3 Queer lawfare in Botswana

Monica Tabengwa & Anthony Oluoch***

1 Introduction

A study by the Williams Institute ranks Botswana 80th of the 175 countries surveyed and fifth in Africa after South Africa, Mauritius, Namibia and Mozambique on social acceptance of LGBTIQ+ people.[1] A major influence in the acceptance of LGBTIQ+ people by society in general including family members, employers, clergy and government institutions are the social attitudes that exist about the population. These social attitudes are framed by, among other things, the law, politics and politicians, shared beliefs and culture, and powerful forces in society such as religion and the media.

Indeed, in Botswana, socio-political, socio-economic, and socio-cultural factors have played a role in influencing attitudes towards LGBTIQ+ people. This is not only evidenced by the positive change in jurisprudential opinions over time, but also by the utterances made by public figures, including the President.

Sections 164, 165, and 167 of the Botswana Penal Code have language that is very similar to criminal codes from countries that are former British colonies. These sections provide for what has been termed 'unnatural offences' and criminalise 'carnal knowledge against the order of nature'. The original sections only applied to men but were amended in 1998 to include women when the laws were made gender neutral by stating:[2]

* Policy Specialist, United Nations Development Programme (UNDP).
** Policy Specialist, United Nations Development Programme (UNDP).

1 AA Flores 'Social acceptance of LGBTI people in 175 countries and locations 1981 to 2020' Williams Institute UCLA School of Law (November 2021) https://williamsinstitute.law.ucla.edu/wp-content/uploads/Global-Acceptance-Index-LGBTI-Nov-2021.pdf (accessed 14 May 2022).

2 Section 167 of the Botswana Penal Code.

> Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence.

Botswana derives its laws from the Constitution, customary law, common law, legislation, and judicial precedent. The country operates a dual legal system consisting of common law and customary laws. Common law is composed of a combination of legislation passed by parliament, and legal precedent which is mainly based on remnants of Roman-Dutch laws and practices passed through colonisation and judicial practices. While it is commonly accepted that the Constitution is the supreme law of the country, it should be noted that the Constitution does not expressly state this, but rather that the courts have repeatedly validated its status as the supreme law of the land and that all laws derive their validity from it. Section 86 of the Constitution gives power to parliament to make laws that are 'subject to the provisions of this Constitution',[3] the courts have declared laws that are inconsistent with the Constitution to be unconstitutional and invalid to the extent of their inconsistency.

There are several cases bearing precedence to the supremacy of the Constitution of Botswana. In *Petrus v The State*,[4] the Court of Appeal declared section 301(3) of the Criminal Procedure and Evidence Act, 1939 void on the grounds that it infringed section 7(1) of the Constitution prohibiting torture, inhuman, or degrading punishment. In the iconic citizenship case of *Attorney-General v Dow*,[5] the Court of Appeal also upheld the constitutional supremacy by declaring section 4(1) of the Citizenship Act, 1998[6] void for violating the constitutional prohibition of discrimination in sections 3 and 15 because it denied citizenship to the offspring of Botswana women married to foreigners but granted citizenship to the offspring of Botswana men married to foreigners.

Section 105 of the Constitution gives the High Court and the Court of Appeal exclusive jurisdiction to adjudicate any matter involving

3 Section 86 of the Constitution of Botswana states: 'Subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good government of Botswana.'

4 [1984] 1 BLR 14.

5 [1992] BLR 119.

6 Section 4(1) of the Citizenship Act of Botswana: 'A person born in Botswana shall be a citizen of Botswana by birth: Provided that a person shall not be a citizen of Botswana by virtue of this subsection if at the time of his birth, he acquires the citizenship of another country by descent through his father.'

Constitutional interpretation. However, although this gives these courts the power to review all legislation and quash any law that infringes any constitutional provisions, it does not give them the power to nullify sections of the Constitution itself.[7]

As in most countries LGBTIQ+ persons have always lived on the fringes of society, their personhood questioned, and their rights denied by both state and non-state entities. They have had to rely on the sanctity and supremacy of the Constitution to assert their rights and have the rights respected by all. The courts have therefore been heavily guided by the decision in *Attorney-General v Dow*,[8] which stated that:[9]

> The existence and powers of the institutions of state, therefore, depend on its [the Constitution's] terms. The rights and freedoms, where given by it, also depend on it. No institution can claim to be above the Constitution; no person can make any such claim. The Constitution contains not only the design and disposition of the powers of the state which is being established but embodies the hopes and aspirations of the people. It is a document of immense dimensions, portraying, as it does, the vision of the peoples' future.

And further:[10]

> In Botswana, when the Constitution, in section 3, provides that 'every person . . . is entitled to the fundamental rights and freedoms of the individual', and counts among these rights and freedoms 'the protection of the law', that fact must mean that, with all enjoying the rights and freedoms, the protection of the law given by the Constitution must be equal protection.

In the 2016 decision of *Attorney-General v Rammoge*, the Court held that human rights group, Lesbians, Gays, and Bisexuals of Botswana (LEGABIBO) should be allowed to register as a society stating that in Botswana, all persons, whatever their sexual orientation, enjoy an equal right to form associations with lawful objectives for the protection and advancement of their interests. The Court ruled that the refusal of the Minister of Labour and Home Affairs to allow the registration of LEGABIBO was unconstitutional and stood to be reviewed and set aside on the ground of illegality.[11]

7 CM Fombad 'UPDATE: Botswana's legal system and legal research' GlobaLex (2021) https://www.nyulawglobal.org/globalex/Botswana1.html (accessed 16 May 2022).

8 Appeal Court 1994 (6) BCLR 1 (locus standi).

9 At 5.

10 At 10.

11 *Attorney-General v Rammoge* Court of Appeal of the Republic of Botswana Civil Appeal

In *ND v Attorney-General,*[12] the High Court had delivered its decision in 2017 finding that the failure of the gender marker to match ND, a transgender man's gender identity, including his physical appearance, subjected ND to severe insecurity, harm, and discrimination. In addition, the Court held that the Registrar's refusal to change the applicant's gender markers violated ND's rights to privacy, equal protection, freedom from degrading and inhuman treatment, freedom of expression, and protection from discrimination.[13]

The lawfare in Botswana culminated in 2019 when after years of incremental strategic litigation cases, the High Court of Botswana decriminalised same-sex sexual acts between adults in their judgement in *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae).*[14] The Court determined that it is not the business of the law to regulate private consensual sexual encounters between adults. It also applied the same to issues of private decency and/or indecency between consenting adults.

Yet with provisions of the Constitution entitling every person to fundamental rights and freedoms which has led to increasingly progressive jurisprudence around LGBTIQ+ issues in Botswana, there remains a need for continuous and sustained advocacy to align societal perceptions with the law. These societal perceptions, influenced by opposing players including evangelical groups, traditional leaders, and sections of the media, have encouraged cases of violation, stigma, and discrimination towards LGBTIQ+ people in the country. LEGABIBO and other civil society organisations continue to run sensitisation campaigns on the existence of, and the need to protect, the rights of sexual and gender minorities.[15]

2 An overview of queer activism

LEGABIBO is the first organisation in Botswana to work on and advocate for the rights of LGBTIQ+ persons. It was founded as a support group

CACGB-128-14 (2016).

12 *ND v Attorney-General* MAHGB-000449-11.

13 Para 198.

14 MAHGB-000591-16. 'Botswana: Criminalisation of consensual gay sex is unconstitutional' African Legal Information Institute (12 June 2021) https://africanlii.org/article/20190612/botswana-criminalisation-consensual-gay-sex-unConstitutional (accessed 16 May 2022).

15 L Pagiwa 'BOTSWANA: "Anti-rights groups are emerging in reaction to progressive gains"' *Civicus* 15 August 2019 https://www.civicus.org/index.php/media-resources/news/interviews/4005-botswana-anti-right-groups-are-emerging-in-reaction-to-progressive-gains (accessed 16 May 2022).

under the fiscal support of the Ditshwanelo Centre for Human Rights. For many years the group operated informally with a few of its members meeting irregularly. The case of *Kanane v The State* (*Kanane* case)[16] however propelled the group into the limelight, with the publicity brought by the arrests of two gay men and the ensuing legal battle through the Botswana courts meaning that LEGABIBO was also forced to 'come out'.

Many great debates and discussions were held, where many questioned and even denied the existence of gay persons in Botswana. The litigation of the *Kanane* case lasted from 1994 to 2003 when the Court of Appeal gave a ruling that society was not ready to decriminalise. While this was a disappointing conclusion to a case that had gripped the otherwise conservative nation's attention for almost a decade, it just about opened the door and left it open for further action.

LEGABIBO in the meantime was growing and with the support of Ditshwanelo, getting bolder and more strategic in their work. Across the border in South Africa the apartheid era had come to an end and a new and much more democratic Constitution had been ushered in. A proliferation of public interest cases had not only ensured that LGBTIQ+ persons were included in the constitutional protections but also that they were able to marry and enjoy family rights like everybody else. Back home President Festus Mogae (1998-2008), whose tenure had been mired in issues of discrimination and stigma from the HIV/AIDS epidemic had come to a new realisation, that complete inclusion of all persons, especially those disproportionately at a higher risk was key to HIV prevention. He advocated for a holistic approach that meant a change in attitude and policies towards sexual and gender minorities. He said this in support of inclusion for LGBTIQ+ persons:[17]

> While I admit that the West often push their agendas on Africa, which we must be wary of, I also believe that we must, as Africans, admit that the world is changing … This means often abandoning some of our long-held convictions about life.

16 High Court Criminal Trial 9 of 1995.

17 MK Lavers 'Former Botswana president speaks in support of LGBT rights' *Washington Blade* 21 January 2016 https://www.washingtonblade.com/2016/01/21/former-botswana-president-speaks-in-support-of-lgbt-rights/ (accessed 11 July 2022).

President Mogae ordered the police to never arrest people based on their same-sex sexual conduct, which meant that the arrest in the *Kanane* case was the last arrest under sections 164 and 167 of the Botswana Penal Code. A combination of these factors and support from friends and allies propelled LEGABIBO to seek legal recognition in the form of registering as a society for the first time in 2005, this would allow them to move out from under the then fiscal hosts BONELA. The application was rejected twice before LEGABIBO went to court in 2013 claiming violation of the constitutional rights by the Registrar of Societies and seeking an order to be registered forthwith. It would take another five years for the Court of Appeal to hand down a judgment declaring that the rights of LEGABIBO members to non-discrimination and to freedoms of association and expression, had been violated by the Registrar's refusal to register LEGABIBO as a society. The Court ordered that LEGABIBO should be registered forthwith.

In the meantime, the LGBTIQ+ community was growing and openly advocating for inclusion amongst other mainstream civil society organisations. Many more organisations such as Rainbow Identity Association (RIA), started operating alongside LEGABIBO thereby increasing the visibility and voice of the LGBTIQ+ community. They were now able to get legal recognition and operate as independent entities and took full advantage of that to integrate themselves into the mainstream policy actions often using HIV funding as a steppingstone. However, the criminalisation of same-sex conduct remained a dark cloud hanging over their newly clad legal recognition. LGBTIQ+ persons suffered discrimination, stigma and human rights violations regularly on account of this criminalisation. They were denied access to public services and their enjoyment of their fundamental rights diminished.

However, going to court meant proving that the social environment, and opinions had changed, that societal attitudes were such that it was time to decriminalise. According to LEGABIBO's amicus arguments in the decriminalisation case *Letsweletse Motshidiemang v Attorney General* brought through expert evidence, it was shown that LGBTIQ+ people living in Botswana experienced higher levels of violence than was reported, experienced sexual orientation and gender identity related discrimination when accessing health on account to the negative stigma, and that sections 164 and 167 of the Penal Code constituted examples of structural stigma. Further to that, the Botswana parliament through the amendment of the Employment Act of 2010 had acknowledged that discrimination on the basis of sexual orientation was possible and prohibited employment discrimination on this basis.

3 A legal analysis of developments and process

3.1 On criminalisation of consensual same-sex conduct: *Kanane v The State*[18]

The Penal Code (Amendment) Act 5 of 1998 amended sections 164 and 167 making them all gender encompassing, substituting the words 'any other' for the word 'male' in section 164 and deleting the word 'male' wherever it appeared in section 167 while inserting the words 'or her' and 'or herself' immediately after the words 'him' and 'himself' respectively.[19] This was an apparent response to the decision in *State v Kanane*, High Court Criminal Trial 9 of 1995 where the accused, one of two men who was charged with engaging in unnatural acts and indecent practices in terms of sections 164 and 167 of the Penal Code, sought the Court's interpretation that these sections were discriminatory towards male persons on the grounds of gender and that these sections hindered male persons in their enjoyment of their right to assemble freely and associate with other persons.

It is important to note that the High Court decision was handed down in March 2002, after the Penal Code was amended. The appeal to this case, and the decision of the Court of Appeal in July 2003 was undoubtedly the canon that launched queer lawfare in Botswana. In *Kanane v State*, the Court relied heavily on the approach and attitude of the society in Botswana. It stated that there was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required decriminalisation of those practices, even to the extent of consensual acts by adult males in private. The Court concluded that the trend was not to move towards the liberalisation of sexual conduct by regarding homosexual practices as acceptable conduct but showed a hardening of the contrary attitude.[20]

While the ruling in *Kanane* was not a favourable ruling, it did, however, highlight three key aspects of the situation at the time that are important to note. Firstly, the Court dissociated itself completely with the opinion of the High Court judge regarding the origin of homosexuality. In the High Court ruling, Judge Mwaikasu quoted literature that implied that homosexuality is a western import and a white man's influence. Secondly, while appreciating the trends in other kindred democracies

18 *Kanane v The State* 2003 (2) BLR 67 (CA).

19 Section 167 of the Penal Code of Botswana.

20 Para 79.

including England where the contested laws originated and neighbouring South Africa, the Court kept the door open for further constitutional interpretation of the law. It stated that the time had not yet arrived to decriminalise homosexual practices even between consenting adult males in private adding that gay men and women did not represent a class which at that stage, had been shown to require protection under the Constitution. Thirdly, that sections 164 and 167 of the Penal Code outlawed practices by any persons, heterosexual, or homosexual, and regardless of their sexual orientation.

3.2 On employment discrimination: Employment (Amendment) Act 2010

Before the HIV epidemic Botswana was rated as the fastest growing economy in Africa[21] but all this was lost as the HIV epidemic devastated lives, families and communities. As a result of the excessive loss of life the country suffered untold economic and developmental losses. The epidemic further contributed to a rise in existing inequalities, especially in communities where poverty, insecurity and weak infrastructure already existed. For instance, communities already living on the margins of society, in poverty and without access to basic amenities became disproportionately and increasingly at risk. Stigma and discrimination were rife, further driving the rates of infections up. This prompted HIV and human rights organisations to lobby the government to provide protection against discrimination based on HIV.

Once again, the Courts proved to be reliable and consistent in upholding human rights and affirming the supremacy of the Constitution in so far as it provided protection against discrimination. In 2010 the Botswana Parliament passed the Employment (Amendment) Act 2010, where they sought to prohibit discrimination based on HIV status. More importantly, for groups and individuals, the Act also amended section 23(d) of the Employment Act Cap 47:07 to forbid the termination of an employee's contract of employment on grounds of sexual orientation. This was all made possible, in part, because of lobbying by BONELA,

21 L Matthews 'How did Botswana become the world's fastest-growing economy? Initiative for African Trade and Prosperity (9 August 2021) https://theiatp.org/2021/08/09/how-did-botswana-become-the-worlds-fastest-growing-economy/ (accessed 16 May 2022).

Ditshwanelo Botswana Centre for Human Rights, and LEGABIBO in various fora.[22]

3.3 On freedom of assembly and association: *Attorney-General v Rammoge*[23]

More than a decade after the loss of the *Kanane* case, the LGBTIQ+ community would once again venture into the public domain and seek to have an organisation registered. The Court of Appeal in *Kanane* had ruled that there was no evidence to suggest that Botswana was ready for decriminalisation of same-sex conduct. That meant that next action in the courts had to be strategic and specifically deal with the question of society's readiness. Another loss would be detrimental and likely make life much more difficult for the small community of LGBTIQ+ activists and allies advocating for LGBTIQ+ equality. So tactically, before going back to the courts for decriminalisation an incremental approach was developed to target the low hanging fruit, that is, find cases that could be easily won with less harmful consequences.

Accordingly, in February 2012, LEGABIBO filed an application to the Department of Civil and National Registration for the registration of LEGABIBO as a society. In March 2012, the Director responded rejecting LEGABIBO's application on the grounds that Botswana's Constitution does not recognise homosexuals. LEGABIBO then appealed this decision on two occasions to the Minister, in October and November 2012, who upheld the decision of the Registrar. Thuto Rammoge and 19 others filed a notice of motion in the High Court seeking, inter alia, the setting aside of the decision by the Minister of Labour and Home Affairs and the declaration that they are entitled to assemble and associate under the name and style of LEGABIBO.

The High Court held that the objects of LEGABIBO were *ex facie* lawful, that it was not correct that the Constitution did not recognise homosexuals, that advocacy for decriminalisation of same-sex sexual relationships could not be equated with encouraging the commission of criminal offences contrary to sections 164 and 167 of the Penal Code, and that the refusal was in breach of sections of the Constitution relating

22 See for example, 'BONELA applauds new Employment Act – Government scraps sexual orientation and health as basis for dismissal' *Bonela* 30 August 2010 https://bonela.org/bonela-applauds-new-employment-act-government-scraps-sexual-orientation-and-health-as-basis-for-dismissal/ (accessed 16 May 2022).

23 *Attorney-General v Rammoge* (n 11).

to equal protection of the law, freedom of expression and freedom of association. The Attorney-General appealed this decision.

The Court of Appeal dismissed the Attorney-General's appeal stating that fundamental rights are to be enjoyed by every person. The Court also stated that while sections 164 and 167 of the Penal Code have the practical effect of limiting sexual activity, even in private, between consenting same-sex partners, it is not and never has been, a crime in Botswana to be gay. The gamble to go after the low hanging fruit proved to be a good one as the courts seemed to embrace their role in interpreting the Constitution generously in favour of minorities while upholding fundamental human rights. Judicial precedents from South Africa,[24] Kenya[25] and India and international human rights mechanisms provided much needed gravitas to the reasoning allowing the courts to expand and read in sexual and gender minorities to be deserving protection from discrimination as provided under sections 3 and 15 of the Constitution of Botswana.

3.4 On gender recognition: *ND v Attorney-General*

Stating that the refusal of the Registrar of National Registration to allow ND, a transgender man, to change his gender marker on his national identity document (*Omang*) qualified as, *inter alia,* inhuman, and degrading treatment, the Court in *ND v Attorney-General*[26] in 2017 reaffirmed the importance of interpreting constitutional provisions using a purposive approach. The Court stated:[27]

> It is well established that in interpreting the provision of the Constitution more particularly with regard to the fundamental rights, the Court must adopt a generous and purposive approach in order to breathe life into the Constitution having regard to its liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed.

This ruling also highlighted the fact that the rights in the Constitution apply to every person. The Court stated that section 3 of the Constitution of Botswana protects the rights of 'every person' and that an individual

24 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

25 *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2016] High Court at Nairobi (Milimani Law Courts) 150 & 234 of 2016 (Consolidated).

26 *ND v Attorney General & Registrar of National Registrations,* HC MAHLB 000449 of 2015

27 Para 13.

human being, regardless of his or her gender identity is 'a person' for the purposes of the Constitution.[28] The Court in this case therefore showed that non-recognition of a person's gender identity denies them equal protection of law and exposes them to wide-spread discrimination, stigma and harassment.

3.5 Decriminalisation of consensual same-sex conduct: *Letsweletse Motshidiemang v The Attorney-General*

There has been sustained public advocacy work by LGBTIQ+ activists in Botswana. This has increased recognition of LGBTIQ+ people in government policies, including the National Strategic Plan to Reduce Human Rights Related Barriers to HIV and TB Services[29] which recognises gay men and other men who have sex with men (MSM), transgender people, and other LGBTIQ+ persons as key and vulnerable populations. All this, and the series of decisions highlighted, paved the way for the decriminalisation of consensual same-sex sexual acts between adults in the 2019 High Court ruling in *Letsweletse Motshidiemang v The Attorney General.*[30]

The Court in *Kanane* ruled that the time had not yet arrived to decriminalise homosexual practices even between consenting adults.[31] In saying that, the Court intimated that the society was not ready to accept homosexuality and that the social structure in place did not provide for a group of gay men who required protection under section 3 of the Constitution of Botswana. Doing this left the door open for the Court of Appeal in later decisions to look at the situation on the ground and analyse its readiness for decriminalisation of homosexuality. It did so in *Letsweletse*. To understand how the Court came to this ruling and the process with which it followed, it is important to look deeper at the judgment.

28 Para 77.

29 NAHP Botswana, The Global Fund & UNAIDS 'National Strategic Plan to reduce human rights-related barriers to HIV and TB services: Botswana 2020-2025' https://www.theglobalfund.org/media/10418/crg_humanrightsbotswana2020-2025_plan_en.pdf(accessed 16 May 2022).

30 T Esterhuizen 'Decriminalisation of Consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae)*' (2019) 19 African Human Rights Law Journal http://ref.scielo.org/3zjk92 (accessed 14 May 2022).

31 N 18.

3.5.1 The time had come

The Court cited three instances that showed that it was the right time to decriminalise same-sex conduct among consenting adults. These instances involved the three arms of government: The Executive, the Legislature and the Judiciary. In his speech during the launch of the country's 2018 commemorations of the 16 days of activism against violence on women and children, the President of the Republic of Botswana, Dr Mokgweetsi Masisi acknowledged LGBTIQ+ people's rights stating:

> There are also many people of same sex relationships in this country, who have been violated and have also suffered in silence for fear of being discriminated … just like other citizens, they deserve to have their rights protected.[32]

This was an acknowledgement by the Executive on the need to protect the rights of the LGBTIQ+ population in Botswana.

Parliament, passed the Employment (Amendment) Act, as outlined above to forbid the termination of an employees' contract of employment on grounds of sexual orientation, gender etc (section 23(d)). Legislative bodies are representative bodies that express the will of the people. Through the passage of legislation, the people's will is transferred into the will of the state. Inevitably, the source of the state's authority, is the people. In this case the people of Botswana have spoken, through the amendment of the Employment Act.[33] This was an acknowledgement by the Legislature that LGBTIQ+ people require protection in the law.

The Judiciary acknowledged the existence, the rights and freedoms, and the need to protect these for LGBTIQ+ persons in the various cases highlighted above, including and especially in the *Rammoge* case where it highlighted: 'There is compelling evidence that attitudes in Botswana have, in recent years, softened somewhat on the question of gay and lesbian rights.'[34]

In the Botswana National Vision 2016, which was adopted following nationwide consultation, the country adopted several pillars that anchor the people's Vision. The nation accepted, amongst other things, to be 'A Compassionate, Just and Caring Nation'. The nation also aspired to be

32 'New president acknowledges LGBTI people's rights' *MambaOnline - Gay South Africa online* 10 December 2018 https://www.mambaonline.com/2018/12/10/botswanas-new-president-acknowledges-lgbti-peoples-rights/ (accessed 19 May 2022).

33 'BONELA (n 22).

34 N 23.

'An Open, Democratic and Accountable Nation' and lastly 'A Moral and Tolerant Nation'. The Court noted that discrimination against a segment of the society is not compassionate. It noted that a democratic nation embraces plurality, diversity, tolerance, and open-mindedness. On this, the Court stated:

> Our shared values are as contained in our National Vision. Furthermore, the task of laws is to bring about the maximum happiness of each individual, for the happiness of each will translate into happiness for all.

The Second Pillar of the Botswana National Vision 2036 on Human and Social development states:

> Social inclusion is central to ending poverty and fostering shared prosperity as well as empowering the poor, the marginalized people, to take advantage of bourgeoning opportunities.[35]

With the three arms of government, and other government policies having highlighted this, it was the Court's opinion that the time had come for it to decide on the constitutionality of the sections criminalising consensual adult same-sex conduct.

3.5.2 The laws were not void for vagueness

To conform to the rule of law, laws must be intelligible and accessible. This is the requirement for clarity because laws must be public not only in the sense of actual promulgation. The fact that these laws exist in the Penal Code means that they are present in society and, as much as they were not used in Botswana often, can cause someone's liberty to be taken away from them. Therefore, laws, and indeed the sections criminalising same-sex conduct, must impose requirements for ordinary citizens to comply with and they need to issue instructions to officials about what to do in the event of non-compliance by the citizens. The rule of law requires that citizens be put on notice of what is required of them and of any basis on which they are liable to be held to account.[36]

The Court noted that a vague law is a violation of due process under the rule of law. The Court therefore quoted Thurgood Marshall J, in *Grayned v City of Rockford,* where the Judge stated:[37]

35 Human and Social Development 'Botswana Vision 2036' https://vision2036.org.bw/human-and-social-development (accessed 19 May 2022).

36 Philip Mullock 'The inner morality of law' (1974) 84 *Ethics* 327.

37 408 US 104 (1972) at 108-109.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply to them. A vague law impermissibly delegates basic policy matters to policemen, judges, juries for resolution on an ad hoc basis, with the attendant dangers of arbitrary and discriminatory application.

On the basis highlighted above, the Court, in interpreting a seemingly vague penal provision, must adopt an interpretation that favours liberty. Given the fact that the Penal Code did not define 'carnal knowledge' and the 'order of nature', the definitions of these terms were provided in *Gaolete v The State*,[38] which defined 'carnal knowledge' as sexual intercourse and 'against the order of nature' as anal sexual penetration. These definitions were also adopted in *Kanane.* The Court found that the sections of the Penal Code were not void for vagueness.

3.5.3 The right to privacy

In defining the right to privacy, the Court was guided by the ruling in *National Coalition for Gay and Lesbian Equality v Minister of Justice.*[39] The 1999 ruling in South Africa stated that there is a sphere of private intimacy and autonomy where sexual expression between consenting adults was not harmful to any person. The Court stated: 'If in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.'

The Court also considered the fact that sections 3(c) and 9 of the Constitution of Botswana, on the face of it, appear only to refer to the protection of the privacy of one's home and property. However, the Court noted that this section ought to be read together with section 3(a) which speaks to the 'security of the person' and applying the *Dow* principle of generous and expansive interpretation of fundamental rights provisions, considered the right to privacy a multi-faceted right going beyond the concept of a man's home being his castle, or merely the right to be left alone. They stated that it extends also to the protection of the right to

38 *Gaolete v The State* [1991] BLR 325 (HC) (Botswana High Court).

39 N 24.

make personal choices about one's lifestyle, choice of partner, or intimate relationships, among a host of others.

In giving a historical context of privacy, the Court stated:

> Privacy is as old as mankind. What is considered to be private and thus legally protected differs; according to era, the society and the individual. Privacy is therefore context based.

As a matter of general proposition, the Court stated, privacy, private life, honour, and image of people are inviolable. Privacy may relate to one's physical body, their personal information, and the privacy of choice. This includes the right to choose an intimate or life partner. Any violation of the right to privacy therefore must be for purposes of protecting the rights listed in section 9(2)(a) and (b) which make provision that the violation is reasonably required in the interests of, inter alia, defence, public safety, public order, public morality, and public health, and that the violation is reasonably required for the purpose of protecting the rights of freedoms of another person.

In this case, the Court found that the provisions impaired the applicant's right to express his sexuality in private, with his preferred adult partner.

3.5.4 The right to liberty, equality and dignity

> A man/woman is known by the company he/she keeps. Liberty, equality and dignity are associable friends who hobnob in close proximity, and are thus intricately and harmoniously related. The said triumvirate is what forms the core values of our fundamental rights, as tabulated and entrenched in Section 3 of the Constitution.[40]

On liberty, criminalisation of carnal knowledge against the order of nature as defined in *Gaolete* and affirmed in *Kanane* denied the applicant the right to choose his preferred intimate sexual partner and undermined his individual autonomy. The Court also stated that sexual orientation is innate to a human being and is not a fashion statement or posture but an important attribute of one's personality and identity. The right to liberty therefore encompasses the right to sexual autonomy.

40 *Letsweletse Motshidiemang* (n 14).

The Court states:

> Anal sexual penetration and any attempt thereof are prohibited and criminalised by Sections 164(a), (c) and 165 of the Penal Code. Effectively, the applicant's right to choose a sexual intimate partner is abridged. His only mode of sexual expression is anal penetration; but the impugned provisions force him to engage in private sexual expression not according to his orientation; but according to statutory dictates. Without any equivocation, his liberty has been emasculated and abridged.

On dignity, the Court relied on the rulings in, inter alia, *Rammoge* and *ND*, which stated that to deny any person their humanity is to deny such person human dignity and that gender identity constitutes the core of one's sense of being and is an integral part of a person's identity. In this case, the Court stated that procreation was not the only reason people engage in sexual intercourse and that it constitutes an expression of love and intimacy. The applicant's way of expressing his sexual feelings by the only mode available to him was criminalised. This criminalisation denied him expression of his sexual orientation which lies at the heart of his fundamental right to dignity.

3.5.5 Discrimination

The Court in *Kanane* did not consider the discriminatory nature of the sections of the Penal Code in question. The Court at that time also did not have the advantage of an expert witness submitting evidence of the effects of the laws on LGBTIQ+ people in Botswana.[41] As already discussed, the Penal Code (Amendment) Act 5 of 1998 amended sections 164 and 167 making them gender neutral and the Attorney-General in this case argued that on that ground, the laws were not discriminatory in nature. However, the substance of the case by the *amicus curiae* was that these provisions were discriminatory by denying the applicant sexual expression and gratification in the only way available to him, even if that way is denied to all.[42]

In making a ruling about the discriminatory nature of the sections of the Penal Code, the Court noted that in the *Dow* case, the enumerated grounds of discrimination in section 3 of the Constitution were not hermetically sealed, nor cast in stone. This enabled the Court to determine

41 Esterhuizen (n 29).

42 *Letsweletse Motshidiemang* (n 14) para 156.

that the word 'sex' in section 3 of the Constitution can be interpreted generously enough to include and capture 'sexual orientation':[43]

> Anal sexual intercourse, is generally, associated with gay men. According to the applicant, as a homosexual man, anal sexual intercourse is his only mode of sexual gratification and expression. Heterosexuals, according to him are spoilt for choice. Effectively, he submitted that sections 164 and 165 completely closes the door in final fashion on his face and places unconstitutional burdens on him, hence the provisions are discriminatory in effect.

The Court interrogated sections 164 and 165 of the Penal Code and noted that they have a substantially greater impact on the applicant as a homosexual, who engages only in anal sexual penetration than it does on heterosexual men and women. The Court stated that the fact that anal intercourse is the only means available to the applicant, denying him the right to sexual expression even if that way is denied to all remains discriminatory in effect.

3.5.6 The distinction between Kanane and Letsweletse

In the *Kanane* case, the Court of Appeal stated that as at that time (2003), the impugned provisions were not discriminatory to gay men, on account of the factual and legal matrix presented in the case. What was presented in *Letsweletse* was fundamentally different from the *Kanane* case. In *Letsweletse*, expert evidence was adduced to prove the case, whereas there was no such evidence in the *Kanane* case. Furthermore, in the *Kanane* case the Court of Appeal, did not deal with the issues of privacy and dignity. It also did not consider if the impugned provisions were discriminatory, in effect.

3.5.7 Public opinion, private morality and universality of human rights

In considering the universality of human rights, the High Court of Botswana was guided by the South African Constitutional Court which had stated as follows:[44]

> To penalize people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a

43 *Letsweletse Motshidiemang* (n 14) para 164

44 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 60

> level or homogenization of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference.

In essence, the Court stated that the notion of universality of human rights is fundamental and that any discrimination against a member of society is discrimination against all. Any discrimination against a minority class of people is discrimination against the majority. 'Plurality, diversity, inclusivity and tolerance are quadrants of a mature and an enlightened democratic society.'[45]

It is not easy to justify a limitation to a fundamental right because clauses that derogate from constitutional rights are to be narrowly construed while those conferring such rights receive a generous construction.[46] In attempting to justify the Penal Code provisions, the Attorney-General relied on the speculation that anal sexual penetration is contrary to public morality and public interest. The respondent did not provide reliable factual material to support these assertions and speculations.

With that in mind, the Court stated that public opinion is relevant in matters of Constitutional adjudication, but it is not dispositive. Human rights enshrined in the Constitution, liberty, equality and dignity, render the opinions of the public very small.

The Court ruled that criminalising consensual same-sex intercourse in private, between adults is not in the public interest. The evidence produced in the case shows that the criminalisation disproportionately impacts on the lives and dignity of LGBTIQ+ persons, perpetuates stigma and shame against homosexuals and renders them recluses and outcasts. There is no victim within consensual adult same-sex intercourse and in the Court's view, such penal provisions exceed the proper ambit and function of criminal law in that they penalise consensual same sex, between adults.[47]

> 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. Consensual sex conduct, per anus, in my view, is merely a variety of human sexuality … The tenor and general theme of our decision, as foreshadowed above, is that the question of private morality and decency, between consenting adults, should not be the concern of the law. Stemming therefrom, is the court justified in severing and excising from the

45 *Letsweletse Motshidiemang* (n 14) para 173.

46 *Attorney-Gneral v Dow* (n 8) 31.

47 *Letsweletse Motshidiemang* (n 14) para 189.

said provision, the word 'private', in order to remedy the unconstitutionality of private indecency.[48]

4 An analysis of effects

4.1 Legal and material effects

An urgent study needs to be conducted with the main purpose to qualitatively analyse the lived realities of Botswana pre and post decriminalisation of consensual adult same-sex conduct. This study would be targeted, not only at LGBTIQ+ persons in the country but also at the society in general. The cases mentioned, the activism that went behind them, and the continued sensitisation of the society on issues around sexual orientation, gender identity and expression has created visibility and with that, dialogue among the people of Botswana about the issues. This needs to be analysed. As the Court in *Rammoge* stated, the attitudes in Botswana have softened in terms of gay and lesbian rights.[49]

The main effect of queer lawfare in Botswana is an understanding, not only by the LGBTIQ+ community, but by the society at large, that the rights conferred to them by the Constitution are inalienable. This understanding will allow the society to fight for their rights where they have been denied and seek jurisprudential assistance when it is necessary.

Letsweletse was won not just by legal analysis, but also through empathy. People's lives were shown to have been impacted by the provisions of the Penal Code. The Court was given evidence to show the effects of these laws on actual lived realities, mental health, access to health services among other things. A change in the way activists approach the courts is important. Laws are important but judges will rule based on the effects these laws have on the lived realities of the people the laws are supposed to be governing.

4.2 Effects on attitudes, beliefs and ideas

The stigma and discrimination faced by LGBTIQ+ people in the country will not automatically end with the decriminalisation of consensual adult same sex conduct. This stigma is already entrenched in the society and in the LGBTIQ+ community who for the longest time, have believed that the existence of sections 164 and 165 in the Penal Code made it a crime for them to be homosexual. The cases in effect have clarified that being gay

48 *Letsweletse Motshidiemang* (n 14) para 190

49 N 23.

or lesbian was not and had never been a crime. The distinction between criminalisation of conduct and perceived criminalisation of individuals is important not only for the cases in Botswana but also regionally.

Thus, the engagement with government officials, state actors, religious leaders, media, and society in general needs to be taken from the premise of inalienable constitutional rights, the fact that individuals are not criminal by mere fact of being LGBTIQ+, and with the ruling from *Letsweletse,* that criminalisation of consensual adult same-sex conduct is unconstitutional on the grounds that it denies people their rights to privacy, dignity and liberty, and is discriminatory in nature.

There is a need for the ability to link people's lived experiences to the law. Making sure that people's lives are at the forefront of activism and litigation. Winning cases is an important step in realising people's privacy, dignity and liberty. The language used needs to be one that recognises that all human beings have equal rights. As was mentioned in *Rammoge,* we must be compassionate towards one another. In activism, there is need to use language that not only speaks to the courts and the legal fraternity, but language that will reach the hearts of the society. In the long term, by removing laws that are so negative in society beyond those that affect LGBTIQ+ people, the society will become better, more inclusive and empathetic.

4.3 Political effects

The ruling of the courts in *ND*, *Rammoge*, *and Letsweletse* which read sexual orientation and gender identity as protected grounds under section 3 of the Constitution, the inclusion of sexual orientation as a protected ground against discrimination in the Employment Act by Parliament and the statement by the President of the Republic of Botswana, Dr Mokgweetsi Masisi, acknowledged LGBTIQ+ people's rights saying that there are many people of same-sex relationships who have been violated and like other citizens, they deserve to have their rights protected[50] shows a political will to make things better for LGBTIQ+ people.

The independence of the judiciary is important in any democracy. This has been shown in the cases discussed herein where the government has complied with the rulings of the court therefore demonstrating the independence of the judiciary and respecting the rule of law. There are always political implications in any litigation. These implications include the registration of LEGABIBO, the changing of a trans person's gender

50 *MambaOnline* (n 31).

marker, and even the declaration of controversial sections of the Penal Code unconstitutional. A long-term political effect of queer lawfare is the recognition of the separation of powers, and the respect of the rule of law.

5 Moving beyond lawfare

The ongoing constitutional review process is one of the areas through which the LGBTIQ+ movement in Botswana can engage beyond lawfare. The Constitutional Review Commission has been mandated to ascertain from the people of Botswana their views on the operation of the Constitution, and its strengths and weaknesses, to assess the adequacy of the Constitution in relation to Botswana's identity, principles, aspirations and values; promoting and protecting peoples' rights, promoting equality, and promoting national unity and democracy, to articulate the concerns of the people of Botswana regarding the amendments that may be required; and to make any recommendation on the review or amendment of the Constitution.[51] LEGABIBO and other LGBTIQ+ rights organisations are fighting to be intentionally involved in the process.

The inclusion of sexual orientation as a protected ground against discrimination in the Employment Act is a first step for the community to ensure that anti-discrimination laws are in place. Beyond the cases that have been won, there is a need for more anti-discrimination legislation that will protect not only LGBTIQ+ people but also other minorities in the country. The recognition of gender identity in the *ND* case opens the door for further trans inclusive laws to be passed in Botswana, thereby protecting trans individuals and allowing them access to trans specific healthcare.

Finally, while there has been a lot of visibility occasioned by the queer lawfare in Botswana, there is need for further, even more targeted sensitisation of the society. Taking example from South Africa where there are non-discrimination laws in place, yet the society continues to be violent towards people based on their sexual orientation and gender identity,[52] the movement in Botswana needs to continue sensitising the community about the lived realities of LGBTIQ+ people, the fact that they are a part of the Botswana community and keep the momentum that was started in the run up to the *Letsweletse* case. *Re Batswana.*

51 BR Dinokopila 'Promise fulfilled? Botswana's first comprehensive constitutional review process gets underway' *ConstitutionNet* 25 February 2022 https://Constitutionnet.org/news/promise-fulfilled-botswanas-first-comprehensive-Constitutional-review-process-gets-underway (accessed 7 June 2022).

52 A Rakhetsi '"Hear our cry": South Africa's LGBTIQ+ Activists demand action amid homophobic attacks' *Global Citizen* 29 April 2021 https://www.globalcitizen.org/en/content/lgbtq-violence-homophobia-south-africa-action/ (accessed 7 June 2022).

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