

# THE VANISHING FREEDOM TO CHOOSE A CONTRACTUAL PARTNER

HUGH COLLINS\*

## I

### INTRODUCTION

An individual's right to choose a contractual partner marks an intersection between fundamental rights and basic contract law. As a fundamental right, the freedom to choose is emblematic of individual liberty and personal autonomy, values that lie at the core of a liberal society. The freedom to choose a contractual partner also contributes to a principal goal of the law of contract by enabling individuals to satisfy their preferences through market transactions. Using freedom of contract, everyone can choose from whom to purchase an item or service. Yet the right to choose a contractual partner also implies the right to reject someone. To enjoy an unfettered choice, a person must be able to reject a partner for good reasons, bad reasons, or no reasons at all. This power of rejection has impacts on others: the rejected partner may be denied an opportunity to obtain a job, or prevented from obtaining a valued service, or even deprived of an essential need such as food and shelter. Sometimes these adverse consequences result from efficient and rational decisions: the candidate for the job was rejected because the employer reasonably believed another applicant was superior. These adverse consequences may arise, however, for reasons that seem inappropriate or invalid, as when a person is rejected as a contractual partner on grounds of race, nationality, sex, sexual orientation, religion, union membership, or simply because his or her appearance is perceived as abnormal.

The unfettered right to choose a partner and the correlative right to reject someone present market societies with a dilemma. On the one hand, the general commitment to freedom of the individual and a free market supports an unrestricted right to choose. On the other hand, the consequences of such choices on rejected groups may comprise a denial of equal opportunity in the market and social exclusion. Under the pressure of this dilemma, liberal societies have been rethinking the scope of the freedom to choose contractual partners. Laws prohibiting discrimination on invidious grounds have placed substantial restrictions on the right to reject a contractual partner. In the past, market transactions were typically regarded as part of the private realm, where individual choices should normally be respected by upholding contracts and by

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\* Professor of English Law, Department of Law, London School of Economics and Political Science.

respecting refusals to enter contracts. Now the freedom to choose a contractual partner is restricted by legislation in particular contexts (such as employment) combined with reference to particular criteria (such as sex, race, and disability). The task now is to understand how and why the new boundary is drawn between fields in which choices are constrained in the public interest and those in which the unfettered freedom to choose contractual partners is preserved. The private realm of the market, where choices of contractual partner are still none of the law's business, outside of the regulatory controls of the anti-discrimination laws, has certainly shrunk in the past half century.

In order to understand how the new boundary around the private sphere in market transactions is drawn, section II explains why an analysis of the competing rights of individuals helps to illuminate the issue. Having described this framework of competing rights as a tool for explaining how the public interest may be understood in this context, the next section briefly describes the traditional protection afforded by the common law to unfettered freedom of choice of contractual partner. Section IV follows with an outline description of the scope of anti-discrimination laws in Europe and the United States, paying particular attention to the lines drawn between regulated market conduct and an unregulated private sphere. Section V explores an aspect of those laws that limits their scope to offers of sales and services to the public as opposed to purely private transactions. The sixth section then considers how this boundary drawn by anti-discrimination laws has been questioned by the European Court of Human Rights, perhaps to the extent of denying that any truly private sphere of unfettered choice should continue to exist. The concluding section assesses whether the freedom to choose a contractual partner has shrunk to a vanishing point under pressure from competing rights. The central claim is that once the legal framework is understood in terms of competing rights, there can be no remaining scope for an unregulated private sphere of freedom to choose a contractual partner.

## II

### RIGHTS AND THE PUBLIC INTEREST

Traditionally, contract law is linked to a private realm, where individuals may pursue their own interests without being directed or controlled by public authorities. Nevertheless, as contracts form the basic units of the market, they cannot be excluded entirely from public scrutiny and legal regulation. As the major source of wealth and economic power, a competitive market has to be steered and safeguarded by legal interventions. In addition to measures to prevent market failures, political aims such as a fair distribution of wealth and power across the different groups of society can provide reasons for legislation to interfere with freedom of contract. Interventions usually take the form of either mandatory rules applicable to contracts or the invalidity of unfair terms or agreements that subvert public policy. These measures interfere with the freedom of the parties to choose the terms of their transactions. This article

focuses on interventions on grounds of public policy with respect to the other main dimension of freedom of contract or contractual autonomy: the freedom to choose a contractual partner.

Public policy is concerned about the freedom to choose a contractual partner because that freedom may be exercised in ways that may be regarded as contrary to the public interest. For instance, the freedom to choose a contractual partner may be exercised negatively in a manner that is discriminatory on grounds of race, sex, or some other protected characteristic. Alternatively, the freedom to choose a contractual partner may be exercised positively in favour of certain categories of persons even though this preference harms the public interest. For instance, jobs in the public sector might be offered to friends or political supporters under a system of patronage without regard for ability to perform the job or the merits of other applicants. Both the negative and positive aspects of the freedom to choose a contractual partner may therefore provoke tensions between, on the one hand, respect for the freedom of the individual to choose the party with whom he or she wishes to associate, and, on the other hand, a public interest both in protecting the interests of others and in ensuring the public benefit of an open and competitive market.

The tension in this context has traditionally been understood as a clash between negative liberty and the collective public interest. Negative liberty was famously described by Isaiah Berlin:

[T]here ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority.<sup>1</sup>

This protection of a private zone is important in a liberal society, but its boundaries need to be set on this traditional view by considerations of public policy. Those policy concerns may relate to efficiency, social order, social justice, or other collective considerations. The touchstone of the boundary of the private zone has often been defined in the liberal tradition following J.S. Mill as depending on whether an act harms or injures others.<sup>2</sup>

An alternative way of formulating the public interest constraint on the freedom to choose a contractual partner concentrates on the rights of the rejected contracting party. On this view, the scope of the public interest is determined by reference to the question whether, in the exercise of the freedom to choose a contractual partner, the choice involves an unjustifiable interference with the rights of others. Those rights of others involve aspects of personal

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1. ISIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 124 (1969).

2. See H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963) (building on Mill's statement that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." JOHN STEWART MILL, *ON LIBERTY* 80 (Yale Univ. Press 2003) (1869)).

autonomy and dignity. For the sake of their autonomy, individuals deserve to have a reasonable range of options open to them, without being excluded from market opportunities by reference to irrelevant personal characteristics, and for the sake of their dignity, individuals should be able to take pride in their identities.<sup>3</sup> Under this approach, liberty is not limited to negative freedom from interference, but requires the law to promote the positive freedom or autonomy of all members of a society. This framework of analysis for investigating the appropriate restraints on the freedom to choose a contractual partner requires a balancing of competing rights.

For instance, in *Bull and Bull v. Hall and Preddy*,<sup>4</sup> the proprietors of a small hotel decided to exclude homosexual couples from rooms with a double bed on the ground that the proprietors regard such behavior—as with all sexual intercourse outside marriage<sup>5</sup>—as immoral and contrary to the tenets of their religious beliefs. This example frames the basic balancing analysis: should the decision to exclude be regarded as falling within the scope of the proprietors' liberty to choose a contractual partner, or should the public interest require that any exclusion of homosexual couples from the hotel should be unlawful? On the one hand, in addition to their demand for the freedom to choose a contractual partner, the proprietors can claim the support of other important rights such as freedom of religion and the right to exclude unwelcome people from their private property. On the other hand, the proprietors' action certainly denies equal respect to homosexual couples, and in so doing strikes at the core ideas of individual dignity and liberty that underpin liberal democracies and human rights. It also denies respect for their right to respect for private and family life.<sup>6</sup>

In this example, it is the proprietors' preferences with respect to contractual partners that are questioned, but the tables can easily be turned. Suppose that a potential customer of the hotel discovers that the proprietor manifests his or her religion in various ways in the decoration of the premises, by for instance placing a large crucifix and a bible prominently in every room. As an ardent atheist, the customer objects to all religious symbols and prefers a strictly secular environment, so he or she decides to find alternative accommodation.

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3. This view of the meaning of autonomy in liberal thought is most closely associated with Joseph Raz. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986). For an application of this theory of autonomy to anti-discrimination laws, see John Gardner, *Liberals and Unlawful Discrimination*, 9 OXFORD J. LEGAL STUD. 1 (1989).

4. [2012] EWCA (Civ) 83 (Eng.).

5. Under current U.K. law, it is not possible for homosexual couples to marry, though they can form a "civil partnership," which has the same legal incidents as marriage. Civil Partnership Act, 2004, c.33 (U.K.). However, the Marriage (Same Sex Couples) Bill, 2012–13, H.C. Bill [126], was laid before Parliament on January 25, 2013.

6. Article 8 of the European Convention on Human Rights, which concerns the right to respect for private and family life, has been used frequently to protect the interests of gays and lesbians. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). For an example application, see *Smith & Grady v. United Kingdom*, 29 Eur. Ct. H.R. 493 (1999).

Can the customer's decision be challenged on the ground that it involves disrespect to the proprietor's religious beliefs and autonomy, or is the customer's preference within the proper scope of the freedom to choose one's contractual partner?

This selection of the rights-based framework for examining these issues is prompted in part by the increasing use of this framework in Europe of human rights law in the sphere of markets and private law.<sup>7</sup> In most European countries it is possible to challenge the traditional rules of private law applicable to contracts and torts by asserting sources of human rights law. In some instances, such as in Germany, the national constitution provides a fertile source of such arguments.<sup>8</sup> In other countries, such as France<sup>9</sup> and the United Kingdom,<sup>10</sup> the source of rights is found in international conventions, particularly the European Convention on Human Rights (ECHR)<sup>11</sup> and the Charter of Fundamental Rights of the European Union (CFREU).<sup>12</sup>

The ECHR applies to all 47 member states of the Council of Europe. It permits individuals to bring a claim before the European Court of Human Rights (ECtHR) alleging that a state has interfered with a right unjustifiably or has failed to protect the individual's right from unjustified interference.<sup>13</sup> Importantly, there is no simple "state action" requirement for there to be jurisdiction for an individual's claim before the ECtHR, though only a state may be a defendant.<sup>14</sup> Therefore, it is unnecessary to demonstrate that an agency of the state directly interfered with the right. Instead, it is sufficient that the laws of the state have failed to protect the individual's right adequately against interference, including interference by another citizen or a business

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7. See OHLA O. CHEREDNYCHENKO, *FUNDAMENTAL RIGHTS, CONTRACT LAW AND THE PROTECTION OF THE WEAKER PARTY: A COMPARATIVE ANALYSIS OF THE CONSTITUTIONALISATION OF CONTRACT LAW, WITH EMPHASIS ON RISKY FINANCIAL TRANSACTIONS* (2007); CHANTAL MAK, *FUNDAMENTAL RIGHTS IN EUROPEAN CONTRACT LAW: A COMPARISON OF THE IMPACT OF FUNDAMENTAL RIGHTS ON CONTRACTUAL RELATIONSHIPS IN GERMANY, THE NETHERLANDS, ITALY AND ENGLAND* (2008).

8. See Jorg Fedtke, *Germany: Drittwirkung in Germany*, in *HUMAN RIGHTS AND THE PRIVATE SPHERE* 125 (Dawn Oliver & Jorg Fedtke eds., 2007).

9. See Myriam Hunter-Henin, *France: Horizontal Application and the Triumph of the European Convention on Human Rights*, in *HUMAN RIGHTS AND THE PRIVATE SPHERE*, *supra* note 8, at 98.

10. See Dawn Oliver, *England and Wales: The Human Rights Act and the Private Sphere*, in *HUMAN RIGHTS AND THE PRIVATE SPHERE*, *supra* note 8, at 63.

11. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6.

12. Charter of Fundamental Rights of the European Union, Dec. 14, 2007, 2007 O.J. (C 303) 1.

13. Article 34 provides that all parties to the ECHR accept the right of "any person, non-governmental organisation or group of individuals" claiming to be a victim of a breach of the Convention to bring an application. Under Protocol 11, both state and individual applications go to the ECtHR, which decides whether the application should be admitted for consideration on the merits. See generally D.J. HARRIS, M. O'BOYLE, E.P. BATES, C.M. BUCKLEY, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 4 (Oxford Univ. Press 2d ed. 2009).

14. See Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003).

organization. Laws that fail to protect rights adequately may be found in either public or private law.

In contrast, the CFREU does not permit direct claims regarding interference with rights. Instead, it requires the institutions of the European Union (EU) and the public authorities of Member States to apply EU law in a manner that is consistent with that declaration of rights.<sup>15</sup> When applying EU law, both EU courts and national courts must interpret that law in a manner that is compatible with the protected fundamental rights.

By these two means—both national constitutional law and transnational human rights law—individuals in Europe may challenge existing private law doctrines on the ground that they give insufficient weight to a particular human right. These challenges both defend individual rights and support the public interest in social justice.<sup>16</sup> Rights establish a framework that both emphasizes the value of respect for rights as a contribution to the public interest and simultaneously demands that any other perspectives on the public interest, such as general welfare, should only be pursued to the extent that they can be properly reconciled with the need to respect rights. Unlike a public law context, however, both parties enjoy rights in disputes located in private law such as contract. The public interest requires a coherent and justifiable reconciliation of the competing rights of the parties. With respect to freedom to choose a contractual partner, in addition to the general protection of individual liberty or autonomy provided by human rights law, this dimension of contract law is most obviously related to the idea of freedom of association, but it also can be supported by reference to other rights in particular instances such as respect for private life, for freedom of expression, and for peaceful enjoyment of property. The competing rights of rejected partners for contracts will also include those fundamental freedoms, often with the additional element of a right to equal treatment. In order to balance the competing rights, European human rights law usually applies a test of proportionality: any interference with the freedom to choose a contractual partner must be for a legitimate purpose and only to an extent that is necessary and appropriate to pursue that goal; similarly, any interference with the right to equal treatment must be justified by the same test of proportionality. The reconciliation of the competing rights occurs through a double application of the proportionality test.<sup>17</sup>

In the case of *Bull and Bull v. Hall and Preddy*,<sup>18</sup> for instance, the proprietors of the bed and breakfast can invoke the rights to liberty including

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15. Consolidated Version of the Treaty on European Union art. 6, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TEU].

16. See HUGH COLLINS, *The Constitutionalisation of European Private Law As a Path to Social Justice?*, in THE MANY CONCEPTS OF SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW 133 (Hans-W. Micklitz ed., 2011).

17. See, e.g., *In re S (FC) (A Child)*, [2004] UKHL 47, [2005] AC 593, para.17; HUGH COLLINS, *The (In)compatibility of Human Rights Discourse and Private Law* 29–32 (London School of Economics, Law Department, Working Paper Series, 07/12, 2012).

18. [2012] EWCA (Civ) 83 (Eng.).

freedom of association, to freedom of religion, and to peaceful enjoyment of their property as the foundation of their claim that they should be free to refuse a double bedroom to a gay couple. The test of proportionality requires an assessment whether the proposed interference with the rights of the proprietors is necessary and appropriate in the light of the legitimate purpose. Here the general aim of the legislation that forbids discrimination against gays and lesbians has to be examined and assessed with respect to the scope and weight of its demands. The analysis also requires an examination of whether the action of the proprietors involves an interference with the rights of the gay customers who wish to stay in the hotel. Their rights to dignity, equal respect, and respect for their private life must also be protected in a proportionate manner.

### III

#### LEGAL PROTECTION OF THE FREEDOM TO CHOOSE A CONTRACTUAL PARTNER

How does the law protect the freedom to choose a contractual partner? Most legal systems are committed to the basic principle of contract law that binding agreements only arise when both parties have consented to the agreement. That process of identifying consent to the contract is often analysed in terms of “offer and acceptance.” If A makes an offer to sell his book to B, it is not possible for a third person C to accept that offer and enter into a binding contract. The protection afforded by the law to the choice whether to enter a contract at all simultaneously protects the narrower choice whether to enter into a contract with a particular person. This latter aspect of freedom of contract permits us to choose, for instance, a more expensive airline offering a worse deal simply on the ground that its rival has a poor reputation in respect of matters which concern us personally, such as its refusal to recognize a trade union for the purposes of collective bargaining or its poor record on environmental matters. This dimension of the freedom to choose a contractual partner enables individuals to fit their market transactions into their broader schemes of values and preferences, thereby helping parties to feel comfortable with their choices and to achieve self-respect.

This protection of the choice whether to enter into a contract at all is further strengthened by the legal rules that invalidate consent on the ground that it was obtained by force, fraud, undue influence, or mistake. For instance, the freedom to choose a contractual partner is protected by the law of duress, which invalidates a contract that has been induced by illegitimate coercion. If coercion has invalidated the consent given to a contract, it does not matter whether the coercion was designed to achieve a sale to a particular objectionable person or simply to force a sale in itself. Coercion negates the consent to any contract, without distinction as to the person. This protection of choice by the established legal doctrines for invalidating consent does not in general distinguish between the general case of the absence of consent to any contract and the particular

case of the absence of consent to a contract with a particular person. In some instances, however, this distinction can be identified in the law.

Under the common law, in those unusual cases of mistaken identity in which the law permits the avoidance of a transaction, the particular identity of the other party is regarded as crucial. The justification for invalidating the contract is that, but for the mistake about the identity of the other party, the decision to enter the transaction would never have been made. English law protects this aspect of freedom of choice not only through the law of fraud—when someone deliberately conceals or lies about his or her identity—but also, and much more rarely, when there has been no misrepresentation but simply a unilateral mistake about the identity of the other person that was material to the decision to enter the contract.<sup>19</sup> This anomaly in the common law, which in general precludes the ability to avoid a contract for unilateral mistake, emphasizes the importance of the narrow freedom to choose the person with whom one enters a contract.

The controversial common law doctrine of undisclosed agency also involves situations in which the ability to select a particular contractual partner becomes significant. An undisclosed agency arises when a person sells goods or services to another, not being aware of the fact that the buyer is acting as an agent for a third person, the principal, to whom the seller would not be willing to transfer the goods or provide the service. In such cases, there is a willingness to enter into a contract of sale, but an absence of consent to a transaction with the undisclosed principal. In the general case when the seller is indifferent as to the identity and existence of the principal, the common law permits the principal a right of action—and grants the seller rights of action against both the agent and the principal. In the unusual case where the seller objects to the identity of the principal as purchaser,<sup>20</sup> or had commercial reasons for selling to the agent in particular,<sup>21</sup> it is arguable that the undisclosed principal should not be permitted to claim rights under the contract, because that would interfere with the seller's freedom to choose a contractual partner. In general, however, the English courts have been reluctant to deprive the principal of contractual rights.<sup>22</sup> The principle that the courts should uphold the bargain because it was both agreed and relied upon—even if under a mistake about the true identity of the counterparty—normally outweighs any concern about the infringement of the freedom to select one's contractual partner. The doctrine of undisclosed agency is controversial precisely because it does not appear to give sufficient weight to the freedom to choose a particular party with whom to contract.

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19. See, e.g., *Cundy v. Lindsay*, (1878) 3 App. Cas. 459; *Shogun Finance Ltd v. Hudson*, [2004] 1 All ER 215.

20. See, e.g., *Said v. Butt*, [1920] All ER Rep 232; *Dyster v. Randall & Sons*, [1926] All ER Rep 151.

21. See, e.g., *Greer v. Downs Supply Co.*, [1926] All ER Rep 675.

22. See, e.g., *Sin Yin Kwan v. Eastern Insurance Co. Ltd.*, [1994] A.C. 199 (U.K.).



This article has discussed how the general principles of the law of contract governing consent protect both a wider freedom of choice whether to enter a contract at all and a narrow freedom to choose the particular contractual partner. These principles are regarded as foundational to the whole field of legally enforceable contracts. Before the advent of anti-discrimination laws, few exceptions were acknowledged. The earlier exceptions were primarily concerned with the granting of a license by a public authority to a private body to operate a monopoly service. Modern examples of this system of licenses also impose a duty to accept customers. For instance, in the United Kingdom, the Electricity Act 1989 provides that electric utilities have a duty to make a connection whenever requested by an occupier of premises.<sup>23</sup> This duty is qualified in various ways, such as for safety concerns and impracticability, and through an indeterminate catch-all clause providing an exception “where it is not reasonable in all the circumstances” to make the connection.<sup>24</sup> Apart from these regulatory intrusions on the freedom to choose a contractual partner, the common law also acknowledges some rare and narrow exceptions.

Under the English common law, an innkeeper was not permitted to refuse to offer lodgings to a traveler if rooms were available.<sup>25</sup> The purpose of this rule was presumably to assist people in need and to encourage travel for such purposes as commerce or pilgrimage. Subject only to rooms being available at the inn, the traveler could be assured of a legal right to lodgings for the night. This common law rule carved out a narrow exception from the general principle that one is free always to decline to enter a contract. But the principle was not so broad as to exclude entirely the innkeeper’s discretion to select a contractual partner, because the innkeeper could refuse entry to a person on reasonable grounds.<sup>26</sup> Similarly, when the common law was extended by statute to hotels holding themselves out as offering food, drink, and accommodation to any traveler, the hotel was only obliged to accommodate travelers who appeared willing and able to pay a reasonable sum and who were in a fit state to be received.<sup>27</sup> This duty to provide a service to the public does not apply to boarding houses, public houses, restaurants, and private residential hotels. Under these rules regarding innkeepers and analogous modern establishments that offer a service to the public, although the general freedom to choose whether to enter a contract is diminished to a considerable extent, the freedom to choose a contractual partner is only foregone to the extent that the innkeeper has no good reason or just cause for excluding the traveler. This objective test will no doubt examine the traveler’s sobriety, ability to pay, and other risks to the premises or other guests of the hotel.

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23. Electricity Act, 1989, c. 29, § 16(1) (Eng.).

24. *Id.* at c. 29, § 17(1).

25. *See, e.g.,* *Browne v Brandt*, [1900–03] All ER Rep 118.

26. *See, e.g.,* *Constantine v Imperial Hotels Ltd.*, [1944] K.B. 693.

27. *See* Hotel Proprietors Act, 1956, c. 62.

There is, nevertheless, an important difference between an unfettered discretion to select a contractual partner and a limited freedom to refuse to contract with a particular person on reasonable grounds. Ultimately a court will determine whether the refusal to enter a contract with a particular person was reasonable or not. For instance, in 1943 a black professional cricketer from the West Indies was required to leave the Imperial Hotel in Russell Square in London on the ground that other guests, who were white military servicemen from the United States, objected to his presence.<sup>28</sup> Even though there was no law against race discrimination at that time in the UK, the hotel was found liable to the cricketer for a nominal sum of £5 for having excluded a guest without proper reason.<sup>29</sup> Here the hotel's freedom of choice with respect to contractual partner was confined on the ground that it was an unreasonable exclusion.

This brief survey of the common law that upholds the principle of the freedom to choose a contractual partner confirms that in general the law invalidates agreements when there has not been consent to the choice of contractual partner. It protects the choice of partner even when there has been a unilateral mistake, though normally a unilateral mistake about the character or subject matter of the contract would not suffice to justify the avoidance of the contract. Exceptions to the principle such as the rule applicable to innkeepers and the doctrine of undisclosed agency are strictly confined and treated as anomalous.

#### IV

#### ANTI-DISCRIMINATION LAWS

The major exception to the freedom to select a contractual partner is now found in anti-discrimination laws. The European Union has enacted directives that apply not only to employment and occupation,<sup>30</sup> but also to race<sup>31</sup> and sex discrimination in entering contracts more generally.<sup>32</sup> Although the directives have slightly different wording, the directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services highlights the general principle applicable. Article 3.1 states,

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28. *Constantine v Imperial Hotels Ltd.*, [1944] K.B. 693.

29. The Race Relations Act 1965 was the first legislation against race discrimination in the United Kingdom.

30. *See, e.g.*, Council Directive 2000/78/EC, of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16; Directive 2006/54/EC, of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast), 2006 O.J. (L 204) 23.

31. *See e.g.*, Council Directive 2000/43/EC, of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22.

32. *See e.g.*, Council Directive 2004/113/EC, 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 O.J. (L 373) 37.

Within the limits of the powers conferred upon the community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.<sup>33</sup>

The implication of this provision is that anyone who offers goods or services to the public has no right to discriminate between men and women either in the decision to enter the contract or in the terms offered. Article 3.1 is immediately qualified, however, by reference to the freedom to choose a contractual partner. Article 3.2 states,

This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.<sup>34</sup>

This latter provision may simply be stating the obvious, namely that the legislation is concerned with sex discrimination and not other kinds of preferences. It is interesting, however, that it was thought necessary to reassert this fundamental freedom to choose a partner even as the freedom was being diminished. This provision may also serve the technical purpose of establishing that freedom to choose a contractual partner can be a legitimate aim for the purpose of the test of proportionality, so that measures that indirectly discriminate against women (or men) may be potentially justifiable simply on the ground that they uphold the broader principle of the freedom to select a contractual partner.

EU directives have to be implemented through national legislation in order to become fully effective. For instance, in the United Kingdom there is the comprehensive Equality Act 2010 that covers all forms of prohibited discrimination. The key provision in respect of restrictions on the freedom to choose a contractual partner is section 29:

(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.<sup>35</sup>

This national legislation has to be interpreted in a manner that, so far as possible, achieves an outcome consistent with the objective pursued by the directives.<sup>36</sup> Furthermore, when there is a national provision that is incompatible with the fundamental EU principle of nondiscrimination, as

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33. *Id.* at 40.

34. *Id.* There is no equivalent provision in the Race Directive.

35. Equality Act, 2010, c.15, § 29(1) (U.K.).

36. *See, e.g.*, Joined Cases C-397-403/01, *Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, [2004] E.C.R. I-8835.

confirmed in Article 2 of the Treaty of European Union,<sup>37</sup> a national court must decline to apply that provision.<sup>38</sup>

Similarly, in the United States, the Civil Rights Act of 1964 introduced a major constraint on the freedom to choose a contractual partner.<sup>39</sup> As well as closely regulating the labor market in Title VII for the purpose of eliminating sex and race discrimination,<sup>40</sup> the Act also controlled the choice of partners in contracts for services in Title II, though only with respect to race.<sup>41</sup>

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment. . .

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).<sup>42</sup>

These provisions regarding discrimination in entering contracts for services and goods deserve closer inspection. Although the laws forbid discrimination in a wide range of contexts, their scope is limited. The freedom to choose a contractual partner persists in many instances.

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37. “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, nondiscrimination, tolerance, justice, solidarity and equality between women and men prevail.” TEU art. 2.

38. See Case C-555/07, *Kucukdevici v. Swedex GmbH & Co. KG*, [2010] I.R.L.R. 346 (CJEU).

39. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (Codified at 42 U.S.C. §§ 2000a–2000a–6 (2006)).

40. See *id.* at tit. VII.

41. Other measures in the United States do protect women. See, e.g., Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691–1691f (2006); Fair Housing Act of 1968, 42 U.S.C. §§ 3604–3607 (2006).

42. Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a (2006).

## V

## PRIVATE AND FAMILY LIFE

A theme that runs through the anti-discrimination laws is an exclusion of private and family life. Although the legislation introduces controls over the freedom to choose a contractual partner, those controls do not apply in this remaining private sphere. According to Article 3 of the EU directive on gender discrimination,<sup>43</sup> there appear to be three overlapping categories of exclusions: (1) transactions that are not concluded in the context of an offer to the public; (2) transactions in the context of private life; and (3) transactions in the context of family life. These exclusions do not map on to a distinction between transactions made in the course of business and sales by private individuals. For instance, if a private individual advertises a used bicycle for sale on a website or in a local newspaper, although that person is not operating as a business, the goods have been offered to the public, so that European anti-discrimination law applies. In contrast, if a man decides to sell his vineyard to his nephew rather than his niece on the ground that “only a man knows how to make good wine,” this sale (which is apparently not an offer to the public but a private sale) would be probably excluded on the ground that it falls within the area of private and family life.

Though not expressly invoking the same exemption of transactions in the context of private and family life, Title II of the Civil Rights Act of 1964 also draws a distinction between businesses providing services to the public and private transactions.<sup>44</sup> Similarly, with respect to accommodation, it excludes private hotels not open to transient guests, and small boarding houses and bed and breakfast establishments where the owner resides on the premises. The Civil Rights Act also excludes private clubs, an exclusion not formally recognized in European law, though one that is likely to be possible in certain contexts such as a single-sex sports club.<sup>45</sup> The scope of the Civil Rights Act seems narrower than the EU directive, because it focuses attention on businesses that are open to the public, such as hotels, restaurants, and theaters, whereas the directive applies not only to all businesses that offer goods and services to the public, but may apply to private individuals when they enter the general marketplace by offering goods and services.

Applying these principles to the earlier example of staying at a hotel, it is evident that anti-discrimination laws draw a distinction between the hotel proprietor and the customer. The proprietor is offering a service to the public and is thus included within the prohibition against discrimination. In contrast, the prospective guest who decides to go elsewhere owing to her dislike of religious artifacts in a hotel is not covered by the legislation. As a private

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43. Council Directive 2004/113/EC of 13 December 2004, *supra* note 32.

44. 42 U.S.C. §§ 2000a–2000a-6.

45. *See id.* Under the UK Equality Act, 2010, §§ 101, 107 (U.K.), discrimination by an association of more than twenty-four members is prohibited. However, an association that restricts membership to a protected class (for example, women) is permitted with the exception of color (Schedule 16).

individual looking for a service, there remains an unfettered freedom to choose a contractual partner, even if the choice is exercised on such proscribed grounds as race, sex, and religion.

Why should the law draw such a distinction between services offered to the public and private purchases? In both cases, a decision whether to enter a contract is affected by a personal characteristic of the other party. In both cases, the decision arguably involves treating the other person with less than equal respect and dignity. Anti-discrimination laws were created precisely to rule out such unequal treatment, not only in the public sphere, such as in voting and education, but also in the market sphere, such as in entering contracts. The argument that choices regarding contracting parties were a privileged area of autonomy, a matter of private and personal choice beyond the reach of public regulation, was rejected. Yet the removal of what John Gardner calls the “privacy” was incomplete<sup>46</sup>: consumers may discriminate in where they shop, workers can discriminate in their choice of employer, and family members may discriminate against each other.

In a case involving the interpretation of the phrase “to the public or a section of the public” in earlier U.K. legislation, Lord Simon explained that

every one of us plays a number of roles . . . . Certain of these roles lie in the public domain; others in the private or domestic. When the draughtsman used the words “provision to the public or a section of the public”, he was contemplating, I think, provision to persons aggregated in one or other of their public roles.<sup>47</sup>

But this explanation of the purpose of the limitation on anti-discrimination laws is unhelpful, since it does not explain why an individual acting as a consumer or a worker is performing only a private role rather than a public one, while an employer or a hotel proprietor is performing a public role. Furthermore, this contrast between public and private roles is unhelpful precisely because the anti-discrimination laws challenge the traditional notion that the entire field of market transactions was regarded as private, a matter for unfettered individual choice. In the traditional liberal view, both the market and the family were part of the private sphere, beyond the reach of public controls and constitutional principles such as equal treatment. Anti-discrimination law questions that boundary and insists that at least some of the market (and the family) should be regarded as a public sphere that can be regulated. Finally, it should be observed that the invocation of a distinction between a public sphere and a private sphere will not prove instructive, because these terms are defined in opposition relative to each other: what is private is not public, and vice versa.<sup>48</sup>

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46. See John Gardner, *Private Activities and Personal Autonomy: At the Margins of Anti-discrimination Law*, in *DISCRIMINATION: THE LIMITS OF LAW* 148, 149 (Bob Hepple & Erika Szyszczak eds., 1992).

47. *Charter v. Race Relations Board*, [1973] 1 All ER 512, 527 (H.L.).

48. See Hugh Collins, *The Decline of Privacy in Private Law*, 14 J.L. & SOC'Y 91 (1987).

## VI

## EUROPEAN CONVENTION ON HUMAN RIGHTS

The ECtHR has addressed this question of how to determine the scope of anti-discrimination laws and their application to fields traditionally viewed as private, when individuals enjoy unfettered choice. Article 14 of the ECHR contains a general anti-discrimination principle:

The enjoyment of rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>49</sup>

It is important to note that the provision is not restricted to a finite list of protected characteristics. On the other hand, to invoke Article 14, it is necessary to point to the interference with some other convention right, such as the right to liberty (Article 5), the right to respect for private and family life (Article 8), freedom of association (Article 11), or peaceful enjoyment of possessions (First Protocol, Article 1).<sup>50</sup> Usually the ECtHR will hold that a discriminatory interference with a convention right cannot be justified and will therefore violate the ECHR.<sup>51</sup>

The ECtHR considered the proper scope of the application of anti-discrimination laws in private transactions in the context of a will drawn up in 1939. In *Pla and Puncernau v. Andorra*,<sup>52</sup> the question was whether a testator could discriminate in her will in favour of sons or grandsons “from a legitimate and canonical marriage.”<sup>53</sup> In a dispute over inheritance of property under the will, the issue arose whether an adopted son of a married couple satisfied this requirement; if not, distant cousins would inherit the property. The issue was complicated by the absence at that time in Andorra of any laws governing adoption, such that it was unclear whether an adopted son should be granted equivalent rights to children born to the marriage. The court of first instance filled this gap inventively by applying the *ius commune* as found in the classical Roman law, which contained an elaborate law of adoption,<sup>54</sup> and held that an adopted son satisfied the requirement in the will. This decision was reversed on

49. European Convention on Human Rights, *supra* note 6 at art. XIV.

50. *See id.*

51. *See, e.g.,* Thlimmenos v. Greece, App. No. 34369/97, 31 Eur. H.R. Rep. 15 (2000); *see* D.J. HARRIS ET. AL, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 13, at ch. 15.

52. App. No. 69498/01, 2004-VIII Eur. Ct. H.R. 334.

53. *Id.* at ¶ 12 (“El qui arribi a ésser hereu haurà forçosament de transmetre l’herència a un fill o net de legítim i canònic matrimoni . . .”).

54. *Id.* at ¶ 17 (According to the Civil Division of the Tribunal des Batlles of Andorra, “The Corpus Iuris provided for the institution of adoption and included in the word ‘child’, children born out of wedlock and adopted children . . . by providing for two forms of adoption: one undertaken under the authority of a princep and the other before a judge. The procedure followed in the first case was to ask the adoptive parent if he sought to take the adopted child as his legitimate child and to ask the adopted child if he consented. It was also stipulated that ‘a consanguineous relationship is not instituted by deed but by birth or solemn adoption’ (Diocletian and Maximianus, Codi 4, 19, 13). Furthermore, ‘the father-child bond is not created by mere declarations or false assertions, even if both parties consent, but only by lawful marriage or solemn adoption’ (Diocletian and Maximianus, Codi 4, 19, 14).”).

appeal to the Andorran High Court on the ground that Catalan law, which usually applies in Andorra, does not recognize adoption, so the child was not “from” and not an “offspring” of the marriage. On a reference to the Andorran Constitutional Court, the Court held that there was no violation of the constitutional requirement of equal treatment for the reason that a testator enjoys the freedom to discriminate between different children and relatives when making a will.

When the adopted son took his case to Strasbourg, the ECtHR was divided five to two.<sup>55</sup> The majority held that both Article 8 (the right to respect for private and family life) and Article 14 were engaged.<sup>56</sup> The Court held that the Andorra’s High Court’s interpretation of the will was plainly wrong on the ground that an adopted child was “from” a marriage.<sup>57</sup> Furthermore, the High Court’s interpretation had a discriminatory effect against adopted children, contrary to Article 14.<sup>58</sup> The ECtHR would not normally challenge a judicial decision about domestic private law, but it would intervene under the Convention “if the national courts’ assessment of the facts or domestic law were manifestly unreasonable or arbitrary or blatantly inconsistent with the fundamental principles of the Convention.”<sup>59</sup> Since the will did not explicitly exclude adopted children, an interpretation should be applied that avoided the discriminatory effect. The majority of the Court therefore treated the judicial interpretation of a will as a kind of public act, so that a state is required to ensure that any interference with the rights of others, such as the right to respect for private and family life of the adopted son in this case, should not be conducted on a discriminatory basis.

In contrast, in a minority judgment Judge Garlicki insisted that a testator’s right to dispose of her property as she wished was an aspect of the right to property and her right to privacy under Article 8.<sup>60</sup> Indeed, as Dean Spielmann has observed, “There is merit in the submission that the whole idea of a will might well be to depart from the general system of inheritance and to discriminate.”<sup>61</sup> Judge Bratza articulated for the minority the traditional separation of public and private spheres:

The fact that, under the Convention, the legislative or judicial organs of the State are precluded from discriminating between individuals (by, for instance, creating distinctions based on biological or adoptive links between children and parents in the enjoyment of inheritance rights) does not mean that private individuals are similarly

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55. Pla and Puncernau, App. No. 69498/01, 2004-VIII Eur. Ct.

56. *Id.*

57. *Id.* For effective criticism of this interpretation, see Richard S. Kay, *The European Convention on Human Rights and the Control of Private Law*, 5 EUR. HUM. RTS. L. REV. 466, 469 (2005).

58. Pla and Purcenau, App. No. 69498/01, 2004-VIII Eur. Ct. H.R.

59. *Id.* at ¶ 46.

60. App. No. 69498/01, 2004-VIII Eur. Ct. H.R. (minority opinion of Garlicki, J.).

61. Dean Spielmann, *The European Convention on Human Rights: The European Court of Human Rights*, in HUMAN RIGHTS AND THE PRIVATE SPHERE, *supra* note 8, at 427, 440.



precluded from discriminating by drawing such distinctions when disposing of their property.<sup>62</sup>

In the view of the minority, as a protected convention right, the testator's freedom to make this personal decision could only be restricted in exceptional circumstances. Such exceptional circumstances would only arise when the disposition in the will was repugnant to the fundamental ideals of the Convention or aimed at the destruction of protected rights and freedoms. In this case, however, by leaving property only to children born to the marriage and excluding illegitimate and adopted children, the testator had acted within her rights and freedoms and the will should be enforced in accordance with its interpretation by the Andorran High Court.

Although this case concerns a will rather than a contract, similar principles should surely apply. As the majority observed,

[T]he Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention . . . .<sup>63</sup>

The majority of the ECtHR reduces the exclusion of private and family life from the scope of anti-discrimination laws almost to the vanishing point. The testator is not acting in the course of business or making offers to the public. On the contrary, she is making a private decision about the distribution of her property among her relatives and descendants after her death. Nevertheless, the majority of ECtHR does not accept that the anti-discrimination principle is so limited in the context of private transactions and the family. Indeed, the court is pushing the anti-discrimination principle into the heart of the family by requiring equal treatment for adopted children, and, presumably, between the sexes.

## VII

### THE END OF THE PRIVATE SPHERE

The acknowledgment of the rights of the rejected party forces a reconsideration of the largely unfettered right to choose a contractual partner. By applying rights to relations between private persons, the legal analysis shifts from the issue of whether some public policy should constrain the exercise of freedom of choice towards an inquiry that carefully measures the competing rights and justification for restrictions placed upon them by the law. The ECtHR has revealed in *Pla and Puncernau v. Andorra* how a legal analysis that demands respect for the rights of a rejected person has the potential to justify regulation not only of services offered to the public, as conceived by current

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62. *Pla and Puncernau*, App. No. 69498/01, 2004-VIII Eur. Ct. H.R. at ¶ 4 (minority opinion of Bratza, J.).

63. *Id.* at ¶ 59.

anti-discrimination laws, but also to private and family exchanges. These developments call into question the sharp contrast highlighted earlier in our discussion of anti-discrimination law between the regulation of businesses offering goods and services to the public and the absence of regulation of personal decisions by consumers and workers to use discriminatory preferences in their shopping and job searches.

This expansion of the constitutional and human rights review of private law clearly presents a challenge to democratically approved legislation and raises difficult questions about the balance between conflicting rights. But it serves the valuable purpose of undermining the emphasis in private law on negative liberty, epitomized by the ideas of freedom of contract and protection of property rights. Instead, by balancing the rights of both parties, the legal analysis is forced to take into account the real choices available to both parties and respect the autonomy of both by measuring the relative importance of their rights by reference to a test of proportionality, which may afford greater scope for a more adequate reconciliation of their interests.<sup>64</sup> In this way, the public interest is better served by the insertion of human rights in private law.

The inevitable consequence of the analysis in terms of competing rights is, however, that a completely insulated private sphere cannot exist any longer. Every choice or rejection of a contractual partner may be challenged on the ground that it disproportionately and unjustifiably interferes with the rights of the rejected party.

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64. For a similar analysis in the context of property rights, see generally Oliver Gerstenberg, *Private Law and the New European Constitutional Settlement*, 10 EUR. L. J. 6, 766 (2004).