Rights-based Struggles Example

Rights-based struggles have proved counterproductive in contexts of sexuality. The importance of rights, and more specifically, civil liberties, can be seen as the legal and political expression of our society. Philosophical notions of autonomy, self-fulfilment, and self expression, in terms of sexuality, have made privacy interests relevant to freedom of action and lifestyle, not merely to freedom from interference.

[1] This essay focuses on rights and notions of 'liberty,' in their most general sense, that being, non-interference by others with one's freedom of choice and action. These notions are linked to autonomy and dignity, but as with sexuality, these notions are not determinative of a person's entitlement to self respect.

[2] In order for clashes to be resolved, one's liberty must be policed by law and social regulation. In this way, one's physical and moral integrity will be protected.

Here, we talk of civil liberties, in the context of sexuality, which defines the relationship between the State and its citizens; freedom against discriminatory treatment. As Feldman maintains, this 'marks a step beyond simple liberties, which are essentially rights not to be interfered with ... Civil liberties impose positive obligations on the

State to assist people in protecting or exercising liberties.'

[3] Human Rights guarantee certain rights to all who find themselves within their jurisdiction, they are the qualities people have intrinsically as human beings.

[4] This essay discusses sexual freedom and, in light of various examples, which are non-exhaustive of this wide area of discussion, examines the perception of disapproved acts and the discrimination against people of particular sexual orientation. The discussion of rights, from a jurisprudential perspective, can be divided into the normative and the analytical. Within the normative jurisprudential standpoint comes theories of justice, expounded by the libertarian view and the liberal view. The libertarian view, such as Nozick's, is that man's rights are inviolable.

[5] The liberal view espoused by Dworkin starts from the premise of equal concern and respect for individuals, as a fundamental right.

[6] Conversely, the value of the analytical approach to rights refers to the clarification of words used in legal relations so that the solutions to legal problems are easier and more certain. Hohfeld saw that the word 'right' can encompass the concept of right, of privilege, of power, and of immunity.

[7] Within the analytical jurisprudence of rights is also the 'will theory,' suggested by Hart, versus the 'interest theory,' suggested by MacCormick.

[8] For Hart, rights are legally protected choices and for MacCormick rights protect certain interests. Although, all are significant when discussing rights in the context of sexuality, for the purposes of limitations in word count, the normative jurisprudence approach to rights will form the subject matter of the ensuing debate. The question presupposes the existence of rights and implies the desirability of the protection of rights. It is necessary to consider whether this belief is unchallenged.

More specifically, it is necessary to establish in what circumstances, if any, rights can be justifiably overridden. Although there is much disagreement between liberals, all agree fundamentally, that society should provide a framework within which the individual can exercise his or her moral capacity.

However, the problem comes when two legitimate rights conflict and a choice has to be made. In jurisprudential terms, this is frequently referred to as rights being 'trumped.' John Stuart Mill recognised the problem and, within his book, entitled On Liberty, he stated that individual rights should only be trumped when the exercise of them would harm or interfere with the rights of others, but beyond this, there would be no trumping of people's rights, as this would reduce the quantum of utility in society.

[9] This principle formed the foundation of two important official reports: the Report of the Committee on Homosexual Offences and Prostitution (the Wolfenden Report)[10] and the Report of the Committee on Obscenity and Film Censorship (The Williams Committee Report).[11] However, it has emerged through differing philosopher's works, that there are considerable differences as to the meaning of harm. To Devlin, society must trump the individual's rights to prevent the decay of society's moral foundations.[12] Therefore, for him, the right to sexual freedom between two consenting male adults, for example, in private, must be restricted even though no physical harm is caused to others, because the harm is being done to the morality of society. Devlin asserted that the proper role of the law was protector of established moral standards, rather than an instrument for changing moral views. This therefore highlights the question of whether law should punish 'wickedness' practised in private, or whether there is a realm of private immorality which the law should not concern itself with. This is protected by the right to respect private life under Article 8(1) of the Convention, the same is true of a person who gives expression to the sexuality which is part of his or her sexual constitution. However, Article 8(2) restricts practical expressions of that respect in order to protect health and morality, so long as any interference with the right is in accordance with the law and is necessary in a democratic society.

There is therefore scope for argument about these demands and the extent to which it necessitates interference with one's sexual freedom. In Norris v Ireland, the Court held that Ireland's total ban on homosexual acts violated

the respect for private life and was disproportionate to aims which could legitimately be pursued under Article 8(2).[13] Furthermore, in Sutherland v United Kingdom, it was decided that the ages of consent for homosexuals and heterosexuals should be equalised at 16 by the Sexual Offences Act 2000.[14] These principles now form English Law in connection with the Human Rights Act 1998. Of relevance to the issue of privacy, are the recent incidents in politics, such as Mark Oaten's announcement of resignation from the Liberal Democrat party over allegations of a relationship with a rent boy (or male prostitute) and Simon Hughes's revelation regarding his homosexuality. These vexed questions are at the centre of a long standing debate, known as the 'Hart-Devlin' debate.[15] The issue is whether conduct such as homosexual acts, prostitution, sodomy and sadomasochism, in other words, sexual morality, can be practised in private, or whether the law should enforce the general sense of morality and require that the law punish it. Stephen J held an extreme view of pro-punishment, in which he felt that society should uphold its moral code as an end in itself and should persecute the grosser forms of that vice.[16] Here there is a problem in showing any objective moral standards. Although, Devlin contends that those practicing such sexual acts in private admit it to be evil, the current writer is not in agreement. Surely this is not true of homosexuality or prostitution. It is also questionable whether the law would be the correct medium with which to enforce such views, as legal coercion would seemingly fail to do justice and would more likely strengthen the will of those opposing the punishment code. Devlin specifically favoured pro-punishment in this context, although his reasoning was that it should be punished for causing harm to society.

Devlin asks and answers three questions: has society the right to pass judgements on morals? He answers yes, because society is a community of common thought and ideas, and if those bonds are relaxed, then the members drift apart. He then asks, to what extent should society use law to enforce its moral judgment? He says that this is to preserve its integrity. Finally, he asks, in what circumstances should the State exercise its power? He says that the moral judgements of society are the standards of the reasonable man and that the State should exercise its power to enforce those standards when the reasonable man feels disgust, when the vice is so abominable that its mere presence is an offence. The present writer is however inclined to reject Devlin's theory as a shared morality in the community is questionable and perhaps a more accurate suggestion would be a toleration of different moralities, that being liberalism. Devlin's theory is also questionable to the extent that: what sort of freedom

allows one to do what their neighbours strongly disapprove of? A more accurate perspective in the view of the current writer is that of the 'harm principle,' as society's view of morality might be wrong. In 1957 the Wolfenden Committee said that there was a sphere of private morality which was not the law's concern.

Neither homosexuality, nor prostitution, should be illegal if they were private, only if they were directly harming those not involved should they be punished. The Sexual Offences Act 1967 followed suit. However, even Hart has not totally accepted this view. He talks of defence to crimes which are consented in serious violence such as paternalism. He says that society is justified in making an offence any conduct which it considers harmful for him, but Hart does not discuss paternalism to the extent of saying what is included, although we presume, homosexuality prostitution etc. are not included. Presumably, this would be limited to physical and psychological harm, such as drug abuse. The area of private, sexual morality is for Hart, not the law's concern, so long as it is in private and does not offend the rules of public decency by being public, it should not be punished even if other members of society are disgusted or offended. It is therefore questionable how Hart would view sadomasochism, as it is intended to cause harm, albeit, consented, private harm.

Furthermore, paedophilia amounts to indecent assault in English law, even if it does not cause bodily harm. This is because of the need to protect children from exploitation.

The question in relation to sexual orientation in private, depends on whether the values of society in Devlin's sense are more important that the idea of freedom of values and ideas expressed by Hart. Certainly, Blackstone's statement shows him to be on Hart's side, feeling that such 'wickedness' should not be punished and, given recent legislation and case law, this seems to be complacent with the views of out emerging society. Although, there is one extraordinary provision within the Sexual Offences Act 1967, which states that a homosexual act is not in private when more than two people are present. This relates to the concern of equal treatment for men and women, and can be seen as a violation of Article 8 and Article 14. Indeed, the Home Office has recognised this and states that this requirement be abolished.[17] Dworkin refers to the political neutrality of the State and therefore believes that the State will treat everyone with equal concern and respect.[18] He speaks of the fact that decisions

are taken on the basis of majoritarian democratic processes, on the basis of utility, but subject to the proviso that the basic rights of the minority are not be infringed.

The rights to which Dworkin is referring to are those held as fundamental human rights. In order to avoid the excesses of utilitarianism, Dworkin refers to 'protected interests,' but provides no indication of what these entail. It is submitted that these would refer to The European Convention on Human Rights which is incorporated in domestic law, by way of the Human Rights Act 1998. Certainly, not all rights can be overrode with legitimate justification, particularly those rights enshrined in the European Convention on Human Rights. Thus, Dworkin's theory allows for State intervention in the exercise of some liberties in order to advance overall social welfare., not only the personal preferences of individuals for their own good but also the external preferences with regards to others. Dworkin would view any restrictions on rights in sexuality as being on policy grounds, by virtue of Article 15 of the Convention, whereas, the current writer, would regard other restrictions, such as Article 17, which provides that rights contained in the Convention cannot be pleaded in order to defeat the exercise of rights by others, as existing on notions of principle. Hart criticises Dworkin's theory in terms of these external preferences, which might tip the balance in favour of a right, such as the right to sexual freedom of homosexuals. Hart suggests that it is not the ascertaining of the aggregate good through the wishes of the majority that is at fault, but rather the wishes of the majority themselves. Dworkin does state that the principle of utility has a limited role in the balancing of 'alienable' liberties. In accordance with the absolutist view, some fundamental rights will never change in content, meaning that utilitarianism cannot account for the existence of such rights since the wishes of the majority may result in an impairment in such rights.

Nevertheless, the relativist standpoint, which states that rights may change with views and the dictates of society, means that the principle of utility will continue to have a role in the content of such rights. Thus an absolutist would regard homosexuality as being denied by utilitarianism, whereas a relativist would say that such a right has evolved in recent years with the changing views of society and that the principle of utilitarianism has given it recognition. Certainly, it is submitted that even in relation to absolute rights, the principle of utility has contributed to the advancement of certain rights in accordance with the general views of society, as subjected to

the majority rule. This notion coordinates with the next section of this essay which discusses the discriminatory practices in employment against those people whose sexual orientation has, until recently, been scarcely understood.

The infringement of the rights of such employees are commonplace, as Stonewall, a national lobbying organisation on behalf of lesbians, bisexuals and gay men, have found.[19] In one survey of 2,000 employees in 1993, 16% of respondents experienced discrimination, 48% had been harassed because of their sexual orientation and 68% felt they had to conceal their sexual orientation from co-workers. However, the changing views of society are perhaps an indication of the recent Sexual Orientation Regulations 2003 and indeed, even the Human Rights Act 1998. Until recently, there were no rights of protection based on sexual orientation in discrimination law, thus the 'equality of misery.' Certainly, no rights conforming to equality laws existed for homosexual or lesbian employees facing discrimination in the European Union, as 'sexual orientation,' was not included within section 1 of the Sexual Discrimination Act 1975: Discrimination on grounds of sexual orientation is not discrimination on the ground of sex within the meaning of the Sexual Discrimination Act 1975. A person's sexual orientation is not an aspect of his or her sex[20]. or Article 5 of the Equal Treatment Directive. Certainly, as late as 1998 in the case of Grant v South-West Trains, the European Court of Justice held: While the European Parliament … has indeed deplored all forms of discrimination based on a person's orientation, it is nevertheless the case that the Community has not yet adopted rules providing for such equivalence.[21] Furthermore, even if this jurisdictional hurdle could be overcome, there was still the evidential requirement of the judiciary. This reasoning was on the basis that the correct approach for the judiciary was to compare a homosexual's treatment against a hypothetical comparator, that being a homosexual in the same situation. It thereby followed that discrimination would only be recognised where a homosexual comparator would be subjected to the same discrimination in the same circumstances. The case of Smith v Gardner Merchant concerned a gay barman who had to prove that a lesbian would be subjected to the same harassment. This intractable view of the judiciary initially gained added support in the recent case of Secretary of State for Defence v MacDonald.[22] The case concerned Mr MacDonald who was employed by the Royal Air Force.

Following a rigorous vetting procedure for a new position, under which he was asked if he was a homosexual, he confirmed that he was a homosexual, which led to his compulsory resignation under Queen's Regulations 2905. The man claimed that he was sexually harassed and unlawfully dismissed on the grounds of his sexuality. The issue of comparators was discussed: If comparators are relevant, the issue is not as between male and female simpliciter but between a male or female homosexual and a male or female homosexual in order to determine not whether one homosexual is being treated less favourably than another but whether homosexuals of either gender in this context are being treated less favourably than heterosexuals of the opposite gender which is the true comparator in the context of sexual orientation.[23] The question of comparators has seen a divergence in terms of the sexuality and gender if the comparator.

Moreover, in MacDonald it was suggested that in serious cases of discrimination, based on sexual orientation, no comparator should be required: 'In circumstances where the behaviour complained of is both 'blatantly unacceptable' and 'sexually related' there is no need for a comparator.' With the passing of the Human Rights Act 1998, the European Convention on Human Rights had impacted on domestic equality legislation, meaning that sexual orientation should be included within the term 'sex' as the basis for a claim under the Sex Discrimination Act 1975. Certainly, it is submitted that the investigation into Mr MacDonald's affairs were contrary to Article 8; a right to respect private life. The justification for this decision came by way of Salguierio da Silva Mouta v Portugal, where Article 14 was interpreted as extending to a right of action for discrimination based on sexual orientation. Nevertheless, during this time, there was some controversy as to how the law should be viewed, since the Court of Session regarded the reasoning as flawed, preferring the conclusions reached in earlier cases: On the whole matter I am satisfied that this statute and in particular this provision is concerned with gender and not sexual orientation. Section 3(1) of the 1988 Act does not in my opinion enable or oblige us to adopt any other reading.[24] However, there have been recent developments in the European Union which attempt to eradicate such views and treatment.

The rights of victims of sexual orientation discrimination has since been implemented in the UK Employment Equality (Sexual Orientation) Regulations 2003. It will be interesting to see how successfully the new regulations

fulfil their intended role. Employees may, for example, be reluctant to pursue claims against their employers due to fear of stigmatisation, victimisation or harassment, despite legal protection being provided. However, coupled with the growing recognition and influence of the Human Rights Act 1998, it is submitted that it can only lead to more positive results. In conclusion, to answer the question posed, the recent legislative changes in UK law have conferred more rights to different types of sexual orientation, although, neither English Law nor Community Law in the past directly protected against discrimination on the grounds of sexual orientation. For example, it is true that for many years there was a total ban on all homosexual activity between men, regardless of age or consent. 'The more liberal sexual atmosphere of the 1960s,' was, however, translated into English Law by way of the Sexual Offences Act 1967.[25] The Sexual Offences Act 1967, by virtue of Section 1(1) provided that 'a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years.' This age was however reduced in 2001, to 16. However, the 1967 Act maintained criminal liability for buggery by members of the armed forces and members of the crew on board a merchant ship. This was held not to grant an admissible argument by way of the European Convention on Human Rights due to the need not to prevent disorder in the army.

However, this criminal liability is now said to be demolished by way of the Criminal Justice and Public Order Act 1994. Increased rights in terms of sexuality, have also been seen from case law, such as in P v S and Cornwall County Council, in which Community rules on sex discrimination were held to protect transsexuals.[26] The European Court of Human Rights has held that taking action against his or her sexual orientation infringes the right to respect their private lives under the European Convention on Human Rights, Article 8(1). Sexual orientation is now being regarded more suitably as a right of a person's worth and identity. However, the title in the question remains true to some extent. For example, the Human Rights Act 1998 protects private life only against public authorities, by virtue of Article 8, while Article 14 does not offer a free standing right to be free from discrimination. Therefore, as Feldman notes, there may therefore still be cases in which it is permissible to dismiss a person by reason of their sexuality.

There are also weaknesses within Article 10 in that it permits states to justify interference if it is prescribed by law

and is necessary in a democratic society. Feldman encourages the UK Government to change free standing anti-discrimination rights under Protocol No 12 and to include it in the European Convention on Human Rights, the Human Rights Act, 1998 and at the same time, implementing the EU Framework Directive on Discrimination. Feldman suggests the possibility of the UK contravening its free-standing non-discrimination right under Article 26 on the International Covenant on Civil and Political Rights, although at present there is no judicial remedy for that breach. However, needless to say, alongside the legal medium employed to help afford more rights to employees of various sexual orientation, society in cooperation, needs to acknowledge and understand homosexuals in a respectful and fair way . **Bibliography** Articles M Rubenstein, Industrial Relations Law Reports, 2000, 29 (11), 745 Wolfenden Report Cmd 247 London: HMSO 1957, examined further. The Williams Committee Report Cmnd 7772 London: HMSO 1979 Home Office Setting the Boundaries vol 1 102, paras 6 Books D Feldman, Civil Liberties and Human Rights in England and Wales, Oxford University Press, 2nd edition, 2002, p 533 R Dworkin, The Theory of Practice of Autonomy, Cambridge University Press, 1998 ch 1 C S Nino, The Ethics of Human Rights, Oxford Clarendon Press, 1991, ch 1 Nozick, Anarchy, State, and Utopia, Basic Books 1977 Dworkin, Ronald M. (1973). “Taking Rights Seriously”, in Simpson, AWB, ed, Oxford Essays in Jurisprudence, Second Series, Oxford: Clarendon Press, 202; reprinted in his Taking Rights Seriously, revd edn, London: Duckworth, 1978, 184. Hohfeld, Wesley Newcombe (1919). Fundamental Legal Conceptions as Applied in Judicial Reasoning, ed Cooke, WW, New Haven: Yale University Press MacCormick, Neil (1977). “Rights in Legislation”, in Hacker, PMS & Raz, J, eds, Law, Morality and Society: Essays in Honour of HLA Hart, Oxford: Clarendon Press, 189. Mill, John Stuart (1969 [1861]). Utilitarianism, in Robson, J, ed, The Collected Works of John Stuart Mill, Vol 10, Toronto: Toronto University Press; London: Routledge & Kegan Paul, 203. Hart, H.L.A. (1979). “Between Utility and Rights”, in Ryan, A, ed, The Idea of Freedom: Essays in Honour of Isaiah Berlin, Oxford: Clarendon Press, 77; reprinted in his Essays in Jurisprudence and Philosophy, Oxford, Clarendon Press, 1983, 198 Hart, H.L.A. (1994). The Concept of Law, 2nd edn, with posthumous postscript, ed Bulloch, P & Raz, J, Oxford: Clarendon Press Devlin P. The Enforcement of Morals Oxford University Press (1965). Cases P v S and Cornwall County Council Case C 13/94 [1996] ICR 795, CJEC Grant v South West Trains [1998] IRLR 206 Secretary of State for Defence v MacDonald [2001] IRLR 431 Smith v Gardner Merchant [1998] IRLR 510 Norris v Ireland Eur Ct HR Series A ~No 45Judgement of 22 October 1981, 4 EHHR 149 Sutherland v United Kingdom Eur Commn HR App No 25186/94 Report of July 1997 Websites

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Footnotes

[1] D Feldman, Civil Liberties and Human Rights in England and Wales, Oxford University Press, 2nd edition, 2002, p 533

[2] R Dworkin, The Theory of Practice of Autonomy, Cambridge University Press, 1998 ch 1

[3] Op Cit Feldman at p 5

[4] C S Nino, The Ethics of Human Rights, Oxford Clarendon Press, 1991, ch 1

[5] Nozick, Anarchy, State, and Utopia, Basic Books 1977

[6] R Dworkin, Taking Rights Seriously, Harvard University Press, 1977

[7] Hohfeld, Wesley Newcombe (1919). Fundamental Legal Conceptions as Applied in Judicial Reasoning, ed Cooke, WW, New Haven: Yale University Press.

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