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The other way around? How freedom of religion may protect LGBT rights

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ABSTRACT

While LGBT people are generally protected by a number of basic human rights, such as the right to privacy, freedom of expression and association, and the right not to be discriminated against, LGBT rights are repeatedly presented as contrary to freedom of religion. However, taking into account how religion has always been *both* condemning and embracing various forms of same-sex sexuality and transgenderism, and how an increasing number of religious people and whole denominations consider LGBT equality in accordance with their beliefs, one finds that freedom of religion relates just as much to LGBT people who live according to their own religious pro-LGBT convictions and to other people with pro-LGBT beliefs, as to those with anti-LGBT beliefs. As freedom of religion also protects the right *not* to believe and not to be forced to live according to other people's religious beliefs, the general claim that LGBT rights must be limited because of the religious freedom of those with anti-LGBT beliefs also represents a direct attack on the negative freedom of religion of LGBT people. The awareness of this may in various ways affect both the legal and more general discussion on both LGBT rights and freedom of religion.

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Lesbian, gay, bisexual and transgender (LGBT) rights are frequently depicted as fundamentally in conflict with freedom of religion, as a typical example of how different human rights may clash. Whereas states banning consensual same-sex sexuality have defended their policies by referring to freedom of religion, for example when criticised by United Nations bodies,¹ exercising one's religious beliefs in ways that means limiting LGBT rights has come to equal the essence of religious liberty within Christian conservative discourse in several countries. As the United Nations Special Rapporteur on Freedom of Religion or Belief in its 2018 report 'notes with concern the increasing trend by some States, groups and individuals, to invoke "religious liberty" concerns in order to justify differential treatment against particular individuals or groups, including ... members of the lesbian, gay, bisexual, transgender and intersex community'.² This conviction is, not least, seen with various so-called 'religious liberty bills' sanctioned, pending, or rejected, on state and federal level in the United States, and with the many court cases in both

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Europe and North America, where freedom of religion has been used in the legal defence of various providers of goods and services in the public sphere, who, because of their anti-LGBT beliefs, refuse service to LGBT people.

Although this legislative and judicial activism has galvanised the resolve against what is often considered the religious infringement of the most fundamental rights of LGBT people, it has simultaneously contributed to an even more widespread acceptance of the basic notion that there really is an essential conflict between LGBT rights on the one hand, and freedom of religion on the other. Even the European Court of Human Rights (ECtHR) seems to have perceived this dispute essentially as a dichotomy of religious and other rights, as seen in the 2013 case of *Eweida and Others v. the United Kingdom*. In this decision, which included the formal complaints of two employees who, due to their sincerely held religious anti-LGBT beliefs, demanded to be relieved from having to service same-sex couples as part of their respective jobs, the Court considered the conflict as one typical between ‘the right to manifest [one’s] religious belief and the ‘interest in securing the rights of others’.³

Whereas freedom of religion is explicitly protected – and limited – in specific articles in all the general human rights conventions on civil and political rights, lesbian, gay and bisexual rights are connected to how the United Nations Human Rights Committee (UNHRC), the ECtHR, and the Inter-American Court of Human Rights (IACtHR), through a number of decisions have all established that sexual orientation is covered by not only the right to privacy according to the International Covenant on Civil and Political Rights (ICCPR) article 17, the European Convention on Human Rights (ECHR) article 8, and the American Convention on Human Rights (ACHR) article 11.2, but also by the general prohibition of discrimination in ACHR article 24, and of discrimination on the basis of ‘other status’ in ICCPR articles 2 and 26 and ECHR article 14.⁴ The UNHRC considers sexual orientation covered by the prohibition against sex discrimination as well,⁵ and has criticised the ‘hierarchisation of discrimination grounds’, demanding that states should ensure ‘equal substantive and procedural protection against discrimination with regard to all prohibited grounds of discrimination’.⁶ The ECtHR has similarly made clear that ‘[j]ust like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification’,⁷ and has, moreover, equalled ‘bias ... against a homosexual minority’ with racism.⁸

This general protection against discrimination on the basis of sexual orientation extends to all parts of society, except for marriage in the United Nations and the European human rights systems, although both the UNHRC and the ECtHR have gone far in demanding equal rights for same-sex couples.⁹ In the Inter-American human rights regime there is no exception in the right to marriage either,¹⁰ whereas the supreme courts in a number of political entities, like South Africa, Nepal, Colombia, Brazil, the USA, Bermuda, the Republic of China (Taiwan), Austria, Costa Rica, Ecuador, as well as in several states, provinces and territories in Canada, the USA, Brazil, and Mexico, have all, on the basis of their respective national legislation, ruled that the principle of anti-discrimination means that same-sex couples have the same right to marriage as opposite-sex couples.

Although there is less human rights jurisprudence on gender identity than on sexual orientation, it is still clear that within the UN, European, and Inter-American human rights regimes, discrimination on the basis of gender identity is equally contrary to the

right to privacy and non-discrimination.¹¹ It is just as much impossible to sever gender identity from the general freedoms and protections offered by the human rights, as with sexual orientation.

A question of balance

Whereas freedom of *belief* is absolute, the *exercise* of freedom of religion is not unlimited, just as is the case with the exercise of most other human rights, including those relating to LGBT rights. That most rights may be limited for the protection of ‘the rights and freedoms of *others*’ is a general human right principle already expressed in the 1948 Universal Declaration of Human Rights,¹² and subsequently established as international law through numerous articles in the major human rights conventions concerning the freedom of thought, conscience and religion, as well as the freedom of expression, assembly, association and movement, and the right to privacy and family life.¹³

The exercise of religion is, indeed, a freedom that *has to* be limited because of ‘the rights and freedoms of others’. As the ECtHR observed in 1993, ‘in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom [of religion] in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected’.¹⁴ Absolutely unlimited exercise of religion is simply logically impossible. The way the heartfelt beliefs of so many faithfuls include various degrees of religious monopoly and coercion means that, if this was left entirely unchecked, the rights of others would automatically be violated, not least, other people’s freedom of religion.

In order not to have free exercise of religion meaning only the privilege of the most powerful, preserving actual freedom of religion always equals the proper *balance* between the free exercise of religion and other rights and freedoms, most importantly, between various claims of exercising freedom of religion.

Religion never generally anti-LGBT

The notion that there really is a fundamental conflict between the ‘right to manifest one’s religious belief’ and LGBT rights is essentially based on the assumption that same-sex sexuality and transgenderism are basically incompatible with religion. But although various religious beliefs certainly represent the main challenge to LGBT equality in today’s societies, there is, however, ample reason to revisit the widespread understanding of freedom of religion as something fundamentally different than LGBT rights.

Turning to the various religious traditions, one finds that, actually, there has never been any universal religious agreement on either same-sex sexuality or transgenderism. Within Hinduism, sex between people of the same gender was traditionally not censured as long as it did not stand in the way of heterosexual marriages nor ran contrary to certain other more particular rules, whereas transgender hijras have always played a significant role in both rituals and beliefs.¹⁵ Buddhism, although generally sceptical to all sex, originally considered sex between men a lesser evil than heterosexuality with its aspects of procreation, as can be seen from early monastic rules. The allegedly unbridled sex between women was, however, seen as definitely worse than heterosexuality.¹⁶ Within some Buddhist traditions sex between men could in certain contexts even be considered sacred.¹⁷ Various

transgender people also received a high degree of acceptance in early Buddhism and still do in many Buddhist communities today.¹⁸

The Hebrew Bible forbids men and women to wear clothes of the opposite sex and condemns anal intercourse between men,¹⁹ but says nothing about either sex between women or other sexual acts between men, even presenting the ‘wonderful’ love between David and Jonathan as exemplary, ‘surpassing the love of women’.²⁰ The Quran, too, offers a clear condemnation only of anal sex between men, but just a vague reference to ‘indecent among your women’, which may or may not refer to sex between women.²¹ The severe demands of proof, the need of four male or eight female witnesses, has at the same time contributed to a large degree of acceptance towards discreet – and sometimes also not so discreet – same-sex sexuality in most Muslim communities. In many Islamic regions there are also traditions of particular forms of transgenderism being accepted.²²

Throughout Christian history, sex between men has often, but not always, been the subject of various degree of condemnation, whereas sex between women most usually was ignored.²³ This seems to be based on earlier Jewish beliefs and the negative attitude of Paul in the New Testament towards sex involving ‘males with males’ and his unclear position on sex between women.²⁴ Jesus, however, is completely silent on this issue. When it comes to transgenderism, there is no consistent attitude in Christian tradition either,²⁵ although Jesus spoke acceptingly of ‘eunuchs who were born that way, ... eunuchs who have been made eunuchs by others’, as well as of ‘those who choose to live like eunuchs for the sake of the kingdom of heaven’.²⁶

As seen here, there has never existed any uniform condemnation of same-sex sexuality or transgenderism in any of the major religious traditions. Instead, there is a number of highly variegated stands that are difficult to conform with such contemporary categories as homosexuality, bisexuality, and LGBT identity, as they differ extensively in what is accepted or denounced, not least according to whether same-sex sexuality involves males or females, and what body parts are employed sexually. The more pronounced and general condemnation of transgenderism and same-sex sexuality found in so many religious communities today is, indeed, a more recent phenomenon, to a large degree a reaction to the modern understanding of particular LGBT identities and how this now often is perceived as a threat to the variety of heterosexual family structures traditionally favoured by most faiths. Although these anti-LGBT convictions were so dominant in the last decades of the twentieth century that they created the widely accepted misconception that most religions really are originally anti-LGBT, they have never held a monopoly within any tradition. At the same time, the very conviction that such anti-LGBT beliefs have always been part of the respective creeds has become a religious belief in itself, which again plays an important part in the general anti-LGBT credo found in various traditions today. As with various other claims of religious literalism, it is a belief generally defended by the most eclectic cherry-picking of different sources.

More recently the general religious landscape has again become much more nuanced, as several of the largest denominations within both Christianity and Judaism have embraced modern LGBT identities and now consider complete LGBT equality consistent with their faith. This includes the two major Jewish denominations in the USA, the Lutheran churches comprising the majority of the population in Denmark, Iceland, Norway, and Sweden, and also the largest Lutheran denominations in Brazil, Canada, and the USA, the biggest Anglican/Episcopal churches in Canada, Scotland and the

USA, the main Presbyterian churches in Scotland and the USA, and two of the largest Protestant churches in Belgium and the Netherlands.²⁷ Millions of Muslims, Buddhists and Hindus are either equally accepting or simply indifferent, and the same is the case with millions of followers of those Christian and Jewish communities that still formally condemn same-sex sexuality and transgenderism.²⁸ This general landscape is made even more complicated by how so many of these anti-LGBT creeds are consistently inconsistent, as they do not excommunicate their numerous followers who are disobedient in either their beliefs, practices, or both. In this way, these denominations to a large degree informally accept that which they often demand that society at large should restrict.

Pro-LGBT beliefs also protected by freedom of religion

That there simply is no religious accord in matters of same-sex sexuality and transgenderism makes it quite impossible to see LGBT rights as intrinsically opposite to freedom of religion. Moreover, as the pro-LGBT beliefs found in every major tradition also constitute religion, this, too, of course, falls under the general protection of freedom of religion. In this way, not only LGBT people who are religiously convinced of their own equal rights, but their non-LGBT fellow believers and even whole religious communities that support LGBT equality, can thus claim that *their* freedom of religion is breached by states accepting any form of LGBT ban or discrimination.

Although those embracing the modern LGBT identity with a religious impetus may be deemed untraditional, this in no way weakens their right to be equally protected by freedom of religion as anyone else. As pointed out by the UNHRC in a General Comment in 1993, freedom of belief ‘is not limited in its application to *traditional* religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions’.²⁹ The ECtHR observes similarly in the important 1996 decision of *Manoussakis and Others v. Greece*, that ‘the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate’.³⁰ At the same time, the pronounced religious acceptance of LGBT rights, in being a more recent phenomenon, only mirrors the more monolithic anti-LGBT beliefs so prominent in much of today’s religious landscape, by the way these are *both* novel phenomena in the history of religion, equally different from the complex and highly variegated attitudes towards same-sex sexuality and transgenderism traditionally found within the different creeds.

The negative freedom of religion

There is, moreover, another aspect that must be taken into account when dealing with freedom of religion and the many rights summed up within LGBT rights. Freedom of religion offers protection not exclusively to religious beliefs and manifestation but, as the UNHRC observes, also to ‘the right *not* to profess any religion or belief’,³¹ or, as the ECtHR points out, to the ‘freedom ... *not* to hold religious beliefs and ... *not to practise* a religion’.³² This is the so-called *negative* freedom of religion or freedom *from* religion, which protects everyone against having to live according to other people’s beliefs, regardless whether one has or does not have a religious conviction of one’s own.

That religious beliefs lie at the heart of most of the opposition to LGBT rights is a generally known fact. As the United Nations Special Rapporteur on Freedom of Religion or Belief noted in 2017,

in certain States where religion has been given ‘official’ or privileged status, other fundamental rights of individuals – especially women, religious minorities and members of the LGBTI community – are disproportionately restricted or vitiated under threat of sanctions as a result of obligatory observation of State-imposed religious orthodoxy.³³

It is, indeed, difficult to identify formal restrictions of fundamental LGBT rights that are not, directly or indirectly, related to religious beliefs. If one really is to follow the argument of those who want to limit LGBT rights in the name of religious freedom, it is essentially *all* about religion. The freedom of religion of those with anti-LGBT beliefs is held up as the very reason why states should accept discrimination of LGBT people in general.

Taking into consideration the profound religious basis of anti-LGBT beliefs and, not least, how so many with such beliefs use freedom of religion as the very reason for restricting LGBT rights, it is relevant to see most, if not all, LGBT discrimination as example of breach of the negative freedom of religion of LGBT people, as it goes against their right *not* to profess any religion or belief. LGBT people has the same right as anyone else not be coerced to live their lives according to other people’s religious beliefs, as stressed by the United Nations High Commissioner For Human Rights, Louise Arbour, as she in the context of the International Conference on LGBT Human Rights in 2006 observed how ‘freedom of religion is a right that also protects the freedom not to share in religious beliefs or be required to live by them’.³⁴ Whenever anyone uses their religious beliefs as reason for demanding that LGBT rights should be restricted, it, thus, automatically becomes a question of freedom of religion versus freedom of religion.

Freedom of religion v. freedom of religion: changing the discussion

That LGBT rights are protected by freedom of religion, both in its positive and its negative dimensions, does not alter the fact that religious anti-LGBT beliefs also connect to freedom of religion. But the awareness of how freedom of religion is one of the most important human rights protecting LGBT people changes the very outset for the debate on every level, including the legal dimension of human rights, the national and international public discourse, as well as the discussion within different religious communities.

Most basically, the awareness of how freedom of religion also protects LGBT-people and religious pro-LGBT-beliefs dispels the myth that being either LGBT or pro-LGBT is essentially about being against religion. Various anti-LGBT and pro-LGBT beliefs are equally at home within all major religious traditions. This is an intra-religious conflict where no party may claim an exclusive right to represent religion in the debate.

As there is no such thing as a general opposition between freedom of religion and LGBT rights, those who hold religious anti-LGBT beliefs simply lose all bases for their claim that their cause is one of defending freedom of religion against attacks on this fundamental right. They will no longer be able to argue that they are simply protecting freedom of religion, as their religious anti-LGBT demands based on their own freedom of religion simultaneously represent a most fundamental assault on the freedom of religion of LGBT people and all those with religious pro-LGBT beliefs. As freedom of religion equally

relates to both parties in the LGBT debate, one finds that those with religious anti-LGBT beliefs are just as much the fierce opponents of freedom of religion as its advocates. When considering the proper balance, one finds that people with anti-LGBT beliefs thus lose the very claim to monopoly of victimhood in the matter of freedom of religion.

As various parties long have tried to relativise human rights in general in order to exclude the protection offered LGBT people, the correct emphasis on how freedom of religion also pertains to LGBT people and those with religious pro-LGBT beliefs will perhaps lead to similar attempts to relativise *freedom of religion*, in order to deny the protection it offers pro-LGBT beliefs and practices. But just as the anti-LGBT relativisation of human rights in general undermines the very essence of human rights at large, any relativisation of freedom of religion means the same for this particular right. If it were accepted that there are certain groups who, due to certain religious or cultural beliefs, do not qualify to be protected by human rights in general or freedom of religion in particular, one cannot keep others from excluding the rights of other groups because of bias found in other religions and cultures, something which, subsequently brings down the essence of the entire human rights system.³⁵ People with religious anti-LGBT beliefs who argue that the negative and positive freedom of religion do not pertain to LGBT people or people with pro-LGBT beliefs, may thus find that they undermine the very protection freedom of religion offers themselves. As their insistence on freedom of religion for themselves, while denying it for others, may sound distinctly hollow, it may, moreover, subvert not only their standing among more neutral parties but also the respect for freedom of religion in society at large.

The emphasis on how freedom of religion also protects LGBT people and people with religious pro-LGBT beliefs should be relevant, too, in some of the ongoing debate in international fora, where a number of conservative Muslim and Christian anti-LGBT regimes, assisted by various religious lobby groups, frequently insists that anything but the outright denial of any human rights protection on the ground of sexual orientation and gender identity represents a serious breach of freedom of religion at large. Pointing out how freedom of religion also relates to LGBT people and religious pro-LGBT beliefs puts these anti-LGBT regimes in a novel position, as it effectively negates their claim as champions of freedom of religion, instead making them having to defend themselves against how their current anti-LGBT stand represents a most severe attack on the freedom of religion of not only LGBT people and those with religious pro-LGBT beliefs in general, but on those of their own citizens who happen to be LGBT or have pro-LGBT beliefs.

How religious attempts to restrict the human rights of others automatically involve the negative and often also the positive freedom of religion of those under siege is a more general issue not only involving LGBT rights. Seeing how obviously this is the case with religious attempts to curtail LGBT rights may, however, also prove helpful in parallel situations involving religious attempts to restrict for example women rights, children rights, or the rights of various minorities.

That any discussion concerning religion and LGBT rights so fundamentally involves the freedom of religion of both parties is something that always must be emphasised, whenever this is an issue dealt with by human rights bodies. Returning for example to the ECtHR case of *Eweida and Others v. the United Kingdom*, one finds that the Court, when defining this as a fundamental conflict between ‘the right to manifest [one’s] religious belief’ of those with anti-LGBT convictions and the ‘interest in securing

the rights of others',³⁶ should have stressed that these 'rights of others' also include the freedom of religion of that other party. How this awareness may affect the balance between rights of LGBT people and those with anti-LGBT beliefs will, however, differ according to what is the context of the conflict.

LGBT rights, freedom of religion and the autonomy of religious communities

While emphasising the freedom of religion of LGBT people or others with pro-LGBT beliefs may certainly affect the discussions within religious communities that do not accept same-sex sexuality or transgenderism, it will make less difference in a legal aspect concerning their internal affairs. Just as no state may force a religious community to alter its beliefs or internal faith practices, criteria for various religious positions, or membership requirement connected to for example sex, (dis)ability, ethnicity, skin colour, caste, various forms of heterosexual practice, no creeds can be coerced into changing their current stand on same-sex sexuality or transgenderism, or even to merely accept LGBT people or people with pro-LGBT beliefs within their ranks at all. As the ECtHR observed on a general basis in the case of *Sindicatul 'Păstorul cel Bun' v. Romania*: 'In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones'.³⁷ Freedom of religion protects the autonomy of the religious communities in such matters, regardless of the sincerity of the religious convictions of those who want such internal faith practices revised. One of the best parallels demonstrating this general principle is probably how the refusal of many religious communities today to ordain women is a practice that only may be changed by the respective communities themselves.

Again because of the principle of autonomy protecting religious communities, freedom of religion of the individual believer does not include a right to dissent within a religious body. The freedom of religion of LGBT people and other people with pro-LGBT beliefs within an anti-LGBT religious community, just as with the freedom of others who oppose certain rules within a particular creed, is instead primarily safeguarded by their right to leave whatever denomination with which they do not agree.³⁸ Many will, of course, instead try to reform their creed from within, but to what degree such activities are possible is again up to the respective community, as any religious community is perfectly free to expel whoever lives or preaches contrary to its current tenets.

How a religious community must relate to employees who are in not-ordained positions is more complicated according to human rights, but the situation of sexual orientation and gender identity seems again to run parallel to that of other aspects which various religious communities stress, even if the freedom of religion of LGBT people or people with pro-LGBT beliefs is put into the equation. Two cases in the ECtHR from 2010, involving employees being dismissed because of extramarital heterosexual affairs, reflect the current standing as well as indicate to what degree the position represent the religious community may be a decisive factor.³⁹ Whereas the Court in *Obst v. Germany* ruled that the Church of Jesus Christ of Latter-day Saints had the right to fire a man in a leading position representing the Church, its European director of public relations,

because of adultery and his subsequent excommunication from the Church,⁴⁰ in *Schüth v. Germany* the Court ruled for the applicant after his being dismissed as a parish musician by the Catholic Church for entering a new relationship after his divorce contrary to Catholic teaching.⁴¹

Bans and freedom of religion

When it comes to the formal prohibition against same-sex sexuality, the ECtHR, the UNHRC, and the IACtHR, have all already established that this runs so fundamentally against the right to respect for privacy and discrimination that no ban is possible, no matter how much this goes against anyone's religious beliefs. The ECtHR has repeatedly countered, usually through ignoring, a variety of religious claims in defence of such bans, such as 'surely the majority in a democratic society are also entitled ... to respect for their religious and moral beliefs', 'the necessity of keeping a law in force for the protection of morals held in high esteem by the majority of people',⁴² 'society was said to be more conservative and to place greater emphasis on religious factors', the support of 'organisations, generally of a religious character',⁴³ 'the Christian and democratic nature' of a state, as well as the not quite correct assertion that 'homosexuality has always been condemned in Christian teaching as being morally wrong'.⁴⁴ When observing that all states must repeal any ban on same-sex sexual activity between consenting adults in order to bring their legislation in line with the ICCPR, the United Nations Human Rights Committee has stressed time and again in its concluding observations on periodic reports from countries with both Christian and Muslim majorities that, 'while acknowledging the diversity of morality and cultures internationally, ... State laws and practices must always be subject to the principles of the universality of human rights and of non-discrimination'.⁴⁵ In its concluding observation on Kuwait in 2016, the UNHRC pointed out that this principle connected equally to the prohibition of 'imitating members of the opposite sex'.⁴⁶ In the 1994 case of *Toonen v. Australia*, the UNHRC also, somewhat more generally, ruled against the claim that 'laws [against consensual same-sex sexuality] are justified on moral grounds', emphasising that it cannot accept that 'moral issues' in connection with the right to privacy 'are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy'.⁴⁷ Dismissing any claims of 'protecting culture, religion and tradition' justifying LGBT discrimination, the IACtHR has similarly made clear that such arguments are irrelevant for outright bans of same-sex sexuality or transgenderism.⁴⁸

As the balance between different rights in connection with the legality of same-sex sexuality and transgenderism is already clearly settled, the emphasis on the positive and negative freedom of religion of LGBT people or others with pro-LGBT beliefs makes little difference for the formal human right understanding. No ban is in any way admissible, no matter how profound or widespread any religious anti-LGBT beliefs may be. The emphasis of freedom of religion also pertaining to LGBT rights, nevertheless, further erodes the leverage of states, religious authorities or other parties claiming that such bans must be there in order to protect the freedom of religion of people with anti-LGBT beliefs. Whereas the religious *conviction* itself that same-sex sexuality or transgenderism should be illegal certainly is protected by the freedom of belief, there is absolutely no basis for claiming that not implementing such beliefs into a legal system represents a breach of the freedom of religion

of those wanting such a ban because of their religious belief. Any such implementation represents instead the utmost restrictions of the freedom of religion of LGBT people who, then, are not able to lead their lives according to their religious beliefs or lack thereof. Indeed, the legalisation of same-sex sexuality and transgenderism actually means no actual intervention whatsoever into the freedom of belief of those who condemn this, as it in no way requires these people to change their convictions. It only takes away their possibility to force LGBT people to live according to their religious anti-LGBT beliefs, in direct breach of the freedom of religion of LGBT people.

LGBT discrimination and freedom of religion

There is a number of areas concerning LGBT people and the rights of anti-discrimination, privacy, family life, expression, and assembly, where religious anti-LGBT beliefs have already been discarded as fundamentally irrelevant. When ruling against the United Kingdom for its discharging gay and lesbian employees because of 'bias' against their sexual orientation in the 1999 case of *Smith and Grady*, the ECtHR made clear that

to the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes ... even if *sincerely* felt by those who expressed them ... cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights ... any more than similar negative attitudes towards those of a different race, origin or colour.⁴⁹

When dealing with LGBT parents' right to custody of their own biological children in the case of *Salgueiro da Silva Mouta v. Portugal*, the ECtHR observed that the state's decisions in this case based on so-called 'traditional' values, here reflecting dominant religious anti-LGBT beliefs, meant that no 'reasonable relationship of proportionality existed between the means employed and the aim pursued'.⁵⁰ In the case of *Oliari and Others v. Italy* in 2015, where the ECtHR ruled against the Italian refusal to establish the institution of civil union for same-sex couples, the Court did not support Italy defending its current ban with the 'religious sentiment' and 'religious inspiration, present in society', and concluded instead that there was an 'absence of a prevailing community interest being put forward by the Italian Government'.⁵¹

In the 2010 case of *Alekseyev v. Russia*, the ECtHR dismissed the most insistent desire of the Russian authorities to accommodate 'the rights of those people whose religious and moral beliefs included a negative attitude towards homosexuality', who would, or could, feel that their freedom of religion was breached if the authorities did not ban a LGBT pride march in Moscow. Whereas Russia argued that such a public display was 'incompatible with religious doctrines and the moral values of the majority', representing an 'intentional insult to their religious feelings', the ECtHR observed that 'the ban was disproportionate' of the aim of preserving the religious freedom of those with anti-LGBT beliefs. Stressing how '[t]he authorities had relied, in particular, on the disapproval of the events by religious and other groups', the Court instead came to a conclusion that applies to all religious majority anti-LGBT attempts to restrict the rights of LGBT people, and has also been referred to in similar cases:

it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the

majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.⁵²

Looking at *Fedotova v. Russia* from 2011, in which a regional ban on 'propaganda of homosexuality' was found in breach of both the freedom of expression and the right to non-discrimination, one finds the UNHRC operating with a similar general limitation of the exercise of religious anti-LGBT beliefs as the ECtHR exhibited in *Alekseyev v. Russia*. The UNHRC observed that since 'the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. Even though one may argue that the religious opposition to same-sex sexuality is found in not just one but in several traditions, this, of course, may be countered by how religious *support* of same-sex sexuality also is found in all the same traditions. Either way, 'any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination' because 'the prohibition against discrimination under [ICCPR] article 26 comprises also discrimination based on sexual orientation'.⁵³ In this case, the UNHRC referred to its own 2011 General Comment 34 as well, thus making it clear that its general condemnation of 'laws to discriminate in favour of... one or certain religions or belief systems', also connects to religious attempts to limit LGBT rights. Indeed, the UNHRC observed, 'it is not compatible with the Covenant [the ICCPR] for a restriction to be enshrined in traditional, religious or other such customary law',⁵⁴ thus making clear how all laws encapsulating religious anti-LGBT beliefs really are in breach of the negative freedom of religion of LGBT people.

In a number of observations on reports from various countries, the UNHRC remarks similarly that even states that today criminalise same-sex sexual activity must not just abolish the ban and cease from discriminating themselves, but take an active part in preventing discrimination in all parts of society, most importantly by including sexual orientation and gender identity in anti-discrimination legislation.⁵⁵ Indeed, as the UNHRC emphasises, 'the principles of the universality of human rights and of non-discrimination' trump 'the diversity of morality and cultures internationally' and the 'political, social, cultural or economic considerations within the State', thus requiring the state to 'ensure that no form of discrimination or violence against persons based on their sexual orientation or gender identity is tolerated and that all such cases are properly investigated and sanctioned'.⁵⁶ Emphasising how LGBT 'discrimination in the form of social stigma, exclusion and prejudices that permeate the workplace, community, education and health institutions' is 'generally' defended by claims of 'protecting culture, religion and tradition', the IACtHR similarly observes that 'it is the obligation of the States to eradicate [such forms of discrimination] by cultivating an understanding of empathy for sexual orientation and gender identity as an inherent part of every person'.⁵⁷

As the ECtHR, UNHRC and IACtHR have already established that religious anti-LGBT beliefs in no way justify official discrimination or the lack of proper anti-discrimination legislation, the emphasis on the freedom of religion of LGBT people and people with pro-LGBT beliefs does not alter the human rights balance in these issues. But as with the bans on same-sex sexuality and transgenderism, the general impetus of those who refer to religious beliefs in defence of anti-LGBT discrimination is even further reduced.

While this does not take away the religious dimension of the various anti-LGBT beliefs, people with such beliefs and their claim to their freedom of religion are all of a sudden countered by the positive and negative freedom of religion of LGBT people, of other people whose beliefs in various ways include LGBT rights, and, not to forget, whole denominations embracing LGBT equality. Seeing these two claims of freedom of religion up against on another, one finds that the lives of those with religious anti-LGBT beliefs are generally unaffected beyond being able to enjoy or not enjoy living in a state where those who do not live according to their particular anti-LGBT beliefs are discriminated against, whereas for LGBT people this is a question of the most severe restrictions on the positive and negative freedom of religion in combination with a whole number of other human rights.

Religion and individual providers of goods or services in the public sphere

According to the United Nations Special Rapporteur on Freedom of Religion or Belief, there is no individual exemption from the general prohibition against religious LGBT discrimination in the public sphere. As the Rapporteur maintains,

the jurisprudence of the [United Nations] Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke ‘religious liberty’ to perpetuate discrimination against ... lesbian, gay, bisexual, transgender and inter-sex persons, when it comes to the provision of goods or services in the public sphere.⁵⁸

The ECtHR, however, has chosen to deal separately with the religious conscience of the individual service provider in this context. In the 2013 case of *Eweida and Others v. the United Kingdom*, which involved one applicant’s refusal to perform same-sex civil partnerships that was part of her job at a local public authority, and another applicant who refused to counsel same-sex couples when employed in a private institution that offered confidential sex therapy and relationship counselling, the ECtHR observed that ‘State authorities ... benefitted from a wide margin of appreciation in deciding where to strike the balance between [the applicant’s] right to manifest his religious belief and the employer’s interest in securing the rights of others’.⁵⁹ Whereas the ECtHR consequently ruled that the United Kingdom was free within its margin of appreciation to allow both private and official employers to terminate the employment of people who refuse to do ordinary parts of their job because of their religious anti-LGBT-beliefs, it is still not clear to what degree the Court would let other countries allow employers and business-owners with anti-LGBT beliefs refuse public services to LGBT people. One must note that this ruling about the state’s ‘wide margin of appreciation’ referred to ‘the right to manifest one’s religious belief *in general*, not just to one’s anti-LGBT beliefs. To whatever degree a state wants to allow people deny service in the public sphere due to their religious anti-LGBT beliefs, it must subsequently allow people refusing service due to other religious beliefs, not least connected to race and sex, as the Court has clearly established that any differences based on sexual orientation is equally serious to that based on race or sex.⁶⁰ At the same time, as argued by the British professor in human rights law, Robert Wintemute, ‘[i]t is extremely unlikely that the ECtHR would require such a broad religious exemption from a prohibition of sex or race discrimination’,⁶¹ which thus makes it equally unlikely that the Court would actually tolerate similar broad religious exemptions in connection

with anti-LGBT beliefs if such a case came up. The conclusion of the ECtHR is thus somewhat unclear both in relations with previous cases and as to what is the major bearing of this ruling.⁶² It is, not least, remarkable that the ECtHR chose to simply ignore the British authorities' argument that the case of the woman dismissed because of her refusal to perform same-sex civil partnerships 'was indistinguishable' from the 2001 case of *Pichon and Sajous v. France*, which also dealt with customers being denied service because of the religious convictions of the persons offering goods and services. Deliberating the freedom of religion of two pharmacists who had been convicted for refusing to sell contraceptive pills due to their religious beliefs, the Court found the whole case inadmissible, concluding that this 'did not interfere with the exercise of the rights [of freedom of religion] guaranteed by Article 9:'

as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.⁶³

When the freedom of religion of the party that would face such religious anti-LGBT discrimination also is taken into consideration, one finds that the conflict takes on an additional dimension. But this is what the ECtHR failed to do in *Eweida and Others*. When the Court discussed 'the right to manifest [one's] religious belief' up against 'securing the rights of others', it ignored that these 'rights of others' always includes also their freedom of religion.⁶⁴ Even though there was nobody who at this point was known to have been discriminated by the two claimants in their respective professional positions, the freedom of religion of those who *could* have been refused services because of their sexual orientation should have been addressed.

When two claims of freedom of religion face each other head on in this way, one of the aspects that must be considered is how these claims compare against one another in regard of how this affect their ability to practice their respective religions or their possibility to not have their lives limited by other people's religion. The right to manifest one's beliefs so that one should be able to deny goods or services to customers who do not live according to or do not agree with one's convictions, must thus be measured up against the right to not risk being turned away in the public sphere because of one's religious beliefs or one's lack of a certain religious conviction. Summed up, it is about having to perform ordinary parts of one's public services for people with whom you disagree in beliefs, versus having to be constantly at risk of being denied goods and services because of others not accepting your religious practices or lack of these. As such, one finds that the two opposing claims of religious freedom connected to goods and services in public sphere are on fundamentally different levels.

The possibility of being denied goods and services in the public sphere may also be seen as related to the *dignity* of a group, whose positive and negative freedom of religion currently is under siege by a wide variety of religious actors. The ECtHR, UNHRC, and other UN human rights institutions have on several occasions emphasised how LGBT discrimination connects with the dignity of LGBT people protected by various human rights.⁶⁵ Pointedly drawing parallels to previously legal racism in the United States, Marvin Lim and Louise Melling of the American Civil Liberties Union show that the following observation of the US Supreme Court in the 1964 case of *Heart of Atlanta Motel, Inc. v. United*

States is just as pertinent to sexual orientation and gender identity as to race and skin colour – not least if one takes into regard how both the UNHRC and the ECtHR have equated LGBT discrimination with racism. As the US Supreme Court observed,

Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.

Such public situations themselves equal ‘the deprivation of personal dignity’, the Supreme Court maintained.⁶⁶

Freedom of religion and the right to marriage

As seen in all countries where same-sex marriage has been up for public debate, the opposition against such marriages is mostly religious. That same-sex marriage is still not recognised in most countries is, indeed, inseparably tied to the dominance of various degrees of explicit anti-LGBT religious beliefs. As the prominent expert on freedom of religion Douglas Laycock points out, even though marriage is a human right independent of religion, many believers still consider this *public* institution inseparable from the *sacred* institution it is within many religious traditions: thus, ‘committed religious [anti-LGBT] believers ... see same-sex marriage legislation as the state interfering with the sacred, changing a religious institution’.⁶⁷

That many hold marriage to be an exclusively religious institution falls, of course, within their freedom of belief. However, when states let such religious beliefs be the basis for the official regulation of marriage, it automatically becomes a question about the negative freedom of religion of all those, whose right to or beliefs about marriage subsequently are limited because other people’s beliefs. There are parallels here to states, which do not allow civil non-religious marriages to take place, thus depriving also opposite-sex couples the right to marry in their native land if they, for example, do not espouse the requirements in the type of religious marriage offered them, belong to different denominations which ban interfaith marriages, are not members of any religious community, or are members of a religious community which simply does not have the right to marry people in the respective jurisdiction. The problematic aspects of this from a human rights perspective has been pointed out by for instance the United Nations Committee on the Elimination of Discrimination against Women.⁶⁸

How countries not recognising same-sex marriage due to various religious anti-LGBT sentiments relate to the negative freedom of belief has, nevertheless, not been discussed by either the UNHRC, ECtHR, or the IACtHR. Although the plaintiffs who were denied the right to same-sex marriage in the 2002 UNHRC case of *Joslin et al. v. New Zealand* argued that ‘others’ religious conceptions [of marriage] should not limit the rights of homosexuals,’ they did not claim a violation of their freedom of belief as protected in article 18 of the ICCPR. This may have been the reason why this was not addressed in the final considerations of the Committee.⁶⁹

As religious communities that consider absolute LGBT equality consistent with their credo⁷⁰ also perform same-sex marriages, the right to marriage for same-sex couples is a question connected with the *positive* freedom of religion as well, both for these denominations and the couples who want to marry according to their faith. Although this

perspective has not been discussed either within any of the major human regimes, one may look at the conclusion of the Supreme Court of Bermuda in the 2018 case of *Ferguson et al. v. the Attorney-General*. This case came about as the Bermuda Parliament replaced same-sex marriage with domestic partnership, after the Supreme Court had originally legalised same-sex marriage in 2017 because of section 5 of the Bermuda Human Rights Act, which, just as the major human rights regimes, protects the right of non-discrimination on the basis of sexual orientation. In this subsequent second ruling, the Supreme Court observed that the replacement of same-sex marriage with domestic partnership, without due cause, ‘interfere[d] with the rights of those who believe (on religious or non-religious grounds) in same-sex marriage of the ability to manifest their beliefs by participating in legally recognised same-sex marriages (as parties to a marriage or as religious officiants)’. As the revocation provisions of the Parliament were ‘a response to a religious [anti-LGBT] campaign led by PMB [the local Preserve Marriage Campaign]’, they ‘also discriminate by giving believers in traditional marriage the advantage of State sanction for their beliefs while withholding such approval from “non-believers”’.⁷¹

How both the negative and positive freedom of religion of same-sex couples and pro-LGBT religious communities must be considered in the question of same-sex marriage could have an impact on the debates in various countries, as it definitely removes one of the main arguments of the anti-LGBT religious opposition, that this is something that relates to the freedom of religion only of those who are against same-sex marriage.

For the IACtHR such deliberations will make no major legal difference, as it already has established that marriage is a human right also for same-sex couples. However, as both the UNHRC and the ECtHR currently hold that legalising same-sex marriage falls within the states’ margin of appreciation, it is thus just the more relevant that they consider how the negative and positive freedom of religion of both same-sex couples and pro-LGBT denominations relate to this question.

When comparing the freedom of religion of those who oppose same-sex marriages with that of those same-sex couples and pro-LGBT religious communities who are denied to have their unions formally recognised as marriages, one finds again that the grievances connected to their limiting freedom of religions are profoundly different. On the one hand, there are those who, when same-sex marriages are legalised, must suffer that the state formally recognise unions of people living contrary to their most sincere anti-LGBT beliefs. On the other hand, there are those who are denied the legal recognition of a union who to them may be equally sacred as that of opposite-sex marriages, in addition to all the formal rights connected to marriage, all because of the religious anti-LGBT opposition to their beliefs or lack thereof.

Conclusion

Although the current balance between the various human rights of LGBT people and the freedom of religion of people with sincerely held religious anti-LGBT belief to a large degree is settled, the emphasis of the positive and negative freedom of religion of LGBT people and people with pro-LGBT religious beliefs may still make a distinct difference in both the legal and the general discussion on freedom of religion and LGBT rights. Decidedly shattering the widespread illusion that LGBT rights are something intrinsically contrary to freedom of religion, the stress on how freedom of religion also includes the

right not to live according to *other* people's religious beliefs, and on how religion never has been universally condemning of same-sex sexuality and transgenderism, and often today is even fully supportive, demonstrates how this conflict really is a clash between the freedom of religion of opposing parties.

Whereas the rights to privacy and non-discrimination already completely protect the right to consensual same-sex sexuality and transgenderism, emphasising how this is also protected by freedom of religion may prove significant in a global community where many states still refuse to recognise the most basic human rights of LGBT people, often while referring to the freedom of religion of those with anti-LGBT beliefs. While the right to non-discrimination already offers protection against LGBT discrimination parallel to that against gender discrimination and racism, the emphasis on how such discrimination also relates to the freedom of religion of both LGBT people and those with religious pro-LGBT beliefs offers an additional perspective in cases involving people with sincerely held anti-LGBT beliefs, where their freedom of religion is systematically used in order to limit the anti-discrimination protection of LGBT people, and thus also *their* freedom of religion, as most importantly seen in connection with goods and services in the public sphere. As for the right to same-sex marriage, which at this point is established as a human right only by the Inter-American Court of Human Rights, both the United Nations Human Rights Committee and the European Court of Human Rights must take the freedom of religion of LGBT people, as well as that of the denominations performing and recognising such marriages, into consideration when deliberating such cases.

The emphasis of the freedom of religion of LGBT people and of people with pro-LGBT beliefs may have a significant impact on the matter of proportionality in all cases concerning LGBT rights, and may, by extension, also prove influential on the more general issue of religious attempts to restrict the rights of other people in situations where their negative and positive freedom of religion often is ignored. Whenever freedom of religion is claimed, one must be aware that this is often a right not exclusively relating to just one of the parties concerned.

Notes

1. Cf. e.g. the remark by Heiner Bielefeldt, the 2010–2016 United Nations Special Rapporteur on Freedom of Religion or Belief: 'During my six years' experience ... I often came across sceptical views that presuppose that freedom of religion or belief does not really fit together with demands for recognizing people in their sexual diversity or gender identity'. Heiner Bielefeldt, 'Introductory Remarks', in *Special Rapporteur's Compilation of Articles on Freedom of Religion or Belief and Sexuality*, ed. United Nations Special Rapporteur on Freedom of Religion or Belief (Geneva: United Nations, 2017), 3–5.
2. United Nations Special Rapporteur on Freedom of Religion or Belief, *Report of the Special Rapporteur on Freedom of Religion and Belief*, A/HRC/37/49, February 28, 2018, 39.
3. *Eweida and Others v. the United Kingdom* (2013). 48420/10, 59842/10, 51671/10, 36516/10, ECtHR, 109.
4. Of the most important cases establishing this in the ECtHR are *Dudgeon v. the United Kingdom*, (1981), 7525/76; *Norris v. Ireland* (1988), 10581/83; *Modinos v. Cyprus* (1993), 15070/89; *Smith and Grady v. the United Kingdom* (1999), 33985/96, 33986/96; and *Salgueiro da Silva Mouta v. Portugal* (1999), 33290/96. In the UNHRC the following early decisions are particularly important: *Toonen v. Australia* (1994), CCPR/C/50/D/488/1992; *Young*

- v. *Australia* (2003), CCPR/C/78/D/941/2000; and *X v. Colombia* (2007), CCPR/C/89/D/1361/2005. For the IACtHR, see *Atala Riffo and Daughters v. Chile* (2012), 12.502; *Duque v. Colombia* (2016), 12.841; and *Advisory Opinion OC-24/17 of 24 November 2017. Series A No. 24*.
5. *Toonen v. Australia*, 8.7.
 6. UNHRC, *Concluding Observations of the Human Rights Committee: Austria*, CCPR/C/AUT/CO/4, October 30, 2007, 8; cf. how the United Nations Special Rapporteur on Freedom of Religion or Belief in 2008 emphasised that ‘there exists no hierarchy of discrimination grounds’ in her *Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir: Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland*, A/HRC/7/10/Add.3, February 7, 2008, 72.
 7. *L. and V. v. Austria* (2003), 39392/98, 39829/98, ECtHR, 45; cf. *Smith and Grady v. the United Kingdom*, 90.
 8. *Smith and Grady v. the United Kingdom*, 97.
 9. Cf. *Young v. Australia*, 10.4; *Karner v. Austria* (2003), 40016/98, ECtHR, 42; *X v. Colombia*, 7.2; *Kozak v. Poland* (2010), 13102/02, ECtHR, 99; *Schalk and Kopf v. Austria* (2010), 30141/04, ECtHR, 109; *X and Others v. Austria* (2013), 19010/07, ECtHR, 151, 153; *Vallianatos and Others v. Greece* (2013), 29381/09, 32684/09, ECtHR, 92; *Oliari and Others v. Italy* (2015), 18766/11, 36030/11, ECtHR, 185, 187; *C v. Australia* (2017), CCPR/C/119/D/2216/2012, UNHRC, 9.6.
 10. The Inter-American Court of Human Rights, *Advisory Opinion OC-24/17 of 24 November 2017. Series A No. 24*, IX.8.
 11. Cf. Human Rights Council, *Resolution Adopted by the Human Rights Council 17/19. Human Rights, Sexual Orientation and Gender Identity*, A/HRC/RES/17/19, July 14, 2011; Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health*, E/C.12/GC/22, May 2, 2016, 23; Human Rights Council, *Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, A/HRC/35/36, April 19, 2017, 22–5, 57; *Goodwin v. the United Kingdom* (2002), 28957/95, ECtHR Grand Chamber, 90–3, 103–4, 8; Council of Europe, *Committee of Ministers Recommendation of the Committee of Ministers to Member States On Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, CM/Rec(2010)5, March 31, 2010; The Inter-American Court of Human Rights, *Advisory Opinion OC-24/17*.
 12. Universal Declaration of Human Rights § 29.2:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of *others* and of meeting the just requirements of morality, public order and the general welfare in a democratic society (my italics).
 13. Cf. the 1950 European Convention of Human Rights §§ 8.2, 9.2, 10.2, 11.2; the 1966 International Covenant on Civil and Political Rights §§ 12.3, 18.3, 19.3, 21, 22.2; and the 1969 American Convention on Human Rights §§ 12.3, 13.2, 15, 16, 22.3, 32.2.
 14. *Kokkinakis v. Greece* (1993), 14307/88, ECtHR, 33.
 15. Cf. Dag Øistein Endsjø, *Sex and Religion: Teaching and Taboos in the History of World Faiths* (London: Reaktion Books, 2011), 158–61; Ruth Vanita, ‘Hinduism’, in *Homosexuality and Religion*, ed. Jeffrey S. Siker (Westport: Greenwood Press, 2007), 125–8.
 16. Cf. Leonard Zwilling, ‘Homosexuality as Seen in Indian Buddhist Texts’, in *Buddhism, Sexuality, and Gender*, ed. J.I. Cabezón (Albany: State University of New York Press, 1992), 204–8.
 17. Cf. Paul Gordon Schalow, ‘Kukai and the Tradition of Male Love in Japanese Buddhism’, in *Buddhism, Sexuality, and Gender*, ed. José Ignacio Cabezón (Albany: State University of New York Press, 1992), 215–22; Endsjø, *Sex and Religion*, 122–5.
 18. Cf. G.G. Bolich, *Crossdressing in Context: Vol. 4: Transgender and Religion* (Raleigh: Psyche’s Press, 2008), 307–78.
 19. *Deuteronomy* 22.5; *Leviticus* 18.22, 20.13.

20. *1 Samuel* 18.3-4; *2 Samuel* 1.26.
21. *Quran* 7.80-84, 26.165-74, 27.54-58, 29:28-34, 4.15.
22. Cf. Momin Rahman, *Homosexualities, Muslim Cultures and Modernity* (Basingstoke and New York: Palgrave Macmillan, 2014), 72–8.
23. Cf. Louis Crompton, *Homosexuality and Civilization* (Cambridge, MA: The Belknap Press, 2003), 111–204, 444–99.
24. *Romans* 1.16. It is not clear whether Paul's condemnation of female behaviour 'contrary to nature' applies to sex between women, or just female lust in general, as this was considered contrary to the passive role women were held to have by nature.
25. Cf. G.G. Bolich, *Transgender History and Geography: Vol. 3: Crossdressing in Context* (Raleigh: Psyche's Press, 2007), 73–100.
26. *Matthew* 19.12.
27. Union for Reform Judaism and United Synagogue of Conservative Judaism in the USA; the Lutheran Church of Denmark, Church of Iceland, Church of Norway, Church of Sweden, Evangelical Church of the Lutheran Confession in Brazil, Evangelical Lutheran Church in Canada, and Evangelical Lutheran Church in America; Anglican Church of Canada, the Episcopal Church of the USA, and the Scottish Episcopal Church; Church of Scotland and the Presbyterian Church (USA); the United Protestant Church in Belgium and the Protestant Church in the Netherlands.
28. Cf. e.g. statistics from various countries in ILGA, *The ILGA-RIWI 2016 Global Attitudes Survey on LGBTI People in Partnership with Logo* (Geneva: ILGA, 2016), 5–7.
29. UNHRC, *General Comment No. 22*, CCPR/C/21/Rev.1/Add.4, July 30, 1993, 2, my italics.
30. *Manoussakis and Others v. Greece* (1996), 18748/91, ECtHR, 47; cf. *Hasan and Chaush v. Bulgaria* (2000), 30985/96, ECtHR, 78; *Metropolitan Church of Bessarabia and Others v. Moldova* (2001), 45701/99, ECtHR, 117.
31. UNHRC, *General Comment No. 22*, 1993, 2, my italics.
32. *Buscarini and Others v. San Marino* (1999), 24645/94, ECtHR, 34, my italics; cf. *Kokkinakis v. Greece*, 31:

As enshrined in Article 9 (art. 9) [of the ECHR], freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.

33. United Nations Special Rapporteur on Freedom of Religion or Belief, *Report of the Special Rapporteur on Freedom of Religion and Belief*, A/HRC/34/50, January 17, 2017, 45; reiterated in United Nations Special Rapporteur on Freedom of Religion or Belief, *Report 2018*, A/HRC/37/49, 38.
34. Office of the United Nations High Commissioner for Human Rights, *Presentation of the Office of the United Nations High Commissioner for Human Rights Ms. Louise Arbour to the International Conference on LGBT (Lesbian, Gays, Bisexual and Transgender) Human Rights*, Montréal July 26, 2006.
35. Cf. Dag Øistein Endsjø, 'Lesbian, Gay, Bisexual and Transgender Rights and the Religious Relativism of Human Rights', *Human Rights Review* 6, no. 2 (2005): 108.
36. *Eweida and Others v. the United Kingdom* (2013), 48420/10, 59842/10, 51671/10, 36516/10, ECtHR, 109.
37. *Sindicatul 'Păstorul cel Bun' v. Romania* (2013), 2330/09, ECtHR, 137; cf. *Svyato-Mykhaylivska Parafiya v. Ukraine* (2007), 77703/01, 146; *Miroļubovs and Others v. Latvia* (2009), 798/05, ECtHR, 80(d).
38. On this general principle cf. *Spetz and Others v. Sweden* (1988), 12356/86, European Commission of Human Rights, The Law.2; *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria* (2009), 412/03, 35677/04, ECtHR, 141; and *Miroļubovs and Others v. Latvia*, 80(d); *Sindicatul 'Păstorul cel Bun' v. Romania*, 137.

39. Cf. Frank Cranmer, 'Employment Rights and Church Discipline: Obst and Schüth', *Ecclesiastical Law Journal* 13, no. 2 (2011): 215.
40. *Obst v. Germany* (2010), 425/03, ECtHR, 50–2.
41. *Schüth v. Germany* (2010), 1620/03, ECtHR, 69, 75.
42. *Modinos v. Cyprus*, 11.
43. *Dudgeon v. the United Kingdom*, 25, 56.
44. *Norris v. Ireland*, 24.
45. UNHRC, *Concluding Observations on the Third Periodic Report of Kuwait*, CCPR/C/KWT/CO/3, August 11, 2016, 12; UNHRC, *Concluding Observations on the Second Periodic Report of Turkmenistan*, CCPR/C/TKM/CO/2, April 20, 2017, 9; UNHRC, *Concluding Observations on the Initial Report of Liberia*, CCPR/C/LBR/CO/1, August 27, 2018, 19; cf. UNHRC, *Concluding Observations on the Initial Report of Mauritania*, CCPR/C/MRT/CO/1, November 21, 2013, 8: 'The Committee respects the cultural diversity and moral principles of all countries, but recalls that these always remain subordinate to the principles of the universality of human rights and non-discrimination'.
46. UNHRC, *Concluding Observations on the Third Periodic Report of Kuwait*, CCPR/C/KWT/CO/3, August 11, 2016, 12.
47. *Toonen v. Australia*, 6.5, 6.8, 8.6.
48. The Inter-American Court of Human Rights, *Advisory Opinion OC-24/17*, 40.
49. *Smith and Grady v. the United Kingdom*, 97, my italics. Exactly the same observation was made in *Lustig-Prean and Beckett v. the United Kingdom* (1999), 31417/96, 32377/96, ECtHR, 90.
50. *Salgueiro da Silva Mouta v. Portugal*, 34, 36, my italics.
51. *Oliari and Others v. Italy*, 185.
52. *Alekseyev v. Russia* (2010), 4916/07, 25924/08, 14599/09, ECtHR, 60, 59, 16, 78–9, 105, 81; the same point was stressed in relations with LGBT rights in *Bayev and Others v. Russia* (2017), 67667/09, 44092/12, 56717/12, ECtHR, 70, and *Zhdanov and Others v. Russia* (2019), 12200/08, 35949/11, 58282/12, ECtHR, 158; cf. *Barankevich v. Russia* (2007), 10519/03, ECtHR, 70.
53. *Fedotova v. Russia* (2010), CCPR/C/106/D/1932/2010, UNHRC, 10.8, 11, 10.5, referring to UNHRC, *General Comment No 34*, CCPR/C/GC/34, September 12, 2011, 32.
54. UNHRC, *General Comment No 34*, 2011, 48, 24.
55. See e.g. UNHRC, *Concluding Observations of the Human Rights Committee: Jamaica*, CCPR/C/JAM/CO/3, November 17, 2011, 8; UNHRC, *Concluding Observations of the Human Rights Committee: Islamic Republic of Iran*, CCPR/C/IRN/CO/3, November 29, 2011, 10; UNHRC, *Concluding Observations on the Initial Report of Sierra Leone*, CCPR/C/SLE/CO/1, April 17, 2014, 11; UNHRC, *Concluding Observations on the Initial Report of Pakistan*, CCPR/C/PAK/CO/1, August 23, 2017, 12; UNHRC, *Concluding Observations on Swaziland in the Absence of a Report*, CCPR/C/SWZ/CO/1, August 23, 2017, 19.
56. UNHRC, *Concluding Observations on the Second Periodic Report of Turkmenistan*, CCPR/C/TKM/CO/2, April 20, 2017, § 9; cf. UNHRC, *Concluding Observations on the Initial Report of Turkey Adopted by the Committee at Its 106th Session*, CCPR/C/TUR/CO/1, November 13, 2012, § 10; UNHRC, *Concluding Observations on the Third Periodic Report of Kuwait*, CCPR/C/KWT/CO/3, August 11, 2016, §§ 12–13; UNHRC, *Concluding Observations on the Initial Report of Liberia*, CCPR/C/LBR/CO/1, August 27, 2018, § 19.
57. The Inter-American Court of Human Rights, *Advisory Opinion OC-24/17*, 40.
58. United Nations Special Rapporteur on Freedom of Religion or Belief, *Report 2018*, A/HRC/37/49, 40.
59. *Eweida and Others v. the United Kingdom*, 109.
60. *L. and V. v. Austria*, 45; *Smith and Grady v. the United Kingdom*, 90, 97.
61. Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others', *The Modern Law Review* 77, no. 2 (2014): 245.
62. As the British professor in European law, Ronan McCrea, argues, the lack of a clear-cut conclusion in *Eweida and Others* against religious anti-LGBT discrimination in the public sphere on part of the ECtHR may have been partly due to the Court not wanting to involve itself 'in

- the kind of political tempest that followed the ... decision in *Lautsi v Italy*', dealing with the display of crucifixes in public schools, a case where the Grand Chamber in the end reversed the Court's original decision of finding this in breach of the freedom of religion of the plaintiffs and instead re-established a broader margin of appreciation (Ronan McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*', *The Modern Law Review* 77, no. 2 (2014): 289; cf. *Lautsi v. Italy* (2009), 30814/06, ECtHR; *Lautsi v. Italy* (2011), 30814/06, ECtHR Grand Chamber).
63. *Pichon and Sajous v. France* (2001), 49853/99, ECtHR; cf. *Eweida and Others v. the United Kingdom*, 59.
 64. *Eweida and Others v. the United Kingdom*, 109.
 65. Cf. *Goodwin v. the United Kingdom*, 90; *X v. Turkey* (2012), 24626/09, ECtHR, 39, 50–1; *İdentoba and Others v. Georgia* (2015), 73235/12, ECtHR, 65, 71; A.P., Garçon og Nicot v. Frankrike (2017), 79885/12, 52471/13 and 52596/13, ECtHR, 130–1; UNHRC, *Concluding observations on the initial report of Bangladesh*, CCPR/C/BGD/CO/1, April 27, 2017, 12; United Nations Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity. Report of the United Nations High Commissioner for Human Rights*, A/HRC/19/41, November 17, 2011, 5; United Nations Human Rights Council, *Resolution 17/19*, A/HRC/RES/17/19, July 14, 2011; United Nations Human Rights Council, *Resolution Adopted by the Human Rights Council. 27/32 Human Rights, Sexual Orientation and Gender Identity*, A/HRC/RES/27/32, October 2, 2014.
 66. *Heart of Atlanta Motel, Inc. v. United States* (1964), 379 U.S. 241, Supreme Court of the United States, 250, 291–2; cf. Marvin Lim and Louise Melling, 'Inconvenience or Indignity? Religious Exemptions To Public Accommodations Laws', *Journal of Law and Policy* 22, no. 2 (2014), 712.
 67. Douglas Laycock, 'Religious Liberty and the Culture Wars', *University of Illinois Law Review* 3 (2014): 848.
 68. Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Israel*, CEDAW/C/ISR/CO/5, February 4, 2011, 48–9; Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Lebanon*, CEDAW/C/LBN/4-5, November 3, 2015, 45.
 69. *Joslin et al. v. New Zealand* (2002), CCPR/C/75/D/902/1999, UNHRC, 5.2.
 70. See *supra* note 27.
 71. *Ferguson et al. v. the Attorney-General* (2018), SC (Bda) 45 Civ, Supreme Court of Bermuda, 112, 12(a). Cf. *Godwin et al. v Registrar General* (2017), SC (Bda) 36 Civ, Supreme Court of Bermuda, 129.i.

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