EQUALITY FOR THE LGBT COMMUNITY

By

The Hon. Mme. Justice Désirée P. Bernard

1. Any discussion on the above subject requires a definition of bisexuality which can be regarded as a romantic or sexual attraction towards both males and females or towards people of any sex or gender.

2. It is an indisputable fact that persons falling within the community of lesbians, gays, bisexuals and transgenders (LGBTs) face some discrimination from persons within the communities where they live or operate. This is due mainly to a lack of understanding of and intolerance for the sexual preferences of the bisexual community.

3. A survey of the position of LGBTs in some countries of the Caribbean is very informative. The only state in which such rights are legal is The Bahamas where it became legal in 1991 although there is no recognition of the relationship. The age of consent to engage in sexual activity is 16 years for straight couples, but 18 years for same-sex couples.

4. In other countries, namely, Barbados, Guyana, Jamaica and Trinidad and Tobago, it is illegal attracting a penalty of life imprisonment for males in two jurisdictions – Barbados and Jamaica. It is, however, legal for women although illegal for men in Jamaica, and one wonders about the reason for the difference in approach. In Guyana even though same-sex sexual activity is illegal, no definition or meaning of “indecent acts” is given to explain the difference. In none of the aforementioned countries is there any recognition of the relationships, The Bahamas being the only state where same-sex adoption is legal.

5. All of the aforementioned countries of the Caribbean being former colonies of Great Britain, inherited all laws and offences regardless of geography,
status or relevance to circumstances of customs. Most of the statutes defining buggery and other sexual offences were, and maybe still are, based exclusively on English statues, in some instances, taken verbatim. An example of this is the use of the words “with hard labour” when imposing punishment for an offence which can still be found in some statutes today. Coincidentally, as I was preparing this presentation the High Court of Trinidad and Tobago delivered a judgment in a lawsuit challenging the legislation which criminalises buggery and found it to be unconstitutional. The said offence carried a penalty of 25 years’ imprisonment if committed between adults, and life imprisonment if committed by an adult on a minor. The trial judge based his decision on the fundamental rights guaranteed under the Constitution of Trinidad and Tobago, and which shall be discussed later in greater detail.

6. An earlier case decided by the Caribbean Court of Justice which was established in 2005 as the final court of appeal for some of the Caribbean states in its appellate jurisdiction, and the court of all of the states in its original jurisdiction under the Revised Treaty of Chaguaramas which was formulated and signed by the member states on 4th July, 1973. The case is Maurice Tomlinson v The State of Belize and Tomlinson v The State of Trinidad and Tobago which were consolidated.

7. The Claimant, a Jamaican national and an attorney-at-law who is homosexual, alleged in his claim that he travels routinely throughout the Caribbean, and was prejudiced in the enjoyment of his right as a CARICOM national to enter the States of Belize and Trinidad and Tobago due to their respective Immigration Act which purportedly include homosexuals as a class of persons prohibited from entering their territories. Mr. Tomlinson conceded that he has never actually been refused entry into these territories, but argued that the mere existence of these statutory provisions prevents him from entering both States since in so doing he would be breaking the domestic laws. He reasoned that his rights as a CARICOM national would be prejudiced in contravention of his right to free movement under the Revised Treaty of Chaguaramas and the 2007 Decision of the Conference of Heads of Government of the Caribbean Community
(CARICOM) as well as his right not to be discriminated against on the basis of nationality only. He also sought an order that the Defendant States amend their Immigration Acts to remove homosexuals from any class of prohibited immigrants.

8. The Defendant States maintained that Mr. Tomlinson is entitled to enter the respective territories without hassle and to remain there for up to six months; further as a homosexual he is not an undesirable person as envisioned under the 2007 Conference Decision; in fact, Mr. Tomlinson had entered both States in the past without hindrance. Under Article 45 of the Treaty member states commit themselves to the free movement of their nationals within the Community.

9. The Court agreed with Belize’s interpretation of Section 5(1)(e) of its Immigration Act which indicates that homosexuals are prohibited from entering the country only where they are seeking financial gain either by offering sexual services themselves or by profiting from those performed by others.

10. In the case of Trinidad and Tobago the Court noted that the relevant section of its Immigration Act differs from that of Belize as it regards “homosexuals” “or persons living on the earnings of homosexuals” thereby categorising homosexuals as prohibited persons. The Court concluded that Mr. Tomlinson appeared to be prohibited from entering Trinidad and Tobago. The Court, however, concluded that Mr. Tomlinson had never and could never be prejudiced in the enjoyment of his right to enter the State since the prohibition would not apply to CARICOM nationals who are homosexuals in light of the 2007 Conference Decision referred to earlier. The Heads had met and agreed that all CARICOM nationals should be entitled to an automatic stay of six months upon arrival in order to enhance their sense that they belong and can move in the Caribbean Community subject to the rights of Member States to refuse undesirable persons entry and to prevent persons from becoming a charge on public funds. The decision had the effect of altering the rights of states to refuse entry to CARICOM nationals.
11. The Court has been criticised for not declaring the relevant laws in Belize and Trinidad and Tobago to be unconstitutional. This, however, was not within the remit of the Court in its original jurisdiction in light of the 2007 Conference Decision of the Member States of CARICOM. An order deeming the laws unconstitutional could only have been made under an appeal from a judgment arising from an action filed in the relevant courts of Belize which has accepted the appellant jurisdiction of the Caribbean Court of Justice. Trinidad and Tobago has not accepted the appellate jurisdiction of the Court, only the original jurisdiction.

12. Significantly, while preparing this presentation I read about the comments of Britain’s Prime Minister Theresa May on homosexuality laws within the Commonwealth when delivering the opening address at the Commonwealth Heads of Government Conference. She announced that the United Kingdom stands ready to support any Commonwealth country that wants to reform outdated homosexuality laws. She urged Commonwealth Nations to overhaul outdated anti-gay laws, and deeply regretted Britain’s role in the legacy of violence and discrimination. She further expressed the view that nobody should face persecution because of who they are or who they love.

13. Statistics indicate that same-sex relationships are illegal in thirty-six (36) Commonwealth countries, and thirty-seven (37) countries criminalise homosexuality, the majority being former British colonies which inherited such laws from Britain.

14. In this regard the case of Attorney General of Botswana v Thuto Rammoge & 10 others (2016) CACGB – 128 – 12 is a classic example. The Court of Appeal held that the refusal of the Minister to allow the registration of LBGTI organisation LEGABIBO to be registered as a society was unconstitutional as it infringed the respondent’s right to freedom of assembly and association. The refusal of the Minister was also illegal as it had no basis in law. The Attorney General had appealed on several grounds among which was that the lower court erred in failing to find that the objectives of LEGABIBO were unlawful in terms of Section 7(2)(a) of the Societies Act as being contrary to good order and under Section 7(2)(e) of the Act as potentially promoting acts
criminalised by Sections 164 and 167 of the Penal Code of Botswana. Further, the lower court erred in holding that homosexual persons were included in the definition of the word “person” in section 3 of the fundamental rights in the Constitution of Botswana and were thus entitled to enjoy such fundamental rights. In addition, even if the lower court had found that the respondents were entitled to such fundamental rights, the lower court had erred in finding that the Minister’s decision was not a justifiable limitation on those rights.

15. Of great significance and universal applicability was the Court’s profound affirmation that “members of the gay, lesbian and transgender community form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity”. This was regarded as a very progressive statement made in a region where homophobic attitudes are very strong.

16. Coming out of Kenya is the case of Eric Gitari v Non-Governmental Organisations Co-Ordination Board, the Attorney General and Others (2015) KLR, in which the Petitioner claimed that persons who belong to the LGBTIQ are subjected to discrimination and stigmatisation contrary to the Constitution. He alleged that such persons are harassed by state officials and subjected to physical violence as well as stigmatisation by their families and society at large. The Petitioner sought to register a non-governmental organisation for LGBTIQ persons with the core objective to address the violence and human rights abuses suffered by gay and lesbian persons, but this was rejected by the Non-Governmental Organisations Coordination Board as alleged by the Petitioner on the basis that the people whose rights the proposed NGO were seeking to protect were gay and lesbian persons.

17. The Board relied on a regulation in the NGO Regulations of 1992 as the basis for rejecting the request, this being that such a name was repugnant to or inconsistent with any law or is otherwise undesirable. After three unsuccessful attempts to register the proposed NGO with different variations at a meeting with the legal adviser of the Board, the Petitioner was informed that any association bearing names “gay and lesbian” could not be
registered by the NGO Board because the association was “furthering criminality and immoral affairs”.

18. The judgment refers to the Petitioner’s case as being grounded on the provisions of certain articles of the Constitution which conferred on the citizen the right to associate in a manner recognised by the State and to share their thoughts and opinions in a collective manner. His contention was that in seeking to register the NGO he was exercising his constitutional right under Article 36 by forming an NGO to enable him to address the plight of homosexuals, bisexuals and transgender persons in the society. It was his contention that Article 36 entrenched freedom of association for “every person” and does not distinguish between different categories of people.

19. Another aspect of the Petitioner’s case was that his right to freedom of association, dignity, equality and right not to be discriminated against had been violated, and the justification presented by the Board for infringing these rights were ill-conceived.

20. With regard to this ground the Court made reference to Article 22 of the International Covenant on Civil and Political Rights which stipulates that everyone has the right to freedom of association with others, and concluded that the provision clearly includes all individual natural persons; further there is nothing to indicate that sexual orientation is a matter that removes one from the ambit of protection by the Constitution. Commendably the Court went beyond this to indicate that subject to limitations under the Constitution, even persons convicted of criminal offences are entitled to the enjoyment of the fundamental rights and freedoms guaranteed under the Constitution.

21. The Court was no doubt seeking to indicate that if persons convicted of criminal offences are entitled to enjoy the guaranteed fundamental rights and freedoms under a Constitution why should one’s sexual orientation be a hindrance to the enjoyment of that guaranteed fundamental right.
22. The Court went on to discuss the freedom of association and recognised that it is not absolute and can be limited only by law, and only to the extent that the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom……” which fell within the dictates of the Kenyan Constitution.

23. It is appropriate at this juncture to discuss in greater detail the recent case of Jason Jones v. The Attorney General of Trinidad & Tobago et al (Claim No. CVC2017-00720).

24. The Court was asked to determine whether the State has the constitutional authority to criminalise sexual relations between consenting adults of the same sex. The Claimant petitioned the Court under Section 14 of the Constitution of Trinidad & Tobago to strike down Sections 13 and 16 of the Sexual Offences Act, Chapter 11:28 as being unconstitutional and of no effect. Alternatively he sought declarations that the relevant Sections of the Sexual Offences Act violated his fundamental rights especially his right to respect his private and family life; further, Sections 13 and 16 of the Act had been proven not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

25. The learned judge opined that the case was not one about religious and moral beliefs but one about the inalienable rights of a citizen under the Republican Constitution of Trinidad & Tobago. It was also a case about the dignity of the person and not about the will of the majority or any religious debate. In pursuance of this conclusion the learned judge began by tracing the historical development of the offence of buggery, and referred to an article by Hon. Michael Kirby entitled “The Sodomy Offence: England’s Least Lovely Criminal Law Export?” in which he traced its origin to the Old Testament of the Christian Bible, Book of Leviticus amongst “divers laws and ordinances” where a proscription on sexual activity involving members of the same sex first relevantly appeared.

26. According to the learned judge the Claimant had also made reference to Article 17 of the International Covenant on Civil and Political Rights which
protects privacy rights and was interpreted as preventing criminalisation of consensual intimacy between adults of the same sex by the United Nations Human Rights Committee in the case of Toonen v Australia (CCPR/c/50/d/488/1992(1994)) where it was argued that “construing the Constitution in a way that protects the impugned Sections of the Act would lead directly to a breach of this international obligation.”

27. The judgment of Rampersad, J. may persuade the rest of the former British colonies in the Caribbean to revisit the position of homosexuality in their jurisdictions.

28. At this juncture it is appropriate to refer to the International Covenant on Civil and Political Rights which most of the countries of the English-speaking Caribbean has ratified. Article 17 mandates the right of privacy, and Article 17(1) protects private adult consensual sexual activity thereby nullifying prohibitions on homosexual behaviour. The right to privacy has been defined as an element of various legal traditions to restrain governmental and private actions that threaten the privacy of individuals.

29. In the circumstances by virtue of the Section 17(1) prohibition on homosexual behaviour in countries which have ratified the aforementioned Covenant, it may be regarded as being nullified and of effect.

30. The case of Toonen v. Australia (supra) is worthy of consideration in that it discusses the effect of Article 17 of the Covenant which mandates the right of privacy, and section 17(1) which protects private adult consensual sexual activity thereby multiplying prohibitions on homosexual behaviour.

31. Toonen was an activist for the promotion of homosexuals in Tasmania and challenged two provisions of the Tasmanian Criminal Code which criminalised various forms of sexual contact between men – including all forms of sexual contact between consenting adult homosexual men in private. Although in practice, no one had been charged either with “unnatural sexual intercourse” or “intercourse against nature” for several years, Toonen contended that because of his activities as a gay rights activist,
his private life and liberty were threatened by the continued existence of the relevant section of the Criminal Code.

32. The State conceded that Mr. Toonen had been a victim of arbitrary interference with his privacy, but Article 17 of the Protocol does not create a right to privacy, but only a right to freedom from arbitrary or unlawful interference with privacy. The State also acknowledged that in the absence of specific policy on the part of the Tasmanian authorities not to enforce the laws, the risk of the provisions being applied to Mr. Toonen remained.

33. The Committee considering Mr. Toonen’s claim defined the right to privacy as an element of various legal traditions to restrain governmental and private actions that threaten the privacy of individuals, and found that Toonen’s rights under Article 17(1) and (2) of the Covenant were violated.

34. There was, however, an individual opinion to the effect that Article 17 does not establish any true right of freedom, it merely mandates that no one shall be subjected to arbitrary or unlawful interference with his privacy, family etc. Furthermore, the provision does not, as do other articles of the Covenant, specify on what grounds a state party may interfere by way of legislation.

**CONCLUSION**

Having considered the position of the LGBT Community throughout the continents of the world – from Africa, the Caribbean and Australia, one can conclude that although there will always be disagreements and discrimination against persons who do not think or act according to the dictates of the majority, it is important that minorities wherever located be given the right and freedom to express their views according to the dictates of their conscience without fear, disfavour or ill-will from the majority who think otherwise.