

The Limitation of Freedom of Contract by the Right to Equality: A Case Study Approach

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Abstract: In an era of increasing social awareness and digital connectivity, businesses face growing scrutiny over their contractual decisions, particularly when refusing service based on individuals' public statements or political affiliations. Through analysis of recent high-profile cases, this article investigates the legal and ethical implications of such refusals. Then this paper examines the tension sometimes exists between freedom of contract and the right to equality, exploring how the latter limits the former in modern legal and business contexts. This paper aims to contribute to the ongoing debate on balancing contractual freedom with anti-discrimination principles, providing insights for future legislation and business practices. This paper finds that while freedom of contract remains a fundamental principle, it is increasingly constrained by equality considerations, reflecting broader societal shifts towards inclusivity. The paper concludes that a more nuanced, context-sensitive approach to balancing these competing rights is necessary, suggesting potential directions for legal and business practice evolution.

Keywords: Freedom of contract, right to equality, anti-discrimination, business ethics, contractual justice.

1. Introduction

In today's interconnected world, the principles of freedom of contract and the right to equality often find themselves at odds. The advent of social media has amplified individual voices, making public statements more impactful and far-reaching than ever before. As noted by Collins (n.d.), public statements are those that "any member of the public can see or be aware of [1]." This increased visibility has led to situations where businesses must navigate the complex terrain between their right to choose with whom they contract and societal expectations of non-discrimination.

The tension between these principles is exemplified in recent high-profile cases where businesses have refused service to individuals based on their public statements or political affiliations. These incidents raise critical questions about the extent to which the right to equality should limit the freedom of contract, a fundamental principle in contract law.

This paper argues that while businesses do have the right to refuse service in many cases, this right is not absolute and is increasingly constrained by equality considerations. The research aims to explore the legal and ethical boundaries of this limitation, contributing to the ongoing discourse on balancing individual rights with business prerogatives in a diverse society.

The significance of this research lies in its potential to inform both legal and business practices. As societies become more diverse and interconnected, the need for clear guidelines on how to balance contractual freedom with equality rights becomes increasingly pressing. This study seeks to provide a framework for understanding these complex issues, drawing on legal precedents, ethical considerations, and real-world case studies.

Moreover, the rapid advancement of technology and the rise of social media platforms have added new dimensions to this debate. The ease with which individuals can now make public statements has increased the potential for conflict between personal expression and business interests. This paper will explore how these technological changes have influenced the dynamics between contractual freedom and equality rights.

2. The Dual Values in Contracts: Freedom of Contract and Contractual Justice

2.1. The Principle of Freedom of Contract: Content and Value

Freedom of contract is a cornerstone of contract law, granting parties the autonomy to decide whether to enter into a contract, with whom, and on what terms. As defined by the Legal Information Institute (n.d.), a contract is "an agreement between parties, creating mutual obligations that are enforceable by law [2]." This principle is fundamental to market economies, fostering innovation, competition, and efficient resource allocation.

The value of contractual freedom lies in its promotion of individual autonomy and economic efficiency. It allows parties to tailor agreements to their specific needs and preferences, theoretically leading to optimal outcomes. As Atiyah argues, "The classical law of contract was based on a principle of freedom of contract which was itself based on an extreme philosophy of individualism [3]."

The principle of freedom of contract has deep historical roots, tracing back to the rise of market economies in the 18th and 19th centuries. It was seen as a crucial element in fostering economic growth and individual liberty. The idea was that individuals, acting in their own self-interest, would create contracts that were mutually beneficial, leading to overall societal prosperity.

This principle gained prominence during the Industrial Revolution, a period characterized by rapid economic growth and technological advancement. The freedom of contract was seen as essential for facilitating the complex business arrangements necessary for industrial expansion. It allowed entrepreneurs and businesses to form agreements quickly and efficiently, without excessive government intervention.

However, the absolute nature of this principle has been challenged over time. Critics argue that true freedom of contract can only exist when there is equality of bargaining power between parties, a condition that is rarely met in reality. This realization has led to the development of various legal doctrines and statutory provisions aimed at protecting weaker parties in contractual relationships.

One of the key criticisms of unfettered contractual freedom is that it can lead to exploitation. In situations where one party has significantly more power or information than the other, the stronger party may be able to impose unfair terms. This critique gained particular traction during the late 19th and early 20th centuries, as concerns grew about the power of large corporations and the vulnerability of workers and consumers.

Despite these challenges, the principle of freedom of contract remains a fundamental tenet of contract law in many jurisdictions. It continues to be valued for its role in promoting economic efficiency and respecting individual autonomy. However, its application in modern legal systems is often tempered by considerations of fairness and equality, leading to the development of the concept of contractual justice.

2.2. Contractual Justice: Content and Value

Contractual justice, on the other hand, focuses on fairness, the protection of vulnerable parties, and the preservation of social order. It recognizes that true freedom of contract can only exist in a society where all parties have equal bargaining power – a condition rarely met in reality. The concept of contractual justice has evolved to include considerations of equality, non-discrimination, and the protection of public interest.

The right to equality, as a key component of contractual justice, has gained prominence in legal frameworks worldwide. For instance, the UK's Equality Act 2010 "legally protects people from discrimination in the workplace and in wider society [4]." This act exemplifies how modern legal systems are increasingly prioritizing equality alongside traditional contractual freedoms.

The concept of contractual justice has its roots in the recognition that unrestrained freedom of contract can lead to exploitation and unfairness. It acknowledges that contracts do not exist in a vacuum but are embedded in a broader social context. As such, contractual justice seeks to ensure that the outcomes of contractual relationships align with societal values of fairness and equality.

One of the key aspects of contractual justice is the protection of vulnerable parties. This can include consumers in their dealings with businesses, employees in their relationships with employers, or minority groups facing systemic discrimination. Legal systems have developed various mechanisms to address these power imbalances, including consumer protection laws, labor regulations, and anti-discrimination statutes.

For example, many jurisdictions have implemented laws that prohibit unfair contract terms in consumer agreements. These laws recognize that consumers often lack the bargaining power to negotiate fair terms with businesses and may not fully understand the implications of complex contractual provisions. By prohibiting certain types of unfair terms, these laws aim to restore a degree of balance to consumer contracts.

Another important element of contractual justice is the consideration of public interest. This recognizes that contracts, while primarily agreements between private parties, can have broader societal impacts. For example, contracts that promote discriminatory practices or undermine public health and safety may be deemed unenforceable on grounds of public policy.

The concept of contractual justice has also been influenced by developments in human rights law. The recognition of certain fundamental rights, such as the right to equality and non-discrimination, has led to the incorporation of these principles into contract law. This has resulted in limitations on the types of contracts that can be legally enforced, even if they were freely entered into by both parties.

3. The Limitation of Freedom of Contract by the Right to Equality Related to Public Statements or Political Stances

3.1. The Conflict Between Freedom of Contract and the Right to Equality Related to Public Statements or Political Stances

The tension between contractual freedom and equality rights becomes pronounced recently when it comes to public statements or political stances. This conflict reflects the broader societal debate about the limits of free speech and the extent to which one's public expressions should impact their access to goods and services. The following two cases vividly reflect this issue and demonstrate its complexity.

3.1.1. Case Study: Sarah Sanders and the Red Hen Restaurant

In June 2018, Sarah Sanders, then White House Press Secretary, was denied service at the Red Hen restaurant in Lexington, Virginia, due to her association with the Trump administration. While this

refusal did not violate federal or state laws, as political affiliation is not a protected characteristic under the Civil Rights Act of 1964 or Virginia's Human Rights Act, it sparked significant controversy. The restaurant owner stated, "I explained that the restaurant has certain standards that I feel it has to uphold, such as honesty, and compassion, and cooperation [5]."

This case highlights the complex interplay between a business's right to refuse service and societal expectations of non-discrimination. Although legally permissible, the restaurant's actions led to public backlash and economic consequences, including the owner's resignation from a local business group [6].

The Sanders case raises several important questions. First, it highlights the gap between legal protections and societal expectations. While the restaurant's actions were not illegal, they were widely perceived as unfair or discriminatory by a significant portion of the public. This suggests that societal norms around discrimination may be evolving faster than legal frameworks.

Second, the case underscores the potential consequences for businesses that exercise their right to refuse service, even when legally permitted to do so. The backlash faced by the Red Hen restaurant demonstrates that public opinion can be a powerful force in shaping business practices, sometimes even more so than legal requirements.

Moreover, this case brings into focus the question of whether political affiliation should be considered a protected characteristic in anti-discrimination laws. While some jurisdictions, such as the District of Columbia, do include political affiliation in their anti-discrimination statutes, most do not. The Sanders case has reignited debates about whether such protections should be more widely adopted.

3.1.2. Nigel Farage and Coutts Bank

In a more recent case, Coutts, a private bank, closed the account of Nigel Farage, former leader of the UK Independence Party, in June 2023. Farage claimed the closure was due to his political views not aligning with the bank's values. A leaked document from the bank stated that Farage used "extreme, hateful and emotive language... at best he is seen as xenophobic and pandering to racists [7]."

This incident underscores the challenges businesses face when exercising their right to choose clients. While not illegal, the bank's actions led to significant reputational damage and leadership changes, including the resignation of the NatWest Group CEO [7].

The Farage case adds another layer of complexity to the debate. Unlike the Sanders case, which involved a public-facing business, this case involves a private banking relationship. It raises questions about the extent to which financial institutions should consider a client's public statements or political views when deciding whether to provide services.

Moreover, the case highlights the potential for conflict between a company's stated values and its business practices. While many businesses now publicly commit to values such as diversity and inclusion, the implementation of these values in day-to-day operations can be challenging and potentially controversial.

3.1.3. The controversial focus of the case

These cases demonstrate the growing conflict between contractual freedom and equality rights. They raise critical questions about the extent to which businesses can refuse service based on personal views or political affiliations without infringing on principles of equality and non-discrimination.

On one hand, the principle of freedom of contract suggests that businesses should have the right to choose with whom they enter into contractual relationships. This principle is rooted in the idea of individual autonomy and economic efficiency. As Epstein argues, "The freedom to contract, or to refuse to contract, is a fundamental aspect of economic liberty [8]."

On the other hand, the right to equality demands that individuals should not face discrimination based on their personal beliefs or political affiliations. This right is grounded in the principles of fairness and equal treatment under the law. As Collins notes, "The right to equality seeks to ensure that all individuals have equal access to opportunities and services, regardless of their personal characteristics or beliefs [9]."

The conflict arises when businesses refuse service or terminate contracts based on an individual's public statements or political stances. Such actions raise several critical questions:

A. To what extent should businesses be allowed to consider an individual's public statements or political views when making contractual decisions?

B. Does refusing service based on political affiliation or public statements constitute a form of discrimination?

C. How can the law balance the right of businesses to choose their clients with the right of individuals to express their views without fear of economic repercussions?

D. Should political affiliation or the content of public statements be considered protected characteristics under anti-discrimination laws?

These questions become particularly complex in the age of social media, where individuals' views are often publicly accessible and can quickly become controversial. As Sunstein points out, "The digital age has blurred the lines between public and private speech, creating new challenges for contract law and anti-discrimination policies [10]."

The conflict is further complicated by the fact that businesses themselves often take public stances on social and political issues. When a business refuses service to an individual based on that person's public statements or political views, it may be seen as the business exercising its own right to free expression. However, this can also be perceived as the business using its economic power to punish or silence dissenting views.

Moreover, the global nature of many businesses today means that they often operate across different jurisdictions with varying approaches to free speech and anti-discrimination laws. This can create additional complexities in determining how to balance contractual freedom with equality rights.

The conflict between freedom of contract and the right to equality in relation to public statements and political stances is not merely theoretical. It has real-world implications that affect individuals, businesses, and society at large. The resolution of this conflict will likely shape the future of contract law and anti-discrimination policies in significant ways.

3.2. How the Right to Equality Restricts Freedom of Contract

The right to equality imposes several limitations on the freedom of contract:

A. Legal Restrictions: Anti-discrimination laws in many jurisdictions prohibit businesses from refusing service based on protected characteristics. For example, the UK's Equality Act 2010 prohibits discrimination based on age, gender reassignment, marriage and civil partnership, pregnancy and maternity, disability, race, religion or belief, sex, and sexual orientation [11].

These legal restrictions represent a direct limitation on the freedom of contract. They effectively remove certain grounds (such as race or gender) from the list of permissible reasons for refusing to enter into a contract. While these laws are generally accepted as necessary for promoting equality, they do represent a significant departure from the classical notion of absolute freedom of contract.

The implementation of these laws has led to numerous legal challenges and debates. For instance, questions have arisen about how to balance religious freedom with anti-discrimination laws, particularly in cases involving businesses refusing to provide services for same-sex weddings. These cases highlight the ongoing tension between different rights and freedoms in modern societies.

B.Social Responsibility: Businesses are increasingly expected to consider social justice and equality in their operations. The Coutts Bank case illustrates how even legally permissible actions can lead to significant reputational damage if perceived as discriminatory.

This social responsibility aspect represents a more subtle, but potentially equally powerful, limitation on contractual freedom. While not legally mandated, the threat of reputational damage and public backlash can effectively constrain a business's choices about with whom to contract.

The rise of social media and instant communication has amplified this effect. Businesses now operate in an environment where their actions can be scrutinized and criticized by a global audience in real-time. This has led many companies to adopt more cautious approaches to potentially controversial decisions, even when those decisions would be legally permissible.

C.Market Order Maintenance: Excessive discriminatory practices can disrupt market order, necessitating limitations on contractual freedom to ensure fair competition.

This consideration recognizes that unchecked discrimination can lead to market inefficiencies and unfair competitive practices. For example, if businesses were free to discriminate based on race, it could lead to the economic marginalization of certain groups, reducing overall economic productivity and social welfare.

Governments and regulatory bodies often justify anti-discrimination measures not just on moral grounds, but also as necessary for maintaining a healthy and efficient market economy. This perspective views equality and non-discrimination as essential components of a well-functioning market system, rather than as constraints on market freedom.

These restrictions aim to balance individual rights with business freedoms, creating a more equitable and inclusive society. However, finding this balance in practice remains a complex challenge, requiring ongoing legal and societal discourse.

The tension between freedom of contract and the right to equality reflects broader societal debates about the role of business in society, the limits of individual freedom, and the nature of equality in diverse societies. As these debates continue, it is likely that the legal and social norms governing business conduct will continue to evolve, seeking to strike a balance between these competing principles.

4. Balancing Contractual Freedom and Equality Rights: A Legal Framework

4.1. Existing Legal Provisions on Equality Rights and Freedom of Contract

Current legal systems worldwide have developed various mechanisms to balance the principles of contractual freedom and equality rights. These provisions reflect the evolving understanding of the need to protect vulnerable parties while maintaining the benefits of contractual autonomy.

In the United States, for instance, the Civil Rights Act of 1964 prohibits discrimination in public accommodations based on race, color, religion, or national origin. This act significantly limits the freedom of businesses to choose their customers based on these protected characteristics. As noted by Epstein, "The Civil Rights Act represents a major departure from the classical liberal conception of freedom of contract, prioritizing equality over absolute contractual freedom [8]."

Similarly, the European Union has implemented comprehensive anti-discrimination legislation. The EU Charter of Fundamental Rights, which became legally binding with the Treaty of Lisbon in 2009, prohibits discrimination on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. This charter applies to all EU institutions and bodies, and to national authorities when they are implementing EU law.

In the UK, the Equality Act 2010 consolidates various anti-discrimination laws into a single act. This act prohibits discrimination in various contexts, including the provision of goods and services.

As Collins points out, "The Equality Act 2010 represents a significant limitation on contractual freedom in the UK, reflecting a societal shift towards prioritizing equality and non-discrimination [9]."

However, it's important to note that these legal provisions do not completely negate contractual freedom. They aim to strike a balance by prohibiting discrimination based on specific protected characteristics while still allowing businesses some discretion in choosing their contractual partners. For instance, businesses can still refuse service based on non-discriminatory reasons, such as a customer's behavior or inability to pay.

4.2. Balancing Methods in Judicial Practice

Courts play a crucial role in interpreting and applying these legal provisions, often having to balance competing rights and interests. The judicial approach to this balancing act has evolved over time, reflecting changing societal values and norms.

One common approach used by courts is the principle of proportionality. This principle, as explained by Brownsword" requires that any limitation on contractual freedom must be proportionate to the aim pursued [12]." In practice, this means that courts will consider whether the restriction on contractual freedom is necessary to achieve the goal of preventing discrimination, and whether it goes no further than necessary to achieve that goal.

Another important consideration in judicial practice is the concept of indirect discrimination. This recognizes that seemingly neutral contractual practices can have a disproportionate impact on certain groups. As Barnett notes, "The recognition of indirect discrimination has significantly expanded the scope of equality protections, requiring courts to look beyond the surface of contractual practices to their real-world effects [13]."

Courts also often consider the public interest when balancing contractual freedom and equality rights. In cases where discriminatory practices could have broader societal impacts, courts may be more inclined to limit contractual freedom. For example, in cases involving housing discrimination, courts have often taken a strong stance against practices that could lead to racial segregation, recognizing the broader societal harm such practices could cause.

4.3. Recommendations for Future Legislation and Judicial Practice

As society continues to evolve, so too must the legal framework for balancing contractual freedom and equality rights. Based on the analysis of current practices and emerging trends, several recommendations can be made for future legislation and judicial practice:

Expanding Protected Characteristics: As societal understanding of discrimination evolves, there may be a need to expand the list of protected characteristics. For instance, the Sanders and Farage cases highlight the potential need to consider political affiliation as a protected characteristic in some contexts. As Schwartz and Scott argue, "The law should be responsive to changing societal norms and values, adapting to protect against new forms of discrimination as they emerge [14]."

Contextual Approach: Future legislation and judicial practice should adopt a more nuanced, contextual approach to balancing contractual freedom and equality rights. This could involve considering factors such as the nature of the business, the potential impact of the discriminatory practice, and the availability of alternatives for the affected party. As Friedman suggests, "A one-size-fits-all approach to anti-discrimination law may not be sufficient to address the complexities of modern contractual relationships [15]."

Emphasis on Transparency: Businesses should be encouraged or required to be more transparent about their policies regarding customer selection or service refusal. This could help prevent misunderstandings and allow consumers to make informed choices. As Sunstein notes, "Transparency

can be a powerful tool for promoting fairness and reducing discrimination in contractual relationships [10]."

Alternative Dispute Resolution: Encouraging the use of alternative dispute resolution mechanisms, such as mediation, could provide a more flexible and less adversarial approach to resolving conflicts between contractual freedom and equality rights. This could be particularly useful in cases where the legal boundaries are unclear or where there are competing legitimate interests.

Regular Review and Update of Legislation: Given the rapid pace of social and technological change, there should be a mechanism for regular review and update of anti-discrimination legislation. This could help ensure that the law remains relevant and effective in addressing new forms of discrimination as they emerge.

Education and Training: There should be increased emphasis on education and training for businesses about their legal obligations regarding non-discrimination and the potential consequences of discriminatory practices. This could help prevent unintentional discrimination and promote a culture of inclusivity in business practices.

Consideration of Economic Impact: Future legislation and judicial decisions should consider the potential economic impact of restrictions on contractual freedom. As Posner argues, "While equality is a crucial societal value, it's important to balance this against the potential economic costs of overly restrictive anti-discrimination measures [16]."

5. Conclusion

The tension between freedom of contract and the right to equality remains a complex and evolving issue in modern legal systems. This research has demonstrated that while the freedom of contract continues to be a fundamental principle in contract law, it is increasingly constrained by considerations of equality and non-discrimination.

The case studies examined, including the Sarah Sanders and Nigel Farage incidents, highlight the practical challenges businesses face in navigating this complex terrain. These cases demonstrate that even when actions are legally permissible, they may still lead to significant reputational damage and public backlash if perceived as discriminatory.

The legal framework for balancing these competing rights continues to evolve, with courts and legislators seeking to find nuanced approaches that protect both individual freedoms and societal values of equality. The recommendations provided in this study suggest a move towards more flexible, context-sensitive approaches that can adapt to changing social norms and technological landscapes.

Looking forward, it is clear that the balance between contractual freedom and equality rights will continue to be a crucial area of legal and societal debate. As technology continues to advance and social norms evolve, new challenges are likely to emerge. For instance, the increasing use of artificial intelligence in decision-making processes may raise new questions about discrimination and fairness in contractual relationships.

Moreover, the globalization of business and the rise of online platforms present new challenges in applying anti-discrimination laws across different jurisdictions. Future research could explore how these trends might impact the balance between contractual freedom and equality rights on a global scale.

In conclusion, while the tension between freedom of contract and the right to equality presents ongoing challenges, it also offers opportunities for developing more nuanced and just legal frameworks. By carefully balancing these competing principles, legal systems can strive to create a society that respects individual autonomy while also promoting fairness and equality. As societies continue to grapple with these issues, ongoing dialogue, research, and legal innovation will be crucial in shaping fair and effective business practices and legal systems in the years to come.

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