

ICLD

Learning Case



Sexual Orientation and Human Rights in Botswana:

What is the City of Gaborone's role?¹

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

1. Learning Objectives

Primary Objectives:

- Examine the role of city councils on social and human rights issues
- Understand the different actors and factors that led to legal and social changes to Lesbian, Gay, Bisexual and Transgender (LGBT)² rights in Botswana
- Understand the experiences of LGBT people, men who have sex with men (MSM) and women who have sex with women (WSW)³ in Botswana
- Consider when and whether city councils should make statements or take action beyond their formal jurisdiction
- Consider the inputs and impact of incremental versus one-step plans
- Reflect on the impact of 'rhetorical' actions (i.e., statements with no direct legal impact)
- Reflect on how majority-based governance systems should address human rights issues of minority populations

¹ With thanks to Chillie Motshusi for his assistance in gathering material for this case and Sarah Steidl for her assistance with notation and formatting.

² Lesbian refers to women who are attracted to women; Gay refers to men who are attracted to men; Bisexual refers to people who are sexually attracted to both men and women; and Transgender refers to gender identity (i.e., how people see themselves with respect to feeling male, or female, or both or neither). The term transgender is most often used by and for people who do not identify with the gendered label assigned to them based on their biology. Sometimes an "I" is added, as in LGBTI, for "intersex", which refers to people who are born with genitalia and sex features that are both male and female, or not clearly one or the other. Sometimes a + is added to cover other sexualities.

³ The terms MSM and WSW are about behaviour, not identity, e.g., someone may not identify as gay, but may, as a man, engage in the behaviour of having sex with another man. Sexual orientation may or may not overlap with sexual behaviour (i.e., people can identify as gay but not be sexually active, or have sexual activity outside of their attraction).

2. Case Description

Dilemma

Prior to 2019, people in Botswana who identified as Lesbian, Gay, Bisexual, Transgender (LGBT), as men who have sex with men (MSM) or as women who have sex with women (WSW) often faced discrimination and ill-treatment, difficulty accessing appropriate healthcare, and difficulty seeking recourse for ill-treatment. This is because, in addition to societal stigma, their sexual behaviour was criminalized by the penal code. These populations were also underserved by HIV interventions (Selemogwe and White 2013), posing a barrier to reaching Botswana's public health goals (Kenyon 2019) as the country continued to have one of the world's highest rates of HIV infection (UNICEF n.d.). LGBT people faced violations of their rights to privacy (such as photos of private parties being published in newspapers), dignity, safety and security of the person (facing physical assaults), the right to found a family and their right to non-discriminatory access to healthcare.

Gaborone, Botswana's capital and largest city, was also home to several non-governmental organisations that were actively pursuing LGBT rights, including the Botswana Network on Ethics, Law and HIV/AIDS (BONELA), Ditshwanelo – the Botswana Centre for Human Rights, and Lesbians, Gays and Bisexuals of Botswana (LEGABIBO, which had operated under the auspices of both BONELA and Ditshwanelo). Gaborone served as the country's media hub, home to the country's national newspapers, most radio stations, and its few television stations. 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. Same-sex sexual activity was considered illegal under the Botswana penal code, which had been interpreted by the courts and which was enforced by the Botswana Police. Botswana society had sent mixed messages on the issue of LGBT rights. While some had moved to becoming more accepting, the courts had been reluctant to change the law criminalizing same-sex sexual activity.

Your role

You are a Gaborone City Councillor who has been approached by a local LGBT person asking you to support their community and help in the fight towards decriminalization. You have heard that a colleague on city council intends to put forth a motion in this area. You will be asked to vote on this motion and need to decide to vote in favour, against, or abstain, and whether any additional action is appropriate.

Background



Photo Credit: Kristi Kenyon, taken with permission at BONELA

Social, Cultural and Religious Background

Botswana is a small close-knit society where anonymity is rare, familial networks are expansive and important, and belonging is highly valued. The country is predominantly Christian, although a Muslim minority exists, and traditional beliefs remain important (Central Intelligence Agency n.d.). In this context, Botswana LGBT⁴ people have experienced physical assault (Fombad 2004, 167) and face the loss of support networks, housing (LEGABIBO, “About Us” n.d.) and faith communities when their sexual orientation or gender identity became known. Many struggle with stigmatization, discrimination and consequent isolation (Sele Mogwe and White 2013; Jacques 2014), which, in turn, could lead to adverse health outcomes, such as suicidality and substance use (Sele Mogwe and White 2013). One Botswana described his experience of hiding his identity:

Growing up queer in Botswana, I learned early on to be like a chameleon, changing colours to blend in as I moved through people and spaces, negotiating my truth, my safety, and my dignity. In my teenage years, that meant denying my sexual orientation to myself and to anyone who asked. It meant doing all that I could to distance myself from anything and anyone that could in anyway appear to be queer (Moremi 2021).

LEGABIBO, the country’s main LGBT organization, expanded on how the law and social views made LGBT Botswana vulnerable:

Being homosexual in Botswana, as in many African countries, is not EASY! Homosexuality is regarded as abominable and sinful, it’s perceived as a crime and homosexual sex is punishable with a possible jail sentence if convicted... The fact [that] homosexual sex is criminal renders LGBT⁵ people of Botswana a very vulnerable group, frequently exposed to discrimination, aggression and abuse by the community and sometimes even by their own families (“About Us” n.d.).

This discrimination was not without financial consequences, as LGBT people also experienced job loss due to sexual orientation (Fombad 2004, 167) and exclusion from a variety of financial structures based on heterosexual marriage, including loans and inheritance norms.

These forms of isolation and exclusion were connected to an ongoing “claim [that homosexuality] is ‘unAfrican’ and was brought by whites” (Olivier as quoted in Fombad 2004, 167). Related to this is an idea of foreignness – some did not believe LGBT lived in Botswana at all. A report on the needs of the LGBTI people and HIV in Botswana opened by saying: “Several findings are of interest in this needs assessment. One of them is that LGBTI communities are in existence in Botswana” (BONELA and LEGABIBO n.d.). Claims of foreign origins (or non-existence) were also disputed by others who argued that the existence of Setswana terms to refer to LGBT people, and pre-colonial records of same-sex sexual relationships (McAllister 2012, 96) demonstrated that LGBT people had indeed historically inhabited Botswana.

By 2010 it seemed that social attitudes with respect to the acceptance of LGBT people in Botswana society were changing. This was visible through pop culture, where music and festivals had highlighted the LGBT community, and through survey data indicating that 43 percent of Botswana would be happy or neutral if they “lived next to homosexuals” (Dulani, Sambo, and Dionne 2016).

⁴ Botswana refers to people from Botswana (in plural, Botswana is singular).

⁵ The “I” is for “intersex” which refers to people who are born with genitalia and sex features that are both male and female, or not clearly one or the other.

In contrast with the West, where the HIV pandemic arguably led to greater discrimination against LGBT populations, in Botswana, the HIV pandemic gradually led to more inclusion, even though Botswana's HIV pandemic had been predominantly characterised by heterosexual transmission. In Botswana, people began to recognize that to effectively combat HIV, more attention needed to be paid to inclusive public health strategies. Many argued that criminalisation led to the spread of HIV, as LGBT people had difficulty accessing healthcare, and condoms were not available in prisons. In fact, in 2013, the Ministry of Health noted the need to “improv[e] the legal environment for marginalized populations” including MSM (2013).

Legal Context



Description: Overview of the Central Business District in Gaborone, the capital city of Botswana

Photo credit: Justice Hubane

Link: <https://unsplash.com/@hubane>

Section 164, 165 and 167 of the Botswana Penal Code, which had been applied to same-sex sexual activity, prohibited “carnal knowledge against the order of nature” providing for up to seven years in prison (164) and, five years for “attempts” (165), and criminalized “gross indecency” “whether in public or in private” (167). These statutes were clearly UK-influenced, and many other states that were British protectorates or colonies had identical provisions. Prosecutions were not common under these provisions in Botswana, but they had occurred, and subsequent court rulings had found a “hardening of a contrary attitude” towards LGBT people by society at large (*Kanane* 1995), noting that LGBT people “did not represent a group or class which at this stage has been shown to require protection under the Constitution” (*Kanane* 2003). This perspective was affirmed by then vice-President Ian Khama, who stated “human rights are not a license to commit unnatural acts which offend the social norms of behaviour” (Midweek Sun as cited in Human Rights Watch 2003).

While the laws had not changed, and there had not been new court decisions, attitudes on the ground appeared to be shifting by the early 2000s. Former President Festus Mogae (1998-2008) urged the police not to enforce provisions of the criminal code criminalizing LGBT people, stating, “I would not want us to persecute sexual minorities” (Ottosson 2010) later explaining in the context of HIV that “[w]e do not want to discriminate,” adding that MSM “are citizens” of Botswana (SAPA-AFP 2011). In 2010, President Ian Khama distinguished identity from behaviour, noting “I don’t think being gay is illegal. If you see someone and you know that they are gay, they are not going to be arrested and charged” adding, however, that “there are certain acts, which are performed by such people, which are illegal” (The Voice, as cited in McAllister 2013, 92). The same year, an amendment supported by BONELA and LEGABIBO added ‘sexual orientation’ to the Employment Act’s prohibited grounds for dismissal (ILO n.d.).

In November 2014, LEGABIBO, which until this point had been operating as a programme of BONELA, won a decade-long battle to register as an independent organisation. Reflecting Khama's statements from several years earlier, the High Court ultimately decided that, despite the provisions of the criminal code prohibiting same-sex sexual activity, LEGABIBO could legally register, as "there is no provision" of the Constitution that "expressly states it does not recognize homosexuals" (Rammoge 2013, 12) and that "it is not a crime for one to be attracted to people of one's own sex" (Rammoge 2013, 13). The court determined that criminalised behaviour ("engaging" in same-sex sexual activity) did not include the prohibition of LGBTI identity or same-sex attraction. Supported by several religious entities, the Attorney General appealed the ruling; however, the decision was upheld in March 2016 (GroundUp Analysis 2016).

Gaborone City Council

In late March 2016, the Honourable Councillor Sergeant Kgosietsile put forward a motion ("Request the government to consider decriminalisation of same-sex sexual activities to support HIV/AIDS Programmes and Policies") before the Gaborone City Council. Councillor Kgosietsile contextualised his proposal in four ways: Human Rights, Sexuality Education and Health Policies, and Experiences of the LGBTI ("Talking Points" 2016).

Kgosietsile referenced Botswana's international commitments to human rights, quoting the provisions for "equal protection against any discrimination" (citing Article 7, Universal Declaration of Human Rights) and rights to equality, life and integrity in the African Charter on Human and People's Rights (Articles 2 and 4). He described LGBTI people as "Batswana, our brothers, sisters, children, parents, relatives, colleagues, leaders, subordinates, employers, employee[s]..." He noted the country's ongoing fight against HIV/AIDS, pointing out that there "are still gaps evident in our approaches" and "[s]ome of the gaps are created by our policies, laws and structure" (quoted in Basimanebotlhe, "Showdown in GCC" 2016). He argued that criminalization of LGBT people was a barrier to effective HIV interventions, for example MSM preferring not to get condoms at health clinics in order to "avoid confrontations with healthcare workers." The Councillor also noted the damaging health impacts of criminalization including isolation, multiple forms of violence, difficulty in accessing and maintaining employment and healthcare, inadequate police protection, and a range of mental health consequences ("Talking Points" 2016).

Kgosietsile concluded with a series of recommendations related to health care training, targeted health education and services, and to "decriminalise same-sex sexual relationships to minimise/end the stigma and discrimination associated with it" ("Talking Points" 2016). His motion went beyond the court's recent decision, and almost nothing he listed was within municipal jurisdiction. The motion was put to a vote by City Councillors.

3. Instructions



Photo credit: Sophie Emeny

Link: <https://unsplash.com/@sophicemeny>

Questions to Reflect On:

Jurisdiction:

- Should City Council vote on motions that are beyond its jurisdiction?
- What are the consequences of a motion that may oppose government perspectives and action?

Role of City Council

- Does City Council have a responsibility to act on human rights?
- Is it appropriate to vote on the rights of minority populations? Is going with ‘the will of the majority’ appropriate? Why or why not?

Impact

- What could the impact of this motion be?
 - Consider: media coverage, impact on public opinion, impact on LGBT people and organisations, impact on political, social and religious leaders
 - (Consider the reaction of a person in each category: i.e. How would you feel as a young LGBT person in Botswana if you heard that this motion passed?)
 - Would Gaborone City Council have more impact than a municipal government of a smaller centre elsewhere in the country? Why or why not?

Additional Decision-Making Factors

- Does the HIV pandemic change the decision-making process?
 - Do public health concerns trump other factors?
- What position should religion have in decision-making?
 - Does it matter whether the religion is a state religion? A majority religion? A minority religion?

Decision Making

- What should City Council do? How should they vote?
- Are there alternatives beyond or in addition to voting yes or no (or abstaining)?

4. The Real Case Ending

What Happened?

The motion was passed with near unanimity; all but one City Councillor voted in favour. There was much positive commentary to the media by City Councillors following the vote, with Mohammed Sobhan describing it as a “step in the right direction” and Sesupo Jacobs affirming that such a motion could ensure that “no one is left out” of Constitutional protection, adding (translated from Setswana) “It is time we accept that we have these people in our lives. To continuously deny these facts would not help us in any way” (quoted in Basimanebotlhe, “GCC Embraces Gays” 2016). Councillor Oarabile Otlaleng said “the issue should not be made a religious issue but rather a human rights issue” elaborating: “I am a pastor and would like to urge people not to speak of Christian values when addressing this issue. People should be accepted the way they are” (as quoted in Basimanebotlhe, “GCC Embraces Gays” 2016).

Not all reactions, however, were positive. Member of Parliament for the governing Botswana Democratic Party, Biggie Butale, noted, “The great majority of Batswana are by nature conservative; they are God fearing and consider themselves to be Christians” (quoted in Letswamotse 2016). He added, “I know the opposition including the mover of the motion are pandering to ‘modernism’ and being open minded and showing that they are progressive. To be progressive does not necessarily mean taking anything that comes outside of your culture and outside the beliefs and values of society and then claim to be sophisticated” (quoted in Letswamotse 2016).

Reactions also included reflections on the impact of the motion. Cindy Kelemi, the Director of BONELA noted, “We are happy that the motion was acceded to by an absolute majority, even though it’s not their mandate to pass the law, they have power to recommend to parliament to enact it” (as quoted in Basimanebotlhe, “GCC Embraces Gays” 2016). She added that she hoped to see similar viewpoints prevail in parliament. Butale noted, “Maybe it is good as [a] newsworthy item that such councillor came with that particular motion but really it has no effect” (quoted in Letswamotse 2016). He added that Botswana was a democracy and would heed the will of the majority (quoted in Letswamotse 2016).

What Happened Next?

Did the City Council Motion indicate change already underway? Was it a contributing factor to the momentum of change? Or, was it a bit of both? It is difficult to know – however, following this motion there continued to be subtle suggestions of change in Botswana with respect to LGBT rights. Later that year, in September 2016, President Ian Khama ordered the immediate arrest and deportation of a pastor from an American church (Westboro Baptist) known for homophobic statements and actions while he was in the midst of a local radio interview. Khama stated bluntly, “We don’t want hate speech in this country. Let him do it in his own country” (Reuters World News 2016). Two years later in 2018, President Mokgweetsi Masisi noted that “[j]ust like other citizens, [LGBTI Batswana] deserve to have their rights protected,” (Igual 2018) demonstrating that this perspective continued amid changes in leadership.

On June 11, 2019, subtle change gave way to radical transformation. 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). The judges concluded that "sexual orientation is innate to a human being" as it is an "important attribute of one's personality and identity," consequently "[t]he right to liberty therefore encompasses the right to sexual autonomy." The court determined that "criminalizing consensual same sex in private between adults is not in the public interest," adding that Botswana's Vision 2016 strategy referenced a "compassionate, just and caring nation" and discrimination "pollutes compassion." The decision was upheld on appeal in November 2021.

Reflection Questions

- Did city council make the right call? Why or why not?
- Should City Council lead or follow society on contentious social issues?
- What elements of this case are specific to Botswana or Gaborone's context and history? What elements are relevant to and applicable to other contexts as well?

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