



**LAW OF DISGUST:
ENFORCEMENT OF MORALS AND ITS CONSTITUTIONAL LIMITS IN
LIGHT OF THE LITIGATION ON SEXUAL MINORITIES IN SOUTH
AFRICA AND THE UNITED STATES**

by Thiago Amparo

HUMAN RIGHTS THESIS
PROGRAM: LLM in Human Rights, Legal Department
PROFESSOR: Renata Uitz, PhD.
Central European University
1051 Budapest, Nador utca 9.
Hungary



Executive Summary

The present thesis addresses the longstanding problem of legal enforcement of morals against sexual minorities from a constitutional perspective. Taking as a starting point the Devlin-Hart debate, and inputs on disgust and sexual minorities from Martha Nussbaum, this thesis analyzes the role of disgust in the constitutional litigation regarding sexual minorities in South Africa and the United States, as well the constitutional framework in these two countries, particularly through the lens of the due process and equal protection clauses.

In this realm, this thesis argues, first, that disgust has three dimensions: (i) disgust is basis for legal enforcement of morals grounded on prejudice against sexual minorities and therefore highlights the hatred aspect of moral-based laws that regulate sexuality and other aspects of sexual minorities; (ii) disgust operates in the realm of offence (to prevent moral offence against others) while criminal law is increasingly justified on the basis of harm principle, and thus disgust-based criminal laws (sodomy being the classic example) violate a basic principle of criminal law; (iii) finally, disgust is related to a recognition dimension and in this sense it highlights the status subordination of sexual minorities and the heteronormative structure of law.

Second, in applying these arguments to the US and South African case-law, I argue the following: (i) the US Supreme Court has developed an emerging dignity-based jurisprudence in relation to sexual minorities, specially after *Lawrence v. Texas*, that challenges the division between equality and liberty doctrines, and therefore addresses the right to recognition of those minorities through the lens of dignity, which will likely impact future cases on formal recognition of same-sex relations highlighting the heteronormative basis of marriage law; (ii) the South African constitutional law, explicitly dignity-based,



serves as a reference to the US both in relation to the potentiality of a dignity in underlining heteronormative nature of legal institutions as well as exposes the dangers of a dignity-based interpretation, especially after Jordan case regarding prostitution.



Acknowledgments

I would like to thank Prof. Renata Uitz, my supervisor, for guiding me through the arid terrain of constitutional law with excellence.

I would also like to thank both Open Society Justice Initiative and Conectas Human Rights for providing necessary conditions for me to conclude this LLM as well as for inspiring me to continue my career in human rights. Special thanks to Anna Fischer, Lucia Nader, Juana Kweitel and Camila Asano.

I would like, finally, to thank my parents and sisters, whom I missed the most during the isolated writing period.

I dedicate this thesis to Ivan, with love.



Table of Contents

Executive Summary.....	i
Acknowledgments	iii
Introduction: “Not the Law’s Business”?	1
Chapter One	
The Bounds of Toleration: Disgust as a Legal Concept in relation to the Enforcement of Morals.....	13
1.1. Introducing Disgust.....	14
1.2. Disgust as Basis for Legal Moralism	16
1.3. Denial of Disgust: Legal Liberalism and the Harm Principle.....	21
1.4. Disgust as Denial of Recognition.....	24
1.5. Conclusion	29
Chapter Two	
Towards Dignity: Disgust in the US Supreme Court Jurisprudence on Sexual Minorities	31
2.1. Overview of the US Supreme Court jurisprudence on sexual minorities	33
2.2. General Framework: The fall of Equality and the Rise of Liberty in the US jurisprudence.....	39
2.3. Liberty as a Pandora Box: Judicial Self-Restraint and the Role of History in Constitutional Interpretation.....	48
2.4. Irrational Prejudice and Disgust	53
2.5. Conclusion: Towards Dignity?	58
Chapter Three	
Human Dignity and Sex: The South African Jurisprudence on Sexual Freedom	61
3.1. The Constitutional-Making Process and the Gay Movement in South Africa.....	63
3.2. Overview of the SA Constitutional Court jurisprudence on sexual minorities.....	67
3.3. General Framework of the Equality Jurisprudence and Section 9.....	74
3.4. Criticism to a Dignity-based Approach: Jordan case.....	78
3.5. Conclusion	81
Conclusion	
Bibliography.....	87
1. Judgments	87
2. Secondary Sources	88



Introduction: “Not the Law’s Business”?

“Maybe the best proof that the language is patriarchal is that it oversimplifies feeling”

(Jeffrey Eugenides, “Middlesex”, p. 217)

In 1969, when hundreds of people, “many of them flamboyant drag queens and prostitutes, refused to go quietly when police carried out a routine raid on the place”¹ called Stonewall, in New York City, and then demonstrated for almost a week; and, in 1982, when Michael Hardwick was arrested in his bedroom based on the Georgia sodomy law for conducting oral sex with another man²; a story was told. It is a story of humiliation, of stigmatization, or more precisely a story of enforcement of morals with the use of state-sponsored coercive means, simply because the majority or, more elegantly, the average person supposedly feels disgust with other forms of sexualities.

The enforcement of morals presents a twofold question. On the one hand, it is a question on whether “the fact that certain conduct is by common standards immoral [should be considered] sufficient to justify making that conduct punishable by law”³, as H. L. A. Hart put it in the 60’s. On the other hand, it is a question of whether the enforcement of morals particularly through criminal law is justified, i.e. whether the State can legitimately make use of certain forms of coercive means of law enforcement, such as police raid or seizure and search procedures illustrated by the US examples mentioned above, in order to enforce laws solely or primarily based on morals.

¹Bawer, Bruce. “Notes on Stonewall.” *The New Republic*, 13 June 1993: 24.

²Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, p. 85.

³Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963.



Those two questions, although intertwined, are of different nature. The first question deals with the justifications of legal enforcement of morals per se, and therefore it is a question of principle (whether enforcing morals-based laws, whether criminal, civil or administrative laws, based solely or primarily on morals are justified, particularly against those who deeply disagree with the morals that support those laws), while the second question is, differently, related to how heavy the State's hands should be in enforcing such laws and thus it is primarily a question of degree⁴.

In order to justify moral-based laws, that is to say: for the sake of finding a ground for the society's right to enforce by law in general or, in the case of sodomy, by criminal law moral values against other members of society who might deeply disagree with those principles, two answers are well-known in the literature.

First, according to Lord Devlin, a moral legislation is justified on the basis of the society's right to preserve itself⁵ (meaning, the right to preserve its moral bounds) using as moral standard the feelings of "intolerance, indignation, and disgust"⁶ of the average person. Second, according to James Fitzjames Stephen, a moral legislation is justified when it is an expression of "an overwhelming moral majority"⁷. Despite its differences⁸, those two theses

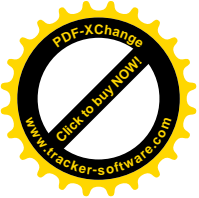
⁴ Nevertheless, whenever extremely forceful means of coercion are lawfully at disposal of the State in enforcing morals, this question can arguably be framed as one of principle, especially as a fundamental liberty issue.

⁵ According to Devlin: "society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence" (Devlin, Patrick. *The Enforcement of Morals*. New York: Oxford University Press, 1965, p. 11).

⁶ Devlin, Patrick. *The Enforcement of Morals*. New York: Oxford University Press, 1965, p. 17. See also: Devlin, Patrick. "Law, Democracy, and Morality." *110 University of Pennsylvania Law Review* 110 (1962): 639.

⁷ Stephen, James Fitzjames. *Liberty, Equality, Fraternity and Three Brief Essays*. London: The University of Chicago Press, 1873, p. 159.

⁸ According to Hart, Lord Devlin's thesis is a moderate one, in the sense that he sees the enforcement of law as an instrument to avoid the disintegration of the moral bounds that keep society together, while Stephen's thesis is an extreme one, in the sense that for him (in Hart's eyes) enforcement of morality is valuable per se, not only for its instrumental functionality



have a common ground, i.e. both of them consider legal enforcement of morals to some extent justifiable, either for its instrumental value in preserving society's moral bounds (Devlin) or for bearing a value per se (Stephen).

The famous debate between Lord Devlin and H. L. A. Hart⁹ over legal enforcement of morals largely derived from the controversy raised by the Wolfenden Report, from 1957, which presented recommendations for legal reforms of the criminal law, regarding homosexuality and prostitution in United Kingdom¹⁰. In particular, the Wolfenden Report, suggested "by a majority of 12 to 1 that homosexual practices between consenting adults in practice should no longer be considered a crime; as to prostitution they unanimously recommended that, though it should not itself be made illegal, legislation should be passed 'to drive it off the streets' on the ground that public soliciting was an offensive nuisance to ordinary citizens"¹¹. Particularly in relation to the homosexuality, the Wolfenden Report

(Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963, p. 48-52).

⁹ The arguments defended by James Fitzjames Stephen are also addressed by Hart in his writings but the debate is largely focused on the Devlin and Hart, most likely because Devlin represents, according to Hart himself, a moderate and therefore more convincing thesis with which he disagrees. For the differences between Devlin and Stephen, see Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963, p. 48-52.

¹⁰ For a more detailed account of this debate see, for example, Martha C. Nussbaum, **From Disgust to Humanity: Sexual Orientation and Constitutional Law**, New York: Oxford University Press, 2010, chapter 1. For a more detailed literature on the Devlin-Hart debate, see also (authors' names highlighted to facilitate the identification of the works referred here): **Feinberg, Joel**. "Some Unswept Debris from the Hart-Devlin Debate." *Synthese* 72, no. 2 (August 1987): 249-275. **Galvin, Richard Francis**. "Two Difficulties for Devlin's Disintegration Thesis." *The Philosophical Quarterly* 37, no. 149 (October 1987): 420-423. **Tennen, Eric**. "Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law." *Boalt Journal of Criminal Law* 8, no. 3 (2004): 3-5. **Cane, Peter**. "Taking Law Seriously: Starting Points of the Hart/Devlin Debate." *The Journal of Ethics* 10, no. 1/2 (January 2006): 21-51. **Miller, Bradley W**. "Moral Laws in a Age of Rights: Hart at the Supreme Court of Canada." *American Journal of Jurisprudence* 55 (2010): 79-103. **Ristoph, Alice**. "Third Wave Legal Moralism." *Arizona State Law Journal* 42 (2011): 1151-1172.

¹¹ Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963, p. 13.



concluded that it is simply “not the law’s business”¹² to invade people’s private realm of morals.

Since the Devlin-Hart debate in the UK in the 60’s, a number of key constitutional developments regarding the rights of sexual minorities have reframed the question of legal enforcement of morals. To name a few, the US Supreme Court upheld in 1986 the Georgia sodomy law in *Bowers v. Hardwick*¹³, on the basis that the Constitution does not confer to homosexuals the right to engage in sodomy. This holding was later overruled when the US Supreme Court decided to struck down the Texas sodomy law in 2003 which, unlike the Georgia law, expressly targeted same-sex couples. This decision in *Lawrence v. Texas*¹⁴ was based on the liberty-related right to choose one’s sexual partner, protected by the Due Process Clause. In parallel, the US Supreme Court had already struck down in 1996 the Amendment 2 to Colorado Constitution, in *Romer v. Evans*¹⁵, holding that it is a violation of the Equal Protection Clause to classify homosexuals with a mere desire to harm this group and therefore put them in an unequal position in relation to other members of society.

Such constitutional developments regarding the rights of sexual minorities are present in other countries with different social background. In South Africa, for instance, the Constitutional Court decided three major cases on this issue. The first two South African cases presented by a nationwide umbrella organization composed of dozens of other NGOs named The National Coalition for Gay and Lesbian Equality, were decided in 1998¹⁶ and

¹² Section 61, Wolfenden Report, as quoted in Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963, p. 14-15.

Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963, p. 13.

¹³ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, 30 June 1986).

¹⁴ *Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, 26 June 2003).

¹⁵ *Romer v. Evans*. 517 U.S. 620 (US Supreme Court, 20 May 1996).

¹⁶ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. CCT11/98 (South African Constitutional Court, 9 October 1998).



1999¹⁷, and solidified, in the first case, the holding that sodomy laws represent a violation of the equality clause, while, in the second case, the Court went further and considered unfair the discrimination of same-sex life partners, without however recognizing gay marriage per se. This later step was taken in 2005, when the South African Constitutional Court considered that a separate legal regime for same-sex relations, to be clear: a regime other than marriage, is inconsistent with the equality clause of the South African Constitution, and therefore ordered, in the Fourie case¹⁸, the Parliament to amend the civil law within one year. In response, Parliament enacted a Civil Union Act in November 2006, which enabled same-sex couples to choose between marriage and civil partnership¹⁹.

The fact that sexual minorities suffer from widespread rejection throughout the world²⁰ creates a heated context in which constitutional courts decide cases related to rights of those minorities. An emphasis on personal liberties might not take into consideration a wider context related to status subordination²¹.

¹⁷*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*. CCT10/99 (South African Constitutional Court, 2 December 1999).

¹⁸*Minister of Home Affairs and Another v Fourie and Another*. CCT 60/04 (South African Constitutional Court, 1 December 2005).

¹⁹ According to Bilchitz and Judge: "The majority judgment (written by Sachs J with the support of eight other judges) required Parliament to correct the constitutional defect within one year. The judgment provided several principles to guide Parliament in this task: first, Parliament could not create a remedy that created equal disadvantage for all; and secondly, it could not create a regime of 'separate but equal' that would serve to violate the dignity of lesbian and gay people" (Bilchitz, David, and Melanie Judge. "For Whom Does the Bell Toll?: The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa." *South African Journal on Human Rights* 23 (2007): 477).

²⁰The International Lesbian, Gay, Bisexual, Trans and Intersex Association. "State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults." *ILGA*. May 2011.

²¹Karst, Kenneth L. "The Liberties of Equal Citizens: Groups and the Due Process Clause." *UCLA Law Review* (The Regents of the University of California) 55 (October 2007): 125.



In 2006, Zoliswa Nkonyana, a 19-year old lesbian, was brutally killed by a mob in a South African township²², while many other lesbians in South Africa are still subject to corrective rape and other forms of sexual violence as a 2011 Human Rights Watch report has indicated²³. Such brutality happens even within a country like South Africa, globally known for being on the vanguard of the rights of sexual minorities by including the first-ever mention to “sexual orientation” in a Constitution²⁴. On an equally brutal note, during 2010, 260 LGBTTI people were reportedly murdered in Brazil because of their sexual orientation or gender identity²⁵, although Brazil is the country with the largest gay pride in the world, with around 3 million of participants, and being one of the few countries in the region to recognize same-sex unions in a landmark 2011 decision by the Brazilian Supreme Court²⁶.

From the standpoint of enforcement of morals, those examples illustrate the complexity of the relation between law and morals in general, and the link between constitutional standards based on rights language and irrational prejudice or disgust²⁷ towards sexual minorities even in countries with progressive constitutional benchmarks. By using

²² Human Rights Watch, *South Africa: Murder Highlights Violence Against Lesbians*. 11 March 2006. <http://www.hrw.org/en/news/2006/03/01/south-africa-murder-highlights-violence-against-lesbians> (accessed October 30, 2011).

²³ Human Rights Watch. “We’ll Show You You’re a Woman’: Violence and Discrimination against Black Lesbians and Transgender Men in South Africa.” 5 December 2011. <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> (accessed December 11, 2011). See also: Human Rights Watch. “More Than a Name: State-Sponsored Homophobia in Southern Africa.” 13 May 2003. <http://www.hrw.org/sites/default/files/reports/safrighlrc0303.pdf> (accessed October 30, 2011).

²⁴ Vos, Pierre de. “The Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State.” *South African Journal on Human Rights* 23, no. 3 (2007): 432-465.

²⁵ Revista Época. “Total de gays assassinados sobe 31% em 2010 no país.” *Revista Época*, 4 April 2011.

²⁶ The International Lesbian, Gay, Bisexual, Trans and Intersex Association. “State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults.” *ILGA*. May 2011: 6.

²⁷ Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010. In this thesis, disgust is defined as an extreme version of prejudice. In this sense, when courts seek to establish a legal framework to fight against prejudice in the law, they are indirectly tackling disgust.



disgust, this thesis is able to highlight the moral dimension of the constitutional debate on the rights of sexual minorities, i.e. how law and morality interacts with each other within the limits of a constitutional rights-based litigation.

The reformulation of the question of legal enforcement of laws, represented by these constitutional developments, transposed a debate primarily about the limits of criminal law and the realm of privacy to a wider discussion over the constitutional limits to the legal enforcement of morals in its various forms, including beyond the criminalization debate. The above-mentioned constitutional developments have reframed the questions of legal enforcement of morals in, at least, two ways.

First, they enriched our thinking about the practical significance of the Devlin-Hart debate with other perspectives relevant to the legal enforcement of morals derived particularly from the constitutional sphere, that is to say, the constitutional developments in South Africa and in the US have informed the debate over enforcement of morals with perspectives associated with liberty, equality and/or dignity, which transcends the rather strict discussion on privacy and the role of criminal law between Devlin and Hart. On this matter this thesis is in debt with Martha Nussbaum and her views on the Devlin-Hart debate and the politics of disgust²⁸. In this sense, the Devlin-Hart debate focused primarily on the role of criminal law in enforcing morals, instead on rights-based limits of constitutional nature to such enforcement of morals.

By adding new elements to the debate, the recent constitutional developments in South Africa and in US regarding sexual minorities have thus reaffirmed, on the one hand, the *multi-dimensional nature* of the issue of legal enforcement of morals (which involves concepts of liberty, equality and dignity of those sexual minorities, to say the least); and, on

²⁸Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010.



the other hand, those developments have also reformulated the Devlin-Hart debate, by exposing a plethora of judicial concepts of each of those rights and how they justify or control laws that seek to enforce morals. Not only were those cases in the US and South Africa were decided on different grounds when the two jurisdictions are put side-by-side, but also their Justices quite often disagreed on the role of those constitutional rights in restricting enforcement of morals as well as they debated over the content of those rights in relation to sexual minorities.

Second, besides contributing to the Hart-Devlin debate on the enforcement of morals, the present analysis of the constitutional developments in US and in South Africa have broadened the discussion taking it beyond the criminalization of homosexual intercourse, and therefore highlighted that other forms of discrimination, for the sake of enforcing morals, are often put in place with the use of law. The most common example is the lack of legal recognition of same-sex relations, through marriage or other means.

When Hart mentioned the role of law in justifying coercion against homosexuals, it was not clear at that time whether this view of enforcement as coercion or punishment could also be applicable to subtler forms of coercion, such as forced exclusion of same-sex family relations from the realm of marriage. One could ask, rightly, whether the exclusion of same-sex relations from the institution of marriage can be considered of equal importance or degree than the issue of coercive enforcement of morals through criminal law such as in the case of sodomy. The question of whether such marriage discrimination is an issue of punitive measures against same-sex couples, on the basis of a moral rejection of their self-worth, will be addressed in the following chapters. However, the recent constitutional debates in the US and, to a larger extent, in South Africa highlights that the legal enforcement of morals can take other forms than merely criminal coercion or punishment (the classic example being the



same-sex marriage), which, in itself, is already an expansion of the scope of the Devlin-Hart debate brought up by the inclusion of a constitutional approach to this discussion.

The present thesis addresses the longstanding problem of legal enforcement of morals against sexual minorities from a constitutional perspective. Bearing in mind, particularly since Lord Devlin, the role of disgust and other forms of aversion feelings towards sexual minorities in legal enforcement of morals. In this realm, this thesis argues, first, that disgust has three dimensions: (i) disgust is basis for legal enforcement of morals grounded on prejudice against sexual minorities and therefore highlights the hatred aspect of moral-based laws that regulate sexuality and other aspects of sexual minorities; (ii) disgust operates in the realm of offence (to prevent moral offence against others) while criminal law is increasingly justified on the basis of harm principle, and thus disgust-based criminal laws (sodomy being the classic example) violate a basic principle of criminal law; (iii) finally, disgust is related to a recognition dimension and in this sense it highlights the status subordination of sexual minorities and the heteronormative structure of law.

Second, in applying these arguments to the US and South African case law, I argue the following. First, the US Supreme Court has developed an emerging dignity-based jurisprudence in relation to sexual minorities, especially after *Lawrence v. Texas*, that challenges the division between equality and liberty doctrines, and therefore addresses the right to recognition of those minorities through the lens of dignity, which will likely impact future cases on formal recognition of same-sex relations highlighting the heteronormative basis of marriage law. Second, the South African constitutional law, explicitly dignity-based, serves as a reference to the US both in relation to the potential of a dignity-based approach in underlining heteronormative nature of legal institutions as well as exposes the dangers of a dignity-based interpretation, especially considering the vagueness of this concept.

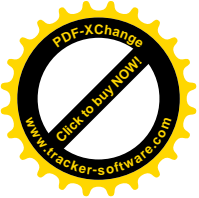


The research question of the present thesis is what are the rights-based limits to legal enforcement of morals in relation to sexual minorities, derived from the recent constitutional litigation on rights of sexual minorities. When this thesis applies the concept of rights-based limits, it refers specially to the triad of liberty, equality and dignity, used by the US Supreme Court and the South African Constitutional Court to restrict the legal enforcement of morals, particularly taking into consideration the societal aversion to those minorities (hereafter, referred to as disgust).

Bearing this in mind, the main object of this thesis is the relation between disgust and constitutional litigation regarding sexual minorities, in general, and how a dignity-based jurisprudence, emerging in US and consolidated in South Africa, curbs (if at all) the legal enforcement of disgust-based morals against sexual minorities. Furthermore, this thesis analyses disgust-based argument in the constitutional litigation regarding rights of sexual minorities from a particular perspective: through the lens of the equality and liberty frameworks²⁹.

The present thesis has the following objectives. First, it outlines how legal claims of sexual minorities have been framed under the US and South African constitutional courts (equality, liberty and dignity or a combination of those grounds). Second, it clarifies what is the impact of such categorization for the role played by disgust-based arguments in the constitutional litigation for rights of sexual minorities, and therefore elucidates the Devlin-Hart debate from a constitutional perspective.

²⁹ Arguing in favor of a dignity-based jurisprudence, see Tribe, Laurence H. "Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak its Name." *Harvard Law Review* 117 (April 2004), or Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124 (January 2011). Arguing in favor of a equality-based jurisprudence, see Burt, Robert. "Regulating Sexuality: On Liberty versus Equality." *SELA*. 11 June 2009. <http://www.law.yale.edu/intellecualife/sela2009.htm> (accessed October 12, 2011).



It should be noted, therefore, that the current thesis is a limited endeavor in several ways. First, it is restricted to the constitutional debate. Thus, this thesis neither presents a detailed account on the litigation on sexual minorities' rights before state or local courts, nor it discusses how statutory laws have protected sexual minorities. In this sense, this thesis is limited to the US and South African apex courts and the moral debate derived from their case law. Second, it is focused on the question of sexual minorities. Any conclusion about the relation between morals and law in the US and South Africa that might derive from this thesis does not necessarily apply to the same extent (if at all) to other areas of the debate on sexuality and morals, such as the criminalization of prostitution, incest or adultery.

From the methodological perspective, the comparison between US and South Africa is justified by differences in the approach of each of the jurisdictions to the question of sexual minorities. By comparing the constitutional standards in the US (due process and equal protection) with the dignity-based equality jurisprudence in South Africa, the difference between the two approaches will be highlighted and their ability to protect the rights of sexual minorities from enforcement of morals subject to scrutiny. Such comparison will allow this thesis to critically assess the argument that South Africa has been more progressive in its dignity approach to sexual minorities than the equal-liberty approach by the US Supreme Court (after *Lawrence*) as well as it will enable this thesis to assess what a dignity-based argument in US would look like in the future cases about formal recognition of same-sex relations.

As far as the structure is concerned, the thesis is organized as follows. In the Chapter 1, I will discuss the idea of disgust and its impact on the enforcement of morals by law. In the Chapter 2, I will present the foundations of the US jurisprudence regarding rights of sexual minorities, with special attention to the plurality of constitutional standards used by the Justices of the US Supreme Court and how the role of disgust in this jurisprudence. In the



Chapter 3, I will present the South African constitutional jurisprudence regarding sexual minorities, putting emphasis on the dignity-based arguments therein raised and in what it might differ from the US experience. In the Conclusion, I will present human dignity-based arguments as an alternative in the US context and, derived from the South African experience, I will outline what shortcomings the US Supreme Court will likely face if it decides to go towards this direction.



Chapter One.

The Bounds of Toleration: Disgust as a Legal Concept in relation to the Enforcement of Morals

“Those who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust. If that were so it would be wrong, but I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached”.

(Lord Devlin, “Morals and the Criminal Law”, p. 40³⁰)

When Zimbabwean President Mugabe referred to gays as “worse than pigs and dogs”³¹, he, despite the particularly hideous choice of words, simply repeated a rather usual reference to disgust as basis for restrictions of gay rights. The well-known association of pigs with animalistic dirtiness, particularly in religious traditions such as Judaism and Islamism where pork’s meat is generally part of dietary restrictions, pictures with clarity the feeling of repugnance when one considers gays and lesbians’ sexual orientation. Such visceral feeling towards sexual minorities, deeply rooted in cultural, moral and religious terms, is here defined as disgust.

In the present chapter, I argue that there are, at very least, three approaches to disgust in legal and moral literature: legal moralism, according to which disgust serves as a basis for legal enforcement of morals; legal liberalism, which expressly denies disgust, instead using the harm principle as regulatory standard; and, finally, human dignity-based arguments according to which disgust is a denial of recognition.

³⁰Devlin, Patrick. “Morals and the Criminal Law.” In *Morality and the Law*, by Richard A. Wasserstrom, 24-48. Wadsworth Pub. Co., 1971: 40.

³¹ BBC News. *Africa's Lesbians Demand Change*. February 27, 2008. <http://news.bbc.co.uk/2/hi/africa/7266646.stm> (accessed June 29, 2011).



Furthermore, disgust is relevant for highlighting certain aspects of the litigation on the rights of sexual minorities that otherwise might be underrepresented in the literature. In particular, a disgust-based approach emphasizes the societal subordination of certain groups based on morals (which, in its turn, obviously impacts one's understandings of equal liberty of those groups), especially for treating the object of disgust as inferior. Likewise, disgust-based approaches to law deny the ideal of rationality of law in its most basic sense, i.e. the idea that law should pursue a legitimate aim through rationally connected means, and not be based on irrational fears or prejudices. Both elements of a disgust-based approach, namely: disgust as consequence of historical subordination and disgust as violation of rationality of law, are present in the opinions of the Justices in US and South African apex courts, analyzed in more detail in the next chapters.

1.1. Introducing Disgust

According to the 2011 World Report on State-Sponsored Homophobia³², edited by ILGA – International Lesbian, Gay, Bisexual, Trans and Intersex Association, 76 countries still criminalize sexual acts committed in private between consenting adults of the same-sex. Gays and lesbians not only face the threat of criminal prosecution, but also more severe forms of violence. For instance, in several countries in Southern Africa, lesbians are often subjected to the so-called “corrective rape”, which is a “term used to describe the practice of raping African women and girls thought to be lesbians with the claimed purpose of turning them into ‘real African women’ – the underlying belief being that homosexuality is a ‘disease’

³²ILGA. *State-sponsored Homophobia*. 2011.
http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf
(accessed June 29, 2011).



imported by the white colonial empire”³³. Gays are also subjected to violent hate crimes, particularly murder. In Brazil, civil society organizations estimate that, in 2010, around 200 gays, lesbians and transsexuals were killed for homophobic reasons³⁴.

Complex social phenomena, such as corrective rape or hate crimes, cannot simply be explained here by feelings of disgust in a reductionist manner. Furthermore, it is outside of the scope of the present thesis to provide the reader with a sociological explanation for those phenomena. However, high rates of homophobic violent crimes such as those illustrate how deep is the feeling of disgust directed towards this group and therefore the question that this chapter addresses is whether constitutional courts in democracies, themselves responsible for applying the law within the framework of human rights law, fail to directly tackle such feelings, and therefore help to perpetuate discrimination throughout society. The fact that sexual minorities are target of systematic rape and murder, among other deprivations of rights, suggests that, because of their sexual orientation or gender identity, those minorities are considered, to use a well-known expression by Graham Greene, “torturable classes”³⁵, i.e. a social group towards which disgust is directed, causing a dehumanization effect.

From a philosophical perspective, disgust is described as a feeling of repugnance towards a certain object and its basic bodily or chemical features. As described by William Ian Miller in a seminal work on this issue, the “modern philosophical interest in disgust starts

³³ Emma Mittelstaedt, **Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations**, 9 *CHIJIL* 353, Summer 2008, footnote 8.

³⁴ Folha de São Paulo, **Aumenta nº de assassinato de homossexuais, diz Grupo Gay da BA**, available at: <http://www1.folha.uol.com.br/cotidiano/898470-aumenta-n-de-assassinato-de-homossexuais-diz-grupo-gay-da-ba.shtml>. Last accessed on: 29 June, 2011.

³⁵ Oscar Vilhena Vieira, *Inequality and the Subversion of Law*, In: **Sur – International Journal on Human Rights**, N. 6, Vol. 4, p. 40.



with Darwin, who centers it in the rejection of food and the sense of taste”³⁶. Accordingly, disgust has, at least, four general features.

First, it is an emotion, and therefore not an intellectual rational exercise. Second, “[it] differs from other emotions by having a unique aversive style”³⁷, in other words, it implies that the object of disgust presents the danger of contamination to the observer. Third, it is delimited by culture, rather than nature, once studies have proven that young children under the age of four or five, in general, do not present usual feelings of disgust seen in adults, such as in relation to feces³⁸. Finally, disgust implies a hierarchical relation between the observer and the object of disgusting, and therefore, from a moral and political perspectives, might play a key role in justifying and maintaining social ranks or other forms of hierarchical societies³⁹. Mugabe’s words at the beginning of this chapter illustrate this view. The reference to animals reinforces how disgust puts the other in a subordinated position, as well as it illustrates how disgust is related to the idea of dirtiness and contamination. The context of Mugabe’s words is the widespread view that homosexuality violates an African values, although there are serious evidences indicating otherwise⁴⁰.

1.2. Disgust as Basis for Legal Moralism

Disgust, when understood as an suggestion of the societal morals, may indirectly justify laws particularly designed to enforce those morals, that is to say: to use coercive means in order to make even those people who disagree with those moral values to comply with them, because

³⁶ William Ian Miller, **The Anatomy of Disgust**, Cambridge, Harvard University Press, 1997, p. 1.

³⁷ William Ian Miller, **The Anatomy of Disgust**, p. 9.

³⁸ William Ian Miller, **The Anatomy of Disgust**, p. 12-13.

³⁹ William Ian Miller, **The Anatomy of Disgust**, p. 220.

⁴⁰ Murray, Rachel, Dr., and Frans Viljoen. "Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union." *Human Rights Quarterly* 29, no. 1 (February 2007): 93-94.



the average person or certain majority feels deeply disgusted by the occurrence of certain acts considered repulsively immoral in the society. When Justice O'Connor, in the US Supreme Court decision that confirmed the women's right to choose to terminate pregnancy (in *Planned Parenthood v. Casey*, 1992) held that "our obligation is to define the liberty of all, not to mandate our own moral code"⁴¹, she clearly declined to exercise the role of moral arbiter in divisive cases.

Yet, the road to liberty presents many obstacles. In the legal history, criminal law has played a key role in enforcing morals. The legal theory that argues for the criminalization of certain acts regarded as immoral regardless of the harm they may cause is hereafter defined as legal moralism⁴². Lord Devlin, who famously criticized the recommendation of the Wolfenden Report for the decriminalization of sodomy, is the key reference in this theory, along with others such as James Fitzjames Stephen⁴³.

Lord Devlin's argumentation starts with a particular conception of society: any society is as such defined for being a "community of ideas, not only political ideas, but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals"⁴⁴. Accordingly, Devlin's view of society is of a moral fabric, which is legitimate

⁴¹ *Planned Parenthood of Southeastern Pa. v. Casey*. 505 U.S. 833 (1992) (US Supreme Court, 29 June 1992), para. 850.

⁴² "That position, to which I shall refer by the overworked label 'liberalism', is that the prevention of harm or offense to parties other than the actor is the only morally legitimate reason for a criminal prohibition. One important rival theory, often called 'legal moralism', insists that it is also sometimes a legitimate reason in support of criminal statutes that they prevent actions that are inherently immoral, even if those actions cause no harm or offense to nonconsenting parties". Feinberg, Joel. "Some Unswept Debris from the Hart-Devlin Debate." *Synthese* 72, no. 2 (August 1987): 249.

⁴³ For the difference between Stephen and Devlin, see the introduction. In this thesis, the arguments developed by Lord Devlin will serve as the key reference, since his moderate argument is more often found in the Justices' argumentation in the US and South Africa as well as he is the leading author analyzed by the recent literature on the disgust, as presented below.

⁴⁴ Devlin, Patrick. "Morals and the Criminal Law." In *Morality and the Law*, by Richard A. Wasserstrom, 24-48. Wadsworth Pub. Co., 1971: 32.



for the criminal law to protect – in other words, punishing acts that attempt against the moral integrity of the society.

In this sense, “for society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed, the members would drift apart”⁴⁵. Such concern with the integrity of the society is known as the disintegration thesis⁴⁶. It is composed of two claims. First, it identifies the society with its morals, i.e. it defines a society by reference to the common moral ideas that compose it. Second, it defends that without such moral agreement society would disintegrate.

In relation to the first claim, H.L.A. Hart argues that it constitutes an absurd proposition, according to which “a society is identical with its morality”⁴⁷. Accordingly, changes in societal morals would represent the end of a given society and the beginning of a new one. Lord Devlin replies defining this particular controversy as a mere play with words. Yet, Devlin reinforces his view that every society is defined by its shared morality as the same way as a game is defined by its rules⁴⁸.

The second claim is more troublesome and has resonance in the cases involving sexual minorities explained later in this thesis. At least, two criticisms have been made. Considered as an empirical statement, the idea of societal disintegration lacks historical evidence (Lord Devlin does not show any evidence in his essay⁴⁹) as well as it treats

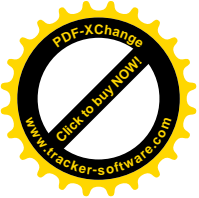
⁴⁵Devlin, Patrick. “Morals and the Criminal Law.” In *Morality and the Law*, by Richard A. Wasserstrom, 24-48. Wadsworth Pub. Co., 1971: 32.

⁴⁶Galvin, Richard Francis. “Two Difficulties for Devlin's Disintegration Thesis.” *The Philosophical Quarterly* 37, no. 149 (October 1987): 420-423.

⁴⁷Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963.

⁴⁸Devlin, Patrick. “Morals and the Criminal Law.” In *Morality and the Law*, by Richard A. Wasserstrom, 24-48. Wadsworth Pub. Co., 1971: note 20.

⁴⁹According to Hart, “no evidence is produced [by Lord Devlin] to show that deviation from accepted sexual minority, even by adults in private, is something which, like treason, threatens the existence of society. No reputable historian has maintained this thesis, and there is indeed much evidence against it.” In: Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963: 50.



unreasonably private acts as threats to the whole society, which is hard to conceive as an actual chain of causality⁵⁰. Considered as a statement of principle, societal disintegration as such could even be something worth pursuing. As argued by H.L.A. Hart, where the ultimate value is the preservation of society itself, and not the protection of other moral goods, such as liberty, equality or any other universal value, it is reasonable to expect that its disintegration might be desirable, once “such a society could be of no practical value for human beings”⁵¹.

Bearing in mind the danger of disintegration of society, in light of this view, law must ensure that the common morals are respected in order to maintain the bounds that keep the members of the community together. In order to preserve itself, society, according to Lord Devlin, should legally enforce morals based on disgust feelings of the average person. In this sense, “disgust, because it is a very intense form of disapproval, provides him with such a test [for legal regulation]”⁵². Feelings such as “intolerance, indignation, and disgust”⁵³ represent, for Devlin, a moral indication of the pervasive nature of certain acts and therefore should be used as a basis for laws designed to enforce morals. It is so, because disgust seemed to be to

⁵⁰ According to Galvin, “This point appears uncontroversial, innocuous and perhaps unarguable only because ‘destruction’ normally entails significant and widespread harms, on the order of Wild in the Streets or the sack of Rome. However, if the ‘destruction of society’ is entailed by changing the speed-limit, securing the protection of voting rights or raising by one per cent the price of a postage-stamp, then it is not clear that society has a right to defend itself from destruction in this sense. Many practices thought to be immoral, such as private consenting homosexual behavior, are more analogous to lobbying for a lower speed-limit, the elimination of poll-taxes or an increase in the postage rate than to bombing the White House, since gradual change from within rather than violent revolution is the likely result.” In: Galvin, Richard Francis. “Two Difficulties for Devlin's Disintegration Thesis.” *The Philosophical Quarterly* 37, no. 149 (October 1987): 422.

⁵¹ Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963, p. 70.

⁵² Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, p. 10.

⁵³ Devlin, Patrick. “Morals and the Criminal Law.” In *Morality and the Law*, by Richard A. Wasserstrom, 24-48. Wadsworth Pub. Co., 1971: 40.



him “an expression of deep-seated social conventions”⁵⁴, without which the moral fabric of society would dissolve.

Nevertheless, disgust is a feeling within specific social context. It is often related to a moral majority, and therefore it poses a democratic question to constitutional courts deciding morally divisive cases, namely: are unelected, and largely unaccountable courts the most legitimate bodies to issue decisions favoring minority rights even when the majority thinks or feels otherwise? This is related to the literature on the counter-majoritarian aspect of constitutional litigation⁵⁵. On the other hand, there is the question of individual autonomy and constitutional rights, related to the power of a moral majority in a constitutional democracy, namely: “may a ‘moral majority’ limit the liberty of individual citizens on no better ground than that it disapproves of the personal choices they make?”⁵⁶

What is important to highlight, however, is that, for involving these aspects, cases dealing with rights of sexual minorities impose on courts an extra burden of justification, in order to address, in general terms, the society through values which may be endorsed by the oppressive majority, such as liberty and dignity.

As seen in the next chapter, when Justice Kennedy in *Lawrence v. Texas*⁵⁷, from the US Supreme Court, emphasized that the right at stake was not merely a right of homosexuals to engage in sodomy, but rather a right to liberty, in the line of several other liberty cases that recognized a personal freedom to choice, he was not only repairing the misrecognition

⁵⁴Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, p. 10.

⁵⁵ For an eloquent voice in this debate (arguing in favor of opening up the political processes to minorities, instead of replacing their relevance with decisions from unelected judges), see: Ely, John Hart. *Democracy and Distrust*. Cambridge: Harvard University Press, 1981.

⁵⁶Dworkin, Ronald. *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge: Harvard University Press, 2000.

⁵⁷*Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003).



against homosexuals' sexuality perpetuated by previous case law⁵⁸. He was also addressing a larger audience in society that, although may feel disgusted with homosexuality, endorse, at least in general terms, personal liberties. Whether the court is successful in this argumentative effort or not is a whole new question, not entirely addressed by this thesis. In the case of sexual minorities, it is particular relevant the role played by religious beliefs in reinforcing the disgust feeling and, therefore, a dignity-based approach, designed to tackle disgust-based laws, must be able to speak out to this religious audience in society as well.

1.3. Denial of Disgust: Legal Liberalism and the Harm Principle

In response to Lord Devlin, Herbert Hart highlights the irrational nature of those feelings of disgust and therefore affirms that, when the society is based on those feelings, one loses the opportunity to engage in rational debate and therefore the chance of establishing a critical morality⁵⁹. This is a criticism against the very idea of the legal moralism or moral conservatism, according to which law should be used to punish immoral acts as such, according to a given longstanding morality. Such perspective has a resemblance in the constitutional debate presented in the next chapters, in particular in relation to how Courts, especially in common-law jurisdictions, have defined constitutional values, such as liberty, through reference to a Nation's tradition or history, and therefore to morals established long ago.

⁵⁸ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986).

⁵⁹ According to Jose Reinaldo, "[Hart] argues that Devlin tries to show immorality as the result of an intellectual activity that combines disgust, intolerance and indignation: if certain acts or attitudes awaken these feelings in the man on the street, then we are certainly facing something immoral, which should be punished by law. In these terms, concludes Hart, the morality proposed by Devlin is uncritical, is not based on any rational discussion of the fundamentals of moral choice, but on impressions and feelings" (Lopes, Jose Reinaldo de Lima. "The right to recognition for gays and lesbians." *SUR - International Human Rights Journal* 2, no. 2 (2005): 64-65). See also Hart, H. L. A. "Immorality and Treason." In *The Philosophy of Law*, by Roland Dworkin. Oxford: Oxford University Press, 1991.



In the contrary, Hart argues for an evolutionary perspective of development of morals, according to which law should not enforce the current moral values, but should let to the free men to change the moral status quo according to a constantly evolving rational process. In this sense, “the value of established institutions resides in the fact that they have developed as the result of the free, through no doubt unconscious, adaptation of men to the conditions of their lives. To use coercion to maintain the moral status quo at any point in a society’s history would be artificially to arrest the process which gives social institutions their life”⁶⁰.

Yet, this liberty is not absolute. Hart sustains that law should play a role in preventing harm to others⁶¹. In this sense, he endorses John Stuart Mill famous “harm principle”, according to which legal coercion against individuals is only moral when it is used to prevent harm to others⁶². Therefore, in order to legitimately restrict one’s liberty, it is enough to be morally offended (for instance, disgusted) by certain act. Rather, it is necessary that one’s rights be harmed in order to morally justify restricting another person’s individual liberty.

The theoretical debate regarding the harm’s principle is a complex one and, for being related primarily to morality and law, is not reflected entirely in the present thesis, focused particularly in the development of constitutional law. However, it is worth mentioning the work of Joel Feinberg, who, based on the Devlin-Hart, elaborated a long literature on harm and the offence principles.

⁶⁰Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963, p. 75.

⁶¹ In Hart’s words: “I do not propose to defend all that Mill said; for I myself think there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others. But on the narrower issue relevant to the enforcement of morality Mill seems to me to be right”. (Hart, H. L. A. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963, p. 5).

⁶² “That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right” (Mill, John Stuart. *On Liberty and Other Essays*. New Haven and London: Yale University Press, 2003, p. 80).



According to him, harm, in the sense of the harm principle, is defined by overlapping two other concepts: a detrimental setback to interests and an unjustifiable wrongdoing to another person's rights⁶³. When those two elements are put together, a sound definition of harm is composed and, according to the harm principle, law should come into play to protect the person injured. A definition of the harm principle leads to a theory on personal liberty and arguably autonomy, key concepts in the liberalism, once the harm principle determines the scope of liberty by setting the standard to what acts the State can legitimately criminalize. In the constitutional development, better analyzed in the next chapter in light of the US Supreme Court jurisprudence, the lack of harm was decisive for the US Supreme Court to hold constitutional the liberty of consenting homosexual adults to choose his/her partner for a private sexual intercourse.⁶⁴

In addition, besides the harm principle, according to Joel Feinberg, a theory on the relation between criminal law and disgust can also be regulated from an offense perspective. The argument advanced by Lord Devlin resembles the "offence principle", i.e. the principle according to which "state's restriction of someone's liberty might be justified to prevent offence to others"⁶⁵. According to Joel Feinberg, the "word 'offense' has both a general and specifically normative sense, the former including in its reference any or all of miscellany of

⁶³ Feinberg, Joel. *Harm to Self: The Moral Limits of Criminal Law*. Oxford: Oxford University Press, 1986, p. X.

⁶⁴ According to Tennen, "From Lawrence, we have a clear answer that an offense to morality alone is not a type of harm and therefore is not a valid basis for criminalization (...) To sum up, these substantive due process cases instruct as follows. Criminalization is severe and, therefore, harm is required before a legislature can constitutionally criminalize certain conduct. Without a valid, harm-based justification, the legislature has acted irrationally. That is, the legislation has no rational basis. While we may not know completely what "harm" is, we know what it is not: it is not morality and it is not, seemingly, paternalism. Morality and paternalism, alone, are not rational reasons for criminalizing conduct (rational in the constitutional sense of failing the rational basis test)". Tennen, Eric. "Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law." *Boalt Journal of Criminal Law* 8, no. 3 (2004): 4.

⁶⁵ David W. Shoemaker, "Dirty Words" and the Offense Principle, *Law and Philosophy*, Vol. 19, No. 5, Sep., 2000, p. 545.



disliked mental conditions (disgust, shame, hurt, anxiety, etc.), and the latter referring to those states only when caused by the wrongful (right-violating) conduct of others”⁶⁶. In other words, offence is located at the sensorial level, similar to feelings of disgust. Arguably, sodomy laws could be justified by the disgust feeling of an overwhelming majority (in Stephen’s view) or the average person (according to Devlin), morally offended by the legality of same-sex intercourse, even when they are conducted in private and between consenting adults⁶⁷.

1.4. Disgust as Denial of Recognition

Disgust-based laws, i.e. laws that are solely or primarily motivated by feelings of deep aversion to a group or act considered immoral by others (average person or overwhelming majority), are also a denial of recognition. Recognition is a concept largely debated in both philosophical and legal terms⁶⁸. When disgust is directed towards a person, his/her humanity is undermined, once he/she is objectified and further reduced to a repulsive thing, such as bodily excrements, like “feces, blood, semen, urine, nasal discharges,

⁶⁶Feinberg, Joel. *Offense to Others: The Moral Limits of Criminal Law*. Oxford: Oxford University Press, 1985, pp. 1-2.

⁶⁷According to Feinberg himself, a liberal view might embrace both the offense and the harm principles, while an extreme view of liberalism (Mill’s or Hart’s) would accept only the last principle as a legitimate one in the realm of criminal law. Feinberg, Joel. *Offense to Others: The Moral Limits of Criminal Law*. Oxford: Oxford University Press, 1985, p. x.

⁶⁸For a more in-depth discussion on recognition, see (authors’ names highlighted to facilitate the identification of the works referred here): **Fraser, Nancy**. “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age.” *New Left Review* 22 (1995): 68–93. **Fraser, Nancy**. “Rethinking Recognition.” *New Left Review* 3, 2000: 107-120. **Fraser, Nancy, and Axel Honneth**. *Redistribution or Recognition: A Political-Philosophical Debate*. London-New York: Verso, 2003. **Young, Iris Marion**. *Justice and the Politics of Difference*. Princeton : Princeton University Press, 1990. **Fredman, Sandra**. “Recognition or Redistribution: Reconciling Inequalities.” *South African Journal of Human Rights*, 2007: 214-234. **Lopes, Jose Reinaldo de Lima**. “The right to recognition for gays and lesbians.” *SUR - International Human Rights Journal* 2, no. 2 (2005): 61-92.



menstrual discharges, corpses, decaying meat, and animals/insects that are oozy, slimy, or smelly”⁶⁹, according to Nussbaum.

Sexual minorities are often object of disgust because their sexuality is associated with those primary bodily objects. Nussbaum calls this association “projective disgust”.⁷⁰ When sexual minorities are object of disgust to the extreme of being branded as criminal by sodomy laws or subjected to an inferior condition of “unmarryable” ones for being prevented from formal recognition of their relations, this circumstance signalizes the moral disapproval towards those minorities, simply because their sexual activity, their exchange of primary bodily objects causes repugnance on others. When Nussbaum argued in favor of a politics of humanity, instead of a politics of disgust, defining the former as a “combination of equal respect for one’s fellow citizens with a serious and sympathetic attempt to imagine what interests they are pursuing”⁷¹, she basically described disgust as a lack of recognition of the other’s equal humanity.

Recognition operates at the symbolic level, at the dimension of cultural value and therefore the lack of it represents status subordination of the group at stake. Misrecognition, according to Nancy Fraser’s status model, is “constituted by institutionalized patterns of cultural value in ways that prevent one from participating as a peer in social life”⁷². In this sense, defining disgust as a denial of recognition has the following consequences, key from a constitutional perspective.

⁶⁹ Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, p. 15. For a more detailed description of disgust, see also Nussbaum, Martha C. *Hiding from Humanity: Disgust, Shame, and the Law*. Princeton: Princeton University Press.

⁷⁰ Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, p. 15.

⁷¹ Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, p. 50.

⁷² **Fraser, Nancy, and Axel Honneth.** *Redistribution or Recognition: A Political-Philosophical Debate*. London-New York: Verso, 2003, p. 29.



First, it highlights that a series of injustices cannot be reduced merely to redistributive or socio-economic injustices, although both kinds of injustice are intertwined⁷³. The recognition paradigm highlights that disgust plays a key role in perpetuating the status subordination by reducing the cultural value of a certain group in relation to its peers in society.

Second, a recognition paradigm also innovates in terms of the remedies it seeks in order to correct cultural injustices, in comparison with the remedies traditionally associated with socio-economic injustices. The later requires certain economic rearrangement⁷⁴, particularly, from a welfare perspective, the provision of social benefits to the most economically vulnerable groups or some sort of restructure of labor rights, among other forms of remedies. The later, on the other hand, requires modifying cultural values and the legal and social institutions associated with them. The goal, when one is considering remedying cultural injustices, is to reevaluate cultural identities⁷⁵, and therefore reform those institutions that are based on a devaluation of certain identities.

⁷³The present thesis follows the analytical distinction by Nancy Fraser, in the following terms: "I propose to distinguish two broadly conceived, analytically distinct understandings of injustice. The first is socioeconomic injustice, which is rooted in the political-economic structure of society. Examples include exploitation (having the fruits of one's labor appropriated for the benefit of others); economic marginalization (being confined to undesirable or poorly paid work or being denied access to income-generating labor altogether); and deprivation (being denied an adequate material standard of living). (...) The second kind of injustice is cultural or symbolic. It is rooted in social patterns of representation, interpretation, and communication. Examples include cultural domination (being subjected to patterns of interpretation and communication that are associated with another culture and are alien and/or hostile to one's own); nonrecognition (being rendered invisible via the authoritative representational, communicative, and interpretative practices of one's culture); and disrespect (being routinely maligned or disparaged in stereotypic public cultural representations and/or in everyday life interactions)". (Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age." *New Left Review* 22 (1995): 70).

⁷⁴ According to Nancy Fraser, it "might involve redistributing income, reorganizing the division of labour, subjecting investment to democratic decision-making, or transforming other basic economic structures". (Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age." *New Left Review* 22 (1995): 73).

⁷⁵ Importantly, for Fraser, the remedies for symbolic remedies could involve upwardly



Take the example of same-sex marriage, addressed in the next chapters from a constitutional law perspective. When marriage is conceived as a legal institution open only to opposite-sex couples, it suggests that people's "disapprobation of homosexual conduct is strong enough to disallow homosexual marriage"⁷⁶, as put by Justice Scalia in his dissenting opinion in the US Supreme Court's decision in *Lawrence v. Texas*. In order to tackle disgust as a denial of recognition, the remedy is to reform the legal and social institutions based on its very misrecognition, such as the lack of formal acknowledgment of same-sex couples before law. To restrict the dilemma of gay rights only to sodomy laws is to demean the cultural injustices sexual minorities have suffered in several other spheres of life, including outside the spatial limits of bedroom, such as same-sex marriage, school bullying, homophobic violence, restrictions in freedom of association and freedom of manifestation, among others.

Third, in order to tackle thoroughly disgust-based misrecognition, the gay movement, particularly in the US and in Western Europe, has increasingly affirmed a positive gay identity⁷⁷. Dissociating from the combative nature of the early gay movement in the US, focused on fighting against sodomy laws and other legal restrictions carried out by the police based on the criminal law (such as police raid in gay bars, being Stonewall the major example), the current US gay movement has affirmed the pride of being gay, increasingly

revaluing disrespected identities and the cultural products of maligned groups. It could also involve recognizing and positively valorizing cultural diversity" (Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age." *New Left Review* 22 (1995): 73).

⁷⁶*Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, 26 June 2003), Justice Scalia's dissenting opinion, para. 604.

⁷⁷As affirmed by Iris Young, "today most gay and lesbian liberation advocates seek not merely civil rights, but the affirmation of gay men and lesbians as social groups with specific experiences and perspectives (...) Gay pride asserts that sexual identity is a matter of culture and politics, and not merely "behavior" to be tolerated or forbidden" (**Young, Iris Marion.** *Justice and the Politics of Difference*. Princeton : Princeton University Press, 1990, p. 161)



focused in the last years on the gay youth due to the high rate of suicide of gays teenagers, in the US context, mainly because of school bullying⁷⁸.

Viewing disgust as a denial of recognition poses the issue: “what is there to recognize?”, which in its turn questions gay identity before society at large. In the US, for instance, several LGBTTI organizations have been reluctant to define sexual minorities’ rights as human rights, particularly because of the allegedly failure of the human rights approach to reflect “the self-critique of identity within LGBT communities that reveals LGBT categories as socially constructed and contested”, as well as due to the success of civil rights claims in that country⁷⁹.

Despite being associated with a reductionist view of sexual identities, a human rights approach to sexual minorities’ rights have proved itself a powerful weapon in other contexts, such as Latin America⁸⁰. Framing sexual minorities’ rights as human rights has helped advocates to gain supporters to their causes at the national level (from politicians, media and other human rights organizations) as well as abroad (from cross-regional human rights networks, regional and international human rights systems and so on), as pointed out by the Latin American experience.

Furthermore, from the perspective of symbolic change of cultural values, a case study on gay prides in Sao Paulo⁸¹, Brazil, where since the 90’s this event takes place annually and currently assembles around 3.5 million people, indicates that a favorable political environment associated with several mass campaigns strategies, such as gay parades, kiss-in events and influence of the pink money derived from gay tourism and public budget, have

⁷⁸For a Project of this nature, see “It Gets Better” Campaign at: <http://www.itgetsbetter.org/>.

⁷⁹Mertus, Julie. “The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US.” *Human Rights Quarterly* 29, no. 4 (November 2007): 1036-1064 (arguing that the LGBT advocacy in US has framed its claims as civil rights demands rather than human rights).

⁸⁰Particularly in relation to gay rights as human rights, see: Encarnación, Omar G. “Latin America Gay’s Rights Revolution.” *Journal of Democracy*, April 2011: 106-109.

⁸¹Santos, Gustavo Gomes da Costa. “Mobilizações Homossexuais e Estado no Brasil: São Paulo (1978-2004).” *Revista Brasileira de Ciências Sociais* 22, no. 63 (2007): 121-135.



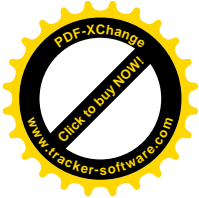
placed the gay movement as a powerful subject in the political arena⁸². This trend in affirming gay pride demands wide reforms in the social and legal systems, including through innovative measures to fight prejudice, from ensuring the traditional freedom of association and manifestation for gay associations up to anti-discrimination campaigns targeted on the public at large.

In sum, recognizing disgust as a denial of recognition leads to much more complex questions regarding what identity is to be recognized (if at all) as well as what remedies from a human rights perspective should be put in place. In order to be properly addressed, those questions need further research outside the constitutional scope of the present thesis. Nevertheless, the constitutional cases presented in the next two chapters have also debated about a recognition dimension minimally discussed in the current work, namely: how the current legal institutions, such as sexual crimes or marriage law, are structured in a context of status subordination of sexual minorities.

1.5. Conclusion

In this chapter, it is argued that disgust has been used as a legal concept in a particular sense: as a moral justification of laws that restrict rights of sexual minorities. This is particularly verifiable in the Devlin-Hart debate, including the inputs from the Joel Feinberg's theory on harm and offence.

⁸²“Gay-pride marches constitute a very different type of activism. Since the early 1990s, this American export has become commonplace in most major Latin American metropolitan areas, led by Sao Paulo, whose gay-pride parade in 2007 drew a crowd of 3.5 million people— the largest of all gay-pride parades held around world, according to Guinness World Records. Because of their outrageous displays of camp and sexuality, gay-pride marches have been criticized, even by some gay people, as frivolous and even counterproductive from the standpoint of advancing gay acceptance. Yet it cannot be denied that they have been effective vehicles for affirming gay identity and mainstreaming gay culture.” (Encarnación, Omar G. “Latin America Gay's Rights Revolution.” *Journal of Democracy*, April 2011: 109).



However, the main argument in this chapter is a wider concept and presents three dimensions: (i) disgust is basis for legal enforcement of morals based on prejudice against sexual minorities and therefore highlights the hatred aspect of moral-based laws that regulate sexuality and other aspects of sexual minorities; (ii) disgust operates in the realm of offence (to prevent moral offence against others) while criminal law is increasingly justified on the basis of the harm principle, and thus disgust-based criminal laws (sodomy being the classic example) violate a basic principle of criminal law, the harm principle; (iii) finally, disgust is related to a recognition dimension and in this sense it highlights the status subordination of sexual minorities and the heteronormative structure of legal institutions.

The case law discussed in the next chapters will address those three dimensions, namely disgust as moral disapproval, disgust as related to offense rather than harm and disgust as denial of recognition. It will be done from a particular constitutional perspective in US and in South African: a dignity-perspective that combines equality and liberty claims.



Chapter Two.

Towards Dignity: Disgust in the US Supreme Court Jurisprudence on Sexual Minorities

“The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons.”
(Justice Kennedy, *Lawrence v. Texas*, US Supreme Court, 2003, para. 558)

Disgust, as it is defined in the previous chapter, presents at least three questions to the constitutional debate: (i) whether feelings of deep aversion against a group should justify the legal enforcement of morals; (ii) whether criminal law should be shaped by an offence principle or a harm principle; (iii) whether law should take into consideration eventual impact on the recognition of the group targeted of disgust-based laws. Those questions are to certain extent addressed by the US Supreme Court jurisprudence, but with a different language, based on the constitutional doctrines relevant to cases related to sexual minorities, particularly the equal protection and the due process doctrines.

In this chapter, I will, first, outline the main issues related to enforcement of morals in general, and its equality and liberty dimensions in particular in the jurisprudence of the US Supreme Court involving sexual minorities. In this initial part, I will present the three major cases decided by the US Supreme Court in relation to sexual minorities, namely: *Bowers v. Hardwick* (1986)⁸³; *Romer v. Evans* (1996)⁸⁴; and *Lawrence v. Texas* (2003).⁸⁵

⁸³*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, 30 June 1986).

⁸⁴*Romer v. Evans*. 517 U.S. 620 (US Supreme Court, May 20, 1996).

⁸⁵*Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003).



Second, I will critically analyze the three cases that compose the jurisprudence on sexual minorities in three parts. First, I will contextualize the debate on the protection of sexual minorities within the general framework of tensions between liberty and equality, and the rising of equal liberty jurisprudence, which is a term largely used by the literature, although not clearly embraced by the Court as a single constitutional doctrine per se. Following this framework, I will outline the two major problems addressed by jurisprudence on sexual minorities, namely: (i) the role of history in the due process clause and therefore the problem of historical discrimination; (ii) the relation between disgust-based laws and irrational prejudice against sexual minorities. In the conclusion, I will discuss what difference a dignity-based doctrine for sexual minorities rights can make in the US jurisprudence.

In sum, I argue that the US Supreme Court jurisprudence involving sexual minorities is a unfinished project: while dignity-based equal liberty, after *Lawrence*, have advanced in order to invalidate sodomy laws, the Court's emphasis on private sphere as a locus for exercise of the liberty recognized in *Lawrence* constitutes a challenge to the further development of the jurisprudence and a misunderstanding of a dignity-based approach. If the next step in the Court's jurisprudence is the discussion on formal recognition of same-sex relations, which is the path the Court seems to be leading to⁸⁶, the current case law must be critically assessed to move beyond the realm of bedroom.

⁸⁶Mears, Bill. "Big cases await U.S. Supreme Court's 2011-12 term." *CNN*. October 2, 2011. <http://edition.cnn.com/2011/09/30/justice/scotus-preview-case-summaries/index.html> (accessed December 15, 2011).



2.1. Overview of the US Supreme Court jurisprudence on sexual minorities

The jurisprudence on sexual minorities have been shaped by three cases, namely: *Bowers v. Hardwick*⁸⁷, decided on June 30, 1986 (upholding a Georgia sodomy law not specifically targeted on same-sex couples on the basis of substantive due process); *Romer v. Evans*⁸⁸, decided on May 20, 1996 (striking down Amendment 2 to Colorado Constitution, which prohibited all legislative, executive or judicial measures taken to protect homosexuals, for violating the Equal Protection Clause); and, finally, *Lawrence v. Texas*⁸⁹, decided on June 26, 2003 (striking down the Texas sodomy law that specifically targeted homosexuals, on the basis of substantive due process, thus overruling *Bowers*). This section is dedicated to outline the major issues in those cases.

In *Bowers v. Hardwick*, Justice White writes for the majority to consider the Georgia sodomy law constitutional. Michael Hardwick was arrested in his bedroom for conducting oral sex with another man⁹⁰ in violation of the Georgia sodomy law that criminalizes when a person “performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another”⁹¹. In this sense, the Georgia sodomy law, unlike the Texas sodomy law in *Lawrence v. Texas*, did not expressly target homosexuals. The divergence in *Bowers* is not in relation to the applicable standard, but rather what is the right at stake.

Deciding the case from a substantive due process perspective, Justice White in *Bowers* argues the following. First, he frames the issue at stake in a rather restrictive manner, as being

⁸⁷ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, 30 June 1986).

⁸⁸ *Romer v. Evans*. 517 U.S. 620 (US Supreme Court, May 20, 1996).

⁸⁹ *Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003).

⁹⁰ Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, p. 85.

⁹¹ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, 30 June 1986), para. 188.



“whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”⁹².

Second, he defines liberty by reference to history, and therefore considers two elements in this definition: whether the liberty at stake is “implicit in the concept of ordered liberty”⁹³ and whether it is “deeply rooted in the Nation’s history and tradition”⁹⁴, the standard approach in substantive due process cases. According to Bowers majority, sodomy laws have longstanding roots and therefore a liberty to engage in sodomy activity, from this historical perspective, is implausible.

Third, particularly relevant from a moral perspective, Justice White expressly rejects the argument that moral-based laws, such as sodomy, incest or adultery laws, are inadequate because of the moral disapproval they might express. According to him, “the law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed”.⁹⁵ Justice Burger, in his concurring opinion, went even further and affirmed the ancient roots of condemnation of homosexual intercourse, which, according to him, is “firmly rooted in Judeo-Christian moral and ethical standards”⁹⁶.

Fourth, in an exercise of judicial self-restraint, Justice White argues that Bowers is not a case for expanding the concept of liberty, once homosexual sodomy is not an issue related to “family, marriage, or procreation”⁹⁷, and therefore Bowers is not linked with the line of cases

⁹²*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, 30 June 1986), para. 190.

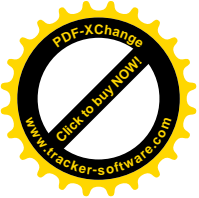
⁹³*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 191.

⁹⁴*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 192.

⁹⁵*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 196. For a comprehensive analysis of the influence of moral values in constitutional law, see the Goldberg, Suzanne B. “Morals-Based Justifications for Lawmaking: Before and After *Lawrence v. Texas*.” *Minnesota Law Review* 88 (2004): 1233-1311. Suzanne Goldberg represented *Lawrence* before state court in Texas.

⁹⁶*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 196.

⁹⁷*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 191.



derived from *Griswold v. Connecticut*⁹⁸, which recognized implicit liberties in the Due Process Clause related to personal rights within the realm of marital relations⁹⁹. Likewise, Justice Stevens' dissenting opinion in *Bowers* also emphasizes the liberty in relation to sexuality derived from this line of cases¹⁰⁰.

Although the majority in *Bowers* rejected such personal liberty approach, both Justice Blackmun's dissenting opinion in *Bowers* and Justice Kennedy's leading opinion in *Lawrence*, which overruled *Bowers*, reassured a liberty-based approach to sodomy laws, declaring those laws a violation of the Due Process Clause. Both Justices reframed the issue at stake, rejecting the restrictive issue formulated by Justice White in *Bowers*, to whom the case was about a right to engage in sodomy. In a famous bit of the judgment, Justice Kennedy argued in *Lawrence* that framing the issue like Justice White did in *Bowers* "demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse"¹⁰¹.

By reframing the issue at stake in those terms, the Justice Kennedy's opinion in *Lawrence* can be read in light of the disgust-based framework presented in the first chapter.

First, in relation to the legal enforcement of morals, both Justices, Blackmun's dissenting opinion in *Bowers* and Kennedy's majority opinion in *Lawrence*, tackles moral-based laws (in this case, particularly, the legal enforcement of moral disapproval of sexual minorities). On contrary, as showed above, the majority in *Bowers* accepts the legitimacy of morally-laws¹⁰². In a passage of *Bowers* that refers explicitly to the Devlin-Hart debate¹⁰³, Justice

⁹⁸*Griswold v. Connecticut*. 381 U.S. 479 (US Supreme Court, June 7, 1965).

⁹⁹*Griswold* is analyzed in more detail in the next section.

¹⁰⁰*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 218.

¹⁰¹*Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003), para. 567. A similar statement can be found in Justice Blackmun's opinion at *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 199.

¹⁰²*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 196

¹⁰³*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 211-212.



Blackmun rejects the Devlin's disintegration principle, according to which society has the right to protect itself through law against the disintegration of the moral fabric that keeps it together, because those laws, in the view of Justice Blackmun, merely serve to enforce private morals, without a public justification.

More precisely, the argument against moral-based laws in *Lawrence* is two-fold. For Justice Kennedy, the issue is of whether the Nation's tradition and history recognize the liberty of making personal decisions regarding sexuality (for him, the answer was affirmative), and therefore the source of the implicit right at stake in this case was not a given moral code, but rather the past and how it has shaped America's understanding of those liberties¹⁰⁴.

On the other hand, for Justice O'Connor in her concurring opinion, the major concern with a moral-based law such as the Texas sodomy provision¹⁰⁵, which specifically targets same-sex couples, is one of equality. Justice O'Connor, who joined the majority in *Bowers* in upholding the Georgia sodomy law, argues against the constitutionality of laws that single out a group only for the sake of moral disapproval¹⁰⁶. Despite it, in *Lawrence* Justice

¹⁰⁴ In Justice Lawrence's words, "It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, 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 answer the question 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.' *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)", at *Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003), para. 559.

¹⁰⁵ The Texas sodomy provision read as follows: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex" (as cited in *Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003), para. 563).

¹⁰⁶ In Justice O'Connor's words: "This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not.



O'Connor reemphasized that she had joined the majority in *Bowers*, and that she did not want to overrule it¹⁰⁷. For her, *Bowers* posed a liberty issue, related to due process, since it was a sodomy not expressly target at same-sex couples, unlike the Texas sodomy law in *Lawrence*.

In relation to morals, Justice Scalia, in his dissenting opinion in *Lawrence*, highlights that the majority opinion in that case does not reflect sufficiently on a number of morally motivated laws that are still on the books, such as laws regarding sale of sex toys or adultery. In this sense, he affirms the ancient right of the majority in enforcing its moral values¹⁰⁸.

Second, *Lawrence* and *Bowers* also present a discussion on the harm principle. In his dissenting opinion in *Bowers*, Justice Blackmun offers a Millian argument, by emphasizing that the private act at issue does not interfere with the right of others, and therefore should not be punished¹⁰⁹. While showing inclination towards deciding the case on the basis of Equal Protection Clause¹¹⁰, Justice Blackmun concludes that the “[*Bowers*] Court failed to see the difference between laws that protect public sensibilities and those that enforce private morality”¹¹¹. By the same token, Justice Kennedy in *Lawrence* highlights that this is not a case involving minors or coercion¹¹², and therefore talking about harm principle is not

Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause” (*Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003), para. 582).

¹⁰⁷*Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003), para. 579 and 582..

¹⁰⁸ The debate on moral majority is a extensive one. For a comprehensive view of it, see: Dworkin, Ronald. *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge: Harvard University Press, 2000.

¹⁰⁹ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), Justice Blackmun’s dissenting, footnote 3.

¹¹⁰ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), Justice Blackmun’s dissenting, footnote 2.

¹¹¹ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 212.

¹¹² According to Justice Kennedy: “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual



adequate, because there is no injury infringed against others in a consensual intercourse between same-sex couples.

Third, *Lawrence* is a bold objection to stigmatization. Stigma is a concept related to cultural injustice, at least from a recognition perspective, as outlined in the first chapter. It is associated with branding a group as outsider, inferior to the rest. In its Greek origin, the word referred to marking someone's body due to a wrongdoing she or he had done¹¹³. For Justice O'Connor, the key issue seems to be not merely the fact that homosexuals are classified by the Texas sodomy provision, but rather the fact that such express classification serves no independent objective than simply stating moral disapproval. Like a physical mark on a person's body, in Justice O'Connor's words, "Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else"¹¹⁴. Her main concern was with the fact that Texas law directly target homosexuals, which, in her view, it is different circumstance from the Bower's law. Justice Kennedy in *Lawrence* presents a similar argument on stigma, although from a due process perspective¹¹⁵.

The stigma argument is key to the third case here analyzed, *Romer v. Evans*¹¹⁶, decided in 1996, striking down the Amendment 2 to Colorado Constitution, which prohibited all branches of the state to protect homosexuals. Justice Kennedy, who delivered the opinion of the Court, was straightforward in his reasoning: Amendment 2 violated the Equal Protection Clause in its most basic sense, i.e. this Amendment only classified homosexuals for a "bare

lifestyle." (*Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003), para. 578).

¹¹³Yoshino, Kenji. "Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"." *Yale Law Journal Company* 108 (December 1998): 523.

¹¹⁴*Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003), para. 581.

¹¹⁵*Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003), para. 575.

¹¹⁶*Romer v. Evans*. 517 U.S. 620 (US Supreme Court, May 20, 1996).



desire to harm a politically unpopular group”¹¹⁷, which failed to pass even the rational basis scrutiny once such animosity is not a legitimate government interest.

First, the State has not been able to present a legitimate interest to justify the classification, which according to Justice Kennedy is done for its own purposes. Second, the intention to injure an unpopular group does not constitute a legitimate interest and therefore violates the core meaning of the Equal Protection Clause. Third, Justice Kennedy emphasizes the unprecedented nature of such broad discriminatory measure, which basically obstructs the very idea of the equal protection of laws, namely “the principle that government and each of its parts remain open on impartial terms to all who seek its assistance”¹¹⁸. Although Justice Scalia filed a dissenting opinion in *Romer*, affirming that the Amendment did not stigmatized homosexuals but rather prohibited the state to grant them special rights, the US Supreme Court decision is considered a minor case, in comparison with *Bowers* and *Lawrence*, once it was before a patent violation and therefore did not advance the rights of sexual minorities in a sophisticated manner simply because it was necessary in order to reach a reasonable holding¹¹⁹.

2.2. General Framework: The fall of Equality and the Rise of Liberty in the US jurisprudence.

The cases outlined above present a wide range of judicial reasoning, when quite often Justices disagree which constitutional right is at stake, being due process of law, from a liberty perspective, or a right to equality. Such duality of constitutional grounds is inserted within a larger debate regarding the fall of equality jurisprudence and the emergence of an

¹¹⁷*Romer v. Evans*. 517 U.S. 620 (US Supreme Court, May 20, 1996), para. 634.

¹¹⁸*Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986).

¹¹⁹Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, p. 113.



equal liberty doctrine, associated with a dignity-approach to both liberty and equality by the US Supreme Court. To be clear, this dignity-approach is largely derived from the recent literature on the topic, described below, and not exactly from the caselaw itself (where this term is used but not to refer to a doctrine) or the Constitutional text in the US (silent about dignity).

In the jurisprudence on sexual minorities, this dignity-approach¹²⁰, that combines both equality and liberty into one single perspective, can be traced even back to Justice Stevens, dissenting in *Bowers*, by affirming: “every free citizen has the same interest in ‘liberty’ that the members of the majority share”¹²¹. In this view, if all citizens have an equal interest in liberty, any judicial interpretation of the due process clause should seek to also incorporate an equality component, and vice-versa. A change in the equal protection doctrine will likely impact future decisions of the US Supreme Court regarding sexual minorities, since the approach adopted in *Lawrence* embraces both liberty and equality, although the main reasoning of the case was due process of law. (Henry 2011)

“Antibalkanization”¹²² and “pluralism anxiety”¹²³ are some of the words used by the literature to designate an emerging phenomenon in the US Supreme Court equal protection jurisprudence. The core idea is, on one hand, an explicit concern from the Court with the impact of its judgments on social cohesion, specially in relation to its group-based equality

¹²⁰ The US Supreme Court has used the term dignity in several contexts and with different meanings. However, here the term is used specifically in reference to dignity as an equal liberty, particularly in cases involving personal choices over family or sexuality issues. For a fivefold concept of dignity derived from an empirical research on the Court’s opinions, see Henry, Leslie Meltzer. “The Jurisprudence of Dignity.” *University of Pennsylvania Law Review* 160 (December 2011): 169-232.

¹²¹ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 218.

¹²² Siegel, Reva B. “From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases.” *Yale Law Journal* 120 (2011).

¹²³ Yoshino, Kenji. “The New Equal Protection.” *Harvard Law Review* 124 (January 2011).



jurisprudence regarding cases involving race and affirmative actions¹²⁴ (the antibalkanization dilemma), and, on the other hand, “an apprehension of and about the country’s demographic diversity”¹²⁵ and, consequently, the fear that new groups will seek a heightened protection from the Court (the pluralism dilemma).

Both dilemmas poses the question of whether the Court will be willing in future cases concerning sexual minorities to make group-based equality, at least the way it did in its race jurisprudence, specially in relation to the formal recognition of same-sex relations¹²⁶. There are serious doubts that the Court will be willing to do so, as a matter of legitimacy before the political process as well as for the consistency of its equality jurisprudence.

Before presenting this discussion in more detail regarding the emergence of a dignity-based approach, that seeks to approximate the equality and liberty doctrines, it should be mentioned that such debate on the fall of equality and an emerging dignity-based equal liberty doctrine, particularly after Justice Kennedy’s decision in *Lawrence*, is to be read cautiously. This debate is primarily influenced by race cases before the US Supreme Court, especially when it is argued that equality doctrine is in decline, and therefore the fall of equality argument faces serious obstacles when transposed to the realm of sexual minorities.

¹²⁴ Siegel, Reva B. "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases." *Yale Law Journal* 120 (2011):10.

¹²⁵ Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124 (January 2011):751.

¹²⁶ In a recent article about *Perry v. Schwarzenegger*, the same-sex marriage case before the US Supreme Court for the next judicial term, Rosky debates Yoshino’s argument regarding the fall of equality and its relation on the future of same-sex marriage: “What this does mean, however, is that if and when the Court decides to review the constitutionality of laws against same-sex marriage, it may be more sympathetic to a claim based on the freedom to marry than a claim based on the equality of gay men and lesbians. If plaintiffs seek to develop the sex discrimination argument before the U.S. Supreme Court, they might do well to accept Justice Kennedy’s invitation at the end of *Lawrence*--to follow Judge Walker’s lead by articulating the argument under the Due Process Clause, rather than relying on the more traditional argument under the Equal Protection Clause” (Rosky, Clifford J. "Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law." *Arizona Law Review* 53 (2011): 913-983).



First, despite the narrow holding of *Romer v. Evans*, as presented above, this case shows the willingness of the Court to protect sexual minorities under the Equal Protection Clause. Even denying them the status of suspect class, the very statement that a bare desire to harm this group fails even to pass the rational basis standard is too strong to be ignored. Second, the fact that Justice Kennedy's opinion focused on liberty rather than equality is partly due to a simple strategic reason, namely: the willingness to overrule *Bowers* on the basis of its due process doctrine. In addition, it should also be mentioned that there is an equality component in Justice Kennedy's liberty doctrine that should not be disregarded. Third, the US Supreme Court has deal with a series of race cases, in a process of judicialization of claims for racial equality, which dates back to *Plessy v. Ferguson* (1896)¹²⁷ and *Brown v. Board of Education* (1954)¹²⁸, and therefore any critical analysis that makes the case of the fall of equality doctrine in general should take into consideration that the Court has dealt with a far larger amount of racial cases in its history, let alone the peculiar political context of those cases and their implementation, in contrast with the smaller number of cases related to sexual minorities.

A wider discussion¹²⁹ on the relation between Due Process Clause, along with its liberty claim, and the Equal Protection Clause has framed the debate on the future of the equal protection clause in the US¹³⁰. The literature has identified the fall of the group-based equality

¹²⁷*Plessy v. Ferguson*. 163 U.S. 537 (US Supreme Court, May 18, 1896).

¹²⁸*Brown v. Board of Education of Topeka*. 347 U.S. 483 (US Supreme Court, May 17, 1954).

¹²⁹For the debate on equality and liberty, see: **Karst, Kenneth L.** "The Liberties of Equal Citizens: Groups and the Due Process Clause." *UCLA Law Review* (The Regents of the University of California) 55 (October 2007). **Brown, Rebecca L.** "Liberty, The New Equality." *New York University Law Review* 77 (December 2002). **Tribe, Laurence H.** "Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak its Name." *Harvard Law Review* 117 (April 2004). **Ackerman, Bruce.** *We the People: Foundations*. Cambridge: Harvard University Press, 1999.

¹³⁰Although it is not necessarily an either-or situation, where one should choose between equality and liberty, the debate has reached such level sometimes. According to Burt, for instance, "different substantive and process consequences follow from the internal logic of



and the rise, instead, of the liberty via the Due Process Clause¹³¹. There are, at least, two grounds for this fall of group-based equality, which are relevant to the present discussion on the rights of sexual minorities.

First, the Court has limited the expansion of the number of categories worthy of the heightened scrutiny. In this context, the development of a rational basis with a bite standard¹³² might be seen as way of the Court to protect certain groups from prejudice or other forms of discrimination, without expanding the existing categories of suspect class, with the stated fear that a “variety of other groups”, in Justice White’s words in *Cleburne* case¹³³, could seek the same heightened scrutiny.

Such perspective over the development of the case law of the US Supreme Court is related to an overall trend in the US jurisprudence named by Yoshino as “pluralism anxiety”¹³⁴ and defined as “an apprehension of and about the country’s demographic diversity”¹³⁵. This is a sociological trend characterized by the decline of social capital as

the two grounds and that, on both scores, the equality norm is a preferable guide” (Burt, Robert. "Regulating Sexuality: On Liberty versus Equality." *SELA*. June 11, 2009:2). Meanwhile for others, such as Yoshino, “the idea of pluralism anxiety [is seen] as a force that is shutting down traditional equality jurisprudence and increasing pressure on the Court to use due process as a vehicle for vindicating equality concerns” (Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124 (January 2011), note 17).

¹³¹ Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124 (January 2011).

¹³² This is a more demanding standard where the Court will question the aims of the government action. This standard is added to the traditional three tiers of judicial review, namely rational basis review (in case of ordinary classifications), intermediary review or heightened review (when the Court faces cases related to quasi-suspect classifications) and, finally, strict scrutiny (regarding suspect classes or fundamental rights). For more on rational basis with a bite standard, see: Smith, Jeremy B. "The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation." *Fordham Law Review* 73, no. 6 (2005).

¹³³ *City of Cleburne, Texas v. Cleburne Living Center, Inc.* 473 U.S. 432 (US Supreme Court, July 1, 1985).

¹³⁴ Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124 (January 2011).

¹³⁵ Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124 (January 2011): 751.



consequence of the increase of diversity¹³⁶, with an impact on the legal arena. In other words, it is related to the exhaustion of the list of groups protected by the Court and the unwillingness of the Court to open the application of its most rigid standard to new groups.

Second, the fall of the group-based equality jurisprudence has been associated with the requirement by the Court that neutral laws with a disparate impact on members of a certain suspect class only violate Equal Protection Clause when a “discriminatory intent” is shown¹³⁷, particularly after the Davis case¹³⁸, related to the disparate impact on blacks of an admission test by the District of Columbia Police Department. The requirement of discriminatory intent makes even harder for applicants to argue a violation of the equal protection clause in the case of textually neutral laws.

As consequence of the fall of the equal protection clause, certain Justices in the Court have developed an “antibalkanization principle” (mainly Justice Kennedy)¹³⁹. This principle is a moderate position between the anticlassification principle and the antidisubordination principle. Through this principle, the Court has increasingly showed concerns with the impact on social cohesion of its equality decisions.

¹³⁶ Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124 (January 2011): 753-754.

¹³⁷ As shown by Spann: “A prior Supreme Court decision, *Washington v. Davis*, had held that the equal protection guarantees of the Constitution did not prohibit actions that had an unintended racially disparate impact. But in an arguable usurpation of legislative policymaking power, the *Ricci* Court has now smuggled a similar restriction into the realm of congressionally created, statutory disparate impact claims. Moreover, the Court has even intimated that it might also hold statutory disparate impact remedies to be unconstitutional as a violation of the equal protection rights of whites”. (Spann, Girardeau A. "Disparate Impact." *Georgetown Law Journal* 98 (April 2010): 1133-1135).

¹³⁸ *Washington v. Davis*. 426 U.S. 229 (US Supreme Court, 1976).

¹³⁹ Siegel, Reva B. "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases." *Yale Law Journal* 120 (2011).



This principle is derived mainly from Justice Kennedy's concurring opinion in *Parent Involved* case¹⁴⁰ and from the Court's opinion in *Ricci* case¹⁴¹, delivered by Justice Kennedy. Both cases deal with public selection processes that seek to promote racial balance, being the former case related to assignment plans of children to schools and the later about promotion test in a fire department. In both cases, Justice Kennedy showed the concern on the impact on social cohesion of a race-based affirmative policy, i.e. its danger of promoting divisiveness in society. In order to fully understand the significance of the antibalkanization principle, it is worth mentioning that this principle is constructed as a moderate position between two other views of the Equal Protection Clause, namely: an anticlassification and a antistatutory principle.

While the former is concerned with laws that are on their letter discriminatory because they present a classification of certain protected group, the later applies a historical perspective in order to assess whether laws, even neutral ones, have discriminated groups already subject to inferior conditions in the past by law. The antibalkanization principle, on the other hand, offers a middle ground: it "interprets equal protection so as to promote social cohesion and to avoid racial arrangements that balkanize and threaten social cohesion"¹⁴².

The construction of an anticlassification principle is widely debated by the literature on race and equal protection of laws¹⁴³. In a recent analysis of the Equal Protection Clause,

¹⁴⁰*Parents Involved in Community Schools v. Seattle School District No. 1*. 551 U.S. 701 (US Supreme Court, June 28, 2007).

¹⁴¹*Ricci v. DeStefano*. 129 S. Ct. 2658 (US Supreme Court, June 29, 2009). According to Siegel, "In *Ricci*, the Court held unlawful New Haven's decision to readminister a civil service exam for fire department officers because the City was concerned that the original examination identified a pool for promotion that included scarcely any minority candidates". Siegel, Reva B. "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases." *Yale Law Journal* 120 (2011): 5.

¹⁴² Siegel, Reva B. "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases." *Yale Law Journal* 120 (2011): 9.

¹⁴³ **Fiss, Owen**. "Groups and the Equal Protection Clause." *Philosophy & Public Affairs*, 1976. **Tushnet, Mark**. "The Return of the Repressed: Groups, Social Welfare Rights, and the



Siegel defines this principle as follows: “proponents of the anticlassification principle associate the rule against classifying by race with a value commonly associated with colorblindness claims: protecting individuals from the harm of categorization by race”¹⁴⁴. In this sense, the anticlassification principle highlights certain aspects of the Equal Protection Clause.

First, the anticlassification principle reads Justice Harlan’s famous words in the dissenting opinion of *Plessy v. Ferguson* that “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens”¹⁴⁵ in a literal manner. In other words, it emphasizes that race must not be taken into consideration in law, or, in technical terms, people should not be singled out by law (i.e. classified) on the basis of race. In this sense, such principle adds a component of formal equality to the idea of equal protection of laws.

In addition, the anticlassification principle has the advantage of speaking out to a certain audience worried with the preservation of the “Constitution's authority - its capacity to speak to and for all”, which, Siegel continues, “depends in significant measure on the ways it creates community in conflict and finds legitimacy under conditions of disagreement”¹⁴⁶. In other words, the anticlassification principle was, from a strategic perspective, a useful standard for the Court to, despite the divisive nature of the racial debate, establish a constitutional standard that guided its decision in overruling *Plessy*. Despite the fact that it was unclear whether *Brown* outlawed de facto segregation as well as whether the Court relied on a neutral principle or on physiological studies of a controversial nature, it is nevertheless

Equal Protection Clause.” *Issues in Legal Scholarship* (The Berkeley Electronic Press (bepress)), 2002. **Siegel, Reva B.** “Brown at Fifty: Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown.” *Harvard Law Review* 117 (March 2004).

¹⁴⁴ Siegel, Reva B. “From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases.” *Yale Law Journal* 120 (2011): 6.

¹⁴⁵ *Plessy v. Ferguson*. 163 U.S. 537 (US Supreme Court, May 18, 1896): 263.

¹⁴⁶ Siegel, Reva B. “From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases.” *Yale Law Journal* 120 (2011): 1477.



derived from its holding the message that classification on the basis of race with a negative impact was to be considered unconstitutional, once separation per se implied inferiority.

The antistatization principle, on the other hand, considers the question of equal protection of laws in general and on the racial equality in particular in a different manner, identifying “racial stratification (rather than classification) as the wrong and endeavors to rectify the forms of group inequality that race-based and race salient policies have caused”¹⁴⁷. In this sense, especially in cases regarding affirmative actions that benefit underprivileged racial groups, the antistatization principle serves as a guiding norm to justify laws that, although classify on the basis of race, are framed in order to favor certain group historically subordinated.

An antibalkanization principle adds a new component to the analysis of the Equal Protection Clause, by referring to the social cohesion as a goal that is arguably related to the very meaning of equality. It is a restrained view. On the one hand, it pays due respect to the anticlassification concern with affirmative action programs that could treat individuals not as individuals, but as merely members of a certain group. On the other hand, the antibalkanization principle adopts a historical perspective over affirmative action programs and agrees, likewise the proponents of the antistatization principle, with those programs for historically disfavored groups as long as they do not jeopardize the social cohesion in society.

Although this debate marks the recent race cases decided by the Court on race issues (particularly *Gratz*¹⁴⁸ and *Grutter*¹⁴⁹ cases, which taken as a whole emphasize that in university admission programs racial diversity can be taken into consideration, but an

¹⁴⁷ Siegel, Reva B. "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases." *Yale Law Journal* 120 (2011).

¹⁴⁸ *Gratz v. Bollinger*. (02-516) 539 U.S. 244 (US Supreme Court, June 23, 2003).

¹⁴⁹ *Grutter v. Bollinger*. (02-241) 539 U.S. 306 (US Supreme Court, June 23, 2003).



individual assessment must be made¹⁵⁰); its transposition to the realm of sexual minorities should be done carefully, if at all. First, a close reading of the Court's opinions in *Romer* and *Lawrence*, both related to laws that expressly target homosexuals, reveals that the Court disregard the eventual impact of the decision on society's morals, and therefore it is doubtful that the Court will incorporate a antibalkanization principle, at least at the current stage, in relation to the societal divisiveness derived from moral-related issues. Second, the burden of justification over the Court's shoulders in cases involving equal protection of sexual minorities is lower than in race cases, since the later involves a suspect class and therefore a heightened scrutiny. The Court's opinion in *Romer* articulates well a combination of anticlassification principle and antissubordination one, since it highlights that the Amendment 2 of Colorado Constitution classifies homosexuals in order to subordinate them. Third, the debate on the fall of equal protection clause in general and the antibalkanization principle in particular refers primarily to affirmative actions in race issues, which is in a much different stage than the laws discussed in the cases involving sexual minorities, which were not designed to protect those minorities (as black people in affirmative policies) but to discriminate them.

2.3. Liberty as a Pandora Box: Judicial Self-Restraint and the Role of History in Constitutional Interpretation

Due Process Clause represents hope for many authors that observe the fall of equal protection. In the realm of sexual minorities, this hope is fed by the Court's opinion in

¹⁵⁰Munich, John, and Andrew W. Broy. "The "Grutter-Gratz split doubleheader": The Use of Student Race in School Admission, Attendance, and Transfer Policies at the K-12 Level." *50 Years after Brown: What Has Been Accomplished and What Remains to Be Done?* Kennedy School of Government, Harvard University, 2004.



Lawrence. The due process doctrine, however, also faces a key criticism since the origin of its substantive facet in the *Griswold* case¹⁵¹

In *Griswold*, the US Supreme Court, in the Justice Douglas' opinion, confirmed a right to marital privacy based on the penumbra of rights not expressly recognized by the Constitution, considering privacy as right able to stand for itself as a constitutional right. *Griswold* is a complex case, due to the plurality of reasoning used by the Justices, particularly the concurring opinions of Justice Goldberg and Justice Harlan. Both based their concurring opinions on a substantive aspect of due process, but, while Justice Goldberg made use of the 9th Amendment to derive from it an implicit right to marital privacy¹⁵², Justice Harlan based his decision directly on the Due Process Clause¹⁵³, arguing that marital rights derive from a concept of ordered liberty, directly based on the substantive due process.

In the dissenting opinion, Justice Black and Justice Stewart highlighted that the Due Process Clause, as it was constructed by Justice Harlan and Goldberg, was wrongly seen as blanket check to the Court "to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of 'civilized standards of conduct.'"¹⁵⁴. In this sense, Justice Black and

¹⁵¹*Griswold v. Connecticut*. 381 U.S. 479 (US Supreme Court, June 7, 1965).

¹⁵² According to Justice Goldberg, "In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments" (*Griswold v. Connecticut*. 381 U.S. 479 US Supreme Court, June 7, 1965, para. 493).

¹⁵³ According to Justice Harlan, "In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, *supra*, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom" (*Griswold v. Connecticut*. 381 U.S. 479 US Supreme Court, June 7, 1965, para. 500).

¹⁵⁴*Griswold v. Connecticut*. 381 U.S. 479 (US Supreme Court, June 7, 1965), para. 513.



Justice Stewart appeal to a judicial self-restraint in cases related to due process, which in practice means that the Court should not recognize implicit liberties under this clause.

The answer of Justice Harlan and Goldberg was to rely on history as an anchor where the liberty protected by the Due Process Clause is based, in other words they presented the Nation history and tradition as a manageable judicial standard to assess what are the liberties implicitly protected by the Court and thus restrain the discretion of the judge in interpreting \ the due process¹⁵⁵.

Interestingly, their reliance on history is different from Lord Devlin's equally strong confidence in social conventions as a source of moral laws. In the view of Justice Harlan and Goldberg, relying on history and tradition is not the same as preserving the current society's values (as it was for Devlin), but a way of finding what are the primary values of society since its constitutional foundation, which can thus contrast with certain aspects of the current morals. In this sense, the protection of the longstanding personal liberty in *Griswold* (marital privacy) may have in fact contradicted the morals of that time against the use of contraceptive means¹⁵⁶.

The importance of *Griswold*, through the lens of Bowers, is twofold: first, *Griswold* affirms that there are certain liberties not recognized explicitly by the Constitution but protected by it through its penumbra (Justice Douglas), its Ninth Amendment (Justice Goldberg) or directly through liberty (Justice Harlan). Second, *Griswold* recognized a realm of personal rights implicit in the Constitution, which is relevant also for a liberty-based doctrine regarding same-sex couples for opening up the Constitution to recognizing new

¹⁵⁵ In Justice Goldberg's words: "The Court stated many years ago that the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (*Griswold v. Connecticut*, 381 U.S. 479 (US Supreme Court, June 7, 1965), para. 487).

¹⁵⁶ In this divisive case, Justice Black accuses Justices Goldberg, Harlan and White of deciding to strike down the law because, as himself, they think it is a offensive law. See: *Griswold v. Connecticut*, 381 U.S. 479 (US Supreme Court, June 7, 1965), para. 507.



rights¹⁵⁷, particularly those related to “freedom of intimate association”¹⁵⁸. Although Griswold recognized personal rights of married couples, in later decisions the Court has extended the same rights to unmarried couples, and therefore the implicit liberty found constitutional in Griswold is not restricted to marriage¹⁵⁹.

Regarding the role of history to advance personal liberty, in the Bowers’ case, Justice White uses history to affirm that criminal provisions against sodomy are deeply rooted in America’s history¹⁶⁰, while Justice Blackmun and Justice Stevens, in their respective opinions, reemphasized the concept of liberty from Griswold and beyond, according to which embraced “the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral”¹⁶¹.

In Lawrence, the historical argument is used in a different way, since he framed the issue differently too. In this sense, by making an “ingenious intentionalist argument that the Framers wished to free us of their specific intent, Justice Kennedy struck the chains of history

¹⁵⁷ Eskridge, William N. "Destabilizing Due Process and Evolutive Equal Protection." *UCLA Law Review*, June 2000: 1203-1204 (arguing that Griswold helped advocates to fight against sodomy laws at state level).

¹⁵⁸ According to Karst, “although much of Griswold's doctrinal importance lies in its stimulation of the recognition of the freedom of intimate association, the decision protected substantive liberty in a setting in which strong concerns about group subordination were visible in the background”. Karst, Kenneth L. "The Liberties of Equal Citizens: Groups and the Due Process Clause." *UCLA Law Review* (The Regents of the University of California) 55 (October 2007): 125.

¹⁵⁹ In Justice Kennedy’s words in Lawrence, “After Griswold, it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, *id.*, at 454, 92 S.Ct. 1029; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights”. (*Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003, para. 565).

¹⁶⁰ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 192.

¹⁶¹ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), para. 218.



from due process jurisprudence”¹⁶². Accordingly, the Framers included vague provisions in the Constitution, such as due process, in order to let next generations to fulfill their concept as long as it is for the sake of achieving greater freedom¹⁶³.

When Justice Scalia, in his dissenting in *Lawrence*, cites the majority opinion in *Bowers*¹⁶⁴, he relies on a historical, backward-looking perspective of the liberty protected by the Due Process Clause¹⁶⁵. In this sense, in order to decide whether the right at stake is a liberty that deserves the protection of the Due Process, the Court had to check whether the claim could be properly formulated as a liberty right, as well as check whether the liberty in question is “‘deeply rooted in this Nation's history and tradition’ or ‘implicit in the concept of ordered liberty’”¹⁶⁶. The reference by Justice White in *Bowers* to *Griswold* is made in order to deny that the right to homosexual sodomy, as he puts it, could ever integrate a liberty implicitly recognized by the Constitution, since homosexual sodomy does not make part, according to him, of the Nation’s history and tradition as well as could not possibly be framed in a proper manner, at least not as a constitutional right of the same magnitude of a marital right to make contraceptive decisions arguably could.

¹⁶² Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124 (January 2011): 747

¹⁶³ “Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom”.

¹⁶⁴ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986).

¹⁶⁵ It is commonly said that equal protection clause is more forward-looking than the due process clause, which is said to be backward-looking. For a version of this argument, see Burt, Robert. "Regulating Sexuality: On Liberty versus Equality." *SELA*. June 11, 2009. <http://www.law.yale.edu/intellectuallife/sela2009.htm> (accessed October 12, 2011). However, as pointed out by Eskridge, the division between forward/backward looking might as well serve to perpetuate the division between those two doctrines, “divorcing the Due Process Clause from the Fourteenth Amendment's core principle of equal citizenship” (Eskridge, William N. "Destabilizing Due Process and Evolutive Equal Protection." *UCLA Law Review*, June 2000: 1185).

¹⁶⁶ *Bowers v. Hardwick*. 478 U.S. 186 (US Supreme Court, June 30, 1986), Justice Scalia’s dissenting.



Such reference to deeply rooted traditions reassembles Devlin-Mill debate over moral principles that guide the regulation of sexuality by the state¹⁶⁷. Justice Scalia applied, without saying, a Devlinesque perspective, referring to long-standing American values, which should legitimately be protected since they are part of the country's tradition. Such appeal to the common morality refers to the idea of disgust in law, or, as Nussbaum puts it, "the appeal to disgust and a solidaristic conception of society are very closely linked in Devlin: it is the value of solidarity that makes the appeal to disgust legally relevant"¹⁶⁸.

In sum, due process of law has an origin in American jurisprudence associated with the Nation's history and tradition, and therefore a progressive jurisprudence regarding sexual minorities should take this as a starting point and as an obstacle. In this sense, liberty arguments are a Pandora box. The diversity of ways history can be seen and told by judges shows that relying heavily on liberty is a risky bet if one cannot properly the liberty claim with a longstanding American history. One way of doing this is to stress both the historical nature of personal liberty to choose one's partner as well as the historical prejudice to which sexual minorities have been subjected in the US, from an equality perspective. The next last section will deal with the later.

2.4. Irrational Prejudice and Disgust

When the Court considers prejudice as an important factor in applying the equal protection clause, it shuts down the way for disgust-based arguments, which are also related to societal preconceived ideas about other's self-worthy. The Court has taken into consideration prejudice in its equality jurisprudence.

¹⁶⁷ Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, 82.

¹⁶⁸ Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, 82.



When the Court is dealing with suspect classes or fundamental rights, it must apply a heightened scrutiny, i.e. where the government must base its laws and policies on a compelling interest narrowly tailored with the use of least restrictive means. The rationale of the heightened scrutiny standard is to protect disfavored groups, or, as Nussbaum has put it, such classifications are those “likely to be linked to hierarchy and discrimination”¹⁶⁹. Currently, the US Supreme Court has recognized five classifications that deserve this heightened scrutiny: “race, national origin, alienage, sex, and nonmarital parentage”¹⁷⁰, while others such as “age, disability, and sexual orientation - currently receive rational basis review”¹⁷¹.

Such suspect groups are considered to be excluded or suffer extra barriers to access the political processes, and therefore the Court is suspicious of laws that single out them, since it is likely that such laws will bring about deleterious effects on those groups. Since the footnote 4 of the *Carolene Products* case, groups that are historically discriminated, and are subjected to “prejudice against discrete and insular minorities”¹⁷² are likely to be included in the group of suspect classes¹⁷³.

The antistatutory and anticlassification principles, described in the previous sections, were inspired by the concept of suspect class. From the theoretical perspective, it is

¹⁶⁹ Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, 44.

¹⁷⁰ Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124 (January 2011): 756.

¹⁷¹ Yoshino, Kenji. "The New Equal Protection." *Harvard Law Review* 124 (January 2011): 756.

¹⁷² *United States v. Carolene Products Co.* 304 U.S. 144 (US Supreme Court, April 25, 1938): footnote 4.

¹⁷³ According to Eskridge, “It was in this context that the Court in *United States v. Carolene Products* (1938) refined equal protection doctrine to justify serious scrutiny toward class-based legislation reflecting “prejudice” against a “discrete and insular minority,” not just African Americans but also Asian Americans and Jews. Judicial activism was best justified when the political process had failed, and the Court considered a process infected with prejudice a failed process” (Eskridge, William N. *Gaylaw: challenging the apartheid of the closet*. Cambridge: Harvard University Press, 2002, p. 207).



possible to see elements of both principles in the idea of suspect class, i.e. the concern with group classifications by law and the reference to historical discrimination in the classification of those groups. From the historical perspective, more importantly, the development of the presumption of unconstitutionality in the case of suspect classes was a response of the Court, in anti-miscegenation cases such as *McLaughlin*¹⁷⁴ and *Loving*¹⁷⁵, to the controversy that followed *Brown* regarding which grounds the Court relied on to apply the inferiority argument to black people, particularly the footnote eleven of *Brown*. In other words, the Court “transformed the constitutional question into a problem concerning the instrumental rationality of regulation”¹⁷⁶, by articulating a framework where racial classification would be per se suspect, and require a heightened scrutiny.

Furthermore, besides its relation with historical discrimination, the idea of suspect class has been also linked by the Court with a prohibition of stereotyping under the Equal Protection Clause. When the US Supreme Court in the *Korematsu* case declared “immediately suspect” the classification of one “single racial group”¹⁷⁷, it launched the concept of suspect class. However, only in *Loving*, the Court clearly affirms, “the clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States”¹⁷⁸. Therefore the idea of a discrimination rooted in prejudice was put in the center of the Equal Protection Clause, although the Court did not need, in *Loving*, to apply the rigid scrutiny since invidious discrimination was not even to be considered a legitimate interest.

¹⁷⁴*McLaughlin v. Florida*. 379 U.S. 184 (US Supreme Court, December 7, 1964).

¹⁷⁵*Loving v. Virginia*. 388 U.S. 1 (US Supreme Court, June 12, 1967).

¹⁷⁶ Siegel, Reva B. "Brown at Fifty: Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown." *Harvard Law Review* 117 (March 2004): 1503.

¹⁷⁷*Korematsu v. United States*. 323 U.S. 214 (US Supreme Court, December 18, 1944).

¹⁷⁸*Loving v. Virginia*. 388 U.S. 1 (US Supreme Court, June 12, 1967).



Likewise, there were instances where the US Supreme Court, even not recognizing that it is a case of a suspect class, has recognized a key role played by stereotypes and prejudices in the discrimination suffered by some groups. For instance, the recognition that, in *City of Cleburne*, an “irrational prejudice against the mentally retarded” could not constitute a legitimate interest¹⁷⁹, along with the formula in *Moreno* case that “bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”¹⁸⁰, compose a picture on the role of prejudice in the Equal Protection Clause.

In light of those cases, the meaning of Equal Protection Clause has shifted from merely opposing anticlassification to antistatutory discrimination. With the emergence of new groups seeking protection the Court, those precedents indicate that the Court has attributed a meaning to the equal protection of laws as prohibiting irrational prejudice in the rationality of law. In other words, to harm a group based, for instance, on disgust or other irrational fears is likely to be a violation of the Equal Protection Clause, even in cases not related to suspect class.

This is the case even when the Court does not grant the status of suspect class to the group subjected to irrational prejudice and therefore not subjected to strict scrutiny¹⁸¹. In the

¹⁷⁹*City of Cleburne, Texas v. Cleburne Living Center, Inc.* 473 U.S. 432 (US Supreme Court, July 1, 1985).

¹⁸⁰*US Dept. of Agriculture v. Moreno.* 413 U.S. 528 (US Supreme Court, June 25, 1973).

¹⁸¹ For the sake of clarification, there are three major tests under the equal protection doctrine in US, derived from its case law. First one is a strict scrutiny test, when fundamental rights or suspect classes are involved. Then, the Court will check (i) whether the state has compelling aims; (ii) whether they are narrowly tailored to this objective, with the use of the least restrictive means. Second, there is an intermediary scrutiny, reserved to quasi suspect class (for instance, gender). The Court will check whether there is an (i) important governmental objective; (ii) means are substantially related to the aim. Finally, there is a rational basis scrutiny, reserved to all the other cases. The court will look at: (i) whether there is a legitimate aim/objective of the State; (ii) Reasonably and rationally related means.



Cleburne case¹⁸², unlike the tradition of deference by the Court to the government under the rational basis review, according to which the Court will just check whether there is a legitimate interest involved and a rationally related means, the Court questioned the aims (justifications) proposed by the government to its policy. This more searching test has been named by the literature as the “rational basis with bite”¹⁸³. Under this standard, a more searching enquiry is conducted by the Court in comparison with the default rational basis review, precisely because the Court will question the aims of the state action¹⁸⁴.

In the case of sexual minorities, where the emergence of irrational prejudices is likely to occur considering the precedent of disgust-based arguments in this context¹⁸⁵, it is arguable that the primary question is not whether homosexuals constitute a suspect class, although there are already considerable literature affirming it would be correct to qualify them as such¹⁸⁶. More importantly, the key issue is rather whether rights of sexual minorities have been denied in equal manner solely on the basis of irrational prejudice related to disgust feelings. The focus on disgust and therefore on historical discrimination is able to convince the Court to apply a more searching standard to laws affecting homosexuals (likely rational

¹⁸² *City of Cleburne, Texas v. Cleburne Living Center, Inc.* 473 U.S. 432 (US Supreme Court, July 1, 1985).

¹⁸³ Smith, Jeremy B. "The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation." *Fordham Law Review* 73, no. 6 (2005).

¹⁸⁴ Smith, Jeremy B. "The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation." *Fordham Law Review* 73, no. 6 (2005): 2774.

¹⁸⁵ Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010.

¹⁸⁶ See Smith, Jeremy B. "The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation." *Fordham Law Review* 73, no. 6 (2005). Or Yoshino, Kenji. "Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"." *Yale Law Journal Company* 108 (December 1998).



basis with a bite), while it still leaves aside the question of whether they constitute a suspect class.

2.5. Conclusion: Towards Dignity?

According to Tribe, who represented Hardwick in *Bowers*, this tension between due process and liberty was shortened by the US Supreme Court holding in *Lawrence* case¹⁸⁷, considered by him the “*Brown v. Board of gay and lesbian America*”¹⁸⁸. As highlighted above, Justice Kennedy, writing for the majority in *Lawrence*, instead of basing the decision on the Equal Protection Clause, saw a Due Process claim in order to overrule the *Bower*’s decision, also based on due process grounds.

If Justice O’Connor and Justice Kennedy’s opinions are taken together, *Lawrence v. Texas* constitute a bold objection to those who believe it is not possible or convenient to relate liberty with equality. According to Tribe, *Lawrence* tells a “multi-layered story”, i.e. “a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity”¹⁸⁹.

Such dignity approach is explicit in Justice Kennedy’s opinion in *Lawrence*, which is in itself a development in relation to the often-implicit recognition of dignity in American law¹⁹⁰. When Justice Kennedy highlighted that “equality of treatment and the due process

¹⁸⁷ *Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003).

¹⁸⁸ Tribe, Laurence H. “*Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak its Name.*” *Harvard Law Review* 117 (April 2004): 1895.

¹⁸⁹ Tribe, Laurence H. “*Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak its Name.*” *Harvard Law Review* 117 (April 2004): 1896; 1898.

¹⁹⁰ According to Eskridge, “The state’s demonization of ‘degenerates,’ ‘homosexuals and sex perverts,’ cross-dressers, lesbians, and gay men in the last century similarly denied dignity to its objects. The gay rights movement recognized this in 1961 when it publicly declared as its twin goals ‘to equalize the status and position of the homosexual with those of the heterosexual’ and ‘to secure for the homosexual the right, as a human being, to develop and



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”¹⁹¹, he set a dignity-approach to rights of sexual minorities. According to this standard, stigmatization, in this case through disgust-based laws that express moral disapproval against a minority, violates an equal liberty clause, and, in this sense, the case should be decided in both grounds and the liberty it recognizes is defined in equal terms to all members of society¹⁹².

Currently, several issues are still pending in the American constitutional jurisprudence regarding sexual minorities. First, it is not clear whether the fall of equality doctrine is applicable to the case of sexual minorities as it is arguably pertinent to race cases, due to the fact that the only case (Bowers) involving sexual minorities decided under the Equal Protection Clause was in fact a strong statement from the Court, despite its narrow holding. Second, it is also unclear the role of prejudice in the equality jurisprudence regarding sexual minorities, since they are not until now considered suspect class, and therefore the Court might be less assertive in terms of rejecting prejudice in law as it was in *Romers*, especially if in the future a case will not so clear-cut as *Romers*. Third, in order to articulate claims of sexual minorities’ rights on liberty, it is necessary to formulate a historical argument through which the liberty claim can be properly framed. Even after the sweeping intentionalist argument developed by Justice Kennedy in *Lawrence*, history and tradition still play a key

achieve his full potential and dignity, and the right as a citizen, to make his maximum contribution to the society in which he lives.’ The principle of dignity has been implicit in some American cases. Lesbians, gay men, and bisexuals have children, often in the context of a marriage to someone of a different sex.” (Eskridge, William N. "Destabilizing Due Process and Evolutive Equal Protection." *UCLA Law Review*, June 2000: 1210).

¹⁹¹ *Lawrence v. Texas*. 539 U.S. 558 (US Supreme Court, June 26, 2003), para. 575.

¹⁹² In Nussbaum’s words, “The core idea of a protected are of liberty is independent of and not fully explained by the idea of equal treatment: we need an account of which liberties are protected before we say that liberties are protected equally for all. *Lawrence* articulates well the relevant notions of liberty and equal liberty” (Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, p. 87).



role in the constitutional due process jurisprudence and therefore the Court might see new claims for formal recognition of same-sex relations as a usurpation of the mandate of the political processes if considers that it is not relied on the country's history and tradition.



Chapter Three.

Human Dignity and Sex: The South African Jurisprudence on Sexual Freedom

The US jurisprudence on sexual minorities leaves several questions without clear answers. Is the emergence of a dignity-based approach a panacea to overcome the tensions between liberty and equality? What is the proper role of history and tradition in defining constitutional rights in the judicial interpretation, particularly in order to avoid incorporating eventual feelings of disgust socially consolidated? Are there any tensions between a race-driven equality doctrine and a claim for universal liberty via due process? Due to lack of clear constitutional standards for interpretation in US, is it reasonable to rely primarily in judicial self-restraint? Those are issues discussed in the previous chapter from the US perspective.

The South African experience with constitutional process and its judicial enforcement, in a post apartheid context, as well as its understanding of the sexual minorities' rights seek to answer those same questions in a different manner than the US and therefore the comparison between these two jurisdiction is an effort worthy to make. The South African Constitutional Court led the development of sexual minorities' rights in that country, first striking down the sodomy provision and, later, recognizing same-sex marriage. Furthermore, from a comparative perspective, if the experience in US is moving towards an increasing recognition of the right to human dignity, as signalized above, the South African jurisprudence based on human dignity is enough food for critical thought of the potential and danger of such dignity-based approach to rights of sexual minorities.

In this chapter, I argue first that, unlike in the US, the South African Constitutional Court is expressly obliged by the constitution to apply a dignity-based approach to sexual minorities' rights, considering the clear-cut text of the Constitution regarding judicial



interpretation of the Bill of Rights. Second, I argue that the South African Constitutional Court applies the concept of human dignity, in its cases related to sexual minorities, as a standard through which the symbolic impact of discriminatory laws on the moral value of those minorities can be constitutionally assessed and disgust-based policies can be overcome. To put it simply and linking it with the discussion in the present thesis regarding disgust-based policies, the South African Constitutional Court embraced dignity as a value mainstreamed in its equality jurisprudence in order to determine what laws harm self-worth of sexual minorities, or, in other words, to precisely tackle disgust. Yet, third, a human dignity approach, for its vagueness, has failed in its mission of serving as a clear constitutional standard, in specific cases (particularly, *S v Jordan and Others*, 2002), where Justices expressed views of what dignity means that are, to say the least, subjected to severe criticism.

This chapter has the following structure. First, it presents briefly the South African political context post-apartheid and its influence in the constitutional-making process. Such prelude leads to a better understanding of the anti-discrimination clause in the Constitution and the jurisprudence of the Constitutional Court. Second, this chapter introduces the South African equality jurisprudence by reference to key cases on sexual minorities' rights as well as to the history of how gay groups and allies managed to include for the first time ever in a constitution the expression "sexual orientation" as one of the prohibited grounds of discrimination in the South African Constitution (Section 9 (3) in the 1996 Final Constitution and Section 8 (3) in the 1993 Interim Constitution). Third, a dignity-based approach will be critically assessed through the lens of two cases, one regarding recognition of same-sex relations as permanent life partners¹⁹³ and the other regarding decriminalization of

¹⁹³*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*. CCT10/99 (South African Constitutional Court, December 2, 1999).



prostitution¹⁹⁴. Finally, in the conclusion, this chapter explains briefly the limits of a dignity-based jurisprudence in linking equality and liberty as well as the reason of its much-celebrated strength.

3.1. The Constitutional-Making Process and the Gay Movement in South Africa

The constitutional-making process in South Africa presents particular features¹⁹⁵. In the process of transition from apartheid to democracy, the Multi-Party Negotiating Process (MPNP) adopted an Interim Constitution, which came into force in April 1994. Such document lists 34 Constitutional Principles that should guide the drafting of the Final Constitution, under the supervision of the Constitutional Court. After the Constitutional Court rejected to certify the Final Constitution once and after it was amended accordingly, the Final Constitution was finally adopted on 10 December 1996, coming into force on 4 February 1997. It was an unprecedented process¹⁹⁶, in constitutional-making, where not only the drafters of the final Constitutional were subjected to a political compromise post-apartheid in the form of constitutional principles, but also the outcome of this process was under the supervision of the Constitutional Court.

The South African experience with constitutional-making in general, and with the inclusion of the sexual orientation in the South African Constitution in particular, had two aspects that later on generated major implications to the equality jurisprudence.

¹⁹⁴*S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*. CCT31/01 (South African Constitutional Court, October 9, 2002).

¹⁹⁵ For more details regarding the constitutional-making in South Africa, see: Roux, Wessel Le. "The South African Constitutional Court." *BISA III*. Pretoria: Pretoria University, 2008, available at: <http://www.conectas.org/IBSA/WesselLeRoux.doc>

¹⁹⁶ Roux, Wessel Le. "The South African Constitutional Court." *BISA III*. Pretoria: Pretoria University, 2008, available at: <http://www.conectas.org/IBSA/WesselLeRoux.doc>, p. 11.



First, the fight to include sexual orientation in the constitution was an elitist movement, in the sense that it did not intend and even avoided in explicitly terms to contribute to the establishment of a grassroots movement to support the cause¹⁹⁷. The main actor in the litigation process for sexual freedom, the National Coalition for Gay and Lesbian Equality, in its efforts to secure the maintenance of the expression “sexual orientation” during the political process that lasted from the 1993 interim constitution and to the approval of the 1996 final constitution, adopted, on one hand, a targeted strategy of focusing on the criminalization of same-sex intercourse, avoiding therefore defending that this clause would eventually lead to legalization of same-sex marriage.

On the other hand, the National Coalition strategically avoided creating a grassroots movement, because of the fear that this could increase existing homophobic feelings by the general public instead of curbing them. In this sense, the National Coalition strategy between 1994 and 1996 was one of lobby based on personal connections with certain politicians rather than mass campaigns¹⁹⁸. This centralized strategy of the National Coalition contrasts with accounts of the underground gay life and movement even during the apartheid¹⁹⁹, and, by not incorporating those multitudes of perspectives, it lost the opportunity of adding the perspective of black and poor gays and lesbian into its advocacy efforts. In this sense, the

¹⁹⁷ Vos, Pierre de. "The Inevitability of Same-Sex Marriage in South Africa's Post-Apartheid State." *South African Journal on Human Rights* 23, no. 3 (2007): 432-465.

¹⁹⁸ Vos, Pierre de. "The Inevitability of Same-Sex Marriage in South Africa's Post-Apartheid State." *South African Journal on Human Rights* 23, no. 3 (2007): 441. In this sense, Oswin's words are also relevant: "The Coalition's lobbying effort was a very conservative kind of activism. It chose not to rattle potential adversaries in South African society by making specific demands around such volatile issues as the definition of family, adoption, and the recognition of same-sex partners as spouses for the purposes of benefits. And, while cognizant of the need to present an image of gender, class, and (most important) racial diversity within its ranks, the NCGLE developed arguments about the immutability of sexual orientation as parallel to the immutability of race and about the harmlessness of gays and lesbians" (Oswin, Natalie. "Homonormativity in Neoliberal South Africa: Recognition, Redistribution, and the Equality Project." *Signs: Journal of Women in Culture and Society* 32, no. 3 (2007): 652.

¹⁹⁹ Rudwick, Stephanie. "'Gay and Zulu, we speak isiNgqumo': Ethnolinguistic identity constructions." *Transformation*, 2010: 115-118.



connection between equality and race in the South African post-apartheid context is still so present that impacts how the gay identity²⁰⁰ is read in light of a transformative constitution such as the one in South Africa.

From a disgust perspective, this elitist process, otherwise successful as an advocacy strategy, led to a schizophrenic scenario: a progressive constitution with a unique anti-discrimination clause while the societal strong prejudice against sexual minorities was left almost intact²⁰¹.

This schizophrenia affected the equality jurisprudence of the Constitutional Court in at least two ways. On the one hand, even if the legalization of same-sex marriage was somehow inevitable due to the inclusion in the Constitution of the expression “sexual orientation” as De Vos argues²⁰², it was not obvious. Due to the conservative strategy adopted between 1994 and 1996 during the constitutional-making process, the Court, when decided the same-sex marriage case, had to read the text of the Constitution beyond its conservative roots. It required an argumentative effort that the Court addressed by tackling

²⁰⁰ On the matter of race and gay identity, Jacklyn Cock’s claim that: “The challenge is to define a lesbian and gay identity as an inclusive African identity. As Gevisser and Cameron write, “there is no single, essential gay identity in South Africa. What has passed for ‘the gay experience’ has often been that of white, middle- class, urban men.” (Gevisser& Cameron, 1994, p. 3). The divisions of gender, race, and class, which still scar the South African society mitigate against any powerful, representative gay and lesbian movement developing. These social cleavages mean that there is no “common experience of sexual oppression,” as Jara and Lapinsky (1988, p. 1) claim.” (Cock, Jacklyn. "Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution." *Women's Studies International Forum* 26, no. 1 (2003): 43).

²⁰¹ In this sense, “the campaign was not aimed at changing the hearts and minds of the South African population or to confront homophobic attitudes and assumptions. It was felt it would be too risky to try to confront societal homophobia because of the strong possibility of a disastrous backlash. Every care was thus taken to be uncontroversial and to show that gay men and lesbians were also ‘normal’ human beings” (Vos, Pierre de. "The Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State." *South African Journal on Human Rights* 23, no. 3 (2007): 440)

²⁰² Vos, Pierre de. "The Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State." *South African Journal on Human Rights* 23, no. 3 (2007).



the heteronormative nature of family law in South Africa and considering a right to be different as one of the foundations of Section 9 (3)²⁰³.

This alleged right to be different faces certain limits in the same jurisprudence of the South African Constitutional Court regarding marriage law, in this case particularly related to whether marriages celebrated only by Islamic law (Sharia) should be considered legal under the South African family law²⁰⁴. In a case involving the recognition of inheritance rights to a woman married only under Sharia law²⁰⁵, Justice Sachs, writing for the majority, reaffirmed her rights due to her monogamous relation, by putting her to the condition of spouse, without however extending the meaning of this word to women marriage only under Islamic law²⁰⁶.

Second, the elitist lobby strategy of National Coalition also had an impact on how race, a clearly decisive matter in South African post-apartheid politics, was connected with the struggle for equality of sexual minorities. It was a complex relation of distance and proximity. On the one hand, advocates for the inclusion of "sexual orientation" in the constitutional text avoided the language of racial discrimination in order to present the group of gays and lesbians as a relatively uniform and united segment. During the constitutional process, the National Coalition was successful in bringing up under its wing forty different groups giving, therefore, an image of unification of the gay movement, despite racial differences. This strategy was qualified as coalition politics.²⁰⁷

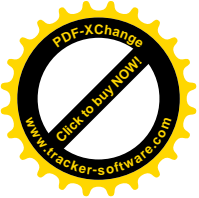
²⁰³ *Minister of Home Affairs and Another v Fourie and Another*. CCT 60/04 (South African Constitutional Court, December 1, 2005).

²⁰⁴ Gabru, N. "Dilemma of muslim women regarding divorce in South Africa." *Potchefstroom Eletronic Journal*, 2004. See also: Rautenbach, Christa. "Gender Equality and Religious Family Laws in South Africa." *Queensland University of Technology Law and Justice Journal* 3, no. 1 (2003).

²⁰⁵ *Juleiga Daniels v. Robin. Grieve Campbell*. Case CCT 40/03 (South African Constitutional Court, March 11, 2004).

²⁰⁶ *Juleiga Daniels v. Robin. Grieve Campbell*. Case CCT 40/03 (South African Constitutional Court, March 11, 2004), para. 29-33.

²⁰⁷ Stychin, Carl F. "The Struggle for Sexual Orientation in the South African Bill of Rights." *Journal of Law and Society* 23, no. 4 (December 1996): 461.



On the other hand, and in a paradoxical manner, the National Coalition used the language of anti-apartheid in order to advance its interests. Taking advantage of the political environment upon the end of the regime of racial segregation where all major political actors across the spectrum were unwilling to deny any claim for equality²⁰⁸, the National Coalition successfully embraced this liberation discourse post-apartheid. In US terms, such broader context for the gay liberalization in South Africa reminds the anti-subordination principle, as De Vos properly recalls²⁰⁹, once it takes history into consideration to determine which groups have been subject to domination and therefore should be specially protected by courts.

3.2. Overview of the SA Constitutional Court jurisprudence on sexual minorities

In 1998, the South African Constitutional Court struck down the common law offence of sodomy between two men, in the case *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*²¹⁰ (hereafter, National Coalition 1). Justice Ackermann, speaking for Court, defended, on the one hand, a wide concept of sexual

²⁰⁸ In this sense, “The Coalition worked hard to show that it was representative and also framed its issues in a language that tapped into the larger discourse of anti-apartheid oppression. They did this, both as a matter of principle and, I would contend, in the interests of strategy because the prevailing political climate prohibited mainstream constitutional players from opposing the granting of rights to historically marginalized groups”. (Vos, Pierre de. “The Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State.” *South African Journal on Human Rights* 23, no. 3 (2007): 442). See also: Stychin, Carl F. “The Struggle for Sexual Orientation in the South African Bill of Rights.” *Journal of Law and Society* 23, no. 4 (December 1996): 461.

²⁰⁹ Vos, Pierre de. “The Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State.” *South African Journal on Human Rights* 23, no. 3 (2007): 448.

²¹⁰ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. CCT11/98 (South African Constitutional Court, October 9, 1998).



orientation²¹¹, and on the other hand placed human dignity in the center of the equality jurisprudence, as explained below.

National Coalition 1 represented a queer moment of the South African Constitutional Court²¹², when Justice Ackermann's wide concept of sexual orientation, conceived according to "a generous interpretation of which it is linguistically and textually fully capable of bearing"²¹³, is analyzed along with Justice Sachs's concurring opinion in the cast. By defining sexual orientation through reference to sexual desire, and therefore avoiding making reference to fixed categories of sexuality, the South African Constitutional Court tackled one of principles of a disgust-based perspective, namely: the idea that non-mainstream forms of sexuality might provoke extreme feelings of rejection by the society, and therefore society would have the right to protect itself, as put by Lord Devlin²¹⁴, including via criminal law.

When sexuality is defined by referring to a ground common to virtually all human beings, namely: sexual desire, it becomes harder for the society to justify criminalizing actions, at a more general level, common to all members of the society. A disgust-based policy (one that defends the criminalization of private sexual acts only because of the majority of the society that's deeply offended by them) assumes that there is a fundamental difference between sexual acts of straight couples and of others. When this key distinction

²¹¹ According to Justice Ackermann: "[This concept] applies equally to the orientation of persons who are bi-sexual, or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex." *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. CCT11/98 (South African Constitutional Court, October 9, 1998), para. 22.

²¹² Vos, Pierre De, and Jaco Barnard-Naudé. "Disturbing heteronormativity: The 'queer' jurisprudence of Albie Sachs." *Southern African Public Law* 25, no. 1: 209-234.

²¹³ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. CCT11/98 (South African Constitutional Court, October 9, 1998), para. 21.

²¹⁴ "Society may use the law to preserve morality in the same way it uses it to safeguard anything else if it is essential to its existence" (Devlin, Patrick. *The Enforcement of Morals*. New York: Oxford University Press, 1965, p. 11).



falls apart by reference to a common ground that puts all forms of consented sexuality at the same moral level, a disgust-based law such as a sodomy provision becomes illogical.

Yet, in Devlin's terms, such reconceptualization of sexuality should reach the mind of ordinary people, because according to him morality relies on the reasonableness of the ordinary man. This is in fact a challenge recognized by the South African Constitutional Court itself in the *National Coalition 1*. Justice Sachs, in his concurring opinion, admits that homophobic prejudice will remain after the decision, but at least the Constitution "require(s) the elimination of public institutions which are based on and perpetuate such prejudice"²¹⁵. Such progressive perspective tackles directly the Burkean conservatism of Lord Devlin, who, according to Nussbaum, "relied on disgust because it seemed to him to be an expression of deep-seated social conventions"²¹⁶. The *National Coalition 1* case answers this issue inverting Devlin's logic and highlighting the role of public institutions in advancing rights, rather than merely enforcing existing moral conventions.

In addition to the queerness of *National Coalition 1*, this case is also relevant for making clear the relation between dignity, liberty and equality. In short, dignity operates as a method of interpreting the equality clause, which within the Harksen test means that dignity serves as a standard to assess the impact of the measure on the individual²¹⁷. In this sense, the South African Constitutional Court argues for a more individualized analysis of the impact of discrimination.

Such individualized perspective lead Justice Sachs to argue for a non-compartmentalized view of equality, dignity and privacy. According to him, anti-sodomy

²¹⁵*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. CCT11/98 (South African Constitutional Court, October 9, 1998), para. 130.

²¹⁶Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010, p. 10.

²¹⁷*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. CCT11/98 (South African Constitutional Court, October 9, 1998), para. 19.



laws violate equal respect for difference, which is vital to equality. On the other hand, restricting different forms of sexuality within the private sphere also leads to a basic violation of equal treatment²¹⁸. Although it is an unclear concept²¹⁹, according to Justice Ackermann, “the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society”²²⁰. In this sense, self-worth is arguably the key element in dignity according to South African Constitutional Court, and therefore individuals should have the right to equality in order to be considered fully and evenly members of the society.

Yet, if the idea of dignity, in the context of sexual minorities, is to address a symbolic discrimination suffered by those minorities, the second judgment delivered by the South African Constitutional Court in an petition by the National Coalition²²¹, regarding same-sex partnerships, represents a shortcoming in the queer jurisprudence of this Court.

In the case here called National Coalition 2, the Court held that same-sex partners have equal rights under the Aliens Control Act 96 of 1991. In this sense, the Court avoided recognizing expressly the constitutionality of same-sex marriage, but read in the Aliens Control Act in conformity with the Constitution, and therefore allowing same-sex partnerships. According to the literature²²², this case represented a shortcoming in the Court’s

²¹⁸*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. CCT11/98 (South African Constitutional Court, October 9, 1998), para. 112.

²¹⁹Wesson, Murray. “Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and South African Constitutional Court.” In *Constitutional Topography: Values and Constitutions*, by András Sajó & Renata Uitz, 280. Utrecht: Eleven International Publishing, 2010, p. 281.

²²⁰*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. CCT11/98 (South African Constitutional Court, October 9, 1998), para. 28.

²²¹*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*. CCT10/99 (South African Constitutional Court, 2 December 1999).

²²²Vos, Pierre de. “The Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State.” *South African Journal on Human Rights* 23, no. 3 (2007): 452-453.



jurisprudence because endorsed a politics of passing²²³, i.e. incorporated an idealized concept of opposite-sex relations and conditioned the recognition of same-sex partnerships to this stereotype.

In particular, the paragraph 88 of the National Coalition 2²²⁴ lists several factors that, according to the Court, would qualify a same-sex relation to be equivalent to an opposite-sex permanent relation under the Aliens Act. In other words, as put by De Vos and Barnard, those requirements created the idea of “good homosexual”²²⁵, i.e. they indicate that same-sex relations should respect an extensive list of requirements to have the same value of opposite-sex relations, although those former relations do not need to comply in general with demands such as shared responsibility in living expenses or nature of the ceremony, among others, listed by the Court.

From a disgust-based perspective, the symbolic dimension of legal misrecognition, i.e. the set of “institutionalized patterns of cultural value [established] in ways that prevent

²²³ Barnard-Naudé, Jaco. “Sexual Minority Freedom and the Heteronormative Hegemony in South Africa.” In *Courting Justice: Brazil-India-South Africa: Comparing the Jurisprudence of the apex courts of Brazil, South Africa and India*, by Oscar Vilhena, Frans Viljoen and Upendra Baxi. Pretoria: Pretoria University Press.

²²⁴ In the Court’s opinion delivered by Justice Ackermann: “Without purporting to provide an exhaustive list, such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another” (*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*. CCT10/99 (South African Constitutional Court, 2 December 1999, para. 88).

²²⁵ Vos, Pierre De, and Jaco Barnard-Naudé. “Disturbing heteronormativity: The ‘queer’ jurisprudence of Albie Sachs.” *Southern African Public Law* 25, no. 1: 218.



one from participating as a peer in social life”²²⁶, is reinforced rather than tackled when the Court sets a list of requirements for same-sex relations inspired directly in an idealized version of opposite-sex unions, which therefore assumes stereotypes (or cultural values) peculiar to heteronormativity²²⁷.

Such heteronormativity was only tackled properly in the later case regarding same-sex marriage, *Minister of Home Affairs and Another v Fourie and Another*²²⁸, when the South African Constitutional Court held that the common-law definition of marriage is inconsistent with the Constitution and granted the remedy of ordering the Parliament to pass a legislative amendment in order to correct such inconsistency within 12 months from the date of the judgment. From the perspective of symbolic discrimination suffered by sexual minorities, especially regarding the design of public institutions by legal means, the Fourie case is central in at very least two ways.

First, the case confirms the centrality of dignity in an equality jurisprudence, in the sense that the “crucial determinant [to determine whether there was a violation of the equality clause] will always be whether human dignity is enhanced or diminished and the achievement

²²⁶ Fraser, Nancy, and Axel Honneth. *Redistribution or Recognition: A Political-Philosophical Exchange*. New York: Verso, 2003.

²²⁷ De Vos presents a description of how the Court has reinforced heteronormativity: “Given the forceful rhetoric of the Court in *NCGL v Justice* regarding the right to be different, the focus on the above factors suggests that only idealized heterosexual marriage-like relationships would be legally protected. Although the Court was at pains to point out that none of these requirements is indispensable for establishing a relationship worthy of legal protection, the cumulative effect of this set of factors and the way in which the Court has dealt with questions about the legal protection of same-sex relationships in other cases, suggests that relationships that do not closely map that of an idealized heterosexual marriage, will not be worthy of equal concern and respect” (Vos, Pierre de. “The Inevitability of Same-Sex Marriage in South Africa’s Post-Apartheid State.” *South African Journal on Human Rights* 23, no. 3 (2007): 452).

²²⁸ *Minister of Home Affairs and Another v Fourie and Another*. CCT 60/04 (South African Constitutional Court, 1 December 2005).



of equality is promoted or undermined by the measure concerned”²²⁹, as pointed out by Justice Sachs. Yet, this decision goes even further. The centrality of dignity in the equal protection jurisprudence was already established clearly by the Harksen test. What Justice Sachs highlights by applying the idea of human dignity is the symbolic impact of legal institutions, particularly when they accord unequal statuses to members of society.

It is impossible to not remind the decision of the US Supreme Court in *Brown v. Board of Education*, discussed in the first chapter, in this particular aspect. When the majority in that case highlighted that physical separation perpetuated per se a system where certain members of society were considered inferior, the Court highlighted the role of public institutions in granting status to individuals according to certain aspects (race, sex, and others). The South African Constitutional Court in *Fourie* takes this idea to another level, beyond the physical separation, by affirming that separated legal regimes (non-recognition of same-sex marriage and common law definition of opposite-sex marriage) imposes an inferior condition to same-sex couples only based on prejudices and strong feelings of rejection, what here is called disgust. Such aspect is explicit in the opinion delivered by Justice Sachs, “It is when separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status that it becomes constitutionally invidious”²³⁰.

Second, the South African Constitutional Court, in *Fourie*, affirms a right to be different. In this sense, the Court radically interprets the equality clause not only as accepting different forms of sexuality and family, but also as requiring that the constitutional debate on equal protection of sexual minorities should be conducted within such pluralistic framework.

²²⁹*Minister of Home Affairs and Another v Fourie and Another*. CCT 60/04 (South African Constitutional Court, 1 December 2005): para. 152.

²³⁰*Minister of Home Affairs and Another v Fourie and Another*. CCT 60/04 (South African Constitutional Court, 1 December 2005): para. 152.



Precisely, the Court has set four aspects of this framework²³¹: (i) in South Africa, family law is plural in terms of the legal entities it recognizes; (ii) recognition of historical discrimination against sexual minorities; (iii) lack of broad recognition of rights to gays and lesbians; (iv) Constitution as a historical document against a background of oppression (apartheid). This framework imposes a historical perspective over the rights of sexual minorities in particular, and the equality clause in general, and therefore seeks to tackle laws based on disgust feeling by putting them into a historical perspective that takes discrimination and lack of legal recognition seriously.

3.3. General Framework of the Equality Jurisprudence and Section 9

When Justice Sachs expressed that dignity is the link between equality, liberty and privacy in his concurring opinion of the first sodomy case before the South African Constitutional Court, decided in 1998 [hereafter, *National Coalition 1 case*]²³², he highlighted a key point in the development of constitutional jurisprudence regarding sexual minorities' rights. It is, namely, on the one hand, the role of dignity in remedying discrimination against sexual minorities at the recognition level (i.e. tackling the heteronormative nature of legal system) and, on the other hand, the role of dignity in providing a solid basis for an equality jurisprudence, in order to overcome tensions between equality and liberty.

From a moral standpoint, Justice Sachs words emphasize the intrinsic value of each member of the society and therefore made it clear that invalidating sodomy provisions was not a “case about who may penetrate whom where” (para. 107), a way of demeaning the issue

²³¹*Minister of Home Affairs and Another v Fourie and Another*. CCT 60/04 (South African Constitutional Court, 1 December 2005): para. 59.

²³²*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*. CCT11/98 (South African Constitutional Court, October 9, 1998).



of the case, but rather a dispute about equal respect. Such reframing of the issue before the Court reminds Justice Kennedy's words in *Lawrence v. Texas*, when he stressed the liberty aspect of the dispute, by denying that the issue was merely the right to conduct sodomy as the majority in *Bowers* had put it almost two decades ago.

From a legal perspective, Justice Sachs's use of dignity as a method of constitutional interpretation, the purposive interpretation, follows the famous death penalty case *Makwanyane v. South Africa*²³³, by applying human dignity as part of the values of the South African Constitution (Section 39 (1) a). According to his view, the Constitution should be interpreted in a "generous" and "purposive" manner²³⁴, according to which dignity is a key object of the rights established in the Constitution, and therefore any interpretation of the Bill of Rights must advance human dignity. This bite of the case illustrates the role of human dignity as a value that transcends the right to human dignity (Section 10 of the South African Constitution), where it is established as a right on its own, and reaches the level of a larger constitutional object or reference for other rights.

Dignity, as interpretative method, is linked with equality, under the equality clause. Equality, as a right, is established by the Section 9 of the South African Constitution, as a protection against unfair discrimination, while it is also an interpretation method determined by the Constitution itself in the Section 39, "when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom"²³⁵. In this sense, to take equality and dignity

²³³ *S v Makwanyane and Another*. CCT3/94 (South African Constitutional Court, June 6, 1995).

²³⁴ *S v Makwanyane and Another*. CCT3/94 (South African Constitutional Court, June 6, 1995), para. 9.

²³⁵ For a detailed analysis of the meaning of this provision on interpretation of constitutional methods, see: Woolman, Stu, and Henk Botha. "Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework and Hard Choices." In *Constitutional*



into account in constitutional interpretation is an explicit obligation of the courts, while in the US there are no clear constitutional standards of interpretation mandated in explicit terms by the Constitution²³⁶.

The text of the Section 9, the equality clause of the South African Constitution, protects against unfair discrimination. The general framework to decide whether it is a case of unfair discrimination was outlined in the Harksen case²³⁷, decided by the South African Constitutional Court in 1997. It is a two-fold framework²³⁸ outlined in the paragraph 53 of the above-mentioned decision.

First, the Court must check whether there is a differentiation in the first place. If yes, it should apply a rationality test (similar to the US rational basis review), asking itself whether such differentiation is rationally related to a legitimate government aim, in order to verify whether the Section 8(1) of the Constitution, regarding the applicability of the Bill of Rights to all three branches, has been violated.

Second, the Court must check whether the differentiation amounts to unfair discrimination in the meaning of the Section 9. On the one hand, it will be the case of discrimination whether “the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner”²³⁹.

Conversations, by Stu Woolman and Michael Bishop, 149-186. Pretoria: Pretoria University Law Press, 2008.

²³⁶ For a contrary view according to which the US Constitution envisages the rules for its own interpretation, see: Paulsen, Michael Stokes. "Does the Constitution Prescribe Rules for Its Own Interpretation?" *Northwestern University Law Review* 103, no. 2 (2009): 857-922.

²³⁷ *Harksen v Lane NO and Others*. CCT9/97 (South African Constitutional Court, October 7, 1997).

²³⁸ In fact, there is a third element in this framework that does not need to be mentioned in the main text of this thesis due to its specificity, namely, whether the discriminatory measure is within the limitation clause of the South African Constitution.

²³⁹ *Harksen v Lane NO and Others*. CCT9/97 (South African Constitutional Court, October 7, 1997), para. 53.



This is a crucial step for the present thesis. Under the concept of human dignity, the Court has been able to tackle discriminatory laws against sexual minorities reaffirming their self-worth and therefore rejecting disgust-based policies with a dignity-based equality jurisprudence. Importing the concept of dignity into the equality analysis is useful to raise the judicial standard, i.e. it helps the Court to determine which kinds of differentiation should deserve its special attention because their risk of impairing dignity²⁴⁰.

On the other hand, the Court must assess whether it is an unfair discrimination. Several factors have been established to assist the Court in this task, such as the extent of the violation, the position of the individual and the nature of the provision²⁴¹. However, the main aspect to determine the unfairness of the discrimination is the impact of the measure on the individual. From a dignity perspective, such individualistic focus opens a wide space for petitioners to argue from the point of view of the victim and its self-worth. Yet, this focus on the individual impact of discriminatory policies can lead to a personalized jurisprudence more focused on claims for recognition, rather than claims on socio-economic redistribution²⁴². This issue has been, for instance, reason of concern in other jurisdictions like in Canada²⁴³.

²⁴⁰ Wesson, Murray. "Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and South African Constitutional Court." In *Constitutional Topography: Values and Constitutions*, by András Sajó & Renata Uitz, 280. Utrecht: Eleven International Publishing, 2010.

²⁴¹ *Harksen v Lane NO and Others*. CCT9/97 (South African Constitutional Court, October 7, 1997), para. 51.

²⁴² Albertyn, Cathi, and Beth Goldblatt. "Towards a Substantive Right to Equality." In *Constitutional Conversations*, by Stu Woolman and Michael Bishop, 231-254. Pretoria: Pretoria University Law Press, 2008.

²⁴³ Wesson, Murray. "Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and South African Constitutional Court." In *Constitutional Topography: Values and Constitutions*, by András Sajó & Renata Uitz, 275. Utrecht: Eleven International Publishing, 2010.



3.4. Criticism to a Dignity-based Approach: Jordan case

Before presenting the problematic related to the Jordan case in South Africa, it is worthy introducing briefly the term here at stake. Human dignity is not often expressly recognized in legal documents. The German Basic Law is a notable exception. Its article 1 establishes the right to human dignity. Nevertheless, dignity has been considered the foundation of several constitutional systems, recognized expressly by the Bill of Rights itself or (more often) indirectly by the jurisprudence of constitutional courts. Accordingly, human dignity has assumed different legal forms.

For instance, when the right to human dignity is expressly mentioned in the German Basic Law (Article 1), it is formulated as an absolute or, in the words of the Basic Law, “inviolable” right. By contrast, the right to human dignity, despite not being expressly mentioned in the legal text, is often derived from other rights. In this sense, the European Court of Human Rights, for instance, derived the right to human dignity from the right to private life (Article 8, European Convention on Human Rights), as stated in the case *Pretty v. United Kingdom*²⁴⁴ (para. 27). The Canadian Supreme Court, on the other hand, derived the right to human dignity from the right to equality based on the anti-discrimination clause (Section 15 (1), Canadian Charter), as highlighted in the case *Law v. Canada*²⁴⁵ (para 53).

Once human dignity is accepted as a right, it can assume different functionalities depending on the circumstances of each case and the specific legal framework. In the *Lüth* Case before the German Federal Constitutional Court, the right to dignity operated as the top value of the so-called “objective order of values” of the Basic Law and therefore it served as

²⁴⁴*Pretty v. United Kingdom* (2346/02) [2002] ECHR 423 (European Court of Human Rights, April 29, 2002).

²⁴⁵*Law v. Canada (Minister of Employment and Immigration)*. [1999] 1 S.C.R. 497 (Supreme Court of Canada, March 25, 1999).



a guidance to solve even cases about private individuals, as application of the indirect horizontal effect of the Bill of Rights. In the *Pretty v. United Kingdom*²⁴⁶, the European Court considers human dignity as the “very essence of the Convention” (para. 27) and protects under its scope even “physically or morally harmful or dangerous” activities that are worthy to the individual concerned (para. 25).

In *Law v. Canada*²⁴⁷, on the other hand, the protection to the human dignity functions as the purpose of the equality clause (para. 53-54), within the general purposive approach to the Section 15 (1) of the Canadian Charter. Finally, as presented earlier, human dignity, in the *Makwanyane v. South Africa*²⁴⁸ before the South African Constitutional Court, operates as part of the values of the Constitution (Section 39 (1) a) to be read under a “generous” and “purposive” approach (para. 9), besides dignity being a right in itself (Section 10).

Furthermore, human dignity is a fuzzy concept. It is hardly defined by constitutional texts or by courts in precise terms. Despite its vagueness²⁴⁹, which makes it harder to apply it as a judicial standard, at least two conceptual features can be drawn from the relation between equality and dignity. First, dignity, in light of a substantive view of equality that incorporates a perspective of socio-economic equalities (distribution dilemma), should not seen as a individualistic concept²⁵⁰, at the price of not giving due consideration to the socio-economic context where people live in real life. Second, and more importantly to the present

²⁴⁶*Pretty v. United Kingdom* (2346/02) [2002] ECHR 423 (European Court of Human Rights, April 29, 2002).

²⁴⁷*Law v. Canada (Minister of Employment and Immigration)*. [1999] 1 S.C.R. 497 (Supreme Court of Canada, March 25, 1999).

²⁴⁸*S v Makwanyane and Another*. CCT3/94 (South African Constitutional Court, June 6, 1995).

²⁴⁹Wesson, Murray. “Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and South African Constitutional Court.” In *Constitutional Topography: Values and Constitutions*, by András Sajó & Renata Uitz, 280. Utrecht: Eleven International Publishing, 2010, p. 281.

²⁵⁰Fredman, Sandra. “Recognition or Redistribution: Reconciling Inequalities.” *South African Journal of Human Rights*, 2007: 225.



thesis, is that dignity should not be seen related to an abstract, universal individual, but should be able to lead to the “affirmation of different identities”²⁵¹.

The last question is more problematic since the South African Constitutional Court decision in *Jordan v. Others*²⁵² regarding the criminalization of prostitution (to be more precise, the criminalization of the work of prostitutes, not the acts of the clients).

Justice Ngcobo’s opinion, writing for the majority, regarding the criminalization of prostitution, illustrates this aspect. He interprets the Sexual Offences Act in a literal manner, affirming that its gender-neutral text does not allow the Court to declare the inconsistency of the measure (para. 15) with the Constitution simply because the statute criminalizes primarily the commercial sex (the work of prostitutes, who are often women). Accordingly, this literal perspective fails to read the anti-discrimination clause beyond its text, representing a backwards step in relation to a dignity-based and historically conscious equality jurisprudence.

Yet, the dissenting opinion delivered by Justices O’Regan and Sachs is more striking, is the incorporation of personal values in defining dignity. They present a troublesome view of dignity of the body of prostitutes, according to which the violation to their dignity is not by the criminalization of their conduct, but by their engagement in the conduct itself²⁵³. This view of the dignity of body (as an inviolable entity, almost saint) disregards the concept of

²⁵¹Fredman, Sandra. "Recognition or Redistribution: Reconciling Inequalities." *South African Journal of Human Rights*, 2007: 226.

²⁵²*S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*. CCT31/01 (South African Constitutional Court, October 9, 2002).

²⁵³According to them, “Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.” *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*. CCT31/01 (South African Constitutional Court, October 9, 2002), para 74.



Kantian concept dignity as personal autonomy, i.e. being his/her own master²⁵⁴. This case exposes the fragility of a dignity-based approach to equality, since the vagueness of this concept may open it up to incorporation of views that violate rights.

3.5. Conclusion

It is tempting to read the South African jurisprudence on sexual minorities as a linear story of legal recognition of rights of gays and lesbians. Several factors contribute to this kind of reading: the first-ever constitutional recognition of sexual orientation as one of the prohibited grounds for discrimination, the queerness of the opinions elaborated by Justice Sachs, the role of symbolic discrimination and dignity in the equality jurisprudence and the first-ever recognition of same-sex marriage in the African continent and so on.

However, some relevant pitfalls in the South African context arise. First, the elitist nature of the gay movement in the mid-90s in South African left almost intact the societal prejudice against gays and lesbians, being cases of corrective rape the most extreme expression of such prejudice²⁵⁵. Second, in the process of recognition the rights of sexual minorities, the South African Constitutional Court adopted certain stereotypes related to heteronormativity in the National Coalition 2, which were even repeated in the process of adopting the new legislation establishing the same-sex marriage few years later²⁵⁶.

The cases presented above, specially National Coalition 1 and Fourie, show the potential of dignity in remedying lack of recognition of the sexual minorities, seeking to

²⁵⁴ Meyerson, Denise. "Does the Constitutional Court of South Africa take rights seriously? The Case of *S v. Jordan* ." In *The Practice of Integrity: Reflections on Roland Dworkin and South African Law*, edited by François du Bois, 138-154. Cape Town: JUTA, 2008.

²⁵⁵ Human Rights Watch. "More Than a Name: State-Sponsored Homophobia in Southern Africa." *Human Rights Watch*. 13 May 2003, chapter 5.

²⁵⁶ Barnard, Jaco. "Totalitarianism, (Same-Sex) Marriage, and Democratic Politics in the Post-Apartheid South Africa." *SAJHR* 23 (2007).



affirm their equality including in the context of positive recognition of their relations. Yet, a textual interpretation has already showed its potential to cause a backward step in the Court's jurisprudence. The Jordan case showed clearly the danger of a dignity-based approach, that may fail due to the vagueness of this term and therefore for not being able to function as a clear judicial standard. Despite this danger, the South African context (its constitution, its post-apartheid context, as well its jurisprudence) has also showed the transformative potential of dignity.



Conclusion

'This paradox lies at the core of our national project – that we come from oppression by law, but resolved to seek our future, free from oppression, in regulation by law'

(Justice Cameron, *Fourie v Minister of Home Affairs*. 3 SA 429, South African Supreme Court of Appeal, para. 8)

The present thesis started with the following research question: what are the rights-based limits to legal enforcement of morals in relation to sexual minorities, derived from the recent constitutional litigation on rights of sexual minorities? In order to answer it, this thesis analyzed the question of sexual minorities through the lens of disgust, a feeling of deep aversion against certain group by the majority of society or by an abstract conception of average person.

First, I argued that disgust has three dimensions: (i) disgust seeks to justify the legal enforcement of morals; (ii) disgust is related to the offence principle, rather than harm principle; (iii) disgust represents a misrecognition of the sexual minorities.

Second, such threefold framework was analyzed through the lens of the US and South African jurisprudence on sexual minorities.

In the US, both the cases and the literature have shown an emergence of a dignity-based approach that seeks to combine liberty and equality. Such approach has not yet been fully developed in the case law, since references to dignity are rare, although increasing. In its development from *Bowers* to *Lawrence*, the US Supreme Court has rejected societal morals as the only basis for criminal law, and therefore (without saying explicitly) considered



disgust-based legislation that restricts personal liberty (vide *Lawrence*) or imposes a stigma on a certain politically unpopular group (vide *Romers*) a violation of the Constitution. Furthermore, in the US it is clear that disgust in the form of irrational prejudice is a relevant component in each of the cases analyzed. From an equality perspective, irrational prejudice is at the core of the idea of suspect class, in the most rigid standard, but also in the rational basis review since *Romers*, in the case of homosexuals, at least under the narrow circumstances of that case. In this sense, laws seeking to enforce irrational prejudice through classifying a group just for the sake of stigmatizing it are a violation of the equal protection at its most basic standard.

From a liberty perspective, irrational prejudice is present through the use of history as a basis for defining implicit liberties in the Constitution, since, in the case of homosexuals, a reference to the Nation's history and tradition can be associated with the history of subordination of this group and therefore perpetuate disgust logic. The literature has signalized the fall of the equal protection doctrine and the emerging of a dignity-based equal liberty jurisprudence. In the case of sexual minorities, this approach is confirmed in *Lawrence* decision, since it not only recognizes a liberty to choose one's sexual partner, but also represented a bold statement in favor of a broad concept of personal liberty of homosexuals derived from the recognition of their equal dignity.

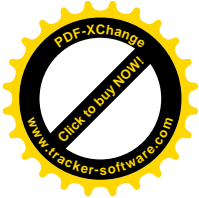
In the case of South Africa, the context of apartheid shaped the constitutional-making experience as well as the jurisprudence of the Court. In this country, the equal protection clause, rather than liberty, is the one used to affirm the rights of sexual minorities, due to the fact that sexual orientation is one of the prohibited grounds of discrimination in the 1996 Constitution. There, a purposive approach that takes into consideration a dignity perspective and aims at enforcing dignity is mandated by the Constitution itself in its clauses on constitutional interpretation. The context of apartheid highlights that the anti-discrimination



clause has been interpreted, in the realm of sexual minorities, as a clause outlawing oppression in its most profound way, i.e. one that touches the self-worth of the group in question. In this sense, the Constitutional Court has been able to instigate the reformulation of legal institutions such as marriage in order to reaffirm the equal value of sexual minorities, and therefore tackling feelings of disgust towards this group.

In the present thesis, disgust was not seen as a judicially manageable standard in deciding constitutional cases, but rather a complex range of aspects that courts should not disregard when dealing with cases involving sexual minorities. Defined as a feeling of moral aversion towards a group by the average person or an overwhelming majority, the concept of disgust is able to highlight several factors in the rights of sexual minorities. First, disgust violates dignity, conceived, from a recognition perspective, as a right to be respected as an equally worthy human being. Second, disgust presents a democratic dilemma to Courts, once they quite often need to justify their decisions in favor of homosexuals, despite the majoritarian view in society that they are not worth of such judicial protection. Third, disgust is based on the clear-cut idea that some people are less worth of respect than others, or, put in a different manner, on the view that some people are so less worthy that deserve to be objectified and then reduced to a repugnant thing.

This last aspect is precisely what the latest jurisprudence on sexual minorities in South Africa and US try to tackle. The liberty that does not dare to speak its name recognized in *Lawrence* in US (one that goes beyond the pure right to have sexual intercourse and reach the realm of dignity-based respect) as well as the equality of all forms of consensual sexuality, recognized from the *National Coalition 1* to the *Fourie* case (one that defines sexuality by referring to sexual desire which is common to virtually all human beings) recognize both that disgust-based policies are not anymore justified when all forms of



consensual sexuality are put at the same moral level; either for their equality roots, or for being related to personal liberties.

Finally, the liberty recognized in *Lawrence* goes beyond the issue of sodomy. Although it does not recognize formally same-sex relations, it does emphasize the equal dignity of homosexuals, and in this sense it goes beyond the right to conduct same-sex intercourse. Likewise, in *Fourie*, when the South African Constitutional Court emphasized the centrality of the institution of marriage to self-worth of same-sex couples, it was not only referring to the right to getting into a formally recognized union, but the right to have equal access to legal institutions, or, on the other hand, the right to have institutions designed in a way that it respects the equal dignity of all members of society.

Indeed, as affirmed in the introduction, language may oversimplify feelings. Disgust adds a multidimensional perspective to the constitutional debate on sexual minorities and, by doing this, dares to speak the name of indignities to which sexual minorities are daily subjected.



Bibliography

1. Judgments

Bowers v. Hardwick. 478 U.S. 186 (US Supreme Court, June 30, 1986).

Brown v. Board of Education of Topeka. 347 U.S. 483 (US Supreme Court, May 17, 1954).

City of Cleburne, Texas v. Cleburne Living Center, Inc. 473 U.S. 432 (US Supreme Court, July 1, 1985).

Fourie v Minister of Home Affairs. 3 SA 429 (SCA) (The Supreme Court of Appeal, 2004).

Gratz v. Bollinger. (02-516) 539 U.S. 244 (US Supreme Court, June 23, 2003).

Griswold v. Connecticut. 381 U.S. 479 (US Supreme Court, June 7, 1965).

Grutter v. Bollinger. (02-241) 539 U.S. 306 (US Supreme Court, June 23, 2003).

Harksen v Lane NO and Others. CCT9/97 (South African Constitutional Court, October 7, 1997).

Juleiga Daniels v. Robin. Grieve Campbell. Case CCT 40/03 (South African Constitutional Court, March 11, 2004).

Korematsu v. United States. 323 U.S. 214 (US Supreme Court, December 18, 1944).

Law v. Canada (Minister of Employment and Immigration). [1999] 1 S.C.R. 497 (Supreme Court of Canada, March 25, 1999).

Lawrence v. Texas. 539 U.S. 558 (US Supreme Court, June 26, 2003).

Loving v. Virginia. 388 U.S. 1 (US Supreme Court, June 12, 1967).

Minister of Home Affairs and Another v Fourie and Another. CCT 60/04 (South African Constitutional Court, December 1, 2005).

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others. CCT11/98 (South African Constitutional Court, October 9, 1998).

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others. CCT10/99 (South African Constitutional Court, December 2, 1999).

Parents Involved in Community Schools v. Seattle School District No. 1. 551 U.S. 701 (US Supreme Court, June 28, 2007).



Planned Parenthood of Southeastern Pa. v. Casey. 505 U.S. 833 (1992) (US Supreme Court, June 29, 1992).

Plessy v. Ferguson. 163 U.S. 537 (US Supreme Court, May 18, 1896).

Pretty v. United Kingdom. (2346/02) [2002] ECHR 423 (European Court of Human Rights, April 29, 2002).

Ricci v. DeStefano. 129 S. Ct. 2658 (US Supreme Court, June 29, 2009).

Romer v. Evans. 517 U.S. 620 (US Supreme Court, May 20, 1996).

S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae). CCT31/01 (South African Constitutional Court, October 9, 2002).

S v Makwanyane and Another. CCT3/94 (South African Constitutional Court, June 6, 1995).

United States v. Carolene Products Co. 304 U.S. 144 (US Supreme Court, April 25, 1938).

University of California Regents v. Bakke. 438 U.S. 265 (US Supreme Court, June 28, 1978).

US Dept. of Agriculture v. Moreno. 413 U.S. 528 (US Supreme Court, June 25, 1973).

Washington v. Davis. 426 U.S. 229 (US Supreme Court, 1976).

2. Secondary Sources

Ackerman, Bruce. *We the People: Foundations*. Cambridge: Harvard University Press, 1999.

Albertyn, Catherine, and Janet Kentridge. "Introducing the Right to Equality in the Interim Constitution." *South African Journal on Human Rights* 10 (1994): 149-178.

Albertyn, Cathi, and Beth Goldblatt. "Towards a Substantive Right to Equality." In *Constitutional Conversations*, by Stu Woolman and Michael Bishop, 231-254. Pretoria: Pretoria University Law Press, 2008.

Alexander, Lawrence A. "Equal Protection and the Irrelevance of "Groups"." *Issues in Legal Scholarship*, 2002.

Barnard, Jaco. "Totalitarianism, (Same-Sex) Marriage, and Democratic Politics in the Post-Apartheid South Africa." *SAJHR* 23 (2007).



Barnard-Naudé, Jaco. "Sexual Minority Freedom and the Heteronormative Hegemony in South Africa." In *Courting Justice: Brazil-India-South Africa: Comparing the Jurisprudence of the apex courts of Brazil, South Africa and India*, by Oscar Vilhena, Frans Viljoen and Upendra Baxi. Pretoria: Pretoria University Press.

Bawer, Bruce. "Notes on Stonewall." *The New Republic*, June 13, 1993: 24.

BBC News. *Africa's Lesbians Demand Change*. February 27, 2008.
<http://news.bbc.co.uk/2/hi/africa/7266646.stm> (accessed June 29, 2011).

Bilchitz, David, and Melanie Judge. "For Whom Does the Bell Toll?: The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa." *South African Journal on Human Rights* 23 (2007): 466-499.

Brown, Rebecca L. "Liberty, The New Equality." *New York University Law Review* 77 (December 2002): 1491-1558.

Burt, Robert. "Regulating Sexuality: On Liberty versus Equality." *SELA*. June 11, 2009.
<http://www.law.yale.edu/intellectuallife/sela2009.htm> (accessed October 12, 2011).

Cane, Peter. "Taking Law Seriously: Starting Points of the Hart/Devlin Debate." *The Journal of Ethics* 10, no. 1/2 (January 2006): 21-51.

Cock, Jacklyn. "Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution." *Women's Studies International Forum* 26, no. 1 (2003): 35-45.
Cockrell, Alfred. "The South African Bill of Rights and the 'Duck/Rabbit'." *The Modern Law Review* 60, no. 4 (July 1997): 513-537.

Currie, Jain. "Judicious Avoidance." *South African Journal on Human Rights* 15 (1999): 138-165.

Devlin, Patrick. "Law, Democracy, and Morality." *110 University of Pennsylvania Law Review* 110 (1962): 635.

Devlin, Patrick. "Morals and the Criminal Law." In *Morality and the Law*, by Richard A. Wasserstrom, 24-48. Wadsworth Pub. Co., 1971.

—. *The Enforcement of Morals*. New York: Oxford University Press, 1965.

Dworkin, Ronald. *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge: Harvard University Press, 2000.

Ely, John Hart. *Democracy and Distrust*. Cambridge: Harvard University Press, 1981.
Encarnación, Omar G. "Latin America Gay's Rights Revolution." *Journal of Democracy*, April 2011.

Eskridge, William N. "Destabilizing Due Process and Evolutive Equal Protection." *UCLA Law Review*, June 2000: 1183-1219.



—. *Gaylaw: challenging the apartheid of the closet*. Cambridge: Harvard University Press, 2002.

Feinberg, Joel. *Harm to Self: The Moral Limits of Criminal Law*. Oxford: Oxford University Press, 1986.

—. *Offense to Others: The Moral Limits of Criminal Law*. Oxford: Oxford University Press, 1985.

—. "Some Unswept Debris from the Hart-Devlin Debate." *Synthese* 72, no. 2 (August 1987): 249-275.

Fiss, Owen. "Groups and the Equal Protection Clause." *Philosophy & Public Affairs*, 1976: 107-177.

—. "The Racial Imbalance in Public Schools: The Constitutional Concepts." *Harvard Law Review* 78, no. 3 (January 1965): 564-616.

Franke, Katherine. "Dignifying Rights: A Comment on Jeremy Waldron's Dignity, Rights and Responsibilities." *Arizona State Law Journal* 43 (2012).

Fraser, Nancy. "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age." *New Left Review* 22 (1995): 68-93.

—. "Rethinking Recognition." *New Left Review* 3, 2000: 107-120.

Fraser, Nancy, and Axel Honneth. *Redistribution or Recognition: A Political-Philosophical Debate*. London-New York: Verso, 2003.

—. *Redistribution or Recognition: A Political-Philosophical Exchange*. New York: Verso, 2003.

Fredman, Sandra. "Providing Equality: Substantive Equality and the Positive Duty to Provide." *South African Journal on Human Rights* 21 (2005): 163-190.

—. "Recognition or Redistribution: Reconciling Inequalities." *South African Journal of Human Rights*, 2007: 214-234.

Gabru, N. "Dilemma of Muslim women regarding divorce in South Africa." *Potchefstroom Eletronic Journal*, 2004.

Galvin, Richard Francis. "Two Difficulties for Devlin's Disintegration Thesis." *The Philosophical Quarterly* 37, no. 149 (October 1987): 420-423 .

Goldberg, Suzanne B. "Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas." *Minnesota Law Review* 88 (2004): 1233-1311.

Hart, H. L. A. "Immorality and Treason." In *The Philosophy of Law*, by Roland Dworkin. Oxford: Oxford University Press, 1991.



—. *Law, Liberty and Morality*. Stanford: Stanford University Press, 1963.

Henry, Leslie Meltzer. "The Jurisprudence of Dignity." *University of Pennsylvania Law Review* 160 (December 2011): 169-232.

Honneth, Axel. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Cambridge: The MIT Press, 1996.

Human Rights Watch. "'We'll Show You You're a Woman': Violence and Discrimination against Black Lesbians and Transgender Men in South Africa." December 5, 2011. <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> (accessed December 11, 2011).

—. "More Than a Name: State-Sponsored Homophobia in Southern Africa." *Human Rights Watch*. May 13, 2003. <http://www.hrw.org/sites/default/files/reports/safrighlrc0303.pdf> (accessed October 30, 2011).

—. *South Africa: Murder Highlights Violence Against Lesbians*. March 11, 2006. <http://www.hrw.org/en/news/2006/03/01/south-africa-murder-highlights-violence-against-lesbians> (accessed October 30, 2011).

ILGA. *State-sponsored Homophobia*. 2011. http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (accessed June 29, 2011).

International Commission of Jurists. "Sexual Orientation and Gender Identity in Human Rights Law." Vers. 4th ed. *International Commission of Jurists website*. April 2010. <http://www.icj.org/dwn/database/UN-Compilations2010.pdf> (accessed October 12, 2011).

International Lesbian, Gay, Bisexual, Trans and Intersex Association. "State-sponsored Homophobia: A world survey of laws criminalising same-sex sexual acts between consenting adults." *ILGA*. May 2011. http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf (accessed December 11, 2011).

Karst, Kenneth L. "The Liberties of Equal Citizens: Groups and the Due Process Clause." *UCLA Law Review* (The Regents of the University of California) 55 (October 2007): 99-142.

Klare, Karl e. "Legal Culture and Transformative Constitutionalism." *South African Journal on Human Rights*, 1998: 146-188.

Lopes, Jose Reinaldo de Lima. "The right to recognition for gays and lesbians." *SUR - International Human Rights Journal* 2, no. 2 (2005): 61-92.



Madison, James. "Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments." *From the New York Packet*, February 8, 1788.

McLaughlin v. Florida. 379 U.S. 184 (US Supreme Court, December 7, 1964).

Mears, Bill. "Big cases await U.S. Supreme Court's 2011-12 term." *CNN*. October 2, 2011. <http://edition.cnn.com/2011/09/30/justice/scotus-preview-case-summaries/index.html> (accessed December 15, 2011).

Mertus, Julie. "The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US." *Human Rights Quarterly* 29, no. 4 (November 2007): 1036-1064.

Meyerson, Denise. "Does the Constitutional Court of South Africa take rights seriously? The Case of *S v. Jordan* ." In *The Practice of Integrity: Reflections on Roland Dworkin and South African Law*, edited by François du Bois, 138-154. Cape Town: JUTA, 2008.

Mill, John Stuart. *On Liberty and Other Essays*. New Haven and London: Yale University Press, 2003.

Miller, Bradley W. "Moral Laws in a Age of Rights: Hart at the Supreme Court of Canada." *American Journal of Jurisprudence* 55 (2010): 79-103.

Miller, William Ian. *The Anatomy of Disgust*. Cambridge: Harvard University Press, 1997. *Minister of Home Affairs and Another v Fourie and Another*. CCT 60/04 (South African Constitutional Court, December 1, 2005).

Munich, John, and Andrew W. Broy. "The "Grutter-Gratz split doubleheader": The Use of Student Race in School Admission, Attendance, and Transfer Policies at the K-12 Level." *50 Years after Brown: What Has Been Accomplished and What Remains to Be Done?* Kennedy School of Government, Harvard University, 2004.

Murray, Rachel, Dr., and Frans Viljoen. "Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union." *Human Rights Quarterly* 29, no. 1 (February 2007): 86-111.

Nussbaum, Martha C. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010.

—. *Hiding from Humanity: Disgust, Shame, and the Law*. Princeton: Princeton University Press.

Oswin, Natalie. "Homonormativity in Neoliberal South Africa: Recognition, Redistribution, and the Equality Project." *Signs: Journal of Women in Culture and Society* 32, no. 3 (2007): 649-669.

Paulsen, Michael Stokes. "Does the Constitution Prescribe Rules for Its Own Interpretation?" *Northwestern University Law Review* 103, no. 2 (2009): 857-922.



Rautenbach, Christa. "Gender Equality and Religious Family Laws in South Africa." *Queensland University of Technology Law and Justice Journal* 3, no. 1 (2003).

Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. New York: Oxford University Press, 1997.

Revista Época. "Total de gays assassinados sobe 31% em 2010 no país." *Revista Época*, April 4, 2011.

Ristroph, Alice. "Third Wave Legal Moralism." *Arizona State Law Journal* 42 (2011): 1151-1172.

Rosky, Clifford J. "Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law." *Arizona Law Review* 53 (2011): 913-983.

Roux, Wessel Le. "The South African Constitutional Court." *BISA III*. Pretoria: Pretoria University, 2008.

Rudwick, Stephanie. "'Gay and Zulu, we speak isiNgqumo': Ethnolinguistic identity constructions." *Transformation*, 2010: 112-134.

Santos, Gustavo Gomes da Costa. "Mobilizacoes Homossexuais e Estado no Brasil: Sao Paulo (1978-2004)." *Revista Brasileira de Ciências Sociais* 22, no. 63 (2007): 121-135. *Satchwell v President of Republic of South Africa and Another*. CCT45/01 (South Africa Constitutional Court, July 25, 2002).

Siegel, Reva B. "Brown at Fifty: Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown." *Harvard Law Review* 117 (March 2004): 1470-1457.

Siegel, Reva B. "From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases." *Yale Law Journal* 120 (2011): 1278.

Smith, Jeremy B. "The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation." *Fordham Law Review* 73, no. 6 (2005): 2769-2814.

Spann, Girardeau A. "Disparate Impact." *Georgetown Law Journal* 98 (April 2010): 1133-1135.

Stephen, James Fitzjames. *Liberty, Equality, Fraternity and Three Brief Essays*. London: The University of Chicago Press, 1873.

Stychin, Carl F. "The Struggle for Sexual Orientation in the South African Bill of Rights." *Journal of Law and Society* 23, no. 4 (December 1996).

Tennen, Eric. "Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law." *Boalt Journal of Criminal Law* 8, no. 3 (2004): 3-5.



Tribe, Laurence H. "Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak its Name." *Harvard Law Review* 117 (April 2004): 1893.

Tushnet, Mark. "The Return of the Repressed: Groups, Social Welfare Rights, and the Equal Protection Clause." *Issues in Legal Scholarship* (The Berkeley Electronic Press (bepress)), 2002.

United Nations Organization. "Universal Declaration of Human Rights." *United Nations website*. December 10, 1948. <http://www.un.org/en/documents/udhr/> (accessed October 12, 2011).

Vieira, Oscar Vilhena. "Inequality and the Subversion of Law." *SUR - International Human Rights Journal*, June 2007: 26-47.

Vos, Pierre de. "The Inevitability of Same-Sex Marriage in South Africa's Post-Apartheid State." *South African Journal on Human Rights* 23, no. 3 (2007): 432-465.

Vos, Pierre De, and Jaco Barnard-Naudé. "Disturbing heteronormativity: The 'queer' jurisprudence of Albie Sachs." *Southern African Public Law* 25, no. 1: 209-234.

Waldron, Jeremy. "A Right-Based Critique of Constitutional Rights." *Oxford Journal of Legal Studies* 13, no. 1 (Spring 1993): 18-51.

Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73, no. 1 (November 1959): 1-35.

Wesson, Murray. "Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and South African Constitutional Court." In *Constitutional Topography: Values and Constitutions*, by András Sajó & Renata Uitz, 280. Utrecht: Eleven International Publishing, 2010.

Woolman, Stu, and Henk Botha. "Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework and Hard Choices." In *Constitutional Conversations*, by Stu Woolman and Michael Bishop, 149-186. Pretoria: Pretoria University Law Press, 2008.

Yoshino, Kenji. "Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"." *Yale Law Journal Company* 108 (December 1998): 485-571.

—. "The New Equal Protection." *Harvard Law Review* 124 (January 2011): 747.

Young, Iris Marion. *Justice and the Politics of Difference*. Princeton : Princeton University Press, 1990.