

FAITH IN RIGHTS: THE STRUGGLE OVER SAME-SEX ADOPTION IN THE UNITED KINGDOM

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Introduction

The regulation of 'sexual orientation' through law in the United Kingdom over the past decade of the Labour Government is frequently explained by its supporters through a narrative of progress and even emancipation. The most recent junction in this journey came in 2007, with the coming into force of the *Equality Act (Sexual Orientation) Regulations*. 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.¹ The Regulations must also be set within a 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 piece meal system of equality rights protection previously found in the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. 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. Understood in this context, the Regulations might be interpreted as a 'tidying up' exercise. However, this would be a 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.² Ultimately, the Regulations were approved by Parliament in March 2007, and entered into effect on April 30, 2007.³

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. This paper focuses on Parliamentary and print media representations of the issues at stake. Central to the controversy was the future status of Catholic

¹ 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.

² 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.

³ The offence is created by s 3 of the Regulations. Section 3(1) states: '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).'

adoption agencies, which, on its face, are caught by the Regulations in that they provide a service to prospective parents.⁴ 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. 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 on 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 be exempted from anti-discrimination legislation when providing a public service (and with public subsidy). 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.⁵

Constructing the Minority Group

Opposition to the Regulations was articulated through a mixture of ‘old’ and ‘new’ tropes. While my particular interest in this paper are the ‘new’ discourses around secularism and the rights of religious ‘minorities’ to exist in a secular society (a characterization which I want to problematize), there was still plenty of space for longstanding ‘old’ arguments which centred on children. Not only did these discourses focus upon the way in which the best interests test should be applied, but also through other claims, which are very familiar to those who have studied anti-gay rhetoric.⁶ 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).⁷ 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 are, but because of what they (potentially) do (although it always seems assumed that the act of

⁴ By comparison, in some states in the USA, statutory restrictions remain in place prohibiting the adoption of children by lesbians and gays: see Carlos A Ball, ‘The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men’ (2007) 38 *Loyola University Chicago Law Journal* 379.

⁵ On heterosexuality as the ‘gold standard’ of parenting, see Judith Stacey and Timothy J Biblarz, ‘(How) Does the Sexual Orientation of Parents Matter?’ (2001) 66 *American Sociological Review* 159 at 162.

⁶ See eg, Didi Herman, *The Anti-Gay Agenda: Orthodox Vision and the Christian Right* (Chicago: University of Chicago Press, 1997).

⁷ 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.

doing sodomy is an *inevitable* result of being given an *opportunity* to practice it).⁸ 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).⁹

In both political and media debate, considerable time also was given over to schools. Baroness O’Cathain, for example, 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’.¹⁰ Here, the long standing trope concerning the promotion of homosexuality through education reappears, which has a pedigree dating back to the now repealed s 28 of the *Local Government Act*, which prohibited the promotion of homosexuality as a ‘pretended family relationship’ by local authorities.¹¹ 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’¹² 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. In this argument, 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.¹³ These potential clients would have no difficulty contracting with others to meet their homosexual needs. 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 trumped (and trampled upon) in the service of the rights of ‘well organised and intolerant lobbies’¹⁴, who have the backing of political elites. While supporters of the Regulations describe the law as achieving a ‘balancing’ of conflicting rights; for

⁸ See eg, Lord Mackay: ‘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’ (Lords, Hansard, 9 January 2007, p 184).

⁹ See eg, Viscount Brookeborough: ‘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 protect their children until they are at an age at which they can decide for themselves’ (Lords, Hansard, 9 January 2007, p 194-5).

¹⁰ Lords, Hansard, 21 March 2007, p 1298.

¹¹ For a discussion of the discourses surrounding s 28 and its repeal, see Carl F Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Oxford: Hart Publishing, 2003). See also Momim Rahman, ‘The Shape of Equality: Discursive Deployments During the s 28 Repeal in Scotland’ (2004) 7 *Sexualities* 150.

¹² Lord Tebbit, Hansard, Lords, 9 January 2007, p 192.

¹³ See eg, ‘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 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.

¹⁴ Lord Anderson of Swansea, Lords, Hansard, 21 March 2007, p 1305.

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 practice their beliefs: ‘It is a development entirely at variance with our well rooted tradition of religious tolerance and liberty’.¹⁵ 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.¹⁶ 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’.¹⁷

The Silenced Majority

At the same time, critics of the Regulations suggest that the law has *also* 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,’¹⁸ who have been marginalized by the actions of political elites seeking to find favour with a well organized, articulate and powerful lesbian and gay constituency. This middle ground is constructed through a ‘common sense’, but a common sense which also includes the practice of ‘disclaiming’ homophobia.¹⁹ That is, opponents of progressive gay rights legislation 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.²⁰ 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 moral or ‘common sense’ objection to gay rights should also be respected and protected. Scepticism regarding the value of same-sex adoption provides one such example of a ‘common sense’ which is self-evidently true,

¹⁵ Lord Bishop of Southwell and Nottingham, Lords, Hansard, 21 March 2007, p 1302. See also Julian Rivers, ‘Law, Religion and Gender Equality’ (2007) 9 *Ecclesiastical Law Journal* 24 at 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’.

¹⁶ See eg, ‘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.

¹⁷ Rivers, *supra*, p 35.

¹⁸ Melanie Phillips, ‘A law that turns sexual tolerance into tyranny’ 19 June 2006, *Daily Mail*.

¹⁹ The practice of ‘disclaiming’ homophobia is discussed by Burrige in the context of opposition to the repeal of s 28 of the Local Government Act: see Joseph Burrige, ‘I am not Homophobic *But* ...’: Disclaiming in Discourse Resisting Repeal of Section 28’ (2004) 7 *Sexualities* 327. The practice of disclaiming is not a new phenomenon: see Anna Marie Smith, *New Right Discourse on Race and Sexuality: Britain, 1968-1990* (Cambridge: Cambridge University Press, 1994).

²⁰ See Phillips, *supra*: ‘We have therefore exchanged one deep intolerance for another’.

but which has been silenced by the ‘totalitarianism’ of gay rights.²¹ 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 multifaith, multicultural society. Finally, they are the defenders of the best interests of children, who are otherwise sacrificed to a political correctness which 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’.²² 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’.²³ The need for compliance with ‘international obligations’ is also mentioned.²⁴ The discourse of child welfare, moreover, is countered on its own discursive 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.²⁵

But this discursive 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 yet 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 Sexual Orientation Regulations do provide for exceptions for religious organizations. 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

²¹ See eg: ‘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.

²² Communities and Local Government, *Guidance on New Measures to Outlaw Discrimination on Grounds of Sexual Orientation in the Provision of Goods, Facilities and Services* (London: Department for Communities and Local Government, 2007), p 5.

²³ Tony Blair, ‘No place for discrimination in society’, www.number10.gov.uk/output/Page10869.asp

²⁴ Lord Lester of Herne Hill, Lords, Hansard, 9 January 2007, p 202.

²⁵ See eg, ‘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 Christianity and our joint commitment to put an end to discrimination’, Baroness Andrews, Lords, Hansard, 21 March 2007, p 1328.

practice). As Rivers argues, ‘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’.²⁶ Therefore, in an unlikely twist, the distinction between act and identity, often deployed to regulate sexual identities and practices, now gets (knowingly) reversed by opponents of the Regulations in defence of the right to practice religion.²⁷ For proponents, by contrast, the religious exceptions ensure that a ‘balancing’ of rights is achieved, and the key distinction is between the religious and the commercial. Once crossed, religious groups must act in a non-discriminatory fashion. Moreover, faith based schools, it is argued, can continue to promote monogamous heterosexuality within the institution of marriage, while providing emotional support to *all* children.²⁸

Secularism as Fundamentalism

But despite the religious exceptions in the Regulations, opponents remain adamant that secularism has become the dominant ideology and, indeed, they claim that it is the new religion of the political class, which has trampled over and silenced all others. In making this claim, an ambiguity is apparent as to whether *all* religions have been unfairly treated (which is sometimes claimed) or whether, more specifically, it is particularly the country’s Christian tradition which is under constant threat from the secular. Moreover, at this point, there are interesting analogies that can be drawn with the way in which Christianity is constructed as under threat from ‘multiculturalism’. The focus on 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 the extent to which 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, in which thinly veiled comparisons are drawn to Islam.²⁹ As Rivers warns:

[I]t 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.³⁰

²⁶ Rivers, *supra*, p 36.

²⁷ See Rivers, *supra*, 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’.

²⁸ See Department for Education and Employment, *Sex and Relationship Education Guidance* (Nottingham: DFEE Publications, 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’.

²⁹ See eg, Carla Powell, ‘Beware the Taleban of Tolerance’, *The Spectator*.

³⁰ Rivers, *supra*, p 52.

Even Catholics on the progressive left, in defense 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’.³¹

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 an anti-Islamic ‘progressive’ politics.³² 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’.³³ I would argue that the controversy around the Sexual Orientation Regulations could be interpreted in support 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’³⁴ in which secularism does not succeed religion, but coexists (perhaps uneasily) with it.

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’.³⁵ However, in the United Kingdom, the evidence of the absolutism of secularism is far from compelling. Stewart Motha makes this very 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’.³⁶ 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’.³⁷

There is much evidence for Motha’s claim in the events surrounding the Sexual Orientation Regulations. A superficial examination of the structure of the Regulations themselves 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 exempt the application of the law.³⁸ While opponents may argue that the exemptions are

³¹ Conor Gearty, ‘Sex and the Secular Liberal’, *The Tablet*, 10 February 2007, p 8 at 9.

³² Judith Butler, ‘Sexual Politics, Torture, and Secular Time’ (2008) 59 *British Journal of Sociology* 1.

³³ *Ibid* at 14.

³⁴ *Ibid.*

³⁵ *Ibid* at 13.

³⁶ Stewart Motha, ‘Liberal Cults, Suicide Bombers, and other Theological Dilemmas’, unpublished manuscript on file with author.

³⁷ *Ibid.*

³⁸ See eg, section 14(3) of the Regulations: ‘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 response 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’.

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 belief. Moreover, Parliamentary debates are virtually devoid of any criticism of faith based homophobic views.³⁹ Instead, supporters of the Regulations argue that when religious groups offer a service to the public, they have crossed a line (the religious/commercial; public/private binary) such that the application of the law is appropriate.⁴⁰ But there is little discursive space for a critique of religion (or especially of Christianity), nor for a discussion of the offensiveness of some religious doctrine.⁴¹ Furthermore, faith based schools (which remain high on the government's agenda) are still allowed to *promote* marriage and heterosexuality as the most desirable way of life.⁴² 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 that 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"?'⁴³

However, what further undermines the claim of the absolutism of secularism (in the way in which is deployed by opponents of the Regulations) 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).⁴⁴ But the political terrain was further complicated by the religious beliefs of

³⁹ See eg: '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).

⁴⁰ See eg, '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).

⁴¹ See eg, 'It is not the Government's intention to attack religious ethos' (Lord Rooker, Lords, Hansard, 9 January 2007, p 208).

⁴² See *Sex and Relationship Education Guidance, supra* at 8: 'Schools of a particular religious ethos may choose to reflect that in their sex and relationship education policy'.

⁴³ 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' (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).

⁴⁴ This increasing vocal role of religious leaders in openly lobbying politicians has not abated since the Regulations were passed, and can be seen graphically in the recent Human Fertilisation and Embryology Bill debates in 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 about to write a letter to the Prime Minister and the entire Cabinet setting out "Catholic teaching about the foundations of family life"': Gearty, *supra*, p 8.

prominent Labour politicians, and the way in which religion, particularly for politicians 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.⁴⁵ 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 organization, and rumour had it that she had difficulty supporting the Regulations, despite having responsibility for social cohesion and inclusion as part of her government portfolio.⁴⁶ Even the *Civil Partnership Act*, although often described as a further ‘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.⁴⁷

But the need for discretion that seems to be felt by some British politicians -- with respect to Roman Catholicism at least -- also 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. 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.⁴⁸

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.⁴⁹ She finds that the *Civil Partnership Act* exemplifies this culture, in which the divisive debates which have characterized struggles over same-sex marriage have been largely absent from British political life. In my view, there is much merit to this position, but the Sexual Orientation Regulations demonstrate the precariousness of such communitarian approaches to rights, and the potential for rights struggles to emerge which produce polarized positions. Although the Regulations carve out religious exemptions, and are characterized by proponents as a sensible, reasonable balancing of rights to equality and freedom of religion in a democratic society, the language of balance and compromise always leaves space for struggles over whether competing rights have been un-balanced, 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’.⁵⁰ In this moment,

⁴⁵ See BBC News Online, ‘Blair feared faith “nutter” label’, 25 November 2007.

⁴⁶ See BBC News Online, ‘Kelly’s views on gays questioned’, 9 May 2006.

⁴⁷ See Carl F Stychin, ‘Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004’ (2006) *Feminist Legal Studies* 79.

⁴⁸ The reactions to the Archbishop of Canterbury’s recent reflections on Sha’ria Law suggest that issues of law, religion and politics remain a potent combination.

⁴⁹ Kate Nash, ‘Human Rights Culture: Solidarity, Diversity and the Right to be Different’ (2005) 9 *Citizenship Studies* 335 at 346.

⁵⁰ Archbishop of York, Lords, Hansard, 21 March 2007, p 1309.

rights are constructed as a zero sum game.⁵¹ They favour individualism over ‘the rights of voluntary societies’.⁵² Given that the *Human Rights Act* itself was a skilful attempt at creating 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’.⁵³ 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.⁵⁴ 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.⁵⁵ Such arguments leave supporters of the Regulations on the ‘backfoot’, relying on their faith in the judicial application of the ‘best interests’ test to ensure that children’s interests are adequately protected.

Concluding Thoughts

To conclude, the Critical Legal Studies movement long ago taught us to be cautious about putting too much of our faith in rights.⁵⁶ The experience of rights struggles around sexuality over the past decade 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. The debate over same-sex adoption highlights this point. Opponents of the Sexual Orientation Regulations can construct faith groups as disenfranchised, oppressed minorities who are increasingly forced to exercise discretion, and keep their beliefs in a private sphere closeted away 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. In this narrative, rights are being undermined by the secularist totalitarianism of the political elites and the fanatics of the lesbian and gay movement. Simultaneously, rights discourse

⁵¹ See eg, ‘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.

⁵² Lord Pilkington of Oxenford, Lords, Hansard, 21 March 2007, p 1304.

⁵³ Archbishop of York, Lords, Hansard, 21 March 2007, p 1311.

⁵⁴ The issue has also been ‘legalized’ through a case before an Employment Appeal Tribunal, concerning whether a magistrate could refuse to follow the Regulation in relation to adoption on the basis of a ‘moral’ objection: *McClintock v Department of Constitutional Affairs* 2007 WL 3130902, Appeal No UKEAT/0223/07/CEA. His arguments failed at both the original tribunal as well as on appeal. The Tribunal concluded: ‘he expressed his objections on grounds which the Tribunal was entitled to find did not engage the terms of the Religion and Belief Regulations. Even had they done so, the Tribunal found that the Department was fully justified in insisting that magistrates must apply the law of the land as their oath requires, and cannot opt out of cases on the grounds that they may have to apply or give effect to laws to which they have a moral or other principled objection’: p 62.

⁵⁵ 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.

⁵⁶ See eg, Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Judy Fudge and Harry Glasbeek, ‘The Politics of Rights: A Politics with Little Class’ (1992) 1 *Social & Legal Studies* 45.

is deployed in the name of the 'common sense' majority and on behalf of vulnerable children needing protection from rights seekers themselves.

However, the very fact that the Regulations have come into force may suggest cause for optimism and the increasing marginalization of voices of opposition. On the other hand, the need felt by Government to postpone the application of the Regulations to Catholic adoption agencies until December 31, 2008, pending further analysis of the potential impact, suggests that the supposed triumph of secularism is far from complete.