

# **'THE VERY OUTER LIMIT OF OUR JURISDICTION': RELIGION, SEXUALITY, AND VALUE CONFLICTS IN ENGLISH LAW**

*Méadhbh McIvor*

*Assistant Professor in Religion, Law and Human Rights*

*University of Groningen*

## **I. Introduction**

Melville's *Bartleby* may have been a particularly unproductive scrivener, but as a general rule, lawyers, clerks, and judges are known for getting things done. They file briefs; they review case notes; they find precedent; they make judgments.

Occasionally, though, cases arise in which those involved seem to have 'preferred not to.' In such cases, no evidence is filed. No clarity is given as to the kind of ruling sought. No judgment is issued. Indeed, in some cases, judges take twenty-five pages – one hundred and nine paragraphs – to make no order at all.

*Johns v Derby City Council*<sup>1</sup> is one such case. *Johns* arose when Eunice and Owen Johns, a Pentecostal couple then living in the English Midlands, applied to their local council<sup>2</sup> for approval as short-term foster carers. When the Johns' conservative views on sexuality threatened to render them ineligible for approval, the parties agreed to ask the High Court for a declaration clarifying the law: how should the Council balance its duty not to discriminate on the grounds of religion or belief with its duty not to discriminate on the grounds of sexual orientation?

The judges who heard the case, Lord Justice Munby and Mr Justice Beatson, declined to answer the question put to them. Stating that it was at the 'very outer limit' of what might be considered their jurisdiction,<sup>3</sup> they instead used their ruling to reflect on the principles ostensibly regulating the 'relationship of law and religion in our society'<sup>4</sup> – and to heavily criticize those who had brought suit in the first place.

---

<sup>1</sup> [2011] EWHC 375.

<sup>2</sup> Councils are a branch of local government handling such issues as fostering and adoption, library and park maintenance, and refuse management.

<sup>3</sup> *Johns* at [31].

<sup>4</sup> *Id.* at [36].

What are we to make of this case, of the amount of time, energy and money that went into discussing a question ultimately deemed too vague to answer? In what follows, I reflect upon *Johns* as an example of the frustration felt by some legal professionals at the rush to ‘legalize’ the apparent conflict between religious freedom and sexual equality, thus reifying this tension and contributing to a “rights-vs-rites” binary’ in popular discourse (Moustafa 2018).

I begin by laying out the facts of *Johns v Derby City Council*, before turning to the judges’ refusal to answer the question put to them. I approach this task in three sections. First, I reflect on the judges’ rhetorical occlusion of the relationship between Christianity and English law, which downplayed the state’s historic role in determining and policing the kinds of theological questions they now claimed an inability to answer. Second, I discuss their simultaneous construction and denial of a ‘hierarchy of rights’ in equality law, suggesting that the judgment relies on essentialised notions of religion-as-optional-choice and sexuality-as-fixed-trait. Finally, I turn to ethnographic accounts of dispute resolution to offer an explanation for the judges’ apparent frustration with the parties to the case, and close by raising discussion questions for budding scholars of law and religion.

## **II. The Facts**

As the circumstances in which the case arose are quite unusual, it is worth summarizing them in some detail. In January 2007, Eunice and Owen Johns, Pentecostal Christians then living in Derby, England,<sup>5</sup> applied to their local City Council for approval as short-term foster carers. They had been approved as such between 1992-1995 and had last fostered a child in 1993.

In the intervening years, however, the standards for fostering had changed – and changed radically. Potential carers were now required to comment on their ability to support children who were LGBTQ+, who were questioning or exploring their sexual identity, or whose parents or family members might be LGBTQ+.

---

<sup>5</sup> The Johns, both of whom were born in Jamaica, had moved to Britain as teenagers. At the time of the initial application, Mrs Johns was in her late 50s while Mr Johns was in his early 60s.

The requirement to respect and promote sexual diversity quickly became a concern. As members of the Church of the God of Prophecy, the Johns felt that sexual relations outside of heterosexual marriage were immoral. Eunice was unwilling to tell a child 'that it is ok to be homosexual.' When asked how he would respond to a child who thought they might be gay, Owen stated that he would 'gently turn them round.'<sup>6</sup>

Jenny Shaw, the social worker who first interviewed them, worried that their views were incompatible with the Council's duty to promote diversity and inclusion:

Eunice and Owen expressed strong views on homosexuality, stating that it is "against God's laws and morals". They explained that these views stemmed from their religious convictions and beliefs. Eunice explained at a later interview, that she had always been brought up to believe that having a different sexual orientation was unnatural and wrong, and that these convictions had not come about as a result of being "saved".

In our initial discussion on this issue, when asked if, given their views, they would be able to support a young person who, for example was confused about their sexuality, the answer was in the negative. Eunice at this time also mentioned a visit she had made to San Francisco, in relation to it being a city with many gay inhabitants. She commented that she did not like it and felt uncomfortable while she was there.<sup>7</sup>

Shaw's notes from a later meeting with the Johns (this time with a colleague, Sally Penrose, also in attendance) record:

In relation to their expressed views on same sex relationships, Sally stressed that these views did not equate with the Fostering Standards which require carers to value individuals equally and to promote diversity. Eunice and Owen were not able to acknowledge that their very strong beliefs in this area would be likely to impact on their ability to support and reassure a young person who may be

---

<sup>6</sup> *Id.* at [7-11].

<sup>7</sup> *Id.* at [6].

confused re their sexual identity... [Eunice] felt that her beliefs would not affect how she was able to care for a young person, and stated that we were really saying that they could not be foster-carers because they are Christians.<sup>8</sup>

This placed the Council in something of a bind. On the one hand, they felt unable to approve foster carers whose views on the rights of LGBTQ+ persons seemed to breach the requirements of the National Minimum Standards for Fostering Services (not least in light of the recent passage of the Equality Act [Sexual Orientation] Regulations 2007, secondary legislation which prohibited discrimination on the grounds of sexual orientation in the provision of goods or services). Yet they were equally bound by the Equality Act 2006,<sup>9</sup> which prohibited discrimination on religious grounds, and by the Human Rights Act 1998, which guaranteed the right to religious freedom.

Notes from their meetings record this difficulty, with the Fostering Panel stating: ‘The department needs to be careful not to appear to discriminate against them on religious grounds. The issue has not arisen just because of their religion as there are homophobic people that are non-Christian.’<sup>10</sup>

With the Council unsure of whether to approve or reject the application, the vetting process stalled. The Johns, now represented by a lobby group called the Christian Legal Centre, began giving interviews in the local and national press. These interviews alleged that Christians with what they called ‘orthodox beliefs’ on gender and sexuality were informally barred from fostering (unless they were willing to ‘compromise’ those beliefs).

In Spring 2009, the Christian Legal Centre suggested that the Johns and the Council apply jointly to the High Court for declaratory relief, a suggestion to which the Council agreed.<sup>11</sup> Together, they sought a declaration on the following question:

How is the Local Authority as a Fostering Agency required to balance the obligations owed under the Equality Act 2006 (not to directly or indirectly discriminate on the grounds of

---

<sup>8</sup> *Id.* at [10].

<sup>9</sup> By the time the case came before the court, the relevant statute was the Equality Act 2010.

<sup>10</sup> *Johns* at [11].

<sup>11</sup> Although the parties applied together, the case was still framed in an adversarial manner, with the Johns as claimants and the Council as defendant.

religion or belief), the obligations under the Equality Act (Sexual Orientation) Regulations 2007 (not to discriminate directly or indirectly based on sexual orientation), the Human Rights Act 1998, the National Minimum Standards for Fostering Services and Derby City Council's Fostering Policy when deciding whether to approve prospective foster carers as carers for its looked-after children [?]<sup>12</sup>

The Johns also sought permission to apply for judicial review of the Council's decision (a decision which had not yet been made).

When the court asked the parties to clarify the terms of the declaration sought, the claimants formulated the following points:

(a) Persons who adhere to a traditional code of sexual ethics, according to which any sexual union outside marriage (understood as a lifelong relationship of fidelity between a man and a woman) is morally undesirable, should not be considered unsuitable to be foster carers for this reason alone...

[...]

(d) It is unlawful for a public authority to describe religious adherents who adhere to a code of moral sexual ethics namely; that any sexual union outside marriage between a man and a woman in a lifetime relationship of fidelity is morally undesirable, as 'homophobic'.<sup>13</sup>

The defendants, meanwhile, asked for confirmation that a fostering service was acting within the law if it declined to approve prospective carers evincing 'antipathy, objection to, or disapproval of, homosexuality and same-sex relationships and an inability to respect, value and demonstrate positive attitudes towards homosexuality and same-sex relationships.'<sup>14</sup>

The questions put to the High Court were hypothetical: remember, again, that no decision had actually been made on the Johns' application. As such, neither side filed any evidence (although the Equality and Human Rights Commission, intervening, submitted evidence on the detrimental impact

---

<sup>12</sup> *Id.* at [26].

<sup>13</sup> *Id.* at [27].

<sup>14</sup> *Id.* at [28].

of negative views of same-sex relationships on LGBTQ+ children's mental health). Pointing out that the parties had failed to agree on an 'appropriately focused question' for the court to address; identify questions of law that could be answered with a simple 'yes' or 'no'; or furnish the court with relevant evidence, the judges declined to grant declaratory relief.<sup>15</sup>

Central to the case, then, were negation and refusal: an unevidenced request to judicially review a decision that had not yet been made, resulting in a refusal to make a purely speculative order.

### **III. 'A Secular State Not a Theocracy'**

That Justices Munby and Beatson were unwilling to settle the questions before them should not be taken to mean they had nothing to say. Although they did not rule on the case at hand, they took the opportunity to expound on the relationship between Christianity and the common law in England, declaring that the United Kingdom was 'a secular state not a theocracy.'<sup>16</sup>

It is hard to ignore the mix of frustration and bemusement saturating the ruling. The judges' harshest criticism was reserved for Christian Legal Centre barrister Paul Diamond, whose representation of the situation facing Christians in the United Kingdom they dismissed as a 'travesty of the reality.'<sup>17</sup> Their surprisingly intemperate language garnered a significant amount of attention in both the traditional press and the legal blogosphere. (After all, it's not every day that a High Court judge rejects a barrister's claims as 'utterly unarguable.'<sup>18</sup>) While many commentators applauded what the British Humanist Association called their 'hard-hitting judgment' (BHA 2011; Wilson 2011), others were quick to label the ruling – and the High Court's treatment of Eunice and Owen Johns – 'a disgrace' (Telegraph View 2011): 'Perhaps there is a historical irony here, because we are witnessing a modern, secular Inquisition – a determined effort to force everyone to accept a new set of orthodoxies or face damnation as social heretics if they refuse.'

---

<sup>15</sup> *Id.* at [107].

<sup>16</sup> *Id.* at [36].

<sup>17</sup> *Id.* at [34].

<sup>18</sup> *Id.* at [106].

Why were Munby and Beatson so willing to upset the norms of judicial discourse in their criticism of the Johns' legal team? To understand their frustration with the Christian Legal Centre's rhetoric, it is important to remember that *Johns* was not the first case to pit religious freedom against sexual equality in this way. Rather, it was the latest in a long line of cases alleging a conflict between the right to religious freedom and the right to non-discrimination on grounds of sexuality (see Stychin 2009; Strhan 2014; McIvor 2019).

The Equality Act (Sexual Orientation) Regulations 2007 bore a particular symbolic weight in this regard. In the lead up to its passage, the Regulations' presumed impact on adoption and fostering agencies with a religious ethos had come to stand for a 'larger principle' in determining the legitimacy (or otherwise) of religious organizations' desire to be exempt from anti-discrimination laws (Stychin 2009, 19-20). As such, and as I explore in greater depth elsewhere (McIvor 2019, 330), the question's reference to balancing obligations 'reflected the by then well-established trope that the duty not to discriminate on grounds of religion and the duty not to discriminate on grounds of sexual orientation were diametrically opposed.'

Nor was adoption the only policy area where this relationship was in question. Cases involving registrars opposed to registering same-sex civil partnerships,<sup>19</sup> relationship counsellors voicing possible 'conscientious objections' to providing psycho-sexual therapy to gay or lesbian clients,<sup>20</sup> and bed and breakfast owners unwilling to let rooms to gay or lesbian couples<sup>21</sup> had all made headlines in the years preceding *Johns v Derby City Council*. Indeed, some of these cases had been fought – and fought unsuccessfully – by the Christian Legal Centre's Paul Diamond, who was quickly gaining a reputation for making what one commentator called 'tendentious arguments in support of claims which are unwinnable' (Rozenberg 2011).

These proliferating cases contributed to a fear among certain sections of the conservative Christian community that 'Biblical values' were unwelcome in British public life. (The fact that Christian employees and business owners seeking exemptions from anti-discrimination law on the

---

<sup>19</sup> *Ladele v London Borough of Islington* [2009] EWCA Civ 1375.

<sup>20</sup> *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880.

<sup>21</sup> *Hall & Preddy v Bull & Bull* [2011] Bristol County Court.

grounds of religious liberty rarely won their cases seemed to confirm this fear.) In this context, the question's reference to the Council's obligation to 'balance' the rights of religious and sexual minorities invoked a narrative in which the relationship between the two was thought to be fundamentally out of kilter (Stychin 2009, 24; Donald, Bennett and Leach 2012).

Indeed, Diamond's written and oral submissions stressed the apparently irreconcilable conflict between these two sets of rights. To understand the force of his arguments (and to get a sense of their reception by the High Court), it is worth quoting Munby and Beatson's summary of his presentation at some length:

Mr Diamond lays much emphasis upon various arguments, many of them couched in extravagant rhetoric, which, to speak plainly, are for the greater part, in our judgment, simply wrong as to the factual premises on which they are based and at best tendentious in their analysis of the issues...

Thus Mr Diamond's skeleton argument opens with these words, "This case raises profound issues on the question of religious freedom and whether Christians (or Jews and Muslims) can partake in the grant of 'benefits' by the State, or whether they have a *second class* status" (emphasis in original). He continues, "The advancement of same sex rights is beginning to be seen as a threat to religious liberty". He asserts that "something is very wrong with the legal, moral and ethical compass of our country" and that "Gay rights advocates construe religious protection down to vanishing point." He submits that the State "should not use its coercive powers to de-legitimise Christian belief." He asserts that what he calls the modern British State is "ill suited to serve as an ethical authority" and complains that it "is seeking to force Christian believers '*into the closet*'." He identifies the issue before the court as being "whether a Christian couple are '*fit and proper persons*' (Counsel's use of phrase) to foster (and, by implication, to adopt) by reason of their faith" and "whether Christian (and Jewish and Muslim) views on sexual ethics are worthy of respect in a democratic society." The manner in which he chooses to frame the argument is further illustrated by his submissions that what is here being



contended for is “a blanket denial on all prospective Christian foster parents in the United Kingdom”, indeed “a blanket ban against all persons of faith”, an “irrebuttable presumption that no Christian (or faith adherent) can provide a suitable home to a child in need of a temporary placement”, that “the denial of State benefits to those who believe homosexuality is a ‘sin’ must be premised on the basis that such beliefs are contrary to established public policy” and that what is being said amounts to this, that “the majority of world religions [are] deemed to have a belief system that could be described as *bigotry* or *discriminatory* because of a code of sexual ethics that some people disagree with.”

It is hard to know where to start with this travesty of the reality... No one is asserting that Christians (or, for that matter, Jews or Muslims) are not 'fit and proper' persons to foster or adopt. No one is contending for a blanket ban. No one is seeking to de-legitimise Christianity or any other faith or belief. No one is seeking to force Christians or adherents of other faiths into the closet. No one is asserting that the claimants are bigots. No one is seeking to give Christians, Jews or Muslims or, indeed, peoples of any faith, a second class status. On the contrary, it is fundamental to our law, to our polity and to our way of life, that everyone is equal: equal before the law and equal as a human being endowed with reason and entitled to dignity and respect.<sup>22</sup>

In response to Diamond’s ‘extravagant rhetoric,’ the judges felt obliged ‘to re-state what ought to be, but seemingly are not, well understood principles regulating the relationship of religion and law in our society.’ In particular, they stressed that ‘reliance upon religious belief, however conscientious the belief and however ancient and respectable the religion, can never of itself immunise the believer from the reach of the secular law.’ This applied even to Christian beliefs. Christianity was not part of the law, they stated, and secular judges in a multicultural community could not privilege Christian views over others. Or, to put it more succinctly: the United Kingdom was ‘a secular state not a theocracy.’<sup>23</sup>

---

<sup>22</sup> *Johns*. at [32-4].

<sup>23</sup> *Id.* at [36-43].

Munby and Beatson set out these points as though they were self-evident and indisputable. But the fact that they were required to expound on them at such length (and with so many qualifications) suggests they are not as obvious as the Justices implied. Indeed, although both the Christian Legal Centre and the court seemed to frame the law as ‘secular’ – in the sense of anti-religious for the former and religiously neutral for the latter – it is equally plausible to view it as deeply *Christian* (albeit in a way that gave little comfort to the Johns).

For one thing, if ‘the laws and usages of the realm [did] not include Christianity,’<sup>24</sup> this was a fairly recent state of affairs. After all, England maintains an established church, and the monarch – who must give Royal Assent to all proposed legislation – is Supreme Governor of the Church of England. As such, the Church’s ‘theological categories’ are also ‘legal categories’ (Sullivan 2006, 916), and the idea that all ‘religions’ should be treated equally has not been an organizing principle of English church-state relations. Indeed, for much of the five hundred year period since Henry VIII broke with Rome and established a national Protestant church, the state had actively discriminated against those of the ‘wrong’ religious persuasion, with penalties ranging from fines and imprisonment to accusations of treason.

It has taken five centuries for the law to move from outright discrimination (in which non-established religions were prohibited or penalized), to non-discrimination (in which non-established religions were ‘tolerated’), to the current position of ‘anti-discrimination,’ in which the state is seen to have a positive obligation to promote freedom of religion for all (see Sandberg 2012 for an account of this transition). The final stage in this journey was the coming into force of the Human Rights Act 1998, which incorporated the European Convention on Human Rights into domestic law. This Act states, in the words of Article 9, that ‘Everyone has the right to freedom of thought, conscience and religion.’ Article 9 was the first time a positive, universal right to religious freedom had been codified in domestic (as opposed to European) legislation (Sullivan 2006, 916).

Still, in spite of this formal religious equality, English judges have been accused of privileging an implicitly Protestant, belief-centric vision of what religion ‘is’ in their freedom of religion case law (see Heather Miller

---

<sup>24</sup> *Id.* at [39].

Rubens' 2014 discussion of the Jews' Free School case<sup>25</sup> for an example of how this plays out in practice). And in addition to these ongoing implicit biases, the *explicit* privileging of Christianity in law has had remarkable longevity. Perhaps most pointedly, it was only in 2008 that an amendment to the Criminal Justice and Immigration Act abolished the common law offences of blasphemy and blasphemous libel, which protected Christianity from 'scurrilous attack.' (That the prohibition of blasphemy applied to Christianity alone was confirmed in *R v Bow Street Magistrates Court, ex parte Choudhury*,<sup>26</sup> in which an attempt to have Salman Rushdie and Penguin Books convicted of blasphemous libel for publishing *The Satanic Verses* failed.)

As such, even if one wishes to downplay the ongoing establishment of the Church of England as representing only 'the embers of Christendom' (Rivers 2012, 375), these embers were certainly still smoldering at the time that *Johns* was heard in 2010. When Munby and Beatson stated that secular judges 'must be wary of straying across the well-recognised divide between church and state,'<sup>27</sup> one could be forgiven for wondering when, exactly, this division had been instituted; and why it was that it was only now being taken seriously.

#### **IV. A Hierarchy of Rights?**

This was not the only part of the ruling that might be accused of disingenuousness, for the fact that they were unwilling to make an official declaration did not prevent Munby and Beatson from weighing in on the question of religious rights vs sexual equality. Consider the following section of their judgment:

While as between the protected rights concerning religion and sexual orientation there is no hierarchy of rights, there may, as this case shows, be a tension between equality provisions concerning religious discrimination and those concerning sexual orientation. Where this is so, Standard 7 of the National Minimum Standards for Fostering and the Statutory Guidance indicate that it must be taken into

---

<sup>25</sup> *R (E) v Governing Body of JFS* [2009] UKSC 15.

<sup>26</sup> [1991] QB 429.

<sup>27</sup> *Johns* at [41].

account and in this limited sense the equality provisions concerning sexual orientation should take precedence.<sup>28</sup>

In this quotation, Munby and Beatson seem to deny and institute a 'hierarchy' in the same breath.

For the Johns and their legal team, this paragraph was proof of what they had long argued: that statutes prohibiting discrimination against LGBTQ+ people while simultaneously enshrining the right to freedom of religion were fundamentally incoherent. One protected characteristic (religion or sexuality) was bound to be prioritized above the other. This, they felt, was deeply unprincipled, for in the absence of an overarching set of values or principles to which to appeal in cases of conflict, judges would end up determining such cases according to the fleeting whims of 'the prevailing politically correct orthodoxy' (Williams 2011; see McIvor 2019 for an analysis of the Christian Legal Centre's response to the ruling).

Another way to approach this apparent contradiction, though, is to explore how 'religion' and 'sexual orientation' are conceptualized in contemporary discourse. To many Britons, it seemed self-evident that in situations of 'tension' between religious freedom and sexual equality, it was the latter that should take precedence. This appears to turn on an essentialised approach to both religious and sexual identities, in which religion is imagined as optional whereas sexuality is seen as inherent. So conceived, religion is (or ought to be) elective, an opinion lightly held rather than an aspect of the embodied self. This understanding can be seen in other high-profile disputes about the place of religion in public life, ranging from the refusal to acknowledge that harm might be caused by words and images experienced as blasphemous to the denial that banning infant circumcision would place a particular burden on minority religious groups (Mahmood 2009; The Religion Factor 2018).

As a general rule, European rights-based law has been unwilling to read discrimination into the disrespect of a position thought to be freely chosen, and thus easily altered (if not discarded in its entirety). By contrast, with sexual orientation increasingly understood as a 'singular nature' rather than a series of acts (Foucault 1978, 43), many Britons are unwilling to tolerate the discriminatory treatment of sexual minorities.

---

<sup>28</sup> *Id.* at [93].

From this perspective, it seemed both natural and appropriate that in cases of conflict, the immutable fact of sexual orientation should be protected above the *lifestyle choice* that was religion. To do so was not to set up a 'hierarchy of rights,' but to acknowledge the difference between identity and opinion. (That many Christians do not view the dictates of their religion in terms of 'choice,' instead feeling themselves bound by rules and obligations beyond their power to change, was left unexplored.)

In practice, then, and despite their confident assertion that there was no 'hierarchy' of rights, it seemed the judges *were* faced with the issue the Christian Legal Centre had identified: they were bound by law to take account of both religious liberty and the principle of non-discrimination, yet had been given no legal principle by which to weigh these competing rights. In this context, perhaps it was unsurprising that they fell back on essentialised notions of religion and sexuality, with religion – or, at least, a 'small "p"' protestant imagining of religion as optional belief (Sullivan 2005, 7) – determined to be of lesser weight than sexual identity.

Given the importance of ensuring a supportive environment for vulnerable LGBTQ+ children, this may well have been the appropriate position to take. Yet to state that it did not involve prioritizing one identitarian claim above another was, perhaps, somewhat misleading. The simultaneous denial and affirmation of an apparent 'hierarchy' gave ample fodder to those looking to stress the conflict between conservative Christianity and LGBTQ+ rights. In the words of the Christian Legal Centre's CEO, 'I hope that the highlighting of the issue in the press will shatter the misconception that the Equality Act means equality for all. Some are very much more equal than others' (Williams 2011; cf. McIvor 2019, 332).

## **V. Resolution (and its Lack)**

As noted above, *Johns v Derby City Council* is one of a number of English cases pitting the right to religious freedom against the right to non-discrimination on grounds of sexual orientation. The cumulative effect of these cases is the creation of what Tamir Moustafa (2018), writing in the very different legal context of Malaysia, has called a "rights-vs-rites" binary,' in which liberal rights are increasingly framed as incompatible with conservative religious norms. The more these cases are referenced by media commentators and lobby groups, the more entrenched the

rights-vs-right binary becomes, thus minimizing the likelihood of compromise and negotiation if and when conflict occurs.

Writing of religiously plural societies, Lori G. Beaman (2017) suggests that formalized, top-down approaches to negotiating diversity tend to assume that religious difference is a problem in need of solution. In practice, however, most people are perfectly capable of approaching their differences (and, when necessary, resolving them) through a mix of flexibility, common sense, and reliance on shared values. These shared values include 'respect, generosity, neighbourliness, forgiveness, caring and protectiveness, compassion and even love,' as manifested through words, gestures, jokes, and acts of humility (ibid, 90-1). Her account of these everyday acts of negotiation – or 'nonevents,' as she terms them – reminds us that legalizing, publicizing, and otherwise ratcheting up the tension is not the only option available to those who find themselves in profound disagreement. Focusing on value similarities rather than value differences, she suggests, would allow us to acknowledge these differences without their necessarily becoming a problem: 'even in those instances [where conflict arises] identification and recognition of similarity can create spaces for reconciliation and grounded problem solving' (ibid).

Similarly, ethnographic studies of dispute resolution suggest that there is a strong correlation between the parties' investment in ongoing relations with one another and efforts to de-escalate or minimize 'the confrontative aspects of their interaction' (Greenhouse 1989, 116). This somewhat obvious point bears repeating: whether the dispute arises in the context of kinship, friendship, politics, or employment (or a combination of the above), those who wish to keep relations harmonious in the future are more willing to mediate and less willing to litigate than those who see no benefit in an ongoing relationship. In other words, litigation often negates (re)conciliation.

Perhaps one reason for the frustration evident in Munby and Beatson's ruling, then, is the simple fact of their having been called in to adjudicate in the first place. After all, the parties' decision to 'lawyer up' had reduced the likelihood of a negotiated settlement between them. Rather than exploring the possibilities beyond an uncritical acceptance of the Johns' application (such as their approval as carers for children 'matching a specific profile, where the demands and difficulties are likely to be less

intense and the role more circumscribed,<sup>29</sup> as one social worker suggested), or, indeed, a principled decision to reject the application outright, the involvement of the High Court simply dragged out the controversy. This further entrenched the rights-vs-rites binary. Indeed, when Paul Diamond's skeleton argument claimed that the recognition of LGBTQ+ rights was 'beginning to be seen as a threat to religious liberty,'<sup>30</sup> he was fulfilling his own prophecy.

To be clear, my point here is not to cast aspersions on the aims, intentions, or 'agenda' of those involved in *Johns v Derby City Council*. (To quote the judgment, I have no desire to 'open windows into people's souls.'<sup>31</sup>) Rather, it is to highlight the ways in which these cases encourage an interested public to view conflicts between sexual equality and religious liberty as a 'zero-sum game' (Stychin 2009, 34).

As such, it is worth asking whether courts of law – with their adversarial character and win-or-lose structure – are an appropriate venue for deciding these disputes to begin with. Rather than being 'the very outer limit' of the High Court's jurisdiction,<sup>32</sup> perhaps cases like *Johns* ought to be seen as representing its absolute boundary (Rozenberg 2011).

## VI. Conclusion and Discussion Questions

There is little doubt that the very public nature of the dispute between Eunice and Owen Johns and Derby City Council contributed to a rights-vs-rites binary in which religious freedom and sexual equality were seen to be in tension with (if not fundamental opposition to) one another. For judges wary of setting precedent on issues that might be better handled by Parliament, efforts to force the legal system's hand by litigating this tension can lead to frustration on all sides.

But it would be misleading to suggest that this tension didn't exist prior to the case, the Johns' press appearances, the involvement of a lobby group, or the intervention of the Equality and Human Rights Commission. Both in the United Kingdom and well beyond, self-identified religious communities are struggling with, resisting against, acquiescing to, and

---

<sup>29</sup> *Id.* at [16].

<sup>30</sup> *Id.* at [33].

<sup>31</sup> *Id.* at [97].

<sup>32</sup> *Id.* at [31].

enthusiastically embracing new understandings of rights, equality, and human sexuality. In the absence of clear Parliamentary guidance on how to navigate these changing social mores, cases like *Johns* will continue to raise questions for lawyers, politicians, religious communities, and scholars thereof:

- 1) Is freedom of religion compatible with church establishment?
- 2) How might understandings of 'religious liberty' differ according to cultural and legal context (for example, between the United Kingdom and the United States)?
- 3) The judges in *Johns v Derby City Council* stated that they sat as 'secular judges serving a multi-cultural community of many faiths.' What does it mean to claim that a judge is 'secular'?
- 4) The Equality Act recognizes a number of 'protected characteristics,' including sexuality, race, religion, gender, disability, and age. Are these similar kinds of characteristics? Why or why not?
- 5) How did the judges in *Johns v Derby City Council* understand the category of religion? How might scholars of religion critique this understanding?
- 6) Should religious beliefs and practices receive special protections in law? Why or why not?
- 7) *Johns v Derby City Council* was framed as a conflict between the right to religious freedom and the right to non-discrimination. What contributed to this framing? Are there other ways of understanding the case?
- 8) Which institution is better placed to resolve issues of societal controversy: Parliament (the legislature) or the courts (the judiciary)? What are the pros and cons of each approach?
- 9) In different ways, both the judges and the Johns' legal team framed the law as 'secular.' Can law ever be fully 'secular'? Is this something to aspire to?



## References

- Beaman, Lori G. 2017. *Deep Equality in an Era of Religious Diversity*. Oxford, UK: Oxford University Press.
- British Humanist Association. 2011. "High Court Rules to Permit Bar to Anti-Gay Christian Couple from Fostering: BHA Comments." *British Humanist Association* [online]. 28 Feb. Available at: <<https://humanism.org.uk/2011/02/28/news-755/>>.
- Donald, Alice, Karen Bennett, and Philip Leach. 2012. "Equality and Human Rights Commission Research Report 84: Religion or Belief, Equality and Human Rights in England and Wales." *Equality and Human Rights Commission Research Report Series* [online]. Available at: <[http://www.equalityhumanrights.com/sites/default/files/documents/research/rr84\\_final\\_opt.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/research/rr84_final_opt.pdf)>.
- Foucault, Michel. 1978. *The History of Sexuality: Volume I*, translated by R. Hurley. New York, NY: Pantheon Books.
- Greenhouse, Carol J. 1989. *Praying for Justice: Faith, Order and Community in an American Town*. Ithaca, NY: Cornell University Press.
- Mahmood, Saba. 2009. "Religious Reason and Secular Affect: An Incommensurable Divide?" In *Is Critique Secular? Blasphemy, Injury and Free Speech*, edited by Talal Asad, Wendy Brown, Judith Butler and Saba Mahmood, 64-100. Berkeley, CA: University of California Press.
- McIvor, Méadhbh. 2019. "Human Rights and Broken Cisterns: Counterpublic Christianity and Rights-Based Discourse in Contemporary England." *Ethnos: Journal of Anthropology* 84 (2): 323-343.
- Moustafa, Tamir. 2018. *Constituting Religion: Islam, Liberal Rights, and the Malaysian State*. Cambridge, UK: Cambridge University Press.
- Rivers, Julian. 2012. "The Secularization of the British Constitution." *Ecclesiastical Law Journal* 14 (3): 371-399.

Rozenberg, Joshua. 2011. Fostering Discrimination. *Standpoint Magazine* [online]. 4 April. Available at: <<http://www.standpointmag.co.uk/node/3830/full>>.

Rubens, Heather Miller. 2014. "‘Something Has Gone Wrong’: The *JFS* Case and Defining Jewish Identity in the Courtroom." *Maryland Journal of International Law* 29: 366-418.

Sandberg, Russell. 2012. *Law and Religion*. Cambridge: Cambridge University Press.

Strhan, Anna. 2014. "English Evangelicals, Equality and the City." In *Globalized Religion and Sexual Identity: Contexts, Contestations, Voices* (ed.) edited by Heather Shipley, 236-255. Leiden: Brill.

Stychin, Carl. 2009. "Closet Cases: ‘Conscientious Objection’ to Lesbian and Gay Legal Equality." *Griffith Law Review*, 18: 17-40.

Sullivan, Winnifred Fallers. 2005. *The Impossibility of Religious Freedom*. Princeton, NJ: Princeton University Press.

-----, 2006. "Comparing Religions, Legally." *Washington and Lee Law Review* 63 (3): 913-30.

Telegraph View. 2011. Foster Parents Defeated by the New Inquisition. *The Telegraph* [online]. 28 Feb Available at: <https://www.telegraph.co.uk/news/religion/8353180/Foster-parents-defeated-by-the-new-Inquisition.html>

The Religion Factor (Various Contributors). 2018. "Circumscribing the Body Politic: Circumcision, Religious Freedom, and Bodily Integrity in Europe." *The Religion Factor* [online]. Available at: <https://www.rug.nl/research/centre-for-religious-studies/religion-conflict-globalization/blog/circumscribing-the-body-politic-circumcision-religious-freedom-and-identity-in-europe-29-03-2018>

Williams, Andrea Minichiello. 2011. Permanent exclusion and the Johns. *Christian Concern* [online]. 8 March. Available at:

<<http://christianconcern.com/blog/permanent-exclusion-and-the-johns>>.

Wilson, A. 2011. Homosexuality, Christianity and Child Welfare. *The Guardian* [online]. 5 March. Available at:  
<<http://www.theguardian.com/commentisfree/belief/2011/mar/05/views-on-homosexuality-children-welfare>>