

A Victory for the Right to Freedom of Association: THE LEGABIBO CASE



*“Freedom of Association
is a Human Right”*

Universal Declaration for Human Rights, Article 20

International Covenant for Civil and Political Rights, Article 22

African Charter on Human and Peoples' Rights, Article 10

UN Declaration on Human Rights Defenders, Article 5

Introduction

Freedom of association is the right of a person/persons to voluntarily form or join a group – and to work with the group on common interests, aspirations, and goals.

The ability to form and join an organisation enables people to meet and share ideas, organise around relevant issues, and engage in advocacy. In many countries you must register your organisation with the government in order to operate. The organisation cannot do things such as open a bank account, solicit funding and be eligible for tax incentives, without being registered.

The right to freedom of association is closely linked to the right to freedom of expression, the right to freedom of assembly, the right to self-determination, and the right to take part in the conduct of public affairs. A denial of the right to freedom of association can affect the afore-mentioned rights, and infringe on the right to equality and non-discrimination, and the right to dignity.

In a 1992 Resolution on Freedom of Expression, the African Commission on Human and Peoples' Rights instructed that in regulating the right to freedom of expression, governments "should not enact provisions which would limit the exercise of this freedom." Furthermore, governments "should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards."

Within Africa, some governments have violated the right to freedom of association for lesbian, gay, bisexual, transgender and intersex (LGBTI) organisations. Some organisations are, however, fighting back. There was an encouraging judgment from a 2015 High Court case in Kenya, where an LGBTI group brought a petition to the Kenyan High Court and won the right to be registered as an organisation [*Gitari v Non-Governmental Organisation Board and Others*, hereinafter referred to as *Gitari*]. Then, in March 2016, the Botswana Court of Appeal – the highest court in Botswana – issued a strong ruling ordering that an LGBTI organisation be registered as a society [*Attorney General of Botswana v Rammoge and 19 Others*, hereinafter referred to as the LEGABIBO case]. The Botswana Court of Appeal's judgment signifies the first time an apex court in Africa has provided an authoritative interpretation of the effect of laws that criminalise consensual same-sex sexual acts.

The Legabibo Case¹

“Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.”²

Case Background

Many African countries criminalise consensual same-sex sexual activities. These laws often perpetuate stigma, persecution and discrimination on the basis of sexual orientation and gender identity – and form the basis upon which governments deny activists their right to freely associate with like-minded individuals. However, there have been significant developments in the protection of the fundamental rights of LGBTI activists.

In March 2016, the Botswana Court of Appeal ordered the Registrar of Societies to register the organisation Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). The Court of Appeal held that the refusal to register LEGABIBO was not only unlawful, but also a violation of the right of LGBTI activists to freely associate.



Four years earlier, activists attempted to register LEGABIBO as a society with the Botswana Division of Civil and National Registration. The government of Botswana rejected LEGABIBO's application on the grounds that Botswana's Constitution does not recognise lesbian, gay and bisexual individuals and that the objectives of LEGABIBO were incompatible with peace, welfare and good order in Botswana. Section 7(2) of the Societies Act provides that the registrar should refuse to register any organisation where it appears that the objective of the society is unlawful, or it is likely to be used for any unlawful purpose. The registrar may also refuse to register an organisation if it appears to have a purpose that is incompatible with or harmful to peace, welfare or good order in Botswana.

The activists then filed an application with the High Court, arguing that the decision of the government violated their constitutional rights. They argued, among other things, that the government's refusal to register LEGABIBO denied them their right to freely assemble and associate with other like-minded individuals who share their interests and aspirations.

In November 2014, the High Court ruled in favor of LEGABIBO – finding that there had been a violation of the activists' rights to freedom of assembly and association, freedom of expression, and equal protection before the law. The government then appealed the judgment to the Court of Appeal. The Court of Appeal agreed with the High Court that there had been a violation of the right to freedom of association. The Court of Appeal acknowledged that fundamental rights are inter-related, and a violation of the right to freedom of association could also implicate violations of other rights.

The following are key points from the Court of Appeal's decision.

Freedom of Association

“All persons, whatever their sexual orientation, enjoy an equal right to form associations with lawful objectives for the protection and advancement of their interests.”²³

The Court of Appeal focused on the right to freedom of association which is protected by section 13 of Botswana's Constitution. It is also protected by the African Charter on Human and Peoples Rights (Article 10), and the International Covenant on Civil and Political Rights (Article 22).

The Botswana Court of Appeal quoted the Kenya High Court case of *Eric Gitari v Non-Governmental Organisations Co-ordination Board and Others* (“*Gitari*”), where a Kenyan LGBT organisation brought a petition after being denied registration as an organisation. The Kenyan court ruled that even if the views of a group are “unacceptable” to some people, the right to associate is “guaranteed to, and

applies to, everyone.”⁴ Furthermore, wrote the Kenyan court, “in a representative democracy”, the government is “restricted from determining which convictions and moral judgments are tolerable.”⁵

The Botswana Court of Appeal examined the reasons why the government claimed that LEGABIBO’s registration as a society should be denied. In reviewing the government’s arguments, three important declarations were made by the Botswana Court of Appeal that will be useful in future litigation and advocacy: 1) human rights are universal; 2) it is not a crime to be homosexual; and 3) it is not a crime to advocate for law reform.

Human Rights are Universal

*“Fundamental rights are to be enjoyed by every person ...
To deny any person his or her humanity is to deny such person
human dignity.”⁶*

A principal tenet of international human rights law is that all human beings are born free and equal in dignity and rights, and are entitled to all rights with no distinction given to their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

The Court of Appeal held that fundamental rights are universal and are enjoyed by every member of society – irrespective of a person’s gender or sexual orientation. The State can only validly limit the fundamental rights of persons, if it is reasonably justifiable to do so within the circumstances.



The government of Botswana argued that homosexuals were not included under the definition of “person” in the Constitution, and therefore are not entitled to the protections of the Constitution.

The Court of Appeal outright rejected the government’s argument, and held, citing the Kenyan court in *Gitari*, that it was “obvious” that an individual human being is a “person” for the purposes of the Constitution – regardless of their gender or sexual orientation. The judgment in *Gitari* further instructed that “... as a society, once we recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings, ... we must accord them the human rights which are guaranteed by the Constitution to all persons, by virtue of their being human, in order to protect their dignity.”⁷

The Botswana Court of Appeal noted that it couldn’t be argued that homosexuals are not recognised by the Constitution, since the Constitution does not make any distinction between heterosexuals or homosexuals. The Court of Appeal referred to section 3 of the Constitution – which provides that “every person in Botswana is entitled to the fundamental rights and freedoms of the individual” – and said there are “no exclusions whatsoever”.

“Fundamental freedoms are to be enjoyed by every member of every class of society – the rich, the poor, the disadvantaged, citizens and non-citizens, and even criminals and social outcasts, subject only to the public interest and respect for the rights and freedoms of others.”⁸



This was a significant observation by the Court of Appeal, as once we accept that human rights are universal and apply to all persons regardless of their sexual orientation and gender identity, it creates an important space within which LGBTI activists can assert and advocate for their basic human rights.

It is Not a Crime to be Homosexual

“It is not, however, and never has been, a crime in Botswana to be gay.”⁹

The Court of Appeal observed that while the provisions of the Botswana Penal Code have the practical effect of limiting same-sex sexual activities, it is not a crime to be gay.

The Court of Appeal quoted the definition of ‘sexual orientation’ from the Preamble of the Yogyakarta Principles¹⁰ – a set of international legal principles that concern the application of international law to human rights violations based on sexual orientation and gender identity. The Court noted that neither party to the case had produced any suggestion or evidence that sexual orientation can be learned or imposed, “or that it is anything other than a natural attribute of every human being.”¹¹

The Court of Appeal clarified the common misconception that “homosexuality” is a crime. The Court emphasised that the criminal provisions prohibiting consensual sexual acts committed between persons of the same sex do not extend to criminalising LGBTI persons themselves. This is significant, as it creates a space for LGBT activists to advocate and campaign for their rights.

It is Not a Crime to Advocate for Law Reform

“There is nothing unlawful about advocating for a change or changes in the law. That is the democratic right of every citizen.”¹²

One of LEGABIBO’s objectives is to advocate for LGBTI rights and for decriminalisation of consensual same-sex sexual acts. The government of Botswana argued that LEGABIBO would in effect advocate for people to engage in (sexual) acts that are illegal.

The Court of Appeal observed that it had reviewed LEGAGBIBO’s objectives, and the organisation’s intentions included lawful and proper activities such as public education and advocacy for equal rights.

It noted that LEGABIBO’s objectives are to further human rights and the wellbeing of LGBTI persons in Botswana – and that advocating for laws to be changed in

and of itself is not illegal. It does not follow that when an organisation advocates for changes in the law on abortion, the death penalty, or same-sex sexual acts, that the organisation or its members is engaging in abortion, or murder, or same-sex sexual acts. Moreover, there are organisations and politicians in Botswana that advocate for LGBTI rights, and no one has accused them of engaging in unlawful activity. Therefore, if LEGABIBO was to engage in advocacy to change the law which criminalises same-sex sexual relations, this would not be unlawful.

Conclusion

The LEGABIBO case is a significant development in the progression of LGBTI rights in Africa. It affirms that LGBTI persons have a right to participate in democratic spaces. It also affirms the basic humanity of LGBTI people, and that all people are entitled to all fundamental human rights.

The judgment in LEGABIBO sets the stage to push for further advancement of human rights for LGBTI people.

(Endnotes)

- ¹ *Attorney General of Botswana v Rammoge and 19 Others*, Botswana Court of Appeal, 16 March 2016, CACGB-128-14.
- ² *Attorney General of Botswana v Rammoge*, at para 60.
- ³ *Attorney General of Botswana v Rammoge*, at para 78.
- ⁴ *Eric Gitari v Non-Governmental Organisations Co-ordination Board and Others*, Petition 440 of 2013, [2015] eKLR, at para 88.
- ⁵ *Eric Gitari v Non-Governmental Organisations Co-ordination*, at para 88.
- ⁶ *Attorney General of Botswana v Rammoge*, at para 60 (court's emphasis).
- ⁷ *Eric Gitari v Non-Governmental Organisations Co-ordination Board*, at para 104.
- ⁸ *Attorney General of Botswana v Rammoge*, at para 58.
- ⁹ *Attorney General of Botswana v Rammoge*, at para 62. The Court continued that, despite the existence of criminal laws prohibited same-sex sexual acts, "[homosexuality] is not unlawful in Botswana and thus cannot be seen as a social ill, at least in the eyes of the law, although some religious and other groups may take a different view" (at para 76).
- ¹⁰ "Each person's capacity for profound emotional, affectional and sexual attraction to and intimate sexual relations with, individuals of a different gender or same gender or more than one gender" (at para 56 of judgment).
- ¹¹ *Attorney General of Botswana v Rammoge*, at para 56.
- ¹² *Attorney General of Botswana v Rammoge*, at para 64.

