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# Homophobia, Brexit and constitutional change

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## **Homophobia, Brexit and constitutional change**

### **Abstract**

*Purpose of this paper:* This paper addresses some of the future challenges that the vote to leave the EU may have on the UK's constitutional framework. The potential abolition of the Human Rights Act 1998 and its replacement with a Bill of Rights is examined in relation to the interpretation of freedom of expression. More specifically, this is analysed in relation to the often conflicting freedoms to express homophobic views and to freely express one's sexual identity. With EU law protecting many of the recently won rights favouring LGBT equality, the paper underlines potential dangers should this layer of international scrutiny be lost and highlights where more improvements for equality are still needed.

*Design/methodology/approach:* This paper offers a critical reflection on the recent political and judicial rhetoric which has accompanied issues of LGBT social and legal equality. Recent judgments from domestic and European courts are analysed to identify how any potential re-interpretation of freedom of expression may affect the LGBT community.

*Findings:* While the UK has made welcome strides in improving the legal equality of the LGBT community, it is argued that the potential loss of judicial scrutiny from the European Court of Human Rights and the European Court of Justice may have negative consequences. An examination of recent judicial and political discourse demonstrates that homophobic expression – or at least tacit acceptance of it – still permeates throughout these institutional spheres.

*What is original/value of paper:* The paper highlights how the subtleties of constitutional changes following Brexit may threaten the current progression of LGBT rights in the UK and proposes that a commitment to freedom of expression must give greater recognition to the right to express sexual identity.

**Keywords:** Brexit, Homophobia, Freedom of Expression, Human Rights, Judicial discourse, Parliamentary discourse

**Words:** 6,025

### **Introduction**

This paper offers a critical analysis of recent judicial and political rhetoric relating to LGBT issues and frames them within the ongoing Brexit discussions. As the

negotiations are still in progress, the potential impact of any future constitutional change must be speculated upon to help inform significant legal developments. In response to Ball's (2016) polemic call to use queer criminology as activism, this paper applies a socio-legal lens to the continuing injustices felt by LGBT people as a result of a legal framework which constrains equal rights and protections. Further, it considers the potential constitutional change following Brexit and the subsequent re-interpretation of human rights at a domestic level that must receive consideration given that the protection of homophobic religious views systemically trumps the rights of LGBT people to protection from intolerance. The importance of this was highlighted in July 2017 by the human rights group Liberty, after winning a legal battle to ensure pension equality for same-sex couples. They highlighted that the 'ruling was made under EU law... [and urged the Government to] promise that there will be no rollback on LGBT rights after Brexit' (Liberty 2017). This article firstly examines the criminological and sociological implications of homophobia and the social constraints that exist in freely expressing a sexual identity. In a judicial discourse analysis from key cases the (sometimes surprising) judgments from the different jurisdictions are examined. Then, the Parliamentary debates which have taken place since the Marriage (Same Sex Couples) Act 2013 are assessed in relation to the noticeable absence of more direct homophobic rhetoric.

It is argued that if any future constitutional changes materialise following the decision to leave the EU, the deficiency in the protection of LGBT people from homophobic abuse should be addressed despite the manifest ranking by politicians and the judiciary of the rights of religious freedom of expression over that of sexual orientation. Prejudicial attitudes expressed in Parliament have two important ramifications. Firstly, those views help shape our law. Secondly, MPs may express

illiberal views on a social minority without any legal retort, which can serve to legitimise hatred and prejudice which is based on certain characteristics. The article concludes that Brexit presents the removal of a significant layer of scrutiny available to aid reconciliation of intractable social issues within the legal system.

### **Sexual orientation, homophobia and freedom of expression**

The vote in the referendum on the continuing membership of the UK in the European Union (EU) in June 2016, heralded a widely reported surge in hate crime (Burnett 2016) and press reports indicated that the Lesbian, Gay, Bisexual and Transgender (LGBT) community were also victimised (Lusher 2016; Townsend 2016). The General Election of June 2017 ignited a public debate about political homophobia both before and after the vote. Before, Tim Farron, then leader of the Liberal Democrats continually evaded questioning about his views on homosexuality (Khomami 2017). After, the failure of the Conservative Party to secure a majority Government forced them into coalition talks with the Democratic Unionist Party (DUP) – who opposed equality for same-sex relationships. Paradoxically, the General Election saw 45 MPs elected to the House of Commons who identify as LGBT; the highest number of openly Gay and Lesbian MPs ever voted in to the House of Commons (Wilson 2017). Such polarized political principles on same-sex relationships in the public sphere, command evaluation of current political culture and the implications for forthcoming constitutional change following the vote to leave the EU.

Brexit presents a significant challenge to the constitutional framework in the UK. The constitution provides the mechanism for the protection of fundamental rights and liberties, much of which lie in European law. Parliament have also indicated a desire

to replace the Human Rights Act 1998 with a new British Bill of Rights, although press reports suggest this may wait until departure from the EU has been addressed (Swinford 2017). The proposed change would repeal the Human Rights Act 1998 and the text of the European Convention on Human Rights (ECHR) would be enshrined in domestic legislation. Therefore, the European Court of Human Rights (ECtHR) would no longer bind the UK Supreme Court and Parliament would be the 'ultimate source of legal authority' (Conservative Party 2015). If such changes were enacted the loss of additional international judicial scrutiny would pose several challenges to the interpretation of human rights in the UK.

This year marks the fiftieth anniversary of the Sexual Offences Act 1967 which partially decriminalised male same sex activity. Homophobic rhetoric within Parliamentary debates accompanying legal equality for same sex couples between the 1967 Act and the Marriage (Same Sex Couples) Act 2013 has been discussed at length (McGhee 2001, Johnson and Vanderbeck, 2014). Yet, despite Stonewall's suggestion that the passing of the Marriage Act represents the 'last piece of the legislative jigsaw providing equality for gay people (Edge 2015: 262), legal flaws persist. Indeed, this serves as a reminder that it is not just physical violence that causes harm - structural, systemic and social inequalities may have even more pervasive effect as Yar (2012) suggests:

Practices such as... symbolic denigration on the basis of... sexual orientation... are properly harms in that they deny those subject to them the experience of self-esteem or recognition of the distinctive worth of their identities and ways of life.

The structural denial of legal recognition, which has excluded homosexuals from certain rights and privileges enjoyed by heterosexuals or, more particularly, those

embracing the heteronormative model, devalues and dehumanises that group, propagating victimisation and social exclusion.

Homophobia as a term is not unproblematic. Monk (2015a: 203) has suggested it is a crude 'label or theoretical frame of reference for capturing differential treatment in an age of formal legal equality'. This is an alluring definition but when we are discussing hate speech and hate crime something more is required – some demonstrable fear, hatred or dislike of either a homosexual individual or characteristic or act associated with the LGBT community (Chakraborti and Garland 2015: 48). Chakraborti and Garland (2015) discuss various homophobic attacks, highlighting that they tend to be more violent and brutal than other forms of hate crime. In homophobic murder cases, particular violence is evident.

In Plymouth in 1995, Terry Sweet was brutally murdered in a homophobic attack. His head and stomach was stamped upon. The cutting of his groin with a craft knife suggests specific sexual hatred. The second victim at the scene, Mr Hawken, survived but was 'rendered an effective cabbage'.<sup>1</sup> The local community was not universally supportive. Hate speech, in the form of graffiti, appeared with statements such as 'In memory of Terry Sweet, may he rest in pieces...ha ha' and 'Please step over spilt AIDS'. Whilst clearly homophobic hate speech, aside from the issue of criminal damage, such expressions may not be deemed unlawful.<sup>2</sup> Today, following the Criminal Justice and Immigration Act 2009, homophobic hate speech is criminalised as long as there is an element of threat associated with it. Therefore, other expressions written as graffiti, such as, 'kill the faggots' and 'No queer's [sic]

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<sup>1</sup> Per Justice Holland in [2006] EWHC 1737 (QB).

<sup>2</sup> However, there may be a case that to that the language used was abusive and may cause harassment alarm or distress which would qualify it for prosecution under section 5 of the Public Order Act 1986.

here, your [sic] banned or face death' would now be seen as a specific homophobic hate crime, rather than a more general public order offence.<sup>3</sup>

This raises fundamental questions about freedom of expression. The tension between freedom of expression and freedom from discrimination is well encapsulated in this tragic vignette but the issues are more complex than is first apparent. The social utility in such graffiti being lawful is questionable. Such explicit expressions of homophobia strike the freedom to express sexual orientation.

Following the murder, the press quoted a 24 year old homosexual male who stated, "There was this sense of 'what did you expect'? and that it was inevitable if you were going to live this lifestyle".<sup>4</sup> The inevitable fear and reluctance to express a homosexual identity, or outwardly express same-sex desire, surely erodes the individual and goes to the heart of discussions about tensions within any theory of freedom of expression. Without being able to freely express one's sexuality, one's self-esteem, self-worth and self-identity will be harmed; such self-denial of an integral aspect of identity ultimately leads to a more difficult and unsatisfying life (Altman 1993).

It is heretical to arbitrarily weigh one species of right more heavily than the other and so this admits closer analysis of mainstream and entrenched heteronormativity. It is possible to draw from Harding (2015) the view that societal institutions, structures and systems are such as to place heterosexuality in a position of privilege and establish it as a norm. This is consistent with Herek's (2009: 67) view that heterosexism 'serves as the foundation and backdrop for individual manifestations of

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<sup>3</sup> *Plymouth Herald* (2015) "How brutal homophobic murder 20 years ago changed Plymouth for the better", 22 November, available at <http://www.plymouthherald.co.uk/brutal-homophobic-murder-20-years-ago-changed/story-28222568-detail/story.html>.

<sup>4</sup> Ibid.

'sexual stigma' which are borne out of 'sexual prejudice'. This can operate to categorise homosexuals as deviant and legitimise discrimination and aggression.<sup>5</sup> Stigma and prejudice are constructed from tradition, interaction with societal institutions and wider social interaction (Herek 2009). There is an apparent synthesis between these sources, social interaction is informed by legitimised structure (legislatures for example) as those stigmatising seek to embed their values, acting as a majority privileged group, in organs of society. In the UK, much of this seems to manifest in rhetoric about the structure of the family, of love and of wider moral values (Harding 2015). If this is so, sexual prejudice is structurally embedded, legitimating hate speech.

If we examine the legislative response and hold up notions of equality and freedom of expression (particularly sexual identity) against formal legal equality, such as it is in the UK, we quickly see an emergence of neoliberal homonormativity (Duggan 2003): equality by the imposition of heteronormative institutional standards which, when received, confers the privilege it enjoys. What emerges is the advent of successful consumerist monogamous same-sex partnerships. This entails structural indirect inequality, for example same-sex couples may adopt but only if their relationship conforms with heteronormative monogamous models.<sup>6</sup> It is an exercise in silencing difference (Monk 2015a).

All the time that heteronormativity<sup>7</sup> and desensitisation (behind the veil of freedom of expression) perpetuate sexual prejudice and drive even low-level forms of

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<sup>5</sup> The question of whether non monogamy (consensual or non consensual) irrespective of gender binary models is outside heteronormativity is outside the instant discussion.

<sup>6</sup> See Monk (2015a).

<sup>7</sup> It should be noted that this is not just gender binary; for example non-consensual (or consensual) non monogamy, whether gender binary or not, falls outside the heteronormative, although is perhaps more widely tolerated.

harassment, particularly within educational settings and social media, concerns remain for young people together with the possibility that demonstrable same-sex desire, such as holding hands in public, will not be publicly expressed for fear of violence.<sup>8</sup> The ideological framework of freedom of expression, presents an internal conflict which must be resolved within the formal institutional framework. In addition, the harm involved in silencing a negative view, may be systemic rather than merely an erosion of one person's right against another. Pereira et al (2016), for example, hypothesise that certain beliefs could lead individuals confronted with anti-prejudice norms to be even more resistant to the suppression of their prejudiced attitudes, this seems an uncontroversial argument if it is considered that some negative attitudes may stem from, for example, strong religious conviction and therefore not be recognised as prejudice by those expressing them.<sup>9</sup>

## **Constitutional Freedom of Expression**

With religion occupying a privileged position that can discriminate against and promote prejudice towards homosexuals, legal responses still require fundamental change. Indeed, the criminal and legal justice institutions have been key in regulating the 'deviance' of the LGBT people (Ball, 2016). Given the UK Supreme Court becomes the final appellate court following potential post-Brexit constitutional change, it is appropriate to analyse recent judgments relating to freedom of expression in regards to sexual orientation and homophobia. Freedom of expression for individuals in the UK, lies in a constitutionally significant principle, Article 10 of the

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<sup>8</sup> Herek (2009) offers an interesting discussion about self-stigma on this point.

<sup>9</sup> For a critical debate about the oppression of religious views and homosexual expression see Hodge (2005) and Melendez and LaSala (2006).

ECHR. This is not an unqualified right and may be subject to conditions, restrictions and penalties.

In terms of domestic legislation, the Criminal Justice and Immigration Act 2009 criminalised homophobic hate speech. However, as mentioned above, an element of threat is needed for the offence to be made out, therefore, religious preaching can still express a belief that homosexuality is immoral, unnatural and sinful. This legislation was tested for the first time in *R v Ihjaz Ali & Ors* (2012). In this case, three men were successfully prosecuted for distributing leaflets with provocative images of a mannequin hanging from a hangman's noose, with various statements including a suggestion that classical literature was concerned only with what method of execution should be brought to bear on homosexuals. The defence ran the argument that they had not intended to threaten anyone but felt it their duty to advertise Islam's stance on homosexuality (Chakraborti and Garland 2015). The Judge made much of the importance of freedom of expression.<sup>10</sup> Notably, reference was made in sentencing remarks to the men distributing earlier leaflets with the statement "turn or burn" which, according to the sentencing judge, may not have been threatening.<sup>11</sup> It is also notable that the authors cannot locate any other successful prosecutions under this legislation.

Similar questions have been asked in the ECtHR. In *Vejdeland & Ors v Sweden* (1813/07) 2012, four men distributed leaflets to a secondary school suggesting homosexuality is deviant and destructive to society, that HIV and AIDS was associated with the promiscuous lifestyle of homosexuals (contributing to a plague) and linking homosexuality and paedophilia. The Swedish criminal justice system

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<sup>10</sup> *R v Ihjaz Ali & Ors* (2012) 'Sentencing Remarks of HHJ Burgess 10 February 2012'.

<sup>11</sup> *Ibid.*

sentenced the men concerned. The applicants contended that this conviction breached their Article 10 right but, in an interesting and important judgment, the ECtHR concluded that it did not. The criminalisation of abusive and threatening homophobic expression is clearly welcome, however, in each case there is some ambiguity of where the threshold between hate speech and hate crime is.

In the next case, we consider the jurisprudence emerging from the European Court of Justice (whose rulings will not necessarily be binding in the UK after Britain's departure from the EU). The case concerned three asylum applications in the Netherlands on the basis of feared persecution attributable to homosexuality in the applicant's home countries. The issue was if it was legitimate to expect homosexuals to exercise restraint when expressing their sexuality (Hueting and Zilli 2014). The court reached the welcome conclusion (para 69-71) that:

requiring [people] sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity [...] an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.

However, despite this ruling, a report from Human Rights Watch has accused the UK Home Office's approach to gay Afghans being deported to Kabul is to '[p]retend you are straight' (Graham-Harrison 2017). These cases serve to demonstrate not only the cross jurisdictional approach to homophobic hate crime but the importance of freedom of expression of sexual identity.

There are more subtle consequences of heteronormativisation evident in judicial discourse even after formal equality. In *Baynes v Meager & Ors* [2008], Margot Baynes contested the will of her partner Mary Watson arguing that she had not been adequately provided for. Under the Inheritance (Provision for Family and Dependents) Act 1975, an unmarried partner can bring a claim for provision under

the will of a deceased, if they can satisfy the Court that they were living as the husband or wife of the deceased. This case followed the Civil Partnership Act, and the court found that the same must apply to those same sex partners living as if they were civil partners. The court found that the applicant and deceased were living together in a committed and loving relationship. However, the claim failed because the relationship was entirely private and not presented publicly. Whilst there is nothing at all to suggest the court would not have reached the same finding were a heterosexual relationship before it, it is difficult to imagine circumstances in which heterosexual parties would have hidden their relationship for fear of harassment based on their sexual orientation (Monk 2015b).

The commitment of the UK courts to protecting the freedom of LGBT people to express their identity without negative repercussions was challenged this year in a Family Court sitting at Manchester in *J, B v The Children [2017] EWFC 4*. Here, following the divorce of an Orthodox Jewish couple in 2015, the father of the five children the marriage produced now lives as a transgender woman. Seeking contact with the children aged between two and 12, the father's (as she is referenced in the transcript) argument was that she should be sensitively reintroduced to the children to help them understand her new way of life. Justice Peter Jackson rejected the application for direct contact with her children. He stated:

I have reached the unwelcome conclusion that the likelihood of the children and their mother being marginalised or excluded by the ultra-Orthodox community is so real, and the consequences so great, that this one factor, despite its many disadvantages, must prevail over the many advantages of contact.

This is a difficult case but it is important to establish that the balance in issue is that of harm to children, not the balance of freedom of religion with freedom from discrimination. It seems the Judge applied the appropriate tests in law and it is right,

as a matter of law, that the welfare of the children were his primary consideration – the case should not turn on LGBT or religious rights. The published judgment considers evidence given by members of the religious community who appear to demonstrate, even reluctantly, the inevitability of ostracising the subject children simply if they were to have direct contact with their father. Whatever the perception of the outcome, the fact is that the expression of a particular religious doctrine was permitted at law to prevail. Clearly, the Court had to balance the harms and acted to minimise, as far as it could, the harm the children would suffer. It is a persuasive argument that the law should not operate to martyr these children to a cause which is not their own in the name of answering questions about the balance of freedoms – that is a separate issue. Yet the fact that religious freedom of expression should have such a profound influence on the operation of the legal system in a multi-cultural society, with such enormous consequences for vulnerable members of society is problematic for the legislature.

Difficult cases such as this will arise. It is not just *prima facie* hate crime which must be addressed legislatively and neither is formal legal equality enough to prevent it. The wider social and philosophical issues presented by this case may well be intractable and it is not the purpose of this article to offer any observation as to the justice of the outcome. The point is that discussion of international jurisprudence was prominent in the published judgment in this case. If Brexit heralds the reduction in international jurisprudential scrutiny, and sovereignty stops ultimately unchecked at a domestic level, then a hugely significant layer of protection and guidance is lost when trying to deal with such intractable issues.

### **After the Marriage (Same Sex Couples) Act 2013: A Honeymoon Period?**

The flagrant homophobic rhetoric which has been expressed in both Houses of Parliament since the 1960s has been well documented (McGhee 2001; Johnson and Vanderbeck 2014). The opposition to greater legal equality for LGBT people and the passing of Section 28 of the Local Government Act 1988, which prohibited the promotion of homosexuality in schools or other areas of council work, demonstrate that the journey has been more of an ebb and flow than a linear progression to a more enlightened system. However, in the years following the Marriage Act 2013, Parliamentary debate has witnessed the retreating of such discernible objections to LGBT equality. While Parliament may be entering a phase of significant transition in relation to championing LGBT rights (or at least the toleration of them), this change in culture must be analysed in relation to the competing rights of freedom of expression, freedom of conscience and religion and freedom from discrimination.

The Marriage Act, was met with significant resistance with 175 MPs voting against the Bill going forward to the Second Reading.<sup>12</sup> Despite two General Elections in the years since the Bill's passing, 121 MPs opposing homosexual equality of marriage rights retained seats. The 2017 General Election saw the Conservative Party win 330 seats (with 107 of those previously voting against the Marriage Act), meaning 32% of the Government's MPs have problematic views on equality for same-sex couples. When coupled with the DUP coalition, significant questions about political commitment to LGBT rights arise. Homophobic rhetoric may have been largely silenced since the Marriage Act, but it is questionable that MPs who have rejected equality for same sex couples would have altered their attitudes, attracting analysis of the Parliamentary debate since 2013.

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<sup>12</sup> *Hansard, HC debates*, 5 Feb 2013, v558, cc232-235.

In 2015, the Psychoactive Substances Bill (before its final iteration) operated to criminalise poppers as well as other substances that were frequently referred to as 'legal highs'. The significance of these debates were that it exposed elements of the Conservative Government who displayed little understanding or concern for the potential dangers such a blanket ban of substances would have on a significant amount of gay men who use poppers recreationally during male homosexual activity. Despite receiving warnings that the risks associated with banning this substance outweigh the benefits, Parliament was determined to proceed. Owen Thompson proposed an amendment which would exempt poppers from the act based on the lack of evidence that there were any harmful effects; largely because of the regulation of the constituent compounds.<sup>13</sup> The proscription of poppers would end regulation endangering the health of users who may turn to illegal and unregulated alternatives. Andrew Gwynne suggested users might access harder drugs and Lyn Brown highlighted medical evidence from practitioners which supported the exemption of poppers from the Psychoactive Substances Bill.

The Minister for Policing, Crime and Criminal Justice, Mike Penning, rejected these arguments, seeking a blanket ban. While he did 'not want to be seen to be picking on any individual group in any shape or form', it was obvious that the ban had significant ramifications for gay men. Despite this, Penning sought to 'protect the public' considering this best achieved by rejecting exemptions.<sup>14</sup> On this analysis, gay men were placed in a less privileged position in society. By the initial inclusion of poppers in the Bill, Parliament arbitrarily went into the bedroom of a significant proportion of the population, indicating that they would review the ban at a later date which did

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<sup>13</sup> *Hansard, HC Debates*, 27 October 2015, cc10.

<sup>14</sup> *Hansard, HC Debates*, 27 October 2015, cc40.

little to protect gay men from discrimination. Whilst the final Act does proscribe poppers, the reasoning behind those that sought to criminalise it remains problematic.

The debates on psychoactive substances represent an ebb, rather than flow in a political culture that is becoming more embracing of same-sex relationship accommodation and equality, other debates are devoid of such discriminating views. For example, in 2015 the NHS was criticised in the House of Commons for purportedly referring LGBT people to gay conversion therapy.<sup>15</sup> Quoting figures from the United States, Stuart Andrew highlighted that those people who had received gay conversion therapy were '8.9 times more likely to commit suicide, 5.9 times more likely to suffer depression and three times more likely to take illegal substances than their peers'.<sup>16</sup> The unanimous condemnation from the House on such practices is obviously welcomed. However, the view may have only been silenced rather than eradicated. While MPs avoid the promotion or support of such practices, religious groups and institutions do not condemn them so readily. In a 2016 report on the family, Pope Francis highlighted that there were no grounds for the Catholic Church to recognise same-sex unions and, in a nod to gay cure therapy, stated that those 'who manifest a homosexual orientation... [should] receive the assistance they need to understand and fully carry out God's will' (Pope Francis 2016). With the importance of procreation stressed in his report, the Roman Catholic stance on homosexuality being unnatural and a treatable condition is still evident. While the Church of England may be more lenient here, by calling on the Government to ban gay cure therapies, the Anglican group, Core Issues Trust, still promotes treatment

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<sup>15</sup> *Hansard, HC Debates*, 3 November 2015, vol 601, cc300-307.

<sup>16</sup> *Ibid*, at c302.

that helps people move 'away from unwanted feelings and behaviours, to allow new desires to gradually develop' (Roberts 2017; Core Issues Trust 2017).

A petition of the citizens of the UK to exonerate persons convicted of gross indecency and related 'homosexual offences' was presented to Parliament on 15 December 2016 which built upon the pardon granted to Alan Turing by HM the Queen in 2013, and following the Policing and Crime Act 2017, pardons for living and deceased men have since been granted. In the debates on pardons, Conservative Nigel Adams used it as a platform to apologise for his opposition to the Marriage (Same Sex Couples) Act. He stated:

having reflected and having seen how the Marriage (Same Sex Couples) Act 2013 has made such a positive difference for thousands of couples around the country, I deeply regret that decision... I apologise to friends, family members and constituents who identify as gay, lesbian or bisexual.<sup>17</sup>

Attitudes may shift and apologies be genuine; the value of political compromise should not be underestimated. The perseverance and activism of those promoting strongly-held principles raising public and political support for bold or radical causes are imperative to the democratic process and success is dependent on politicians' attitudes towards compromise (Gutmann and Thompson 2010).

There has also been a noticeable change in the House of Lords where traditional negativity towards same-sex relationship equality had existed.<sup>18</sup> In 2014, the House of Lords debated the treatment of lesbian, bisexual and trans women in the NHS which showed no signs of any of the previous homophobic rhetoric. Condemning the number of complaints from women who had been treated insensitively because of their sexuality, Earl Howe highlighted that the NHS constitution needed to enshrine

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<sup>17</sup> *Hansard, HC Debates*, 21 October 2016, vol 615 cc1115.

<sup>18</sup> For example, the Labour government had to resort to the Parliament Act 1911 to overrule the House of Lords who voted against equalising the age of consent for gay men to 16 in 2003.

the duties of a civilised society, before highlighting a number of different funding initiatives to help educate and remove such discrimination.<sup>19</sup>

Other recent developments address obscure discrimination. The Merchant Shipping (Homosexual Conduct) Bill 2017 repeals Sections 146(4) and 147(3), the right to dismiss a seafarer on a UK merchant ship for homosexual conduct. Although the Equality Act 2010 effectively emasculated the discriminatory provision, the Bill is of 'deeply symbolic importance'<sup>20</sup> removing 'an ugly relic from a bigoted past'.<sup>21</sup> These views from the House of Lords demonstrate the strong language used to acknowledge previous homophobic discrimination in the law, and argue that recent social and political change is making such laws outdated. Interestingly, Christopher Chope forwarded an amendment to make the Bill retrospective to pardon those dismissed of service since 1994. This was opposed by Conservative Sir Greg Knight as being undemocratic. Chope's amendment was uncharacteristic as he had previously opposed the Marriage (Same Sex Couples) Bill and the Alan Turing (Statutory Pardon) Bill. Within such political compromise, mutual respect plays an important part of the democratic process, and while many MPs have poor voting records as to LGBT rights, there is a necessity to treat citizens as autonomous agents who have a role in the creation of legislation, rather than just being the objects of it (Guttman and Thompson 2010). Therefore, shifting social attitudes require consideration in the relation of policy creation.

The 34<sup>th</sup> British Social Attitudes report suggests increased acceptance of same-sex relationships and marriage. The 2017 report highlights that while there has been

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<sup>19</sup> *Hansard, HL Debates*, 3 Dec 2014, vol 757, cc 1384-1396

<sup>20</sup> *Hansard, HL Debates*, 6 April 2017, vol. 782, c.1180.

<sup>21</sup> *Ibid.* at c.1178.

greater acceleration in more liberal views in the last five years, taking a longer view shows significantly different attitudes. In 2017, 64% of respondents identified that same sex relationships were 'not wrong at all'. This represents a significant change from the 11% which responded this way in the 1987 survey. In 2017, 19% of respondents thought same sex relationships were either 'always' or 'mostly' wrong. In 1987, 74% of people responded in those terms (National Centre for Social Research 2017). Such revolutions in social attitudes require politicians to also adapt, sometimes against their own principles. To air an unpopular or distasteful opinion can serve to prematurely end a political career.

The increasing use of social media and news media affords greater opportunity for public denunciation of homophobic views. It has also been highlighted that social network sites can enable greater dialogue between the public and politicians which increases accountability and transparency (Khazaeli and Stockemer 2013).

Conservative MP Andrew Turner dropped out of the 2017 election after an A level student reported that he had told students that homosexuality was 'wrong' and 'dangerous to society' (Asthana 2017). Although recent years had witnessed MPs forward similar views with impunity, this is an indication that such views now might be unwelcome.

Religious MPs, such as Edward Leigh, whose outspoken homophobic discourse in the past had been used to support Section 28 and oppose the Civil Partnership Bill, must now find alternative outlets for their position. Leigh proposed an amendment to the Local Government Bill in 2015 protecting the Judaeo-Christian tradition as the historical foundation of the United Kingdom by providing 'a legislative basis for

continuing the tradition... of prayers before meetings in local government.<sup>22</sup> This retrograde amendment clings to the symbiotic relationship between religion and the state, creating conflicts of interests when considering LGBT equality. While momentum in silencing Parliamentary homophobic rhetoric grows, political culture has not necessarily eradicated such discrimination, but a combination of political compromise, opportunism and silent tolerance have now become strategically important to politicians, especially those with strongly held religious beliefs.

### **Conclusion: What does this mean in terms of potential Constitutional change?**

The prospect of significant constitutional change commands a focus on the balancing of competing rights, not only as amongst private individuals but with greater care being paid to broader consequences and systemic inequalities. Article 9 of the Bill of Rights 1688 enshrined Parliamentary freedom of expression - that is to insulate members from judicial scrutiny and systemic accountability for anything they might say. Within the constitutional framework of the UK, membership of the EU has acted as a significant weapon in the judicial armament and conferred upon the judiciary a means of scrutinising Parliamentary activity which might otherwise remain unfettered.

There is, to a great extent, formal legal equality. Yet to regard this as sufficient is to put the cart before the horse. The unfettered freedom of speech enjoyed in Parliament over five decades has and continues to legitimate and perpetuate homophobic hate speech and silence difference. Although there has been noticeable change in relation to the use of Parliamentary expression in recent years, the continuing alignment with religious values continues to pose problems. Religious

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<sup>22</sup> *Hansard, HC Debates*, 16 January 2015, vol 590 cc 1127.

institutions which formally exclude LGBT people, with the support of Parliament and the Courts, constitute state engineered denigration. The effects of this should not be underestimated as it serves to deny recognition to people based on their sexual orientation causing harm to their identity and self-esteem. Departure from the EU and reconfiguration of the constitutional framework for the protection of rights presents a significant risk. The nuances of freedom of expression cannot be confined to the right to express an offensive opinion weighed against freedom from discrimination. The greater issue for our constitution is the freedom of expression of identity of minority groups weighed against the unfettered freedom of Parliament to vindicate homophobia with impunity and the obligation on domestic Courts to comply.

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