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INFORMATION ABOUT NAMIBIA'S LAW

Sodomy in Namibia and Botswana

In a bold statement which went strangely unreported by *The Namibian*, Namibia's First Lady Monica Geingos spoke out at the official opening of the "The Journey", an interactive human rights dialogue, on 12 June in Parliament Gardens about the need to repeal the outdated law which criminalises sodomy between consenting adult men.

She pointed out that no convictions have been recorded under this law since Independence, and that it would not be feasible to prosecute anyone for this crime without violating the Constitutional protections for personal privacy. She also noted that the sodomy law is perhaps the only Namibian law which discriminates against men, since consensual sexual activities between women are not addressed by the criminal law at all.

The First Lady also called attention to the recent decriminalisation of sodomy in Botswana. By an unanimous decision on 11 June, the Botswana High Court found that the criminalisation of sodomy violates the fundamental, constitutional rights to privacy, liberty, dignity and equality, holding that these rights are to be guaranteed on an equal basis to people in same-sex relationships. Cultural practices cannot justify denying these rights to anyone, according to the Court, which also noted that homosexuality is just another form of sexuality.

The case was brought by a 24 year old gay student who asserted that the sodomy law discriminated against homosexuals and interfered with an intimate and personal aspect of his life which is not harmful to the public interest. A local NGO - Lesbians, Gays and Bisexuals of Botswana, (LEGABIBO) – submitted additional arguments stressing the negative impact of the sodomy law on access to health care services, and its links to the stigma and violence experienced by the LGBTI community.

The State's key counterarguments were that the law against sodomy did not criminalise homosexuality but only a specific sexual act, and that the decision on law reform should be left to Parliament.

The High Court began its analysis by noting that the law on sodomy was a British colonial import to Africa, imposed without any consultation with the local populace. The law, which was repealed in Britain back in 1967, was a relic of Victorian times, when sexual intercourse was viewed as being only for procreation –which does not correspond to the modern reality of sexual relationships.

The Court ruled that the issue could not be left to Parliament, because the law against sodomy violated several provisions of the Constitution – the supreme law from which all other laws derive their legitimacy.

Firstly, the sodomy law violated the constitutional right to privacy. The Court pointed out that privacy "is essential to who we are as human beings. It gives a person space to be himself/herself without judgment." The Court found that there is a protected right to "a sphere of private intimacy and autonomy" where this entails no harm to any other person., and that the sodomy law unjustifiably impaired the right of individuals to express their sexuality in private with their preferred adult partner.

Secondly, the sodomy law interfered with the right to liberty. The Court found that the notion of liberty "goes beyond mere freedom from physical restraint or detention. It includes and protects inherently private choices, free from undue influence, irrational and unjustified interference by others". Liberty thus encompasses "autonomy on matters of sexual preference and choice".

Thirdly, the Court found that the sodomy law violated the applicant's right to dignity, because it prevented him from expressing his sexual orientation, which is a fundamental, innate and integral part of his identity.

Fourthly, even though Botswana's sodomy law (unlike Namibia's) criminalised all anal intercourse, including anal intercourse between persons of the opposite sex, the Court nonetheless found that it discriminated on the basis of sexual orientation - because it prevented gay men from expressing their sexuality and love in the manner most natural to them, while not having the same effect on heterosexual men and women. Relying in part on the interpretation of the International Covenant on Civil and Political Rights, the Court found that discrimination on the basis of sexual orientation is a component of discrimination on the basis of sex, which is constitutionally forbidden.

Having found that the sodomy law offended multiple constitutional rights, the Court next had to consider whether the law's infringement of these rights was justifiable as a means to safeguard the rights and freedoms of others.

The State asserted that the law was necessary to protect the public interest and public morality, but the Court found that criminalising sodomy between consenting adults could not be in the public interest because it has a disproportional impact on the lives and dignity of gay persons, and because it "perpetuates stigma and shame against homosexuals and renders them reclusive and outcasts".

The Court also noted there is no victim in the context of consensual sexual activities, and that enforcement would require serious invasions of privacy to police private places and bedrooms.

It also considered the question of whether prevailing public opinion could justify the retention of the sodomy law on the grounds of public morality, noting that public opinion is relevant but not dispositive in matters of constitutional adjudication. In this instance, the law's severe violations of fundamental constitutional rights clearly outweighed any arguments based on public opinion.

The Court noted that the "impugned penal provisions oppress a minority and then target and mark them for an innate attribute that they have no control over and which they are singularly unable to change". It concluded, "There is nothing reasonable and justifiable by discriminating against fellow members of our diversified society."

The Court summed up its holding as follows: "Our constitutional ethos of liberty, equality and dignity are paramount. Our Constitution is a dynamic, enduring and a living charter of progressive rights which reflect the values of pluralism, tolerance and inclusivity. Minorities, who are perceived by the majority as deviants or outcasts, are not to be excluded and ostracised. Discrimination has no place in this world. All human beings are born equal."

In 1998, the South-African Constitutional Court found sodomy to be unconstitutional on the basis of reasoning similar to that of the Botswana High Court. Mozambique decriminalised consensual sodomy when it enacted a new criminal code in July 2015. Angola did the same in January 2019, with its Parliament going even further by adding an explicit prohibition to the criminal code making it a crime to refuse to employ or provide services to anyone on the basis of sexual orientation.

On the other hand, Kenya's High Court upheld laws on sodomy and gross indecency last month on the basis that the criminal provisions do not single out LGBT people and that the applicants had provided insufficient proof of some of the constitutional violations alleged. On the issue of privacy and dignity, the Court's speculative reasoning was that decriminalising consensual sodomy between adults would lead to same sex persons living together as couples, and that such relationships would violate the tenor of the constitutional provision which limits marriage to persons of the opposite sex. This judgment is likely to be appealed.

Namibia's sodomy laws, like Botswana's, are a colonial relic inherited via South Africa at independence. Like Botswana, Namibia is a country which -- according to the very first sentence of the Preamble of our Constitution -- recognises the inherent dignity and the equal and inalienable rights of "all members of the human family" as being "indispensable for freedom, justice and peace". The LGBT community is surely part of the Namibian house, and the Namibian family. It is time for the repeal of Namibia's law on sodomy.