

TOWARDS FREEDOM OF ASSOCIATION AND UNIVERSALITY OF RIGHTS: THE BOTSWANA COURT OF APPEAL DECISION IN ATTORNEY GENERAL V RAMMOGE AND 19 OTHERS¹

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Introduction

In any society that is founded on democratic values and ideals, it is essential that the State recognises the rights of citizens to associate with one another and collectively share opinions. Associations and organisations facilitate participation in the democratic process and the dissemination of opinions, even where those opinions are unpopular and shared only by a minority of citizens. Unfortunately, many activists throughout Africa are restricted from accessing their democratic right to freely associate with collectives that share their views and ideals.

For several years, LGBTI⁴ activists in Botswana were denied the right to form an organisation called Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), which aimed to promote the interests of members of the LGBTI community. This denial amounted to a restriction of the activists' abilities to participate freely in their democracy and exercise their freedom of association. However, through courage, persistence and the continuous assertion of their rights, LEGABIBO was registered on 29 April 2016 as the first organisation to publicly advocate for the rights of LGBTI persons in Botswana. The registration came after the Botswana Court of Appeal found that the government's refusal to register LEGABIBO for several years was unlawful and violated the activists' constitutional right to freely associate.

On 16 March 2016, the Botswana Court of Appeal unanimously delivered a landmark judgment in which it dismissed the government of Botswana's appeal against a Gaborone High Court decision which allowed for the registration of LEGABIBO. The case is a significant victory for the advancement and recognition of the human rights of gay, lesbian, bisexual and transgender persons, both in Botswana, and throughout Africa. The decision emphasises that fundamental rights and freedoms are universal and that all persons, regardless of their sexual orientation and gender identity, are entitled to protection of their human dignity.

Unfortunately, despite this significant step forwards in the recognition of fundamental rights and tolerance of sexual diversity, many gay, lesbian, bisexual and transgender persons in Africa remain vulnerable to stigma, persecution and discrimination. Several African governments still have laws that criminalise consensual same-sex sexual practices. These laws, in turn, form the basis upon

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4 LGBTI stands for lesbian, gay, bisexual, transgender and intersex.

which governments unjustifiably deny activists the right to form associations.

This paper will explore the importance of the Botswana Court of Appeal's decision in *Attorney General v Rammoge and 19 Others*⁵ to the advancement of fundamental rights, such as freedom of association. It will further characterise the decision as a significant step towards the acceptance of sexual diversity. The paper focuses on the Court of Appeal's debunking of the Botswana government's anti-gay rhetoric. This rhetoric was, in many cases, in direct contradiction with the human rights entrenched in the Constitution.

Background

In February 2012, several activists filed an application for the registration of their organisation, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), as a society in terms of the Societies Act.⁶ Soon thereafter the "Director of the Department of Civil and National Registration rejected their application for registration on the grounds that Botswana's Constitution does not recognise homosexuals and that the application would violate section 7(2)(a) of the Societies Act."⁷

The activists then submitted an appeal against the administrative decision of the Director to the Ministry of Labour and Home Affairs ("the Minister"). Unsympathetic to the activists' cause, the Minister upheld the decision of the Director rejecting the application for registration. This left the activists with no alternative but to take their case to the High Court of Gaborone, challenging the decisions of the Director and Minister to refuse the registration of LEGABIBO. The challenge was lodged on the basis that the decisions were irrational and violated the activists' constitutional right to freely associate with likeminded individuals in order to protect their interests.

On 14 November 2014, the High Court of Gaborone agreed with the activists and declared that the decision of the Minister to refuse registration of LEGABIBO contravened sections 3, 12 and 13 of the Botswana Constitution.⁸ In the decision, Rannowane J further declared that the activists were entitled to have LEGABIBO registered as a society.

Unsatisfied with the Gaborone High Court's decision, the State approached the Court of Appeal and appealed the High Court's decision. The State first argued that lesbian, gay and bisexual individuals were not recognised under the protective rights provisions in the Constitution of Botswana. Secondly, they argued that the objectives of LEGABIBO were incompatible with peace, welfare and good order in Botswana. Thirdly, the government asserted that LEGABIBO's intended advocacy, which included reforming the Penal Code to decriminalise consensual same-sex sexual conduct, would in effect popularise criminal offences and encourage members of LEGABIBO to break the law. This paper will rebut those arguments and show how the Court of Appeal has contributed significantly to human rights jurisprudence and developing the right to freedom of association. This development, in turn, should be applied across the African continent.

5 Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016).

6 Cap 18:01 of the Laws of Botswana.

7 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) para. 13.2.

8 *Rammoge and 19 Others v Attorney General of Botswana* (2014) MAHGB-000175-13.

Legal Basis of the Right to Freedom of Association

Freedom of association is an essential component of democracy. It provides individuals with invaluable opportunities to express their political opinions and form social bonds with likeminded members of State-recognised organisations. Freedom of association safeguards against the banning of political parties and is used to protect people from persecution on the basis of their political opinions and convictions.⁹

In *Rammoge*,¹⁰ the Botswana Court of Appeal held that all persons, regardless of their sexual orientation, enjoy equal rights to form associations with lawful objectives. This is particularly true when these associations are formed for the express purpose of protecting and advancing the rights and interests of vulnerable groups. The Court of Appeal also observed that the right to freedom of association is protected not only in Botswana's Constitution,¹¹ but also in the Universal Declaration of Human Rights (UDHR),¹² the International Covenant on Civil and Political Rights (ICCPR)¹³ and the African Charter on Human and People's Rights.¹⁴ In addition to protecting freedom of association, the African Charter also provides that "every individual shall have the right to assemble freely with others",¹⁵ and places a duty on States to ensure, through teaching and education, the promotion and respect for all rights and freedoms.¹⁶

The African Commission has recognised that competent authorities "should not enact provisions which would limit the exercise of [freedom of association]"¹⁷ and "should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international human rights standards."¹⁸ In addition, the African Commission recognised in *Civil Liberties Organisation v Nigeria*¹⁹ that:

"Freedom of association is enunciated as an individual right and is first and foremost a duty for the State to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends."²⁰

9 See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR); *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR).

10 Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016).

11 Section 13 of the Constitution of Botswana 1966.

12 Article 20(1) of the Universal Declaration of Human Rights, "[e]veryone has the right to freedom of peaceful assembly and association."

13 Article 22(1) of the International Covenant on Civil and Political Rights, "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

14 Article 10(1) of the African Charter of Human and People's Rights, "[e]very individual shall have the right to free association provided that he abides by the law".

15 *Id* at article 11.

16 Article 25 of the African Charter of Human and People's Rights, "State parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood."

17 ACHPR, Fifth Resolution on the Right to Freedom of Association (1992).

18 *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* 2000 AHRLR 186 (ACHPR) at para. 15; see also *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR); *Law Office of Ghazi Suleiman v Sudan* (II) (2003) AHRLR 144 (ACHPR).

19 Communication No. 101/93 (22 March 1995).

20 *Id* at para. 15. See also *Gitari v Non-Governmental Organisations Co-ordination Board and Others* Petition No. 440 of 2013, para. 82.

In the pursuit of fulfilling this public duty, the State cannot take into consideration the fact that some associations might espouse views that are unacceptable to or unpopular with the majority of a country's population. The Uganda Court of Appeal in *Kivumbi v Attorney-General*²¹ established a method for evaluating the importance that a society attaches to particular rights and freedoms. The Court of Appeal held that:

“In every society there is always tension between those who desire to be free from annoyance and disorder on one hand to those who believe to have the freedom to bring to the attention of their fellow citizens matters which they consider important... The way therefore, any legal system strikes a balance between the above mentioned competing interests is an indication of the attitude of that society towards the value it attaches to different sorts of freedom. A society especially a democratic one should be able to tolerate a good deal of annoyance or disorder so as to encourage the greatest possible freedom of expression.”²²

The right to freedom of association is held in high esteem by both local and international legal instruments. The Court of Appeal in LEGABIBO classified the right as a fundamental right that is universally applicable to all people. Furthermore, this declaration was the foundation of a number of other progressive proclamations about the rights and freedoms of members of the LGBTI community.

Debunking the State's Legal Arguments

The State relied on three legal arguments in defending their decision to deny the registration of LEGABIBO. These arguments were dismissed by the Court of Appeal following a thorough examination. The first argument levelled by the State was that members of the LGBTI community were not recognised as persons capable of being protected by the provisions in the Constitution of Botswana.²³ The second argument presented was that the objectives of LEGABIBO were unlawful as the Botswana Penal Code criminalises homosexuality.²⁴ Lastly, the State asserted that advocating for the decriminalisation of same-sex sexual acts would popularise criminal offences and encourage members of LEGABIBO to break the law.²⁵ The Botswana Court of Appeal refuted these arguments in the *Rammoge* judgment, holding that fundamental rights are universally applicable, it is not a crime to be LGBTI, and the ability to advocate for changes in the law is a democratic right.

Fundamental rights are universally applicable

A fundamental principle of international human rights law is that all human beings are born free and equal in dignity, and are entitled to all rights with no unjust differentiation on the basis of their “race, colour, sex, language, religion, political or other opinion, national or social origin, property,

21 (2008) UGCC 4.

22 *Id* 15.

23 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) at para. 18.

24 *Id*.

25 *Id* para. 4.

birth, or other status.”²⁶ Likewise, article 1 of the Universal Declaration of Human Rights provides that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

The government of Botswana, however, argued in *Rammoge* that the Constitution of Botswana does not recognise “homosexual persons” and they were therefore excluded from the definition of a “person” in the Constitution.²⁷ Because of these assertions, the government of Botswana argued that members of the LGBTI community were not entitled to the protections contained in the Constitution.

The Court of Appeal rejected this argument outright as irrational and contrary to the Constitution of Botswana which applies to “every person” in Botswana.²⁸ The Court further held that “an individual human being, regardless of his or her gender or sexual orientation, is ‘a person’ for the purposes of the Constitution.”²⁹ It noted that it could not be argued that homosexuals are not recognised by the Constitution, since the Constitution does not make any distinction between heterosexuals and 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 whatever.”³⁰

The Court stated that, “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.”³¹ The Court of Appeal further held that the State can only validly limit the fundamental rights of persons, if it is reasonably justifiable and proportionate to do so within the circumstances.³²

In a proper move, the Court of Appeal stated that:

“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.”³³

The Court of Appeal approvingly quoted the Kenyan High Court decision in *Gitari v Non-Governmental Organisations Co-ordination Board*,³⁴ a similar case in which the refusal to register a society formed to promote the interests of gay, lesbian, transgender and intersex persons was successfully challenged. Here the Court held 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. It further noted that:

26 Article 2 of the Universal Declaration of Human Rights.

27 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) para. 21(4).

28 *Id* paras. 56-60.

29 *Id* para. 58.

30 *Id*.

31 *Id*.

32 *Id*.

33 *Id* para. 60.

34 Petition No. 440 of 2013.

“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”.³⁵

This is a significant and crucial observation as once we accept that human rights are universal and apply to all persons, regardless of their sexual orientation and gender identity, an important space is created within which LGBTI activists can assert and advocate for their basic human rights and freedoms. Even in States where consensual same-sex activities are prohibited, LGBTI persons retain all of the other rights that are afforded to individuals through national constitutions, as well as regional and international legal instruments.

Homosexuality is not a criminal offence

The Botswana government argued that because homosexuality is illegal, LEGABIBO’s objectives, which include advocating for the interests of homosexual individuals, were unlawful. This argument is based upon a gross misconception which the Court of Appeal rectified in their judgment. The Court of Appeal emphasised that the criminal provisions prohibiting consensual sexual acts committed between persons of the same sex do not extend to criminalising LGBTI persons themselves.

Sections 164 and 167 of the Botswana Penal Code³⁶ criminalise same-sex sexual acts between consenting adults, irrespective of the gender and sexual orientation of the perpetrators.³⁷ While these Penal Code provisions might create a pernicious stigmatising effect against lesbian, gay and bisexual individuals, they do not criminalise the existence of LGBTI persons or limit, in any way, their right to associate with other people or enter into associations of their choice. Indeed, there is no law in Botswana that prohibits anyone from being lesbian, gay or bisexual, nor is there any law that permits the suspension, restriction, limitation or suppression of the fundamental constitutional rights of these individuals.³⁸ Botswana’s criminal law in this respect, as with several other African countries, extends only to certain sexual practices between persons of the same sex. The Court of Appeal emphasised that while the provisions of the Botswana Penal Code have the practical effect of limiting same-sex sexual activities, “[i]t is not, however, and never has been, a crime in Botswana to be gay”.³⁹

The High Court of Kenya in *Gitari* similarly held that:

“[T]he Penal Code does not criminalise homosexuality, or the state of being homosexual, but only certain sexual acts ‘against the order of nature’. That the State does not set out to prosecute

35 *Id* para. 104.

36 Cap 08:01 of the Laws of Botswana.

37 *Id* section 164, “Any person who (a) has carnal knowledge of any person against the order of nature; ... or (c) permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years”; section 167 “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.”

38 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) para. 60.

39 *Id* para. 62.

people who confess to be lesbians and homosexuals in this country is a clear manifestation that such sexual orientation is not necessarily criminalised. What is deemed to be criminal under the above provision of the Penal Code is certain sexual conduct 'against the order of nature'... More importantly, the Penal Code does not criminalise the right of association of people based on their sexual orientation, and does not contain any provision that limits the freedom of association of persons based on their sexual orientation."⁴⁰

Several African governments have provisions in their Penal Codes that are markedly similar to those contained in the Botswana Penal Code. The misinterpretation of these provisions is often used to justify the limitation of LGBTI persons' rights, such as the right to freely associate with likeminded individuals and form associations to promote common interests. The Court of Appeal's clarification that homosexuality is not a criminal offence is significant because it creates a space for LGBTI activists to advocate and campaign for their rights without the fear of being unlawfully and arbitrarily arrested because of their real or perceived sexual orientation and gender identity.

LGBTI advocacy will popularise criminal acts

LEGABIBO lists in its objectives the desire to advocate for the rights of LGBTI persons by calling for the decriminalisation of consensual same-sex sexual acts. The State argued that this objective was illegitimate and incompatible with peace, welfare and good order in Botswana. This assertion was based on the idea that advocacy for LGBTI rights would popularise same-sex sexual acts, thus promoting the commission of a crime.⁴¹

In addressing this argument, the Court of Appeal held that advocating for laws to be changed is not illegal. The Court stated that, "there is nothing unlawful about advocating for a change or changes in the law. That is the democratic right of every citizen."⁴²

The Court of Appeal further noted that 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.⁴³ Advocating for the legalisation of same-sex sexual acts does not necessarily mean that people are encouraged to participate in these acts. Moreover, there are organisations and politicians in Botswana that advocate for LGBTI rights and these groups and individuals are not accused of engaging in unlawful activities.⁴⁴ Therefore, if LEGABIBO was to engage in advocacy to change the law that criminalises same-sex sexual relations, this would not be unlawful.

The Court then reviewed each of LEGABIBO's objectives and concluded that there was no indication whatsoever that the organisation intended to pursue anything other than lawful and

40 *Gitari v Non-Governmental Organisations Co-ordination Board and Others* Petition No. 440 of 2013, paras. 114-115. See also *Kasha Jacqueline and Others v Rolling Stone Limited and Another* No. 163 of 2010, 9 where the High Court of Uganda held that "section 145 of the Penal Code Act [does not] render every person who is gay a criminal under that section of the Penal Code Act. The scope of section 145 is narrower than gayism [sic] generally. One has to commit an act prohibited under section 145 in order to be regarded as a criminal."

41 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) para. 21(3).

42 *Id* para. 64.

43 *Id*.

44 *Id*.

proper objectives.⁴⁵ In fact, the Court found that LEGABIBO's objectives were admirable because they focused on promoting the human rights and welfare of LGBTI persons. The organisation's objectives also include the bettering of public healthcare and public education around issues like HIV prevention.⁴⁶ As discussed above, being a LGBTI person is not a crime. It is also not criminal to advocate for the fundamental rights of LGBTI persons. As such, it was impossible for the Court to conclude that LEGABIBO's objectives were in any way unlawful.

The Court of Appeal then ordered that the Minister register LEGABIBO as an organisation.⁴⁷ This decision is a massive victory both for the activists who have been fighting for the registration as well as the LGBTI community at large as LEGABIBO can now advocate for their interests. Moreover, many of the remarks made by the judges in this case could be used to advance the recognition of LGBTI persons, not only in Botswana but on the African continent in general.

Analysis of the Impact of the Judgment

The decision in *Rammoge* contributed significantly to human rights jurisprudence in the African region. In addition, it has also contributed to advancing Goal 16 of Sustainable Development Goals⁴⁸ which requires equal access to justice and fundamental freedoms to all persons in accordance with national constitutions and international agreements. This contribution is not weakened by the criminal provisions prohibiting consensual same-sex sexual practices in Botswana, which are very similar to statutes in many other African States. This judgment, despite the continued existence of these criminal provisions, has the potential to foster greater tolerance and extended protection for LGBTI persons in Botswana and throughout Africa.

Changing social attitudes

The crucial take-away from this judgment is the recognition of the fact that fundamental rights are universal and applied to all persons regardless of their real or perceived sexual orientation and gender identity. This means that members of the LGBTI community are fully entitled to all rights necessary to protect their dignity.

Many African countries continue to criminalise consensual, same-sex sexual practices. While these criminal provisions do not extend to criminalising LGBTI persons themselves, the mere existence of these criminal provisions perpetuates and promotes stereotypes, which increase the LGBTI community's vulnerability to stigma, discrimination and harassment. The judgment in *Rammoge* emphasises the universal application of freedom of association as well as all fundamental human rights. The full realisation of these rights, however, is greatly hampered by negative public attitudes towards members of the LGBTI community. This Court of Appeal judgment seemingly brings an end to the State's reliance on criminal provisions that prohibit certain sexual practices as a justification for the limitation of the LGBTI community's fundamental human rights. States need

45 *Id* para. 66.

46 *Id* para. 3.

47 *Id* para. 81(b).

48 United Nations General Assembly *Transforming Our World: The 2030 Agenda for Sustainable Development* (25 September 2015) A/RES/70/1.

to start taking measures to change social attitudes and to educate the public about issues such as tolerance towards sexual diversity. African States should also take active and progressive steps to educate every segment of society about their constitutional and fundamental rights.

Civil society and organisations, such as LEGABIBO, could play a crucial role in assisting African governments to foster a culture that protects human rights. Indeed, civil society organisations could be important allies and partners to assist African States in carrying out intensive sensitisation campaigns and education on LGBTI and other human rights issues. This is especially true of those organisations that specifically represent the interests of the LGBTI community. By denying these organisations registration and treating them as adversaries, governments are missing out on a crucial opportunity for collaboration and the chance to create an inclusive society. That kind of society could breed a culture of tolerance and respect for diversity while simultaneously upholding the obligations contained in regional and international legal instruments.

Now that LEGABIBO has finally been registered it creates an opportunity for the government of Botswana to partner with LEGABIBO to promote human rights and work towards a just and caring society. The registration of LEGABIBO in Botswana has created an important space within which LGBTI advocates and allies can assist the government of Botswana to fight against HIV, carry out advocacy and education, work towards the elimination of homophobia, and enhance the appreciation and respect of sexual expression and diversity.

Protecting the rights of LGBTI persons

While the *Rammoge* case did not seek to impugn any existing laws, the judge wrote a good deal of *obiter dicta* that could be used in future cases to extend the protections and rights afforded to LGBTI persons. Legal activists and associations in Africa are often hamstrung by a conservative legal culture that permeates throughout the legal system. This often means that cases about issues that are controversial and contrary to majority public opinion are not given a fair hearing, or sometimes, they are not heard at all. The judgment for LEGABIBO exemplifies the manner in which incremental changes in jurisprudence can be achieved.

Botswana was one of the first countries to include “sexual orientation” as a prohibited ground for employment discrimination in their employment legislation.⁴⁹ The reason for its inclusion stemmed from the vulnerable position in which LGBTI persons find themselves as a result of the stigma and harassment that they experience in conservative working environments. This recognition was a small step towards greater protection of the interests of the LGBTI community. In addition, Botswana national policies created in order to address the HIV epidemic identified LGBTI persons as particularly vulnerable and in need of special attention.⁵⁰

In *Kanane v State*,⁵¹ the Court of Appeal dealt with the constitutionality of the provisions of the Penal Code that outlawed consensual same-sex sexual acts and concluded that the time had not yet come to include lesbian and gay people in the list of protected groups. They left the door

49 Section 23(d) of the Employment Act, Cap 47:01 of the Laws of Botswana.

50 See Botswana National AIDS Coordinating Agency “Progress Report of the National Response to the 2011 Declaration of Commitments on HIV and AIDS” (2015).

51 (2) BLR 64 (CA) (2003).

open, however, for another legal challenge to the criminal provisions at a time when society has progressed to a point where it would be appropriate.⁵² In the arguments presented to the Court of Appeal in *Rammoge*, the process by which same-sex sexual acts have been decriminalised progressively was traced in various countries such as South Africa, the United Kingdom, the United States of America and Australia and New Zealand.⁵³ These arguments could not be used to make any definitive ruling in the case as the provisions in the Penal Code were not challenged. However, the Court held that it was evident that they showed a softening of opinions towards the LGBTI community.⁵⁴

The Court in *Rammoge* emphasised the fact that because of the incremental changes, such as those listed above in healthcare policy and employment legislation, it is clear that attitudes towards LGBTI persons have improved in Botswana. The fact that there is now a public discourse on the promotion of LGBTI rights is indicative of the fact that the taboo has been eroded and some semblance of normalisation can now take place. By building on the victories prior to LEGABIBO and the progressive *obiter dicta*, it might not be long before the time is ripe to once more challenge the provisions of the Penal Code that criminalise consensual same-sex sexual acts.

Conclusion

The Botswana Court of Appeal decision represents significant progress in the promotion of the rights of lesbian, gay, bisexual, transgender and intersex persons. The judgment has broader implications for Botswana and many other African countries. It highlights the State's duty to uphold basic rights and to ensure dignity, tolerance and acceptance for marginalised groups within society. It also illustrates the importance of the independence of the judiciary and highlights the judiciary's role and constitutional mandate in the protection of the most vulnerable groups in society.

52 *Attorney General v Rammoge and 19 Others*, Court of Appeal of the Republic of Botswana, Civil Appeal No. CACGB-128-14 (2016) para. 49.

53 *Id* para. 47.

54 *Id*.