FREEDOM OF EXPRESSION, SEXUAL ORIENTATION AND GENDER IDENTITY:

A JURISDICTIONAL COMPARATIVE

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'The degree and kind of a man's sexuality reach up into the ultimate pinnacle of his spirit.[2]'

Freedom of Expression can at times be a difficult, abstract and ambiguous notion easily shrunken in value. However it can also be interpreted as a Constitutional ban on many things. Sexual orientation and gender identity are powerful forms of such an expression. The right of free expression is important because without it, people become reduced to mere mechanisms of the State; to be used merely as means to ends. Society needs this right because there is a real connection between it and intelligent self-government – people must be able to express their opinions and feelings in order to have a proper democracy.[3] The state should take these factors into account when designing an infrastructure to enable the fulfilment of its citizens' rights to freedom of expression, Sexual Orientation and Gender Identity

This paper shall examine four jurisdictions (Ireland, South Africa, Botswana and the United States) that look at the issue of homosexual sexual intercourse as a core expressive freedom. In the following pages, sexual orientation refers to 'each person's capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.'[4] Gender identity refers to 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the

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[2] Friedrich Nietzsche, *Beyond Good and Evil* (Courier Dover Publications 1997).

[3] Alexander Micklejohn speaking to the Senate Subcommittee on Constitutional Rights in a speech entitled 'The First Amendment: The Core of the Constitution' in a Radio broadcast from Berkeley, California KPFA-FM Friday August 14th, 1959.

[4] Preamble to the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, <www.yogyakartaprinciples.org> accessed January 2011.

sex assigned at birth including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.'[5] Social progress is neither new nor old but perennial and meets with varying degrees of resistance depending on the seriousness of the perceived threat; such resistance being buttressed by institutional and societal sclerosis protecting the status quo as if it were immutable.[6] The right of free expression is more textual than a right to privacy in the majority of the aforementioned jurisdictions, with sexual orientation being a core social controversy.

The most significant human rights treaties and resolutions, both at the UN level and within regional human rights mechanisms in the Americas, Africa, and Europe recognise these rights and specify that they are intended to be enjoyed by everyone and to be non-discriminatory in application.[7] Just *what* then is the human right to freedom of sexual orientation? Every woman, man, youth and child has the human right to freedom of sexual orientation. This includes the fundamental human right to freedom from discrimination based on sexual orientation or any other status, and other fundamental human rights depending upon the realisation of the human right to freedom from discrimination.

The human rights related to non-discrimination are explicitly set out in the Universal Declaration of Human Rights,[8] the

[5] Ibid.

[6] Nelius Carey, 'Lawrence v Texas: Homosexuals Approach Liberty' (2004) 11(1) DULJ 320.

[7] For example Article 9(2) of the African Charter on Human and Peoples' Rights 1986 sets out that 'Every individual shall have the right to express and disseminate his opinions within the law.' Article 13(1) of American Convention on Human Rights 1969 provides that 'Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice' and Article 10(1) of the European Convention on Human Rights 1953 provides that 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

[8] G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) reading:

> All human beings are born free and equal in dignity and rights....Everyone is entitled to ... rights...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

International Covenants,[9] the Convention on the Rights of the Child[10] and other widely adhered to international human rights treaties and Declarations. While these documents do not contain direct references to discrimination based on sexual orientation, they do prohibit discrimination on grounds of sex. In 1993 the UN Commission on Human Rights declared that the prohibition against sex discrimination in the International Covenant on Civil and Political Rights[11] included discrimination on the basis of sexual preference.[12] The obligation to protect the rights to freedom of expression, assembly, and association implies that governments should take effective steps to end human rights abuses. [13] They must not only ensure that their agents refrain from violating rights but must also prevent and punish violations by private actors (such as individuals and private enterprises).[14]

Half the world's nations that criminalise homosexual conduct do so because they cling to Victorian morality and colonial laws.[15] Freedoms of sexual orientation and gender identity have been subjected to quite radically different approaches by nation governments. This paper begins by analysing the Irish approach. Ireland has taken a markedly different approach to South Africa or Botswana.

[9] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 and International Covenant on Economic and Social Rights, 16 December 1966, 993 UNTS 3.

[10] G.A Res. 44/25 20 November 1989 reading:

> States Parties shall respect and ensure…rights…without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

[11] G.A Res. 2200A (XXI) 16 December 1966. Article 24 reads: 'Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.'

[12] The People's Movement for Human Rights Education, 'The Human Right to Freedom of Sexual Orientation', <http://www.pdhre.org/rights/sexualorient.html> accessed January 2011.

[13] International Gay and Lesbian Human Rights Commission, 'Violations of the Rights to Freedom of Expression, Assembly, and Association Related to Sexual Orientation, Gender Identity and Gender Expression: A Report Prepared by the International Gay and Lesbian Human Rights Commission for the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Special Representative of the Secretary General for Human Rights Defenders' <http://www.iglhrc.org/binarydata/ATTACHMENT/file/000/000/1551.pdf> accessed January 2011.

[14] Ibid.

[15] Scott Long, Director of the lesbian, gay, bisexual, and transgender rights program at Human Rights Watch: 'Getting rid of these unjust remnants of the British Empire is long overdue.'

Ireland and the Right to Gay Sex

In 1983, Senator David Norris took a case to the Supreme Court seeking to challenge the constitutionality of laws that criminalised homosexuality, but was unsuccessful. In its judgement (delivered by a 3-2 majority) the court referred to the 'Christian and democratic nature of the Irish State' and argued that criminalisation served public health and the institution of marriage. In 1988, Norris took a case to the European Court of Human Rights to argue that Irish law was incompatible with the European Convention on Human Rights. The court, in the case of *Norris v. Ireland*[16], ruled that the criminalisation of homosexuality in the Republic of Ireland violated Article 8 of the Convention, which guarantees the right to privacy in personal affairs. The Irish parliament (Oireachtas) decriminalised homosexuality five years later.

The Supreme Court takes the view that it is legitimate to restrict or fail to recognise the right to express homosexual sexual intimacy.[17] The reason given is that the Court believes that the Irish Constitution should not be used to strike down sodomy laws because the religious nature of the State does not move in that way.[18] The leading example of this judicial thinking comes from *Norris v. Attorney General*[19]. The plaintiff was a Senator, lecturer at Trinity College and very openly gay. The two laws at issue at that time came from an English Statute prohibiting sodomy without specifying gender orientation and the second specifically prohibited acts of indecency between men (a blanket ban that included everything). In essence, the plaintiff was arguing that these laws violated his right to privacy and that because the aim of the law was to humiliate men and scare them, it deprived them of their dignity. As an extension, this author would posit that it can be seen that any law that would criminalise the only way of consummating sexual intimacy possible in such relations constitutes a bar on the freedom of homosexuals to express their feelings physically. Laws denouncing these means of consummation concretise and aggravate the stigmatisation of same sex relations.[20]

[16] *Norris v Ireland* Application no. 10581/83 (ECHR, 26 October 1988).

[17] *Norris v Attorney General* [1984] IR 36.

[18] Dr. Neville Cox, Lecture on Comparative Civil Rights, Trinity College Dublin November 5th 2008.

[19] [1984] IR 36.

[20] Lawrence H. Tribe, 'Lawrence v. Texas: The 'Fundamental Right' That Dare Not Speak Its Name' 117 Harv. Law. Rev. 1893, 1896 (2004).

In the Supreme Court, O'Higgins CJ opined that the case before him was either a case about whether there is a constitutionally protected right to freedom of expression by way of gay sexual intimacy *or* if there was a right to privacy here and when it could be limited. It is this author's view that it is not altogether clear whether the judge took a broad approach to privacy or a narrow interpretation of a constitutional right, but either way he found against the plaintiff either because there was no such constitutional right *or because* the right to privacy could be limited. Even from this initial analysis, a narrow and strict interpretation of Article 40 of the Irish Constitution emerges.[21] The crux of the O'Higgins CJ decision can be broken down into four main areas which he felt justified his reasoning in this case.

First, he upheld the sodomy laws in order to protect the family. What this author took from this is that essentially O' Higgins CJ felt that if Ireland were to legalise gay sex, the traditional family would collapse. An obvious flaw in this thinking is that it completely misconstrues the notion of being gay as a voluntary life choice and not as a natural expression of the innermost core of human personality. 'Any law that uplifts human personality is just. Any law that degrades human personality is unjust.'[22] He also falsely interpreted the role of the law in such cases thinking that legalising homosexuality will make it more attractive in public and private spheres. However, the law does not have this effect. Indeed Robinson[23] argues that when you are dealing with morals laws, the law cannot make you moral, they can only make you obey them. Arguing against this, Mitchell[24] wrote that laws can over time, change society.

[21] Article 40.6.1 provides that:

> The State guarantees liberty for the exercise of the following rights, subject to public order and morality: the right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

[22] Martin L. King, 'Letter from the Birmingham Jail' in Martin Luther King Jnr (ed), *Why We Can't Wait* (first published 1963, Signet 2000).

[23] John A.T. Robinson, *Honest to God* (Philadelphia: Westminster Press 1963) 116-119.

[24] Basil Mitchell, *Law, morality and religion in a secular society* (Oxford University Press 1967).

> Secondly he wanted to protect young people; since youths are vulnerable as to their sexual orientation, legalising it might make them try it. Yet again, this author feel he mistakes the notion of homosexuality as a voluntary life choice and completely over-uses the power of the law.
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> Thirdly, the judge said that we wanted to protect public health as homosexuality caused AIDS. In all fairness to O'Higgins CJ, this was a common belief at the time. [25]

Finally, the most influential reason to hold against the plaintiff was Catholic theology.[26] So either this was an extraordinary religious decision, viewing Ireland as a theocracy or the decision is not so much religious as it is textualist, that is, it is a form of constitutional interpretation that clings to the words of the Constitution. There is a strong resonance to Justice Scalia here in *Lawrence v. Texas*[27] where he says:

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[25] M.T. Schechter, K.J.P. Craib, K.A. Gelmont *et al*., *HIV-1 and the aetiology of AIDS* (1993) The Lancet 341, 658-659.

[26] On this point he noted:

> It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs. Yet it is suggested that, in the very act of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting *unnatural* sexual conduct which Christian teaching held to be gravely sinful. It would require very clear and express provisions in the Constitution itself to convince me that such took place. When one considers that the conduct in question had been condemned consistently in the name of Christ for almost two thousand years and, at the time of the enactment of the Constitution, was prohibited as criminal by the laws in force in England, Wales, Scotland and Northern Ireland, the suggestion becomes more incomprehensible and difficult of acceptance.
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> [emphasis added] [1984] IR 36 at 64.

[27] *Lawrence v. Texas* 539 U.S. 558 (2003). Responding to a reported weapons disturbance in a private residence, Houston police entered John Lawrence's apartment and saw him and another adult man, Tyron Garner, engaging in a private, consensual sexual act. Lawrence and Garner were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. The Supreme Court, in a 6-3 decision, declared unconstitutional a Texas law that prohibited sexual acts between same sex couples. Justice Kennedy, writing for the majority, held that the right to privacy protects a right for adults to engage in private, consensual homosexual activity. Justice Kennedy's opinion expressly overruled the Court's decision in Bowers v. Hardwick (1986), which had come to an opposite conclusion. Justice O'Connor concurred in the judgment and said that she would not overrule *Bowers*, but would declare the Texas law unconstitutional on equal protection grounds because it prohibits sexual acts between same sex couples that are allowed between opposite sex couples. Justice Scalia wrote a dissenting opinion, joined by Chief

> It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.[28]

The *Norris* decision has strong comparative links to both *Bowers v. Hardwick*[29] and *Lawrence* where the conservative judges concluded that the right to gay sex should not exist because it was not consistent with the traditional US ethos.

The dissenting opinions of Justice McCarthy and Justice Henchy were based on the constitutional right to privacy. It is worth noting that Henchy J. appeared willing to accept that sexual orientation is an immutable characteristic.[30] They acknowledged that the European Court of Human Rights in *Dudgeon v United Kingdom*[31] had already dealt with this issue. In facts almost mirroring *Norris*, the ECtHR held that Northern Ireland's anti-sodomy law was

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Justice Rehnquist and Justice Thomas, in which he argued that states should be able to make a moral judgment against homosexual conduct and have that enforced through law.

[28] Ibid 02-1002. He went on to add that

> persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts--or, for that matter, display *any* moral disapprobation of them--than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change.

[29] 478 U.S. 186 (1986). Michael Hardwick was observed by a Georgia police officer while engaging in the act of consensual homosexual sodomy with another adult in the bedroom of his home. After being charged with violating a Georgia statute that criminalised sodomy, Hardwick challenged the statute's constitutionality in Federal District Court. The Supreme Court decided in *Bowers* that the Constitution does not prohibit the criminalisation of consensual sexual activity between adult homosexuals, even when such activity occurs in the privacy of their homes. Justice White, writing for a 5-4 majority, grounded his opinion on the premise that the federal Constitution does not confer a fundamental right to engage in homosexual sodomy. Justice White wrote that the right asserted in this case did not bear 'any resemblance' to rights associated with the protection of privacy under the due process clause of the fourteenth amendment. Mitchell Lloyd Pearl, *"Chipping away at Bowers v. Hardwick: Making the best of an unfortunate decision"* (1988) 63 N.Y.U.L. Rev. 154.

[30] Here Henchy J. stated that

> [t]he plaintiff is homosexual in nature to the extent that his sexuality is compulsively and exclusively directed towards members of his own sex....What appears from the evidence is that his sexual condition was predestined from birth or from childhood rather than adopted by choice....

[1984] IR 36 at 67.

[31] *Dudgeon v. United Kingdom* (1981) Series A no 142.

unconstitutional as a violation of an individual's right to privacy under Article 8 of the European Convention of Human Rights. Quite unsurprisingly then in the later case of *Norris v Ireland*[32] the ECtHR held that Ireland had breached Article 8 of the ECHR.

While the gay civil rights movement was something of a late bloomer, the campaign for equal treatment of homosexuals in Ireland certainly exists and is growing stronger. One legal academic has commented that, 'Without being wildly optimistic, it is clear that the legal situation of same-sex couples in Ireland is on the cusp of major change.'[33] It appears that policy-makers recognise that civil rights law cannot remain frozen in what Gerard Hogan S.C. has referred to as the 'permafrost of 1937'.[34] The traditional interpretation of Article 41 of the Constitution[35] (in which the institution has been taken to refer only to monogamous heterosexual unions) has remained a bulwark to the recognition of other family units.[36]

South Africa and the Right to Gay Sex

As is the case with sodomy laws around the world, the decision of South Africa's Constitutional Court to decriminalise sex between men has far-reaching implications for the civil rights of gays and lesbians. In its first ruling ever on a gay or lesbian issue, South Africa's Constitutional Court enforced the nation's pioneering

[32] *Norris v Ireland* (1988) Series A no 45.

[33] Leo Flynn, 'From Individual Protection to Recognition of Relationships/ Same-Sex Couples and the Irish Experience of Sexual Orientation Law Reform' in Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships:A Study of National, European and International Law* (HART Oxford-Portland Oregon 2001) 591.

[34] Aisling O' Sullivan, 'Same-sex marriage and the Irish Constitution' (2003) The International Journal of Human Rights 485.

See also BBC News, 'Gay couple granted legal review' (BBC News, 9 November 2004) <http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/3995357.stm> accessed January 2011:

> The Irish Constitution drafted 67 years ago by then-Prime Minister Eamon de Valera undoubtedly presumed that "marriage" meant between a husband and wife, but argued that constitutional law should not be trapped within "the permafrost of 1937.

[35] Art. 41.1. 1° provides that

> The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

[36] Leonora Nyhan, 'Bringing it Home: The Plight of Migratory Same–Sex Couples' (*Cork Online Law Review*, 2006) <http://www.mercuryfrost.net/colr/editions/2006/2006%207%20Nyhan.pdf> accessed January 2011.

guarantee of freedom from sexual orientation discrimination, as it struck down laws against sex between men.[37] In *NCGLE v. The Minister for Justice*[38], reference was made to a 1975 *Sexual Offences Act* which criminalised sodomy. Ackermann J for the Court opined that this law violated the Constitution on grounds of equality, dignity and privacy. In his decision, the judge began by dealing with equality and then bolstered it with privacy and dignity. The judge was particularly rational, stating that there was no basis at all to prohibit sodomy and so the law cannot be justified.

The common law prohibition on sodomy criminalises all sexual intercourse *per anum* between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different ethnic groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[39]

Ackermann J felt that 'all laws aimed at prohibiting male gay sex violate the right to equality' because they unfairly discriminates against gay men on the basis of their

> sexual orientation....It is declared that the common-law offence of commission of an unnatural sexual act is inconsistent with the Constitution of the Republic of South Africa 1996 to the extent that it criminalises acts committed by a man or between men which, if committed by a woman or

[37]PlanetOut, 'South Africa Sodomy Law Stricken' (*PlanetOut*, October 1998) <http://www.glapn.org/sodomylaws/world/south_africa/sanews004.htm> accessed January 2011.

[38] *NCGLE v. The Minister for Justice* CCT 11/98.

[39] Ibid 30, para 28.

> between women or between a man and a woman, would not constitute an offence.[40]

The rationale of this approach can be set out at follows. The court opined that homosexuals are a vulnerable minority in society and sodomy laws criminalise their intimate relations.[41] This devalues and degrades them and violates their fundamental right to dignity even though both parties are consenting and are not harming anyone.[42] 'The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives…This intrusion on the innermost sphere of human life violates the constitutional right to privacy.'[43] The judge further commented that open and free democratic societies around the world are increasingly turning away from sexual orientation discrimination.[44] The fact that the law, he said, also violates dignity and privacy merely strengthens the conclusion that the discrimination against them is unfair.[45] Sachs J (concurring) felt that human rights are better approached in an integrated fashion. He said that the 'violation of equality by laws is all the more egregious because the offences also violate the right of privacy by touching the deep, invisible and intimate side of people's lives.'[46]

We can link this declaration to the US decisions of *Roe v. Wade*[47], *Eisenstadt v. Baird*[48], *Bowers v. Hardwick*[49] and *Griswold v. Connecticut*.[50] The right described in those cases as inherent in the due process guarantee is the promise that 'a certain private sphere

[40] Ibid 4.

[41] Ibid 28, para 26(c).

[42] Ibid 28, para 26(b).

[43] Ibid 25, para 23.

[44] Ibid 39, para 39.

[45] Ibid 29, para 28.

[46] Ibid 11, para 114.

[47] *Roe v. Wade* 410 U.S. 113 (1973).

[48] *Eisenstadt v. Baird* 405 U.S. 438 (1972).

[49] *Bowers v. Hardwick* 478 U.S. 186 (1986).

[50] *Griswold v. Connecticut* 381 U.S. 479 (1965).

of individual liberty will be kept largely beyond the reach of the government.'[51]

Sachs J went on to say that inequality established though differentiation perpetuates disadvantage as well as group-based differential treatment.[52] He opined that what is statistically normal is no longer a basis for establishing what is legally normative and that the Constitution requires the acknowledgement of people's variability and the affirmation of equal respect and concern for all people as they are.[53] Several points are worthy of note in relation to this decision. This decision could be said to be peculiarly South African because of the nation's Constitutional text and because the decision looks at the norms underpinning the State.[54] These are very much emerging norms in a new post-Apartheid State which is heavily based on equality as the guiding State issue. The South African guarantee of homosexual equality goes beyond the formalist and proceduralist version embodied in the US Constitution.[55] Any form of discrimination against a group of persons that amounts to a disadvantage is unfair and entrenches inequality.

Botswana and the Right to Gay Sex

The case of *Kanane v. Botswana*[56] was decided just three weeks after the *Lawrence*[57] decision in the US, which shows that fashionable Western values (in pronouncing that sodomy laws are contrary to the core principles of a free and democratic society and inconsistent with the Western constitutional conception of equality) are not always defensible. In *Kanane*, there was a question of whether two sections of the Penal Code dealing with 'unnatural offences' and 'indecent practices between men' were

[51] Linda McClain, 'The Poverty of Privacy' (1992) 3 Colum. J. Gender & L. 119, 128.

[52] *NCGLE v. Minister for Justice* (CCT 11/98) 123, para 125.

[53] Ibid 131, para 134.

[54] In this regard, Theunis Roux writes that the purpose behind the adoption of South Africa's Final Constitution is to establish a society based on democratic values. He adds that the expectation is that the Final Constitution's commitment to democracy will permeate all social relations and inform all South Africans dealing with each other. Theunis Roux, *Constitutional Law of South Africa* (2nd edition, Juta & Co. 2008) 10-22.

[55] Katherine M. Franke, 'The Domesticated Liberty of Lawrence v. Texas' (2004) 104 Colum. L. Rev. 1399.

[56] *Kanane v. Botswana* 1995 BLR 94 (High Court).

[57] *Lawrence v. Texas* (2003) 539 U.S. 558.

contrary to the Constitution. In the High Court it was believed that homosexuality was not part of the African culture despite being practiced by some Africans, but a practice brought in by whites which only white African states dealt with.[58] This was an extraordinary statement. Politicians in Botswana defended sodomy laws based on the belief that homosexuality represents both the antithesis of Botswana culture and reflects Western values. The then Assistant Minister of Labour and Home affairs, Olifant Mfa, claimed that homosexuality is 'barbaric, whether you argue it from the perspective of religion or culture.'[59]

On subsequent appeal to the Supreme Court, the majority held that public opinion was the grounding norm there and held that society was not ready to change to accept the decriminalisation of homosexual sodomy.[60] Teabutt J for the Court went on to say that it is the task of parliament to decide what is criminal and it must take a moral position in tune with the perceived public mood. Public interest, he said, is a 'huge consideration in areas of public concern and that indications of society actually show a hardening of the contrary attitude to the liberalisation of sodomy laws.'[61] Essentially he concluded that gay men and women do not represent a class that require Constitutional protection at this stage.[62]

In synthesis, this paper has outlined that in terms of gender identity and sexual orientation as forms of free expression, South Africa recognises such a freedom in relation to the equality of all persons, Ireland historically refused to recognise it because it

[58] Mwaikasu J, in a lengthy and detailed judgment, held that the sections of the Penal Code complained of did not violate any of the provisions of the Constitution and were in accordance with them. The learned judge was of the view that the application essentially concerns the place and extent of public morality or moral values in the criminal law of a given society. In his view, the criminal law has as its basis the public morality or moral values or norms as cherished by members of the society concerned, and is influenced by the culture of the moment of such society. Such moral values regulate the conduct of individual members of society for the good of society and provide a conducive environment for the exercise and enjoyment of the individual rights and freedoms of members of such society. He added that the conduct of any person that is seen to threaten the fabric of a given society is what falls to be proscribed under the criminal law of the society concerned. In this regard, the identification of any such moral values or norms as being of importance to the welfare of society as a whole and for the promotion of the dignity, rights and freedoms of its members is the preserve of the society concerned. See Crim Trial No F94/1995 (unreported). Cited from E.K Quansah, 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2004) 4 AHRLJ, 213 – 214.

[59] Aubrey Lute, 'Homosexuality is rubbish', *The Botswana Gazette* (Botswana, 24-30 May 2006).

[60] However, see Ronald Dworkin, 'Lord Devlin and the Enforcement of Morals' (1965) 75 Yale L.J. 986 arguing that the problem is that public opinion is indistinguishable from prejudice founded upon ignorance.

[61] *Kanane v. Botswana* (n 56) 25.

[62] *Kanane v. The State* 2003(2) BLR 64 (CA) at 8.

contradicts Catholic teachings and Botswana also failed to recognise such a right because it felt society as a whole was not ready for it. But what of the United Kingdom and, perhaps most importantly, the United States? The latter takes a markedly different view by dealing with traditions and conscience.

America and the Right to Gay Sex

'[T]he particular form of abomination which shocked the sensibilities of our forefathers…'

The above words, stated by the Kansas Supreme Court in a 1925 sodomy case,[63] sum up the historical attitude of the Anglo-American legal system toward non-procreative homo-eroticism. The psychological discomfort of repressed or moralistic individuals from centuries before created a jurisprudence relegating the enjoyment of non-procreative physical intimacy to the status of criminality.[64] Those forefathers' attitudes controlled this legal system for a long time. Sodomy laws in the United States, laws primarily intended to outlaw gay sex, were historically pervasive. While they were often originally intended to outlaw sex acts between homosexuals, many definitions were broad enough to make certain heterosexual acts illegal as well.[65]

In *Bowers v. Hardwick*,[66] the Supreme Court addressed the issue of whether the US Constitution confers a fundamental right on homosexuals to commit sodomy and therefore invalidating laws criminalising it. Justice White was unwilling to find such a right and referred to 'the laws of the many States that still make such conduct illegal and have done so for a very long time.'[67] He said that the prescriptions against such acts have ancient roots and the claim that such a right is deeply rooted in the Nation's history and traditions or implicit in the concept of ordered liberty is, at best, facetious.[68] Employing what one writer described as 'the scornful

[63] *State v Hurlbert* 118 Kan. 362, 234, 945.

[64] George Painter, 'The Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States (1999-2005)' (*Sodomy* Laws, 25 September 2007) <http://www.sodomylaws.org/sensibilities/pennslvania.htm> accessed January 2007.

[65] Ellen Ann Andersen, *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (University of Michigan Press 2006) Chapter 4.

[66] *Bowers v. Hardwick* 478 U.S. 186.

[67] Ibid 190.

[68] Ibid 191-194.

tone of a locker-room conversation,'[69] White J said that Georgia was justified in outlawing private, consensual sodomy because of the 'presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.'[70] This, he opined, was enough. The concurring opinion of Chief Justice Warren Burger noted that condemnation of sodomy is firmly rooted in Judeao-Christian moral and ethical standards. To strike down the law 'would be to cast aside millennia of moral teaching.'[71] It was on this basis of ancestors' moral standards that a twentieth-century constitutional decision on sodomy laws was based.

In his dissenting opinion, Blackmun J, felt that the case was actually not about the right to gay sex at all, but the right to be let alone. 'It would be revolting if reasons for laws have long vanished and they only persist from blind imitation of the past.'[72] He stated that the Constitution recognises a private sphere which is protected from State intrusion and also protects rights that are associated with it because these are central to people's lives. Blackmun J criticised the majority for having failed to recognise the fundamental interest people have in controlling the nature of their intimate relations. 'The right of people to conduct gay sex in their own home seems to be at the very heart of the Constitution's protection of privacy.'[73]

Marshall J, concurring in dissent, opined that not allowing people to be socially diverse disintegrates social organisation.[74] He also commented that Judaeo-Christian values proscribed homosexual acts was not an adequate justification for such a law.[75] He argued that 'mere public animosity or intolerance cannot constitutionally justify the deprivation of one's physical liberty.'[76] The fact that the governing majority, he went on, traditionally views a particular practice as immoral is not sufficient to prohibit homosexual

[69] David G. Savage, *Turning Right* (John Wiley & Sons 1992) 93.

[70] *Bowers v. Hardwick* (n 66) 196.

[71] Ibid 197.

[72] Oliver Wendell Holmes, Jr., 'The Path of the Law', (1987) 10 Harv. L. Rev. 457, 469, quoted in *Bowers v. Hardwick* (n 66) Blackmun, J., dissenting).

[73] Ibid para II(B).

[74] Ibid 199.

[75] Ibid para III.

[76] Quoting with approval *O'Connor v. Donaldson* 422 U.S. 563, 575 (1975).

sodomy.[77] He concluded that it is unacceptable to view gays as not having the same interests in liberty as heterosexuals.[78] The majority's conflation of sodomy with gay sex underscores and helps perpetuate sodomy as a gays-only act which discriminates against homosexuals publicly and privately.[79]

Lawrence v. Texas[80], unlike *Bowers* involved a Statute that was not orientation neutral and strictly prohibited male sex. Kennedy J, writing for the Supreme Court, rejected the *Bowers* decision.

> Our obligation is to define the liberty of all, not to mandate our own
> moral code. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.[81]

He observed that the provision at issue here was born out of animosity towards the class affected and had no relation to a legitimate governmental purpose.[82] He added that the Constitution promises a realm of personal privacy and criminalising gay sex demeans homosexuals' existence.[83]

The breadth of this landmark case is extraordinary. The Supreme Court declared all sodomy laws unconstitutional, putting an end to sodomy laws. The decision's sweeping language about gay people's equal rights to liberty marked a new era of legal respect for the gay community according to Lambda Legal.[84] *Lawrence v. Texas* is considered the most significant gay rights breakthrough of our time. However, the Court relied on a very narrow, geographised and domesticated form of liberty so it may not be the robust

[77] *Bowers v. Hardwick* (n 66) 199, para I. See also *Loving v. Virginia*, 388 U.S. 1 (1967).

[78] Ibid.

[79] *Franke* (n 55).

[80] *Lawrence v. Texas* (n 23).

[81] Ibid 3.14.

[82] Ibid 3.16.

[83] Ibid.

[84] Lambda Legal, '*Lawrence v. Texas*: Summary' <http://www.lambdalegal.org/in-court/cases/lawrence-v-texas.html> accessed January 2011.

conception of sexual expressive freedom some feel it is. Heinze[85] wrote that tenuous and opaque criteria such as deep-rootedness in the history and tradition and implicitness in the concept of ordered liberty do not plague more modern formulations of Article 8 ECHR. He opines that this criterion is more antipathetic than sympathetic to the anti-majoritarian foundations of human rights.

Conclusion

There is little doubt that rights and freedoms in general are something society cannot not want, to apply a concept from Gayatri Spivak.[86] Freedom of expression is essential in enabling democracy to work as well as public participation in decision-making. Freedom of expression is thus not only important for individual dignity but also to enable participation, accountability and democracy.[87] Progress has been made in recent years in terms of securing respect for the right to freedom of expression. The right to freedom of expression upholds the rights of all to express their views and opinions freely. It is essentially a right which should be promoted to the maximum extent possible given its critical role in democracy and public participation in social life.[88]

Human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute an entrenched global pattern of serious concern.[89] They include extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights. International human rights law recognises the interrelationship of the rights to freedom of expression, assembly, and association.[90] This is very pertinent to homosexual people, whose rights are often

[85] Eric Heinze, '*Sexual Orientation: A Human Right. An essay on international human rights law*' (Martinus Nijhoff Publishers 1995).

[86] Gayatri Spivak, '*Terror: A Speech After 9-11*' (2004) Boundary; 31 81.

[87] The Human Rights Education Associates <www.hrea.org> accessed January 2011.

[88] Ibid.

[89] Dr. Agnès Callamard, 'Defending the Right to Express Sexual and Gender Identity: Article XIX press release' <http://www.article19.org/pdfs/press/defending-the-right-to-express-sexual-and-gender-identity.pdf> accessed January 2011.

[90]The Icelandic Human Rights Centre, 'The Right to Freedom of Expression and of Religion' <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/substantivehumanrights/therighttofreedomofexpressionandreligion/> accessed January 2011.

violated on multiple dimensions. In many countries, the mere visibility of gay people acquires a political dimension (from simply disclosing their non-normative sexual orientation or gender in public to voicing a request for equal rights and non-discrimination) because it exposes them to violence and sometimes death, effectively denying their rights and inhibiting their ability to express themselves publicly.[91]

It took until the twenty-first century for the legal nightmare that began in the colonies in the seventeenth century to be vanquished with an awakening from the gentle hand of liberty.[92] The American cases dealt with above represent a story of shifting societal attitudes towards homosexuality, sex, and gender. The courts here more or less passively identify a set of personal activities in which individuals may engage free from government regulation. It now appears that the right of freedom of expressing one's gender identity and sexuality through engaging in consensual, adult, intimate homosexual relations is free from such regulation. In *Lawrence*, Kennedy J uses broad, sweeping language when saying that

> Freedom [of expression] extends beyond spatial boundaries. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct. The State cannot demean homosexuals' existence or control their destiny by making their private, consensual, intimate sexual conduct a crime.[93]

This soaring language recognises the dignity and respect attributable to homosexuals.[94] South African jurisprudence tells us that their constitution requires an acknowledgement of the equal worth and value of all individuals in society. Ackermann J points to the stigmatic penalties of sodomy laws which devalue and degrade gay men. Kennedy J too also recognises such stigmatic consequences of sodomy laws but does so in a manner far narrower than Ackermann J. The former highlights the stigma arising out of criminal convictions while the latter ties this stigma to the mere existence of sodomy laws.[95]

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[91] *International Gay and Lesbian Human Rights Commission* (n 13).

[92] *Painter* (n 64).

[93] *Franke* (n 55).

[94] Ibid.

[95] Ibid 3.68.

Previously, when the courts considered the legal status of gay men, they approached the spectre of homosexual sex with a horror ordinarily reserved for cases of incest.[96] But after the *Lawrence* decision announced that the criminalisation of homosexual sodomy is unconstitutional because it interferes with gay people's rights to enter into serious domestic relationships, gays are no longer seen as 'sodomitic outlaws, but instead as civilised domestic subjects.'[97]

In the jurisdictions this paper has dealt with, the underlying rationale for the historical prohibitions on homosexual sodomy was grounded in the text of either Statute or Constitution. Constitutions represent the hopes, aspirations, values and priorities of societies, concerning issues of fundamental importance to the healthy development of the nation.[98] Many constitutions have absorbed the changed, contemporary outlook towards homosexual relationships and intimate relations. It is to our constitutions that we must turn to realise the equality of all.

At this juncture, it is important to quote a decision of Aguda JA from the Botswana case of *Petrus v. The State*[99] where he emphasised that, 'the Constitution is not a lifeless museum piece and that the courts must continue to breathe life into it as the occasion arises to ensure the healthy growth and development of the State.'[100] He furthered that construction of constitutional provisions may meet the demand of a previous society but may not meet those of a new one. Judges must make the constitution grow and develop to meet society's demand as it develops and this as part of a wider and larger human society governed by an acceptable concept of human dignity.

[96] Ibid 3.70.

[97] Ibid, 3.73.

[98] Dr. Neville Cox, Dr. Neville Cox, Lecture on Comparative Civil Rights, Trinity College Dublin 5 November 2008.

[99] *Petrus v. The State* 1984 BLR 14.

[100] Ibid.