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CLOSET CASES
'Conscientious Objection' to Lesbian and Gay Legal Equality

Carl F Stychin[*]

This article interrogates recent developments in equality jurisprudence for lesbians and gay men in the United Kingdom. In particular, it examines arguments made by those who object to sexuality equality that they require an exemption from the law based upon their religious views. The author argues that 'conscientious objectors' to equality make the argument that they are a persecuted minority in an increasingly secular society, and also that the views of the 'silent majority' are being ignored. Objectors claim that a balancing of rights between sexual and religious groups is required. The author concludes that such arguments must be taken more seriously, but that claims of secularisation require critical interrogation. At the same time, developments in rights discourse also require careful analysis in order to reveal how the politics of rights manifests itself in this sphere.

Introduction

Within the United Kingdom, legal progress towards equality for lesbians and gay men has moved at a brisk pace over the past decade of the Labour government.[1] Moreover, as legal equality is increasingly secured through the realm of parliamentary politics, progress has also been made in the judicial sphere, facilitated in large measure by the increasing role of rights discourse in the form of the *Human Rights Act* and *European Convention on Human Rights* (ECHR).[2] However, in this

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[*] Professor of Law and Social Theory, University of Reading. I am grateful to the many audiences who have commented upon this work in its various forms. Particular thanks to the Griffith University Law School for providing generous financial support which allowed me to attend the Justice Michael Kirby Award Ceremony and Colloquium at which this article was presented.

[1] Accomplishments include: the ability of a same-sex couple to adopt a child jointly; paternity leave and flexible working practices available to same-sex partners; anti-discrimination legislation in employment; new sexual offences legislation; new legislation dealing with human fertilisation and embryology; repeal of section 28 of the *Local Government Act 1988*; equalising of the age of consent; the *Civil Partnership Act*; and a new criminal offence of incitement to hatred on the grounds of sexual orientation.

[2] See, for example, *Ghaidan v Godin Mendoza* [2004] 2 AC 557 (HL) (protection for spouses or unmarried cohabitees of deceased tenants interpreted to include same-sex partners). But see also *Secretary of State for Work and Pensions v M* [2006] 2 AC 91 (HL) (majority upholding difference in treatment as between unmarried same-sex and opposite-sex couples with respect to liability for child support). The UK Parliament's Joint Committee on Human Rights (2007), p 11 has described the current position: 'It is now clear that discrimination on grounds of sexual orientation in relation to any matter

article, I argue that the temptation to construct a 'straightforward' narrative of equality and emancipation should be eschewed. Instead, legal progress has produced a range of counter-arguments and discursive constructions that resist measures geared towards equality. These developments are of interest in part because of the ways in which they are articulated through the same tropes that have proven useful in the cause of equality for lesbians and gay men. Those sympathetic to sexuality equality must take such counter-arguments seriously, and not only because we may see them appear with increasing frequency in the years ahead. The claims are also worthy of close examination because they represent genuine, deep-seated 'world views' made by those who now truly believe themselves to be oppressed by a secular order which marginalises and trivialises their belief systems. Thus, the very language of oppression — so long the preserve of lesbians and gay men — has now been fully appropriated by those resistant to their claims to equality.[3] In this article, I provide a snapshot and an analysis of discourses surrounding sexuality today, many of which do have a long historical pedigree but which are also, in some sense, products of a new political order.

Consumers of Rights: The Goods and Services Regulations

The regulation of 'sexual orientation' through law in the United Kingdom is frequently explained through a modernist narrative of progress. A recent junction in this journey came in 2007, with the coming into force of the Equality Act (Sexual Orientation) Regulations.[4] This is secondary legislation which contains measures prohibiting discrimination on grounds of sexual orientation in the provision of goods, facilities and services, education, the use and disposal of premises, and the exercise of public functions. This moment in the legal history of sexual orientation may seem relatively insignificant (given the landmark events which have gone before), and this view is evidenced by the fact that this legal change came about through a statutory instrument rather than primary legislation.[5] The Regulations also must be set within the wider context of the still fairly new *Equality Act 2006*, which creates a single Commission for Equality and Human Rights (the enforcement body), and which replaces the piecemeal system of equality rights protection previously found in the Equal Opportunities Commission, the Commission for

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which is within the ambit of any of the Convention rights would be very likely to be in breach of Article 14 ECHR, in the absence of any compelling justification.'

3 There are several examples which I could draw upon to support my thesis, such as the reaction to the *Criminal Justice and Immigration Act 2008*, which creates a new criminal offence of incitement to hatred on the grounds of sexual orientation, as well as the reaction to the decision in *Hammond v DPP* [2004] EWHC 69 (Admin) (conviction upheld of street preacher for causing 'alarm or distress' because of homophobic speech). For a very interesting interpretation of these two examples from a Christian sympathetic perspective, see Leigh (2008).

4 Hereafter, I refer to these as the Regulations or the Goods and Services Regulations.

5 The issue of employment discrimination on the basis of sexual orientation had previously been dealt with by the Employment Equality (Sexual Orientation) Regulations in 2003, which implement the European Community Equal Treatment Directive of 2000.

Racial Equality and the Disability Rights Commission.[6] The *Equality Act* also outlawed discrimination on the grounds of religion or belief, imposed duties relating to sex discrimination on persons performing public functions, but left for a later day the issue of sexual orientation discrimination in the provision of goods and services. Thus, the Regulations might be interpreted as a 'tidying up' exercise. However, this would be a serious misinterpretation of events. The issue of sexual orientation was held over to be dealt with in secondary legislation, in part because of the perceived complexity and controversial nature of the issue and perhaps in the hope that extensive public debate and discussion would be avoided.[7] Ultimately, the Regulations were approved by Parliament in March 2007, and entered into effect on 30 April 2007.[8]

Even before the Regulations were laid before Parliament, a storm of controversy erupted which raised wide-ranging issues concerning rights, sexuality, religion, belief, secularism, and the limits of tolerance of 'minorities', as well as how a minority is socially constructed. Central to the controversy was the future status of Catholic adoption agencies, which, on its face, is caught by the Regulations in that they provide a service to prospective parents.[9] The widely discussed question was whether those agencies should be exempt from a duty to consider same-sex couples on an equal basis in the application of the 'best interests of the child' test in placing children for adoption. The issue assumed a symbolic importance far beyond its practical relevance.[10] It was widely agreed that there are many avenues open to same-sex couples wishing to pursue adoption, aside from the Catholic agencies, and intuitively it seems unlikely that many same-sex couples would be adamant about pursuing adoption only through a Catholic agency. Nevertheless, same-sex adoption came to stand for a larger principle concerning the extent to which faith-based groups could (and should) be exempt from anti-

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6 See generally O'Cinneide (2007).

7 In fact, little opportunity was made available in Parliament to debate the question. However, the choice to use secondary legislation was itself subject to some fierce criticism, and not only from critics of the substance of the Regulations.

8 The offence is created by section 3(1) of the Regulations: 'For the purposes of these Regulations, a person ("A") discriminates against another ("B") if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).' Opponents of the Regulations are now turning their attention to a draft European Union directive which concerns both goods and services and harassment: *Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, which was published in July 2007 by the European Commission.

9 By comparison, in some states in the United States, statutory restrictions remain in place prohibiting the adoption of children by lesbians and gays: see Ball (2007).

10 In the end, the government decided to postpone the application of the Regulations to Catholic adoption agencies until 31 December 2008, pending further analysis of the potential impact. According to one website, the church has been 'forced out of adoptions' as a result, although 'at least one [agency] is preparing to stand up against the UK laws', presumably through a legal challenge: Christian Institute, www.christian.org.uk, winter 2008/09 newsletter.

discrimination legislation when contracted by the state to provide a public service, or when engaged in commercial activity. Conversely, the principle was expressed as the extent to which the discourse of equality and gay rights 'trumped' the sincerely held faith-based views of a minority, which were being *expressed* through the provision of adoption services. Not surprisingly, the adoption issue also fuelled well-worn discourses around the best interests of children, same-sex parenting, and whether the heterosexual family provides the 'gold standard' in the raising of children.[11]

Constructing the Minority Group

Opposition to the Regulations was articulated through a mixture of 'old' and 'new' tropes. While my particular interest in this article is the 'new' discourses around secularism and the rights of religious 'minorities' to exist in a secular society (a characterisation I want to problematise), there was still plenty of space for long-standing 'old' arguments which centred on children. Not only did these discourses focus upon the way in which the 'best interest' test should be applied, but also through other claims, which are very familiar to those who have studied anti-gay rhetoric.[12] For example, much attention was paid to the family-run 'bed and breakfast' establishment, and the alleged right of proprietors to turn away same-sex couples because their faith would not allow them to create opportunities for those couples to engage in sodomy within the family home (a home which, of course, had been turned into a commercial operation).[13] This example allowed both sides to demonstrate the manipulability of the binaries of public/private, commercial/residential and home/work in support of their arguments. It also gave rise to interesting references to the act/identity distinction around sexual orientation. Couples would be turned away not because of who they were, but because of what they (potentially) might do (although it always seems assumed that the act of doing sodomy is an *inevitable* result of being given an *opportunity* to practise it).[14] The language of child protection also figured prominently in this example, through the claimed desire of hypothetical families to protect their children from the infiltration of homosexuals into the family home (and this further resonates with *very* old tropes concerning pollution and infection).[15]

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11 On heterosexuality as the 'gold standard' of parenting, see Stacey and Biblarz (2001), p 162.

12 See, for example, Herman (1997).

13 The Regulations, however, do contain an exception in relation to the family home if the premises do not accommodate more than two households or six individuals (in addition to the landlord and his/her near relative): s 6. For an excellent analysis of the class and gender implications of the 'bed and breakfast' paradigm, see Cobb (2009).

14 See, for example: 'They must be prepared to allow them, if appropriate, to use the facilities that they provide for the purpose of homosexual practice. That is quite different from other types of discrimination.' (Lord Mackay, Lords, *Hansard*, 9 January 2007, p 184).

15 See, for example: 'This is about having people among your family … the Government is introducing into a family something from which it is surely the right of the parents to

In both political and media debate, considerable time also was given over to schools. Baroness O'Cathain recounted that 'a pro-gay group … is already going around the country telling schools that the regulations mean they have to "normalise" homosexuality to seven-year-olds and read gay fairy tales in the classroom'.[16] Here, the long-standing trope concerning the promotion of homosexuality through education reappears; this has a pedigree dating back to the now repealed section 28 of the *Local Government Act 1988*, which prohibited the promotion by local authorities of homosexuality as a 'pretended family relationship'.[17] Opponents of the Regulations feared that schools (including faith-based schools) would be forced to 'promote' homosexuality through gay sex education classes, because of the letter of the law, as well as the 'climate of fear'[18] created by the Regulations. In this way, faith-based schools would be prevented from promoting sexual monogamy through the institution of marriage.

However, there was also a new focus in popular and parliamentary debate, which turned on the faith-based 'conscientious objector' to homosexuality, who provides goods and services to the public and for whom a 'conscientious exemption' from the law is necessary.[19] The term 'conscientious exemption' has been explained succinctly by Yossi Nehushtan:

> Conscientious exemption is called for when a deeply held belief that is based on deeply held moral values of a group or an individual runs into the demands of a specific law. In other words, the conscientious objector seeks an exemption from the law not because of his status (as is generally the case regarding constitutional exemptions) but because he holds an alternative set of basic values or an alternative way of balancing basic values — which are all part of his conscience, or the result of it — that conflicts with the ends, the means or the values of a specific law and ultimately contradict the demands of that law.[20]

In this particular context, the wedding photographer and the caterer become the oft-cited examples of those who might feel morally compelled to turn away lesbian or gay clients.[21] These potential clients would have no difficulty contracting

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protect their children until they are at an age at which they can decide for themselves.' (Viscount Brookeborough, Lords, *Hansard*, 9 January 2007, pp 194–95).

16 Lords, *Hansard*, 21 March 2007, p 1298.

17 For a discussion of the discourses surrounding section 28 and its repeal, see Stychin (2003); Rahman (2004).

18 Lord Tebbit, Lords, *Hansard*, 9 January 2007, p 192.

19 See Joint Committee on Human Rights (2007), p 13: 'The human rights issue which arises is whether Article 9 ECHR requires there to be any exemptions from the prohibitions on discrimination on grounds of sexual orientation, in order to protect freedom of conscience and belief, and, if so, what the scope of those exemptions should be.'

20 Nehushtan (2008), p 245.

21 See, for example: 'They make it possible for homosexual activists to sue people who disagree with a homosexual lifestyle because of their religious beliefs. Bed and breakfast owners and Christian old people's homes will be sued for not giving a double

with others to meet their homosexual needs. Thus, the objectors to homosexuality are consistently constructed as a minority group, and an increasingly oppressed minority, who will be forced to act against their genuinely and deeply held religious beliefs. In the process, their rights are trampled upon in the service of the rights of 'well organised and intolerant lobbies',[22] who have the backing of political elites. While supporters of the Regulations describe the law as achieving a 'balancing' of conflicting rights, for opponents the law has reached the opposite point. It 'unbalances' the relationship between equality and freedom of religion, and does so in such a way that runs counter to the historic Englishness of the protection of liberty, speech, and the freedom of groups to practise their beliefs: 'It is a development entirely at variance with our well-rooted tradition of religious tolerance and liberty.'[23] In this way, the law has ignored the interests of an increasingly persecuted minority and puts essentially 'innocent', morally upstanding individuals in fear of prosecution.[24] Thus 'religions are now seen not primarily as beneficiaries of rights of protection from the state, as subjects enjoying religious freedom, but as potential sources of human rights breaches. Religion is a problem.'[25]

The Silenced Majority

At the same time, critics of the Regulations suggest that the law *also* has ignored the voices of the (silenced) majority who occupy the genuine 'middle ground' of politics. The Regulations are 'a weapon *promoting* discrimination against both majority and minority religious faiths',[26] who have been marginalised by the actions of political elites seeking to find favour with a well-organised, articulate and powerful lesbian and gay constituency. This middle ground is constructed through 'common sense', but a common sense which also includes the practice of 'disclaiming' homophobia.[27] That is, opponents of progressive gay rights legislation

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bed to homosexual civil partners. Wedding photographers will be made to pay compensation for not taking bookings for civil partnership ceremonies. Christians in business could even be sued for sharing their faith with customers. Worst of all, they require religious organisations to choose between obedience to God and obedience to the state' (Lord Morrow, Lords, *Hansard*, 9 January 2007, p 180).

22 Lord Anderson of Swansea, Lords, *Hansard*, 21 March 2007, p 1305.

23 Lord Bishop of Southwell and Nottingham, Lords, *Hansard*, 21 March 2007, p 1302. See also Rivers (2007), p 52: 'Freedom of religion in English law has not simply been about the freedom to believe and manifest that belief in worship and doctrine, but about the construction of a plurality of protected social and material spaces in which believers could live faithfully to their religion'.

24 See, for example, 'these regulations would leave perfectly innocent people in fear of legal action by the fanatical wings of the lesbian and gay pressure groups' (Lord Tebbit, Lords, *Hansard*, 9 January 2007, p 192).

25 Rivers (2007), p 35.

26 Phillips (2006).

27 The practice of 'disclaiming' homophobia is discussed by Burridge (2004) in the context of opposition to the repeal of section 28 of the *Local Government Act 1988*. Disclaiming is not a new phenomenon: see Smith (1994). However, some commentators

increasingly make clear (although this has always been true at least to some extent) that they are not personally homophobic. Indeed, many commentators and politicians go further and are at pains to point out that they have supported gay rights in the past, but that this is a step too far.[28] While these critics proclaim their support for anti-discrimination legislation in employment, and possibly even for civil partnership legislation (probably because it is not marriage in name), and occasionally even support anti-discrimination legislation with respect to goods and services in general, the 'common sense' objections to gay rights should also be respected and protected. Scepticism regarding the value of same-sex adoption provides one such example of 'common sense' which is self-evidently true, but which has been silenced by the 'totalitarianism' of gay rights.[29] Thus, critics seek to defend both the rights of a minority, as well as the views of the majority. They also can portray themselves as defenders of *the* faith (as well as of *all* faiths) by pointing *both* to the establishment church and to the country's Christian heritage (which is being eroded by the government), as well as to the importance of a multi-faith, multicultural society. Finally, they are the defenders of the best interests of children, who are otherwise sacrificed to a political correctness that protects the rights of lesbians and gays as *consumers* of adoption services.

In response, proponents of the Regulations rely heavily on the rhetoric of equality, rights, fairness and balance: 'The measures we have brought forward protect the rights of individuals and organisations to hold religious beliefs while also ensuring that everyone lives a life free from harmful discrimination.'[30] Analogies are drawn between sexual orientation, race and gender, all of which are deserving of the same level of legal protection: 'I start from a very firm foundation: there is no place in our society for discrimination.'[31] The need for compliance with 'international obligations' is also mentioned.[32] The discourse of child welfare, moreover, is countered on its own terrain. Arguments are made that the Regulations will protect gay youth in schools from bullying, protect children of gay parents from discrimination in education, and could ensure that children who otherwise would be left unadopted will find loving homes with same-sex couples (although the 'gold standard' of heterosexual parenting remains largely untroubled in these arguments). Many supporters of the Regulations also bolster their positions by proclaiming their own Christian faith, which is articulated through competing, progressive principles of tolerance, fairness and social justice.[33]

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appear to draw into question the existence of homophobia as a social force, in one case by consistently placing the term within inverted commas: Leigh (2008).

28 See Phillips (2006): 'We have therefore exchanged one deep intolerance for another.'

29 See, for example: 'we should allow adoption agencies to have, as one of the criteria that they use in selecting parents, the preference, if that can be achieved, for having two parents of opposite sex.' (Lord Blackwell, Lords, *Hansard*, 21 March 2007, p 1320).

30 Department for Communities and Local Government (2007), p 5.

31 Number 10 Downing Street, www.number10.gov.uk/output/Page10869.asp.

32 Lord Lester of Herne Hill, Lords, *Hansard*, 9 January 2007, p 202.

33 See, for example: 'the principles of human rights are universal … they derive not only from the secular Enlightenment but from all the great religions' (Lord Lester of Herne Hill, Lords, *Hansard*, 21 March 2007, p 1323); 'there is no polarity between

But this battle becomes abstracted to a further degree in the debates, as it increasingly is reformulated in terms of a struggle between secularism and faith. Opponents castigate the Regulations as a further example of a secular ideology which has become the dominant and guiding principle of the Labour government, and indeed of political elites more generally. In this narrative, it is rights discourse, and specifically the *Human Rights Act*, which is central to the undermining of freedom and pluralism, and which has created a (literal) perversion of 'right reason'. Through the protection of human rights, a secular society is being forced upon the population, in which religion has been relegated to a narrow, private sphere, which must be 'closeted' from public display.

The Goods and Services Regulations do provide for exceptions for religious organisations.[34] However, for their opponents, these exceptions only protect the narrow sphere of worship (that is, religious *identity*), rather than the 'doing' of religion in the public realm (the *practice*). This conceptual division between belief and the manifestation of religion has its legal grounding in the interpretation of Article 9(1) of the ECHR.[35] While freedom of conscience and religion may be absolute, the practice of it is legally capable of limitations 'if they can be shown to be justified as being necessary to protect the right of others not to be discriminated against'.[36] Julian Rivers argues that 'at best, this seems to create a category of "tolerated" religion which may be permitted between consenting adults in private, but which ideally would be eradicated'.[37] Therefore, in an unlikely twist, the distinction between act and identity — often deployed to regulate sexual identities and practices — now gets appropriated by opponents of the Regulations in defence of the right to practise religion in the public sphere.[38] For proponents, by contrast, the religious exceptions ensure that a 'balancing' of rights is achieved, and the key

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Christianity and our joint commitment to put an end to discrimination' (Baroness Andrews, Lords, *Hansard*, 21 March 2007, p 1328).

34 For a good explanation of the structure of the Regulations, see Sandberg and Doe (2007), p 309: 'These organisations may lawfully restrict the provision of goods and services by that organisation and membership or participation in the organisation on one of two bases. The first is "if it is necessary to comply with the doctrine of the organisation", the second is "so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers". The Regulation states that this does not apply in the case of discrimination by a responsible body of an educational establishment or where an organisation makes provision with and "on behalf of a public authority under the terms of a contract".'

35 Article 9(1) states: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.'

36 Joint Committee on Human Rights (2007), p 15. In fact, the Joint Committee (2007), p 15 went further and argued that a wider exemption 'would be likely to be in breach of Article 14 in conjunction with Article 8'.

37 Rivers (2007), p 36.

38 See Rivers (2007), p 46: '[Exceptions] tend to address what are centrally "religious" activities, and they do not address peripheral difficulties that might be experienced by religious people trying to work in a changed ethical environment.'

distinction is between the religious and the commercial. Once crossed, religious groups must act in a non-discriminatory fashion.

Conscience in the Courtroom

I turn now to a recent, related development taken from the field of employment law, which closely connects to the themes of the previous section. This controversy springs directly from what would be described by some as the crowning achievement of the Labour government's sexuality agenda — the *Civil Partnership Act*. This Act received Royal Assent in November 2004, and it creates a new legal status that allows adult same-sex couples to gain formal recognition of relationships, accessing many of the rights and responsibilities of marriage. Frequently described as 'gay marriage', this characterisation is something of a legal misnomer. Rather, the Act cleverly grants the substantive rights and imposes the responsibilities of marriage, while simultaneously preserving the institution of marriage for opposite-sex couples (and also prevents opposite-sex couples from choosing civil partnership over marriage). Thus, the ingeniousness of the *Civil Partnership Act* lies in the fact that it can produce a legal status of civil partner that does not depend upon marriage but which displays virtually all of the characteristics of a civil marriage. The British solution to the 'problem' of same-sex marriage thus was found in an alternative recognition route which parallels, but does not intersect with, the institution of marriage, with a bundle of rights and responsibilities that cannot be split up, and which must be consciously accepted.[39]

However, it has become clear that the *Civil Partnership Act* — like the Goods and Services Regulations — is producing a complex set of arguments which trouble the tale of progressive legal change. With respect to civil partnerships, these developments are occurring in the judicial arena, and they are emerging in the field of employment law.[40] One case in particular has come to represent the broader aspirations of those who object to the progressive gay rights agenda: *London Borough of Islington v Ladele*.[41] The case was brought by a Christian registrar — the local government official who now is required to perform civil partnerships — who claimed that she was subject to direct and indirect discrimination, as well as

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39 I explore these issues in far more detail in Stychin (2006). See also Barker (2004, 2006).

40 See, for example: *McFarlane v Relate Avon Ltd* (Employment Tribunal, unreported, 5 January 2009); *McClintock v Department of Constitutional Affairs* [2008] IRLR 29 (EAT). The Christian Institute plays an increasingly important role in bringing these test cases: Langdon-Down (2008). The Christian Institute is a non-denominational charity in the United Kingdom, which is supported by a range of individuals and churches. In fact, the Institute (and others) applied for judicial review of the Equality Act (Sexual Orientation) Regulations (Northern Ireland), which included a provision covering 'harassment'. The applicants persuaded Weatherup J to quash the harassment provision based on an absence of proper consultation. His judgment also contains a wealth of *obiter dicta* on the need for a 'balance of rights' to be determined on a case-by-case basis, which may well prove useful to conscientious objectors in legal challenges in the years ahead: *Re The Christian Institute's and others' Application for Judicial Review* [2008] NI 86 (QBD).

41 *London Borough of Islington v Ladele* [2009] IRLR 154 (EAT).

harassment from her employer, London Borough of Islington, because of its insistence that she perform civil partnerships despite her religious objections. The case was financed by the Christian Institute's Legal Defence Fund and, in 2008, contrasting judgments were delivered by the Employment Tribunal and the Employment Appeal Tribunal. Indications are that the case will be subject to further appeal, underscoring how the arguments which underpin it are of increasing relevance, and worthy of close examination.

At first instance, the Employment Tribunal ruled unanimously that the decision to require Ms Ladele to perform civil partnership registrations, contrary to her conscience, was an unlawful act of religious discrimination. Key to this determination was the Tribunal's finding as a fact that Islington was able to deliver a 'first-class' service to same-sex couples without Ms Ladele's involvement.[42] The Tribunal held that the council 'disregarded and displayed no respect for Ms Ladele's genuinely held religious belief' and it created an 'intimidating, hostile, degrading, humiliating or offensive environment for her on grounds of her religion or belief'.[43] The Tribunal accepted implicitly that Ms Ladele's sincerely held religious belief that 'marriage was a union of one man and one woman for life to the exclusion of all others'[44] could be translated into a sincerely held religious belief that runs counter to the availability of the legal status of civil partnership between two people of the same sex (with no requirement of consummation) until such time as the partnership is dissolved through death or dissolution proceedings and which cannot be celebrated in a religious building.[45]

For Ms Ladele, her supporters and sections of the media, this was seen as a victory for a minority group who are bullied and harassed for their (minority) religious beliefs.[46] In the words of the Head of Communications of the Christian Institute, 'the witch hunt against those who disagree with homosexual practice has to stop'.[47] Media representations claimed that those of faith are persecuted by a secularist ideology, which leaves no room for dissent and which bullies those who try.

This legal victory for conscientious objectors, however, proved to be short lived, as the Employment Appeal Tribunal reversed the decision on all grounds.[48] In a unanimous judgment, Elias J began by accepting that Ms Ladele's 'objection was to the formal recognition of the status of civil partnerships in a form which she

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42 *Ladele v London Borough of Islington* (Employment Tribunal, unreported, 3 July 2008), at 87.

43 *Ladele v London Borough of Islington* (Employment Tribunal, unreported, 3 July 2008), at 104.

44 *Ladele v London Borough of Islington* (Employment Tribunal, unreported, 3 July 2008), at 7.

45 All of which is prescribed by the legislation.

46 See, for example, Koster (2008). I leave aside the very interesting issue of the ways in which media portrayals (across the political spectrum) were informed by a racialisation of the claimant, who is an evangelical Christian of African ethnicity. In no way do I want to diminish this issue, but I cannot do it justice in this article.

47 Christian Institute, www.christian.org.uk, 10 July 2008.

48 *London Borough of Islington v Ladele* [2009] IRLR 154 (EAT).

considered to be akin to marriage', and that this was a 'genuine religious belief' which would not be questioned by a court.[49] However, the insistence that she perform civil partnership registrations could not be characterised as constituting direct discrimination against Ms Ladele, for 'it cannot constitute direct discrimination to treat all employees in precisely the same way'.[50] While it *was* the case that the council objected to Ms Ladele putting 'belief into practice', 'it would still be her conduct rather than her beliefs which would then be the reason for the treatment', and there was no evidence that the council acted as it did because of her beliefs.[51]

Moreover, the Employment Appeal Tribunal was unreceptive to the argument that the council had displayed more sympathy towards two lesbian and gay registrars who complained about Ms Ladele's refusal to carry out civil partnerships than it did towards the complaints of Ms Ladele. Counsel for Ms Ladele argued that 'there was a striking difference between management's response to their sexual orientation and the claimant's religion',[52] which is a frequently encountered argument about the lack of 'balance' and even-handedness shown to sexual and religious 'minorities'. Elias J rejected this claim, holding that the comparison was inapposite:

> she was challenging the council's decision not to accommodate her religious beliefs by permitting her to refuse to carry out civil partnerships; they were in no sense seeking to be exempt from performing the duties of the post. Indeed, they were complaining that it was wrong, because discriminatory, for the claimant to be permitted to be so exempt.[53]

Furthermore, management is not required to be sympathetic to an employee's beliefs, but simply must avoid discrimination.[54] There was no evidence, therefore, of direct discrimination.[55]

With respect to the claim of indirect discrimination, the Employment Appeal Tribunal began by accepting that the 'requirement that all registrars perform civil partnership functions had the effect of placing persons of the claimant's religion or belief at a particular disadvantage when compared with other persons'.[56] However, that was only the beginning of the analysis, which then required a consideration of whether this was a proportionate means of achieving a legitimate aim. The legitimacy of the aim was easily resolved, which was characterised as the provision

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49 *London Borough of Islington v Ladele* ([2009] IRLR 154 at 156 (EAT).

50 *London Borough of Islington v* [2009] IRLR 154 at 161 (EAT).

51 *London Borough of Islington v Ladele* [2009] IRLR 154 at 161 (EAT).

52 *London Borough of Islington v Ladele* [2009] IRLR 154 at 162 (EAT).

53 *London Borough of Islington v Ladele* [2009] IRLR 154 at 163 (EAT).

54 *London Borough of Islington v Ladele* [2009] IRLR 154 at 163 (EAT).

55 *London Borough of Islington v Ladele* [2009] IRLR 154 at 164–65 (EAT). Nor did Elias J (at 94) find evidence of harassment.

56 *London Borough of Islington v Ladele* [2009] IRLR 154 at 165 (EAT).

of a service on a non-discriminatory basis.[57] Crucially, the means were found to be proportionate to achieving that aim:

> they were entitled in these circumstances to say that the claimant could not pick and choose what duties she would perform depending upon whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on grounds of sexual orientation.[58]

The question of 'equal respect' between 'minorities' was not relevant and, even if it was, the framing of that issue would require a very different inquiry from that proposed by counsel for Ms Ladele:

> In any event, in our view giving equal respect in this context would require that the council should also discipline gay registrars who refused to marry, say, certain Christian evangelicals because the registrars objected to their hostility to civil partnerships … there was no finding that the council would not have treated such persons in the same way.[59]

Although the Appeal Tribunal chose not to decide whether the refusal to accommodate Ms Ladele was the only legal course of action open to the council — preferring instead to note in *obiter dictum* the 'virtue in taking a pragmatic line if it is lawful'[60] — it concluded that Islington was certainly not required to 'connive in what they perceived to be unacceptable discriminatory behaviour'.[61] Instead, it was 'entitled to adopt as an objective an unambiguous commitment to the non-discriminatory provision of services'.[62]

Finally, Elias J turned to the relevance of the ECHR, and noted the narrowness of the protection guaranteed to employees by virtue of Article 9.[63] He concluded that there was no breach, and that 'the manifestation of the belief must give way when it involves discriminating on grounds which Parliament has provided to be unlawful'.[64]

The reaction to the decision of the Employment Appeal Tribunal was swift. A news release from the Christian Institute quoted its director, Colin Hart, stating that

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57 *London Borough of Islington v Ladele* [2009] IRLR 154 at 165 (EAT).

58 *London Borough of Islington v Ladele* [2009] IRLR 154 at 166 (EAT).

59 *London Borough of Islington v Ladele* [2009] IRLR 154 at 166 (EAT).

60 *London Borough of Islington v Ladele* [2009] IRLR 154 at 167 (EAT).

61 *London Borough of Islington v Ladele* [2009] IRLR 154 at 167 (EAT).

62 *London Borough of Islington v Ladele* [2009] IRLR 154 at 167 (EAT). Interestingly, Islington *did* in fact offer a compromise to Ms Ladele and others, namely that registrars with a conscientious objection to civil partnerships would not be required to undertake civil partnership *ceremonies*. They would only be expected to administer the signing process by which information is obtained from the prospective civil partners. Ms Ladele rejected this compromise.

63 *London Borough of Islington v Ladele* [2009] IRLR 154 at 167 (EAT).

64 *London Borough of Islington v Ladele* [2009] IRLR 154 at 167 (EAT).

'if this decision is allowed to stand it will help squeeze out Christians from the public sphere because of their religious beliefs on ethical issues'.[65] A spokesman for the Institute, Mike Judge, underlined that freedom of religion demands not just the right to believe, but also to act upon those beliefs, and to be accommodated by others:

> I think it will be a concern to all Christians, because it does fail to understand that religious liberty is the liberty not just to believe certain things in your head but also to act in accordance with those beliefs. If this ruling is allowed to stand, it will endanger not just registrars but workers in other situations too. We are not saying that religious belief should trump everything, but where there is a reasonable religious belief it should be accommodated.[66]

Clearly, the decision of the Employment Appeal Tribunal proved a setback for the cluster of arguments advanced by the Christian Institute. Elias J refused to accept the construction of Ms Ladele as an oppressed minority in the workplace, and also explicitly rejected the comparison between Christian registrars and lesbian and gay registrars in terms of the respect it was claimed they were given by their employer. Furthermore, any argument concerning 'balance' as between respect for the rights of religious minorities, and those of sexual minorities, was rejected in favour of an analysis which focused upon the legitimacy of the aim and the proportionality of the means adopted by the Council to achieve it. In this way, Elias J avoided entering the discursive terrain mapped out by Ms Ladele's counsel. Nevertheless, the case vividly demonstrates the arguments which consistently are being advanced in support of 'conscientious objectors'. I believe that these arguments will continue to be heard in the legislative, judicial and other public arenas. Consequently, the next section provides a closer analysis of the fundamental claim being advanced by opponents of sexuality equality rights in the United Kingdom today.

Secularism as Fundamentalism

Both the Goods and Services Regulations and the litigation in *Ladele* underline the way in which 'secularism' is deployed by those who claim to be oppressed by its hegemony. To recap, despite the religious exceptions in the Regulations, opponents remain adamant that secularism has become the dominant ideology. Indeed, they claim that it is the new religion of the political class, which has silenced all others. In making this claim, an ambiguity is apparent as to whether *all* religions have been unfairly treated (which is sometimes argued) or whether, more specifically, it is the country's *Christian* tradition that is under constant threat from the secular.[67] At this point, there are also interesting analogies that can be drawn to the way in which Christianity is constructed as under threat from 'multiculturalism'. The focus on

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65 Christian Institute, www.christian.org.uk, 19 December 2008.

66 Quoted in Beckford (2008).

67 See, for example, Michael Phillips, consultant to the Christian Legal Centre, quoted in Langdon-Down (2008), p 18: 'Society is becoming less tolerant and there is a feeling that other religions are allowed to express their faith in ways Christians aren't.'

Catholic adoption agencies, and the extent to which this issue resulted in extensive lobbying of government both by Catholic bishops and the Church of England hierarchy (acting in cooperation), underscores how the issue was seen as an attack on Christianity.

This is further supported by the way in which secularism has been constructed not only as the new religion, but as a *fundamentalist* religion. As Julian Rivers warns:

> it seems that a new moral establishment is developing, which is being imposed by law on dissenters. Those filling public offices are well advised to avoid challenging it, and even the most measured and reasoned public questioning of its truth can trigger formal investigations. This new orthodoxy masks itself in the language of equality, thus refusing to discuss its premises and refusing to articulate its conception of the good.[68]

Even some Catholics on the progressive left, in defence of gay rights, resort to language that is not altogether dissimilar: 'in the post-socialist age, non-faith based progressives are deadly serious about imposing their liberalism'.[69]

In this regard, the debate provides a flavour of the way in which secularism is invoked today in the United Kingdom as the sign of an ideological struggle. On this point, Judith Butler has recently addressed how secularism is deployed in the admittedly very different political culture of France, in order to interrogate how it works to bolster anti-Islamic 'progressive' politics.[70] In so doing, she also makes the general argument that 'secularism does not so much succeed religion sequentially, but reanimates religion as part of its ideas of culture and civilization'.[71] I would argue that the recent British controversies could be interpreted in terms of this thesis. Rather than the totalitarian imposition of a secular ideology upon a faith-based population — with the replacing of religion by a new faith (in liberal rights) — we find instead a 'mix of religious and secular ideals'[72] in which secularism does not succeed religion, but coexists (perhaps uneasily) with it.[73]

Butler argues (and here she mirrors the views of many opponents of the Regulations) that 'secularism has a variety of forms, and many of them involve forms of absolutism and dogmatism that are surely as problematic as those that rely on religious dogma'.[74] However, in the United Kingdom, the evidence of the absolutism of secularism is far from compelling, and we need to recognise that

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68 Rivers (2007), p 52. See also Leigh's (2008), p 338 use of the term *kulturkampf* in relation to sexual orientation hate laws.

69 Gearty (2007), p 9.

70 Butler (2008).

71 Butler (2008), p 14.

72 Butler (2008), p 14.

73 My inquiry here is distinct from the question whether (and how) a process of 'secularisation' may have had an important historical impact on personal identity formation in the United Kingdom. For an interesting analysis of this question, see Brown (2001).

74 Butler (2008), p 13.

secularism 'varies across cultures depending in part on the form of "religion" to which it is contrasted'.[75] As Margaret Davies suggests, 'Western secular states are undoubtedly *de facto* entangled with their dominant Christian heritages'[76] in which 'the ideal or normative citizen takes on dominant characteristics of race, culture, religion, and gender … the white Anglo-Christian male'.[77] Stewart Motha makes a closely related point in relation to the juxtaposition of liberalism and the construction of Islamic 'fundamentalism' when he argues that 'the repression of the religious as the condition of modern politics reveals itself to be the unfinished enterprise threatened by the eternal return of religion'.[78] Motha refers to a British culture which can claim to be both 'secular in outlook' and, at the same time, 'committed to Christian institutions, political and juridical formations'.[79] Thus, we must recognise that 'secularism itself is obviously complex and contradictory'.[80]

There is ample evidence of complexity and contradiction. A superficial examination of the structure of the Goods and Services Regulations reveals that faith is embedded within the law in the form of the exemptions. Religious faith is taken to be synonymous with the integrity of belief, and serves to partially exempt the application of the law.[81] While opponents may argue that the exemptions are drawn too narrowly, the relevant point is that they are drawn on the basis of religion rather than, for example, simply on the basis of a sincerely held (secular) belief. In this way, the Regulations accept the premise that 'religious belief has special value and deserves special protection'.[82] Moreover, parliamentary debates are virtually devoid of any criticism of faith-based homophobic views.[83] Instead, supporters of the Regulations argue that when religious groups offer a service to the public, they

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75 Jakobsen (2002), p 50.

76 Davies (2008), p 76.

77 Davies (2008), p 79.

78 Motha (2009), p 242.

79 Motha (2009), p 244.

80 Jakobsen (2002), p 63. See also Herman (2008).

81 See section 14(3): 'Nothing in these Regulations shall make it unlawful for an organisation to which this regulation applies, or for anyone acting on behalf of or under the auspices of an organisation to which this regulation applies — (a) to restrict membership of the organisation, (b) to restrict participation in activities undertaken by the organisation or on its behalf or under its auspices, (c) To restrict the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices, or (d) to restrict the use or disposal of premises owned or controlled by the organisation, in respect of a person on the ground his sexual orientation'. Section 14(3) applies, by virtue of s 14(1), 'to an organisation the purpose of which is — (a) to practice a religion or belief, (b) to advance a religion or belief, (c) to teach the practice or principles of a religion or belief, (d) to enable persons of a religion or belief to receive any benefit, or to engage in any activity, within the framework of that religion or belief.'

82 Webber (2008), p 26.

83 See, for example: 'The regulations have been drafted to allow for the views and opinions of religious groups and organisations to be protected where it is necessary to comply with doctrine.' (Lord Rooker, Lords, *Hansard*, 9 January 2007, p 209)

have crossed a line (the religious/commercial; public/private binary) such that the application of the law is appropriate.[84] But there is little discursive space for a critique of religion (especially of Christianity), nor for a discussion of the offensiveness of some religious doctrine.[85] Furthermore, it is not at all clear that faith-based schools (which remain high on the government's agenda) are prevented from promoting marriage and heterosexuality as the most desirable way of life.[86]

The one notable exception to this uncritical acceptance of religion can be found in the speech of the openly gay and Muslim member of the House of Lords, Lord Alli, who makes clear that discriminatory views grounded in religious texts are unacceptable in a liberal democracy, and not just when religious actors enter the public, commercial sphere:

> When I read the Koran, it tells me in some passages that I must kill Jews. If I believe strongly enough that I must kill Jews, does than mean that I have the right to say, 'Exempt me from legislation because I believe it strongly enough. Let me discriminate against Jews, at least, because I believe it strongly enough and it is written in the Koran'?[87]

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84 See, for example: 'The Government have provided an exemption for religious or belief organisations, and those acting under their auspices, where that is necessary to avoid conflicting either with the doctrine of the organisation or the strongly held beliefs of a significant number of a religion's followers. But where religious organisations choose to step into the public realm and provide services to the community, either on a commercial basis or on behalf of and under contract with a public authority, that surely brings with it a wider social responsibility to provide those services for the public as they are, in all their diversity, and not to pick and choose who will benefit or who will be served.' (Baroness Andrews, Lords, *Hansard*, 21 March 2007, p 1291)

85 See, for example: 'It is not the Government's intention to attack religious ethos.' (Lord Rooker, Lords, *Hansard*, 9 January 2007, p 208)

86 See Department for Education and Employment (2000), p 4: 'pupils should be taught about the nature and importance of marriage for family life and bringing up children. But the government recognises … that there are strong and mutually supportive relationships outside marriage. Therefore pupils should learn the significance of marriage and stable relationships as key building blocks of community and society'; and p 8: 'Schools of a particular religious ethos may choose to reflect that in their sex and relationship education policy.' See also the *obiter dictum* of Weatherup J that 'the [Northern Ireland] regulations do not apply to the school curriculum': *Re The Christian Institute's and Others' Application for Judicial Review* [2008] NI 86 (QBD) at 118. But see also the view of the Joint Committee on Human Rights (2007), p 21: 'We do not consider that the right to freedom of conscience and religion requires the school curriculum to be exempted from the scope of the sexual orientation regulations. In our view the Regulations prohibiting sexual orientation discrimination should clearly apply to the curriculum, so that homosexual pupils are not subjected to teaching, as part of the religious education or other curriculum, that their sexual orientation is sinful or morally wrong.'

87 Lords, *Hansard*, 21 March 2007, p 1317. Although some opponents do make the claim that religion is not 'homophobic': 'Christians and other faiths across the country have a gracious and loving attitude towards their neighbours, regardless of their orientation.'

However, what further undermines the claim of the absolutism of secularism (in the way in which it is deployed by opponents of sexuality equality) is the place given to religious voices in political debate in the United Kingdom. The Catholic Church and Church of England played prominent roles around the same-sex adoption question, which is facilitated by membership of church officials in the House of Lords (hardly a secular institution).[88] But politics was further complicated by the religious beliefs of prominent Labour figures, and the way in which religion — particularly for those of the centre left — has been partially 'closeted' from the public sphere. Most famously, Tony Blair's admission of his deeply held religious beliefs (and his conversion to Catholicism immediately after leaving office), combined with his openly admitted fear of being labelled a 'nutter' for his faith, underscore the complexities of religion for the Labour Party.[89] The then Secretary of State for Communities and Local Government, Ruth Kelly, is well known as a practising Catholic and member of the Opus Dei organisation, and rumour has it that she had difficulty supporting the Regulations, despite having responsibility for social cohesion and inclusion as part of her government portfolio.[90] Even the *Civil Partnership Act*, although often described as a 'sop' to the lesbian and gay communities, prevents the forming of civil partnerships in religious buildings, and ensures that marriage is restricted to the union of one man and one woman.

The need for discretion that seems to be felt by some British politicians — with respect to Roman Catholicism at least — could be seen as providing evidence that practising Christians have been forced into a sphere of privacy and even secrecy by the dominance of secularism on the left.[91] Equally, however, it can be understood through age-old stereotypes regarding Catholics, secret societies and foreign allegiance to the Vatican. I would suggest that, at a minimum, it indicates a complex and contested relationship between religion, (but more specifically of Christianity) and politics in Britain today, which is informed by the historic roles played by the established church and Roman Catholicism.

(Lord Browne of Belmont, Lords, *Hansard*, 21 March 2007, p 1306); 'The Catholic Church is not homophobic.' (Baroness Morris of Bolton, Lords, *Hansard*, 21 March 2007, p 1306)

88 The increasingly vocal role of religious leaders in openly lobbying politicians has not abated since the Regulations were passed, and can be seen graphically in the debates preceding passage of the *Human Fertilisation and Embryology Act 2008*, in which Catholic bishops exhorted Catholic Members of Parliament to oppose the legislation on the grounds of conscience. Indeed, at the time of the Sexual Orientation Regulations, a Roman Catholic Cardinal 'felt able to write a letter to the Prime Minister and the entire Cabinet setting out "Catholic teaching about the foundations of family life"': Gearty (2007), p 8.

89 BBC News Online, http://news.bbc.co.uk/1/hi/uk_politics/7111620.stm, 25 November 2007.

90 BBC News Online, http://news.bbc.co.uk/2/hi/uk_news/politics/4756399.stm, 9 May 2006.

91 See Christian Institute, www.christian.org.uk, 6 October 2008, quoting Ruth Kelly MP: 'It is difficult to be a Christian in politics these days … The public debate has become more secular and believers are portrayed as a bit odd.'

Compromising Rights?

Kate Nash has argued that human rights politics in the United Kingdom is best described in terms of a 'communitarian rights culture' in which the values of dialogue, compromise and 'the attempt to reach and sustain agreement over conflict and divergence in understandings of social relationships' is paramount.[92] She finds that the *Civil Partnership Act* exemplifies this culture, in which the divisive debates which have characterised struggles over same-sex marriage elsewhere have largely been absent from British political life. I believe that there is much evidence for this claim as a description of political culture, and also much to commend it as a normative proposition. However, recent events demonstrate the precariousness of such communitarian approaches to rights, and the potential for rights struggles to emerge out of the belief that true compromise has not been achieved.

Although the Regulations carve out religious exemptions, and are characterised by proponents as a sensible, reasonable balancing of rights to equality and freedom of religion in a democratic society, the language of compromise always leaves space for struggles over whether competing rights have been unbalanced, and whether society has gone too far: 'this legislation effects a rearrangement of discriminatory attitudes and bias to overcompensate and skew the field the other way'.[93] In this moment, rights are constructed as a zero-sum game.[94] They favour individualism over 'the rights of voluntary societies'.[95] Given that the *Human Rights Act* itself was a skilful attempt to create a 'balance' between fundamental rights and the principle of parliamentary supremacy, leaving the working out of the inevitable compromises around rights to be resolved in the political realm, it is hardly surprising that British rights discourse can become an obvious site of struggle, and that human rights can be described as a 'quagmire'.[96] Furthermore, it may be that the issue of same-sex adoption adds a particularly combustible fuel to the politics of rights because of the complex relationship between children, parents and sexuality. In part, this is because it is far too easy to move from rights of consumers of services to rights to possess (and perhaps 'consume') 'our' children.[97] Such arguments can leave supporters of sexuality

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92 Nash (2005), p 346.

93 Archbishop of York, Lords, *Hansard*, 21 March 2007, p 1309.

94 See, for example: 'The Government have taken the view that gay rights trump religious rights … A citizen's right to manifest sexual orientation is absolute, but the right to manifest religious belief is not.' (Baroness O'Cathain, Lords, *Hansard*, 21 March 2007, p 1298).

95 Lord Pilkington of Oxenford, Lords*, Hansard*, 21 March 2007, p 1304.

96 Archbishop of York, Lords, *Hansard*, 21 March 2007, p 1311. Section 12(1) of the *Human Rights Act* potentially adds to the confusion: 'If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.'

97 Of course, the tragic irony in this narrative is the historic role of Christian denominations in the abuse of children (especially those in care), which for so long remained shielded in a protected sphere of privacy and secrecy.

equality on the 'back foot', relying exclusively on their (new-found?) faith in the judiciary to ensure the protection of their rights.

Concluding Thoughts

This analysis gives rise to a number of conclusions, as well as directions for further analysis. First, it is worth recalling that the Critical Legal Studies movement long ago taught us to be cautious about putting too much of our faith in the power of rights.[98] The experience of rights struggles around sexuality over the past decade in the United Kingdom (and elsewhere) reveals that the language of rights lends itself to anti-gay arguments which not only deploy 'rights talk', but which can mirror the arguments advanced by progressive actors. Opponents of the Goods and Services Regulations construct faith groups as disenfranchised, oppressed minorities who are increasingly forced to exercise discretion, and keep their beliefs in a private sphere closeted from public view. According to them, the 'being' of religion may be their right, but the 'doing' of religion is subject to intense legal regulation by the state, undermining the core of the freedom. The *Ladele* case provides a perfect example of the making of the claim that religious freedom is hollow without the ability to act on one's religiously inspired 'world view'. In this narrative, rights are undermined by the secularist totalitarianism of the political elites, and by the fanatics of the lesbian and gay movement. Simultaneously, rights discourse is deployed in the name of the 'common sense' majority, and on behalf of vulnerable children needing protection from rights-seekers themselves.

Second, I want to reiterate that those of us who support sexuality rights should not be too quick to dismiss the arguments advanced in support of 'conscientious objectors'. Queer theorists have long been troubled by the separation of sexual acts and sexual identities within rights discourse — the 'being' and 'doing' of sexuality — and the manipulability of the public/private distinction.[99] While the courts may rightly hold that the ability to act on one's religious beliefs is necessarily limited by the rights of others, it may well be that accommodation and tolerance have much to offer as a political strategy and a normative aspiration. Compromise and dialogue within a communitarian rights culture, it seems to me, have much to recommend them, as opposed to the 'winner take all' adversarial approach. The exclusion of religion from the public realm of politics in the name of secularism also may have unintended political consequences,[100] and fails to grapple with the fact that religious freedom is 'founded upon the affirmative valuing of religion'.[101] At a minimum, this demands an open discussion of the limits of tolerance in a society dedicated to equality.[102] Simultaneously, it should create more space for an open, public discussion of the *offensiveness* of some religious doctrine.

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98 See, for example, Bakan (1997); Fudge and Glasbeek (1992).

99 See, for example, Halley (1989); Thomas (1993). I have argued, however, that there may be strategic possibilities within the act/identity distinction: Stychin (1996).

100 See Davies (2008), p 76: 'At the political level, excluding religion may only strengthen its power to operate behind the scenes.'

101 Webber (2008), p 26.

102 I agree with Nehushtan (2008), p 248 that 'tolerance' may be the most appropriate way to analyse this issue. But I recognise fully that the 'working out' of the limits of

Third, this article suggests caution regarding the way in which secularism is invoked. I suggest that those who support sexuality equality should question the claims made by opponents that we live in a secular society in which religion has been closeted. Instead, secularism should itself be recognised as a site of contradiction. In the United Kingdom, claims of secularism are further undermined by the presence of an established church, which buttresses Christian hegemony.[103] While the secular state may be an aspiration, we should challenge those who claim not only that it has been achieved, but that it has been imposed on those of religious faith.

Finally, I would urge that we should continue to interrogate recent 'progressive' developments through a critical lens. It is all too easy — particularly in the face of such vociferous (and articulate) opposition — to defend sexuality rights that have been achieved, without critically engaging in the politics of these rights victories. The Goods and Services Regulations protect our rights as consumers in a capitalist society, and the *Civil Partnership Act* must be placed within the wider context of the privatisation of care under neo-liberalism, in which the cohabiting couple continues to be privileged. Read in this way, the socially (and economically) transformative potential of rights discourse looks very remote, suggesting instead that secularism may 'reinforce the dominations and disciplines of market-reformed-Protestantism',[104] rather than opening up new possibilities for social organisation. In the end, rights *politics* is just that, and this arena of struggle (like the so called triumph of secularism) is far from finished.

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tolerance will not be easy. For example, compare the somewhat different views of the majority and concurring judgments in *North Coast Women's Care Medical Group v Superior Court of San Diego County; Guadalupe T Benitez, Real Party in Interest* 44 Cal. 4th 1145 (2008). See also *Ontario Human Rights Commission v Brockie* [2002] 22 DLR (4th) 174; and the *obiter dicta* of Weatherup J in *Re Christian Institute's and Others' Application for Judicial Review* [2008] NI 86 (QBD).

103 Smith (2008), p 181 points out the potential contradiction: 'Establishment, which rests on the assumption that religious provision is a legitimate matter of state concern and public interest, and which assumes that religion has a role to play in the public sphere, exists side by side with the human rights framework, which tends to exclude religion from the public sphere.'

104 Jakobsen (2002), p 64.

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