Decriminalizing Homosexuality: The Effects of the Botswana Court Verdict

Mili Gupta

In 2019, the High Court of Botswana (HC) decriminalized same-sex partnerships in the case of Letsweletse Motshidiemang v. Attorney General. *The HC was of the view that Botswana's sodomy laws, which criminalize certain sexual acts, infringe upon the freedom, privacy and dignity of LGBTQ+ persons, are discriminatory against LGBTQ+ persons, and serve no public interest. The Court of Appeals (CoA), on November, 29, 2021, dismissed the appeal brought by the government to challenge the 2019 verdict of the HC. Consequently, the CoA upheld the 2019 ruling, with a view that human dignity is harmed when minority communities are marginalized. In the judgement on the appeal, the CoA acknowledged the stigma, discrimination, vulnerability, and marginalization suffered by LGBTQ+ people. The CoA devoted a significant portion of its decision to review of the arguments raised by the government and its previous verdict in* Kanane v. The State. *The Court dramatically broadened the purview of constitutional rights, such as the rights to freedom, privacy, dignity and non-discrimination. The acknowledgment of these rights correctly highlights that judicial intervention is only the first step toward guaranteeing equality.*

Mili Gupta *received her LL.M in 2021 from the Institute of Law at Nirma University in Ahmedabad, India. Her research interests include constitutional law, comparative human rights law, anti-discrimination law, gender law, and international humanitarian law.*

INTRODUCTION

Following a constitutional challenge brought by LGBTQ+ campaigners, the High Court of Botswana decriminalized same-sex partnerships in *Letsweletse Motshidiemang v. Attorney General* (hereafter "*Motshidiemang*").[1] Same-sex marriages in Botswana were previously subject to penalization of up to seven years' imprisonment under the Botswanan Penal Code. The government's appeal against the HC judgment was dismissed by the Court of Appeals (CoA) on November 29, 2021. LGBTQ+ rights activists throughout the African continent hailed the 2019 verdict as a triumph, especially in the face of an unsuccessful effort in Kenya to abolish colonial-era legislation criminalizing gay sex.

In a consensus judgment, the HC found that Section 164 (a) & (c) of the Penal Code [2] infringed on the right to privacy (Section 9 of the Constitution),[3] the right to be free from discrimination (Section 15 of the Constitution), and the right to security, liberty of persons, and equal protection under the law (Section 3 of the Constitution). The decision adds Botswana to an expanding list of nations, including India,[4] that have recently curtailed similar laws criminalizing same-sex partnerships, stands apart from the verdicts recently declared by the HCs of Kenya[5] and Singapore,[6] in which they upheld legislations that criminalize same-sex relations.

FACTUAL BACKGROUND

Motshidiemang addresses criminal laws that previously applied to all former British territories. Challenged sections 164(a) and 164(c) of the 1964 Botswana Penal Code criminalized relationships "against the course of nature," which had been construed by the courts to forbid same-sex anal penetration. In cases involving the decriminalization of same-sex relationships, both parties made common arguments. The Government of Botswana, then challenged the HC decision in *Motshidiemang* in the CoA. The appellant, the Government, contended that the laws were not enforced, that they were gender-neutral, and thereby not discriminatory, that they only outlawed particular sexual activities such as anal penetration, and that they did not promote or create discrimination, stigma, or tyranny.

Lesbians, Gays, and Bisexuals of Botswana (LEGABIBO), an advocacy organization, testified before the Court regarding how legislation penalizing consensual same-sex partnerships perpetuated marginalization and prejudice against LGBTQ+ persons, extending existing social discrimination and undermining these persons' fundamental dignity. The evidence

demonstrated that criminalizing such sexual activities, and thus including consensual same-sex partnerships, alienated LGBTQ+ people from basic health services and care, jeopardizing national HIV prevention programs and compromising public health. LGBTQ+ people also confront higher levels of hostility than the general populace of Botswana.

The Respondents, the Attorney General (as the representative of the State), and LEGABIBO, acting as the *amicus curiae*,[7] argued that, while the laws were gender-neutral, their impact was discriminatory. The role of the amicus in this matter was especially important as the HC was examining the constitutionality of legislation that may affect people other than the plaintiff. The Government targeted same-sex relationships for criminalization, infringing the community's basic rights to privacy, freedom, dignity, and equality before the law. These laws did not comprise admissible constraints of basic rights, and thus resulted in sex discrimination.[8]

The basic right to life, protection, freedom, and privacy of household and property is guaranteed by Section 3 of the Botswana Constitution to everyone in the country—regardless of their "sex".[9] Section 7 states that no person should be tortured or exposed to brutal or degrading punishments or other treatment. Section 15 establishes a basic right to be free from discrimination based a list of factors, including "sex".

Despite the fact that claims based on Section 7 were made before the HC, the CoA limited itself to other basic rights on the grounds that no decision was made by the HC on the provisions of Section 7, and that no appeal was filed on this pretext.[10] The appellant provided the following arguments before the CoA:[11] Firstly, the HC neglected *stare decisis*[12] because it was bound by the 2003 CoA judgment in *Kanane*, in which a constitutional challenge to the same clauses was firmly denied. Secondly, reform in the legislation is a policy issue that falls under the purview of the legislature. In other words, any adjudication is unconstitutional judicial law-making.[13] Thirdly, the HC failed by neglecting to employ Section 15(9), a "saving" constitutional clause which preserved and shielded from discrimination or scrutiny legislative provisions which existed at the time the Constitution came into operation.[14]

CHANGES AFTER THE KANANE DECISION

The CoA in *Kanane* dismissed a constitutional challenge to the disputed laws premised on Sections 3 and 15 of the Constitution.[15] The CoA in *Motshidiemang*, on the other hand, took a quite different approach. The CoA in *Kanane* determined that the time had not yet come to regard

homosexual or gay persons as a distinct group capable of inclusion, and that Section 15(3), which safeguards people from prejudice, did not apply to LGBTQ+ groups. Following a comprehensive review of its previous judgment, the CoA agreed with the HC.[16] They concluded that the constitutional conclusions in *Kanane* were conditional rather than categorical. For example, the CoA in *Kanane* had clearly declared that "the moment had not yet come" to repeal the clause "at this point," despite supporting the "rights of the LGBT people."[17] Hence, there was no purpose to distinguish a case that had kept a door open for future evidence to be presented that may amount to a distinct judgment.[18]

The CoA argued that in Sections 3 and 15 [3] of the Constitution, "sex" must encompass both sexual orientation and gender identity due to the "sufficient evidence of the shift in [public] attitude. As a result, the CoA concluded that the HC's decision on appeal was rational[19] and did not violate *stare decisis*. The decision of the CoA on this point is consistent with the constitutional interpretation approach in Botswana, which is based on living-tree constitutionalism:[20] the CoA had previously declared in *Attorney General v. Dow*[21] that the Constitution is not a "lifeless museum piece,"[22] but a living document that should fulfil the reasonable needs and ambitions of an ever-developing society. Likewise, the HC had ruled that the "living and active charter of revolutionary human rights, representing the past, the here and now, and also the unborn constitutional subjects."[23]

In *Motshidiemang,* the CoA determined that Botswanan public opinion on homosexuality had evolved sufficiently to strike down the punitive provisions. The CoA, in then recognizing that public perception cannot on its own be the reasons for striking down clauses,[24] found support for its conclusion in the "proper independent evidence" that it believed exemplified the impact of these provisions on the LGBTQ+ community, namely marginalization and stigma, and lack of freedom, dignity, privacy, and equal protection under the law.[25] In the case of *Ramantele v. Mmusi*, the Court held that while public opinion is relevant, it cannot take the responsibility of the court to interpret and enforce the Constitution.

RIGHT TO PRIVACY

The HC stated that Penal Code Sections 164(a) and (c) damaged the right of the applicant to express his sexuality with his chosen adult partner. The court further acknowledged that the right to privacy was not absolute and that it might be restricted in some situations. However, any limitation or intervention must be done under the purview of law. Given its brief

affirmation of the finding by the HC, the CoA established an expanded concept of privacy by stating that the "full extent and reach" of the constitutionally guaranteed rights is not limited to a geographical sense, but also includes personal decisions.[26] This suggests that the right to privacy not only applies in the seclusion of one's bedroom, but also guarantees one the freedom to make decisions. Under the doctrine of severability, "the function of the court is to analyse and interpret the legislations in order to determine their relevance; on this basis, the court found that legislation has no business governing "private sexual relationships between adults," and this further "extends to matters of private decency or indecency between consenting adults."[27]

In a similar case, *Navtej Singh Johar v. Union of India*, the Supreme Court of India ruled that the right to privacy "safeguards the freedom of an individual to make some critical decisions about their well-being without threat, coercion, and intervention from state and non-state actors."[28] The right to privacy also includes the freedom to make personal decisions about private sexual behavior and to engage in voluntary intimacy in line with the sexuality of the person.

The laws that criminalize same-sex sexual practices also infringe upon a person's right to freedom and dignity, as they restrict his freedom to select and express himself sexually with his partner of his choice. In the case of *Attorney General vs Rammoge*,[29] the CoA ruled that the protection of dignity was the cornerstone and essence of all other constitutional rights. Legal acknowledgement of a person's sexuality is thus a part of his right to dignity and ability to express himself in a way that he is psychologically comfortable with. Refusing the applicant the right to sexual orientation with the partner of his choice infringes upon his inherent dignity and self-respect. Right to freedom is not merely freedom from physical restriction. Instead it includes and safeguards inherently personal choices. Therefore the impugned sections infringes the applicant's right to express his sexuality in private.

In any case, the abrogation of basic rights, such as the right to privacy, in our democratic era cannot be supported or justified, and the consequences of such abrogation is disproportionate to the benefits it may or may not have provided (the proportionality test).

SEPARATION OF POWERS

It was argued by the appellant that amending or repealing the challenge clauses only lies within the jurisdiction of a democratically elected

parliament. The CoA categorically condemned this, holding that when fundamental rights are violated, courts must "tweak" the interpretation of legislation to facilitate compliance with the Constitution.[30] Per Section 18 of the Constitution, which empowers any person who believes that their rights have been infringed to seek justice in the Court, the CoA stated that the "courts are the final interpreter and arbitrator of our Constitution."[31] The CoA, in dismissing the argument of the Government, maintains that constitutional ideals trump majoritarian politics. The CoA correctly points out that where statutory provisions deviate from basic rights, the saving provision or clause must be given a narrow and limited interpretation.[32]

RIGHT TO NON-DISCRIMINATION

In practice, the penal provisions under question are discriminatory in nature and lead to indirect indiscrimination. Discrimination against one member of the community on the basis of that member's identity is discrimination against all its members. Discrimination against a group of individuals or against a minority population is discrimination against the mainstream. The state claimed that the penal provisions were gender-neutral and they were applicable to both homosexual and heterosexual citizens. Nevertheless, the submissions made by the amicus demonstrates that their effects were discriminatory and had a severely negative effect on the lives of LGBTQ+ people as compared to non-LGBTQ+ people. The HC recognized that the negative consequences of penalization are harmful to public health writ large, including its initiatives with respect to HIV education, prevention, and care.

Furthermore, in *Motshidiemang,* the HC complied with the international commitments of Botswana by broadening the definition of "sex" to include "sexual orientation". In the case of *Toonen v. Australia*,[33] the Human Rights Committee came to same result, notably that the term "sex" in Articles 2[34] and 26[35] of the International Covenant on Civil and Political Rights (ICCPR) are to be interpreted as comprising "sexual orientation".

CONCLUSION

In cautiously exploring the assertions advanced by the Government along with its preceding ruling in *Kanane*, the CoA expressly acknowledged the stigma, discrimination, vulnerability, and marginalization suffered by same-sex relation people by focusing on expert evidence submitted by the amicus and research authored by Botswanan authorities themselves. In

particular, *Motshidiemang* draws attention to the fear that LGBTQ+ individuals have of being arrested and denied access to public health services. Importantly, it states that such stigmatization occurs in "all sectors of the community and will continue even if the challenged clauses are overturned."[36] Here, the Court dramatically broadened the purview of constitutional rights in terms of consensual same-sex sexual activities, such as the right to freedom, privacy, dignity and non-discrimination. Specifically, in evaluating and interpreting the purview of the constitutional rights in issue, the Court aimed to uphold and encourage the constitutional principles that underpin a democratic and open society and the collective goals of the country—notably, compassion, democracy, tolerance, diversity, plurality and inclusivity. The acknowledgment of this facet correctly highlights that judicial intervention is only the first move toward guaranteeing equality, which is defined not only as the absence of legitimate constraints, but also as the creation of an atmosphere free of social boundaries in which LGBTQ+ individuals can flourish and are protected by the Constitution.

Furthermore, the decision plainly and unambiguously demolishes the myth that homosexuality is in any manner "un-African". The decision should serve as a highly persuasive precedent in African courts, demonstrating that the rights of the LGBTQ+ people must be acknowledged, respected, and protected. By reasonable lawful rationale and constitutional interpretation, the Court of Botswana has established an example for several other courts in the area and especially in Africa, on the significant role that Courts may and should serve in safeguarding and strengthening the human and fundamental rights of all citizens, including those of disadvantaged and marginalized communities. ***f***

ENDNOTES

1 *Motshidiemang v. Attorney General*, Global Freedom of Expression (Columbia University), September 30, 2019, https://globalfreedomofexpression.columbia.edu/cases/motshidiemang-v-attorney-general/.
2 Penal Code of Botswana, 1964, Sections 164 (a), (c).
3 "Botswana's Constitution of 1966 with Amendments through 2016," Constitute Project, last updated March 18, 2022, http://www.constituteproject.org/constitution/Botswana_2016.pdf?lang=en.
4 *Navtej johar v. Union of India,* AIR 2018 SC 4321.
5 *Eg v. The Hon. Attorney General.*
6 *Ong Ming Johnson v. Attorney General.*
7 A person or a group who is not a party to the particular litigation but that is allowed by the court to assist it by providing advice or information on the subject-matter.
8 "Sex discrimination" refers to the treatment of any individual unfavourably due to their sexual orientation.
9 The HC expanded the term "sex" in Section 3 of the Constitution to include "sexual

orientation". By adopting this approach the HC aligned itself with the international obligations of Botswana.

10 *Motshidiemang*, para. 8, 10.
11 Ibid., para. 35, 110.
12 A legal doctrine which obligates the courts to follow precedent rulings when making a judgement on the same or closely related issue.
13 *Motshidiemang*, para. 10, 74.
14 Ibid., para. 35, 36, and 91.
15 *Kanane v. The State,* 2003 (2) BLR 67 (CA).
16 *Motshidiemang*, para. 57.
17 Ibid., para. 64.
18 Ibid., para. 55-58.
19 Ibid., para. 71.
20 Jack M. Balkin, "The Roots of the Living Constitution," *Boston University Law Review* 92: 1153-1160.
21 *Attorney General v. Dow*, 1992 BLR 119 (CA).
22 *Dow*, 42.
23 *Motshidiemang*, Para 76.
24 Ibid., para. 66.
25 Ibid., para. 67.
26 Ibid., para. 112.
27 Ibid., para. 223.
28 Ibid., para. 122.
29 *Attorney General v. Rammoge,* (2016) CACGB-128-14.
30 *Motshidiemang*, para. 81, 83.
31 Ibid., para. 185-186.
32 Ibid., para. 103, 108.
33 HR Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992(1994).
34 Article 2 of the ICCPR reads, "To Ensure and Respect Covenant Rights, International Covenant on Civil and Political Rights."
35 Article 26 of the ICCPR reads, "Equality before the Law, International Covenant on Civil and Political Rights."
36 *Motshidiemang*, para. 16.