Homosexuality: A constitutional question

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Recent public reaction in Barbados and Trinidad and Tobago, condemning, in essence, any move on the part of the State to decriminalize homosexual intimacy among consenting adults in private, is testimony to the poverty of the rights discourse in the Commonwealth Caribbean. In Barbados, an Anglican cleric, in response to a suggestion by the Attorney General that decriminalization be seriously considered, has gone so far as to suggest that, if homosexuality is to be decriminalized, then the people of Barbados should first have their say in a public referendum.

Similarly, in Trinidad and Tobago, no less a group than Lawyers for Jesus, who may indeed have judges amongst their number, have been equally condemning of the idea that persons of that particular sexual orientation should enjoy the equal protection of their fundamental rights and freedoms.

This is especially sad, for it betrays a rather simplistic understanding of the nature of the fundamental rights and freedoms to which we have committed ourselves in our constitutional texts, and of the form of democratic governance such rights and freedoms actually inform. What is more, it shows that, in our public debate on the issue, we have missed the critical question by miles.

The central question raised by the suggestion that homosexuality be decriminalized, and that persons of that particular sexual orientation enjoy the equal protection of the law, is whether the State has the constitutional authority to criminalize homosexual practices among consenting adults in the privacy of their homes or other private places. This is indeed the question, notwithstanding that the main policy objective behind the Barbados Attorney Generals suggestion was to address the problem of the spread of HIV/AIDS in Barbados.

Interestingly, this is the very question that pertains to the States authority to criminalize heterosexual practices among consenting adults in private. But we do not consider this a genuine question since we take it for granted that the State does not have that authority. The question therefore arises: what is it about homosexual practices that would make them the proper subject for criminalization and punishment?

Judging from the responses to the Attorney Generals suggestion, coming from members of the clergy and the public at large, I surmise that the answer would be that homosexuality is unnatural; it is a sin and an abomination; and, most importantly, the overwhelming majority of the populace are emphatically against decriminalization.

But, unfortunately, these prevailing sentiments about homosexuality hardly constitute an adequate response to the question of the constitutional authority of the State to criminalize homosexual practices among consenting adults. The answer to the question rather turns on an adequate understanding of the nature of a constitutional democracy and the limitations imposed on the State in respect of those forms of behaviour that it can or cannot criminalize.

Constitutional democratic rule is the only form of political rule that makes a strong claim to moral distinction. It is the form of political rule that is predicated on an assumption of persons as rational, free and moral equals, capable of making critical choices about their lives and, therefore, of formulating and pursuing their own conceptions of a good life. Constitutional democracy is therefore the only form of political rule that seriously respects the basic moral rights of persons, of which our constitutional bills of rights are but contingent and particular attempts at a more specific political instantiation. On this view, the right to vote, on the principle of universal adult suffrage, is no ordinary political right. Rather, it rests on a more basic and deeply profound moral right: the right of people to engage in self-government and in the choice of the fundamental rules for their governance, and to participate as equals in decision making about policies that would affect their lives.

In the event, these basic moral rights, specified in our constitutional bills of rights, are rights that we have, simply in virtue of the fact that we are human beings. They are therefore not rights legislated by political institutions, nor are they determined by political majorities. They cannot be withdrawn at the convenience of legislators or judges, based on public referendum, or by constitutional amendment, no matter how overwhelming the publics support for the amendment might be. In sum, these rights define the moral and political independence of persons which the State cannot breach except for compelling reasons. This leads to the question of the States authority to criminalize behaviour.

The power of the State to criminalize and punish certain forms of behaviour is a critical aspect of its sovereignty. But in a constitutional democracy, this power is exercised within constitutional limits. Specifically, the basic moral rights of citizens define the substantive limits on the authority of the State regarding the forms of behaviour it can or cannot criminalize, and the degree and forms of punishment it may impose for the commission of crimes. In a word, the State must have morally compelling reasons for criminalizing certain forms of behaviour.

This is a critical point. Criminal law is overwhelmingly the most coercive aspect of law. In the arrest, trial, conviction and punishment of the

criminal defendant, the awesome power of the State is brought to bear on the single individual. It is for this reason that Herbert Packer would define the criminal sanction as the laws ultimate threat; and for this reason, the States activities in criminalizing and punishing behaviour are always in special need of moral warrant.

Consideration of a classic crime like rape would help make the point. The State has morally compelling reasons for criminalizing such behaviour given that the violent act of rape constitutes the most egregious violation of the basic moral rights of the victim: the right to bodily integrity and of self-realization. That is to say, the act of rape denies to the victim a basic moral right that we each hold dearly: the right to make that critical choice as to the circumstances, and with whom, one would choose to be intimate. In a word, then, the criminalization of rape is morally justified because it constitutes the violation of certain fundamental interests and values we have committed to constitutional protection.

The very arguments that we have advanced to explain the criminalization of rape must now be applied to a determination of the issue of the criminalization of homosexual practices among consenting adults. That is to say, the moral justification for the States action must be predicated on the knowledge that homosexual behaviour constitutes a violation of certain basic moral rights of persons, rights we have committed to constitutional protection.

This, we have seen, is never the form of argument advanced by those who are so strongly against decriminalizing homosexual behaviour and for good reason: this argument is simply not available to their case. And because of this, a related question is placed in high relief. It is a question as to whether the States act in criminalizing homosexual behaviour among consenting adults is itself in violation of the fundamental rights of those persons who wish to engage in intimate homosexual acts, without the threat of criminal sanction. We may address this question by considering the States authority to criminalize heterosexual behaviour among consenting adults.

Earlier, I noted that we may take for granted the States lack of authority to criminalize heterosexual behaviour among consenting adults. But why does the State lack such authority? The answer is rather simple. Heterosexual behaviour among consenting adults in private is protected by certain basic moral rights and freedoms, such as freedom of thought, conscience, and association; the rights of privacy, autonomy and self-determination, which together entail the right to make critical choices as to the forms of intimacy one chooses to engage in.

But these rights and freedoms are held by all members of a democratic society as equals; they do not belong

only to those persons of whose intimacies we approve. Indeed, they are the rights that define the moral and political independence of all persons. Therefore, our personal preferences, religious or otherwise, that others do not engage in certain intimate practices of which we disapprove, could hardly be the sufficient warrant for inviting the State to criminalize the behaviour or, as in the instant case, inviting the State not to decriminalize it.

The Attorney General of Barbados was therefore on solid constitutional ground; the criminalization of homosexual behaviour among consenting adults is unconstitutional. The theological debate over the sinfulness and immorality of homosexuality is protected by our fundamental rights of free speech, conscience and religious beliefs. The debate is an essential part of a moral discourse, open to all conscientious citizens in the democratic polity, as to the kind of society they should wish for themselves and their posterity. That moral discourse may be reflected in legislation, duly enacted. However, that very moral discourse enjoins that the courts in a democratic polity repudiate statutes in defence of legal rights or interests that, though officially acknowledged in the constitutional text and widely accepted in principle, are largely overlooked or even consciously and unjustifiably denied in practice.

In sum, then, the ideal of law embodying a conception of the moral equality of persons, enjoins in particular the infliction of penalties on unpopular persons or groups without compelling moral justification. As one commentator puts it, The rule of law entails a requirement of equal citizenship, obliging government to justify the distinctions between persons on which it relies; and that obligation is not merely one of political wisdom or expediency, dependent for its efficacy on the vigilance of politicians or the force of public opinion, but has legal force, regulating the validity of laws and administrative orders and decision. The public debate in Barbados and Trinidad and Tobago, with its preoccupation on criminalizing homosexual practices among consenting adults in private, is hardly illuminating of the foundational terms of our legal and constitutional order.

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