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CONTENTS

Page

THE BUGGERY LAW IN JAMAICA: SHOULD IT BE REMOVED OR REPEALED?

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Introduction

The Committee on Economic, Social and Cultural Rights considered the combined third and fourth periodic report of Jamaica on the implementation of the International Covenant on Economic, Social and Cultural Rights and concluded that consensual same-sex relations continue to be criminalized under the Offences Against the Person Act, thus perpetrating discrimination against homosexual, bisexual and transsexual persons in all spheres of life, including their enjoyment of economic, social and cultural rights (art.2).

Also While noting the amendment to Chapter III of the Constitution on fundamental rights and freedoms with the adoption of the Charter of Fundamental Rights and Freedoms in April 2011, the Committee is concerned at the narrow scope of prohibited grounds for discrimination, which is limited to "being male or female, race, place of origin, social class, colour, religion or political opinions", thus failing to prohibit discrimination on the basis of other grounds, such as sexual orientation, disability, and health.

Sodomy laws, which authorize the government to dictate what behavior is appropriate in the bedroom, have historically been extremely controversial. These laws criminalize either same-sex acts or certain gender-neutral, non-procreative sexual conduct. For the past third of a century, however, sodomy laws have rarely been enforced. Instead, they were used mainly as legal justification to discriminate against homosexuality.

It is in this context that the buggery law in Jamaica has to be viewed and whether it should be removed or repealed from the law books in Jamaica. The removal or repeal of the buggery law some would argue is only a peg of the larger

worldview of the post-modern movement and has greater implications that would affect not only the social fabric of the Jamaican society but also has serious health implications. It is against this background that the removal or repealing of the buggery or sodomy laws will be examined in this paper.

In English law "buggery" was first used in the Buggery Act 1533, while Section 61 of the Offences against the Person Act 1861, entitled "Sodomy and Bestiality", defined punishments for "the abominable Crime of Buggery, committed either with Mankind or with any Animal". The definition of "buggery" was not specified in these or any statute, but rather established by judicial precedent.[1] Over the years the courts have defined buggery as including either

1. anal intercourse or oral intercourse by a man with a man or woman[2] or
2. vaginal intercourse by either a man or a woman with an animal,[3]

However, any other form of "unnatural intercourse",[4] the implication being that of anal sex with an animal, would not constitute buggery.

The aforementioned position is still the position in Jamaica, as our law is derived from the laws of England, and our legislation is modelled off their Offences Against the Person Act 1861. Jamaica's 'buggery law' still reads like the original 1861 British law. Article 76 of the Offences Against the Person Act, entitled the 'Unnatural Crime,' says, 'Whosoever shall be convicted of the abominable crime of buggery [anal intercourse] committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years'. Article 77 goes further, making the attempt to engage in 'buggery' or 'indecent assault' on a male punishable by seven years with or without hard labour. Article 78, in keeping with the 1828 amendment to the British Offences Against the Person Act, requires only penetration – not emission – as proof of the crime. Finally, the law also makes it illegal for 'male persons' to engage in or attempt to engage in 'acts of gross indecency,' in public or private, a misdemeanour offence punishable by two years in prison with or without hard labour.

The Fundamental Rights Argument

First, among the fundamental rights that are implicit in the concept of order of liberty, must be the right of all adult couples, whether same-sex or not, to be free from unwarranted State intrusion into their personal decisions about their preferred forms of sexual expression.

Fundamental liberty and privacy interests in adults' private, consensual sexual choices are essential to the ordered liberty that the Jamaican Constitution protects. The State may not, without overriding need, regiment and limit this personal and important part of its citizens' lives.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. Liberty presumes an autonomy of self that includes freedom of thought,

[1] *Quintin Hogg, Baron Hailsham of St Marylebone* (ed.). *Halsbury's Laws of England*. **11**(4th ed.). p. 505.
[2] *R v Wiseman* (1718) Fortes Rep 91.
[3] *R v Bourne* (1952) 36 Cr App R 135; Sir Edward Coke also reports "... a great lady had committed buggery with a baboon and conceived by it..." at 3 Inst 59.
[4] *Crown cases reserved for consideration: and decided by the Twelve judges of England, from the year 1799 to the year 1824*. 1825. pp. 331–332.

belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

All adults have the same fundamental liberty interests in their private consensual sexual choices. This fundamental protection is rooted in three well-recognized aspects of personal liberty – in intimate relationships, in bodily integrity, and in the privacy of the home. These aspects of liberty should not be viewed as "a series of isolated points, but are part of a rational continuum" that constitutes the full scope of liberty of a free people.

Control over one's own body is fundamentally at stake in sexual relations, involving as they do the most intimate physical interactions conceivable. Like the decision whether to continue or terminate a pregnancy, or the decision whether to permit or decline medical procedures, the physical, bodily dimensions of how two persons express their sexuality in intimate relations are profoundly personal. Indeed, consent is a critically important dividing line in legal and societal views about sexuality for the very reason that individual control over sexual activity is of fundamental importance to every person's autonomy. Jamaica buggery/sodomy laws invade the liberty interest in bodily integrity by dictating that citizens may not share sexual intimacy unless they perform acts approved by the legislature, and by attempting to coerce them to select a sexual partner of the other sex.

In colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.

Hence early Jamaican buggery/sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Being forced into a life without sexual intimacy would represent an intolerable and fundamental deprivation for the overwhelming majority of individuals. Equally repugnant is any form of external compulsion to engage in sexual relations. There should be no doubt, then, that the Constitution imposes substantive limits on the power of government to compel, forbid, or regulate the intimate details of private sexual relations between two consenting adults.

Laws prohibiting buggery/sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law.

Thus the model sodomy indictments presented in a 19th-century treatise, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved

relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

The condemnation of homosexual conduct as immoral has been shaped by religious beliefs, conceptions of right and acceptable behaviour, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not address the topic before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."

A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later (Sexual Offences Act 1967, section 1).

The Equality Argument

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

The stigma this criminal law imposes, moreover, is not trivial. The offense, to be sure, is a misdemeanor, a major offense in the Jamaican legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The convicted persons will bear on their record the history of their criminal convictions.

The Jamaican statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. It appears that prosecutions under Jamaica's buggery/sodomy law are rare. The effect of Jamaica's buggery/sodomy law is not just limited to the threat of prosecution or consequence of conviction. Jamaica's buggery/sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else.

Moral disapproval of a group cannot be a legitimate governmental interest under the equal protection clauses because legal classifications must not be designed for the purpose of disadvantaging the group burdened by the laws of the society. Jamaica's invocation of moral disapproval as a legitimate state interest proves nothing more than Jamaica's desire to criminalize homosexual sodomy. However, because Jamaica so rarely enforces its buggery/sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behaviour. The Jamaica buggery/sodomy laws raise the inevitable inference that the disadvantage imposed is born of animosity toward the group of persons affected.

Therefore, when a State makes homosexual conduct criminal and not deviate sexual intercourse committed by persons of different sexes, that declaratory statement in and of itself is

an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable group of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Jamaican buggery/sodomy laws subject homosexuals to a perennial penalty and stigma. A legislative classification that threatens the creation of an underclass cannot be compatible with modern day human rights and equal protection.

Therefore, a law branding one group of persons as criminal based solely on the State's moral disapproval of that group and the conduct associated with that class runs contrary to the values of the Constitution and the principle of equal protection.

Buggery or Homosexuality as a Fundamental Right

It is entirely irrelevant whether the laws in our national tradition criminalizing homosexual buggery/sodomy were targeted at homosexual conduct as a distinct matter. Whether homosexual buggery/sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it was criminalized, which suffices to establish that homosexual sodomy is not a right deeply entrenched in our Nation's history and tradition.

An emerging post-modern awakening is by definition not deeply entrenched in this Nation's history and tradition as "fundamental right" status requires. Constitutional entitlements do not spring into existence because some countries choose to lessen or eliminate criminal sanctions on certain behaviour. Much less do they spring into existence, because foreign nations decriminalize the aforesaid conduct. Post-modernity's rational-basis holding is likewise devoid of any reliance on the views of other civilizations. The discussion of these foreign views, ignoring, of course, the many countries that have retained criminal prohibitions on buggery/sodomy) is therefore meaningless conjecture.

The Jamaican buggery/sodomy laws undeniably seek to further the belief of its citizens that certain forms of sexual behaviour are immoral and unacceptable, the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. The Jamaican laws should not further any legitimate state interest which can justify its intrusion into the personal and private life of the individual. That there are those who embrace, the fact that the governing majority in a country has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. This effectively decrees the end of all morals legislation. If, as some people assert, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.

Equal Protection Fallacy

Men and women, heterosexuals and homosexuals, are all subject to the prohibition of deviant sexual intercourse with someone of the same sex. The buggery laws do distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. However, this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding

partner that is drawn in the country's laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. No fundamental basis to discriminate against men or women as a class can be gleaned from the Jamaican law. That review is readily satisfied here by the same rational basis that satisfied it in the society's belief that certain forms of sexual behaviour are immoral and unacceptable. This is the same justification that supports many other laws regulating sexual behaviour that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.

The discrimination in this law which must be justified is not its discrimination with regard to the sex of the partner but its discrimination with regard to the sexual proclivity of the principal actor.

While it is true that the law applies only to conduct, the conduct targeted by the buggery/sodomy law is conduct that is closely correlated with being homosexual. Under such circumstances, Jamaica's buggery/sodomy law is targeted at more than conduct. It is instead directed toward homosexual persons as a group.

However, the same could be said of any law. A law against public nudity targets the conduct that is closely correlated with being a nudist or an exhibitionist and hence is directed at more than conduct; it is targeted toward nudists and exhibitionists as a group. But be that as it may. Even if the Jamaican buggery/sodomy laws do deny equal protection to homosexuals as a group, that denial still does not need to be justified by anything more than a rational basis, which our context shows is satisfied by the enforcement of traditional notions of sexual morality.

Today's shifting and diverse opinions on the issues of the buggery/sodomy laws are the products of a post-modern culture, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which is meant the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.

Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Jamaica is one of the few remaining countries that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else.

It is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best. One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly.

The matters appropriate for resolution are only three: Jamaica's prohibition of buggery/sodomy laws neither infringe a "fundamental right", nor are unsupported by a rational

relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws.

Current Context

It was only through pressure from the courts that the law for one part of the United Kingdom, Northern Ireland, was changed. The case of Dudgeon v the United Kingdom[5] was one of four cases decided within a 30-year time frame in international jurisdictions that had significant influence on the repeal of homophobic legislation. It is interesting to examine the reasons why each of these cases was decided in a positive light towards homosexuality.

The European Court of Human Rights decided the case of Dudgeon in 1981, at a time when Northern Ireland still had "sodomy" laws that had not been altered since the 19th Century; nor had Northern Ireland legislated to accept the recommendations from the Wolfenden Report, possibly due to the greater influence of the Catholic and Protestant churches in that country compared to the rest of the UK. Dudgeon argued that Article 8 of the ECHR, which protects the right to a private and family life, and Article 14, which prohibits status discrimination, should apply to same sex conduct. The Court held in favour of Dudgeon and stated that there had been a breach of his rights under Article 8.

The right to a private family life included private sexual relations and therefore not extending this right to homosexuals resulted in a breach of this article. As this was definitive, the Court saw no purpose in examining Article 14. It can therefore be said that Article 8 was interpreted to imply full equality in terms of sexual orientation. This case represented a leap forward for the gay rights movement across Europe, since the ruling applied to all countries that had ratified the ECHR.

The next case that could be argued to have had an even wider impact is Toonen v Australia.[6] This case was heard by the United Nations Human Rights Committee, as there had allegedly been certain breaches of articles of the ICCPR. The complainant communicated to the Committee that sections 122(a) and (c) and 123 of the Tasmanian Criminal Code did not comply with articles 2(1) and 26 of the ICCPR which deal with discrimination and article 17 which deals with the right to privacy. The Tasmanian Criminal Code outlawed various forms of sexual contact between men, including between consenting males. The complainant therefore argued that certain sections breached his right to privacy as well as being discriminatory.

The Committee noted that apart from Tasmania, every other state in Australia had already repealed laws concerning "sodomy". The Committee decided the case solely on the basis of the right to privacy and, like the European Court of Human Rights, did not feel the need to decide the case on grounds of an infringement of the right to equality. Article 17 of the ICCPR was now affirmed to extend to sexuality as an aspect of private life. Recently, the United Nations High Commissioner for Human Rights, Navi Pillay, stated that this case was ground-breaking and it has prompted several other countries to follow suit.

[5] Dudgeon v United Kingdom, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981.

[6] The International Covenant on Civil and Political Rights was affirmed to include sexual orientation as a characteristic protected from discrimination in the case of Toonen v Australia, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

In 2006, laws were passed in Zimbabwe providing that any actions such as holding hands or kissing someone of the same sex were a criminal offence. Canaan Banana, former President of Zimbabwe, was convicted of homosexual assault and sentenced to ten years' (nine suspended) imprisonment. Banana argued that "sodomy" laws were contrary to constitutional principles, and that no individual should be criminalized because of their sexual orientation. When highly regarded political figures are sentenced on the basis of "sodomy", it brings such laws into the public sphere and initiates much controversial debate around the subject. This can be seen in the recent prosecution of Anwar Ibrahim, leader of the opposition in Malaysia, on the charge of "sodomy". Recently, Anwar was acquitted of such allegations. This has led to Malaysia contemplating the repeal of the "sodomy" section of the Criminal Code which Anwar had been accused of breaching.[7]

Post-Note

The argument that you "should not legislate morality" has long been used by those who advocate using certain recreational drugs. Those who advocated unrestricted abortions argued that any restrictions on abortion were the legislation of morality. Those in favor of gay marriage argue that restrictions on homosexual marriage are religious in nature and thus, the legislation of morality. But, those who say that one cannot, or should not, legislate morality are almost always in favor of legislating morality that they agree with. If the term "morality" or "morals" is taken in a broader sense, outside of a strictly religious context, and interpreted to mean what is right or wrong, or what is best, or a concept of personal values or societal values, then it is hard to find a law which does not touch on morality.

Both an advocate of natural law and an advocate of positivist law would hold that murder is wrong or against the law; or that stealing is against the law. One would argue that it is morally wrong to unjustly take another's life or to take another's property. The positivist would argue that it is a violation of one's civil rights or societal order. But, it is only a violation of civil rights because a society places a value on those civil rights. Almost all societies recognize that a society cannot function if there is not a consequence for killing someone you are mad at. People cannot indiscriminately take another person's property. That is a moral value of almost every society. As a matter of fact, almost every person who claims that one cannot legislate morality or that we are a product of unguided evolution, still claims to have some moral values and some concept of right and wrong. It is probably safe to say that nearly all atheists, positivists, and libertarians would agree that it is wrong for a person to get drunk and then drive an automobile so that an innocent person is killed. Statutes that outlaw driving under the influence are based on a moral value that human life is important and to unnecessarily place that human life at risk is unlawful. For the same reason, there are laws against speeding on the highways.

We have sanitation laws that prohibit us from throwing our garbage and refuse in the street or on our neighbor's property. There are sanitation laws that apply to food handling in restaurants. These laws reflect a moral or a value from society that we have a duty to the public at large not to promote the spread of disease or filth. There are those who maintain that morality should not be imposed upon them, or someone else's laws should not be imposed upon their bodies, who still maintain that what we are doing to the planet is "immoral". They have taken the

[7] See article by the Deputy Asia-Pacific director at Amnesty International: Guest, D., "Malaysia: Anwar case shows why sodomy law must be scrapped", 9 January 2012, available at: http://www.amnesty.org/en/news/ malaysia-anwar-case-shows-why-sodomy-law-must-be-scrapped-2012-01-09.

position that pollution is immoral. There are people who favour no restrictions on abortion and proclaim that any abortion restrictions are imposing morality on themselves or others, and yet take the position that the death penalty is immoral. They may maintain that there is no sufficient due process of law that would cause a murderer to forfeit his or her life, and yet still argue that due process of law would not apply to an unborn child. Such an argument is based on values or morals. They may maintain that abortion is a civil rights issue and if so, it should be a balancing of the rights of the mother, the father, and the unborn child. But how one values the rights or the life of the unborn child, and the rights of the mother and the father is a moral issue.

There are those who maintain that regulating sexuality is an attempt to legislate morality. A person should have the right to choose his or her sexual partner or as many sexual partners as they want without interference from other people or the law. Yet, many of those people would still agree that there is a need for laws concerning the statutory rape of a minor. They might argue that it is just a civil rights issue and that a minor cannot give legal consent. Yet, again, the idea that a minor cannot give legal consent is based on a value or a moral to protect the rights of minors.

Homosexuals, who lobby for the right to marry, objected to laws which prevented them from marrying each other. Yet there are other laws regulating marriage that say that a person cannot marry several people; cannot marry a five year old child; cannot marry their pet; or cannot marry their sister. All of these laws are based on the value which society gives to marriage, procreation, the home, and basic decency. Whether one is for or against gay marriage, it is a moral value, and whichever side prevails is imposing its morals or values on the other side. Many people who advocate the legalization of marijuana for recreational use are against smoking in public restaurants. In their mind, the legalization of recreational marijuana is a private matter, but smoking in public imposes a public health hazard. How far privacy goes and what restrictions may be placed on people for public health reasons are based on moral perceptions of both the rights and the value of health.

Conclusion

It is clear that all laws enact some sort of individual or societal value which is a form of morality. It is easy to understand how people who disagree with such laws might feel like their personal preferences are being violated and that someone else's morality is being imposed upon them. It could be argued that under the positivist view of law that some laws are passed not for moral issues, but rather for policy issues. For example, a law banning smoking in public might be enacted, not because people believe that it is morally wrong to harm the health of others, but rather that if more people have lung disease it will cost the state more. There are people who believe that to illegally enter Jamaica and to disobey some of the laws of Jamaica while taking advantage of other laws is morally wrong. Other people believe that to deny a person the opportunity to come from poverty and have a better life is morally wrong. There are others who don't have a position based on principal, rather just follow the most current trend or what is most beneficial to them. There are politicians or government officials that may not care one way or the other regarding gay marriage, but vote in favour of gay marriage because it is politically expedient. Thus, the morality of certain laws, or the right and wrong of such laws, may not matter to some. Yet their refusal to care is in itself a moral issue. Thus, a person who doesn't

care one way or the other on gay marriage but takes a position because it is politically expedient, is showing that person's values. It shows their own political ambition is more important to them than whether gay marriage is right or wrong. Thus, the law itself reflects moral values and how people react to the law also reflects their moral values.

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