

## **The development of sexual rights and the LGBTI movement in Botswana**

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This paper examines the development of LGBT sexual rights in Botswana and the role of civil society groups in Botswana.

### **Introduction**

Botswana operates a system of dual law comprising the customary laws and practices of the different ethnic tribes and the common law. The customary law is largely unwritten and differs from tribe to tribe and community to community. The common law is constituted by a combination of old English and Roman Dutch law and the statutory enactments passed by Parliament over time. Upon attaining independence from British rule in 1966, Botswana adopted a Constitution which is in place today with a few changes. The Constitution is the supreme law of the land; all other laws and practices that do not comply can and have been declared unconstitutional.

The Constitution of Botswana provides for the protection of ‘all persons’ within Botswana; in particular, Section 3 of the Botswana Constitution provides for the protection of all fundamental rights and freedoms without discrimination. The definition of what is considered ‘discriminatory’ is found under Section 15(3). This clause has been held up by the Courts of Botswana as allowing them to interpret the law very liberally in order to protect the rights of the most vulnerable groups of our society, such as women and children and all others whose fundamental human rights are being violated, which could include sexual minorities. In fact in the famous case of the *State vs. Unity Dow*<sup>1</sup> the Court of Appeal held that the Constitution is supreme and where there is conflict with another law or culture the Constitution must trump them. In this case the court agreed with the suggestion that although the words sex or gender were not included in the definition of discrimination the interpretation has to be broad allowing for a read in of the words rather

1 The State vs Unity Dow 2003 BLR XXX (CA)

than an exclusion of a right. The list was therefore held to be generic and not exhaustive.

However, Botswana society is highly conservative with many practices and stereotypes which privilege some and exclude or deny other groups such as lesbians, gays, bisexuals, trans-gender, intersex and sex workers the right to exist. The relevant sections which deal with discrimination under the Constitution of Botswana as aforementioned are Sections 3 and 15 respectively. Section 3 provides that 'every person in Botswana is entitled to fundamental rights and freedoms of the individual, that is to say the right whatever his race, place of origin, political opinions, colour, creed or sex but subject to respect for the rights and freedoms of others and for public interest ...'

Section 15(3) defines discrimination as 'affording different treatment to different people attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description'. The Constitution makes no specific mention of either sexual orientation or gender identity as a possible ground upon which an allegation of discrimination can be made.

The Botswana Penal Code regulates most criminal conduct and not unlike the Constitution it is also a legacy of British colonial rule and remains in effect today, also with very few amendments. The offending provisions with regard to same sex conduct are found under Sections 164 and 167 of the Penal Code, and they provide as follows: 'any person who has carnal knowledge of any person against the order of nature, has carnal knowledge of an animal or permits carnal knowledge of him/her against the order of nature, is guilty of an offence and is liable for imprisonment' and 'any person who ... commits any act of gross indecency with another person'. This provision on same sex conduct has been subject to much debate as it does not provide a definition of 'carnal knowledge' but the definition that the courts of Botswana have adopted is that it refers to sexual intercourse. The offence applies generally without any limitations to age, gender, or the location where the acts occur, which in effect means that effectively even sexual acts between consenting adults in the privacy of their homes can be prosecuted. In November 1998, a local human rights lawyer, Duma Boko,<sup>2</sup> speaking at the Ditshwanelo Conference on Human Rights and Democracy in Botswana, argued that the provision was vague and embarrassing and should accordingly be declared null and void by the courts. Mr Boko made the following observations:

2 Mr Boko is a lawyer with profound interest in human rights. He has, in the recent past, carried out research on the issue of homosexuality and the decriminalisation of it.

the Penal Code does not provide any definition of ‘**the order of nature**’ ... The sections are extremely vague and embarrassing in law. The conduct they seek to proscribe is so unclearly defined, if at all, that the ordinary citizen and society must keep guessing at their meaning and differ as to application.<sup>3</sup>

Although by strict interpretation this provision could include sex between heterosexuals, the application of the law has shown clearly that gay men are the primary targets of this law. In other jurisdictions it is clear that the act that is sought to be punished is sodomy.<sup>4</sup> The crime carries a penalty of seven years’ imprisonment.

In 1998 a review of all laws affecting the status of women was undertaken by the government and this process momentarily raised expectations among the LGBTI community and LeGaBiBo members that the discriminatory laws might be repealed. However, the ruling Botswana Democratic Party (BDP), facing an election the following year, opposed any suggestions to change the law. The BDP Executive Secretary told the media that the party ‘could not even debate the issue of homosexuality’ because it ‘would shock the Botswana nation’ (Long 2003). The then vice-president of Botswana, Seretse Ian Khama, stated that ‘human rights are not a license to commit unnatural acts which offend the social norms of behaviour ... The law is abundantly clear that homosexuality, performed either by males or females, in public or private is an offence punishable by law’ (Midweek Sun 1998). Kgosi Seepapitso IV<sup>5</sup> of the Bangwaketse told the *Midweek Sun* that people who are gay should be whipped or sent to jail. The Evangelical Fellowship of Botswana, a coalition of evangelical churches, launched what they called a crusade against homosexuality. Its National Secretary, Pastor Biki Butale, called on ‘all Christians and all morally upright persons within the four corners of Botswana to reject, resist, denounce, expose, demolish and totally frustrate any effort by whoever to infiltrate such foreign cultures of moral decay and shame into our respectable, blessed, and peaceful country’ (Mokome 1998).

The 1998 review commissioned by the government reviewed all laws that discriminated against women and many of these were repealed or amended. The move was to make all laws gender neutral especially laws relating to sexual offences<sup>6</sup> and violence but the implementation of these remain problematic because the socio-political environment remain largely patriarchal and characterised by unequal power relations with the men wielding most of the power.

3 Duma Boko, Ditshwanelo Conference on Human Rights and Democracy, Gaborone 1998

4 Sodomy is defined as unlawful and intentional sexual intercourse *per anum* between two male persons

5 Chief of the Ngwaketse tribe of Botswana

6 This amendment modified all sexual offences, increased penalties and criminalised the spread of HIV infection.

This meant that provision which originally afforded different treatment according to differences in gender were repealed and replaced with a more gender neutral provision covering both males and females equally. For instance within the review of sexual offences, the offence of rape,<sup>7</sup> which originally did not recognise females as possible perpetrators of the rape, was amended to include women, thus making the offence of rape gender neutral. Similarly, the provisions for same-sex conduct, which had originally criminalised sexual conduct between ‘male persons’, were subsequently replaced with gender-neutral provisions to include sexual conduct between women. The argument for the amendment was that the provisions were originally discriminatory on the basis of gender and therefore unconstitutional. Instead of repealing the offending law, Parliament saw fit to extend it to sexual acts between women ostensibly to comply with demand to eliminate the discriminatory effect of the law. As a result, Botswana not only retained the criminalisation of same-sex sexual acts between men in 1998, but also expanded its laws to criminalise sexual conduct between women.

Although the offence had been expanded to include sexual conduct between females the general provisions remained the same, no more insight was provided to assist with what was meant by ‘against the order of nature’. Due to the private nature of the acts being criminalised this law was hardly ever enforced and so the Courts had little opportunity to attempt an interpretation. However an opportunity to refer the issue for judicial review arose through the Kanane<sup>8</sup> case. The facts were that sometime during the night the police, acting on a tip off, raided the residence of Robert Norrie and found him engaged in the act of sexual intercourse with Utjiwa Kanane. The two men were charged with committing an act of gross indecency and engaging in unnatural sexual acts contrary to the Penal Code.<sup>9</sup> Mr Norrie, an American citizen, pleaded guilty and was convicted and subsequently deported. The Centre for Human Rights, DITSHWANELO, intervened to establish this as a test case for the decriminalisation of same-sex sexual conduct. They instituted a Constitutional challenge in the High Court alleging that the Penal Code provisions violated rights conferred to him by the Constitution of Botswana, namely, the right to non-discrimination; specifically that it discriminated against male persons on the grounds of gender, the right to privacy and the right to freedom of association, assembly and expression conferred under sections 9, 15 and 13 respectively. Moreover, the acts on which the charges against Mr Kanane were based had taken place between consenting male adults within the privacy of their residence.

The High Court dismissed the case, placing much emphasis on religious doctrine and accusing westerners for being the source of many evils such

7 Section 141 Penal Code Amendment No 5 of 1998

8 *Kanane v. the State* 2003 (2) BLR 67 (ca)

9 CAP [08:01] Laws of Botswana

as HIV/AIDS and homosexuality in Botswana. The High Court (Judge Mwaikasu) upheld the constitutionality of Sections 164 and 167 of the Penal Code. It held that the provisions of the Botswana Constitution that protect rights to privacy, association, and freedom of expression could be curtailed by legislation enacted to support public morality. The Court further found that the law prevented harm to public morality due to carnal knowledge against the order of nature. Additionally, it found that although lesbian intercourse was not considered to be any sort of carnal knowledge (i.e., neither natural nor unnatural), there was no gender discrimination in the Penal Code.

In 2003, Ditshwanelo appealed the case to the Court of Appeal alleging that the High Court had misinterpreted the Constitutional provisions referring to non-discrimination. The same arguments were presented before the Court of Appeal who also dismissed the case on the basis that the Botswana society was not yet ready to decriminalise homosexuality. The Court of Appeal did not consider the issue of gender discrimination as they felt that the amendment of the Penal Code in 1998, which made this same offence gender neutral, had rendered such challenge redundant. (*Kanane v The State* BLR 2003). After reviewing all the evidence and the legal arguments the Court held that there was nothing to suggest a change in the societal perception against homosexuality and that in fact all indications were that there was a hardening attitude to maintain the *status quo*. The Court held as follows:

The Court can take judicial notice of the incidence of AIDS both worldwide and in Botswana, and in my opinion the legislature in enacting the provisions it did was reflecting a public concern. I conclude therefore that so far from moving towards the liberalisation of sexual conduct by regarding homosexual practices as acceptable conduct, such indications as there is show a hardening of a contrary attitude. Gay men and women did not represent a group or class which at this stage had been shown to require protection under the Constitution (*Kanane v The State* 2003 BLR).

The clear implication of the above is that the Court considers that AIDS is caused in part by homosexual conduct and therefore society, by amending the law to broaden penalties against same-sex sexual conduct, was hardening its heart against gays and lesbians. The Court argued that homosexual practices should not be decriminalised because gay and lesbians are not a group protected by the Constitution. Moreover, the judges shifted interpretation of the scope of the law from behaviour ((homo) sexual conduct) to identifying 'gay men and women'. The main inference of this judgement is that the legal position as expounded by the Court in this decision reflects the opinion of the public towards homosexuality. In fact, the Court was of the view that there was no evidence to suggest that public opinion in Botswana had changed and developed to warrant decriminalisation. The Court felt that Botswana, being a liberal democracy, had expressed through the elected legislators their

disapproval of homosexuality through the 1998 Penal Code amendment which extended the offence to cover sexual acts between female persons. It was also the Court's view that the law did not prevent gays and lesbians from associating so long as it was within the confines and subject of the law. This is debatable, however, as this works on the premise that people understand that what is criminalised is the conduct and not the personal status of being gay, lesbian, transgender or otherwise. In Botswana like in many other communities with similar provisions criminalising same-sex conduct people have been stigmatised and/or subjected to discriminatory conduct on the basis of their actual or perceived sexual orientation and gender identity.

### **International human rights discourse in Botswana**

The issues of sexual orientation and gender identity have been receiving a lot of attention lately, at both the local, regional and international arenas. Just last month for the first time at the UN a resolution seeking to address ongoing persecution and discrimination of persons on the basis of sexual orientation and gender identity (SOGI) was tabled and voted with approval. This resolution was introduced by South Africa, the one African country that has made constitutional provisions to guarantee non-discrimination based on sexual orientation. This resolution was met with some disapproval, not surprisingly, from many of the other African countries led by Nigeria, Egypt, Uganda and others who were opposed to any discussion on SOGI at the UN. It was no surprise that Botswana abstained from voting on this resolution as it has always sided with African countries that choose to selectively apply tradition and public morality to deny the existence of communities such as gay, lesbian, bisexual and transgender people and sex workers.

The Coalition of African Lesbians has repeatedly appeared before the African Commission on Human and Peoples Rights applying for accreditation, which has resulted in many fierce debates, both formal and informal. At the heart of these debates are the issues of traditional values and public morality, with the majority feeling that traditional and religious cultures should be upheld. The Commission itself is divided on this issue but the prevailing official position is that sexual orientation and gender identity have no place in the African human rights mechanisms, especially as there is no specific mention of sexual orientation in the African Charter.

The international treaties, which Botswana has ratified, do not automatically apply because Botswana is a dualist legal system. For such treaties to be enforceable and applicable domestically they must be specifically incorporated by legislative enactments into the domestic law. This however does not mean that international treaties bear no significance in the application of the laws of Botswana. Although they are not justiciable without specific incorporation they can be persuasive within the Courts. The status of international law in

Botswana has been perfectly summed up in the case of *Attorney General v Unity Dow*<sup>10</sup> judgment where Justice Amisshah stated that international law must be used in the interpretation of the law. In his words:

Botswana is a member of the community of civilised states which has undertaken to abide by certain standards of conduct and, unless it is impossible to do otherwise, it would be wrong for its Courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.

Justice Aguda, JA also added the following observations;

the Courts must interpret domestic laws in a way that is compatible with the State's responsibility not to be in breach of international law as laid down by law creating treaties, conventions, agreements and protocols within the United Nations and the Organisation of African Unity.

The Courts have used this same judgment and international treaties such as the ICCPR and the ILO Convention<sup>11</sup> to protect people from discrimination on the basis of HIV status. In *Lemo v Northern Air Maintenance (Pty) Ltd*<sup>12</sup> Lemo, an employee of Northern Air Maintenance, was dismissed the day after he disclosed his HIV status to his employer. During the final four years of his employment, Lemo's health deteriorated and he had taken all of his annual leave, sick leave, and was repeatedly on unpaid leave. There was a factual dispute as to whether Lemo was terminated due to his HIV status or his frequent absence from work. Where an employee is HIV positive, employers should refrain from any discriminatory practices towards an HIV/AIDS positive employee, and should view the employee in the same way as it would any other employee suffering from a life threatening illness. It is therefore clear that the Courts are willing to exercise some judicial activism in applying international human rights standards, notwithstanding that the many treaties that have been ratified to date are yet to be domesticated.

The refusal by the government to register LeGaBiBo presents an opportunity to test the judicial activism that was shown in the case of *Unity Dow* and the other cases discussed above. The denial of registration of LeGaBiBo is a violation under the International Covenant on Civil and Political Rights (ICCPR) Article 22 of the freedom of association. Another violation of LGBT rights in Botswana is the state's criminalisation of same-sex sexual activity.

Despite instances of discrimination against LGBT individuals in Botswana and the fact that the ICCPR prohibits such conduct, Botswana's reports to the Human Rights Committee failed to mention the existence (or lack thereof) of

10 *Attorney General v Unity Dow* (1992) BLR 119 CA

11 The International Labour Organisation Declaration on Fundamental Principles and Rights at Work, adopted in June 1998

12 *Lemo v Northern Air Maintenance (Pty) Ltd* No 166 Industrial Court 2004

specific efforts to eliminate discrimination against LGBT persons (Botswana Report to the United Nations Human Rights Committee 2008). LeGaBiBo, with the assistance of GLOBAL Inter-Rights,<sup>13</sup> presented a shadow report in March 2008, whose goal was to provide information to aid the Human Rights Committee in its evaluation of Botswana's adherence to the rights set forth in the ICCPR, and eventually lead to a genuine attempt to protect and provide civil and political rights to LGBT persons in Botswana.

The Human Rights Committee in 2009<sup>14</sup> recommended that Botswana decriminalise homosexual relationships and practices/consensual same-sex activities between adults and to forbid discrimination on the basis of sexual orientation to be in violation of the right to privacy guaranteed by the ICCPR. Although Botswana has committed to uphold the principles of the ICCPR, it has failed to bring its criminal code into compliance with international principles regarding discriminatory practises against minority groups such as LGBTI and sex workers. Such laws violate international protections of the right to privacy and protections against discrimination and threaten basic freedoms of association, assembly and expression. These laws violate Articles 2, 26 (non-discrimination), and 17 (right to privacy) of the ICCPR.

### **Why criminalise? Whose morality?**

When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

*Lawrence vs. Texas*, US Supreme Court 2003

In Botswana LGBTI people are opposed for a variety of personal, moral, political, and religious reasons. Some people would say that it is unnatural and encourages unhealthy behaviour; others believe that it undermines the traditional family, they choose to believe that children should be brought up in a home with both a mother and father and that children should not be exposed to sexualities other than the accepted heterosexuality. Many Christian people consider same-sex sexual acts a sin and un-Christian, often referring to the biblical notions of the 'sin of Gomorrah and Sodom'. This kind of opposition is deeply embedded in people's attitudes and behaviour. Many acts of discrimination against LGBTI communities come from people who view the act of homosexuality as 'immoral'. However, most people who are opposed to LGBTI rights have little or no personal contact with openly gay people. As a result of the criminalisation of same-sex sexual relationships by the Botswana government and the religious dogma and hate mongering that is preached

13 International human rights organisation based in USA, Washington .DC

14 [http://ohchr.org/HRBodies/UPR/Documents/Session3/BW/A\\_HRC\\_10\\_69\\_Add1\\_Botswana](http://ohchr.org/HRBodies/UPR/Documents/Session3/BW/A_HRC_10_69_Add1_Botswana)



by religious groups, many individuals are loath to accept LGBTI people as deserving equal respect and protection (Mutua 2011).

Since the Kanane case there has been no further prosecutions for engaging in same-sex sexual activity, so generally people are left alone. The government of Botswana has in fact used this as an excuse not to be criticised for discriminatory practices against LGBTI people. In March 2010 the ex-president of Botswana, who is now a champion of decriminalisation, said in the course of a BBC debate that during his term in office he instructed the police and law enforcement officers to 'leave homosexuals alone'. Upon being asked why it was not more prudent to decriminalise when he had the power and opportunity as the president he said that 'he could not risk losing an election because of gays', this referring to the fact that the majority of people in Botswana were so homophobic that they would lose faith in him as a leader were he to openly support the cause to decriminalise same-sex sexual conduct.

### **Effects of criminalisation of same-sex conduct**

Criminalisation affects the lives of many people across the country because the laws uphold societal attitudes of intolerance and homophobia. It has been demonstrated in other jurisdictions that, even where laws criminalising homosexuality are not enforced, the mere presence of the law is insidious and can create the conditions for discrimination in employment, stigmatisation, disparagement, threats of physical violence and other human rights abuses. Moreover, criminalisation deters the reporting of human rights abuses perpetrated against individuals on the basis of actual or imputed sexual orientation or gender identity since survivors of abuse may face criminal prosecution when they report these crimes to the police. As a consequence, homosexual liaisons are conducted furtively and there is no 'out' community of any note except for a few isolated individuals who are also employees of LeGaBiBo.

There is a general misunderstanding of the intent of the law as most people believe the law criminalises both the sexual orientation status as well as the conduct. Accordingly homophobic individuals may interpret these provisions as permission to target LGBTI people, their organisations and their events. Members of LeGaBiBo have reported that they have been denied access to entertainment places by nightclub owners because of their sexual orientation and gender expression. One such incident involved an individual who was ejected from a local nightclub on the grounds that she was 'a lesbian'. She was simply standing in line for a drink, when a man who identified himself as the owner of the club approached her. He proceeded to push her into the kitchen where he touched her chest and frisked her and demanded, 'Identify yourself. Are you a man or a woman? We don't allow lesbians here'. (LeGaBiBo 2006). She was then escorted off the premises by a security guard.

LeGaBiBo responded by issuing a press release condemning this act as being discriminatory. However, this incident had no recourse because there is no law in Botswana that recognises the rights of non-heterosexual people. Therefore, reporting such an incident to authorities or the police is to no avail as there is no legal instrument in Botswana that recognises discrimination based on sexual orientation or gender expression.

The mere existence of these laws allows officials to invade the private spaces of individuals alleged to be engaging in same-sex activity and can result in arbitrary arrests and detention. The high-profile case of *Kanane v The State* is an example of this kind of invasion of privacy. Intolerance by society further drives homosexuals underground, a situation further aggravated by the homophobic statements of national leaders and politicians of neighbouring countries such as Zimbabwe, Namibia, Malawi and Kenya.

### **Homophobia in Botswana – popular opinion or the few voices of overzealous politicians?**

Is the majority of Botswana society really homophobic or are the views of a few overzealous politicians pre-empting and influencing public opinion? Does the criminalisation of same-sex sexual relations sustain prevailing public attitude or is the reverse true? Is it the laws that influence public attitude or the public attitude that influence the law? Should public attitude be allowed to triumph over constitutionally protected human rights?

The presence of criminal laws which proscribe same-sex sexual conduct gives legitimacy to political leaders to make undisguised anti-homosexuality statements. In fact, the Court in the case of *Kanane v The State* (2003) made little attempt to establish what the public opinion actually was. With no research evidence available it seems difficult to really know what societal attitudes are towards homosexuality.

Historically, colonialism introduced laws against homosexuality (Baudh 2008; Gupta 2002; Saunders 2009). However, post-colonial states have not, in the main, kept pace with legislative reform in the colonising countries; nor have they kept up with changing societal norms. It is very common for homosexuality to be dismissed as a 'western' disease and as 'un-African', and politicians in Botswana describe the decriminalisation of same-sex acts as the antithesis of Botswana culture and as a reflection of western influence. Changes in the content of the law should follow changes in society. Yet Botswana has clung doggedly to criminal provisions which are now at odds with the vision of creating a tolerant and transparent nation as per the national vision.<sup>15</sup> Although it has been argued that the laws of Botswana represent the views of the majority because they are enacted by an elected legislature, the same is not true for the Penal Code which dates from colonial rule. Politicians have been known to take advantage of their

15 Botswana Long Term Vision 2016

positions to influence public opinion and in this case their anti-homosexuality opinions take legitimacy from the presence of the criminal code while purporting to act as protectors of 'good' public morals. In fact, it is difficult at this point to find clear indications as to what societal attitudes towards same-sex sexual conduct actually are or to define a standard moral code.

In 2006, the Assistant Minister of Labour and Home Affairs, Olifant Mfa, was quoted in the press as saying that homosexuality is 'barbaric, whether you argue it from the perspective of religion or culture', and that such individuals should 'go for counselling and serious therapy so that they can be brought back to normality' (Lute 2006). Mr Mfa went on to state that the reason that homosexuality is not part of Botswana culture is because 'even people who claim to be homosexual are afraid to come out in the open' (Lute 2006). Certainly, fear of being exposed to negative and discriminatory treatment by political and religious forces keeps these individuals from coming out into the open. It will continue to be difficult for the LGBT community to be open about their sexual orientation so long as it is constituted as a criminal offence.

BONELA (The Botswana Network on Ethics, Law and HIV/AIDS) and LeGaBiBo responded the published interview by an open letter to the newspaper editor letter stating, 'we continue to advocate for the rights of the lesbians, gays, bisexuals, transgender and intersex community because they have long been here, contribute to the fabric of this country and will long be here to stay. Homosexuality is found all around Botswana, including in rural areas ... Homosexuality cannot be cured simply because it is not a disease' (BONELA and LeGaBiBo 2006). Kgosi Sediegeng Kgamane, a tribal authority, admitted that he was aware of such behaviour in the society, however, he said that homosexuality is not welcome in the Tswana custom and is a kind of mental illness (Lute 2006). Kgosi Lotlaamoreng II, the paramount chief of Barolong, claimed that there are no elements of homosexuality in Botswana or other African societies and that homosexuality is 'alien behaviour that comes with foreigners' (Lute 2006).

However the issue remains a divisive one even among human rights organisations. The Botswana Council of NGOs<sup>16</sup> has to date failed to come up with a clear position because their members have been unable to agree to accept and acknowledge LGBTI rights as human rights deserving full promotion and protection like all other rights. Many people still opt to adopt subjective interpretations of culture and morality over protecting rights of LGBTI people.

### **Public health, HIV and decriminalisation**

Another consequence of the prohibitive criminal code is that it hinders the government from providing adequate appropriate services to these marginalised

16 This is a network of all human rights NGOs in Botswana, LeGaBiBo not a member due to lack of registration status.

populations. For instance, the social intolerance of same-sex sexual conduct has contributed to the inability of the government to provide condoms to prisoners. The prison population represents a unique group of men who have sex with men (MSM) who do not necessarily identify as gay, transgendered or otherwise, and who often go back to their usual interrelations with the rest of the community as soon as they are released from prison.

HIV/AIDS has contributed to many governments and aid organisations shifting their attitude towards same-sex relationships. The government of Botswana is presently debating the same issues with many organisations and leaning towards a human rights based approach, having come to the realisation that from a public health perspective they cannot continue to deny full access to health services to sexual minorities. For instance, in 2000, the then-President Festus Mogae launched the Botswana Human Development Report 2000 in which he urged the nation 'not to be judgmental' towards groups vulnerable to HIV, including LGBTIs, prisoners, and commercial sex workers.

These remarks may have been prompted by the need to address HIV/AIDS and the factors that contribute to the high infection and prevalence rates in Botswana holistically. The same Human Development Report determined that laws criminalising same sex sexual conduct have been detrimental to Botswana's efforts at HIV/AIDS education, prevention and care because they excluded a whole community of people from participating in HIV prevention programmes. In *Toonen v Australia* the Human Rights Committee noted that the criminalisation of same sex sexual practices '... could not be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS'.<sup>17</sup> In fact it was observed generally that statutes criminalising homosexual activity tend to impede public health programmes by driving underground many of the people at the risk of infection. The Human Rights Committee also concluded that the 'criminalisation of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention'.<sup>18</sup>

Civil society organisations in Botswana such as BONELA, LeGaBiBo and Ditshwanelo have attempted to engage with the government emphasising the fact that the government has a moral and legal obligation to prevent the spread of HIV among prisoners and among communities. Prisoners are part of the community. They come from the community and return to it after completing their sentences. Protection of prisoners is therefore protection of and prevention of potential harm to of communities. The attention on HIV has brought for sexual minorities new spaces for the discussion of sexual rights and thus has created possibilities of alliances between LGBTI groups with other mainstream

17 *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) Paragraph 8.5.

18 *Toonen* Communication (supra)

human rights organisations. The Botswana government has also had to realign their development strategies to include to ensure that marginalised populations including sex workers, gay and other men who have sex with men, people living with HIV, and other marginalised populations must be meaningfully engaged and represented at all levels of the national and regional response to HIV and AIDS. Botswana has been most affected by HIV, but with leadership from the Office of the President the country has managed to mobilise a strong response to the epidemic which has resulted in the scaling up of a more harmonised and holistic response. However, one significant gap has been the meaningful engagement of key populations in the planning, delivery, and monitoring of programmes, and in high-level decision-making. HIV is a global health and human rights issue and also a development issue that threatens social and economic stability and Millennium Development Goal 6 which Botswana has accepted is to halt and begin to reverse the spread of HIV and AIDS, and to achieve universal access to treatment for HIV for all those who need it. The best possible way to achieve this is to adopt a human rights-based approach that holds that all people have equal rights and dignity. Sex workers, gay and other men who have sex with men, substance users, and other marginalised groups share equal human rights to healthcare, security, gender equality, freedom from discrimination, and to self-determination. In principle the Botswana has shown its willingness to engage with these marginalised communities but the decriminalisation of same sex conduct, sex work and HIV is still outstanding.

### **Botswana – time to decriminalise?**

The government has so far refused to acknowledge LeGaBiBo, the only organisation that represents lesbian, gay, bisexual, transgender and intersex (LGBTI) peoples in Botswana. As a result LeGaBiBo operates in an unfriendly environment. There are no social or legal protections available for LGBTI people who are subjected to prejudice or discrimination. The issue of gender expression in the form of cross-dressing, although not explicitly prohibited in any of the statutes, is frowned upon. The system recognises only two genders and the existence of other genders is shrouded in taboo and silence. LeGaBiBo members have their hands full working around the clock with limited resources to ensure that their constituents are not subjected to human rights violations.

Despite working under immense difficulty in a hostile and non-conducive environment, LeGaBiBo has had tremendous support through the years. Civil society organisations have spoken out against prejudice, and one mainstream human rights group, Ditshwanelo, the Botswana Centre for Human Rights, urged the decriminalisation of homosexual conduct as early as 1990 when the group LeGaBiBo was first initiated. The Centre used to coordinate LeGaBiBo as a project run on behalf of an informal group of lesbians, gays and bisexuals. This group comprises mainly of persons who are between the ages of 18 and

40 years old. In 1998, Ditshwanelo hosted a conference on human rights and democracy and a representative of LeGaBiBo made a presentation on lesbian and gay rights. The workshop resulted in a Human Rights Charter for Lesbians, Gays and Bisexuals in Botswana. In 2001, Ditshwanelo held a workshop on safer sex for this group in relation to HIV/AIDS prevention. Government policy makers and representatives from the United Nations Development Programme attended. A report was prepared and widely circulated. Ditshwanelo continues to advocate and lobby for the decriminalisation of same-sex relations by providing information to students, researchers, members of the public and the media on this issue.

Due to financial constraints Ditshwanelo was unable to sustain their support of the project. As a result LeGaBiBo was not in operation until 2004 when LeGaBiBo resumed its work under the auspices of BONELA to address the human rights issues which affect them. Since then BONELA has provided LeGaBiBo with office space, guidance and mentoring. Through this collaboration LeGaBiBo has been able to provide services such as workshops on healthy relationships, substance and alcohol abuse, partner abuse, safe and safer sex. In addition to service provision, LeGaBiBo has engaged with local media in order to advocate and influence reporting with regard to the human dignity of LGBTI people. LeGaBiBo has also been able to extend their network abroad through membership in both regional such as the Coalition of African Lesbians (CAL) and international networks such as the International Lesbian and Gay Association (ILGA), which has improved their ability to fulfil their objectives. In 2005 LeGaBiBo submitted a constitution to the Registrar of Societies in order to get officially registered. Although the organisation anticipated that the registration would be refused this was intended to force the government to make a determination on the issue of registration of an LGBTI organisation and, should they decline, a test case on the basis of the constitutionality of the Penal Code provisions would again be brought before the courts.

It took more than two years of repeated demands from members of LeGaBiBo but finally the application was rejected by letter dated 10 September 2007 on the grounds that:

the country's constitution does not recognise LGBTIs, and ... Section 7(2)(a) of the Societies Act which says any of the objects of the society is, or is likely to be used for an unlawful purpose or any purpose prejudicial to or incompatible with peace, welfare or good order in Botswana.

The rejection of the application came as no surprise. The letter raised some issues: *inter alia* that the director and his office interpreted the Penal Code provisions to mean that the very fact of being 'homosexual' is what the law prohibits. The import of this misguided interpretation is that organising and registering an entity whose objective is to work with LGBTI communities is seen as aiding the commission of an unlawful act. This interpretation of the law has

hindered the free association of the LGBTI community, most of whom remain closeted, fearing ridicule, stigma and discrimination. This strict interpretation of the Penal Code provisions prohibits sexual acts between people of the same sex rather than on the basis of one's sexual orientation although there appears to be a thin line. The Societies Act itself would be hard put to deny registration of LeGaBiBo, but read together with the Penal Code, gives new meaning to what might be considered as 'prejudicial to or incompatible with peace, welfare and good order'.<sup>19</sup>

The members of LeGaBiBo have since served notice on the Attorney General's office to sue the state on the following grounds:

1. That by denying registration the State is violating them the right as individuals and as a collective to freedom of association and free assembly as guaranteed by the Constitution of Botswana under Section 13. The Constitution guarantees for all persons fundamental human rights and freedoms without discrimination, however sexual orientation is not amongst the list for which discrimination is prohibited. The case of *Attorney General v Unity Dow* (1992) laid to rest fears that the list was exhaustive but rather laid down an enabling interpretation that it was a generic list and that the intention of parliament was not to exclude but rather was broad based such that other words like 'sex' could be read into it. In a similar fashion it would therefore follow naturally that the word 'sexual orientation' be read into the list so that discrimination on the basis of one's orientation is prohibited by the Constitution of Botswana.
2. The provisions violate the right to privacy which is conferred by Section 9 of the Constitution in so far as they purport to regulate sexual conduct that takes place between two consenting adults that does not result in harm to any of the participants.
3. The provisions violate the right to freedom of association as conferred by the Constitution in so far as they seek to dictate to persons what intimate relations they should form or refrain from constituting.
4. The provisions violate the freedom not to be subjected to cruel and/or degrading treatment, as conferred by Section 7, in so far as they prescribe criminal sanction for conduct that does not result in harm to anyone.
5. The provisions violate the right to free speech, which is entrenched by Section 12 of the Constitution, in so far it criminalises the expression of affection between LGBTI people. The provisions violate the right to non-discrimination, in so far as they penalise the only means available to LGBTI people of expressing intimacy, yet do not criminalise that available to heterosexuals.

19 Societies Act Sec 7(2)(a) CAP 18:01 Laws of Botswana

6. The provisions violate the right to movement conferred by Section 14 of the Constitution, to the extent that the provisions in question compel individuals to constantly cross the border in search of a place where they can freely form intimate associations without the fear of societal stigmatisation and where they can express their affection for fellow LGBTIs without fear of criminal sanctions.
7. It is contrary to Section 86 of the Constitution as it advances no legitimate legislative objective.

The members of LeGaBiBo are fully aware that the Court of Appeal declared the said provision constitutional as it arrived at the finding that Botswana is not ready for homosexuality. However the Court of Appeal also indicated in the case of *Kanane v. The State* (2003) that the courts in Botswana should be open to arriving to a different conclusion should it be shown that the attitudes of Botswana towards homosexuality have softened.

The Constitution of Botswana contains a bill of rights and such rights are universal in application to all persons without discrimination. The right to privacy is found under Section 9 of the Constitution and has been defined as the right to be left alone by the High Court of Botswana.<sup>20</sup> Further, the South African case of the National Coalition of Gays and Lesbians Equality v Minister of Home Affairs<sup>21</sup> described the right to privacy as recognising that all individuals have the right to a sphere of private intimacy which allows individuals to establish relationships without interference from the community and states that it is not the business of the state to dictate the nature nor extent of such intimacy. In the case of Botswana, the Court failed to conclusively deal with whether or not the Penal Code infringes on the constitutional right to privacy of LGBTI men and women. Such issues of whether or not one is heterosexual, homosexual, or whatever the case may be, become paramount as they are central to one's personal identity and therefore are private. The right to privacy rightfully embodies the actual enjoyment of one's personal identity and liberty and should not be denied by anybody beyond what is reasonably justifiable.

Sections 3 and 9 of the Constitution create situations where limitations may be imposed on the enjoyment of the right to privacy by private individuals. Some of these derogations are to serve the public defence, safety, health, order, morality, development, etc or any other purpose beneficial to public interest. Section 9 provides most importantly that any derogation for whatever reason must be reasonably justifiable in a democratic society. It is noteworthy that the Penal Code does not proscribe homosexuality as a way of life but only the

20 *Diau vs Botswana Building Society* (2003) 2 BLR 409, IC

21 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999)



act of intercourse between two people of the same sex. Furthermore, these provisions fail to define what acts would be considered to be either against the order of nature or grossly indecent. Accordingly, they are by their own nature vague and embarrassing as they fail to define exactly the acts which they seek to criminalise. Because of this vagueness they are subject to arbitrary interpretations, and subject to the whims of individual prejudices, as was demonstrated by the limitless application of religious doctrine by the judge in the case of *Kanane v The State* (2003) and others who have had the opportunity to adjudicate on LGBTI issues.

Thus the question remains as to whether the state is justified in invoking Section 9 to legislate for the criminalisation of homosexual acts between consenting adults under the guise of preserving public morality. Such blanket derogation cannot be reasonably justified, as the act it purports to prohibit does no harm to society. More importantly the judges in the case of *Attorney General v Unity Dow* (1992) made a very important statement when they stated that Botswana has chosen to be a member of the United Nations, a body of states that respects the dignity and inviolability of universal human rights.

## Conclusion

Attitudes towards same-sex sexual relationships have changed over time: whereas in many societies it was initially regarded as a sin and immoral, then as deviant and an illness that needed treatment, the 21st century brought about new attitudes towards gay men and women. Although same-sex sexual intercourse remains a crime in many jurisdictions of the world, the discussion has now shifted to whether same-sex relationships should be formally acknowledged and accepted and whether fundamental rights to privacy, personal liberty and protection of the law should be realised equally without discrimination on the basis of sexual orientation, gender identity and/expression.

Given that it has been accepted that communities such as men who have sex with men (MSM) are a highly vulnerable to HIV it becomes imperative for governments to re-examine the impact of maintaining prohibitive criminal provisions against same-sex sexual conduct. As alluded to by the *Kanane v The State* (2003) decision, the prevailing position against same-sex sexual conduct exists because of public opinion. Accordingly, the Botswana community must also re-examine itself and decide whether to maintain the criminal law that sustains homophobia at the cost of public health and human rights. Although there is limited data or research, the little that has been done recently suggests that HIV/AIDS is having a disproportionate effect on LGBTI communities in Botswana. A pilot study on MSM found that 17 per cent of the respondents (out of 151 men who have sex with men who participated in the study) were infected, clearly suggesting that there is a raging epidemic, and one that needs to be addressed using a human rights based approach. Another report from

the Botswana National Aids Agency (2003) declared the need to take critical measures in order to curtail the spread of the disease:

to halt and eventually reverse the destructive tide of the HIV/AIDS epidemic requires a more dynamic, determined and radical response. To do anything less may spell disaster.

LeGaBiBo has been encouraged by this declaration and is hopeful that the radical response will include the elimination of all barriers, legal and social which contribute to the country's inability to effectively control and manage HIV/AIDS.

One positive principle is that of *botho*, captured in Botswana's Long Term Strategic Vision document (Presidential Task Group 1997). *Botho* is a word derived from Setswana, the national language in Botswana that refers to a well-rounded character, with good manners, discipline, and the realisation of full potential, individually and within communities.

The principle of *botho* in the Botswana's Vision 2016, is committed to providing life-long learning opportunities and to educating tomorrow's leaders as it is for the national development. Botswana's Economic and Social Development Agenda is based upon five national principles, which are: Democracy, Development, Self-Reliance, Unity, and *botho*. Botswana's Vision 2016 acknowledges *botho* as one of the tenets of African culture. It encourages people to applaud rather than resent those who succeed. It disapproves of anti-social, disgraceful, inhuman and criminal behaviour, and encourages social justice for all. *Botho* as a concept must stretch to its utmost limits the largeness of the spirit of all Botswana. The five principles are derived from Botswana's cultural heritage and are designed to promote social harmony. They set the broader context for the objectives of national development, which are: Sustained Development, Rapid Economic Growth, Economic Independence and Social Justice. *Botho* must be central to education, to home and community life, to the workplace, and to national policy.

Adherence to the Botswana Vision 2016, the Millennium Development Goals, the Constitution and domestication of all other treaties that provide for non-discrimination of all persons should ensure that decriminalisation is indeed a likely possibility in Botswana.

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