); A. Ruggeri and A. Spadaro, 'Dignità dell'uomo e giurisprudenza costituzionale (prime annotazioni)', 3 *Politica del diritto* (1991), p. 343–348; M. Di Ciommo, *Dignità umana e Stato costituzionale. La dignità umana nel costituzionalismo europeo, nella Costituzione italiana e nelle giurisprudenze europee* (Passigli, 2010); G. Repetto, 'La dignità umana e la sua dimensione sociale nel diritto costituzionale europeo', 1 *Diritto Pubblico* (2016); S. Rodotà, *Il diritto di avere diritti* (Laterza, 2012); P. Grossi, 'La dignità nella Costituzione italiana', in E. Ceccherini (ed.), *La tutela della dignità dell'uomo* (Editoriale scientifica, 2008), p. 79–97.

83. The Article 3(1) of the Constitution of the Italian Republic refers to human dignity as 'social dignity'; G. Ferrara, in G. Abbamonte et al. (eds.), *Studi in onore di Giuseppe Chiarelli*, p. 1089–1105; G. Repetto, 1 *Diritto Pubblico* (2016); A. Apostoli, 'La dignità sociale come orizzonte della uguaglianza nell'ordinamento costituzionale', *Costituzionalismo.it* (2019), [https://www.costituzionalismo.it/download/Costituzionalismo\\_201903\\_717.pdf](https://www.costituzionalismo.it/download/Costituzionalismo_201903_717.pdf).

84. S. Baer, 'Lecture: Dignity Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism', 59 *The University of Toronto Law Journal* (2009), p. 417, 420.

85. Articles 2 and 3(2) of the Constitution of the Italian Republic.

86. *Ibid.*, Article 3(2).

87. *Ibid.*, Articles 36(1) and 41(2).

88. A. Ruggeri and A. Spadaro, 3 *Politica del diritto* (1991), p. 343–348; M. Di Ciommo, *Dignità umana e Stato costituzionale*; P. Grossi, in E. Ceccherini (ed.), *La tutela della dignità dell'uomo*, p. 79; A. Apostoli, *Costituzionalismo.it* (2019).

89. P. Grossi, in E. Ceccherini (ed.), *La tutela della dignità dell'uomo*, p. 79; C. Mirabelli, 'La giurisprudenza costituzionale in materia di libertà religiosa: sintesi per una lettura d'insieme', in A. Nardini and G. Di Nucci (eds.), *Dall'Accordo del 1984 al disegno di legge sulla libertà religiosa. Un quindicennio di politica e legislazione ecclesiastica* (PDCM, 2001), p. 51.

90. Articles 3(1) and 41(2) of the Constitution of the Italian Republic.

lawyers over the idea that human dignity is an interlacing element of the Italian constitutional system.<sup>91</sup> Human dignity is primarily a philosophical concept that creates a bond between the notion of formal equality, which is expected in most legal liberal societies, and a commitment to an extensive welfare state.<sup>92</sup> The interlacing function, therefore, has ontological and teleological elements. It brings together, for instance, the Weberian principle of a meritocratic Republic (Articles 1 and 4) and the principle of social solidarity (Article 2).<sup>93</sup>

The debate about whether these ideals are delivered in practice is not part of our discussion.<sup>94</sup> However, it is important to note that Article 41 directly references the national economic interest as a limitation to the freedom of enterprise.<sup>95</sup> We will return to this point later in this article, but in relation to the protection against discrimination, it is clear that the third comma of Article 41 allocated to the Parliament the task of balancing private economic activities, the protection of human dignity inherent to a robust human rights culture and national economic interest.<sup>96</sup> The allocation of such a power to pass a law to Parliament has direct implications for an evaluation of a hypothetical Italian *Lee v. Ashers* case because, at the time of writing this article, there is no specific legal protection in the areas of providing goods and services to gay people in Italian law.<sup>97</sup>

In Italy, the religious beliefs of directors are not likely to be considered relevant. The directors of the Ashers Baking Company claimed that a set of strongly held religious beliefs is a reason to refuse a service.<sup>98</sup> While the Italian Constitutional Court accepts that there is a correlation between the daily running of a business and activities that have religious significance, such jurisprudence focuses exclusively on labour relationships.<sup>99</sup> This is in tune with the Court of Justice's jurisprudence. In the case of *Samira Achbita* and the case of *Asma Bougnaoui*, the Court of Justice, for instance, distinguished between the internal elements of a religious belief, which cannot be regulated by EU law, and their manifestations (for example wearing a cross pendant or a headscarf) that might be regulated in a way that balances conflicting rights in a working environment.<sup>100</sup>

The relevant elements are squarely engaged in Article 41 of the Italian Constitution, which balances the freedom of enterprise with human dignity.<sup>101</sup> The freedom of enterprise upheld in Article 41 allows individuals who own a company or those who act on behalf of the owners to select with

91. S. Sacchi, 'The Italian Welfare State in the Crisis: Learning to Adjust?', 23 *South European Society and Politics* (2018).

92. *Ibid.*

93. G. Ferrara, in G. Abbamonte et al. (eds.), *Studi in onore di Giuseppe Chiarelli*, p. 1089–1105; G. Repetto, 1 *Diritto Pubblico* (2016); A. Apostoli, *Costituzionalismo.it* (2019); A. Ruggeri and A. Spadaro, 3 *Politica del diritto* (1991), p. 343–348; M. Di Ciommo, *Dignità umana e Stato costituzionale*; P. Grossi, in E. Ceccherini (ed.), *La tutela della dignità dell'uomo*, p. 79; A. Apostoli, *Costituzionalismo.it* (2019).

94. A. Coco, 'Neopatrimonialism and Local Elite Attitudes: Similarities and Differences Across Italian Regions', 3 *Territory, Politics, Governance* (2015); S. Sacchi, 23 *South European Society and Politics* (2018).

95. A. Apostoli, *Costituzionalismo.it* (2019), p. 20.

96. G. Ferrara, in G. Abbamonte et al. (eds.), *Studi in onore di Giuseppe Chiarelli*, p. 1089–1105; A. Apostoli, *Costituzionalismo.it* (2019).

97. Law No. 246/2005 is concerned only with labour relationships.

98. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49, para. 40, 42, 50, 52.

99. As the Italian Court of Cassation established in its sentence No. 3416/2016, the employer cannot disregard the specific requests of employees because of the religious beliefs they adhere to. The case concerned a worker who had expressed the need not to be assigned to Sunday work shifts due to his Catholic faith.

100. Case C-157/15 *Achbita and Another v. G4S Secure Solutions*, EU:C:2017:203; Case C-188/15 *Asma Bougnaoui, Association de Défense des Droits de l'Homme (ADDH) v. Micropole SA*, EU:C:2017:204.

101. G. Ferrara, in G. Abbamonte et al. (eds.), *Studi in onore di Giuseppe Chiarelli*, p. 1089–1105; A. Apostoli, *Costituzionalismo.it* (2019), p. 20.

whom they bind themselves in contractual relations.<sup>102</sup> There is a general obligation not to discriminate, but such a limitation tends to be restricted to the direct manifestation of prejudices.<sup>103</sup> The owner of a hair salon in Milan might, for instance, explicitly state to a new customer that she charges a premium to cut red hair because she believes that it brings bad luck to the business.<sup>104</sup> The client with red hair might claim that such a belief is discriminatory, but it is a matter of speculation whether such a claim might have traction in court. Yet once she has accepted paying a premium for having her red hair trimmed, she has, as far as we know, no remedy in a court of law.<sup>105</sup> Similar limitations apply to all businesses once the obligation has been accepted (like it was in the *Lee v. Ashers* case), an Italian Ashers Baking Company cannot add any irrational reasons put forward by the owners (or by those who are managing the company on behalf of the owners) to rescind a contract.<sup>106</sup> Once these considerations are brought to bear on a hypothetical Italian *Lee v. Ashers* case, it is reasonable to suggest that Mr Lee could obtain the payment of damages for a unilateral breach of contract.

However, a richer comparative analysis of the protection against homophobic discrimination in Italy can be drawn from an evaluation of a different scenario. Let us assume, for instance, that, following a request by Mr Lee, one of the directors of a hypothetical Italian Ashers Baking Company refuses to honour an open offer to make a bespoke cake. In this scenario, the refusal to provide a service is legitimate.<sup>107</sup>

There are specific limitations for companies that act as a monopoly, such as water and electricity companies, which can be compelled to form contractual relationships with anyone who might require it.<sup>108</sup> A medical professional who refuses to provide a voluntary termination of a pregnancy will face criminal consequences (Article 9 of the law, May 22, 1978, No. 194). A pharmacist who refuses to provide the so-called morning-after pill to customers incurs penalties due to a violation of the code of conduct reserved for civil servants, which might also have criminal ramifications.<sup>109</sup>

The overarching assumption, however, is that businesses can choose, outside of cases in which they are dealing with specific protected characteristics (for example gender and race) with whom they decide to form a contractual relationship.<sup>110</sup> As mentioned earlier, the Constitution provides an extensive list of protected characteristics that might limit such freedoms that can be claimed directly in court (this is how Italian law implements the so-called *Drittwirkung* principle). The aforementioned list of characteristics includes linguistic minorities (Article 6), religious associations

102. L. Montesano, 'Obbligo a contrarre', in U. Breccia (ed.), *Enciclopedia del diritto*, vol. 29 (Giuffrè, 1979).

103. D. Maffei, 2 *Rivista Trimestrale di Diritto e Procedura Civile* (2008), p. 401–408; G. Carapezza Figlia, 'Il divieto di discriminazione quale limite all'autonomia contrattuale', 6 *Rivista di diritto civile* (2015); M. Ciancimino, 2 *Il diritto di famiglia e delle persone* (2018).

104. D. Maffei, *Offerta al pubblico e divieto di discriminazione* (Giuffrè, 2007); G. Carapezza Figlia, 6 *Rivista di diritto civile* (2015); M. Ciancimino, 2 *Il diritto di famiglia e delle persone* (2018).

105. *Ibid.*

106. Civil Code (Italy), Royal Decree No. 262/1942, Article 1429.

107. Law No. 246/2005; D. Maffei, *Offerta al pubblico e divieto di discriminazione*.

108. Regarding English and Welsh Law, see for instance: *Constantine v. Imperial Hotels Ltd* [1944] KB 693. An analogous reasoning is in the text of the Civil Code (Italy), Royal Decree No. 262/1942, Article 2597.

109. See Royal Decree No. 1706/1938, Article 38, prohibiting the pharmacist from refusing to sell the medicinal products with which he is supplied; G. Di Cosimo, 'I farmacisti e la "pillola del giorno dopo"', 1 *Quaderni costituzionali* (2001), p. 142–144.

110. D. Maffei, *Offerta al pubblico e divieto di discriminazione*, p. 408; G. Carapezza Figlia, 6 *Rivista di diritto civile* (2015), p. 1402. For a different view see E. Navarretta, 'Principio di uguaglianza, principio di non discriminazione e contratto', 3 *Rivista di diritto civile* (2014), p. 547, 556.

(Article 19) and women who work (Article 37).<sup>111</sup> Sexual orientation, for historical reasons, is not explicitly covered by constitutional protection, yet doctrinal analysis suggests that it is nevertheless included in the broad meaning of the constitutional text, where there is a reference to ‘personal and social conditions’.<sup>112</sup> This assumption has not been tested in court.

There is, however, resistance to intervention in areas of law that have been partially covered by statutory measures.<sup>113</sup> Civil law and common law lawyers, when faced with an irrational legal situation, tend to demand changes.<sup>114</sup> Yet, it is unlikely that Italian judges would accept a narrative that protects gay people for two sets of reasons. Firstly, the statutory measures regulating anti-discrimination law have been scattered throughout different areas of law, such as health law and labour relations.<sup>115</sup> The process creates a normative assumption: that the limitations of Article 41 must be specified by statute or derived from endorsed law principles. For instance, in 2017, the Supreme Court of Cassation, in case No. 11165, directly linked the protection against discrimination in the workplace to dignity at work in Article 41 of the Constitution.<sup>116</sup> In this instance, the Court made a direct reference to Article 2, which protects human dignity in general, as one of the reasons for its decision,<sup>117</sup> yet the reference to the prohibition of discriminating was too general to be considered a basis for developing a new protected category.<sup>118</sup>

Secondly, Parliament could legislate in the area of discrimination law and include cases like those discussed in this article but has repeatedly refused to do so. This stance has solidified the assumption among Italian judges that they should not overstep their constitutional boundaries.<sup>119</sup> In 2005, Law No. 246 tasked the Government to deliver a general reform of anti-discrimination law.<sup>120</sup> However, in 2006, the Government’s legislative decree No. 198, which actuated the aforementioned delegation, focused almost exclusively on gender discrimination.<sup>121</sup>

It was not the first time that bathos followed great expectations for gay Italian people. Parliament, while implementing the Equal Treatment in Goods and Services Directive 2004/113/EC, could have regulated the protection against discrimination based on sexual orientation, but did not do so.<sup>122</sup> The assumption that Parliament’s omission was intentional was confirmed in 2013 when a group of MPs sponsored Bill No. 404.<sup>123</sup> The bill, if it were enacted, would have extended the application of anti-

111. As already mentioned, Article 41(2) of the Constitution of the Italian Republic provides that private economic enterprise ‘may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity’.

112. Article 3(1) of the Constitution of the Italian Republic.

113. V. Fon and F. Parisi, ‘Judicial Precedents in Civil Law Systems: A Dynamic Analysis’, 26 *International Review of Law and Economics* (2006).

114. L.R. Helfer and E. Voeten, 68 *International Organization* (2014), p. 80.

115. Cass. sez. lav. 8.5.2017 n. 11165.

116. *Ibid.*

117. *Ibid.*

118. D. Maffei, *Offerta al pubblico e divieto di discriminazione*; D. Maffei, 2 *Rivista Trimestrale di Diritto e Procedura Civile* (2008), p. 401–408; G. Carapezza Figlia, 6 *Rivista di diritto civile* (2015); M. Ciancimino, 2 *Il diritto di famiglia e delle persone* (2018).

119. Law No. 246/2005.

120. *Ibid.*

121. Decree No. 198/2006.

122. Directive 2004/113/EC of the Council of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.

123. Bill No. 404/2013 (Lo Giudice et al.). In 2018, a similar initiative had the same result: Bill No. 569/2018 (Zan et al.).

discrimination law to gay people, yet it failed to collect enough support within the Italian Parliament.<sup>124</sup>

The lack of support by Parliament has direct implications in the debate over the possibility of denying a service to a gay individual. It is reasonable to assume that ordinary judges, in a hypothetical Italian *Lee v. Ashers* case, would encounter extreme difficulties in passing a decision that inserts a limit to a constitutionally protected freedom (that is, the individual's freedom of enterprise in Article 42) after such a limitation had been evaluated and rejected by Parliament. This point is delicate. The argument defended in this analysis is not that gay people, a minority that has been historically discriminated against in a way that is diminishing their human dignity, should not be protected against discrimination; rather, the article provides an analysis of the legal setting in which gay people might be treated in the Italian market for goods and services. This analysis shows that, during pre-contractual activity, Italian businesses are still able to discriminate against gay people.

### **Internationally accepted legal principles: EU law and a German authority**

Given the lack of a rational underpinning of Italian policies, it is unfortunate that *Lee v. United Kingdom* did not engage in the substantive issues of the case.<sup>125</sup> In the previous section, it was explained that Italian judges might, by way of comparison to the UK Supreme Court, reach a diverging decision in their assessment of a hypothetical Italian *Lee v. Ashers Baking Company*. It was argued that contractual obligations between an individual and a company might not be unilaterally rescinded on the basis of the strongly held beliefs of company directors.<sup>126</sup> The decision of an Italian court is also likely to be different in a situation in which a company refuses to honour a public offer, such as a service to provide bespoke cakes. It was explained that private initiative is constitutionally protected, and its limitations, including those related to the protection of historically discriminated-against individuals such as gay people, normally require statutory intervention. There is, however, the possibility for the parties in an Italian process to demand the quasi-automatic implementation of international law, as required by Article 10(1) of the Italian Constitution.<sup>127</sup>

There are historical reasons for the drafters of the Italian Constitution to select monism over dualism.<sup>128</sup> It is sufficient to say that monistic systems, like the one adopted by the Italian Constitution, allow judges to increase the level of oversight over public institutions by implementing rules that are, for instance, adopted by international organizations.<sup>129</sup> It is also worth noting that recent Italian constitutional jurisprudence might have recast the effects of Article 10.<sup>130</sup>

124. Bill No. 404/2013 (Lo Giudice et al.).

125. ECtHR, *Lee v. United Kingdom*.

126. M. Ciancimino, *2 Il diritto di famiglia e delle persone* (2018), p. 686.

127. M. Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community', 12 *Michigan Journal of International Law* (1990); E. Ciongaru, 'The Monistic and the Dualistic Theory in European Law', 1 *Acta Universitatis George Bacovia. Juridica* (2012).

128. H. Lindahl, 'Democracy, Political Reflexivity and Bounded Dialogues: Reconsidering the Monism-Pluralism Debate', in E. Christodoulidis and S. Tierney (eds.), *Public Law and Politics: The Scope and Limits of Constitutionalism* (Ashgate, 2008); M. Lando, 'Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court', 78 *The Modern Law Review* (2015).

129. M. Cartabia, 12 *Michigan Journal of International Law* (1990).

130. E. Ciongaru, 1 *Acta Universitatis George Bacovia. Juridica* (2012); O. Lando and H. Beale, *The Principles of European Contract Law, Parts I and II* (1st edition, Kluwer Law International, 1999).

However, and at a general level, Italian jurisprudence considers EU law to be potentially automatically applicable to Italian law.<sup>131</sup> Such presumed automatism normally requires judicial intervention, but it includes the protection against discrimination that can be read by the combined evaluation of Article 21 of the CFREU<sup>132</sup> and Article 19 TFEU.<sup>133</sup> Helfer and Voeten explain, for instance, that decisions by international courts in the area of anti-discrimination law increase the probability of changes across Europe.<sup>134</sup> In addition, there is a consensus among Italian public lawyers that the constitutional traditions of other EU Member States might also be considered by Italian courts without requiring legislation to be enacted.<sup>135</sup>

There is, however, little help for Mr Lee from the European Court of Justice jurisprudence.<sup>136</sup> The enactment of the CFREU has indeed further strengthened the EU's general commitment to reducing discriminatory practices.<sup>137</sup> Nevertheless, there are still several grey areas on the limits of such a commitment.<sup>138</sup> Article 21(1) of the Charter has no direct horizontal effects on private individuals.<sup>139</sup> In the *Association de Médiation Sociale* case, the Court of Justice asserted that 'Article 21(1) of the Charter, is sufficient to confer on individuals an individual right',<sup>140</sup> but the case focused on labour relations. *Lee v. Ashers Baking Company* is not a case about hate speech that can be compared with Case C-507/17, *NH v. Associazione Avvocatura per i Diritti LGBTI*.<sup>141</sup>

Connolly's recent critique of Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia* also explained the general limitations of the European Court of Justice's qualification of discrimination in a case of racial discrimination.<sup>142</sup> As mentioned earlier, Connolly's narrative is part of a critique of the UK Supreme Court's 'the message not the person' narrative, which is not under review in this article.<sup>143</sup> Again, Connolly's critique is

131. M. Cartabia, 12 *Michigan Journal of International Law* (1990). For an analysis of the persuasive effects of the international courts' jurisprudence in Member States see: L.R. Helfer and E. Voeten, 68 *International Organization* (2014), p. 82.

132. The CFREU [2012] OJ C 326/391 and the related Article 6 of the Consolidated version of the TEU [2008] OJ C 115/1 and the TFEU [2012] OJ C 326/1.

133. Consolidated versions of the TEU and the TFEU [2016] OJ C 202/1.

134. L.R. Helfer and E. Voeten, 68 *International Organization* (2014), p. 79. The persuasive effects of international courts' decisions is also engaged in: D.V. Kochenov and U. Belavusau, 27 *Maastricht Journal of European and Comparative Law* (2020), p. 557.

135. V. Piccone and O. Pollicino (eds.), *La Carta dei diritti fondamentali dell'Unione Europea. Efficacia ed effettività* (Editoriale Scientifica, 2018); P. Gianniti (ed.), *I diritti fondamentali dell'Unione europea. La Carta di Nizza dopo il Trattato di Lisbona* (Zanichelli, 2013); L. Trucco, *Carta dei diritti fondamentali e costituzionalizzazione dell'Unione europea. Un'analisi delle strategie argomentative e delle tecniche decisorie a Lussemburgo* (Giappichelli, 2013).

136. L.R. Helfer and E. Voeten, 68 *International Organization* (2014).

137. The CFREU [2012] OJ C 326/391.

138. L.R. Helfer and E. Voeten, 68 *International Organization* (2014); D.V. Kochenov and U. Belavusau, 27 *Maastricht Journal of European and Comparative Law* (2020); A. Tryfonidou, 27 *Maastricht Journal of European and Comparative Law* (2020).

139. *Ibid.*

140. Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT*, EU:C:2014:2, para. 47.

141. A. Tryfonidou, 27 *Maastricht Journal of European and Comparative Law* (2020); Case C-507/17 *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford* [2020].

142. Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, EU:C:2015:480; M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 29–60, 510–541.

143. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49, para. 34; Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*.

cogently delivered and it is plausible to assume that, in the near future, the concept of discrimination by association will be qualified in a way that is more coherent with the principle of equality.<sup>144</sup> However, this comparative analysis focuses on the lack of protection against discrimination for gay people in the Italian market of services and goods, which is currently situated in a legal lacuna.<sup>145</sup>

The monist principle of Article 10 of the Constitution would also allow Mr Lee to refer directly to EU Member States' constitutional traditions.<sup>146</sup> Recently, the German Federal Constitutional Court qualified a claim of discrimination by association based on political beliefs that is analogous to a hypothetical Italian *Lee v. Ashers* case. In November 2009, the wife of one National Democratic Party of Germany member booked a four-day stay in a wellness hotel.<sup>147</sup> The National Democratic Party is considered a neo-Nazi political group that makes political claims that are on the extreme spectrum of what is allowed in a liberal society.<sup>148</sup> The booking was initially confirmed and then cancelled by the hotel's management. The couple was offered reimbursement or alternative accommodation.<sup>149</sup> The hotel management justified its decision by arguing that the company aims to provide every customer with an enjoyable experience and that the presence of a representative of an extremist political party might have a detrimental effect on other guests.<sup>150</sup> However, the couple claimed that the refusal to provide a service was illegitimate because it discriminated against individuals by association based on their political opinions (Article 3(1) of the Basic Law).<sup>151</sup> The German Federal Constitutional Court agreed that the political views of a customer cannot be considered relevant after the booking has been accepted.<sup>152</sup> However, Article 3(1) cannot be constructed as a limitation of the individual's freedom to select contractual partners.<sup>153</sup> In other words, BvR 879/12 confirmed the separation between pre-contractual and contractual obligations adopted by Italian jurisprudence. That is, discrimination by association can be claimed only after a contract has been perfected. This is of little use for gay people in Italy. This is the case because, in both Germany and Italy, a constitutionally protected freedom, like the freedom to manifest beliefs, does not automatically impose horizontal obligations on a business to accept an unwanted contractual relationship.

It is important to note that BvR 879/12 and *Lee v. Ashers* have factual differences. The National Democratic Party of Germany and its members support reactionary ideas that are within the extreme limits of a liberal society.<sup>154</sup> Instead, it can be reasonably argued that Mr Lee and QueerSpace

144. M. Connolly, 72 *Northern Ireland Legal Quarterly* (2021), p. 29–60, 510–541.

145. L.R. Helfer and E. Voeten, 68 *International Organization* (2014).

146. Article 10 of the Constitution of the Italian Republic.

147. 1 BvR 879/12. An English version of the case is available at: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/08/rk20190827\\_1bvr087912en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/08/rk20190827_1bvr087912en.html).

148. G. Molier and B. Rijpkema, 'Germany's New Militant Democracy Regime: National Democratic Party II and the German Federal Constitution Court's "Potentially" Criterion for Party Bans: Bundesverfassungsgericht, Judgment of 17 January 2017, 2 BvB 1/13, National Democratic Party II', 14 *European Constitutional Law Review* (2018). For a general review of a distinctively German form of constitutional patriotism: J. Habermas, 'Address: Multiculturalism and the Liberal State', 47 *Stanford Law Review* (1995).

149. 1 BvR 879/12, § 1.

150. *Ibid.*, §4.

151. *Ibid.*, §5.

152. *Ibid.*, §12.

153. *Ibid.*, §5.

154. G. Molier and B. Rijpkema, 14 *European Constitutional Law Review* (2018); R. Curren, 'Patriotism, Populism and Reactionary Politics since 9.11', *Handbook of Patriotism* (Springer, 2018).



promote an advancement in the level of protection of human dignity. The key element of BvR 879/12 is the narrow construction of anti-discrimination law by association in commercial areas.

## Concluding remarks

In *Lee v. United Kingdom*, the ECtHR did not review, for good reasons, whether the Supreme Court's interpretation of Regulation 3(1) and 5 of SOR 2006 hindered Mr Lee's Convention rights.<sup>155</sup> The ECtHR's reasoning for not discussing the case is cogently made and technically sound.<sup>156</sup> Mr Lee, put simply, did not articulate a human rights narrative in British courts.<sup>157</sup> However, the lack of substantive engagement by the ECtHR with *Lee v. United Kingdom* should be considered a missed opportunity for the development of Italian law and of other European legal systems that do not grant full anti-discrimination protection to gay people.<sup>158</sup> It was explained that private contractual autonomy is protected either explicitly or implicitly in the United Kingdom and Italy, and the article compared the limits of such autonomy. In *Lee v. Ashers*, the UK Supreme Court ruled that service providers could refuse to reproduce a manifestation of political opinions when such a message was against the deeply held beliefs of company directors and could not be closely associated with a protected category.<sup>159</sup> It was argued that a hypothetical Italian *Lee v. Ashers* case would likely have, by comparison to British jurisprudence, a different outcome. In Italy and Germany, a contract with a non-solo-trader limited company cannot be rescinded because of the beliefs held by the directors of the company.<sup>160</sup>

The article also speculated on the case in which the request for the cake by a gay individual was rejected by a hypothetical Italian Ashers Baking Cake Company during the pre-contractual phase. In this scenario, it was speculated that Mr Lee could have claimed a connection between his request to have a bespoke cake and his interaction with the QueerSpace community. Articles 2 and 3 of the Italian Constitution protect connections between individuals and the groups in which they develop their sense of identity.<sup>161</sup> Independently from the proximity between the individual and the group, this protection is, in the Italian Constitution, linked to a positive commitment to remove obstacles that might reduce the ability to interact with other members of a community.<sup>162</sup> This is a right that does not require balancing because a hypothetical Italian Ashers Baking Company Ltd is not a legal person and cannot claim the right to hold beliefs.<sup>163</sup> Unfortunately for gay people in Italy, Article 3 has been interpreted as imposing duties only on public institutions. In short, it is reasonable to suggest that a hypothetical Mr Lee's gambit in Italy to link his claim to Articles 2 and 3 would not be successful.

The last part of the article considered the potential effects of EU law as an analogous German case in Italian law. Italian judges, for historical reasons, can automatically apply any foreign

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155. ECtHR, *Lee v. United Kingdom*, para. 69.

156. *Ibid.*

157. *Ibid.*, para. 70.

158. ILGA-Europe's *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia*, 2022.

159. *Lee v. Ashers Baking Company Ltd and others* [2018] UKSC 49.

160. M. Ciancimino, 2 *Il diritto di famiglia e delle persone* (2018), p. 686.

161. G. Alpa et al. (eds.), *Il diritto alla identità personale* (Cedam, 1981); E.C. Raffiotta, 'Appunti in materia di diritto all'identità personale', *Forum di Quaderni costituzionali* (2010), [https://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti\\_forum/paper/0173\\_raf](https://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0173_raf).

162. *Ibid.*

163. E.V. Ibarra, 83 *The Modern Law Review* (2020).

legal principles without waiting for those principles to be enacted. This is particularly true in cases in which individual rights might be violated. However, EU law does not include a remedy for these types of discrimination, and analogous cases of discrimination by association, such as the German BvR 879/12, are not helpful. Gay people are, by way of comparison to Italy, fully protected against discrimination. BvR 879/12 discussed, instead, a company's entitlement to cancel a hotel reservation made by the wife of a known member of a right-wing political party.<sup>164</sup> However, during the pre-contractual phase in Germany, as in Italy, private businesses can discern with whom they wish to have a commercial transaction.<sup>165</sup>

In conclusion, there are indications that the Italian and British systems are rebalancing in ways that seek to protect individuals from unjustifiable discriminatory practices. Sexual orientation is considered a protected characteristic in Northern Ireland, yet the effect of such protection by association has been qualified by the Supreme Court. In Italy, the situation is less protective of gay people. The statutory protection granted to gay people is fragmented. It is recognized in labour relations, but not in the market of services and goods. This lack of consistency is problematic in many ways. In Italy, a gay employee, for instance, might be ordered to refuse service to a lesbian. This lack of coherence can only be remedied by a statutory measure or by the development of shared foreign principles. *Lee v. United Kingdom* could have changed the level of protection for gay people, but the ECtHR did not engage with the substantive element of the case. The result is that Italian law does not protect gay people against unfair practices in the market of goods and services. The reasons for such a lacuna are probably cultural, but that does not diminish the fact that gay people are waiting for protection, which, in all probability, should already have been explicit.

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164. 1 BvR 879/12.

165. *Ibid.*