

ICLD

Facilitator's guide



Sexual Orientation and Human Rights in Botswana: What is the City of Gaborone's role?

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Photos: Description: LGBT organizers in Botswana advocating for human rights. Photo Credit: LEGABIBO

Summary of the Case

Botswana stands out in the African context for its unique approach to Lesbian, Gay, Bisexual, Transgender (LGBT) issues. Prior to 2019, those identifying as LGBT and others who engaged in sexual activity with those of the same sex, faced discrimination and ill-treatment, difficulty accessing appropriate healthcare, and difficulty seeking recourse for ill-treatment. In addition to societal stigma, their sexual behaviour was criminalized by the penal code. Over time, this law was enforced less and less with some high-profile political voices speaking out against the prosecution of LGBT people. In 2013, the High Court determined that criminalised behaviour (“engaging” in same-sex sexual activity) did not include the prohibition of LGBTI identity or same-sex attraction.

Gaborone City Council did not have jurisdiction over the legalization of same-sex sexual activity or identity, but it did have an important voice that could be influential. In the midst of cautious social change, the city council of Gaborone, the country's capital and largest city, came out with an unexpected motion. In late March 2016, the Honourable Councillor Sergeant Kgosietsile put forward a motion “Request[ing] the government to consider decriminalisation of same-sex sexual activities to support HIV/AIDS Programmes and Policies” before the Gaborone City Council. The motion was put to a vote by City Councillors and passed with near unanimity. Three years later, subtle change gave way to radical transformation, and Botswana's High Court declared sections of the penal code criminalising same-sex sexual activity to be in contravention of sections 3 (rights to liberty, privacy, dignity), 9 (right to privacy) and 15 (right to non-discrimination) of the Constitution and struck them down (Motshidiemang 2019).

How to introduce and explore the case

The case of Gaborone can be introduced as one where a municipal government took action to speak openly and clearly about the human rights of a marginalized group, even though this was not in their area of jurisdiction. This action speaks to the role that municipal governments can take with respect to speaking on human rights issues, and raises questions about the role of democratically elected officials vis-à-vis minority rights, the relationship between federal and municipal governments, and the impact and appropriateness of making statements in areas beyond one's jurisdiction.

Key concepts and tools

There are three concepts that can be useful in contextualizing the discussion:

- 1) **Minority Rights:** the rights that are held by minority populations (i.e. smaller populations within a society). How and why is protecting minority rights challenging through democratic governance, which is based on majority support?
- 2) **Jurisdiction:** what level of governance is given power to act in particular areas and on particular topics. When and why (if ever) should governments make statements on issues beyond their purview?
- 3) **Lead or Follow?** There are differing views on whether governments should lead or follow public opinion, particularly on social issues. Which is appropriate? Do we delegate decision making to government officials and defer to them for their term of office, or do we expect them to represent the views of those who elected them?

Application

Begin by reviewing the case with the group, suggesting that participants read it as if considering what they might do as a City Councillor faced with Kgosietsile's motion. For those from countries with similar legislation it may also be useful to consider how they might react to a similar motion in their own context. The three concepts outlined above can provide a framework to consider this topic that will also have implications on other topics and in other places.

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