

Human rights and religious litigation – faith in the law?

ABSTRACT

This is the era of human rights and religious litigation. Recent years have witnessed an unprecedented rise in the number of cases where the principles of non-discrimination and equality have been pitted against the right to freedom of religion or belief. This article seeks to examine this development with regard to an issue that is particularly synonymous with controversy – legal conflicts between conservative religious believers and people from LGBTIQ+ communities. The article’s primary focus is on the adverse consequences of excessive litigation in this field. In order to tackle the problem of conservative faith/LGBTIQ+ disputes it is suggested that a more holistic approach is needed, based on the principles of compromise, dignity and empathy. The proposed mechanism by which such an approach might be effected is that of ‘meaningful engagement’, a dispute resolution strategy that has been recognised by the South African Constitutional Court.

1. INTRODUCTION

Barely a month seems to pass without press reports of claims that religious freedom is being curbed by human rights laws.¹ The relationship between faith and human rights, which was once relatively uncontentious,² is now increasingly synonymous with controversy. In recent

¹. Such claims are commonly made by conservative faith groups such as Christian Concern and the Christian Institute. See <https://www.christianconcern.com/> and <https://www.christian.org.uk/>.

². The once relatively uncontentious nature of this relationship is evidenced by the fact that the European Court of Human Rights only made its first ruling under Article 9 of the ECHR (guaranteeing the right to freedom of

years a significant number of acrimonious disputes, involving religious litigants, have ended up in court. A common refrain from such litigants is that, far from protecting their faith, human rights laws are interpreted in ways that erode their religious freedom. Perhaps unsurprisingly there is a lack of consensus as to the veracity of such claims, but it is undeniable that the last decade has witnessed a dramatic increase in the number of courtroom battles being fought on the extent to which manifestations of (conservative) religious belief should be constrained by human rights laws that curtail discrimination and promote equality. Thus, as Christopher McCrudden puts it, ‘the days when the relationship between human rights law and religion was a quiet backwater, appearing to confirm arguments about the end of religion as a serious force in the world, are long gone, and ‘religious litigation’ is on the rise.’³

The rise of what McCrudden terms ‘religious litigation’ is part of a more general process that is commonly termed the ‘juridification of religion’ – a state of affairs whereby religion has increasingly become subject to legal regulation. This article is focused on one particular aspect of this phenomenon – the plethora of recent cases in which conservative religious believers and people from LGBTIQ+ communities have found themselves in the courtroom as competing litigants.⁴

The central premise of this article is that litigation alone is unlikely to solve the problem of conservative faith/LGBTIQ+ disputes. Instead, we suggest that fresh thought and

religion or belief) in *Kokkinakis v Greece*, App No 14307/88 (1994) 17 EHRR 397, more than three decades after first coming into existence.

³. Christopher McCrudden, *Litigating Religions* (Oxford University Press 2018) 126.

⁴. Whilst litigation in this area has, to date, typically involved conservative religious believers’ antipathy to same-sex relationships concerning gay men and lesbians, the term LGBTIQ+ (Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning) is used here because of its inclusivity, and the fact that it may refer to some of the protagonists in future conflicts.

impetus is given to the adoption of dispute resolution strategies, such as that of the South African Constitutional Court's principle of 'meaningful engagement'. In advocating a more holistic approach,⁵ we aim to shine a light on areas of common ground that are shared by conservative faith and LGBTIQ+ groups – a subject on which there has been a relative paucity of published material.⁶ We suggest these areas of commonality could potentially provide a basis for the building of bridges between the warring parties, in contrast to litigation which typically erects barriers and creates a 'zero-sum game' in which there exist only winners and losers. We acknowledge the importance of litigation in helping to shape social norms and fix the parameters of the law, but are also mindful of the fact that it is a less than effective tool for the amelioration of many of the divisive issues that lie at the very heart of conservative faith/LGBTIQ+ conflicts.

Whilst there has been, to date, a significant amount of legal scholarship on conservative faith/LGBTIQ+ litigation, there has been a relative paucity of published material on the efficacy of the courtroom as a forum for the resolution of such conflicts.⁷ One possible reason for this state of affairs is a latent assumption that the current proliferation of conservative faith/LGBTIQ+ disputes is little more than an aberration, and that the resistance of those who object to the equal recognition of same sex relationships will ultimately melt

⁵. In seeking to reconcile the right to freedom of religion and sexuality, there have been calls for 'a holistic approach ... to promote and protect everyone's human rights and fundamental freedoms': Michael Wiener, 'Freedom of Religion or Belief and Sexuality: Tracing the Evolution of the UN Special Rapporteur's Mandate Practice over Thirty Years' (2017) 6 *Oxford Journal of Law and Religion* 253, 267. There is however no clear guidance on what this might mean or entail, so our aim is to develop this idea more fully.

⁶. More on this issue has been published in the US, where it has been argued that 'both religious minorities and sexual minorities ... make essentially parallel claims on the larger society'. See Douglas Laycock, 'The wedding-vendor cases' (2018) 41(1) *Howard Journal of Law and Public Policy* 49-64, 61.

⁷. On the more general issue of the law relating to freedom of religion or belief see Equality and Human Rights Commission, *Religion or Belief: Is The Law Working?* (2016).

<<https://www.equalityhumanrights.com/en/publication-download/religion-or-belief-law-working>>

away in the face of adverse legal rulings. In seeking to challenge such assumptions, this article rests on the premise that the problem of resolving conflicts in this area is set to continue – or, as has been suggested elsewhere – ‘neither gay and lesbian people nor people with deeply held [conservative] religious convictions are going anywhere soon’.⁸ Accordingly, we maintain that there is a pressing need for innovative dispute resolution strategies, built on shared values, to ameliorate the number of acrimonious conservative faith/LGBTIQ+ cases ending up in court.

In advancing these arguments, the article is structured as follows. First, it starts by documenting the increasing regulation of religion by law (‘the juridification of religion’) generally, and the specific issue of conservative-faith/LGBTIQ+ disputes in particular. Second, attention is focused on the shortcomings of the law when it comes to litigation concerning religiously conservative and LGBTIQ+ parties. Third, the article explores whether the recent increase in religious litigation could be stemmed by fresh efforts to promote dialogue between conservative faith and LGBTIQ+ groups. And finally, a number of different options are discussed and, of these, it is argued that the most credible is the dispute resolution strategy of ‘meaningful engagement’.

2. RELIGIOUS LITIGATION

A. The juridification of religion

The increasing regulation of religion by the state – a wide-ranging process that has been associated with the creation of new laws, unprecedented discussion of ‘religious rights’, and a

⁸. Robin Bradley Kar, ‘Transformational Marriage: How to end the Culture Wars over Same-Sex marriage’ in Robin Fretwell Wilson (ed) *The Contested Place of Religion in Family Life* (Cambridge University Press 2018) 12, forthcoming <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049650>

significant increase in religious litigation – has been referred to by scholars as the ‘juridification of religion’.⁹ Most notably Russell Sandberg, building on the work of Blicher and Molander,¹⁰ has suggested that the ‘juridification of religion’ has three dimensions. The first relates to ‘legal explosion’, which is the way that the ‘law comes to regulate an increasing number of different activities’.¹¹ The crucial legal changes that have acted as catalysts to this ‘legal explosion’ have been the Human Rights Act 1998 (HRA) which incorporates the main articles of the European Convention on Human Rights into UK law,¹² and the Equality Act 2010 (EA) which draws together and strengthens strands of pre-existing non-discrimination legislation.¹³ The HRA and the EA each protect *both* freedom of religion/belief *and* the principles of LGBTIQ+ rights/equality. Prior to these developments the positive legal protections available to both religion/belief and (especially) to LGBTIQ+ rights and equality were either significantly weaker or effectively non-existent.

Sandberg’s next dimension of the juridification of religion concerns the ‘process whereby conflicts increasingly are being solved by or with reference to law’¹⁴ – a state of affairs illustrated by a spike in the number of freedom of religion/belief cases ending up in

⁹. See eg Helge Årsheim and Pamela Slotte, *Juridification of Religion?* (Brill 2017) and Russell Sandberg, *Law and Religion* (CUP 2011), 193. A similar term, the ‘judicialization of religious freedom’ is used by James Richardson to describe the influence of ‘key rulings’ of the European Court of Human Rights: J T Richardson, ‘Managing Religion and the Judicialization of Religious Freedom’ (2015) 54(1) *Journal for the Scientific Study of Religion* 1-19, 5.

¹⁰. L C Blicher and A Molander, ‘Mapping Juridification’ (2008) 14(1) *European Law Journal* 36-54.

¹¹. Sandberg (n 9) 194.

¹². These include **Article 9, the right to freedom of religion or belief; and also the right to private and family life (Article 8) and the right not to be discriminated against in relation to Convention rights (Article 14), provisions that have been instrumental in the protection of LGBTIQ+ rights.** See eg Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2012).

¹³. **It includes the ‘protected characteristics’ of sexual orientation and gender reassignment, and also religion and belief.** See generally John Wadham, *Blackstones Guide to the Equality Act 2010* (Oxford University Press, 3rd ed, 2016).

¹⁴. Sandberg (n 9) 195.

court. Finally, Sandberg's third dimension of the juridification of religion refers to 'legal framing', which he characterizes as being the way in which 'people increasingly tend to think of themselves and others as legal subjects'¹⁵ – an evident legacy of the rights based culture which the drafters of the Human Rights Act sought to cultivate.¹⁶

According to Sandberg, the juridification of religion is characterised by two elements – 'the active promotion of religious liberty as a right' and 'the significant shift by which the passive tolerance of religious difference has been superseded by the prescriptive regulation of religion'.¹⁷ In view of the first of these two elements ('the active promotion of religious liberty as a right') one might have perhaps assumed that the juridification of religion would have been universally welcomed by religious groups. After all, a legal development such as the incorporation of Article 9 of the ECHR into UK law grants express protection to the rights of believers and unprecedented recognition to a wide range of beliefs.¹⁸ Yet any such assumption would be erroneous. This is mainly to do with the second element of Sandberg's twofold classification – the phenomenon of a 'prescriptive regulation of religion' – a process that has led to some being alarmed by the state's efforts, vis-à-vis human rights and equality legislation, to use the law as a way of curbing certain manifestations of religious belief in order to protect others from discrimination and from interferences with *their* rights.¹⁹ Indeed, a former Anglican Bishop (Michael Nazir Ali) has described human rights law as being akin to a modern day 'Trojan horse', in that they risk surreptitiously eroding the rights of faith

¹⁵. Ibid.

¹⁶. See eg *Rights Brought Home*, CM 3782, October 1997
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf>

¹⁷ Sandberg (n 9) 195.

¹⁸. See eg *Kokkinakis v Greece* (1993) 17 EHRR 397, para 31.

¹⁹. See eg Roger Twigg, *Equality, Freedom and Religion* (2013 OUP) and Patrick Parkinson, 'Christian concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83-121.

groups under the guise of offering them protection,²⁰ while Britain's former Chief Rabbi (Lord Sacks) has even claimed that anti-discrimination laws have fueled an 'erosion of religious liberty' that has echoes of the 'Mayflower'.²¹ Thus, the juridification of religion has the potential of being highly controversial – and in this regard few issues have attracted more controversy than that of human rights laws which place curbs on manifestations of religious belief in order to prohibit sexual orientation discrimination.

B. Human Rights and conservative-faith/LGBTIQ+ disputes

In recent years, in both public and private sectors, there has been a marked increase in the number of conservative faith/LGBTIQ+ disputes in which manifestations of religious belief have been constrained by respect for human rights. The increase in such disputes is attributable to a number of factors.

First, changing attitudes mean that the long-standing social consensus on sexual ethics, which was once closely aligned with centuries old Christian thought, no longer exists. Thus adherents to traditional Christian teaching on such matters may find themselves out of step with contemporary social norms²² - an issue compounded by the fact that, as Paul

²⁰. See 'Bishop fears Church will be exiled', *The Daily Telegraph*, 30 September 2000

<<http://www.telegraph.co.uk/news/uknews/1357378/Bishop-fears-Church-will-be-exiled.html>>

²¹. See 'Chief Rabbi: Equality laws leading to new Mayflower exodus', *The Daily Telegraph*, 30 June 2011, referring to the Pilgrim Fathers' voyage to America in 1620 to escape religious persecution in England.

<<https://www.telegraph.co.uk/news/religion/8609531/Chief-Rabbi-Equality-laws-leading-to-new-Mayflower-exodus.html>>

²². **On the history of Christian thought and sexual ethics see eg., Kyle Harper, *From Shame to Sin* (Harvard University Press, 2013), who argues that, in the ancient world, Christianity 'not only drove profound cultural change [but also] created a new relationship between sexual morality and society' (p.5). See also Merry Wiesner-Hanks, *Christianity and Sexuality in the Early Modern World: Regulating Desire, Reforming Practice* (Routledge, 2014).**

Johnson puts it, '[w]e are living through a profound transformation in the social regulation of homosexuality'.²³ A second reason for the proliferation of faith/LGBTIQ+ disputes has been the evolution of human rights and the development of principles such as equality, so the law currently governs religious belief and sexual orientation in ways that were not historically the case.²⁴ Thirdly, a relevant consideration in this regard has been the growth of radical (oft termed 'fundamentalist') groups, whose followers typically eschew liberal values.²⁵ Fourthly, the increase of conservative faith/LGBTIQ+ litigation has been fuelled by the enthusiastic way in which various pressure groups have sought to deploy competing human rights claims on behalf of their clients.²⁶ And finally, a variety of other considerations have undoubtedly contributed to the rise of religious litigation in this area, ranging from the historically poor relations between people of faith and sexual minorities,²⁷ to the emotive and vitriolic language that frequently characterizes conservative faith/LGBTIQ+ disputes.²⁸

Of course, there are many people of faith (usually from liberal faith traditions), who have few qualms about the way in which the parameters of religious freedom have been shaped by contemporary human rights norms. Yet there remain a significant proportion of others – typically those of a religiously conservative disposition – who have a very different

²³. **Johnson (n 12) 1.**

²⁴. On the changing relationship between equality law and freedom of religion see Julian Rivers, 'Promoting Religious Equality' (2012) 1(2) *Oxford Journal of Law and Religion* 386-401, 393.

²⁵. On claims that liberal Christians have let more conservative groups 'set the agenda' see Robert Wuthnow, *Christianity in the Twenty-first Century: Reflections on the Challenges Ahead* (Oxford University Press 1993) 127.

²⁶. See Douglas NeJaime, 'Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation' (2009) 32(2) *Harvard Journal of Law and Gender* 305-381, 322, 327.

²⁷. See eg Louis Crompton, *Homosexuality and Civilization* (Harvard 2006).

²⁸. See Linda C McClain, 'The Rhetoric of Bigotry and Conscience in Battles Over "Religious Liberty v. LGBTIQ+ Rights"', Boston University, School of Law, Public Law Research Paper No. 18-05 (21 Mar 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3144478>

perspective.²⁹ In their eyes human rights laws often impose unfair restrictions on the manifestation of their beliefs in the public sphere, and it is upon these groups that we focus. A variety of terms have been used to characterise such people, ranging from ‘obdurate believers’³⁰ and ‘awkward customers’³¹ to those with ‘religious objections (Old-Testament Based) to same-sex marriage.’³² In this article we use the term ‘conservative religious believers’ on the basis that it is not merely value neutral, but that it is also sufficiently flexible to encompass a broad category of people, including those from a range of different faith traditions.³³ This flexibility includes both those who, in certain circumstances, may be willing to engage or potentially even compromise with ‘the other’, as well as those who stubbornly oppose mediation, dialogue or compromise.³⁴

²⁹. A similar distinction between liberal Christians, defined as being ‘more accepting of homosexuality than average’ and conservative Christians, who are ‘more likely than average to disapprove’ of homosexuality, has been drawn by the House of Bishops of the General Synod of the Church of England. See *Report of the House of Bishops Working Group on human sexuality* (Church House Publishing 2013) para. 168, 52.

³⁰. Anthony Bradney, ‘Faced by Faith’ in Peter Oliver, Sionaidh Douglas-Scott, Victor Tadros (eds) *Faith in Law: Essays in Legal Theory* (Bloomsbury 2000) 90, 91. The term ‘obdurate believers’ is defined by Tony Bradney as depicting those characterised by ‘the unyielding nature’ of their faith, as well as by their rejection of ‘high modernity’, and adherence to a ‘preordained system of values and commitments’.

³¹. See ‘Religious freedom: Strasbourg’s balancing act’, *The Guardian* (editorial) 15 January 2013 <<https://www.theguardian.com/commentisfree/2013/jan/15/religious-freedom-strasbourg>>

³². Doron M Kalir, ‘Rethinking Religious Objections (Old-Testament Based) to Same-Sex Marriage’ (2018) 33 *Notre Dame Journal of Law, Ethics and Public Policy* (forthcoming).

³³. **Although all of the litigants in reported cases to date in this area have been Christians, there is evidence to suggest that resistance can be found within some other faith communities to the law’s recognition of a more liberal sexual ethic. For example, according to research conducted by Linda Woodhead, in response to the question ‘Do you think same-sex marriage should be allowed’, 59 per cent of Muslim respondents answered in the negative. The figures for Jewish and Hindu respondents were 38 per cent and 26 per cent respectively. See Linda Woodhead, ‘What People Really Believe About Same-Sex Marriage’ 55(1) *Modern Believing* 27-38.**

³⁴. **Even though we use the word ‘conservative’ here as an umbrella term to describe those within faith communities who tend to have reservations about same-sex relationships, we acknowledge that, given the complexity of the issues at hand, certain problems of classification may remain. A case in point is the classification of a group such as Living Out – a group of Christians who say they ‘experience same sex**

Whichever term one uses, one thing beyond dispute is the high number of conservative faith/LGBTIQ+ conflicts to have come before British judges in recent years. Examples of such cases include: a conservative Christian sex therapist who wished to be excused from having to counsel gay couples;³⁵ two sets of Christian B&B owners who refused to rent rooms in their establishments to same-sex couples;³⁶ a Christian doctor who challenged the revocation of his appointment to a drugs advisory council because of critical comments he had made about ‘gay marriage and homosexuality’;³⁷ a married Christian couple who were deemed to be unsuitable as potential foster parents because of their views on homosexuality;³⁸ a Christian Council Registrar who wished to be excused from conducting same-sex civil-partnership ceremonies;³⁹ a Christian student excluded from a University course because of comments he had made on Facebook about his opposition to same-sex marriage;⁴⁰ and most recently, Christian bakers who were unwilling to bake a cake with the slogan ‘Support Gay Marriage’.⁴¹

attraction’, and describe themselves as being ‘committed to ... what the church has always taught about marriage and sex’, choosing to self-identify as ‘same-sex attracted’ rather than ‘as gay Christians’: <http://www.livingout.org/>. In spite of the limitations of the term ‘conservative’, we employ it in this article because there are no better alternatives, as well as the fact that it is commonly used in other publications in the field (see eg., *Report of the House of Bishops Working Group on human sexuality*, n 29).

³⁵. *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1.

³⁶. *Black & Anor v Wilkinson* [2013] EWCA Civ 820; *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83.

³⁷. *Raabe, R (on the application of) v Secretary of State for the Home Department* [2013] EWHC 1736 (Admin).

³⁸. *Johns v Derby City Council and Equality and Human Rights Commission* (intervening) [2011] EWHC 375 (Admin).

³⁹. *Eweida and Others v. the United Kingdom* (2013) 57 EHRR 8.

⁴⁰. *Ngole, R (On the Application of) v University of Sheffield* [2017] EWHC 2669 (Admin) (27 October 2017).

⁴¹. *Lee v Ashers Bakery Company Ltd and Others* [2018] UKSC 49.

In all of these cases, bar that of the bakers, the Christian parties were unsuccessful.⁴² These cases have already been subject to comprehensive review and detailed analysis elsewhere.⁴³ Thus, rather than proceeding along an already well-worn path, we wish rather to focus on a separate issue that has garnered much less attention – the consequences of (what is arguably) an increasingly common societal assumption: that such disputes may ultimately require judicial adjudication.

This is not to ignore the obvious advantages of judicial adjudication in such cases. It is axiomatic that the courts provide legally enforceable judgments which ensure that the immediate issue is resolved, the parameters of the law are set, and contemporary social norms are (at least in part) shaped. Yet, by the same token, the fact that the courts are increasingly called upon to rule on controversial issues of policy and principle, such as those associated with conservative faith/LGBTIQ+ conflicts, is problematic for a number of reasons. Three of these will now be examined in more detail. They are: the risk of faith/LGBTIQ+ disputes being characterised as a ‘zero sum game’; the difficulties of reconciling the right to freedom of religion and the principle of equality; and the failure of the law to change the hearts and minds of litigants who maintain that the right to freedom of religion or belief should trump the principle of non-discrimination.

3. FAITH/LGBTIQ+ LITIGATION – SHORTCOMINGS OF THE LAW

⁴² **The fact that the litigants in the aforementioned cases were all Christians should perhaps not obscure the fact that comparable reservations about contemporary sexual ethics may exist within other faith traditions. For example, it should not be forgotten that in the case of the Christian Registrar (Lilian Ladele) who objected to conducting same-sex civil-partnership ceremonies, it was reported that another Registrar, ‘a Muslim woman who also raised similar concerns, left the Council’s service’. See Elias J, in *London Borough of Islington v Ladele* [2008] UKEAT 0453 08 1912, para 6.**

⁴³. See eg Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart 2016) and Sandberg (n 9) 100-130.

A. 'Zero-sum game': 'winners' and 'losers'

A first downside of the increase in religious litigation is the risk of disputes, such as those between conservative faith/LGBTIQ+ litigants, being characterised as a 'zero sum game'. This situation, whereby the principles of freedom of religion and equality are pitted against each other, has been described as a process whereby 'a gain for one side necessarily entails a corresponding loss for the other side'.⁴⁴ The adversarial nature of litigation means that it is perhaps unsurprising that such perceptions are commonplace. Thus, when commenting on conservative faith/LGBTIQ+ disputes, scholars frequently employ the language of competition or 'conflict',⁴⁵ making reference to terms such as 'competing interests',⁴⁶ 'competing rights'⁴⁷ and 'competing equality claims'.⁴⁸ Whilst, at first glance, one might assume that such 'winner/loser' classifications would merely reflect the reality of the situation and thereby be relatively unproblematic, on closer inspection this is often far from being the case. After all, on an issue as highly charged as conservative faith/LGBTIQ+ litigation, 'zero-sum game' characterisations can be problematic for a number of reasons.

For a start, the zero sum game nature of litigation encourages the parties only to focus on strategies that will enable them to 'win'. In relation to conservative faith/LGBTIQ+

⁴⁴. Chai Feldblum, 'Moral Conflict and Liberty: Gay Rights and Religion' (2006) 72 *Brooklyn Law Review* 61-123, at 87.

⁴⁵. See eg Patrick Parkinson, 'Accommodating religious beliefs in a secular age: The issue of conscientious objection in the workplace' (2011) 34 *University of New South Wales Law Journal* 281-299, 294.

⁴⁶. Carl F Stychin, 'Faith in the future: Sexuality, religion and the public sphere' (2009) 29(4) *Oxford Journal of Legal Studies* 729-755, 749.

⁴⁷. Lucy Vickers, 'Religious discrimination in the workplace: An emerging hierarchy?' (2010) 12(3) *Ecclesiastical Law Journal* 280-303, 296.

⁴⁸. *Ibid* 296.

disputes, this has fostered greater enmity between the competing parties and has led to claims of litigants ‘seeking to use the force of the state to stamp out belief systems with which they disagree.’⁴⁹ By the same token, this emphasis on ‘winning’ may deter litigants from seeking to explore ways, beyond the courtroom, in which the dispute at hand could be resolved. Such victory oriented strategies might also, for example, consist of cultivating a sense of victimhood, with each party seeking to portray itself in court as a socially vulnerable group in need of the law’s protection (‘competing victim-hoods’). On this Ronan McRea, commenting on the case of Lillian Ladele (the registrar who refused to register civil-partnerships on the basis of her belief that homosexuality is sinful), makes the pertinent observation: ‘[r]ecourse to the courts and particularly to human rights courts can encourage each side to focus on articulating a position in which they are accorded the status of victim rather than attempting to define more general norms for a fair resolution of these clashes that treats everyone’s conscience equally and takes due account of relevant broader principles.’⁵⁰

In addition, the ‘winner/loser’ nature of such disputes highlights and effectively crystallises the differences between the competing parties. This may create perceptions that the interests of the litigants are ultimately incompatible and that conflict is ineluctable. The clear differentiation between ‘winners’ and ‘losers’ also ensures that the stakes are high, not least because no one wants to leave court as the ‘loser’. This may ‘reinforce the uncompromising posture of the contending sides’,⁵¹ and lead to a situation in which the

⁴⁹. Douglas NeJaime, ‘Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination’ (2012) 100 (5) *California Law Review* 1169-1238, at 1181.

⁵⁰. Ronan McRea, ‘Religion in the Workplace: Eweida and Others v United Kingdom’ (2014) *Modern Law Review* 277-291, 290.

⁵¹. Roger Severino, ‘Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty’ (2007) 30(3) *Harvard Journal of Law and Public Policy* 939-979, 942.

competing parties seek to humiliate and destroy the other – which in turn risks fostering even greater division and polarization.

Another problem with the ‘zero sum game’ approach (in this context) is that unsuccessful litigants and their supporters often lose confidence in the way the courts interpret human rights law.⁵² It is a common refrain in some quarters that judges just don’t ‘get’ or fully understand religion and that, as a consequence, their rulings can undermine religious freedom.⁵³ For some this is particularly the case when it comes to issues of sexual morality, as evidenced by claims that unsympathetic judges have contributed to a new moral ‘orthodoxy’, to which people of faith must adhere.⁵⁴ The ‘zero sum game’ aspect of religious litigation may exacerbate such concerns, and further stoke the fears of those who maintain that recent court rulings have ‘rendered irrelevant the concerns of those with tender consciences about complicity in behaviour they consider immoral’.⁵⁵

Finally, the ‘zero sum game’ model risks nurturing a sense of grievance and societal disaffection amongst those who exit the courtroom as ‘losers’. In this regard Michael McConnell has warned that groups which regard themselves as being excluded from the legal process are more likely to become ‘alienated and radicalised’.⁵⁶ Accordingly, in the UK, the

⁵². See eg Baroness Deech, HL Hansard, 25 January 2010, col. 1230, who claims that judges are misusing their power and that ‘[e]quality, human rights and freedom have in themselves become a religion or philosophical belief [which] like a juggernaut [is] crushing all other religions.’

⁵³. See eg Lord Carey of Clifton, intervening in *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, where he complained that the reasoning of judges in cases involving non-discrimination laws and religious freedom is ‘dangerous to the social order and represents clear *animus* to Christian beliefs.’

⁵⁴. See Julian Rivers, ‘Law, Religion and Gender Equality’ (2007) 9 *Ecclesiastical Law Journal* 24-52, 52.

⁵⁵. Julian Rivers, ‘The Secularisation of the British Constitution’ (2012) 14 *Ecclesiastical Law Journal* 371-399, 390.

⁵⁶. Michael W McConnell, ‘Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation’ (2007) 1 *Journal of Law, Philosophy and Culture* 159-174, 167.

fact that conservative Christians are usually the unsuccessful parties in litigation of this kind, has almost certainly contributed to perceptions, in some quarters, that Christians are socially marginalised,⁵⁷ and that Christianity is increasingly being forced out of public life.⁵⁸ Yet, by the same token, it is equally striking that on those occasions where it is the litigant seeking to protect LGBTIQ+ rights (rather than the conservative Christian) who leaves court as the ‘loser’, similar sentiments of bitterness and alienation are commonly expressed. A case in point is *Ashers*, where, in response to the Supreme Court’s ruling that a Christian bakery had been justified in refusing to bake a cake with a message supporting same-sex marriage, the losing party reiterated how the relevant events had left him feeling like a ‘second-class citizen’.⁵⁹ The ‘winner/loser’ nature of cases like *Ashers* puts already fraught conservative faith/LGBTIQ+ relations under even further strain, and, perhaps most significantly, risks concealing the fact that, as observed by Laycock and Berg, ‘conflict between religious liberty and gay rights is bad for both sides’.⁶⁰

B. Balancing freedom of religion and equality – a hierarchy of rights?

⁵⁷. On claims by Christians of the marginalisation of Christianity see Paul Weller, Kingsley Purdam, Nazila Ghanea, Saria Cheruvallil-Contractor, *Religion or Belief, Discrimination and Equality* (Bloomsbury 2013) 210.

⁵⁸. See eg Roger Twigg, *Religion in Public Life: Must Faith Be Privatised?* (Oxford University Press, 2007), and George and Andrew Carey, *We Don’t Do God: The Marginalization of Public Faith* (Monarch Books 2012).

⁵⁹. Owen Bowcott, ‘UK supreme court backs bakery that refused to make gay marriage cake’, *The Guardian* 10 October 2018 <<https://www.theguardian.com/uk-news/2018/oct/10/uk-supreme-court-backs-bakery-that-refused-to-make-gay-wedding-cake>>

⁶⁰ Douglas Laycock and Thomas C Berg, ‘Protecting Same-Sex Marriage and Religious Liberty’ (2013) 99(1) *Virginia Law Review*, 4.

A second problem associated with conservative faith/LGBTIQ+ litigation relates to what has been referred to as a ‘clash of equality rights’⁶¹ – the challenge of striking an appropriate balance between the right to freedom of religion and the principle of equality. The challenge in this context is clearly formidable. Michael Wiener has argued persuasively that there ‘should neither be an abstract hierarchy of human rights nor a general trumping of the equality principle over religious freedom, or vice versa’.⁶² Whilst such a position may be the ideal in theory, its realisation in practice is especially problematic.

There are, for example, some who complain that the courts, in balancing the principles of freedom of religion and non-discrimination, have in effect created a hierarchy of rights, in which the principle of non-discrimination has taken precedence over the right to freedom of religion.⁶³ In relation to cases where competing conservative faith and LGBTIQ+ claims have been at issue, Sandberg suggests that the courts have reduced the relevant issues to a “‘battle of rights” analysis’ whereby ‘either we protect freedom of religion or we protect the right not to discriminated against on grounds of sexual orientation’ – and that ‘[w]hen this analysis is applied, religious rights become easily “trumped” by the right not to discriminate on grounds of sexual orientation’.⁶⁴ This view – that in the event of a clash between the right to freedom of religion and the prohibition of discrimination on the grounds of sexual orientation, ‘[t]here seems to be no [legal] recognition that equality policy protects

⁶¹. Lady Hale, speaking at the Comparative and Administrative Law Conference, Yale Law School, ‘Religion and Sexual Orientation: The clash of equality rights’, 7 March 2014 < <http://supremecourt.uk/docs/speech-140307.pdf> >

⁶². Wiener (n 5) 267. See also Maleiha Malik, ‘Religious Freedom, Free Speech and Equality: conflict or cohesion?’ (2011) 17 *Res Publica* 21-40, 38.

⁶³. See eg Roger Twigg, *Equality, Freedom and Religion* (OUP 2013) 133, and Julian Rivers, ‘The Secularisation of the British Constitution’ (2012) 14 *Ecclesiastical Law Journal* 390.

⁶⁴. Russell Sandberg, ‘Submission to the Consultation on Legal Intervention on Religion or Belief Rights’, 4 [http://www.law.cf.ac.uk/clr/research/Russell%20Sandberg%20\(Cardiff%20University\)%20Submission%20to%20the%20Consultation%20on%20Legal%20Intervention%20on%20Religion%20or%20Belief%20Rights.pdf](http://www.law.cf.ac.uk/clr/research/Russell%20Sandberg%20(Cardiff%20University)%20Submission%20to%20the%20Consultation%20on%20Legal%20Intervention%20on%20Religion%20or%20Belief%20Rights.pdf)

discrimination on grounds of religion as well as on grounds of sexual orientation’ – has been echoed by a number of other scholars.⁶⁵ As one of them (Julian Rivers) claims, there is a risk of equality being ‘too easily subverted into an empty vessel waiting to be filled with one’s prejudices ... and being used to become a super-right, overriding other human rights and stifling discussion about what is morally good’.⁶⁶

There are various possible responses to the claim that equality has become a ‘super right’ which can be used to ride roughshod over the religious convictions of believers, and of these two are now discussed. The first is that such claims are fallacious because commonly cited cases in this regard such as *Ladele*⁶⁷ and *McFarlane*⁶⁸ merely reveal ‘a hierarchy of different types of discrimination’ – since the prevention of direct discrimination on the grounds of sexual orientation takes precedence over indirect discrimination on the ground of religion/belief – rather than ‘a hierarchy between different protected characteristics’.⁶⁹ And a second response is that even if a de facto hierarchy of rights actually exists, such a development is to be welcomed. This is on the basis that because freedom of religion (and/or belief) is unlike other protected grounds against discrimination (eg., sex, race, sexual orientation, disability), because the accommodation of certain religious beliefs and practices

⁶⁵. Russell Sandberg, ‘The Right to Discriminate’ (2011) 13 *Ecclesiastical Law Journal* 172. See also Parkinson (n 45) 281-299; and Twigg (n 63) 133.

⁶⁶. Julian Rivers, ‘Three principles for Christian citizens’ < <http://www.jubilee-centre.org/three-principles-for-christian-citizens/>> See also Ian Leigh, ‘Towards a Christian approach to religious liberty’ in Paul Beaumont (ed) *Christian Perspectives on Human Rights and Legal Philosophy* (Paternoster Press 1998) 32, where Leigh argues that ‘in the perpetual sibling rivalry between liberty and equality the latter has gained the upper hand’.

⁶⁷. See n 39. As noted earlier, this case involved a Christian registrar who was unwilling to officiate at same-sex civil partnership ceremonies.

⁶⁸. See n 35. In this case a Christian sex therapist was reluctant to counsel same-sex couples.

⁶⁹. See eg Megan Pearson, ‘Religious discrimination and the ‘hierarchy of rights’ Non-existent, appropriate or problematic?’ (2016) 16(1) *International Journal of Discrimination and the Law* 37-50, 40.

is hard to reconcile with equality⁷⁰ – so the prohibition of discrimination on the grounds of sexual orientation should take priority over religious freedom.⁷¹

Lucy Vickers has made the pertinent observation that ‘although it may be inevitable that a hierarchy will be created as between different grounds of equality, further thought needs to be given to where religion should sit on the spectrum, and why.’⁷² To date a number of attempts have been made to fill this void. For example, in seeking to inform the debate about the relationship between religion and equality, Evans and Gaze maintain that ‘the more significant the social or economic impact of the activity being undertaken, the greater the argument in favour of applying non-discrimination laws’, whereas, when it comes to the identification of factors that would justify religion taking precedence over equality, a key consideration is the ‘centrality of a particular activity’ to the faith in question.⁷³ A different approach is advanced by Trispiotis who argues that, in order to strike an appropriate balance between religion and equality, people must have an ‘assurance’ of feeling secure that they have ‘an elementary entitlement to justice, and [that] all deserve protection from the most egregious forms of violence, exclusion, indignity and subordination’.⁷⁴ And finally, a ‘harm approach’ has been advocated by Wintemute, whereby the accommodation of religious

⁷⁰. See eg Aileen McColgan, ‘Class Wars? Religion and (In)equality in the Workplace’ (2009) 38(1) *Industrial Law Journal* 21-29; Anthony Lester and Paola Uccellari, ‘Extending the equality duty to religion, conscience and belief: proceed with caution’ (2008) 5 *European Human Rights Law Review* 567-573; and Marci Hamilton, *God versus the Gavel: The Perils of Extreme Religious Liberty* (Cambridge University Press 2014).

⁷¹. See eg Feldblum, n 44, at 120. By way of contrast on claims that, in the event of a clash, religious liberty should win over gay rights see eg Lynn D Wardle, ‘The Attack on Marriage as the Union of a Man and a Woman’ (2007) 83 *North Dakota Law Review* 1365-1391, 1378.

⁷². Vickers (n 47) 302.

⁷³. Carolyn Evans and Beth Gaze, ‘Between Religious Freedom and Equality: Complexity and Context’ (2008), *Harvard International Law Journal* 40-49, 46-7.

⁷⁴. Ilias Trispiotis ‘‘Alternative lifestyles’ and unlawful discrimination: the limits of religious freedom in *Bull v Hall*’ (2014) 1 *European Human Rights Law Review* 39-48.

beliefs in this area should be determined by the ‘harm’ caused to the accommodating party, as measured by considerations such as inconvenience, disruption and cost.⁷⁵

Although each of these proposals are worthy of serious consideration, an evident shared weakness is ‘consistency’, especially because terms such as ‘assurance’ and ‘harm’, being open-ended and nebulous, are inevitably subject to a variety of different interpretations. Indeed, the challenges facing judges in this area were recently acknowledged by the Master of the Rolls, Sir Terence Etherton, when he said that the question of whether the courts should ‘favour one protected right over another’ constitutes ‘one of the most difficult and sensitive issues currently faced by the courts’ today.⁷⁶ Judges will continue to face this taxing challenge as long as a steady stream of conservative faith/LGBTIQ+ disputes come their way. Thus, it is apposite to bear in mind an observation made by Evans and Gaze in this regard – that ‘[i]n the process of reconciling non-discrimination and freedom of religion it is important to hear the views both of those who seek to preserve traditions, and of those who bear the costs of such traditions and may seek protection’.⁷⁷ Calls such as these for further input from *all* parties highlight the shortcomings of litigation, and demonstrate the need for innovative (non-legal) dispute resolution strategies.

C. Changing hearts and minds

A third shortcoming of litigation in the context of conservative faith/ LGBTIQ+ disputes relates to concerns that it has little effect on changing the hearts and minds of litigants who

⁷⁵. Robert Wintemute, ‘Accommodating religious beliefs: harm, clothing or symbols, and refusals to serve others’ (2014) 77(2) *The Modern Law Review* 223-253.

⁷⁶. Sir Terence Etherton, ‘Religion, the Rule of Law and Discrimination’, Barnard’s Inn Hall, 26 June 2014, para 53 <<http://www.gresham.ac.uk/lectures-and-events/religion-the-rule-of-law-and-discrimination>>

⁷⁷. Evans and Gaze (n 73) 48.

have religiously-based objections to same (or minority) sex relationships. To the extent that a key objective of equality legislation is to ‘change organisational policy and behaviour’,⁷⁸ or even to create a world ‘inhabited by better people’,⁷⁹ the impact of such laws on those who (for religious reasons) wish to elevate heterosexual relationships above homosexual ones appears to be limited. For example, public statements from unsuccessful conservative faith litigants, in the wake of their exposure to the legal process in this regard, tend not to suggest that they have become any more accepting of human rights in general or LGBTIQ+ rights in particular.⁸⁰ On the contrary, the risk is that exposure to the law may even harden the resolve of those conservative faith litigants who view themselves as being akin to religious martyrs from a previous age, in the sense of being forced to choose between obeying the laws of God or man.⁸¹

The extent to which the liberal state may use ‘compulsion’ so as to transform obdurate believers into dutiful liberal citizens is a matter that has long generated controversy.⁸² The philosopher William Galston has said that ‘a liberal democracy must have the capacity to

⁷⁸. Bob Hepple, ‘Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation’ (2011) 40 (4) *Industrial Law Journal* 315-335, 315.

⁷⁹. Alexander Somek, *Engineering Equality* (Oxford University Press 2011) 15. It should however be noted that Somek, a harsh critic of EU anti-discrimination law, made this comment rather sardonically.

⁸⁰. A case in point is Gary McFarlane, the Christian therapist unwilling to counsel same-sex couples, who, in a recent interview, described as ‘shocking’ what he regards as ‘an aggressive intolerance’ against Christians in public life: Javier García Oliva, Helen Hall, *Religion, Law and the Constitution: Balancing Beliefs in Britain* (Routledge 2018) 352.

⁸¹. See eg in relation to Lillian Ladele (*Eweida*, n 39, para 23). Moreover, those who may wish to draw such parallels can point to the work of the historian Sarah Covington who, in documenting the social influence of martyrdom five hundred years ago in England, has observed that stories of martyrdom were associated with ‘a legal rhetoric, in a judicial drama that involved different claims on and visions of the law.’ See Sarah Covington ‘‘The tribunals of Christ and of man’’: law and the making of martyrs in early modern England’ (2014) 19(2) *Mortality* 134-150.

⁸². See eg Nicholas Wolterstorff, ‘The paradoxical role of coercion in political liberalism’ (2007) 1(1) *Journal of Law, Philosophy and Culture* 135-158.

articulate and defend its core principles, with coercive force if needed'⁸³ and, with one such 'core principle' being equality/non-discrimination on the grounds of sexual orientation, the prohibition of (religiously motivated) discrimination, and commencement of related litigation, demonstrates the state's commitment to the equal treatment of sexual minorities. Moreover, as the political theorist Stephen Macedo has observed, the liberal state needs to shape and influence its citizens because 'there is no reason to think liberal citizens come about naturally'.⁸⁴ But the extent to which judges' rulings can influence the hearts and minds of litigants who have an aversion to same-sex relationships is highly questionable – especially where such people regard themselves as being ultimately accountable to a higher power that is spiritual rather than terrestrial in nature.⁸⁵ Thus, to the extent that the law in relation to the recognition of LGBTIQ+ rights is part of what Koppelman calls 'a project of social reconstruction',⁸⁶ its effectiveness may be tempered by resistance to change based on deeply embedded tenets of conservative belief. As a result, in regard to the ability of human rights and anti-discrimination laws to shape attitudes, *real* change may ultimately depend on the degree to which such 'laws are internalised and reflected in new custom'⁸⁷ – a particularly challenging process when it comes to affording equal recognition to LGBTIQ+ rights, given

⁸³. William Galston, 'Expressive liberty, moral pluralism, political pluralism: three sources of liberal democracy' (1999) 40 *William and Mary Law Review* 869-907, 904.

⁸⁴. Stephen Macedo, 'Transformative constitutionalism and the case of religion: defending the moderate hegemony of liberalism' (1998) 26 *Political Theory*, 56-80, 58.

⁸⁵. Ran Hirschl and Ayelet Shachar, 'Competing Orders? The Challenge of Religion to Modern Constitutionalism' (2018) 85(2) *University of Chicago Law Review* 425-456.

⁸⁶. Andrew Koppelman, 'Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law' (2015) 88 *Southern California Law Review* 619-660, 651.

⁸⁷. Antony Allott, *The Limits of Law* (Butterworths 1980) 236.

the longstanding priority afforded by some religious groups to heterosexual marital relationships.⁸⁸

It would be absurd to expect human rights and anti-discrimination laws to work sudden ‘miracles’ in terms of transforming the attitudes of conservative religious believers⁸⁹ – not least because few subscribe to ‘a magic belief in the efficacy of the law in shaping human conduct and social relations’.⁹⁰ But, even in the long run, it is questionable whether legal rulings in this area are capable, to any significant degree, of changing intransigent attitudes about sexuality in some of the nation’s most religiously conservative communities. As the sociologist Peter Berger has observed, for many people the cosmic basis of religious belief provides them with ‘an ultimate sense of rightness, both cognitively and normatively’ that is a central part in their lives.⁹¹ When this ‘ultimate sense of rightness’ is at odds with contemporary social norms or law, the potential for conflict is clear.⁹² Accordingly, the law’s ability to modify the attitudes of some believers on an issue like that of LGBTIQ+ rights is relatively modest because laws are ‘blunt instruments of social control’,⁹³ and, on such

⁸⁸. For example, Weatherup J in *Re the Christian Institute and others Application* [2007] NIQB 66 [2008] NI86 at para 5 observed that traditional Christian teachings on homosexuality and sin have been ‘a long established part of the belief system of the world’s major religions’.

⁸⁹. Louise Melling argues that whilst laws that aim to curb discrimination in the name of religion have ‘not worked miracles’, they have nonetheless ‘established a norm, a standard that creates a baseline of expectations.’ See Louise Melling, ‘Religious Refusals No Public Accommodations Laws: Four Reasons to Say No’ (2015) 38 *Harvard Women’s Law Journal* 177-192 at 191.

⁹⁰. Otto Kahn-Freund, ‘Industrial Relations and the Law: Retrospect and Prospect’ (1969) 7 *British Journal of Industrial Relations* 301-316 at 311.

⁹¹. Peter L. Berger, *Sacred Canopy: Elements of a Sociological Theory of Religion* (Anchor Books 1990) 37.

⁹². For example, on the argument that religion is special because of the unique role it plays in the life and identity of the believer see John Witte Jr, *God’s Joust, God’s Justice: Law and Religion in the Western Tradition* (Eerdmans 2006) 102.

⁹³. Richard Arneson, ‘Against Freedom of Conscience’ (2010) 47(4) *San Diego Law Review*, 1015-1040,1021.

matters, ‘the sort of equality that law can produce is too thin and formal to alter deep “habits of mind”’.⁹⁴

Karl Marx once observed that ‘revolutions are not made by laws’.⁹⁵ By the same token it hardly seems credible that litigation will be the catalyst for a revolution in the fixed attitudes of conservative religious believers to LGBTIQ+ rights. As such, it is important for attention to be focused on alternatives to litigation in relation to the resolution of conservative faith/LGBTIQ+ disputes.⁹⁶

4. REDUCING CONSERVATIVE FAITH/LGBTIQ+ LITIGATION

A. New forms of dispute resolution – academic support

The aforementioned draw-backs of religious litigation demonstrate the need for fresh and imaginative ways of responding to socially damaging conservative faith/LGBTIQ+ disputes. In looking beyond the courtroom for other ways of resolving (or at least ameliorating) acrimonious conflicts in this area, it is worth bearing in mind that alternative forms of dispute resolution have, in principle, been said to provide a suitable alternative to litigation where

⁹⁴. Jane Schacter, ‘Sexual Orientation, Social Change, and the Courts’ (2005) 54 *Drake Law Review* 861-881, 864-5.

⁹⁵. Karl Marx, *Capital* 775 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Swan Sonnenschein & Co. 8th ed. 1902) (1867).

⁹⁶ **It could be argued that there is a need for fresh empirical research as to whether there is actually more compromise and conciliation on the ground that has hitherto been recognised. On the risk that the (mis)reporting of certain high-profile cases, and attendant public responses, may give the impression that tensions between religion/belief and other interests are worse than they are in reality, see Alice Donald, ‘Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism?’ (2013) 2(1) *Oxford Journal of Law and Religion* 50-71, 56.**

conflicts with a profound moral dimension are concerned.⁹⁷ Likewise, in relation to religious conflicts at the workplace, scholars such as Katayoun Alidadi have stressed the benefits of conducting informal strategies for the resolution of disputes with a religious or moral dimension, such as arbitration, negotiation and mediation.⁹⁸ More specifically, in relation to conservative faith/LGBTIQ+ disputes, mediation rather than litigation has been advocated by legal scholars such as Jennifer Gerarda Brown⁹⁹ and Michael McConnell,¹⁰⁰ who regard it as being the most appropriate way of responding to the needs of *all* parties. A similar approach has been taken by Carl Stychin who, in emphasizing the problems associated with the ‘zero-sum game’ nature of litigation, makes the point that ‘[c]ompromise and dialogue within a communitarian rights culture ... have much to recommend them, as opposed to the ‘winner takes all’ adversarial approach.¹⁰¹

Of course, it is not only scholars who are supportive of what might be termed ‘pragmatic’ solutions, whereby conservative faith and LGBTIQ+ people strive to resolve their differences without involving the courts. For example, when legal proceedings were first commenced in the Ashers Bakery case,¹⁰² there were calls for mediation rather than litigation by the very person for whom the cake was intended, Andrew Muir, Northern Ireland’s first

⁹⁷. See eg Jeffrey R. Seul, ‘Settling Significant Cases’ (2004) 79 *Washington Law Review* 881-968. However, a contrary view is expressed by Owen Fiss, ‘Against Settlement’ (1984) 93 *Yale Law Journal* 1073-1090.

⁹⁸. Katayoun Alidadi, ‘Religion and the Workplace’, RELIGARE Working paper No. 3, September 2010 <http://www.religareproject.eu/system/files/WP4_State_of_the_art_Religion_%2526_the_Workplace_e-version_0.pdf > at p.9.

⁹⁹. Jennifer Gerarda Brown, ‘Peacemaking in the Culture War Between Gay Rights and Religious Liberty’ (2010) 95 *Iowa Law Review* 749-817.

¹⁰⁰. See Michael W. McConnell, ‘The Problem of Singling Out Religion’ (2000) 50 *DePaul Law Review* 1-47, 44, who maintains that the best way to resolve the problems associated with the zero-sum game nature of litigation is for the competing parties to resolve their differences privately.

¹⁰¹ Carl F Stychin, ‘Closet Cases – ‘Conscientious Objection’ to Lesbian and Gay Legal Equality’ (2009) 18 *Griffith Law Review* 17-40, 35.

¹⁰². See n 41.

openly gay Mayor.¹⁰³ Moreover, the opportunities for the cultivation of such ‘pragmatic’ solutions have been enhanced by the development of several partnerships in recent years between faith and LGBTIQ+ groups, aimed at forging closer ties between their respective communities. These range from national initiatives, such as the collaboration between The Three Faiths Forum (representing Judaism, Christianity and Islam) and LGBTIQ+ groups,¹⁰⁴ to more local ones, such as the recent partnership in Leicester between a group of Anglicans (under the auspices of the St Philip’s Centre) and TRADE, a local sexual health charity, from which a report was produced that offers guidance on how religious communities can best meet the needs of sexual minorities who are also people of faith.¹⁰⁵ Engagement of this kind demonstrates that tensions may be defused, and bridges even built, between the members of groups that have traditionally viewed one another with considerable suspicion. Yet notwithstanding these considerations, there are numerous hurdles to be overcome if these positive initiatives are to be replicated on a wider scale, in the sense of them offering guidance to those who wish to support measures that might stem the flood of recent conservative faith/LGBTIQ+ disputes. In this regard, in seeking to move away from the heavy reliance on litigation, it is suggested that attention should be focused on three interrelated criteria: compromise and dialogue (as argued by Carl Stychin, above); and perhaps most crucially, empathy. Each of these will now be discussed in turn.

¹⁰³. See ‘‘Gay cake’ row: Andrew Muir calls for mediation’, BBC News, 26 March 2015.

<<http://www.bbc.co.uk/news/uk-northern-ireland-32053610>>

¹⁰⁴ See ‘Interfaith group offers training in ‘pink spirituality’, *The Times*, 7 April 2018

<<https://www.thetimes.co.uk/.../interfaith-group-offers-training-in-pink-spirituality-k3zpq>>

¹⁰⁵. See *Sexuality Gender Identity and Belief: the Leicester Approach*, Leicester City Council, 2017

<[http://www.tradesexualhealth.com/snip/ckUploads/files/SGIB%20Leicester%20Guidance%20Document%20-%20TSH%20and%20SPC%20\(Low%20Res\).pdf](http://www.tradesexualhealth.com/snip/ckUploads/files/SGIB%20Leicester%20Guidance%20Document%20-%20TSH%20and%20SPC%20(Low%20Res).pdf)>

B. Compromise

The challenge of facilitating Stychin’s proposal for ‘compromise’ is a particularly daunting one. An obvious problem in the context of conservative faith/LGBTIQ+ disputes is *who* exactly should ‘compromise’? One possible way to proceed would be for the burden of compromise to lie predominantly on those groups that are currently in the ascendancy. Such a course of action can be inferred from the comments of Andrew Koppelman (a longstanding advocate of LGBTIQ+ equality in the US) who has argued that because ‘[t]he reshaping of culture to marginalize antigay discrimination is inevitable [and] the gay rights movement has won ... [i]t should be magnanimous in victory.’¹⁰⁶ But given the continued influence of a number of prominent religious organisations that refuse to accord full recognition to same sex relationships – one thinks, say, of the Church of England, and its special constitutional status¹⁰⁷ – many would reject Koppelman’s assumption of there already having been a ‘victory’ for LGBTIQ+ groups.¹⁰⁸ Moreover, Koppelman’s comments are unlikely to carry much weight with those who caution against granting concessions to ‘religious forces [that] are often the catalysts behind anti-gay-rights initiatives and ... are seeking to roll back gay rights victories’.¹⁰⁹ And even if some LGBTIQ+ groups were to ‘compromise’ as Koppelman suggests, it remains extremely questionable whether many conservative religious believers

¹⁰⁶. Koppelman (n 86) 658.

¹⁰⁷. See eg Harriet Sherwood, ‘Cof E bishops refuse to change stance on gay marriage’, *The Guardian*, 27 January 2017 <<https://www.theguardian.com/world/2017/jan/27/church-of-england-bishops-marriage-doctrine-talks>>

¹⁰⁸. Moreover the increasing influence of the Far Right in parts of Europe (eg Hungary), and the US (eg President Trump’s conservative agenda) further casts down on Koppelman’s opinion in this regard.

¹⁰⁹. Marc L Rubinstein, ‘Gay Rights and Religion: A Doctrinal Approach to the Argument that Anti-Gay-Rights Initiatives Violate the Establishment Clause’ (1995) 46 *Hastings Law Journal* 1585-1620, at 1592. See also Suzanna Danuta Walters, *The Tolerance Trap: How God, Genes, and Good Intentions are Sabotaging Gay Equality* (New York University Press 2016).

would be equally willing to reciprocate on an issue as toxic to them as LGBTIQ+ rights, for an unwillingness to compromise is certainly a characteristic of case-law in this area.¹¹⁰

The former Dean of Harvard Law School, Martha Minow, has made the pertinent observation that opportunities for the resolution of disputes would be increased if there were a ‘bit more respect, *flexibility* and humility on all sides in the clash between religious groups and advocates for rights for gays, lesbians, and transgendered’.¹¹¹ But to date the parties to such disputes have all too frequently opted for intransigence rather than compromise. Thus, with the prospect of any significant progress in this regard still evidently somewhat off, we now turn to Stychin’s other suggested criterion, ‘dialogue’.

C. Dialogue

The case for dialogue between religions and other groups has been powerfully made by a number of influential legal scholars,¹¹² judges,¹¹³ philosophers¹¹⁴ and religious leaders.¹¹⁵ In

¹¹⁰. See eg *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.

¹¹¹. Martha Minow, ‘Should Religious Groups Be Exempt from Civil Rights Laws?’ (2007) 48 *Boston College Law Review* 781-848, 845 (emphasis added).

¹¹². For example, Malcolm Evans has argued that there is a ‘pressing need [for] genuine dialogue between religion and human rights’: Malcolm Evans, ‘Introduction’ in Nazila Ghanea-Hercock, Alan Stephens and Ralph Walden (eds) *Does God Believe in Human Rights?* (Brill 2007) 16.

¹¹³. For example, in her dissenting judgment in *Leyla Sahin v Turkey*, App. No. 44774/98 (2007) 44 EHRR 5, para. 19, Judge Françoise Tulkens spoke positively (albeit in the context of religious dress) about the benefits of a ‘tolerance-based dialogue between religions and cultures’.

¹¹⁴. Jürgen Habermas et al, *An Awareness of What is Missing: Faith and Reason in a Post-secular Age* (Polity Press 2010) 16.

¹¹⁵. For example, as Pope Benedict has suggested, ‘the world of reason and the world of faith ... should not be afraid to enter into a profound and on-going dialogue.’

<http://www.catholicherald.co.uk/news/2010/09/17/papal-visit-2010-the-popes-speech-in-westminster-hall-full-text/>

relation to the specific issue at hand – the often fraught relationship between conservative faith groups and the members of LGBTIQ+ communities – the advantages of dialogue are three-fold. For a start, dialogue can (in this context) break down barriers, for there is a clear correlation between positive attitudes and one’s contact with members of LGBTIQ+ groups.¹¹⁶ In addition, dialogue can (at least in theory) contribute positively to the informal resolution of faith/LGBTIQ+ conflicts, and thereby help to avoid litigation.¹¹⁷ And finally, dialogue can be used to identify the main concerns of the parties in dispute,¹¹⁸ and, in the words of a former Chief Executive of the Equality and Human Rights Commission, build on the ‘need to work backwards and work out areas of consensus, rather than just pass law, and wait for the consequences’.¹¹⁹

Few would deny that, in principle, dialogue is a worthy social good – a point implicit in Jürgen Habermas’s observation that it ‘makes a difference whether we speak with one another or merely about one another’.¹²⁰ Yet, in practice, it is unclear how the resolution of

¹¹⁶. See eg Laura Olson, Wendy Cadge, and James T Harrison, ‘Religion and Public Opinion about Same-Sex Marriage’ (2006) 87(2) *Social Science Quarterly* 340-360.

¹¹⁷. For example, commenting on *Ladele* (n 39), involving the Christian registrar who refused to conduct same-sex civil partnership ceremonies contrary to the instructions of her employer, Islington Council, Matthew Gibson says that both ‘Ladele and Islington could ... have had a more positive dialogue to determine precisely what accommodations would have been reasonable after her designation as a civil partnership registrar.’ See Matthew Gibson, ‘The God “dilution”?: Religion, Discrimination and the Case for Reasonable Accommodation’ (2013) 72(3) *The Cambridge Law Journal* 578-616, at 601.

¹¹⁸. Groups such as the EHRC have already sought to promote dialogue with faith groups and their representatives, so as to better understand their concerns and priorities. See eg the Joint Committee on Human Rights, *The Work of the Equality and Human Rights Commission*, 14 May 2014 <http://www.parliament.uk/documents/joint-committees/human-rights/Transcript_of_EHRC_oral_evidence_140514.pdf>

¹¹⁹. These remarks were made at a conference, in the specific context of cases involving religion, belief and human rights. See Mark Hammond, ‘Religious Literacy for Equality in Religion or Belief’, London, 18 April 2013.

¹²⁰. Habermas (n 114) 16.

conservative faith/LGBTIQ+ conflicts might be assisted by dialogue, not least because ‘dialogue’ is an imprecise term that is open to a variety of interpretations. Thus, in seeking guidance on this matter, assistance is provided by Christopher McCrudden who has suggested that at least three conditions are necessary for ‘a real dialogue’:

First, a dialogue will only take place if those in dialogue come to the conversation with sufficient confidence in their own positions to be able to open up to others.

Second, since a dialogue is a conversation that involves differing positions, and with that comes the tendency to regard the other as hostile, for a dialogue to be successful, those taking part need to recognise that there may nevertheless be some value in what the other is saying. Third, those in dialogue have to be prepared to question their own starting points; we can’t simply assume the correctness of our deepest beliefs, but have to be open to the possibility that we are wrong.¹²¹

Each of these three conditions presents taxing challenges. For example, even if, in efforts to facilitate dialogue between conservative faith and LGBTIQ+ groups, the participants were willing ‘to open up to others’, the second criterion (the ‘need to recognise ... some value in what the other is saying’) remains problematic, not least because each party may view the beliefs of the other as irrational, immoral or offensive. Josef Schmidt alludes to this when he says that for fair dialogue to take place between those arguing from religious and secular positions, it is important ‘that partners take each other seriously’, and that ‘if a dialogue worthy of the name is to take place, the discussion partners must assume that their respective

¹²¹. Christopher McCrudden, ‘In Pursuit of Human Dignity: An Introduction to Current Debates’ (15 February, 2013). University of Michigan Public Law Research Paper No.309. Available at SSRN: <<http://ssrn.com/abstract=2218788>>

convictions are in essence intelligible ... [and] *worthy of discussion*'.¹²² This is doubtlessly an onerous challenge in some circumstances, while in relation to McCrudden's third condition (a preparedness to question one's 'own starting points'), the consequent heavy reliance on 'reason' rather than 'faith' seems likely to create problems for some religious believers.¹²³

When it comes to compromise and dialogue, the ideal scenario is perhaps one whereby potential litigants 'through reasonable discussion ... can learn to respect each other's views, and even change their policy positions'.¹²⁴ Yet scholars have observed that this becomes more difficult where those holding inflexible attitudes obstruct efforts to engage in dialogue and discussion.¹²⁵ Accordingly, at first sight, one might assume that the very idea of dialogue between conservative religious believers and sexual minorities is somewhat fanciful. Yet on closer inspection this is not necessarily the case, for as will now be argued, common human values (and in particular the universal principle of empathy) may potentially unlock the door to dialogue and possibly even compromise.

5. SHARED VALUES – EMPATHY AND COMMON GROUND

A. Empathy and perspective-taking

¹²². Josef Schmidt, 'A dialogue in which there can only be winners', in Habermas (n 111), 61, 62 (emphasis added)

¹²³. On this issue generally see Kent Greenawalt, *Private Consciences and Public Reasons* (Oxford University Press 1995).

¹²⁴. Éric Montpetit, 'Does Holding Beliefs with Conviction Prevent Policy Actors from Adopting a Compromising Attitude?' (2012) 60 *Political Studies* 621-642, at 621.

¹²⁵. Diana C. Mutz, *Hearing the Other Side: Deliberative versus Participatory Democracy* (Cambridge University Press 2006).

Empathy is certainly in vogue at the moment.¹²⁶ Claims have been made that it not only constitutes the ‘grand theme of our times’,¹²⁷ but that it can even ‘bring about fundamental social change’,¹²⁸ so that ‘any problem immersed in empathy becomes soluble’.¹²⁹ Indeed, in recent years, there has been such an out-pouring of work emphasising its importance in human affairs that one leading commentator has even referred to an ‘empathy craze’.¹³⁰ Empathy has unquestionably been identified as a key element of human behaviour and of group living.¹³¹ After all, neuroscientists have discovered mirror-neurons,¹³² and have identified an ‘empathy circuit’¹³³ that, it is claimed, provides concrete scientific evidence for empathy being ‘hard wired’ in our brains.

There exist, however, certain problems with utilising ‘empathy’ as a way of facilitating the resolution of conservative faith/LGBTIQ+ disputes, not least the ambiguity of the term and its ‘reputation as a fuzzy, feel-good emotion’.¹³⁴ After all, ‘empathy’ is a word that ‘does not mean the same thing in every mouth’, and there is not a ‘single, unified

¹²⁶. See eg Steven Pinker, *The Better Angels of Our Nature: a History of Violence and Humanity* (Penguin 2012); Simon Baron-Cohen, *Zero Degrees of Empathy: A New Theory of Human Cruelty* (Allen Lane 2011); J D Trout, *Why Empathy Matters: The Science and Psychology of Better Judgment* (Penguin 2010); and Bruce D Perry and Maia Salavitz, *Born for Love: Why Empathy is Essential (and Endangered)* (Harper Collins 2010).

¹²⁷. Frans de Waal, *The Age of Empathy: Nature’s Lessons for a Kinder Society* (Souvenir Press 2009) ix.

¹²⁸. Roman Krznaric, *Empathy: why it matters and how to get it* (Rider 2014) i.

¹²⁹. Baron-Cohen (n 126) 127. For a rebuttal of this see Rowan Williams, Tanner Lecture on Human Values, ‘The Paradoxes of Empathy’ 8 April 2014 <<https://www.youtube.com/watch?v=v79tL7uYTrA>>

¹³⁰. Pinker (n 126) 695. See also Paul Bloom, *Against Empathy* (Vintage 2016), 19.

¹³¹. See de Waal (n 127) and Perry and Salavitz (n 126).

¹³². See Marco Iacoboni, *Mirroring Principle: The Science of Empathy and How We Connect with Others* (Picador, 2009).

¹³³. Baron-Cohen (n 126) chapter 2.

¹³⁴. Krznaric (n 128) ix.

phenomenon that uniquely deserves the label'.¹³⁵ Indeed, the social psychologist C Daniel Batson has identified *eight* different meanings of empathy, ranging from: 'coming to feel as another person feels' through to 'intuiting or projecting oneself into another's situation', 'imaging how another is thinking and feeling', and 'imagining how one would think and feel in another's place'.¹³⁶ Other scholars draw the lines of distinction between various conceptions of empathy in different places. For example, a commonly drawn division is between cognitive empathy – 'awareness of another's feelings', and affective empathy – 'feeling what another feels'.¹³⁷ A different fault line is between automatic 'mirror-based' empathy – involved, for example, when one observes another person suffer a painful shock, or exhibit a disgust response – and 'reconstructive empathy', a 'more effortful or constructive process' whereby 'you ... reflect on that person's situation, construct in imagination how things are (were, or will be) playing out for him, and imagine how you would feel if you were in his shoes'.¹³⁸

In light of the above definitional and conceptual confusions, for the purpose of ameliorating conservative religious/LGBTIQ+ disputes, we suggest that the most appropriate definition is that proposed by the leading empathy scholar and philosopher, Roman Krznic:

¹³⁵. Alvin I Goldman 'Two Routes to Empathy: Insights from Cognitive Neuroscience' in Amy Coplan and Peter Goldie (eds) *Empathy: Philosophical and Psychological Perspectives* (OUP 2011) 31.

¹³⁶. C Daniel Batson 'These Things Called Empathy: Eight Related but Distinct Phenomena' in Jean Decety and William J Ickes (eds) *The Social Neuroscience of Empathy* (MIT Press 2009) 3-15. The other four are 'knowing another person's internal state, including his or her thoughts and feelings', 'adopting the posture or matching the neural responses of an observed other', 'feeling distress at witnessing another's suffering' and 'feeling for another person who is suffering'. These definitional complexities are fully explored in Amy Coplan and Peter Goldie (eds) *Empathy: Philosophical and Psychological Perspectives* (OUP 2011).

¹³⁷. Martin L Hoffman 'Empathy, Justice and Law' in Coplan and Goldie, *ibid*, 230-231.

¹³⁸. Alvin I Goldman (n 135) 36.

empathy is the art of stepping imaginatively into the shoes of another person, understanding their feelings and perspectives, and using that understanding to guide your actions.¹³⁹

This sense of empathy blends both cognitive ('I am aware of how you feel') and affective ('I feel what you feel') elements. Importantly, in the context of conservative religious/LGBTIQ+ controversies, it goes beyond imagining how *I* would feel in another's situation, and requires us to imagine how the *other* feels.¹⁴⁰ In the kind of disputes under consideration – where the protagonists' characteristics, sexualities, moralities and beliefs are so at odds – it is clearly important that the sides must try to imagine the situation from the perspective of the *other*, if any headway is to be made in the amelioration of the situation.

The crucial step is to take the imaginative leap in order to see the world from the other's perspective, and thereby ask the question, 'if *you* believed what *I* believe' or if *you* possessed *my* sexuality, how do you think *you* would feel to be in my position?¹⁴¹ In this regard Martha Nussbaum advocates the cultivation of 'inner eyes' and a 'participatory imagination ...' that allows us to see the other:

as a person pursuing human goals, and understanding in some loose way what those goals are, so that one can see what a burden to their conscience is ... By imagining other people's way of life, we don't necessarily learn to agree with their goals, but we

¹³⁹. Krznaric (n 128) x.

¹⁴⁰ See Batson, (n 136). In this regard Krznaric proposes a 'Platinum Rule' 'Do unto others as they would have you do unto them' (which he distinguishes from the 'Golden Rule', 'do unto others as you would have them do unto you'), Krznaric at 59-60. For criticism of this position see Peter Goldie, 'Anti-Empathy' in Coplan and Goldie (n 136) 302.

¹⁴¹ Paraphrasing William Galston, *Liberal Pluralism* (CUP 2002) 117 (emphasis in original).

do see the reality of those goals for them. We learn that other worlds of thought and feeling exist.¹⁴²

Notwithstanding arguments by authors like Krznaric and Nussbaum, there remains a further problem with empathy as a way of helping to prevent and solve acrimonious disputes between conservative religious/LGBTIQ+ people: it can be difficult to empathise with those who are distant from us, and different to us in significant ways.¹⁴³ As a general rule people tend to be much more willing and able to adopt the perspectives of those with whom they have obvious ties, such as family, friends, neighbours, fellow countrymen/women, and those (in the current context) of a shared sexuality and/or faith. An absence of such similarities can be problematic in the sense that it may lead to what the sociologist Arlie Hochschild calls ‘empathy walls’: defined as obstacles ‘to [a] deep understanding of another person ... that can make us feel indifferent or even hostile to those who hold different beliefs’, or whose circumstances are very different from our own.¹⁴⁴

One way in which such empathy walls may be traversed (or even dismantled), so that we come to see others as being more like us, is via the stories of the other peoples’ lives.¹⁴⁵ As the historian Lynn Hunt has argued, a significant factor in the ‘invention’ of human rights in the eighteenth century was the empathy generated by the popularity of epistolary novels,

¹⁴² Martha Nussbaum, *The New Religious Intolerance. Overcoming The Politics Of Fear In An Anxious Age* (Harvard University Press 2012) 143-144. See also Stychin (n 46) 729 and Maleiha Malik, ‘Faith and the State of Jurisprudence’ in Peter Oliver, Sionaidh Douglas-Scott, Victor Tadros (n 30) at 145.

¹⁴³ See Bloom (n 130) 91. Adam Smith famously suggested that a person would be more distressed over the loss of his own little finger than at the deaths of millions in an earthquake in China, ‘provided he never saw them’: Adam Smith *The Theory of Moral Sentiments* (1790) (Liberty Classics 1976) 233.

¹⁴⁴ Arlie Hochschild, *Strangers in Their Own Land: Anger and Mourning on the American Right* (The New Press 2016) 5.

¹⁴⁵ See eg Toni M Massaro, ‘Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?’ (1989) 87(8) *Michigan Law Review* 2099-2127.

which drew their readers into identifying with characters through passionate involvement in the narrative.¹⁴⁶

In reading they empathized across traditional social boundaries between nobles and commoners, masters and servants, men and women, perhaps even adults and children. As a consequence, they came to see others – people they did not know personally – as like them, as having the same kinds of inner emotions.¹⁴⁷

Subsequent centuries provide many examples of best-selling novels or memoirs revealing the plight of a downtrodden group, and leading to widespread opposition to oppressive practices, including, perhaps most famously, Harriet Beecher Stowe's *Uncle Tom's Cabin*, which helped to mobilize the abolitionist movement in the United States.¹⁴⁸ More recently, Steven Pinker has argued that in the last century or so, the influence of television, cinema and the world-wide-web has added much to our ability to see the world from other people's perspectives, thus 'expanding empathy ... by getting people into the habit of straying from their parochial vantage points'.¹⁴⁹

But to what extent is the ability to 'stray' from one's 'parochial vantage point' feasible or realistic in regard to an issue as toxic as conservative faith/ LGBTIQ+ relations? As noted above, people typically find it easier to imagine what it would be like to stand in the

¹⁴⁶ See Lynn Hunt, *Inventing Human Rights* (Norton 2008) 26, 27.

¹⁴⁷ Ibid, 39-40.

¹⁴⁸ Pinker (n 126) 213. See also Hoffman (n 137) 239 ff. Other example of such empathy wall traversing novels include Charles Dickens' *Oliver Twist* and *Nicholas Nickleby*, which opened people's eyes to the suffering of children in workhouses, and Herman Melville's *White Jacket*, which led to the debate that culminated in an end to the practice of flogging sailors.

¹⁴⁹ Pinker (n 126) 213.

shoes of ‘another’ when there are (or perceived to be) areas of common ground between the relevant parties. So are there any areas of commonality that might potentially help to build reciprocal empathy and facilitate perspective taking in this most emotive of areas? It is thus to areas of potential commonality that we now turn.

B. Common Ground – A Foundation For Empathy And Dialogue

In view of the acrimonious nature of conservative faith/LGBTIQ+ litigation one might, at first glance, assume there to be few areas of common ground between staunch advocates of the right to freedom of religion or belief and those campaigning for the equal treatment of sexual minorities. Yet, on further reflection, this is not necessarily the case. The Canadian jurist Beverly McLachlin has noted that ‘the similarities that unite human beings by far overshadow their differences’.¹⁵⁰ Thus, it is important to acknowledge the values, principles and convictions that conservative faith and LGBTIQ+ groups have in common, which could provide a possible basis for dialogue or engagement.

A first area of common ground is that the members of conservative faith *and* LGBTIQ+ communities are minorities that (at least in their own eyes) are socially vulnerable and subject to prejudice from the majority. Whilst such characterisations may be hard to quantify and be open to challenge,¹⁵¹ there seems little doubt that, throughout British history, people of different religious and sexual orientations have been disadvantaged (respectively) by, for example, the privileges uniquely vested on the Church of England, as well as the

¹⁵⁰. Beverly McLachlin, ‘The civilisation of difference and Human Rights: the Canadian experience’ in Stephan Breitenmoser, Bernhard Ehrenzeller, Marco Sassoli (eds) *Human Rights, Democracy and the Rule of Law* (Nomos Verlagsgesellschaft 2007) 457.

¹⁵¹. See eg Douglas NeJaime (n 26) 303, who makes the point that ‘[l]awyers from both movements cast constituents as vulnerable minorities’.

law's sole recognition of heterosexual relationships.¹⁵² Indeed, today, in certain parts of the world, religious and sexual minorities frequently both suffer persecution for their beliefs and lifestyles, making this shared experience a potential issue of engagement, empathy and dialogue for the representatives of conservative faith and LGBTIQ+ groups.

A second commonly accepted principle is the importance of *identity* to both religious and sexual minorities. Just as religious beliefs are typically central to the identity of the person of faith, so too is one's sexuality ordinarily integral to the identity of those found within LGBTIQ+ communities. The concept of personal identity may be difficult to define or quantify,¹⁵³ but as Douglas Laycock observes, 'both same-sex couples and religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free from all non-essential regulation, even when manifested in conduct.'¹⁵⁴ By the same token, a shared characteristic of sexual minorities and conservative believers is the conviction that their sexual orientation/religious beliefs are (respectively) much more than a simple act of choice, but rather such considerations underpin their very being. As Laycock and Berg point out, '[s]ame-sex partners cannot change their sexual orientations, and the religious believer cannot change God's mind [for] both religious believers and same-sex couples feel compelled to act on those things [that are] constitutive of their identity'.¹⁵⁵

¹⁵². On parallels on the historical evolution of the principles of non-discrimination on the grounds of religion and sexual orientation see Sandberg (n 64) at 157.

¹⁵³. See eg Jed Rubenfeld, 'The Right of Privacy' (1989) 102 *Harvard Law Review* 737-807 at 797-798, who comments that personal identity is 'that sense of a unitary, atomic self that we all tend to consider ourselves to have'.

¹⁵⁴. Laycock (n 6) at 61.

¹⁵⁵. Douglas Laycock and Thomas C Berg, 'Protecting Same-Sex Marriage and Religious Liberty' (2013) 99(1) *Virginia Law Review*, 1-9, 4.

A third area of agreement is a shared desire for ‘authenticity’, in the sense that conservative faith and LGBTIQ+ communities wish to manifest their beliefs and values in public. Yet their freedom to do so may be inhibited by social pressures requiring them to downplay or conceal elements of their identity, be it based on faith or sexuality. This shared burden on LGBTIQ+ people, as well as those who object to LGBTIQ+ rights on faith grounds, has been characterised as, in effect, constituting the message: ‘what you do in your own home/house of worship is fine; just don’t flaunt it or impose it on the public forum.’¹⁵⁶ Yet there is evidence to suggest that disclosure and openness at the workplace is important for both faith and LGBTIQ+ employees. For example, those who feel able to discuss their religious belief at work tend to have higher levels of job satisfaction than those employees who lack this freedom,¹⁵⁷ whilst studies also demonstrate the advantages to LGBTIQ+ employees of being in an open, positive and supportive working environment.¹⁵⁸ Thus, a desire for ‘authenticity’ and an aversion to having to hide key aspects of one’s identity in public – be it based on religion, sexuality, or both – is a shared characteristic of most people in conservative faith *and* LGBTIQ+ communities.

A fourth area of potential communality is (perhaps counter-intuitively) the importance of spirituality and one’s beliefs to people of faith, who are found in *both* conservative religious *and* LGBTIQ+ communities.¹⁵⁹ The relationship between sexual minorities and

¹⁵⁶. Brown (n 99) at 817.

¹⁵⁷. See eg Brent Lyons, Jennifer Wessel, Sonia Ghumman, Ann Marie Ryan and Sooyeol Kim, ‘Applying models of employee identity management across cultures: Christianity in the USA and South Korea’ (2014) 35(5) *Journal of Organizational Behavior* 678-704.

¹⁵⁸. See eg Belle Rose Ragins, Romila Singh and John M. Cornwell, ‘Making the invisible visible: fear and disclosure of sexual orientation at work’ (2007) 92(4) *Journal of Applied Psychology* 1103-1118.

¹⁵⁹ See Andrew Yip, ‘Sexual Orientation in religious communities’ in M. V. Lee Badgett and Jefferson Frank (eds) *Sexual Orientation Discrimination: An International Perspective* (Routledge 2007) 209-224.

organised religion over the centuries may have been fraught,¹⁶⁰ but it should not be forgotten that a significant number of people within LGBTIQ+ communities today self-define as religious believers.¹⁶¹ As a result, the characterization in some quarters of an inevitable conflict between LGBTIQ+ and religious rights ('Gay Rights versus Religious Freedom'¹⁶²) is fallacious. Admittedly, there are people of faith who continue to justify their aversion to same-sex relationships on the basis of certain ancient religious texts¹⁶³ – yet there are others who interpret these scriptures very differently,¹⁶⁴ and argue that they can only be properly understood in an appropriate historical context.¹⁶⁵ With many faith groups more receptive to the principle of LGBTIQ+ rights than ever before,¹⁶⁶ the possibility remains that dialogue between people with similar religious beliefs, but different attitudes to sexual behaviour, may assist in the amelioration of conflicts in this area.

¹⁶⁰. See eg Jeffrey S Siker (ed) *Homosexuality and Religion* (Greenwood Publishing 2007).

¹⁶¹ See eg Gary Comstock, *Unrepentant, Self-Affirming, Practicing: Lesbian/Bisexual/Gay people within Organized Religion* (Continuum 1996); Gene Robinson, *God Believes in Love: Straight Talk about Gay Marriage* (Vintage 2013); and Jimmy Creech, *Adam's Gift: A Memoir of a Pastor's Calling to Defy the Church's Persecution of Lesbians and Gays* (Duke University Press 2011).

¹⁶². See eg George W Dent, Jr, 'Civil Rights for Whom? Gay Rights Versus Religious Freedom' (2007) 95 *Kentucky Law Journal* 555-658.

¹⁶³. For a list of such verses in the (Old Testament) Bible see Michael Perry, *Under God? Religious Faith and Liberal Democracy* (Cambridge University Press) 60.

¹⁶⁴. In the context of Christianity see eg Matthew Vines, *God and the Gay Christian: The Biblical Case in Support of Same-Sex Relationships* (Convergent Books 2014); Linda Patterson, *Hate Thy Neighbor: How the Bible is Misused to Condemn Homosexuality* (Infinity 2009); and Jay Michaelson, *God vs. Gay?: The Religious Case for Equality* (Beacon Press 2012).

¹⁶⁵. See eg Heather White, *Reforming Sodom: Protestants and the Rise of Gay-Rights* (University of North Carolina Press 2015) 185, who argues that the notion of homosexuality as an aberration in the Protestant Christian context is only a relatively recent development. See also Mark Jordan, *The Invention of Sodomy in Christian Theology* (University of Chicago Press 1997).

¹⁶⁶. See eg The House of Bishops of the Church of England, n 29 at 57, and *Diverse Gender Identities and Pastoral Care*, Church of Scotland (2018)

http://www.churchofscotland.org.uk/resources/learn/publications/diverse_gender_identities_and_pastoral_care

A final issue of consensus relates to those values, principles, norms and convictions that are common to humanity.¹⁶⁷ A case in point is the very idea of human rights. Conservative faith and LGBTIQ+ litigants may often disagree as to how contemporary human rights laws are applied in practice, but when it comes to affirming the importance of such laws in principle, there is widespread unanimity. For example, the leaders of major world religions put ideological and theological differences aside in 2008, when they pledged their ‘support [for] the human rights and fundamental freedoms of every human person, alone or in community with others’.¹⁶⁸ In view of such considerations, it is perhaps worth considering Michael Ignatieff’s exhortation that we should ‘stop thinking of human rights as trumps and begin thinking of them as a language that creates the basis for deliberation’.¹⁶⁹ Thus, in retreating from what have been called the ‘dogmas of human rights’,¹⁷⁰ and accepting that human rights norms are often created by ‘messy political trade-offs and political calculi’,¹⁷¹ such norms – commonly seen as a stumbling block to good relations between conservative faith and LGBTIQ+ communities – might ironically provide a basis for honest dialogue between groups that view religion and sexuality in very different terms.¹⁷²

6. CONCLUDING THOUGHTS: WHAT IS TO BE DONE?

¹⁶⁷. See eg Kristen Renwick Monroe, *The Heart of Altruism: Perceptions of a Common Humanity* (Princeton University Press 1996).

¹⁶⁸. See the Preamble to the 2008 Faith in Human Rights Statement:

<http://www.oikoumene.org/en/folder/documents-pdf/faith_human_rights.pdf>

¹⁶⁹. Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2003) 95.

¹⁷⁰. Malcolm Evans, *Religious Liberty and International Law* (Cambridge University Press 1997) 261.

¹⁷¹. Upendra Baxi, *The Future of Human Rights* (Oxford University Press 3rd edn 2002) 61.

¹⁷². Similarly, both sides typically ‘frame their rights claims in the language of pluralism’. See Douglas NeJaime (n 26) at 305.

In this article we have focused on one aspect of the increase in religious litigation – the proliferation of conservative faith/LGBTIQ+ cases in recent years. We acknowledge the important role of the courts in dispute resolution and the setting of standards on issues of faith and LGBTIQ+ rights, but are concerned about the adverse consequences of excessive litigation in this area. So what is to be done? In weighing up the different options, we identify at least four different approaches – and, of these, we maintain that the fourth is the most credible way forward.

A. Legal reform

The first possible way forward draws on the argument that the law should strike a more equitable balance between freedom of religion/belief and equality. Proposals in this regard have, for example, ranged from demands for specially selected judges to be employed in cases involving religion,¹⁷³ to calls for the introduction of a new British Bill of Rights,¹⁷⁴ and recognition of the principle of ‘reasonable accommodation’ for religion or belief.¹⁷⁵ Such measures might assuage the fears of (at least some) religiously conservative groups about the

¹⁷³ See eg., the views of the former Archbishop of Canterbury, Lord Carey in George and Andrew Carey, *We Don't Do God: The Marginalization of Public Faith* (Oxford Monarch Books, 2012) 100-101. In *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, Laws LJ said that Lord Carey's comments in this regard, made in an earlier intervention in this case, ‘were misplaced’ [para 18] and that ‘[t]hese concerns are formulated at such a level of generality that it is hard to know precisely what Lord Carey has in mind’ [para 20]. See also Russell Sandberg, ‘Laws and Religion: Unravelling *MacFarlane v Relate Avon Limited*’ (2010) 12 *Ecclesiastical Law Journal*, 361, 370, who criticizes Lord Carey for having shown ‘a complete lack of understanding of the judicial process’.

¹⁷⁴ See eg., James Orr, Res Publica, *Beyond Belief: Defending religious liberty through the British Bill of Rights* (2016) <<https://www.respublica.org.uk/wp-content/uploads/2016/11/Religious-Liberty.pdf>>

¹⁷⁵. See eg., *ibid*; Matthew Gibson, ‘The God “dilution” religion, discrimination and the case for reasonable accommodation’ (2013) (72) *Cambridge Law Journal* 578-616; and Katayoun Alidadi, ‘Reasonable accommodations for religion and belief: Adding value to Art.9 ECHR and the European Union's anti-discrimination approach to employment?’ (2012) 37(6) *European Law Review* 693-715.

scope of human rights/equality laws. However there is no guarantee that they would contribute to a reduction in conservative faith/LGBTIQ+ disputes.¹⁷⁶ Moreover, proposals of this kind are problematic in that they attach considerable weight to the questionable notion that there is something unique about religious belief,¹⁷⁷ whilst their emphasis on the right to freedom of religion/belief risks posing a threat to hard won freedoms in the field of equality.¹⁷⁸

B. Maintain the status quo

A second perspective is that legal reform in the field of religion/belief and equality/human rights is unnecessary. An obvious rationale for this approach is that the law is currently working well.¹⁷⁹ However, as noted above, some would strongly contest this claim on the basis that it has downgraded religion generally¹⁸⁰ and certain forms of belief in particular.¹⁸¹

¹⁷⁶. For an excellent summary of the arguments for and against a duty of reasonable accommodation see Peter Edge and Lucy Vickers, *Review of equality and human rights law relating to religion or belief*, Equality and Human Rights Commission Research report 97 (2015) 50-56.

¹⁷⁷. On this issue see Brian Leiter, *Why Tolerate Religion?* (Princeton University Press 2012) 133.

¹⁷⁸. See eg., Davina Cooper and Didi Herman, 'Up Against the Property Logic of Equality Law: Conservative Christian Accommodation Claims and Gay Rights' (2013) 21 *Feminist Legal Studies* 61-80; Gwyneth Pitt, 'Taking Religion Seriously' (2013) 42(4) *Industrial Law Journal*, 398-408; and Gwyneth Pitt 'Keeping the faith: trends and tensions in religion or belief discrimination' (2011) 40(4) *Industrial Law Journal* 384-404.

¹⁷⁹. See eg., Equality and Human Rights Commission, n 7, 30-40.

¹⁸⁰. On claims that the law has unfairly created a hierarchy of rights that has elevated sexual orientation above the right to freedom of religion/belief see eg., *The Clearing the Ground inquiry: Parliamentary Report into the Freedom of Christian in the UK* (2012) 5-6 <<https://www.eauk.org/current-affairs/publications/upload/Clearing-the-ground.pdf>>

¹⁸¹. See eg., Martin Mitchell and Kelsey Beninger, with Alice Donald and Erica Howard, 'Religion or belief in the workplace and service delivery, Equality and Human Rights Commission Call for Evidence Report (2015) which found (p.4) that some Christians believed 'that Christianity had lost status as a result of the legal framework'.

<https://www.equalityhumanrights.com/sites/default/files/call_for_evidence_report_executive_summary.pdf>

Alternatively, a potentially less contentious argument for eschewing further legal reform is that it is unnecessary because, with society's increasing acceptance of LGBTIQ+ relationships, the high-water mark of faith/LGBTIQ+ litigation has already been reached, and that such conflicts will soon be a thing of the past. In an ideal world this might well be the case, but there are a number of reasons why such an optimistic assumption may be open to question. For a start, there is every likelihood that – with new configurations of these issues probably going to emerge (such as controversies involving, eg, transgender rights and curbs on 'gay conversion') – conservative faith/LGBTIQ+ court-room disputes seem set to continue. Moreover, it cannot be assumed that as society in general becomes increasingly tolerant of sexual diversity, a reduction in conservative faith/LGBTIQ+ conflicts will necessarily follow, for there will always be some who disavow compromise and see court-room battles as badges of honour. And finally, with some of the fastest growing faith groups in Europe being ones that have rejected a liberal approach to LGBTIQ+ issues, there is a real risk that the battles of today will continue to be waged tomorrow.¹⁸² Thus, with predictions that the 'struggles for and against gay rights ... will continue far into the indefinite future',¹⁸³ one cannot discount the possibility of further legal reform being necessary in this area sooner rather than later.

C. Faith and equality – the limits of the law

¹⁸². See eg in relation to Islam, Ruud Koopmans claims that more than 70 per cent of 'fundamentalist Muslims ... reject homosexuals as friends': Ruud Koopmans, 'Religious Fundamentalism and Hostility against Out-groups: A Comparison of Muslims and Christians in Western Europe' (2015) 41(1) *Journal of Ethnic and Migration Studies* 33-57, 53.

¹⁸³. Robert Rains, 'Icing on the Wedding Cake: Same-Sex marriage and religious objections – is there an accommodation that will make everyone equally happy (or unhappy)?' (2017) *Vermont Law Review* 191-223, 223.

A third perspective is the sceptical approach – that conflict is inevitable because the courts are ill-equipped to resolve disputes in an area as complex and controversial as that of conservative faith/LGBTIQ+ relations. In other words, given the challenges associated with litigants increasingly testing the boundaries of their rights, and judges having to offer guidance on seemingly intractable problems, decisions about religious freedom and equality are best made outside the courtroom, by those with democratic accountability.¹⁸⁴

The suggestion that elected politicians, rather than judges, should take more responsibility for decision making in key policy areas (including, presumably, religion/belief and equality relations) has recently been made by no less a figure than Lord Sumption.¹⁸⁵ Moreover, there are occasions where judges themselves have alluded to the difficulties they experience in balancing freedom of religion and equality – a case in point being Chief Justice Roberts’s comment in the seminal US Supreme Court case of *Obergefell v. Hodges*: ‘[h]ard questions arise when people of faith exercise religion in ways that may seem to conflict with the new right to same-sex marriage’.¹⁸⁶ Such ‘hard questions’ seemingly explain why, when it comes to disputes concerning matters of belief and equality, religious freedom jurisprudence has been described as ‘patternless’,¹⁸⁷ and judges have been castigated for

¹⁸⁴. See eg Steven Smith, *Getting Over Equality: A Critical Diagnosis of Religious Freedom in America* (New York University Press 2001) 45-57.

¹⁸⁵. See Frances Gibb, ‘Courts have been left to make big policy decisions, says Lord Sumption’, *The Times*, 4 October 2018

<<https://www.thetimes.co.uk/article/courts-have-been-left-to-make-big-policy-decisions-says-lord-sumption-bnjxdvg3t>>

¹⁸⁶. C J Roberts (dissenting) in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) at 2625. In this case the US Supreme Court held that the constitution guarantees the right to marry to same-sex couples.

¹⁸⁷. Nelson Tebbe, *Religious Freedom in an Egalitarian Age* (Harvard University Press 2017) 5.

having to ‘muddle through, seeking modus vivendi solutions without any hope of principled results’.¹⁸⁸

The shortcomings of the law in this area are obvious, but this does not necessarily mean that one should embrace the ‘sceptical approach’. After all, it is an approach that is essentially defeatist, for it offers little of a positive nature. As one scholar puts it, writing in the context of the courts having to deal with clashes between freedom of religion/belief and other fundamental values:

... in judicial decision-making, we proceed with confidence that these conflicts can be resolved in an intelligent way. We do not wring our hands or proclaim that resolution of such conflicts is ‘impossible’.¹⁸⁹

In order to go beyond mere hand-wringing, there is an urgent need for innovative and practical solutions. These could, in terms of ‘thinking outside the box’, be based on good practice from other jurisdictions and different areas of law. As will now be argued, such an example is the principle of ‘meaningful engagement’.

D. Meaningful engagement

‘Meaningful engagement’ is a novel means of dispute resolution that has been utilised by judges in South Africa. It allows a court to ask the competing parties to engage directly with

¹⁸⁸. Ibid 6.

¹⁸⁹. Laura S Underkuffler (2018) ‘Religious Freedom in an Egalitarian Age: Rejecting Doctrinal Nihilism in the Adjudication of Religious Claims’ (2018) 31(2) *Journal of Civil Rights and Economic Development*, 217-232 at 220.

one another – say by having a face-to-face interaction – in seeking to resolve the dispute by arriving at a mutually beneficial solution.

The mechanism of ‘meaningful engagement’ was initially developed by the South African Constitutional Court in *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*.¹⁹⁰ In this case there was a dispute between the City of Johannesburg and the residents of several informal communities who sought to prevent the City from evicting them from dilapidated buildings (for health and safety reasons) as part of an inner-city regeneration project. When proceedings reached the South African Constitutional Court, the Court, before giving judgment, issued an order requiring the parties: ‘to engage with each other meaningfully ... in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.’ It also required that the parties should, one month later, file affidavits with the Court, so as to report back on the results of the negotiations.¹⁹¹

In what has been described as a ‘remarkable settlement’,¹⁹² because this had been a long-running and acrimonious dispute, the parties filed affidavits with the Constitutional Court (within the allotted time-frame) which revealed agreement on most of the issues. The settlement reached was (inter alia) that the City would, before relocating the residents, offer them temporary accommodation in refurbished buildings, and promise to consult with them about more permanent housing solutions. The Constitutional Court then, in delivering its final

¹⁹⁰. Case CCT 24/07 [2008].

¹⁹¹. Ibid, Yacoob J, para.5.

¹⁹². See eg Brian Ray, ‘Occupiers of 51 Olivia Road v City of Johannesburg: enforcing the right to adequate housing through ‘engagement’ (2008) 8(4) *Human Rights Law Review* 703-713 at 705, who calls it ‘a remarkable settlement’.

opinion on the matter, endorsed the parties' agreed settlement. It also expressed optimism that, in relation to the unresolved matters, 'there is no reason to think that future engagement will not be meaningful and will not lead to a reasonable result',¹⁹³ before adding that judicial intervention remained an option if it 'becomes necessary'.¹⁹⁴

The mechanism of meaningful engagement, which has been subsequently employed by the South African Constitutional Court in a number of other cases,¹⁹⁵ has been lauded as 'a welcome addition to South African law',¹⁹⁶ and described as having 'the potential to promote localised, contextual solutions to human rights conflicts'.¹⁹⁷ Thus, it is suggested that the principle of meaningful engagement may provide a novel mechanism for the resolution of conservative faith/LGBTIQ+ disputes. In this regard the following three considerations should be borne in mind.

First, even though meaningful engagement has, to date, been associated with socio-economic rights,¹⁹⁸ it seems illogical to confine it only to that particular genre of rights. After all, it is commonly accepted that 'it is impossible to draw a bright line between social and

¹⁹³. Yacoob J (n 190) para 34.

¹⁹⁴. Ibid.

¹⁹⁵. See eg *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, 2010 (3) SA 454 (CC) (10 June 2009) and *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwazuluNatal and Others*, 2010 (2) BCLR 99 (CC)

¹⁹⁶. Gustav Muller, 'Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership' (2011) 22 *Stellenbosch Law Review* 742-758 at 758. However, for a more critical view, see Kirsty McLean, 'Meaningful engagement: One step forward or two back? Some thoughts on Joe Slovo' (2010) 3(1) *Constitutional Court Review* 223-242.

¹⁹⁷. Sandra Liebenberg, 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'' (2012) 12(1) *African Human Rights Law Journal* 1-29 at 26.

¹⁹⁸. See eg Gustav Muller, 'Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership' (2011) 22 *Stellenbosch Law Review* 742-758 at 756, who has described meaningful engagement as 'an innovative mechanism for enforcing socio-economic rights'.

economic and civil and political rights’¹⁹⁹ – and the absurdity of such rigid distinctions has been demonstrated by scholars such as Kate Malleson, who has argued that a defect of UK anti-discrimination law is its failure to include ‘socio-economic status’ as one of its protected characteristics.²⁰⁰

Second, meaningful engagement is a flexible concept that does not require the parties ‘to agree on every issue’.²⁰¹ That said, it has to be ‘a two-way process’,²⁰² for it rests on ‘good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side’.²⁰³ If, as suggested above, litigants in conservative faith/LGBTIQ+ disputes were to place greater emphasis on their shared values, rather than merely focusing on their differences, meaningful engagement could give fresh impetus to hitherto unsuccessful attempts to resolve seemingly intractable disputes.

Finally, meaningful engagement ensures a neatly balanced role for the courts. On the one hand it safeguards the courts from accusations of judicial overreach – for the onus lies on the parties to resolve the dispute amicably themselves – and on the other it necessitates judicial involvement because agreements between the parties must be endorsed by the court at a later date, prompting the claim that meaningful engagement is ‘a deliberative version of

¹⁹⁹. Anashri Pillay, ‘Toward effective social and economic rights adjudication: The role of meaningful engagement’ (2012) 10(3) *International Journal of Constitutional Law* 732-755 at 735.

²⁰⁰. See Kate Malleson, ‘Equality Law and the Protected Characteristics’ (2018) 81(4) *MLR* 598-621 at 611.

²⁰¹. Ngcobo J in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, 2010 (3) SA 454 (CC), para 244.

²⁰². Yacoob J (n 190) para.14.

²⁰³. Ngcobo J in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, 2010 (3) SA 454 (CC), para 244. See also Yacoob J in *Occupiers of 51 Olivia Road and Others* (n 190) para 15, who says that ‘Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process.’

judicial review’.²⁰⁴ What is more, the fact that parties involved in engagement discussions know that there is a ‘judge on their shoulder’ seems likely to focus their minds and reduce the risk of protagonists merely talking past each other, as they ‘bargain in the shadow of the law’.²⁰⁵

It is conceded that ‘meaningful engagement’ is not some kind of ‘magic bullet’, that will suddenly offer a magical solution to the difficult challenge of conservative faith/LGBTIQ+ disputes. It can only succeed if, as argued earlier, parties to such disputes are willing to engage in dialogue, be open to compromise and be prepared to try and see the matter from the other’s perspective. Yet in spite of its limitations it is argued that, of the four different approaches outlined above, meaningful engagement is the most credible one.

In an area like this, synonymous with controversy and uncertainty, perhaps the only thing that can be said with complete certainty is that there are no easy answers to cases when the right to freedom of religion/belief is pitted against the principles of equality and non-discrimination. Lady Hale appeared to admit as much when, in this context, she commented that: ‘I am not sure that our law has yet found a reasonable accommodation of all these different strands. *The story has just begun*’.²⁰⁶ As evidenced by the increase in religious litigation in recent years, this is a highly contentious and topical story. It is a story with no sign of an imminent conclusion. It is a story with an all too familiar plot-line, which needs a

²⁰⁴. See eg Anashri Pillay, ‘Toward effective social and economic rights adjudication: The role of meaningful engagement’ (2012) 10(3) *International Journal of Constitutional Law*, 732-55, 732.

²⁰⁵. This term is borrowed from Robert H Mnookin and Lewis Kornhauser, ‘Bargaining in the shadow of the law: The case of divorce’ (1978) 88 *Yale Law Journal* 950-997.

²⁰⁶. Baroness Hale, Annual Human Rights Lecture for the Law Society of Ireland, 13 June 2014, 20 (our emphasis).

<<https://www.supremecourt.uk/docs/speech-140613.pdf>>

fresh narrative, inspired by creativity, imagination and bold new ideas. Until that happens it is a story that seems set to run.