

**DECRMINALISATION OF SEXUAL ACTS BETWEEN CONSENTING ADULTS IN SAME  
SEX RELATIONSHIPS IN BOTSWANA**

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## Abstract

The Constitution of Botswana under section 3 read in conjunction with section 15, guarantees all Batswana equal enjoyment of fundamental rights and freedoms irrespective of one's race, colour, sex, tribe, status etc. Section 15 (3) further qualifies what conduct will be deemed discriminatory. Section 9 also ensures that every person's right to privacy is protected except where the person has given consent to have their right violated. Notwithstanding, the same Constitution permits limitations to the full enjoyment of these fundamental rights and freedoms on matters of public interest, public morality or for protecting the interests and rights of others. However, limitations in order to pass the constitutional scrutiny, must take place in terms of the authority of the law and have to be reasonably justifiable in a democratic society.

Criminalisation of same sex conduct which is provided for under the Penal Code is a prima facie violation of the above constitutional provisions, which is, as it will be argued here, not capable of justification. The Penal Code violates section 3 of the Constitution, which aims at promoting equality of all citizens. It does so by criminalising certain sexual conducts committed by a certain group of persons (those involved in same-sex relationships), and not extending the same treatment to heterosexuals—thereby creating a discriminatory act. A prima facie violation of the right to privacy under section 9 is also established by this criminalisation. It will be argued that permitting the law to traverse into the sexual life of grown up people and regulate their sexual behavior, is not only a violation of their privacy but also dignity. Prescribing who people should fall in love with and who they should engage in sexual conduct with, violates individual autonomy—freedom of choice, which freedom should be inherent in every individual. Section 15 of the Constitution is also violated in the sense that, although its objective is to eradicate any form of discrimination, permitting discrimination on the basis of sexual orientation through criminalising same sex sexual conduct between consenting adults, defeats the very purpose that the provision is aimed at achieving.

This paper acknowledges the existence of the rights to religious beliefs and practices as well as the culture and morals of the majority in Botswana. Notwithstanding, it will be argued that, taking these rights into consideration, it still does not justify the violations that the Penal Code establishes through criminalisation. This paper will recommend that, because courts are vested with the powers to declare any law or policy which it finds unconstitutional, they should thus declare those provisions of the Penal Code null and void to the extent of their unconstitutionality.

## Dedication

This piece of work is dedicated to the late sensei Dr Patrick Solly Makgabenyana (my former boss at Legal Services Division). He passed away when I was about to finish my studies so that we can go and celebrate my success together. I must point out that, I made it this far because of the faith he had in me and the potential he saw in me. He always said to me ‘Mmagwe Mpho I know you are going to make it.’ These words kept me focused and pushed me to work very hard so as not to let him down. I know he would have been very proud of me. May your soul rest in God’s eternal peace Rragwe Mpho.

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*The will of God will never take you where His grace cannot keep you, where His arms cannot support you, where His riches cannot supply your needs, nor where His power cannot endow you. This will would never take you where the Spirit of God will not work through you, where His wisdom cannot teach you, nor where His arms cannot mold you. Furthermore, this will would never take you where the love of God cannot enfold you, where His mercies cannot sustain you, nor where His peace will not calm your fears. Most importantly, this will would never take you where the comfort of God cannot dry your tears, where His omnipresence cannot find you, nor where His miracles cannot be done for you.*

My indebtedness goes to the Almighty God for taking me from my family in Botswana and sustaining me throughout my period of study in Cape Town, providing me with everything according to his riches in heaven. I would not have achieved this degree had it not been for the perfect will he has about my life. I also wish to extend my heartfelt gratitude to my parents (both biological and in-laws) who although it was difficult for them, provided me with an unconditional support to come and do my studies. I know it was not easy without me, but I'm grateful and will forever cherish you in my life. Your intercessions on my behalf provided a breakthrough in my journey and for that I humble myself.

My supportive husband, Kagiso Morupisi, words alone cannot quantify the appreciation I have for you. Firstly, for permitting me to be away from the family for a year and leaving you alone to take care of things alone. I know it was not an easy decision to make, but I'm grateful and assure you it was not in vain. Most significantly, taking care of our boy in my absence must have been a mammoth task, but my heart goes out to you for having done it whole heartedly with love. For that I salute you and deeply exalt God for having made me a part of such a grateful man. I would not forget my son, Motheo Kyle Morupisi, for having been very strong in my absence and excelling in his studies as though I was with him. I know it was not a walk in the path my boy, but I assure you one day you will understand that I was doing it all for you—to make a better future for you.

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probably the frustration when reading my work and correcting me many times that you did. I have learnt so much by working with you, especially for your direction and patience. There was a time when I questioned my ability, but I'm grateful nonetheless that you gave me a chance to prove myself. It is indeed true, a journey to success is not an easy one. It is marred with hardships, sloppiness, but in the end those who are celebrated are those who triumph over the challenges.

Last but not least, my anchor, my pillar, my confidant, my bulwark, my prayer warrior, my friend Mikovhe Comfort Maphiri, it is indeed true that dynamites come in small nicely wrapped packages. Your mother did not name you 'Comfort' in vain, you are indeed a true comforter. I would not have done this without you my friend. I thank God for allowing our paths to meet from the first day. When my faith was diminishing, you jerked it up, you helped me regain my confidence and strength when I was at the lowest moments of my life. The talk and laughter we shared I will forever cherish. When I didn't believe I will submit this dissertation, the words you echoed were 'Dorothy I refuse on your behalf, we are submitting in September and graduating in December. The God I pray and promise people will not let us down.' I thank God for you and will never forget you.

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Signature **Signed** \_\_\_\_\_

Date 14/09/2015 \_\_\_\_\_

## List of abbreviations

*ACHPR*- African Charter on Human and People's Rights

*ACDP*- African Christian Democratic Party

*ANC*- African National Congress

*BCC*- Botswana Christian Council

*BONELA*- Botswana Network on Ethics, Law and HIV/AIDS

*EFB*- Evangelical Fellowship of Botswana

*GASA*- Gay Association of South Africa

*GDP*- Gross Domestic Product

*GLOW*- Gay and Lesbian Organisation of the Witwatersrand

*ICCPR*-International Convention on Civil and Political Rights

*LAGO*- Lesbian and Gays against Oppression

*LEGABIBO*- Lesbians, Gays and Bi-sexuals of Botswana

*LGBTI*- Lesbians, Gays, Bisexual, Transgendered and Intersexual

*MSM*- Men Sleeping with Men

*NCGLE*- National Coalition for Gay and Lesbian Equality

*NGOs*- Non-Governmental Organisations

*OLGA*- Western Cape Organisation of Lesbian and Gay Activist

*SADC*- Southern African Development Community

*SASAS*- South African Social Attitudes Survey

*UDF*- United Democratic Front

*UN*- United Nations

*WOLFENDEN REPORT*- Report of the Committee on Homosexual Offences and Prostitution

## Chapter one

### INTRODUCTION

#### 1.1 *Homosexuality in Botswana*

Contrary to homophobic claims in Africa that homosexuality is imported from the West, this paper departs from the premise that same-sex sexual practice, if not homosexuality, has formed part of local social practices on the continent for a very long time. That this is the case also in Botswana – which will be the jurisdiction of focus here – can, for instance, be illustrated by the fact that a word for it exists in the Setswana language of the majority in the country. This word is ‘matanyola’.<sup>1</sup> In Botswana and South Africa alone, Setswana is spoken by about 4.5 million people.<sup>2</sup> Based on these facts, one could surmise that same-sex sexual relationships and practices – if not ‘homosexuality’ — has a prevalence in Botswana society and that this prevalence is not particularly new. The only unfortunate reality is that it has been and continues to be judged as taboo by a vocal and significantly powerful part of Botswana society. The taboo judgment is generally reflected in the attitudes of people in positions that derive their power from authority: political, cultural, secular, religious, traditional and societal authorities in general deplore homosexual behaviour in the social interactions of the Botswana. The lesbian, gay, bi-sexual, transgendered and inter-sexed citizens (LGBTI) of Botswana are consequently rejected, ostracised, victimised and sometimes also blackmailed by their compatriots.<sup>3</sup>

As a result of this condemnation, LGBTIs face stigmatisation and prejudice from family members, friends and society in general. The stigmatisation is, however, not simply societal but also institutional and systemic. Same-sex activity between males and females is illegal in Botswana.<sup>4</sup> There are no legal provisions that explicitly entrench the equality of non-heterosexuals with that of heterosexuals. It is this position that lies at the root of the formation of the Lesbians,

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<sup>1</sup> ‘Matanyola’ is a Setswana word used to describe male-to-male anal, penetrative sexual intercourse.

<sup>2</sup> C Stewart ‘Botswana chiefs: homosexuality has always been here’ *Erasing 76 Crimes*, 26 July 2013, available at <http://76crimes.com/2013/07/26/botswana/> accessed on 3<sup>rd</sup> March 2015. This was at a meeting for 25 local chiefs (dikgosi) hosted by the Anti-AIDS human rights organisation BONELA (the Botswana Network on Ethics, Law and HIV/AIDS). At this meeting gay men and chiefs shared their understanding and experiences. After listening to the testimony of a gay person concerning his experience as a gay person, the chiefs posited that no culture explicitly prohibited homosexuality but the bible.

<sup>3</sup> D Keorapetse ‘Botswana: Gay rights are human rights’ *Africanveil.com*, 7 March 2012, available at [http://africanveil.com/index.php?option=com\\_content&view=article&id=883:botswana-gay-rights-are-human-rights&catid=88&Itemid=509&lang=en](http://africanveil.com/index.php?option=com_content&view=article&id=883:botswana-gay-rights-are-human-rights&catid=88&Itemid=509&lang=en), accessed on 12 May 2015.

<sup>4</sup> Penal Code, (Cap 08:01) sections 164 and 167. Section 164 makes references to ‘unnatural offences’. It makes it an offence for anyone to have sex with another person against the order of nature, to have sex with an animal or to incite another person to have sex with them against the order of nature. Section 167 on the other hand, criminalises any act or attempt of ‘gross indecency’ between people, whether committed in private or public.

Gays and Bi-sexuals of Botswana (LEGABIBO)<sup>5</sup> organisation, launched in 1998. It was, however, only in November 2014 that the organisation won a legal battle to be registered and thus was recognised as a legal entity.<sup>6</sup> Judge Rannowane ruled that any refusal to register the organisation was against the constitutional right of the Batswana to freedom of association and freedom of assembly.<sup>7</sup> Despite this, the government seems determined to assign outcast status to homosexual communities or communities that practise and accept same-sex sexuality. This is evidenced by the fact that it is appealing the decision of the court.<sup>8</sup> It is the sexual activity between consenting male and adult females and not the state of being a homosexual itself<sup>9</sup> that is said to be illegal and shall remain so until the government changes the laws.

The above distinction between activity, conduct or behaviour, on the one hand and existential identity, on the other, is ostensibly underlying the comment of the current president of the Republic of Botswana, Lieutenant Seretse Khama Ian Khama, who in 2010 was quoted as saying that, 'I don't think being gay is illegal...they (gays) can fully participate in society like everyone else...being gay is private'.<sup>10</sup> This view is, however, far from universal. Other members of the communities of Botswana – notably those who occupy positions that come with considerable power - hold different and indeed divergent and more conservative opinions. For example, one politician, Pono Moatlhodi, publicly declared his hatred for homosexuals and their way of life by saying that if he had a way he would have homosexuals killed.<sup>11</sup>

Prosecutions for what is considered 'unnatural' sexual activity are, however, very rare in Botswana, the most recent being a widely publicised, high profile case heard in 2001.<sup>12</sup> In this

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<sup>5</sup> An organisation representing Lesbians, Gays and Bi-sexual people in Botswana, whose objectives are inter alia; to promote a non-discriminatory legal framework for LGBTI community, to create a community that is educated and sensitised on LGBTI issues to recognise same-sex relationships, available at <http://www.legabibo.wordpress.com>, accessed on 3 March 2015.

<sup>6</sup> *ThutoRammoge and 19 others v The Attorney General* (BLR) unreported case noMAHGB-000175-13 of 14 November 2014, available at <https://wordpress.com/2014/11/15/register-legabibo-judge-rannowane-orders-botswana-government/>, accessed on 11 February 2015.

<sup>7</sup> *Ibid* at para 34.

<sup>8</sup> SAPA 'Botswana appeal gay rights group ruling', *Iol News*, 19 January 2015, available at <http://www.iol.co.za/news/africa/botswana-to-appeal-gay-rights-group-ruling-1.1806437>, accessed on 23 March 2015. It says in the appeal papers filed before the Court of Appeal that the government's lawyers argued that the Constitution does not recognise homosexuality.

<sup>9</sup> *ThutoRammoge* supra note 6 at para 33.

<sup>10</sup> C Stewart 'Botswana again rejects LGBTI anti-AIDS group' *Mamba Online*, 2 May 2012, available at <http://76crimes.com/2012/05/02/botswana-again-rejects-lgbt-anti-aids-group/>, accessed on 3<sup>rd</sup> March 2015.

<sup>11</sup> 'Botswana MP says he hates gays and lesbians' *Pink News*, 11 February 2011, available at <http://www.pinknews.co.uk/2011/02/11/botswana-mp-says-he-hates-gays-and-lesbians/>, accessed on 23 March 2015.

<sup>12</sup> *Kanane v State* 2003 (2) BLR 67 (CA).

matter, a Botswana resident, who was accused of engaging in sexual relations with a man, filed an application challenging the constitutionality of sections 164 and 167 of the Penal Code.<sup>13</sup> Both the High Court and Court of Appeal dismissed Kanane's claims, reasoning that the law did not recognise homosexuals in Botswana. It was ruled that gay men and women did not represent a class of people who needed constitutional protection.<sup>14</sup> The fact remains that although LEGABIBO might be registered to conduct its business of raising awareness and advocating for constitutional and other legal reform, the sexual conduct of the people it represents continues to be conducted furtively and under threat of criminal prosecution. This study seeks to address the argument for decriminalisation and proposes recommendations that will ensure that Botswana adheres to her constitutional obligation to protect the rights of LGBTIs as human beings of equal worth.<sup>15</sup>

### 1.2 *Thesis statement*

Constitutional supremacy should never be compromised at any time. The existence of cultural and religious beliefs should not be lawful justifications adequately to deny citizens equal protection of the law and ultimately full enjoyment of their fundamental rights and freedoms guaranteed by the Constitution. This research argues that the right to equality (section 3), right to privacy (section 9), and freedom from unfair discrimination (section 15), which are guaranteed by the Constitution<sup>16</sup> should at all times take precedence over any religious or cultural belief or practice.

### 1.3 *Motivation for Research*

Reference in the dissertation will be made to the ruling in the recent landmark case in which LEGABIBO took the government to court for recognition of its right to register as a society. This judgment sparked this research because it illustrated again that the pleas of LGBTIs to the government of Botswana have, for a long time, fallen upon deaf ears and continues to do so. The court in this case concluded that refusal by the government to register the organisation was unreasonable<sup>17</sup>. It reasoned that being gay is not a crime but that it is rather engagement in same sex sexual activities that are the subject of criminalisation. Although the decision in this case overturned the dictum in a 2003 court case of *Kanane v The State*<sup>18</sup> where it was held that gay

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<sup>13</sup> See supra note 4.

<sup>14</sup> *Kanane's case*, supra note 12 at 81.

<sup>15</sup> The Constitution of Botswana does not have a clause that expressly guarantees the right of dignity to its citizens. However, the constitutional rights afforded to everyone imply equal human dignity.

<sup>16</sup> The wordings of these sections are fully provided for at footnotes 19, 20 and 21 respectively.

<sup>17</sup> *Thuto Rammoge* case supra note 6 at para 26.

<sup>18</sup> *Kanane's case* supra note 12.

people do not represent a class of people significant enough to warrant constitutional protection, it has left the criminal proscription of homosexuality intact and this means that it has nevertheless failed to protect the rights of these minorities from oppression by the majority. The question thus remains, has the time not come for the full legal emancipation of Botswana's LGBTI communities? And it will be argued in this dissertation that 'full legal emancipation' begins, at the very least, with decriminalisation.

#### *1.4 Main Research Question*

In light of the above court decisions, the study seeks to answer the following question: do sections 164 and 167 of the Penal Code, which prohibit same sex conduct, contravene sections 3<sup>19</sup>, 9<sup>20</sup> and 15<sup>21</sup> of the Constitution of Botswana to the extent that these sections of the Penal Code fall to be declared unconstitutional and therefore invalid?

#### *1.5 Research Problem*

Section 3 of the Botswana Constitution, read in conjunction with section 15, guarantees all citizens equal protection of the law, regardless of their status, colour, sex, creed etc. Section 9 also ensures that every person's right to privacy is protected except where the person has given consent to have their right violated. Notwithstanding, the Constitution allows for limitations of these fundamental rights and freedoms on matters of public interest, public morality or for protecting the interests and rights of others.<sup>22</sup> However, limitations, in order to pass constitutional muster, must take place in terms of the authority of law and have to be reasonably justifiable in a democratic society, although the Constitution itself is silent on the test to be applicable to determine whether a limitation is unconstitutional.<sup>23</sup>

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<sup>19</sup> This section guarantees protection of fundamental rights and freedoms to all Batswana irrespective of their 'race, place of origin, political opinion, colour, creed or sex'.

<sup>20</sup> This section protects the privacy of citizens by prohibiting any unauthorised search of 'his or her person or his or her property or the entry by others on his or her premises...'. Subsection 2 lists circumstances under which this right could be curtailed.

<sup>21</sup> This section provides that any law that is discriminatory in nature is null and void ab initio. It proceeds to define what discrimination and lists the grounds under which discrimination is prohibited. These include affording different treatment on the basis of one's race, tribe, place of origin, political opinions, colour, creed or sex.

<sup>22</sup> Section 9 (2) (a) provides that limitations of rights and freedoms shall be permissible in the interests of defence, public safety, public order, public morality, etc, (b)...for the purposes of protecting the rights and freedoms of other people. A proviso to section 3 is to the effect that limitations shall be allowed to the extent that they ensure that enjoyment of the rights and freedoms by an individual does not prejudice the rights and freedoms of others and public interest. The Constitution however, is silent on what public interest entails.

<sup>23</sup> Courts rely on the jurisprudence of foreign courts in order to determine this issue. This test will be discussed in detail in Chapter 2.

Criminalisation of same sex conduct which is provided for under the Penal Code is a prima facie violation of the above constitutional provisions, which is, as it will be argued here, not capable of justification. The Penal Code violates section 3 of the Constitution, which aims at promoting equality of all citizens. The violation exists in the fact that the Penal Code makes an arbitrary legal distinction between subjects who engage in homosexual activity and those who do not. This arbitrary distinction translates as a criminal sanction. Accordingly, the law discriminates between the sexual conduct of homosexuals and those of heterosexuals by criminalising the former. This means that it denies to homosexual subjects the full enjoyment of the section 3 constitutional right. By excluding those who engage in same-sex activity from protection of the law, the suggestion is that homosexual subjects are not worthy of equal treatment. This establishes a prima facie violation of the right to equality which guarantees everyone equal treatment and protection by the law. A prima facie violation of the right to privacy under section 9 is also established by this criminalisation. This violation occurs when the law regulates sexual conduct which takes place in private between two consenting parents. Section 15 of the Constitution is also violated in the sense that, although its objective is to eradicate any form of discrimination, permitting discrimination on the basis of sexual orientation through criminalising same sex sexual conduct between consenting adults, defeats the very purpose that the provision is aimed at achieving.

This study acknowledges the existence of the rights to religious beliefs and practices as well as culture of the majority in Botswana<sup>24</sup>. Notwithstanding, it will be argued that, even while these rights are taken into account, the violations of the right to equality that are breached by the Penal Code through the criminalisation of same-sex relationships cannot be justified. Courts have powers to declare invalid any law or policy which it finds to be unconstitutional.<sup>25</sup> This research thus hopes to persuade the courts to eventually declare null and void those provisions of the Penal Code that infringe the Constitution.

### 1.6 *Significance of study*

This study will be a contribution to the debate about the legal recognition in Africa of LGBTI sexual rights and the consensual sexual activities they engage in. It is this that LEGABIBO is

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<sup>24</sup> Section 11 (1) protects the right to freedom of conscience. This freedom includes inter alia, freedom of thought and of religion, freedom to change one's belief etc. It is worth noting that the Constitution does not expressly cover cultural practices or beliefs.

<sup>25</sup> Instances where courts have declared some laws unconstitutional will be discussed fully in Chapter 2.

currently fighting for. It is worthy to note that the decision by Justice Rannowane in *Thuto Rammoge's* case has not yet been followed by any discussion in secondary legal resources.<sup>26</sup> It is hoped that the recommendations suggested in the dissertation will contribute to prompting the government to protect the rights of LGBTI subjects which will also fulfil its international obligations in this regard.<sup>27</sup> It is the aim of this dissertation to draw the government's attention to the suffering of homosexuals as a result of criminalisation and the concomitant non-recognition of their sexual rights as human rights. The study also aims to emphasise the socially destructive impact that this state of affairs has on the country as a whole.

### 1. 7 Literature Review

Many scholars have contributed to the debate on the protection of the rights of sexual minorities in Botswana. Dingake, a judge of the Botswana High Court, argues that sexual minorities are human beings just like persons who fall into any other social group and that the principle of equality requires that they be treated similarly. He postulates that 'early efforts to bring sexual minorities into the human rights discourse have met with some resistance from conservative elements, who have used religion and culture to frustrate such efforts'.<sup>28</sup> This study agrees with Dingake's argument and will try to address it further in order to establish what can be done to create a balance between the issues of culture and religion and the protection of constitutional rights of homosexuals.

When comparing the attitude of the judiciary towards sexual minority rights in Botswana, South Africa and Zimbabwe, Quansah<sup>29</sup> acknowledges that while the judiciary in South Africa has protected the rights of sexual minorities, the judiciary in Botswana has failed to do so. He recognises that the unique protection afforded to sexual minorities in the Constitution of South Africa<sup>30</sup> may account for this, but nevertheless insists that a broad and generous interpretation of

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<sup>26</sup>*Thuto Rammoge's* case supra note 6.

<sup>27</sup> Botswana as a member of the global international law community has obligations to protect human rights under several treaties to which it is party. These obligations will be fully discussed in Chapter 2.

<sup>28</sup> BKO Dingake 'The role of the judiciary and the legal profession in protecting the rights of vulnerable groups of people in Botswana' *Southern African Litigation Centre*, 3 March 2014, available at <http://www.southernafricanlitigationcentre.org/1/wp-content/uploads/2014/12/3>, accessed on 23 March 2015.

<sup>29</sup> EK Quansah 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2004) 4 *AHRLJ* 201 at 216. This position was also articulated further by E Yaw Ako *The Debate on Sexual Minority Rights in Africa: A Comparative Analysis of the Situation In South Africa, Uganda, Malawi and Botswana*, (LLM Thesis, University of Western Cape, 2010) 7.

<sup>30</sup> Section 9 (3) of the Constitution of the Republic of South Africa, 1996 famously includes 'sexual orientation' as a ground of presumed unfair discrimination.

the concepts of equality, dignity and privacy by the courts in Botswana could achieve the same results as in South Africa.<sup>31</sup> This study agrees with Quansah's position and extends the debate further by arguing that judges must, as far as possible, give effect to international human rights obligations in their judgments on domestic law and that the government should also strive to discharge its international obligations under treaties that it has ratified by domesticating international human rights protection instruments. This should not be optional, as is the current position.

Chilisa is of the view that the criminalisation of homosexuality reinforces the societal prejudices and stigma that is attached to sexual minorities.<sup>32</sup> He implores the judiciary in the constitutional democracy that is Botswana to vigorously protect constitutional rights without fear, favour or prejudice in fulfilment of its proper role as a branch of government. It is the responsibility of the courts when interpreting the law to make sure that it complies with the Constitution and, in those instances where this is not possible, declare such legislation unconstitutional and recommend changes to the law.

De Vos argues that although changing the law has been significant in giving homosexuals a sense of belonging, these changes were more concerned with the acts carried out by homosexuals rather than with helping them define their identity.<sup>33</sup> He makes a point that criminalisation has made LGBTI subjects vulnerable by representing them as inferior and tainted. He points to the fact that the law is nevertheless an important tool through which gays and lesbians can participate in the construction of their own identity.<sup>34</sup> As Ackermann J observes in a South African case, gays and lesbians are more vulnerable because they are a 'political minority not able on their own to use political power to secure favourable legislation'.<sup>35</sup> As such, they depend on legal protection of the law embodied in the Constitution and interpreted by the judiciary. This view supports my argument that it is high time Botswana realised that the number of gays and lesbians have increased in the country, therefore rendering them a significant class, albeit a minority, of people entitled to legal protection.

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<sup>31</sup> Quansah op cit note 29 at 201.

<sup>32</sup> MM Chilisa 'Two steps back for human rights: A critique of the Kanane case' in Christine Stegling (ed) *The Botswana Review of Ethics, Law and HIV/AIDS* (2007).

<sup>33</sup> P De Vos 'On the legal construction of gay and lesbian identity and South Africa's traditional Constitution' (1996) 12 *SAJHR* 270.

<sup>34</sup> De Vos op cit note 33 at 272.

<sup>35</sup> *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and Others* 1999 (1) SA 6 (CC) 27 para 25. This case will be hereinafter referred to as '*The First National Coalition*' case.

De Vos and Barnard are of the view that societal prejudice should never justify discrimination and that the views or opinions of the majority can never make an otherwise unfair discrimination fair.<sup>36</sup> In the 1950s this issue received considerable attention in jurisprudential circles when Lord Patrick Devlin argued controversially that the fact that a majority of people may disapprove of a practice does not make it a matter of society as a whole.<sup>37</sup> This study submits that the law should ensure respect for people's choices and preferences and should be an instrument of emancipation and not chastisement.

This research agrees with the classically liberal position as articulated in the Wolfenden Committee report's view on the role of criminal law.<sup>38</sup> The report states that criminal law should be concerned with preserving public decency and order, reasonably protect people from any form of harm and not unduly interfere in their private lives. The law should not prescribe how citizens should live their private lives, especially not who they should engage with in a sexual relationship. Botswana, as a member of the international community, should align its laws and policies with the recommendations of this Committee and decriminalise homosexuality between consenting adults, not least because, as Norrie asserts, 'decriminalisation removes the primary justification for treating same-sex couples less favourably than opposite-sex couples'.<sup>39</sup> Lord Patrick Devlin adds that 'immorality' which is not offensive and injurious to the public should not be recognised as a criminal offence.<sup>40</sup> Leaving aside his objectionable description of homosexuality as 'immorality', Devlin's argument is that as long as what is done behind closed doors is not in the public eye, it cannot in any legally recognisable or protectable way cause offence or harm. This study endorses this assertion, whilst at the same time recognising that there are limits to what the law can achieve in terms of the emancipation of societally oppressed minorities.

Dworkin argues that it remains possible that homosexuality might be said to be deontologically immoral as a result of prejudice, based on the assumption that homosexuals are

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<sup>36</sup> Pierre de Vos & Jaco Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2006) 124 *SALJ* 795.

<sup>37</sup> Patrick Devlin *The Enforcement of Morals* (1965) 8.

<sup>38</sup> Report of the Committee on Homosexual Offences and Prostitution at 9 para 13, available at [http://www.humandignitytrust.org/uploaded/Library/Other\\_Reports\\_and\\_Analysis/Wolfenden\\_Report\\_1957.pdf](http://www.humandignitytrust.org/uploaded/Library/Other_Reports_and_Analysis/Wolfenden_Report_1957.pdf) accessed on 27 July 2015. The report will hereinafter be referred to as 'The Wolfenden Report'.

<sup>39</sup> Kenneth McK. Norrie 'Marriage and civil partnerships for same-sex couples: The international imperative' (2005) 1 *Journal of International Law and International Relations* 255.

<sup>40</sup> Devlin op cit note 37 at 3.

morally inferior creatures, or because of personal hatred.<sup>41</sup> This makes it even more vital for the legislator to scrutinise these arguments and positions in order to ascertain which ones are prejudicial and personal aversions. It is paramount to distinguish rationally moral positions from mere emotional reactions for which one cannot provide legally or constitutionally valid reasons. This argument supports the submission that it is time that the government of Botswana conducts adequate research with a view to determining what its people's views are on homosexuality, rather than assuming that it is axiomatic.

### 1.8 *Methodology*

The dissertation will employ a comparative, critical and analytical approach to examine the Penal Code and the Constitution of Botswana. Methodology will be based on desk research, using a variety of printed and online resources including case law, statutes, journal articles, books and newspaper reports.

### 1.9 *Limitations of the study*

The study is centred on the sexual rights of homosexuals in Botswana with a particular focus on the law that criminalises sexual conduct between consenting adults and recommends decriminalisation of such laws. It is necessary, however, to examine cultural and religious attitudes that have played a role in the criminalisation of these sexual acts. The study will examine the cultural and religious factors that have formed the primary justification for criminalising sodomy laws against the need for constitutional protection and the international obligation placed on Botswana. However, the aim of this study is not to provide a socio-legal analysis of the position of Botswana's LGBTI subjects. To the extent that such a study is not undertaken here, the reasonable assumption is that criminalisation impacts negatively on the LGBTI community in Botswana. The assumption is reasonable because research in other jurisdictions has repeatedly illustrated the negative impact of criminalisation.<sup>42</sup>

The situation in South Africa will be analysed because Botswana is currently in the same position that South Africa once was in in respect of sexual orientation. It will be argued that while Botswana's Constitution does not explicitly protect LGBTI subjects, lessons can nevertheless be drawn from South Africa. South Africa has been selected as the comparative jurisdiction because

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<sup>41</sup> Ronald Dworkin 'Lord Devlin and the enforcement of morals' (1966) 75*The Yale Law Journal* 1000.

<sup>42</sup> The *First National Coalition* case supra note 35 at 27 para 25. The constitutional court highlighted that the detrimental effect of criminalisation on the LGBTI community is that made harsh by the fact that they are a political minority group not capable on their own to use political power to secure favourable legislation for themselves.

it was the first country in the SADC region to forbid discrimination on the ground of sexual orientation<sup>43</sup> and its laws have advanced to the extent that they protect same-sex marriages.<sup>44</sup> The study will limit itself to the decriminalisation of the so called ‘sodomy’ laws.

### 1. 10 *Overview of chapters*

The research will be presented by way of division into chapters, each chapter describing the general field of inquiry to be undertaken in that chapter and the purpose that inquiry fulfils in the dissertation.

Chapter One is the introductory chapter that presents the research problem and related questions. It sets out the justification for the research and the argument and lays out what the research expects to achieve and how it will do this.

Chapter Two focuses on the legal history in Botswana regarding sexual rights of homosexuals or LGBTIs. It will discuss how sections 164 and 167 of the Penal Code violate sections 3, 9 and 15 of the Constitution. The chapter also draws attention to the obligations imposed on Botswana by human rights treaties at both international and regional level. It also assesses the level of domestic compliance with these treaties and suggests the way forward.

Chapter Three explores the legal history in relation to LGBTI rights in South Africa with a view to establish how South Africa proceeded from criminalisation to its current position. The research suggests that the South African experience should serve as a wake-up call for Botswana in terms of realising that other democratic countries, including, most recently, the United States of America, have stepped up to the plate and have aligned their laws with the reasonable demands of LGBTI activist groups.

Chapter Four discusses to what extent issues of culture and religion play pivotal roles in the development of a country’s legal framework. It will do so by analysing existing research while supplementing this with an examination of the negative effects of non-protection of sexual rights of homosexuals.

Chapter Five is a summary of critical points and proposes possible interventions to ensure that all citizens’ constitutional rights are protected.

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<sup>43</sup> The constitutional court declared sodomy laws unconstitutional for the first time in 1999 in the *First National Coalition* case (supra note 35) ensuring freedom for the gay community of South Africa.

<sup>44</sup> Civil Union Act 17 of 2006.

## Chapter two

### 2. LEGAL POSITION OF BOTSWANA REGARDING LGBTIS

Botswana operates a system of dual law comprising the customary laws and practices of the different ethnic tribes, on the one hand, and the common law, on the other. The customary law is largely uncodified and differs from tribe to tribe and community to community. The common law is constituted by a combination of English law and Roman-Dutch law.<sup>45</sup> Statutory enactments by Parliament form the bulk of the law in Botswana. Upon attaining independence from British colonial rule in 1966, Botswana adopted a Constitution.<sup>46</sup>

As in many countries that operate a democratic dispensation, the Constitution is the supreme law of the land in Botswana and takes supremacy over any piece of legislation that may be enacted in the jurisdiction.<sup>47</sup> If any such law is in existence, it could be challenged in a court of law and could be overturned on the grounds of unconstitutionality.<sup>48</sup> Justice Horwitz in the *Dow v Attorney General*<sup>49</sup> case, when dealing with the issue of the interpretation of the Constitution, endorsed the meaning given to the Constitution by the Supreme Court of Nigeria.<sup>50</sup> It was said in this case that the Constitution is:

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<sup>45</sup> See *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd*, 1996 BLR 190 at 195 where Tebbutt JA stated that ‘...it is to be noted that the common law of Botswana is the Roman-Dutch law. Although this was laid down as long as 1909 (by Proclamation No. 3 of 1909) when Botswana was still the Bechuanaland Protectorate, the Roman-Dutch law had continued to this day to be applied and is still so applied in Botswana’.

<sup>46</sup> M Tabengwa & N Nicol ‘The development of sexual rights and the LGBT movement in Botswana’ in C Lennox & M Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (2013) 339-358 at 339.

<sup>47</sup> Section 88 (2) of the Constitution provides that Parliament shall not pass or amend any law, if it has any effect of altering any provisions of the Constitution. Although the Constitution itself is silent on issues of supremacy, it could be implied from the wording of this section. See L Booii & CM Fombad ‘Update: Botswana’s legal system and legal research’ (2011), available at [www.nyulawglobal.org/globalex/Botswana/](http://www.nyulawglobal.org/globalex/Botswana/), accessed 3 March 2015.

<sup>48</sup> J Limpitlaw *Media Law Handbook for Southern Africa* (2012) 93. Courts have not hesitated to invalidate legislation that was found to be inconsistent with the Constitution in the past. Section 301 (3) of the Criminal Procedure and Evidence Act was declared void on the grounds that it infringed s 7(1) of the Constitution in the case of *Petrus & Another v The State* [1984 1 BLR 14]. This constitutional provision guarantees freedom from torture, inhuman and degrading punishment. In *Attorney-General v Dow* [1992 BLR 119 (CA)] s 4 (1) of the Citizenship Act [Cap 01:01] was nullified for violating sections 3 and 15 of the Constitution because it denied citizenship to the offspring of Botswana women married to foreigners, but granted same to men who married foreigners. Last, but not least, the Court of Appeal again rose to the occasion and declared void a college regulation which required pregnant women to leave college for at least one year discriminatory and punitive because the same treatment was not accorded males who could have impregnated those females. The regulation was thus declared contrary to section 15 of the Constitution on the basis of gender in *Students’ Representative Council of Molepolole College of Education v Attorney-General* [1995 BLR 178 (CA)].

<sup>49</sup> 1991 BLR 233 (HC) at 238.

<sup>50</sup> *Rafiu Rabai v The State* (1981) 2 N.C.L.R 293.

the Supreme Law of the land; that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn . . . that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore, more technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution.<sup>51</sup>

In light of the above, one can rightly conclude that the Constitution is the heart of the jurisdiction. Neither common law nor customary law can compromise the supremacy of the Constitution<sup>52</sup> and in the case of conflicts, the subordinate law must yield to the super-ordinate.

Section 105 of the Constitution vests exclusive jurisdiction in the High Court and the Court of Appeal in respect of any matters involving constitutional interpretation. However, although these courts are given these powers to review all legislation and declare null and void any that infringes any constitutional provision, they are not empowered to nullify sections of the Constitution itself.<sup>53</sup>

### 2.1 *Constitutional protection of human rights*

Botswana is one of the very few African countries in which a Constitution that was adopted when it attained independence is still in use. The Bill of Rights has never been amended since its enactment in 1966 and, to some extent, still reflects the traditional British attitude towards the entrenchment of human rights.<sup>54</sup> Activists have argued that there is a need for the Constitution to be amended to align it to the present-day democratic demands and lifestyles.<sup>55</sup> At a conference held by the Law Society of Botswana,<sup>56</sup> it was concluded that there is a need for a wholesale review of the Constitution in order to ensure and promote accountability, participation, transparency and predictability. Since independence, much that warrants constitutional reform has transpired with

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<sup>51</sup> *Rafiu Rabiu* supra note 50 at 326.

<sup>52</sup> *Attorney General v Dow* 1992 BLR 119 (CA) at 137 para F.

<sup>53</sup> *Booi & Fombad* op cit note 47.

<sup>54</sup> CM Fombad (ed) *Essays on the Law of Botswana* (2007).

<sup>55</sup> A Motlhagodi 'Review of Botswana's Constitution long overdue' *Sunday Standard* 5 November 2012, available at <http://www.sundaystandard.info/article.php/email.php?NewsID=15477>, accessed on 27 July 2015.

<sup>56</sup> T Moipolai *Report on Conference on Constitutional Reforms in Botswana: The Constitution of Botswana: Is It Time for Reform?* (2012), available at <http://www.lawsociety.org.bw/news/REPORT%20CONFERENCEONCONSTITUTIONALREFORMSINBOTSWANAMAY2012%28F%29.pdf>, accessed on 16 March 2015.

regards to human rights, not just in the country but also within the international community. Countries neighbouring Botswana have also improved their legal systems to be in alignment with current developments. One of those countries is Zimbabwe, whose Constitution was repealed and an entirely new Constitution adopted in 2013, following a referendum in which 94.49 per cent of the participating citizens voted for the new Constitution.<sup>57</sup>

For the purposes of relevance to the research, constitutional provisions that will be specifically reviewed against the background of a general need for constitutional reform are sections 3 and 15 of the Constitution, and sections 164 and 167 of the Penal Code of Botswana. The argument in this chapter is that these provisions, read together, amount to a constitutionally untenable position in relation to LGBTI persons in Botswana.

### 2.1.1 *Equality before the law*

Section 3 of the Constitution provides that every citizen in Botswana is entitled to the enjoyment of fundamental rights and freedoms regardless of his or her race, place of origin, political opinion, colour, creed or sex, but subject to respecting the rights and freedoms of others and public interest. Section 15 on the other hand prohibits discrimination on any ground listed as above. It further clarifies for purposes of the Act the kind of conduct that will be termed discriminatory.<sup>58</sup>

Reading section 3 in juxtaposition with section 15 implies a constitutional protection of formal equality - that all citizens in Botswana should be equal before the law. That is to say, all citizens regardless of their origin, tribe, colour, sex or gender should enjoy fundamental rights as conferred on them by the Constitution. They should thus all be protected by the law. The principle of formal equality attempts to ensure that no member of society is made to feel that they deserve less respect and consideration from others and that the law is likely to be used against them more harshly than against others.<sup>59</sup>

This principle of equality has been found to be at the core of a humanistic orientation to law. This was reflected in a few cases in Botswana and elsewhere. For example, in *Attorney*

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<sup>57</sup> The new Constitution is now known as 'The Constitution of Zimbabwe Amendment (No. 20)' which came into effect on 22 May 2013. See AJ Mavedzenge & DJ Coltart *A Constitutional Law Guide towards Understanding Zimbabwe's Fundamental Socio-Economic and Cultural Human Rights* (2014) 1.

<sup>58</sup> Section 15 (3) Constitution.

<sup>59</sup> *Mmusi and others v Attorney General* (BLR) unreported case no. MAHLB-000836-10 of October 2012, available at [www.ancl.radc.org.za/sites/default/files/images/Edith%20M%20Mmusi%20and%20Others%20v%20S%20%20Ramantele](http://www.ancl.radc.org.za/sites/default/files/images/Edith%20M%20Mmusi%20and%20Others%20v%20S%20%20Ramantele), accessed 17 March 2015.

*General v Dow*,<sup>60</sup> Amissah JP, upheld this principle and declared that a provision that discriminated between men and women violated the equality principle because it took away the rights of women to enjoy their fundamental rights and freedoms in the same way as men. This ruling is supported by the Kantian principle which theorises that ‘everyone should be treated as an end and never as a mere means to the ends of others’.<sup>61</sup> Kant’s argument is that all human beings have the ability to think and make choices about how they want to conduct their lives. In other words, they have autonomy and an intrinsic, inalienable worth. This study endorses this argument and adds that these values should be respected irrespective of one’s sexual orientation. The question that remains to be answered at this juncture relate to whether the mere fact that LGBTIs have different tastes and preferences mean that they should be treated differently? This question will be addressed in more detail in the next section.

### 2.1.2. *Whether section 3 of the Constitution includes those who engage in same-sex sexual conduct*

When delivering his judgment, Justice Rannowane in the *Thuto Rammoge* case,<sup>62</sup> pointed out in explicit terms that:

Section 3 of the Constitution...refers to all “persons in Botswana” and since members of LEGABIBO are also “persons” albeit with sexual orientation, it is difficult to imagine that they are not included in the phrase “all persons”.... [I]f the framers of the Constitution intended that they should be excluded from the enjoyment of those fundamental rights and freedoms, I am certain that they would have done so in clear terms. Consequently, to hold that gay people are excluded from the enjoyment of fundamental rights and freedoms conferred on “all persons” would amount to cutting down on the scope of such rights by reading into the above provision implicit restrictions contrary to accepted cannons of constitutional interpretation.<sup>63</sup>

The conclusion to be drawn from the above judgment is that the phrase ‘all persons’ includes both homosexuals and heterosexuals by the mere reason that they are all citizens of Botswana. This means that they are also entitled to enjoy the fundamental rights and freedoms conferred on them by the Constitution.

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<sup>60</sup> *Attorney General v Dow* supra note 52 at 135.

<sup>61</sup> Immanuel Kant, *Grounding for the Metaphysics of Morals* 3ed (1993) 33.

<sup>62</sup> *Thuto Rammoge* case supra note 6.

<sup>63</sup> *Ibid* at 16 para 32.

### 2.1.3. *Whether section 3 permits discrimination on the ground of sexual orientation*

Sexual orientation discrimination occurs when people are afforded a lesser status and treated different because of their sexual orientation and in this case treating LGBTIs differently because they are attracted to and engage in sexual conduct with people of their own sex as compared to heterosexuals. The question that could be asked is whether the omission of the word ‘sexual orientation’ from the grounds of discrimination means that the Constitution is permitting discrimination on sexual orientation grounds. A somewhat similar question was posed before the court in *Attorney General v Dow*.<sup>64</sup> In this case the court had to answer the question as to whether an omission of the word ‘sex’ in section 15 (3)<sup>65</sup> allowed for discrimination on the basis of sex. Counsel for the appellant had argued that the omission of the word ‘sex’ from section 15 had been done intentionally ‘so as to accommodate, subject to the fundamental rights protected by section 3 thereof, the patrilineal structure of Botswana society, in terms of the common law, the customary law, and statute law’.<sup>66</sup> The court when making its ruling, said equal treatment of the law is conferred on a person irrespective of their sexual status. It expanded this meaning by alluding to the fact that no principle of construction in law can be interpreted to have the effect that a fundamental right conferred on an individual can be restricted by another provision.<sup>67</sup> The court concluded that the grounds listed under the Constitution were just examples and that the list is not exclusive.<sup>68</sup>

From the above decision one can conclude that it was never the intention of the framers of the Constitution that discrimination on an arbitrary grounds or grounds relating to immutable personal characteristics be allowed. It can thus be argued that while section 15 does not explicitly refer to sexual orientation as a ground of unfair discrimination, sexual orientation is nevertheless what has been called an ‘analogous ground’ in the South African jurisprudence.<sup>69</sup> On such an interpretation, it can be proposed that the time has come for the legislators to amend section 15 of

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<sup>64</sup> *Attorney General v Dow* case supra note 52.

<sup>65</sup> Prior to the *Dow* case, the grounds of discrimination listed in section 15 (3) were limited to race, tribe, place of origin, political opinion, colour or creed, although sex was included under section 3. Subsequent to the ruling made in this case, the Constitution was amended to add the word ‘sex’ as a ground of discrimination under section 15 (3).

<sup>66</sup> *Attorney General v Dow* case supra note 52 at 142.

<sup>67</sup> *Ibid* at 142-143.

<sup>68</sup> *Attorney General v Dow* supra note 52 at 122.

<sup>69</sup> *Hoffmann v South African Airways* 2001 SA 1 (CC) at 21 para 40. The constitutional court of South Africa declared that denying a person employment on the basis of their HIV status was unconstitutional, thus it constituted unfair discrimination.

the Constitution so as to expressly include the word ‘sexual orientation’ in the list of the grounds for discrimination. Bojosi has confirmed the justifiability of the above suggestion by arguing that although sexual orientation is not listed in sections 3 and 15, it is nonetheless a ground ‘analogous’ to those listed under the said sections.<sup>70</sup> This, he says is because ‘sexual orientation is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings’.<sup>71</sup>

If the law is not amended so as to explicitly cover ‘sexual orientation’, gay men and lesbian women may remain frustrated, weak and vulnerable because their legal protection will remain subject to an interpretive measure by a judiciary in a favourable case.<sup>72</sup>

In light of this reasoning, the next step will be to question the constitutional validity of the Penal Code, inter alia, sections 164 and 167.

#### 2.1.4. *Whether criminalisation of same sex activities violate sections 3, 9 and 15 of the Constitution*

As stated in Chapter 1, sections 164 and 167 of the Penal Code criminalise certain sexual acts regardless of whether they are committed in private or in public.<sup>73</sup> If the law is authorised to encroach on activities happening behind closed doors where only the people involved are privy to what is happening, what does this mean for the privacy right<sup>74</sup> of those individuals?

In the *First National Coalition* case,<sup>75</sup> Ackermann J explained this right as recognising that all individuals have a right to a sphere of private intimacy, which allows people to establish relationships with each other without interference from the community. In the private domain, he continued, it is not the State’s business to dictate with whom individuals are intimate. Further, in *Diau v Botswana Building Society*,<sup>76</sup> Dingake J described the right to privacy as the right to be left alone.

If the Constitution guarantees ‘all persons’ protection of their fundamental rights and freedoms under section 3, the question then would be why it criminalises consensual sexual activity between adults conducted behind closed doors? The court was faced with this issue in the case of *Kanane*

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<sup>70</sup> K Bojosi ‘An opportunity missed for gay rights in Botswana: *Utjiwa Kanane v The State*’ (2004) 20 SAHRJ 479.

<sup>71</sup> Ibid.

<sup>72</sup> The *First Coalition* case supra note 35 at 27 para 25.

<sup>73</sup> See footnote 4.

<sup>74</sup> See footnote 20.

<sup>75</sup> The *First Coalition* case supra note 35 at 30 para 32.

<sup>76</sup> 2003 (2) BLR 409 at 431.

*v The State*,<sup>77</sup> but failed to protect the rights of homosexuals. The facts of this case are, briefly, that the police had one night invaded the house of Mr Kanane and found him in a compromising position with one Norrie. The two were charged with contravention of sections 164 and 167 of the Penal Code. Norrie pleaded guilty to both charges but subsequently left the country. Kanane, however, contested the charge on the basis that the provision violated various freedoms that the Constitution conferred upon him, namely, the right to non-discrimination (section 15 of the Constitution), the right to privacy (section 9), the right to freedom of association (section 13) and the right to equality (section 3). In dismissing Kanane's arguments, the High Court relied heavily on religious doctrines, asserting that homosexual practices were unknown to Africans until they had been brought to Africa by Westerners.<sup>78</sup> Mwikasu J reasoned that liberal sexual attitudes had brought about 'evils' like HIV/AIDS and teenage pregnancy.<sup>79</sup> Homosexuality, in his view, was a practice introduced to Africans by liberal Westerners that would also bring about similar evils.

The case was appealed and one of the main issues that the appeal court had to determine was whether homosexual acts between two consenting male persons carried out in private should be decriminalised in Botswana. Tebutt J, who delivered the lead judgment, opined that the public opinion of Botswana has not changed and developed so as to decriminalise consensual sexual acts between gays and lesbians, and that they do not represent a class of people in the society who already required constitutional protection.<sup>80</sup> In simple terms, the judge failed to recognise that these people are equally important and deserve protection of the law.

One view that has been espoused regarding the decision of the court in this case is that the court viewed the matter purely through the 'binoculars of an outsider passing judgment on homosexual conduct taking a rather narrow approach by confining itself to the question of whether or not "Botswana" were ready for the decriminalisation of homosexuality'.<sup>81</sup> This was contrary to the principle as laid out in *Dow's case*,<sup>82</sup> where it was said that constitutional interpretation should be broad. Amissah P emphasised the importance of the role of the judiciary in developing the Constitution so as to meet 'the just demands and aspirations of an ever-developing society which

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<sup>77</sup> *Kanane's case* supra note 12.

<sup>78</sup> The court referred to Malinowski's *The Sexual Life of Savages in North-Western Melanesia* to reach this conclusion.

<sup>79</sup> It must be noted however that, the Court of Appeal expressly stated that it disassociated itself from the views advanced by the High Court calling the said views 'a startling proposition'. See *Kanane's case* supra note 12 at 78.

<sup>80</sup> *Kanane's case* supra note 12 at 81.

<sup>81</sup> Chilisa op cit note 32 at 47.

<sup>82</sup> *Attorney General v Dow* supra note 52.

is part of the wider and larger human society governed by acceptable concepts of human dignity'.<sup>83</sup> The judge in this case acknowledged that the developments of society in a democratic dispensation are not stagnant but keep evolving with time. It is imperative to ensure that throughout all these developments, human dignity is placed at the forefront and that at all times the objective should be to promote it.

It is worth noting that, contrary to the Botswana Constitution, the South African Constitution expressly obliges courts to promote and protect human dignity and privacy whenever interpreting the Bill of Rights.<sup>84</sup> To show that human dignity, one dimension of which can also be described as 'autonomy', is a highly regarded value, it is one of the rights that are entirely protected, and thus no derogation or limitation on this right shall be imposed.<sup>85</sup> Human dignity has been defined as a value that 'recognises the inherent worth of all individuals as members of our society as well as the value of the choices they make'.<sup>86</sup> In this case, the court observed that criminalisation of consensual sexual conduct is a 'form of stigmatisation which is degrading and invasive'<sup>87</sup> and, further, that 'if one's consensual sexual choices are not respected by society, but are criminalised, one's innate sense of self-worth will inevitably be diminished...',<sup>88</sup> even when prosecution of such criminalisation rarely occurs.

Although the Constitution of Botswana does not expressly protect the right to human dignity as does South Africa's, both Constitutions protect the right to privacy which is a personality right that aims at protecting the inherent worth of an individual and their right to make self-choices. This privacy is 'an inner sanctum' as expressed in *Bernstein and others v Bester and others NNO*,<sup>89</sup> and has been said to include sexual preference which ought to be respected by the community. Notwithstanding the non-inclusion of the 'right to human dignity' in the Constitution, based on the words of Foxcroft J, one can conclude that it was never the intention of the framers of the Constitution for the human dignity of all individuals to be violated and not respected.<sup>90</sup>

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<sup>83</sup> Ibid at 166.

<sup>84</sup> Constitution of the Republic of South Africa, 1996, section 39.

<sup>85</sup> See table of non-derogable rights under the Bill of Rights.

<sup>86</sup> *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* 2014 (1) SACR 327 (CC) 344 para 52.

<sup>87</sup> Ibid at 345 para 55.

<sup>88</sup> Ibid.

<sup>89</sup> 1996 (2) SA 751 (CC) at 788 para 67.

<sup>90</sup> *Tsodilo Services (Pty) Ltd t/a Sunday Standard and others v Tibone* 2011 (2) BLR 494 (CA) at 498. The judge made an observation that the Botswana Constitution, just like the South African one, 'places great value on human dignity and reputation...'

The court in *Kanane's* case ought to have been concerned with protecting Kanane's constitutional right to privacy and his inherent dignity that comes with being a human being, instead of what the majority of the public thinks. The Wolfenden committee cautioned that there must remain a realm of private morality and immorality of human conduct which is not the law's business.<sup>91</sup> It has also been argued contrary to Devlin's view that society cannot be the ultimate reference for determining legal responses to private conduct.<sup>92</sup> The court as an organ of state owes its citizens a positive duty to protect their fundamental rights and freedoms against violation by anyone, and is under a negative duty not to violate the rights itself. Below we shall see that one of the main constitutional obstacles to this kind of protection consists in the constitutional position on rights limitation.

#### 2.1.5. *Limitation of fundamental rights enshrined in the Constitution*

Although section 3 of the Botswana Constitution guarantees all citizens enjoyment of their rights and freedoms, full enjoyment of any right is subject to such limitations of that protection as are contained in those provisions, being limitations to ensure that the rights and freedoms of other people are not prejudiced and that public interest is safe-guarded.<sup>93</sup> However, for the limitation to pass constitutional muster it has to be 'justifiable in a democratic society'.<sup>94</sup> Notwithstanding this, the Constitution does not explicitly elaborate on the test to be applied in order to determine whether or not the limitation is constitutional. The courts in instances like this seek guidance from foreign judgments, although the decisions are not binding but persuasive.<sup>95</sup> As Collins JA in *Ahmed v Attorney General*,<sup>96</sup> it is necessary for the courts 'to join hands and share our progressive liberal democracy with like-minded countries, especially through paying close attention to each other's judicial pronouncements on constitutional issues dealing with fundamental rights and freedoms'.

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<sup>91</sup> The Wolfenden report op cit note 38 at 24 para 61.

<sup>92</sup> Dworkin op cit note 41 at 990. Devlin is of the view that if society regards homosexuality as an 'abdominal vice', then it has the right to eradicate it. See Devlin op cit note 37 at 17.

<sup>93</sup> Proviso to section 3 of the Constitution. It must be noted that section 3 is the substantive umbrella section which entrenches the inherence of the set out the fundamental rights in each individual regardless of their status. See *Molefi Ramantele v Mmusi and others* (BLR) unreported case no CACGB-104-12 of September 2013, at para 65, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/Mmusi-Court-of-Appeal-Judgment.pdf> accessed 10 September 2015. Thus sections 3 to 16 of the Constitution constitute fundamental rights and freedoms, which in other jurisdictions is referred to as a 'Bill of Rights'.

<sup>94</sup> See for example proviso to section 9. This section limits the enjoyment of the right to privacy, however the limitation must reasonably be justifiable in a democratic society.

<sup>95</sup> *Mmusi and others* supra note 59 at para 61.

<sup>96</sup> 2002(2) BLR 431 (HC) at 440 A.

In South Africa, the Constitution<sup>97</sup> clearly sets out the test to be applied when testing the legality of the limitation clause.<sup>98</sup> In the Zimbabwean case of *Chavanduka and anor v Minister of Home Affairs*,<sup>99</sup> the court developed a three-pronged test for that Constitution.<sup>100</sup> The court of appeal in Botswana has recently cautioned that constitutional derogations from fundamental rights, like penal statutes, should be given a strict and narrow construction.<sup>101</sup> This research recommends for the adoption of the above mentioned limitation test to fill up the lacuna created in the Constitution.

Against this background, it is submitted that the question should be to determine whether the limitation stipulated in the Constitution (public morality and interest) is reasonably justifiable in a democratic society. In the sexual morality context, the question involves weighing up public morality against the right to privacy (human dignity and autonomy). In relation to the *Kanane case*, one would ask, for instance, if penalising homosexual conduct could be said to advance any legitimate legislative objective as per the *Chavanduka case*. It seemed not, because the court in *Kanane* did not state any such legislative objective. Instead it relied heavily on the perspectives and views of the society that held that consensual sexual conduct was a criminal offence. The court allowed itself to be dictated to by the public opinion and missed the opportunity to declare the Penal Code unconstitutional.

#### 2.1.6. *Whether the ruling in Kanane discriminates against homosexuals*

The *Dow* case maintains that any form of discrimination that is irrational is unlawful.<sup>102</sup> In order to determine whether the rationale for discrimination is unlawful, it has been held in the European Court of Human Rights that one should ask whether such discrimination corresponds to a ‘pressing social need’ in the society and whether it is proportionate to the legitimate social need pursued.<sup>103</sup> The ‘pressing social need’ of a society can be said to be the worth that the society places on a

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<sup>97</sup> Section 36, Constitution of South Africa.

<sup>98</sup> The test was applied in *S v Makwanyane and another* [1995 (3) SA 391 (CC) at 346 (104)], where it was held that it involves weighing up of competing values and ultimately making assessment based on proportionality.

<sup>99</sup> 2000 (4) ZS.

<sup>100</sup> ... [A] three-fold test is used to determine whether or not infringements are reasonably justifiable in a democratic society, if it does not meet any one of the criteria, then it should be struck down as unconstitutional; 1. the legislative objective which the limitation is designed to promote is important enough to warrant overriding a fundamental right; 2. the measures designed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations; and, 3. the means used to infringe upon the right or freedom are no more than is necessary to accomplish the objective ( pages 15–16).

<sup>101</sup> *Molefi Ramantele v Mmusi* case supra note 93 at 44 para 70,

<sup>102</sup> *Attorney General v Dow* supra note 52.

<sup>103</sup> *Handyside v United Kingdom* 1976 (1) EHRR 737. The court held in this case that freedom of expression was a pressing social need, that it constituted one of the essential foundations of a democratic society.

particular value or norm and this is relative to that particular society. However, Hart argues that it should not follow that everything that a society regards as of moral worth should be regulated or punishable by the law.<sup>104</sup> Otherwise if this is to happen there will be imbalances in the community of those who form the majority outweighing the minority as it will be their moral perspectives that will be used to determine the morality of that community. In the *Kanane* case, for example, the court held that the minority are not worthy of constitutional protection based on the attitudes of the majority. Yet, no survey was conducted to determine whether the court's view was that of the majority of the Batswana. This means that it cannot be said conclusively that the court did not substitute its own view for that of the majority. At the very least, in the absence of empirical data, the court based its view on an untested assumption about society's morality. It was unjustifiable for the court to do so and thereby dash the hopes of the vulnerable people who looked up to it for protection.

Justice Dingake, when giving a keynote address at a conference about the role of the judiciary, recently said:

Broadly speaking, the role of the judiciary is to ensure that the Constitution is enforced. Within the human rights discourse, the judiciary has an enormous task of protecting and advancing human rights. This kind of role requires the judiciary not only to interpret the law, but sometimes to develop the law in a manner that promotes the enjoyment of fundamental rights. Today, most of the existing constitutional democracies – including the Republic of Botswana – require the judiciary to interpret and develop common law and customary law, as well as legislation, in a manner that promotes the spirit, purport, and object of the Constitution, particularly the Bill of Rights. As such, it is the role of the judiciary to interpret and, under certain circumstances, develop the law in a fashion that ensures maximum protection and the widest possible enjoyment of the principle of equality by women, persons with disabilities, children, and sexual minorities.<sup>105</sup>

The South African Constitution also supports the above view that courts should strive to promote the spirit, purport and object of the Bill of Rights at all times when interpreting the law.<sup>106</sup> It is submitted that the underlying objective of the Constitution is to ensure that 'all' citizens of Botswana, regardless of their colour, origin, tribe, language, sexual orientation and creed, are given protection by all laws in Botswana — be it customary or common law, — to enjoy their

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<sup>104</sup> HLA Hart 'Immorality and Treason' (1959) at 85.

<sup>105</sup> Dingake op cit note 28.

<sup>106</sup> Section 39(2) Constitution of South Africa.

fundamental rights and freedoms. It seems the court in *Kanane's* case not only failed to exercise its role but rather opted to discriminate against Kanane by giving weight to what it perceived to be the views and opinions of the society, while turning a blind eye to the fact that the issue of human rights is not simply a matter of preference by the majority, but often a device by way of which minorities are protected in a constitutional state against the tyranny of the majority. In the Zimbabwean case of *Banana A v State*,<sup>107</sup> Gubbay CJ in his minority judgment said:

It may well be that the majority of the people, who have normal heterosexual relationships, find acts of sodomy morally unacceptable. This does not mean, however, that today in our pluralistic society that moral values alone can justify making an activity criminal. If it could one immediately has to ask: "By whose moral values is the state guided"...I am thus not persuaded that in a democratic society such as ours it is reasonably justifiable to make an activity criminal because a segment, maybe a majority, of the citizenry consider it to be unacceptable...It is irrational in my view to criminalise anal sexual intercourse between consenting male adults...<sup>108</sup>

The minority seemed to be of the view that public opinion should not dictate to the court when making a judgment, nonetheless although the judge in *Kanane* cited this *obiter*<sup>109</sup> as though to persuade his decision, he chose not to follow it but held that the situation was different in Botswana. This was a clear evidence of the court failing its constitutional duty.

However, something worth noting is that, although homosexuality might be said to be unlawful in Botswana in terms of the Penal Code, the Employment (Amendment) Act of Botswana<sup>110</sup> prohibits employment termination on the grounds of sexual orientation.<sup>111</sup> This move by government to amend the Employment Act was commended by the Botswana Network on Ethics, Law and HIV/AIDS (BONELA),<sup>112</sup> which acknowledged that the move was likely to uproot stigma and discrimination within the workplace.<sup>113</sup> The point being made here is that, if the

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<sup>107</sup> 2000 (4) LRC 621 (ZSC).

<sup>108</sup> *Ibid* at 645–646.

<sup>109</sup> *Kanane* case *supra* note 12 at 79 para D.

<sup>110</sup> Employment (Amendment) Act of 2010.

<sup>111</sup> *Ibid* at section 23(d).

<sup>112</sup> A network of individuals and organisations that promotes a just and inclusive environment to prevent HIV infection and provide a greater quality of life for people affected by HIV/AIDS through scaling up a coordinated community response and promoting accountability. The organisation also aims at fighting for the rights of minority groups of people.

<sup>113</sup> I Morewagae 'Botswana: BONELA commends Government on amending the Employment Act' *Mmegi Newspaper* 31 August 2010, available at <http://www.southernafricalitigationcentre.org/2010/08/31/botswana-bonela-commends-govt-on-amending-employment-act/>, accessed on 15 May 2015.

government saw it necessary to amend the law to make termination of employment on the ground of sexual orientation a prohibition, surely the same can be done to lift the ban on same- sex sexual conduct. The prohibition on employment termination on grounds of sexual orientation is surely an indication that the legislature has taken notice of a change or shift in society's views on homosexuality.

The position that Botswana has adopted in terms of treating the rights of its minorities like LGBTIs has been outlined in this section. It is, however, also of critical importance to assess whether Botswana is in compliance with its international obligations in this regard. Botswana has ratified a number of treaties and conventions both at international and regional level, all of which aim to protect fundamental human rights. This will be the focus of our discussion in the following paragraph.

## 2.2. *Status of Botswana with regard to international human rights treaties*

Botswana is a member of contemporary civilised states which have undertaken to abide by certain standards of conduct. It is thus expected to interpret its legislation in a manner that is compatible with international standards and agreements,<sup>114</sup> especially when dealing with 'constitutional provisions that relate to the right to equality for previously disadvantaged persons'.<sup>115</sup> Dingake concurs with the ruling made by Amissah J that an interpretation which favours international law should reign supreme over one which supports national law, whenever the two are in conflict.<sup>116</sup>

International law plays a limited role in the domestic law of Botswana due to a lack of clarity and certainty regarding its status and relevance in national law. Thus the status of international and human rights treaties is not specifically addressed by the Constitution as it is in countries like South Africa, Malawi and Namibia.<sup>117</sup> Although the Interpretation Act obliges courts to have regard to international law, it does not automatically authorise that international law be part of national law, nor does it mean that international law which is not yet incorporated into domestic law should be disregarded.<sup>118</sup> However, in respect of a rule of customary international

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<sup>114</sup> Section 24 (1), Interpretation Act (Cap 01:04) imposes an obligation on the courts to interpret the law by having regard to 'any relevant international treaty, agreement or convention'.

<sup>115</sup> Dingake op cit note 28.

<sup>116</sup> Ibid. See also *Attorney General v Dow* supra note 52 at 154 (D).

<sup>117</sup> Fombad op cit note 54 at 233.

<sup>118</sup> Emmanuel K Quansah 'An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana' in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 45.

law, Viljoen is of the view that it automatically forms part of domestic law subject to statutory modification or abrogation.<sup>119</sup>

Quansah is of the view that Botswana has adopted a dualist approach in the relationship between international and domestic law.<sup>120</sup> This approach postulates that ‘before any rule or principle of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically “transformed” into municipal law’.<sup>121</sup> Contrary to Quansah’s contention, Tshosa claims that Botswana has adopted the classical monist theory<sup>122</sup> with respect to customary international law and a dualist conception in relation to treaties.<sup>123</sup> His position is premised on the fact that the received Roman-Dutch common law never had to be legally incorporated into domestic law, but continues to operate alongside national law and is the basis of judicial decisions in Botswana.<sup>124</sup>

However, the case of *Agnes Bojang v The State*<sup>125</sup> clearly demonstrates that Botswana has adopted the dualism doctrine. This position can be implied from the words of Gyeke-Dako J when he asserted that the right to legal representation which is embodied in international instruments, hence a rule of customary international law, could not be said to automatically form part of municipal law without express incorporation.<sup>126</sup>

### 2.3. *International human rights instruments that Botswana has ratified*

The Republic of Botswana is a member of the United Nations and the African Union. It has ratified many UN Human Rights Conventions and thus has made binding international commitments to adhere to the standards laid down in these universal human rights documents.<sup>127</sup> This research will limit itself to one such commitment at international level and one at regional level.

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<sup>119</sup> F Viljoen & Precious Susan (eds) *Human Rights Protected? Nine Southern African Country Reports on HIV/AIDS, and the Law*, available at <https://books.google.co.za/books?>, accessed on 16 March 2015

<sup>120</sup> Quansah op cit note 118 at 45.

<sup>121</sup> J Osogo Ambani ‘Navigating past the ‘dualist doctrine’: The case for progressive jurisprudence on the application of international human rights norms in Kenya’ in M Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 27.

<sup>122</sup> Doctrine of monism on the other hand maintains that international law and municipal law are a single universal concept. See O Tshosa *National Law and International Human Rights: Cases of Botswana, Namibia and Zimbabwe* (2001) 6. See also Fombad op cit note 54 at 230.

<sup>123</sup> O Tshosa op cit note 122 at 64.

<sup>124</sup> Ibid.

<sup>125</sup> 1994 BLR 146.

<sup>126</sup> Ibid at 157.

<sup>127</sup> Claiming Human Rights ‘When human rights are violated in Africa...’, available at [www.claiminghumanrights.org/botswana](http://www.claiminghumanrights.org/botswana), accessed on 19 March 2015.

### 2.3.1. *The International Covenant on Civil and Political Rights (ICCPR)*

Botswana is a party to the International Covenant on Civil and Political Rights (ICCPR), following its accession on September 8, 2000.<sup>128</sup> Article 2(1) establishes that the rights guaranteed within the Covenant are guaranteed to all the citizens of each signatory country, ‘without distinction of any kind, such as race, colour, [or] sex’. Article 26 guarantees the right of all people to equality before the law and equal protection of the laws and legal systems of each signatory country. Discrimination ‘on any ground such as race, colour, [or] sex’ is likewise prohibited. Article 17 forbids arbitrary or unlawful interference with one’s privacy, family, home or correspondence.

In 1994, in *Toonen v Australia*,<sup>129</sup> the Human Rights Committee considered the criminalisation of private sexual activity between consenting same-sex adults and found that such laws violated articles 2(1), 17, and 26 of the Covenant. According to the Committee, the notion of sex in articles 2(1) and 26 must be interpreted as including sexual orientation: it was held that the term ‘sex’ is to be read to include sexual orientation, thereby guaranteeing every person equal protection of the law regardless of personal sexual orientation. The *Toonen* decision has been referenced many times by the Committee, other Treaty Bodies, and the UN Special Procedures in confirmation that articles 2(1) and 26 of the Covenant prohibit discrimination based on sexual orientation.

### 2.3.2. *African Charter on Human and Peoples’ Rights (ACHPR)*

The African Charter on Human and Peoples’ Rights (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms on the African continent. Oversight and interpretation of the Charter is the task of the African Commission on Human and Peoples’ Rights that was set up in 1987 and is now headquartered in Banjul, Gambia. A protocol to the Charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples’ Rights was to be created. The protocol came into effect on 25 January 2005. Botswana ratified this agreement on the 17 July 1986 and signed

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<sup>128</sup> Ibid.

<sup>129</sup> *Toonen v Australia Communication* no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

the protocol that established the Commission on the 9 June 1998.<sup>130</sup> For purposes of this dissertation, focus will be on articles 1, 2 and 3 of the Charter.<sup>131</sup>

#### 2.4. Botswana's level of compliance with international obligation of human rights protection

In 2009 the Human Rights Committee recommended<sup>132</sup> that Botswana should decriminalise homosexual relationships and practices / consensual same-sex activities between adults, and that it should stop discrimination on the basis of sexual orientation as this was a violation of the right to privacy guaranteed by the ICCPR.<sup>133</sup> Despite Botswana's pledge to uphold the principles of ICCPR, it has failed to implement the recommendations made.

Authorities in the country have remarked that Botswana as a democratic country could never recognise the sexual rights of LGBTIs because that will be against the culture of the society and the wishes of the majority of Botswana.<sup>134</sup> As I have shown up to this point, this remark is highly questionable. In a democratic constitutional society that protects human rights there might well be instances where the views of the majority cannot translate into legislative or judicial action because of the people's prior democratic undertaking to curtail their power constitutionally.<sup>135</sup> Joshua Cohen, in fact, contends that in a democratic dispensation the views and opinions of each person should matter equally — all should take part in determining the outcome of constitutional processes that establish the laws which they will be required to comply with.<sup>136</sup>

From Cohen's statement it could be argued that in a democratic society 'the voice' of majority cannot be used to silence the minority. Indications are that homosexuals in Botswana continue to experience routine societal rejection and victimisation.<sup>137</sup> The report makes reference

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<sup>130</sup> *Rule of Law in Armed Conflict Projects* available at [http://www.geneva-academy.ch/RULAC/regional\\_treaties.php?id\\_state=33](http://www.geneva-academy.ch/RULAC/regional_treaties.php?id_state=33) accessed 15 July 2015.

<sup>131</sup> Article 1 obligates all members of Organisation of African Unity (OAU) to recognise and respect the fundamental rights and freedoms of all people and undertake all measures to ensure compliance with the Charter. Article 2 guarantees all people full enjoyment of their fundamental rights and freedoms and art 3 secures the right to equality of all people and emphasises on protection of all people by the law.

<sup>132</sup> Arc International; 3<sup>rd</sup> UPR Session, available at [arc.international.net/global/-advocacy/universal-periodic.../b/botswana](http://arc.international.net/global/-advocacy/universal-periodic.../b/botswana), accessed 12 March 2015.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> Frank Michelman 'Law's republic' (1988) 97 *The Yale Law Journal* 1493-1537 at 1497.

<sup>136</sup> Joshua Cohen *For a Democratic Society: The Cambridge Companion to Rawls* (2003)86.

<sup>137</sup> UNHCR 'Botswana: Treatment of homosexuals by society and the government; legal recourse and protection available to homosexuals who have been subject to ill-treatment (2003-2006)' *Ref World*, 9 March 2007, available at <http://www.refworld.org/docid/4fa5382c.html> accessed 12 March 2015.

to an article in a Botswana newspaper in which a gay-rights advocate is quoted as saying that discrimination makes it difficult for homosexuals to receive health care.<sup>138</sup> On the other hand, it is reported that although the Penal Code criminalises same-sex sexual activity, prosecution for such acts are very rare if non-existent.<sup>139</sup> However, taken in the context of societal alienation the scales appear to be tipped in favour of the counter-argument, namely that ‘even when laws are not actively enforced in a country, they stigmatise and marginalise vulnerable groups within the society’.<sup>140</sup>

During the working group review, referred to above, Botswana reported<sup>141</sup> that its law forbids the registration of societies whose constitution and objects go against the law of the land.<sup>142</sup> It is worth noting that since the origin of LEGABIBO in 1998 the government of Botswana had refused to register it as a society and, as a result, this has created difficulty for the entity to implement its objectives, because without being registered it could not receive funding.<sup>143</sup> In response to the government’s refusal, however, LEGABIBO applied to the court for a ruling that would compel government to register it. In November 2014 the court finally ruled that it should be registered as a society under the Societies Act.<sup>144</sup> It will be necessary to discuss this case at length as there are some valid points that have been raised by the judge that will require thorough analysis and examination.

The facts of this case are briefly that the applicants, who are members of LEGABIBO<sup>145</sup> approached the High Court with a notice of motion seeking an order, among others, to have the Minister’s decision refusing to register it as a society declared unconstitutional as it violated

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<sup>138</sup> T Setsiba ‘Botswana Gays rejoice RSA victory’ *Mmegi* 21 November 2006, available at <http://www.mmegi.bw/2006/November/Tuesday21/247920822741.html>, accessed on 9 May 2015.

<sup>139</sup> RT Francoeur & RJ Noonan (eds) *The Continuum Complete International Encyclopaedia of Sexuality*, available at [http://books.google.com/books/about/The\\_Continuum\\_Complete\\_International\\_Enc](http://books.google.com/books/about/The_Continuum_Complete_International_Enc), accessed 12 March 2015.

<sup>140</sup> Arc International op cit note 132. This was the Canadian HIV/AIDS Legal Network’s commentary on Botswana’s compliance with the recommendation that it has to outlaw discrimination on the basis of sexual orientation. This was said following a report that although the Penal Code criminalises same-sex sexual activity, there is no known case of discrimination on the basis of sexual orientation.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> Francoeur & Noonan op cit note 139.

<sup>144</sup> Societies Act (Cap 18:01). This Act provides for the registration of societies in Botswana and how they will be regulated.

<sup>145</sup> Thuto Rammoge and 19 others were represented by the former high court judge Ms Unity Dow. The applicants had in March 2012, filed an application with the Director of Department of Civil and National Registration for registration as a society. The Director refused registration for the reason that ‘the constitution does not recognise homosexuality and that the application would violate Section 7 (2) (a) of the Societies Act’. On an appeal by the applicants, both the Permanent Secretary and Minister of Labour and Home Affairs, respectively, re-affirmed the decision of the Director. The applicants then approached the High Court for further redress.

section 3 of the Constitution in so far as it denied them equal protection before the law; and to declare the Minister's decision discriminatory in itself, and thus a violation of section 15 of the Constitution. Section 7 (2) (a)<sup>146</sup> gave the Registrar powers to refuse to register a local society if, according to the Registrar, the objects of the society are such that it is 'likely to be used for any purpose unlawful or prejudicial to or incompatible with peace, welfare or good order in Botswana'.<sup>147</sup>

In delivering his judgment, Rannowane, J<sup>148</sup> said the objectives of LEGABIBO are not in any way harmful, and could not be seen as a threat to the good order of Botswana and do not have the capacity to injure nor tamper with its peace and welfare. He said the objectives of the entity were, among others, mainly to lobby or advocate for decriminalisation of same-sex sexual activities, which is *prima facie* neither sinister nor unlawful. He said it was common cause that in many democratic societies that 'lobby or advocacy groups' operate freely and lawfully in order to persuade those in authority to embark on legislative reforms that would make it possible for particular conduct to be lawful.<sup>149</sup> Furthermore, that 'registering a society for the purpose of lobbying for reforms that will make same-sex sexual activities legal is not a crime... what would offend against the said section is to engage in same-sex relationships.'<sup>150</sup>

The judge correctly pointed out that the Constitution does not expressly state anywhere that it does not recognise same-sex relationships nor does it state that it recognises heterosexual relationships. After defining what homosexuality meant,<sup>151</sup> he declared that 'it is not a crime for one to be attracted to people of one's sex and this has nothing to do with the Constitution. It may be that homosexual activity is outlawed...'.<sup>152</sup> Despite the order compelling the government to register LEGABIBO, the court still failed LGBTI subjects because it failed to condemn criminalisation itself. Despite many developments in the world, lobby groups advocating for decriminalisation of sexual conduct between same-sex relationships, Botswana still fails to align itself to those developments.<sup>153</sup>

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<sup>146</sup> Societies Act op cit note 144.

<sup>147</sup> Ibid.

<sup>148</sup> *Thuto Rammoge case* supra note 6 at 10.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid at 12.

<sup>151</sup> The *Shorter Oxford Dictionary* provided the definition of homosexuality as a 'person who is sexually attracted to people of his or her own sex'.

<sup>152</sup> *Thuto Rammoge case* supra note 6 at 13.

<sup>153</sup> The latest development regarding homosexuality was when the Supreme Court of United States of America ruled that gay marriages should be legalised across all the fifty states. The ruling is a victory for gay people in America. See

One remark that the former minister, Mr Seretse made was that there are civil society organisations in Botswana<sup>154</sup> that will have to educate Batswana about homosexuality in general for it to be accepted in the country as it is not part of the Tswana culture.<sup>155</sup> He says it would be dangerous to ignore the culture of the majority and go with the minority as it is this culture that has played a vital role in making the nation what it actually is and that the result might destabilise the country.<sup>156</sup> He added that once the people have been educated and have accepted homosexuals, the government will amend the laws.

It is clear that the courts are failing to protect the rights of a minority group (homosexuals). If the courts rely on the Penal Code as justification for their judgements — even though it has been criticised to be a draconian piece of legislation imposed by colonial masters without the input of the people — they do this at the expense of the Constitution.<sup>157</sup> The irony is of course that the former colonial master (the United Kingdom)<sup>158</sup> has long decriminalised homosexual<sup>159</sup> acts taking place in private between consenting adults following the Wolfenden Report.<sup>160</sup> Thus, there is no legitimate reason why the former colony should still be adhering to the law abolished by the master. This is the position that Botswana should be moving towards adopting now in an era of liberal democracy in Africa. It will show that there is governmental respect for people's choices and decisions. As Dworkin adds, if a 'behaviour is a basic liberty (like sex), this should never be taken away, even if the person is doing it differently'.<sup>161</sup>

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Reuters 'Supreme Court rules in favour of gay marriage' *SABC News* 26 June 2015, available at <http://www.sabc.co.za/news/a/5b66238048e35a769ee6fe95551cf013/Supreme-Court-rules-in-favour-of-gay-marriage-nationwide-20152606>, accessed on 9 July 2015.

<sup>154</sup> Arc International op cit note 132. This assertion however sounds ironic because this is what LEGABIBO is aiming at achieving, but it appears that the government is determined to frustrate its efforts.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> The Act was enacted in 1964 before Botswana gained independence, thus before democracy found its roots in the governance system of Botswana. See also footnote 27 in Odunsi, B 'A need to re-examine the voice of the people? Reflections on the interplay of homophobia and the HIV/AIDS pandemic in Botswana' in Christine Stegling (ed) *The Botswana Review of Ethics, Law and HIV/AIDS* (2007) 40.

<sup>158</sup> Britain declared a protectorate over Botswana in 1895 until 1966 when Botswana gained its independence.

<sup>159</sup> Decriminalisation of Homosexual Acts, 1967. The Act was passed following the recommendations by the Wolfenden Report of 1957.

<sup>160</sup> The Wolfenden Committee recommended that homosexual conduct between consenting adults in private should be decriminalised. See the Wolfenden report op cit note 38 at 25, para 62.

<sup>161</sup> Hart-Devlin debate available at [http://sixthformlaw.info/01\\_modules/other\\_material/law\\_and\\_morality/08\\_hart\\_devlin.htm](http://sixthformlaw.info/01_modules/other_material/law_and_morality/08_hart_devlin.htm) accessed on 20 May 2015.

### 2.5. Conclusion

Although the Constitution of Botswana tries to ensure protection of the fundamental rights and freedoms of its citizens, it does not extend protection to all and sometimes that extension is denied based on tenuous and arbitrary grounds. In the LGBTI context, it results in a violation of these particular individuals' constitutional human rights and also a violation of the international obligation of protecting human rights. Both the ACHPR and ICCPR explicitly expect its member states to put all measures in place to ensure non-discrimination on any basis. Botswana has to amend its Constitution and the Penal Code to align same with international treaty obligations. Until this amendment is effected, sexual orientation should be read as an 'analogous ground' of non-discrimination in section 15 (3) of the Constitution. This should be so because, to put it in the words of Viljoen and Murray, 'sex' as the factor already explicitly provided for by article should be understood to include 'sexual orientation'<sup>162</sup> and the Constitution clearly stipulated 'sex' as a ground for non-discrimination.

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<sup>162</sup> Rachel Murray & Frans Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 91.

## Chapter three

### 3. HISTORY OF DECRIMINALISATION OF SAME SEX RELATIONSHIPS IN SOUTH AFRICA

#### 3.1 *Introduction*

In pre-1994 South Africa, as in most African countries, the government did not protect minority groups because their sexual orientation differed from the norm.<sup>163</sup> This chapter will examine the legal history in relation to the LGBTI subject in South Africa. Much of the discussion will focus on the progress that has been made in the legal regulation of same-sex relationships. Challenges — both pre- and post-constitutional equality — faced in order to ensure full emancipation of the LGBTI society will also be explored. The inclusion of the so called ‘gay rights clause’ in South Africa’s post-apartheid Constitution explicitly prohibits discrimination on the basis of sexual orientation. South Africa is the first country in Africa to follow this path, thereby not only setting an example for the rest but also offering valuable lessons to be drawn from the liberation process in this regard.<sup>164</sup> The present chapter aims to establish the key moments of gay liberation in South Africa in order to draw lessons for Botswana from this experience. Christiansen asserts that the South African move must be seen as a ‘radical departure from the legal practice of other nations and even from the pre-liberation South Africa’s legal traditions’.<sup>165</sup> It is, however, sad to note that, despite all the efforts undertaken to bring equality of homosexuals to par with heterosexuals, homophobia is still rampant and often comes at the cost of queer lives.<sup>166</sup>

#### 3.2 *History of homosexuality in South Africa*

In South Africa in both the criminal and civil spheres, the law has never treated lesbians and gays equally to heterosexuals. On the contrary, it appears that laws regulating same-sex sexual conduct were intended to punish and exclude non-heterosexual subjects from society.<sup>167</sup> According to Jivan, this is because the sexual orientation of gays, lesbians and transsexuals differed from the

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<sup>163</sup> Usha Jivan ‘From individual protection to recognition of relationships: Same-sex couples and the South African experience of sexual orientation reform’ (2007) 11*Law, Democracy & Development* 19–46.

<sup>164</sup> Jacklyn Cock ‘Engendering gay and lesbian rights: The equality clause in the South African Constitution’ (2003) 26 *Women’s Studies International Forum* 35-43.

<sup>165</sup> EC Christiansen ‘Ending the apartheid from the closet: Sexual orientation in the South African constitutional process’ (1997) 32 *International Law and Politics* 1019.

<sup>166</sup> ‘Woman killed for being a lesbian’ -Report News 24 18 August 2014, available at <http://www.news24.com/SouthAfrica/News/Woman-killed-for-being-a-lesbian-report-20140818> accessed on 5 August 2015.

<sup>167</sup> E Cameron ‘Sexual orientation and the Constitution: A test case for human rights’ (1993) 110 *SALJ* 453.

norm.<sup>168</sup> Homosexual conduct thus formed the basis of a variety of criminal offences.<sup>169</sup> The legal situation in the pre-democratic era is said to have been more barbaric than that in any of the neighbouring countries because, unlike in those countries, South Africa had ‘condemnatory’ laws since its colonial times.<sup>170</sup> Laws that discriminated against homosexuals found their roots in Roman law.<sup>171</sup> These included the common law ‘unnatural sexual offences’ and the common law crime of sodomy that was made the subject of a provision of criminal procedure which gave the police special powers in the pursuit of an arrest in relation to a man or men suspected of sodomy.<sup>172</sup>

Unique to the South African legal system was the Sexual Offences Act<sup>173</sup> that made a criminal offence of any act committed by a man ‘calculated to stimulate sexual passion or to give sexual gratification’ with another male person at a party.<sup>174</sup> It was in the mid-1960s that ‘concerted attacks on the gay community’<sup>175</sup> began. A campaign by the National Party government to launch anti-gay legislation intensified following a police raid on a house in Forest Town in 1996, where about 300 gay men were found partying and engaging in ‘illicit’ homosexual acts.<sup>176</sup> Laws were afterwards passed that related to gay parties, sex with teenage boys and the use of dildos.<sup>177</sup> The recommendations pertaining to the Immorality Act were passed into law in 1969, despite differences between the government and opposition parties.<sup>178</sup>

### 3.3 *Gay and lesbian movements*

During the late 1980s the apartheid regime was criticised and sanctioned worldwide for its abuse of and discrimination against black people, and it was during this period that gay and lesbian movements were established to place gay issues on the agenda of the anti-apartheid struggle both

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<sup>168</sup> Jivan op cit note 163 at 21.

<sup>169</sup> Ibid.

<sup>170</sup> Christiansen op cit note 165 at 1019.

<sup>171</sup> E Cameron ‘Unapprehended felons: Gays and lesbians and the law in South Africa’ in M Gevisser & E Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (2012) 91.

<sup>172</sup> Ibid at 97.

<sup>173</sup> Act 23 of 1957.

<sup>174</sup> Section 20 A. Party is defined as an occasion where more than two people meet.

<sup>175</sup> Cameron op cit note 171 at 101.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid at 103. It was resolved that ‘any sexual acts between men at a party were to be banned; the age of consent for male homosexual acts was to be raised from 16 to 19 years; and the manufacture or distribution of any article intended to be used to perform an unnatural sexual act was to be prohibited’.

<sup>178</sup> Ibid. The Immorality Amendment Act No 21 of 1950 prohibited adultery, attempted adultery or related immoral acts (extra-marital sex) between white and black people.

in South Africa and abroad.<sup>179</sup> Prior to the 1980s there was little evidence of a gay rights struggle in South Africa.<sup>180</sup> However, during the 1980s gay life became politicised.<sup>181</sup> The first gay and lesbian organisation, the Gay Association of South Africa (GASA), was established in Johannesburg in 1982.<sup>182</sup> Its principal function was to serve as a social meeting place for white, middle-class gay men.<sup>183</sup> At first, the nascent gay and lesbian movement did not align itself with the anti-apartheid struggle, but the position changed drastically when GASA became involved in the isolation of groups sympathetic to the apartheid movement.<sup>184</sup>

Because of the intensified politicisation, the Lesbian and Gays against Oppression (LAGO) movement was formed in Cape Town in 1986 — the first gay and lesbian organisation with explicit links to the Mass Democratic Movement.<sup>185</sup> In 1988, gay anti-apartheid activist Simon Nkoli established the first mass-based black gay and lesbian organisation, the Gay and Lesbian Organisation of the Witwatersrand (GLOW).<sup>186</sup> This organisation committed itself to a ‘non-racist, non-sexist, and non-discriminatory democratic future’.<sup>187</sup> Nkoli emphasised that the battles against homophobia and racism were indivisible.<sup>188</sup> He stated that: ‘I’m fighting for the abolition of apartheid, and I fight for the right of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I am not free as a gay man.’<sup>189</sup> GLOW was followed by the establishment of the Western Cape Organisation of Lesbian and Gay Activist (OLGA), which eventually replaced LAGO.<sup>190</sup> Although the majority of the members of OLGA were white, the organisation located itself within the liberation struggle and was led by anti-apartheid activists.<sup>191</sup> OLGA was affiliated to the leading organisation in the struggle for

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<sup>179</sup> Cock op cit note 164 at 36.

<sup>180</sup> M Gevisser ‘A different fight for freedom: A history of South African lesbian and gay organisation from the 1980s to the 1990s’ in M Gevisser & E Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995) 14-86.

<sup>181</sup> P de Vos ‘The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid state’ (2007) 23 *SAJHR* 435.

<sup>182</sup> *Ibid.*

<sup>183</sup> Cameron op cit note 171 at 50.

<sup>184</sup> De Vos op cit note 181 at 435. See, also, S Croucher ‘South Africa’s democratisation and the politics of gay liberation’ (2002) 28 *Journal of South African Studies* 324.

<sup>185</sup> Christiansen op cit note 165 at 1023.

<sup>186</sup> R Louw ‘Sexual orientation’ (1997) 8 *South African Human Rights Yearbook* 245-266 at 260. See, also Christiansen, op cit note 165 at 1025.

<sup>187</sup> R Louw op cit note 186 at 260.

<sup>188</sup> S Nkoli ‘Wardrobe: Coming out as a black gay activist in South Africa’ in M Gevisser & E Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995) 249-257.

<sup>189</sup> This statement was made at the first public parade in 1990 organised by GLOW. See footnote 61 in H de Ru ‘A historical perspective on the recognition of same-sex unions’ (2013) 19 *Fundamina* 227.

<sup>190</sup> H de Ru op cit note 189 at 228.

<sup>191</sup> Christiansen op cit note 165 at 1024.

democracy, namely the United Democratic Front (UDF), a broad-based political alliance aligned with the African National Congress (ANC).<sup>192</sup>

Until the late 1980s the ANC had no policy on sexual orientation, and some senior officials in the party even dismissed gay issues as irrelevant.<sup>193</sup> By the time the South African political parties began drafting the Interim Constitution, the ANC had formally recognised gay and lesbian rights and had agreed to include a prohibition of discrimination on the basis of sexual orientation in its proposed Bill of Rights.<sup>194</sup> In November 1987, Thabo Mbeki declared that ‘the ANC is indeed very firmly committed to removing all forms of discrimination and oppression in a liberated South Africa’ and that the commitment will not leave out the protection of gay and lesbian rights.<sup>195</sup> At a press conference in Stockholm, Nelson Mandela also re-assured the conference attendees that anti-apartheid forces will be united and that equality for all was a guarantee.<sup>196</sup>

According to De Vos, the gay and lesbian movement was ultimately successful because its leaders were fortunate and wise enough to present their struggle as forming part of a broader struggle against oppression by the apartheid state.<sup>197</sup> H de Ru embraces the assertion made by De Vos and comes to the conclusion that in ‘South Africa the most powerful master frame or master narrative available was that of the anti-apartheid struggle’.<sup>198</sup> He further adds that gay men and lesbian women could refer to this struggle and were able to argue that their struggle fitted the same frame, namely the larger struggle for human rights and the emancipation of the oppressed.<sup>199</sup> It could thus be said that had it not been for the commitment of the struggle groups during the apartheid era and the dedication of some people who put their lives in danger, the achievement of the constitutional protections in the Bill of Rights will not have seen the light of the day.

#### 3.4. *Inclusion of sexual orientation as a ground of discrimination in the interim Constitution*

H de Ru is of the view that, because of the complications that surrounded the adoption of the Constitution in South Africa, it is difficult to identify a clear beginning and an end to the political

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<sup>192</sup> Ivan Toms ‘Ivan Toms is a fairy’ in M Gevisser & E Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995) 258-263.

<sup>193</sup> Christiansen op cit note 165 at 1025.

<sup>194</sup> De Vos op cit note 181 at 437.

<sup>195</sup> Neville Hoad, Karen Martin & Graeme Reid (eds) *Sex and Politics in South Africa* (2005) 47.

<sup>196</sup> Ibid.

<sup>197</sup> De Vos op cit note 181 at 436.

<sup>198</sup> H de Ru op cit note 189.

<sup>199</sup> Ibid.

and social transformation of the country.<sup>200</sup> Cameron argues the reason could have been because, although it seemed apparent that all parties that participated in the drafting of the Constitution were in agreement regarding the equality clause and non-discrimination, there was no unanimity on how that agreement was to be embodied in the Constitution.<sup>201</sup> The inclusion of the unfair discrimination clause was thus a result of a number of factors, but credit must be given to the manipulation done in the Technical Committee<sup>202</sup> and the ANC by a highly credible activist group of lesbians and gays during the drafting process.<sup>203</sup> It has been said that success of this group was because of its single-issue focus.<sup>204</sup>

The Public Participation Programme during the drafting process has also been hailed as a major contributing factor to the success of the strong Constitution that South Africa has today.<sup>205</sup> This programme was meant to make the public part of the drafting process, so that in the end people could feel that they own the final Constitution, rather than have the document imposed on them.<sup>206</sup>

#### 3.4.1. Struggle by the Coalition group

In 1994 the National Coalition for Gay and Lesbian Equality (NCGLE) organisation was formed.<sup>207</sup> Although this was not the first gay activist group in the country,<sup>208</sup> what made it unique was the fact that it successfully consolidated over forty other different groups under one umbrella and managed to win support of popular political parties and some public figures like then Bishop Desmond Tutu. This was the move which ensured that sexual orientation remained in the final

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<sup>200</sup> Ibid. '[T]hat the process was set against dramatic historical backdrop of the end of apartheid and the fundamental reformulation of the political and societal structure of the entire nation.'

<sup>201</sup> Cameron op cit note 167 at 451.

<sup>202</sup> The Technical Committee consisted of experts who were responsible for the actual drafting of the Interim Constitution. See CF Stynch 'Constituting sexuality: the struggle for sexual orientation in the South African Bill of Rights' (1999) 23 *Journal of Law and Society* 457.

<sup>203</sup> Ibid at 459.

<sup>204</sup> Cock op cit note 164 at 37.

<sup>205</sup> Christiansen op cit note 165 at 1007. There were nonetheless some complaints from other members of the public who felt that the programme was ineffective, as it did not reach people in the rural areas, informal settlements, women and elderly citizens. However, an independent survey conducted by the Community Agency for Social Equity revealed that almost 73 percent of the population was reached through media campaigns.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid. The objectives of this group were (1) retaining the sexual orientation clause in the Constitution; (2) decriminalising (male) same-sex conduct; (3) constitutional litigation challenging discrimination against same-sex relationships; and (4) training representatives and effective leaders within the lesbian and gay organisations.

<sup>208</sup> Barnard-Naude 'The politics of private law: Sexual minority freedom in South Africa and Scotland' in E Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 48.

Constitution.<sup>209</sup> In 1995, the Constitutional Assembly received submissions, written and oral, from all sectors of society on the draft constitution and this provided crucial political space, which the NCGLE used to mobilise.<sup>210</sup> The two issues most emphasised by the NCGLE in its submission were issues of equality and uniformity of all forms of discrimination and that the two should be the most ‘fundamental and overriding principles’ of the interim constitution.<sup>211</sup> Furthermore, it was recognised that discrimination against gays and lesbians has the same features or is the same as discrimination on the grounds of race and gender.<sup>212</sup> Another submission was to the effect that ‘sexual orientation is fixed, immutable, and therefore part of the natural order. ... historical, scientific, and medical evidence shows that homosexual orientation is a natural phenomenon’.<sup>213</sup> This view proved baseless the claims held by many that homosexuality is a choice. Stynch adds that the retention of the anti-discriminatory clause in the interim Constitution was made possible by the political climate of South Africa at the time, which made it politically incorrect for the majority to oppose the granting of equality rights to a minority group.<sup>214</sup>

Although much of the advocacy for the inclusion of the equality and non-discrimination principles in the interim Constitution seemed to be successful, there was serious opposition from some groups of people who invoked notions of religion and morality to support their opposition to it.<sup>215</sup> However, the survey that was carried out indicated that the number of people who were for the inclusion of the clause out-numbered those who were against it.<sup>216</sup> Cock bases this success on the fact that ‘the dominant notion of democracy was rooted in a conception of rights rather than a simple majoritarianism’,<sup>217</sup> while Stynch argues that it is the coalition’s insider strategy at the drafting stage in combination with the changed political climate that ensured success.<sup>218</sup>

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<sup>209</sup> Hoad, Martin & Reid op cit note 195 at 460.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Hoad, Martin & Reid op cit note 195 at 38.

<sup>214</sup> Hoad, Martin & Reid op cit note 195 at 460.

<sup>215</sup> Ibid at 473. The African Christian Democratic Party (ACDP) was the only party which actively opposed the inclusion of sexual orientation. The party’s major contention was that homosexuality was a sin.

<sup>216</sup> Ibid.

<sup>217</sup> Cock op cit note 164 at 38.

<sup>218</sup> Stynch op cit note 202 at 476.

### 3.5. Decriminalisation of male homosexual practices post the inclusion clause

The inclusion of the 'sexual orientation' ground in the equality clauses of the post-apartheid Constitutions did not automatically invalidate the criminal proscription of homosexual sexual conduct between consenting male adults. Such a de-criminalisation required explicit abolition by an appropriate governmental authority of the common law offence of sodomy. As it turned out, the judiciary became the vehicle through which decriminalisation would proceed. Following the enactment of the interim Constitution, the Cape High Court delivered judgment in *S v K* in which the court expressed the considered opinion that the common law crime of male sodomy became unconstitutional with the enactment of the interim Constitution.<sup>219</sup> The decision was, however, only valid in the geographical jurisdiction of this court.

The aim of the first Coalition challenge, heard in the Witwatersrand Local Division of the High Court,<sup>220</sup> was to seek an order declaring the common law crimes of sodomy and the commission of unnatural sexual acts by men unconstitutional.<sup>221</sup> The court granted the order as per the plea of the Coalition on the basis that there was no justification for criminalising the laws in question.<sup>222</sup> The matter was then brought before the Constitutional Court for confirmation of the order under section 172 (2) (a) of the final Constitution.<sup>223</sup> The first issue that the court dealt with was whether differentiation on the ground of sexual orientation constituted unfair discrimination.<sup>224</sup> It was held that as a ground listed under section 9(3) it will be presumed unfair, unless there is proof that the discrimination was fair. The court concluded that since fairness was not established, the evidence before it sufficed to conclude that discrimination was unfair.<sup>225</sup> In order to determine the impact of the discrimination on the affected group, the court analysed the concept of sexual orientation in depth and held that a generous interpretation had to be adopted.<sup>226</sup> The court adopted Cameron's definition of sexual orientation<sup>227</sup> and declared that the scope of sexual orientation extended also

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<sup>219</sup> 1997 (4) SA 469 (C). However, the decision reached was only applicable within the jurisdiction of this court.

<sup>220</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (2) SACR 102 (W).

<sup>221</sup> The *First National Coalition* case supra note 35.

<sup>222</sup> Ibid 21–2 para 11–13.

<sup>223</sup> This section provides that the Supreme Court, High Court or any court of similar status may make an order to the concerning the constitutional validity of an Act of Parliament, but it shall be of no force or effect unless confirmed by the Constitutional Court.

<sup>224</sup> The *First National Coalition* supra note 35 at 24 para 18.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Cameron op cit note 167 at 452.

to bi-sexuals or transsexuals and to those who might only on occasion be sexually attracted to the people of their own sex.<sup>228</sup>

The court proceeded to state what the equality principle aims to achieve by saying that it was not about eliminating differences but rather to try and place oneself in the shoes of the people seeking equality, in order to understand where they are coming from.<sup>229</sup> It was said that the impact of the discrimination on gays and lesbians is exacerbated by the fact that they are politically unable to secure any legislation that will favour them.<sup>230</sup>

On the issue of whether the common law offence of sodomy infringes on the rights of dignity and privacy of gay men, the court looked into both concepts of dignity and sodomy law, and what they each aim at achieving. In light of the findings, it was concluded that the existence of any law that punishes gay sexual expression degrades and devalues them. As such it was held to be an invasion of their dignity and privacy as it impermissibly interfered in their personal conduct and space.

Finally, the court endorsed the High Court's decision and declared section 20A of the Sexual Offences Act unconstitutional, advancing the same reasons as for sodomy laws. This judgment paved a way for the achievement of freedom for many who had suffered because of their sexual orientation and were as a result outside the heterosexual and 'heteronormative hegemony'.<sup>231</sup> In other words, it suggested a 'plethora of possibilities for the recognition of alternative forms of sexuality and sexual relations in post-apartheid South Africa'.<sup>232</sup>

Following this ground-breaking judgment, the law evolved progressively in so far as the protection of constitutional rights of gay people were concerned. It provided an opportunity for legislative review and reformulation in the areas of criminal, civil<sup>233</sup> and family law.<sup>234</sup> In *National*

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<sup>228</sup> The *First National Coalition* supra note 35.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Barnard-Naudé Sexual Minority Freedom and the Heteronormative Hegemony in South Africa in Baxi, Vilhenja & Viljoen *Courting Justice: Brazil-India-South Africa: Comparing the Jurisprudence of the apex courts of Brazil, South Africa and India* (2013) at 311.

<sup>232</sup> Ibid at 317.

<sup>233</sup> The case of *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T) illustrates how employment law came to prohibit discrimination in terms of sexual orientation. The court ruled that medical schemes that do not recognise same-sex relationships were unconstitutional. The Medical Schemes Act 131 of 1998 came into effect immediately after the judgment.

<sup>234</sup> Jivan op cit note 158 at 30. 'The provisions of the Aliens Control Act 96 of 1991 sparked a number of cases in which the meaning of 'family' and the right to 'family life' arose'. See also *Farr v Mutual and Federal Insurance Company Ltd* 2000 (3) SA 684 (C) where the court ruled that two gay men living together as a couple constituted a family and *Satchwell v President of the Republic of South Africa*, 2002 (6) SA 1 (CC) where the Constitutional Court

*Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs*,<sup>235</sup> the Constitutional Court declared that section 25 (5) of the Aliens Control Act was unconstitutional as it denied immigration benefits to spouses in same-sex life partnerships. It held that the impact of the provision is to ‘reinforce harmful and hurtful stereotypes of gays and lesbians’<sup>236</sup> invading their constitutional right to dignity and conveying a message that those in same-sex relations lacked the same validity as heterosexual ones.<sup>237</sup> The court found that it would be inappropriate for the entire section to be declared invalid, but rather to ‘read in after the word “spouse” in the section the words “or partner, in a permanent same-sex life partnership”’.<sup>238</sup>

South Africa made history again by becoming the first country in Africa to eventually recognise same-sex marriages. This followed the ruling in *Minister of Home Affairs v Fourie*<sup>239</sup> where the Constitutional Court confirmed that the right to marry is an inalienable right that belongs to everyone who resides in South Africa, including blacks, whites, coloureds, homosexuals or heterosexuals and that to exclude same-sex couples from a marriage regime is tantamount to saying that they are outsiders and their need for legal protection is less worthy than that of heterosexual couples.<sup>240</sup> The Court added that in principle denying same-sex life partners the option to marry suggests that their capacity to love, commit and accept responsibility is less worthy of regard than that of their heterosexual counterparts.<sup>241</sup> The majority concluded that the common law definition of marriage and section 30(1) of the Marriage Act No 25 of 1961 are ‘under-inclusive and unconstitutional to the extent that they make no provision for gay and lesbians to celebrate their unions the same way as heterosexual couples do’.<sup>242</sup> Parliament responded to this judgment by enacting the Civil Union Act<sup>243</sup> that now allows for the registration of a marriage or a civil partnership.

Although the South African government supports the LGBTI community through legislation, these developments were achieved against the background of a society in which

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ruled that the long-term relationship partner of a judge should be entitled to the same pension benefits as a judge’s spouse.

<sup>235</sup> 2000 (2) SA 1 (CC). This case is hereinafter referred to as ‘*The Second National Coalition*’ case.

<sup>236</sup> Ibid at 31 para 49.

<sup>237</sup> Ibid.

<sup>238</sup> Ibid at 47 para 97.

<sup>239</sup> 2006 (1) SA 524 (CC).

<sup>240</sup> Ibid at 553 para 71.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid at 557 para 82.

<sup>243</sup> Act 17 of 2006.

‘heteronormativity and extreme conservatism regarding sexuality and sexual orientation still remain the order of the day’.<sup>244</sup> This implies that there was opposition which made it difficult for the status quo to be achieved. The discussion that follows will focus on the challenges that were present amidst this transformation process.

### 3.6. *Challenges facing the decriminalisation process*

#### 3.6.1 *Prior to the equality clause*

In the early 1990s, gays and lesbians in South Africa had minimal political power, because they were poorly organised, often racially discriminated against and were rejected by the apartheid society.<sup>245</sup> Attempts to form and organise themselves were challenged by the conservative culture of the churches, which held that homosexuality is against the law of God and hence a sin.<sup>246</sup> Before the ANC could make any formal policy on the rights of gays and lesbians, some prominent members of its party publicly declared the resentment they had for homosexuals.<sup>247</sup> In the face of a possibility that it would lose international support as a result of these declarations, the movement released its official pro-gay standing.<sup>248</sup>

During the drafting period of both Constitutions, there were other political parties which were against the inclusion of the ‘gay clause’ in the Constitution. The Conservative Party rejected the Bill of Rights reasoning that there was no need for it as the ‘biblical Ten Commandments’ served the same purpose.<sup>249</sup> The African Christian Democratic Party (ACDP) actively rejected inclusion of the sexual orientation clause, raising biblical values.<sup>250</sup> It argued that homosexuality is against the ‘will of God and African culture’.<sup>251</sup> There were other religiously affiliated conservatives who also opposed the inclusion of the ‘sexual orientation’ ground, arguing the same reasons as the ACDP and the Conservative Party.<sup>252</sup>

Results of the Public Participation Programmes indicated that there was a considerable percentage of individuals who made submissions that rejected the inclusion of the gay protection

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<sup>244</sup> Barnard Naudé op cit note 231 at 321.

<sup>245</sup> Christiansen op cit note 165 at 999.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid at 1025.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid at 1030.

<sup>250</sup> Sytinch op cit note 202 at 473.

<sup>251</sup> Ibid.

<sup>252</sup> Christiansen op cit note 165 at 1039.

clause.<sup>253</sup> It was apparent from the wording of these petitions that rejection was mostly fuelled by hatred or strong feelings of dislike rather than religious and cultural morals cited by many.<sup>254</sup> Others believe that despite claims that homosexuality is imported, ‘it is condemnation of homosexuality rather than same-sex desire’ that is imported.<sup>255</sup> Simply put, it is the attitudes of people towards homosexuality that reigns supreme, rather than its so-called social ills. Some gay rights advocates argue that a major problem of apartheid was precisely that it tried to prescribe to people how they should live their lives, juxtaposing it with a democratic government which gives people the liberty to choose how they live.<sup>256</sup>

### 3.6.2 *Post-apartheid*

The inclusion of the gay rights clause in the post-apartheid constitutions failed to cure the homophobia in South Africa and studies show that it is still rampant.<sup>257</sup> Gays and lesbians in some communities continue to be treated as outcasts and face stern ‘discrimination, harassment and violence’.<sup>258</sup> This led to gays and lesbians protesting that constitutional protection is just a sham as, in reality, they faced great atrocities including from the law enforcement officers who are supposed to be ensuring their safety.<sup>259</sup> Jivan shares the same sentiments, namely that although legal victories are critical in reinforcing gay identity, they nonetheless fail to eradicate homophobia and exposure to homophobic violence.<sup>260</sup>

Reports reveal that it is mostly gays and lesbians who live in townships and rural areas who are affected the most.<sup>261</sup> Most cases of attacks go unreported because the victims are often attacked further by the community and their family members if they talk to the media.<sup>262</sup> It is also shown that it is mostly black and coloured subjects who are victims of these homophobic attacks.<sup>263</sup> These reports are supported by a South African Social Attitudes Survey (SASAS) that was conducted for

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<sup>253</sup> Ibid. These petitions were organised by church goers and they amounted to ‘more than a two-to-one’ of the majority who petitioned for inclusion.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid at 1051.

<sup>256</sup> Ibid at 1048.

<sup>257</sup> Cock op cit note 164 at 41.

<sup>258</sup> Ibid. It is mostly lesbians who were attacked as the perpetrators claimed they wanted to keep them in their places.

<sup>259</sup> Ibid.

<sup>260</sup> Jivan op cit note 163 at 45.

<sup>261</sup> Stuart Graham ‘Gay community still facing many challenges’ *IOL* March 11 2004, available at <http://www.iol.co.za/news/south-africa/gay-community-still-facing-many-challenges-1.207527?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 25 June 2015.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

a period of five years (2003-2007).<sup>264</sup> The results indicate that more people, especially the elderly living in rural areas have negative perceptions about homosexuality because they still believe it is anti-African, brought in only to corrupt African culture and morals.<sup>265</sup> Another study by the Pew Research Centre in 2013 revealed that about ‘61 percent of the South African community believe homosexuality should not be accepted’.<sup>266</sup> Roberts and Rendy observe that the negative perceptions could be a result of ‘low levels of education, awareness, urban-rural divide, age and religion’.<sup>267</sup> Other scholars have suggested that, in order to cure this intolerance, the awareness of homophobia as a form of discrimination should be taught as early as primary school.<sup>268</sup>

### 3.7. Conclusion

South Africa has a long history of discrimination against gays and lesbians. Although millions of people were affected by the apartheid regime which lasted for forty-six years (1948 to 1994), the LGBTI community was particularly affected because it was a forbidden community. This chapter has told a story of how South Africa, which was once living under the oppression of the colonial and minority rule, managed to rescue itself from this oppression and develop into the new South Africa lived today, where people are legally recognised irrespective of their sexual orientation. The solidarity and steadfastness of the coalition groups during the struggle period have been praised as the reason why the country was able to establish for itself a Constitution that became a foundation, not only for South Africa but for other countries as well. Many countries, including Botswana, aspire to have a well-formulated and user-friendly Constitution like South Africa’s. This is the reason why these countries use the South African legal system for guidance.

The Public Participation Programme that was embarked on during the drafting of the Constitution and the enactment of the Civil Union Act were milestones in the public education relative to the transformation process. It is important in a democracy for the voice of the voters to

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<sup>264</sup> Benjamin Roberts & Vasu Rendy ‘Pride and prejudice: Public attitudes towards homosexuality’ (2008) *HRSC Review* 6(4), 9-11.

<sup>265</sup> Ibid.

<sup>266</sup> Lydia Smith ‘Corrective rape: The homophobic fallout of post-apartheid South Africa’ *The Telegraph* 21 May 2015, available at <http://www.telegraph.co.uk/women/womens-life/11608361/Corrective-rape-The-homophobic-fallout-of-post-apartheid-South-Africa.html> accessed on 25 June 2015.

<sup>267</sup> Roberts & Rendy op cit note 264.

<sup>268</sup> CJ Els & WJ van Vollenhoven ‘The human rights paradox of gays, lesbians, bi-sexuals and transgendered students in South African education’ (2013) 46 *De Jure* 284.

be manifest in all major decisions that are being made so as to avoid intolerable levels of public rejection or opposition following implementation.

The inclusion of the clause which prohibited discrimination on the ground of sexual orientation laid the foundation for the freedom of sexual minorities and gave them a sense of belonging in their own country as it made them achieve parity with heterosexuals who for a long time were favoured by the law. The many cases that were brought before the courts after the final Constitution enabled the constitutional court to confirm and legally end the sufferings that homosexuals had endured for a long time. However, despite all the positive developments in legislation, it is evident that the homophobia in some of the people of South Africa still exists. It is yet to be seen how long it will take for the community to accept that homosexuals are also equally people.

## Chapter four

# 4. CULTURE AND RELIGIOUS BELIEFS THAT LIMIT THE ENJOYMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS BY SEXUAL MINORITIES IN BOTSWANA

## 4.1 Introduction

Laws have to cover everyone, even the many people within the society who have very different moral positions than you do. The laws have to incorporate the reality that they must accommodate many diverse individuals –which is why maximum individual freedom is a good idea. That way, you are allowed to have your own morality, and I have mine, and we can operate under our own moral senses without interference from the law - which only serves to help us function together as a society. The law merely does what it can to make sure that citizens operate well together as a group. Morality is about a personal sense of right and wrong.<sup>269</sup>

It is evident from scholarly works that the many people, especially in Africa, believe that homosexuality is an alien, uncultured, un-African monster that has been imported from the white man's cultural practices. It has also become a crystallised belief that its existence does nothing but corrode the fabric of the society, in other words the good morals on which a society is founded. Others, who are affiliated to religious practices and beliefs, add that it is a sin against the law of God.

As is the case with most countries in Africa, Botswana has a very conservative society with respect to homosexuality. This has had a considerable influence on the way most people reason and, ultimately, on the laws that have been passed, which are an expression of what is believed to be the prevalent views in the society. As we have seen in Chapter 2, the Constitution allows for the invasion of individual privacy if the enjoyment of the right contravenes public morality.<sup>270</sup> The argument that forms the basis of this chapter is that public views and opinions and ultimately legislature must itself pass constitutional validity before they are enforced, because Botswana is founded on constitutional supremacy.<sup>271</sup>

This chapter will start by interrogating the validity and constitutionality of the cultural morals and religious beliefs that hinder the enjoyment of rights and freedoms by gays and lesbians

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<sup>269</sup> 'What does it mean to "legislate morality"?' *FreethoughtBlogs.com* available at [freethoughtlogs.com/axp/2011/11/07/what-does-it-mean-to-legislate-morality/](http://freethoughtlogs.com/axp/2011/11/07/what-does-it-mean-to-legislate-morality/) accessed on 29 June 2015.

<sup>270</sup> Sections 9 (2) (a) and 12 (2) (a) Constitution.

<sup>271</sup> Bojosi op cit note 70 at 480.

in Botswana. It will do so by revisiting the famous Hart-Devlin debate. This study endorses the Wolfenden Committee's report that it is not the business of the law to investigate private morality, but rather that the law should be concerned with granting protection to all its citizens irrespective of their personal sexual choices. It will be argued that Lord Devlin's assertion that decriminalising homosexual conduct is tantamount to corroding the society's walls and fabric is unconstitutional in the Botswana context. Additionally, I will argue that culture and religion should not be used to deny sexual conduct to homosexuals. The latter, I believe, is an inalienable and inherent way of expressing oneself in relation to another human being. Prohibiting homosexual expression of love has been said to be an infringement of human dignity because the so called 'sodomy offence' is a primary form of homosexual sexual expression. As Sachs J puts it, 'it is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral that impinges on the dignity and self-worth of a group.'<sup>272</sup>

Secondly, the consequences that arise out of a failure to legally grant equal protection to gays and lesbians will be considered. The argument being made here is that homosexuals have been made to feel like they are less worthy as human beings than heterosexuals. As Ackermann J has correctly observed, it is high time the law start treating gay people well because they 'have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity ... at a deep level'.<sup>273</sup> It is the hope of this paper that providing evidence of homophobic effects will raise awareness to policy makers, economists, and global leaders to better understand that antigay laws ultimately do more harm than good - to LGBTI people and the population at large.

## 4.2 *Morality and homosexuality*

### 4.2.1 *Morality v Law: Definition*

Morality has been defined as a 'code of social behaviour: it is something which is both within the individual and which also encapsulates him by virtue of his membership of society'.<sup>274</sup> Thus a moral rule is one that when an individual obeys, he or she will feel satisfied internally, that they have done the right thing and can consequently be praised for that, but if one disobeys it, they will

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<sup>272</sup> The *First Coalition* case supra note 35 at 66 para 127.

<sup>273</sup> Ibid at 27 para 26.

<sup>274</sup> LBlom-Cooper & Gavin Drewry (eds) *Law and Morality* (1976) xii.

feel that they have done wrong.<sup>275</sup> Some moral values or rules are inherent in us, whereas others are inculcated in us during our infancy stage, while others we learn as we grow up, either by observing members of our societies and families or through personal experiences.<sup>276</sup> Morality is highly subjective in that what is moral to one individual may not necessarily be moral to another. What is moral is also dependant on the society at any particular time. According to Lord Devlin, society plays a major role in the enforcement of morality.<sup>277</sup> He thus defines morality in relation to society as: ‘the moral structure of a society’, a ‘public morality’, a ‘common morality’, ‘shared ideas on politics, morals, ethics’, ‘fundamental agreement about good and evil’, and a ‘recognised morality’.<sup>278</sup>

Law on the other hand has been defined as a set of rules and principles which are determined by a state to regulate the behaviour or conduct of the people that are subject to its authority.<sup>279</sup> It is the responsibility of the State again to determine the magnitude of the sanctions it shall impose on the violators of the law.<sup>280</sup>

#### 4.2.2. *Relationship between morality and the law*

Both law and morality purport to regulate people’s behaviour and conduct. Law ensures that people obey the rules and regulations because disobedience is punished, while morality ensures compliance by, inter alia, rewarding those who do well in a variety of ways.<sup>281</sup> Shavell also posits that in terms of establishment of the two, legal rules are more expensive to promulgate than morals in that with the latter, much more effort is needed for a moral value to eventually be accepted and obeyed as a legal rule.<sup>282</sup> In thinking how law influences morality, the question remains how far we are morally obliged to obey the law, and in terms of how morality affects the law, one should consider the extent to which morality is relevant for fixing the content of the law.<sup>283</sup> Dworkin suggests that law is embedded in morality,<sup>284</sup> that the two mean one concept, while Habermas, on

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<sup>275</sup> Steven Shavell ‘Law versus morality as regulators of conduct’ (2002) 4 (2) *American Law and Economics Review* 230.

<sup>276</sup> Ibid.

<sup>277</sup> Devlin op cit note 37 at 10.

<sup>278</sup> Ibid.

<sup>279</sup> Cooper & Drewry op cit note 274 at 229.

<sup>280</sup> Ibid at 230. Thus legal sanctions may be imposed in monetary terms of imprisonment for a particular period, depending on the degree of the offence committed.

<sup>281</sup> Ibid at 227.

<sup>282</sup> Shavell op cit note 275 at 233.

<sup>283</sup> Hugh Baxter ‘Dworkin’s “one-system” conception of law and morality’ 90 *Boston University Law Review* 858.

<sup>284</sup> Ibid at 860.

the contrary, holds the view that each concept is independent of the other.<sup>285</sup> Hart also supports the idea that the two have an intimate relationship, but adds that despite this, it does not follow that ‘particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice’.<sup>286</sup>

Both law and morality exist for ‘mutual forbearance and compromise’, because naturally people are unequal in physical strength, suppleness and intellect.<sup>287</sup> That is to say, to avoid situations where other people will be made to feel inferior, less important or even non-existent, it is critical that laws be created to protect them and promote cooperation and respect. Hart further adds that men are by nature beings that at times want to advance their selfish interests at the expense of others, exploiting resources that belong to all for self-benefit.<sup>288</sup> In the absence of rules that will punish the chancers, many would succumb to that selfish act, in the end disadvantaging those who are too weak to fight for themselves.

Hart continues to make a distinction between a system which is fair and caters genuinely for the interests of its entire people, and one which is narrow and exclusive, focusing only on the views and interests of the dominant group.<sup>289</sup> He argues that the former will gain and retain allegiance for its entire people and consequently be stable, while the latter will continually be oppressive and unstable with high probabilities of mayhem. This study favours the former system, and adds that it is not the duty of the law to discriminate against its people but rather to embrace all of them by enacting laws that will cater for all their interest. The discussion that follows will analyse the arguments advanced following the Wolfenden Report.

#### 4.2.3. *The role of criminal law in terms of the Wolfenden Report*

As already alluded to in chapter two, the Wolfenden Report, sets out exactly what it considers the role of criminal law to be.<sup>290</sup> The report asks the question as regards which principles are to be followed when deciding to make some acts criminal rather than others (prostitution, adultery and fornication, were not, at the time of the Wolfenden Report criminalised as offences in England, while homosexuality was).<sup>291</sup> The Committee had recommended that homosexual conduct

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<sup>285</sup> Ibid at 862.

<sup>286</sup> HLA Hart *The Concept of Law* (1961) 181.

<sup>287</sup> Ibid at 190.

<sup>288</sup> Ibid at 193.

<sup>289</sup> Ibid at 197.

<sup>290</sup> Wolfenden report op cit note 38.

<sup>291</sup> Ibid.

between consenting adults in private should be decriminalised.<sup>292</sup> The justification advanced for the recommendation was that, society and the law should respect individual choice and freedom especially in matters of private morality, and that there must at least remain a ‘realm of morality and immorality’ which should be out of reach of the law.<sup>293</sup>

#### 4.2.4. *Hart-Devlin debate*

The debate between Hart and Lord Patrick Devlin arose as a result of the recommendations of the Wolfenden Committee Report. Devlin famously equated private sexual immorality with treason, that the two are both offences, and as such should be punishable by the law.<sup>294</sup> He is of the view that criminal law does not only protect the individual but also society, and thus the State can justifiably legislate morality in order to protect itself against behaviours that may destabilise the society and its institutions.<sup>295</sup> Devlin thinks of morality as something that holds the society together, ideas and beliefs that a society share and without which the society will disintegrate. He feels strongly that the society should use its criminal law to enforce its moral code lest it disintegrates: ‘[t]he suppression of vice is as much the law’s business as the suppression of subversive activities, it is no more possible to define a sphere of private morality than it is to define one of private subversive activity’.<sup>296</sup> According to Lord Devlin, private immorality has as much potential to dangerously harm the society as any criminal activity.

This study does not agree with this argument that the society should use law to punish private moral conduct, or that unpunished immorality will deplete the society. Societies consist today of different families constituted by different individual members. As such, respect for a society starts by respecting an individual’s rights — dignity, autonomy, privacy and liberty. Simon Lee cautions that it must always be remembered that rights such as these ‘militate against intervention’.<sup>297</sup> He adds that ‘one should never leap from the premise that something is immoral

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<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

<sup>294</sup> Devlin op cit note 37 at 14.

<sup>295</sup> This is the ‘Disintegration Thesis’. The thesis essentially says that disintegration of the society occurs when common morals are not observed. Devlin argues that sexually permissive behaviour, even when done in private, will contribute to social disintegration by undermining the cohesive social morality. Hart asserts that ‘instead of contributing to social disintegration such permissiveness might make it easier for men to submit to restraints on violence which are essential for social life.’ See HLA Hart ‘Social solidarity and the enforcement of morality’ (1967) 35 *The University of Chicago Law Review* 1-13 at 1.

<sup>296</sup> Devlin op cit note 37 at 13-14.

<sup>297</sup> Simon Lee *Law and Morality: Warnock, Gillick & Beyond* (1986) 15 at 33.

to the conclusion that it should therefore automatically be made illegal.<sup>298</sup> In light of this caution, it is concluded that by society invading into private morality of its people, it is by so doing destroying the fabric which it claims it is preserving and it is doing so by disrespecting its people.

In response to Devlin's arguments, Hart, asserted that when we talk of society's right to protect itself, it is imperative to know the kind of society we are talking about and the steps required for it to protect itself.<sup>299</sup> He advances that it is dangerous to accept the disintegration theory, as it seems to 'constitute a highly ambitious empirical generalisation about a necessary condition for the existence or continued existence of a society'.<sup>300</sup> He adds that apart from the general statement that 'history shows that the loosening of moral bonds is often the first stage of disintegration', Devlin has not put forward any evidence that supports his argument that society will disintegrate if private immorality goes unpunished.<sup>301</sup>

He critiques Devlin's definition of the term 'society' as a form or type of social life individualised by a certain morality or moral code. To this he responds by saying that, a 'society in the sense of form or type of social life can change, disappear or be succeeded by different forms of society without any phenomenon describable as disintegration or members drifting apart'.<sup>302</sup> He argues that Devlin fails to provide an empirical support for the claim that deviations from public morality will threaten society.<sup>303</sup> This study supports Hart's argument and, further, qualifies that culture is dynamic. Surely we do not accept to be stuck to the same beliefs, practices and values that were in place some 100 years ago. As such, we should ensure that we evolve with the time, to meet with modern demands.

As regards laws that purport to prevent sexual immorality, Hart adopted John Stuart Mill's harm principle to caution that 'power in the form of criminalisation could only be "rightfully" exercised over people in order to prevent harm to others'.<sup>304</sup> That is to say, private conduct which

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<sup>298</sup> Ibid.

<sup>299</sup> Barnard-Naudé 'Anti-homosexuality legislation in Africa: The Hart-Devlin debate revisited' *Mail & Guardian* 14 September 2014, available at <http://www.thoughtleader.co.za/jacobarnardnaude/2014/09/14/anti-homosexuality-legislation-in-africa-the-hart-devlin-debate-revisited/>, accessed on 29 June 2015.

<sup>300</sup> HLA Hart *Essays in Jurisprudence and Philosophy* (2001) 250.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid at 251.

<sup>303</sup> Ibid.

<sup>304</sup> Barnard-Naudé op cit note 299. Also see JM Elegido *Jurisprudence: A Textbook for Nigerian Students* (1994) 351. John Stuart Mill's argument is that 'while each of us has a good knowledge of his own interests, our knowledge of other people's interests consists mostly of generalities and it often ignores the special needs and concerns of specific individuals'. He further argues that the use of force for the 'purpose of self-protection can be justified for it is based

does not bring any harm to anyone, especially not people who are privy to it, should not be punishable by the law. This argument is analogous to the saying that ‘what one man does not know cannot hurt him’.

Hart continues to argue that the law’s interference with an individual’s freedom of choice when it comes to matters of sexuality could be seen as a unique form of suffering because suppressing sexual feelings could never be equated with any kind of criminal activity.<sup>305</sup> This argument is premised on the ground that it is the society’s role to ensure that the happiness and well-being of its members are met. Wherefore, interfering with individual’s sexual freedom, which is the root of one’s personal life and happiness in the name of enforcing morality is unjustifiable. This present study endorses the reasoning advanced by Hart, and concludes that, just as it was contended by the Wolfenden Committee, punishing homosexual conduct practised between consenting adults in private, is a double jeopardy to the people concerned. It is double jeopardy in the sense that, first, these people are already vulnerable because of continued discrimination and ostracism by the society, as they are deemed ‘abnormal and alien’ in their own country. Secondly, for the law to also discriminate against them is equivalent to adding fuel to the already burning fire. Homosexuals should be able to look up to the law for refuge. The last thing that they should have to expect is for that very law to shun them.

### 4.3. *Religion and homosexuality*

#### 4.3.1. *Freedom of religion in Botswana*

Religion is universally recognised as one of the fundamental and inalienable rights of a human being.<sup>306</sup> ‘It comprises a set of common beliefs and practices generally held by a group of people, codified as prayer, ritual, religious law as well as cultural and ancestral traditions and myths’.<sup>307</sup> It also has traces of ‘ancestral or cultural traditions, writings, history and mythology, as well as personal faith and mystic experience’.<sup>308</sup> In Botswana, freedom of religion is enshrined in the

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on reliable knowledge, but our ignorance of the details of the interests of others means that our interference with their conduct is likely to cause often negative results’.

<sup>305</sup> Ibid.

<sup>306</sup> Article 8, African Charter on Human and People’s Rights. It provides that ‘Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms’.

<sup>307</sup> EK Quansah ‘Law, religion and human rights in Botswana’ (2008) 8 *African Human Rights Law Journal* 486.

<sup>308</sup> Ibid.

Constitution<sup>309</sup> and this has contributed to a mushrooming of different religious beliefs in the country.<sup>310</sup> Botswana can thus be referred to as a ‘multi-religious’ state.

However, just like any other right, this right is not absolute. Section 11(5) provides for limitation to this right where it can be shown that it conflicts with national defence, public safety, public order, public morality, public health, or for the protection of the rights and freedoms of other people. Notwithstanding, the limitation has to be reasonably justifiable in a democratic society for it to be valid.<sup>311</sup>

It is worth noting that the Constitution of Botswana does not prioritise any religion over the other. That is to say, all religions represented in the country are equally important. This is notwithstanding the fact that during official gatherings, it is common knowledge that a prayer will be offered before the commencement of proceedings and that Christian holidays are officially observed.<sup>312</sup>

Against the backdrop of the constitutional protection of freedom of religion in Botswana, the important issue now to investigate is what the views of the religious people regarding homosexuality are.

#### 4.3.2. *Christianity and Homosexuality*

According to Quansah, the statutory observance and celebration of some Christian events in Botswana could be an indication that Botswana is a Christian state.<sup>313</sup> Whilst one writer has pointed out that the country has never been officially declared a Christian state, we can safely presume that it is one, looking at the number of people affiliating with Christianity.<sup>314</sup>

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<sup>309</sup> Section 11 of the Constitution provides that ‘except with his own consent, no person shall be hindered in the enjoyment of his or her freedom of conscience... freedom to change his or her religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his or her religion...’.

<sup>310</sup> It is estimated that about 8 worldly different religions are represented in Botswana. These include: Christianity, Islam, Sikhism, African Traditional Religion, Buddhism, Hinduism, Baha’i and Judaism. It is also estimated that about 70 percent of the population is affiliate with Christianity (Christian churches are divided into three categories: Pentecostal, Mission and Independent churches), 20 percent do not subscribe to any religion, and the remaining 10 percent is shared between other religions. The possibility of these statics having changed is very high because this information was gathered in 2007. (*Botswana: International Religious Freedom Report 2007* released by the United States of America Bureau of Democracy, Human Rights and Labour on 14 September 2007.) Quansah at footnote 26, op cit note 307.

<sup>311</sup> Proviso to section 11 (5) Constitution.

<sup>312</sup> This however, does not stop other religions from celebrating their important events.

<sup>313</sup> See the Public Holidays Act (Cap 03:07) and Government Notice 506 of 2007. Christian holidays observed and celebrated in Botswana include: Good Friday, Easter Monday, Ascension Day and Christmas day. See also footnote 68, Quansah op cit note 307.

<sup>314</sup> Percival J Mtetwa ‘Is Botswana a Christian nation?’ *Mmegi online* 12 April 2010 available at <http://www.mmegi.bw/index.php?sid=2&aid=1603&dir=2010/April/Monday12> accessed on 1 July 2015.

Christians in Botswana condemn homosexuality because they view it as an activity which is against the order of nature or God — unbiblical and unholy. Addressing a press conference in 2013, the president of Evangelical Fellowship of Botswana (EFB),<sup>315</sup> Master Matlhaope proclaimed that homosexuality disturbs the peace and tranquillity in the country and thus urged legislators to continue upholding public order by not legalising homosexuality and prostitution.<sup>316</sup> In the same article in which the above utterance was reported, one of the human rights advocates in the country, Uyapo Ndadi, criticised the church for discriminating against gays and lesbians, arguing that it [the church] had lost track of its role. He argued that the church should embrace gays and lesbians as sinners and not cast them away, because the church is a place for sinners, where they come to seek forgiveness of their sins.<sup>317</sup> He implored the nation of Botswana, including gays and lesbians, to recognise that human rights are inherent in every person, regardless of their race, colour, sexual orientation, etc.<sup>318</sup>

Pastor Emmanuel Ololwabi has, on the contrary, opined that God will never accept homosexuality and prostitution in Botswana because, the ‘two are not just abuse and sin against the human body, but also against God’<sup>319</sup> and that legislating to accept homosexuality will make both the legislator and the government accomplices to the sin. He said it is bad enough that some people are homosexuals in the country, but for them to request for a change in the laws to protect them is ‘very daring and insulting’.<sup>320</sup>

Be that as it may, one pastor, Reverend Rupert Hambira, who is also the head of Botswana Christian Council (BCC),<sup>321</sup> publicly defended gays and lesbians as children of God who also deserved acceptance in the community. He appealed to the government to consider relaxing the laws and tolerate gays and lesbians.<sup>322</sup> This, of course, came as a surprise to many, mainly because

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<sup>315</sup> An organisation made up of Pentecostal and Evangelical churches in Botswana which aims at impacting, uniting and empowering the nation with sound gospel of Jesus Christ and addressing the socio-economic needs of the nation.

<sup>316</sup> ‘Evangelical Fellowship of Botswana condemns homosexuality’ *Thevoicebw* 16 August 2013, available at <http://www.thevoicebw.com/2013/08/16/evangelical-fellowship-botswana-condemns-homosexuality/>, accessed on 1 July 2015.

<sup>317</sup> Ibid.

<sup>318</sup> Uyapo Ndadi ‘Church onslaught on gays regrettable’ *Mmegi online* 16 August 2013 available at <http://www.mmegi.bw/index.php?sid=1&aid=48&dir=2013/August/Friday16> accessed on 1 July 2015.

<sup>319</sup> ‘God will not allow homosexuality and prostitution in Botswana’ *Mmegi online* 18 November 2011, available at <http://www.mmegi.bw/index.php?sid=6&aid=28&dir=2011/November/Friday18>, accessed on 1 July 2015.

<sup>320</sup> Ibid.

<sup>321</sup> ‘Botswana debates the relaxation of anti-gay laws’ *Johannesburg Daily Mail & Guardian* 19 January 1999, available at <http://www.glapn.org/sodomylaws/world/botswana/bonews001.htm> accessed on 1 July 2015.

<sup>322</sup> Ibid.

Hambira is a Christian leader, but to others it brought hope that with politicians like him, the country could be steered in the right direction.

Elegido argues that ‘there is nothing wrong in trying to accommodate members of society who find it impossible or simply difficult to comply with some legal rules because of beliefs which they hold sincerely’.<sup>323</sup> He adds that a ‘readiness to adjust differences and to accommodate others as far as may be possible surely is a desirable trait of a society’.<sup>324</sup> In other words, it is neither an insult nor a disgrace as felt by some, for the government of Botswana to change its laws to accommodate gays and lesbians. It would rather be a move that shows tolerance and respect for the human rights of all its people.

It is the role of legislators to enact laws that will protect minorities from oppression by the majority.<sup>325</sup> The latter has the potential of tearing the nation apart. As Sachs J<sup>326</sup> correctly advises, it is constitutionally impermissible to use the religious beliefs of some people to decide on the constitutional rights of others.<sup>327</sup> He adds that in an open and democratic society which is guided by the Constitution, the role of the court is to ensure that arbitrary prejudice is outlawed.<sup>328</sup> He emphasises that the views of the majority can be harsh on the minorities and that in oppressive circumstances they can expect the courts to step in and shield the minority rather than assist their adversaries.<sup>329</sup> To balance majority and minority views the test should be ‘whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom’.<sup>330</sup>

#### 4.4. *Effects of homophobia on gays and lesbians*

It is important to acknowledge that homophobic attacks on gays and lesbians are rampant and that extremely negative effects, both emotionally and physically, accompany such attacks.<sup>331</sup> The consequences of these attacks last long after their actual occurrence. One study reveals that homosexuals compared to heterosexuals are highly likely to experience the following: mental

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<sup>323</sup> JM Elegido *Jurisprudence: Relations between Law and Morality, Justice and Religion* (1994) 371.

<sup>324</sup> *Ibid.*

<sup>325</sup> Ndadi op cit note 318.

<sup>326</sup> *Minister of Home Affairs v Fourie* supra note 239.

<sup>327</sup> *Ibid* at 560 para 92.

<sup>328</sup> *Ibid* at 561 para94.

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*

<sup>331</sup> Amanda Chatel ‘Homophobia and Its Horrifying Impact: 7 Good Reasons to End the Hate’ *Huffpost Gay Voices* 3 March 2014 available at [http://www.huffingtonpost.com/2014/03/03/homophobia-impact-\\_n\\_4889287.html](http://www.huffingtonpost.com/2014/03/03/homophobia-impact-_n_4889287.html) accessed on 2 July 2015.

illnesses,<sup>332</sup> short life expectancy, a higher risk of cardiovascular diseases, a higher likelihood to be victims of crime, a higher chance of becoming suicidal,<sup>333</sup> a higher possibility of the abuse of intoxicating substances<sup>334</sup> and difficulties in establishing long term relationships.<sup>335</sup>

In the *Second Coalition* case<sup>336</sup> the court cautioned that denying homosexuals the same inherent worth and dignity accorded to their heterosexual counterparts, is ‘deeply demeaning and frequently had the ability of destroying their confidence, self-worth and respect’.<sup>337</sup>

Another study revealed that India is likely to lose close to \$30.8 billion a year or 1.7 percent of its Gross Domestic Product (GDP) a result of homophobia.<sup>338</sup> These effects are quantified based of LGBTI social exclusion factors such as: imprisonment, job loss, harassment in schools or pressure to marry.<sup>339</sup>

In Botswana, empirical research has shown that failure by the government to include LGBTI people in the HIV/AIDS programme is a serious shortfall on its progress to fight the pandemic.<sup>340</sup> Statistically it is shown that of the 117 Botswana men who have sex with other men (MSM)<sup>341</sup>, ‘34 percent ... were married to females; ...54 percent of the males ... engaged in sexual activity with both males and females’.<sup>342</sup> These results are alarming to say the least. It is reported that the reason men gave for concealing this illicit behaviour is fear that their identity will be exposed and that they would face stigmatisation and violence from anti-gay people.<sup>343</sup> As a result

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<sup>332</sup> In Botswana, homosexual participants during a survey concerning their well-being reported emotional distress and depression. See Ehler, et al. ‘The well-being of gays, lesbians and bi-sexuals in Botswana. (2001) 35 (6) *Journal of Advanced Nursing* 848-856 at 852.

<sup>333</sup> Ibid. 14 out of the 42 participants (29.8 percent) reported that they have considered suicide at some stage in their lives, and 29.8 percent revealed that they continue to have suicide ideation.

<sup>334</sup> Empirical findings revealed that Botswana LGBTI evidenced a high prevalence rate of alcohol abuse; of the 42 participants, 30 (63.8 percent) reported drinking more than two drinks per day. See M Selemogwe & D White ‘An overview of gay, lesbian and bisexual issues in Botswana’ (2013) *Journal of Gay & Lesbian Mental Health* 17:4 406-414 at 409.

<sup>335</sup> In Botswana, a study carried out revealed that out of the six lesbian respondents, none of them had a desire to have children and start a family, while 16 out of 42 gay men were not sure.

<sup>336</sup> The *Second Coalition* case supra note 235

<sup>337</sup> Ibid at 28 para 42.

<sup>338</sup> Dominic Bocci ‘Quantifying the effects of homophobia’ Advocate.com 5 May 2014, available at <http://www.advocate.com/politics/2014/05/05/quantifying-effects-homophobia>, accessed on 2 July 2015.

<sup>339</sup> Ibid.

<sup>340</sup> M Selemogwe & D White ‘op cit note 334 at 408.

<sup>341</sup> Only 117 men participated in the empirical research because of difficulties in accessing a lot of them. See Stefan Baral et al. HIV prevalence, risks for HIV infection and the human rights among men who have sex with men (MSM) in Malawi, Namibia and Botswana (2009) *PLOS One* available at <http://dx.doi.org/10.1371/journal.pone.0004997> accessed on 18 September 2015.

<sup>342</sup> Selemogwe & White op cit note 334.

<sup>343</sup> Ibid.

of hiding their identity, their chances of positively embracing themselves is being diminished, which is detrimental to their psychological well-being.<sup>344</sup>

Ndadi warns that continuous hatred towards gays and lesbians in Botswana by homophobes will do no good. It will simply incite more violence, injustice and instability for a country that has for a long time maintained the ‘ideals of human rights and botho’.<sup>345</sup> As a result, this might, in the end, cause homophobic deaths, which is something that happened across the continent in countries like Cameroon,<sup>346</sup> South Africa<sup>347</sup> and Uganda.<sup>348</sup> This study rejects the brutal murder of innocent people for a worthless cause and appeals to the country to rise to the occasion to protect the lives of its people. As it turns out, it is the very continued criminalisation and persecution of homosexuality that is detrimental to the society’s well-being, rather than the homosexual conduct.

Reports indicate that homophobic bullying in youth can have serious repercussions in personal growth and self-esteem.<sup>349</sup> A survey conducted in 2008 in Canada revealed that LGBTI youth and adults experience homophobic bullying at higher rates in the form of sexual assault, robbery and physical assault, in fact three times higher than heterosexuals.<sup>350</sup> Students who have been subjected to harassment have had their school performance dropping and even abscond from school for fear of further abuse or victimisation.<sup>351</sup> A society that tolerates this abuse of a significant portion of its members and that does not criminalise such abuse (as opposed to the victims of this abuse) cannot be said to be conducting itself in a manner conducive to its well-being.

#### 4.5 Conclusion

It is an unquestionable fact that every legal system exists because of the legal rules and morals that govern its people, thereby enabling them to live in relative harmony together. The underlying principle behind this contention is that the law should enable different people to live amidst each other, despite the differences in beliefs or opinions that each might hold. It is thus one of the basic

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<sup>344</sup> Ibid.

<sup>345</sup> Ndadi op cit note 318.

<sup>346</sup> ‘1000s who died in anti-gay, anti-trans attacks (updates)’ *Erasing 76 Crimes* 7 July 2015, available at <http://76crimes.com/100s-die-in-homophobic-anti-gay-attacks-statistics-updates/>, accessed on 15 July 2015.

<sup>347</sup> Sunnive Brydum ‘Gay South African brutally murdered’ *Advocate.com* 31 March 2014, available at <http://www.advocate.com/world/2014/03/31/gay-south-african-brutally-murdered> accessed on 15 July 2015.

<sup>348</sup> Jeffrey Gettleman ‘Ugandan who spoke up for gays is beaten to death’ *The New York Times* 27 January 2011 available at [http://www.nytimes.com/2011/01/28/world/africa/28uganda.html?\\_r=0](http://www.nytimes.com/2011/01/28/world/africa/28uganda.html?_r=0), accessed on 15 July 2015.

<sup>349</sup> ‘Homophobic Bullying’ *NoBullying.com* 27 August 2014, available at <http://nobullying.com/homophobic-bullying/>, accessed on 13 July 2015.

<sup>350</sup> Ibid.

<sup>351</sup> UNESCO *Review of Homophobic Bullying in Educational Institutions* 12 March 2012, available at [http://www.coe.int/t/dg4/lgbt/Source/UNrevhomophbullying12032012\\_EN.pdf](http://www.coe.int/t/dg4/lgbt/Source/UNrevhomophbullying12032012_EN.pdf), accessed on 13 July 2015.

roles of a legal system to ensure that this elementary freedom is made available to its people and that they are actually enjoying it. However, forcing people to subscribe to beliefs to which they would otherwise not voluntarily subscribe to, or forcing them to curtail their intimate conduct on pain of legal punishment is tantamount to an inhuman and degrading treatment. For as long as what they do in private does not cause any harm to anyone, the law should not be permitted to interfere in the private lives of its subjects.

## Chapter five

### 5. CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 *Conclusions*

This study has argued that laws that prohibit gays and lesbians from freely expressing their feelings of affection for their loved ones, especially through sexual engagement with them, are violating their human rights and should thus be declared unconstitutional. In particular, reference was made to sections 164 and 167 of the Botswana Penal Code and it was suggested that they contravene sections 3, 9 and 15 of the Constitution.

Numerous studies have suggested that whilst not known as ‘homosexuality’, same-sex practice on the African continent is not new, nor is it an illness that requires medical attention or spiritual cleansing. Botswana is no exception in this regard. Therefore, to term homosexuality ‘un-African’ or ‘European’ is based on a mis-informed and prejudicial position.

Gays and lesbians, like heterosexuals, are human beings who should be accorded equal treatment by law, rather than be made by it to feel like they are less of a people or that they have committed a crime or sin because of their sexual orientation. It is not appropriate for the law to discriminate against persons on the basis that they are a minority. Rather, it should ensure that adequate measures are put in place to respect and protect the dignity of all people.

Botswana as a signatory to human rights treaties and conventions is obliged, like all member states, to adhere to the agreed principles aimed at promoting human rights. Although international calls have been made on Botswana to comply with all of these, it has failed to remedy the situation. More and more gays and lesbians, who are now coming out of the closet and accepting their identities, rely on the laws of the country to make it possible for them to be accepted by their families and the societies they belong to.

Although morality and religious beliefs have been used as a justification for denying gays and lesbians equal opportunity to freely express love to their loved ones, Chapter 4 has shown that while the two, law and morality, cannot be divorced from each other, the law should not be the instrument by way of which a perception about a dominant societal morality in relation to sexual conduct, is enforced. In as much as autonomy is by itself a moral value, the same goes for the belief that homosexuality is unnatural.<sup>352</sup> Yet there is an important difference between the legal

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<sup>352</sup>Simon Lee op cit note 297 at 16. The author here posits that liberalists demand the law to enforce their morality of liberalism, which is mainly about respecting people’s autonomy over their own sexuality and not condemning

protection of morality and its criminal proscription. The law should not be used to deny or renounce the right to privacy, but rather should be concentrated on making people's lives and surroundings safer to live in.

The same argument applies in relation to Christians who claim that homosexuality is a sin, hence that gays and lesbians should never be accepted by society because they are imperfect people. Christians should rather embrace homosexuals just like any other sinner. The Bible clearly tells us that man has sinned and has fallen short of the glory of God.<sup>353</sup> If all men have sinned, why then should the church choose one class of sinners and persecute them, instead of standing in solidarity with them?

## 5.2 Recommendations

African leaders have in a joint statement prior to the Vienna Conference of 1993 confirmed that 'the universal nature of human rights is beyond question; that their protection and promotion are the duty of all states, regardless of their political, economic or cultural systems.'<sup>354</sup> In light of this resolution, this paper suggests the following recommendations to address the shortfalls in the law in Botswana:

### 5.2.1 To the Judiciary

The judiciary is urged to interpret the Bill of Rights in a purposive manner to protect the rights of all persons, including sexual minorities, in cognisance of Botswana's international obligations as well as decisions of other courts in other jurisdictions. Courts should not favour the voice, interests or desires of what is perceived to be the majority over the minority. Both should be equal before the law and the law should thus extend equal treatment to them.

In South Africa, the Constitution mandates courts to interpret the law in a spirit that promotes the dignity, privacy, autonomy and worth of the people. This study proposes a constitutional reform to make it mandatory for the courts in Botswana to endorse a similar provision to the one provided for under the South African Constitution. Courts should always favour constitutional provisions that purport to promote the enjoyment of fundamental rights over those that limit it.

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homosexuality. Liberals see individual autonomy as the 'capacity to think and to act on one's reasoning, to determine the course of one's life by oneself'.

<sup>353</sup>See biblical scripture in *Romans 3 verse 23*.

<sup>354</sup>Final declaration of the regional meetings for Africa of the World Conference on Human Rights, in Report of the regional meeting for Africa of the World Conference on Human Rights, Tunis, 2-6 November 1992, UN Doc A/CONF.157/AFRM/14 (24 November 1992) quoted in M Killiander 'African human rights law in theory and practice' in S Joseph & A Mc Beth *Research Handbook on International Human Rights Law* (2010).

Any provision that aims at defeating the value of human worth should be declared unconstitutional. As a result of the arguments which have been advanced in this study, supported by research, it is recommended that the courts should declare sections 164 and 167 of the Penal Code to be inconsistent with sections 3, 9 and 15 of the Constitution. The argument that homosexuality is against the culture and morals of Botswana should be abandoned and give way to human dignity, autonomy, liberty and privacy. Culture on its own is a concept that evolves with time, so it is time Botswana embrace the idea of living with homosexuals. The law can be ‘a great teacher’ in this respect.<sup>355</sup>

The rule of law and constitutional supremacy implies that the judiciary is the custodian of the law, so when the people’s rights are infringed, even by the executive or legislature, it is the responsibility of the judiciary to step in to protect those rights. Therefore, it is very important for the judiciary to be impartial and not pander to the whims of the majority in society. While it is significant to listen to the views of the majority, they should not be used as justification for trampling on the rights and freedoms of the minority.

#### *5.2.2 To the government*

Homosexuality is the least of crimes or challenges that Botswana is currently faced with. The government should rather focus on the escalating rate of corruption that is crippling the country’s economy and disadvantaging its citizens and come up with strategies of how best to uproot it. Diseases such as HIV/AIDS are still growing despite the efforts to combat them, so government should devote its resources to finding alternative measures to eradicate its adverse effects. The country is faced with a high rate of unemployment, especially of the youth, which has resulted in poverty, an increased crime rate and many other social ills. Instead of fighting so hard to frustrate homosexuals, the government should rather engage with them to fight these challenges.

Politicians must be made aware of the importance of respecting and promoting the rights of its people and adhering to international obligations. This is particularly necessary because of the influential power politicians hold as law makers. Just like the judiciary, they should know that they are in Parliament to represent the interests of all people because it is the people who have voted for them, including the very homosexuals that they are mistreating.

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<sup>355</sup> *Minister of Home Affairs v Fourie* supra note 239 at 556 para 78.

The Penal Code is a colonial relic which has been inherited from Britain, and is deeply inflected by religious dogma. Time has evolved to the extent that those religious beliefs have outlived their usefulness. The Code should be brought into alignment with current global developments.

Botswana is once more reminded that it needs to adhere to its international obligations that have arisen out of signing and ratifying treaties and conventions.

A review of the Constitution has so far been deemed as necessary and decried by many. This study calls on the government to consider reviewing the Constitution and nullifying those provisions which are inconsistent with current living patterns and lifestyles. At the time of review, it would be prudent to engage in a form of Public Participation Programme such as that adopted by the South African government during the drafting of its ground-breaking Constitution. It is very important to involve the people in decisions such as constitutional review, so that they are made to feel their part in the governing process. This will bear positive results during implementation as opposition and negative criticism will be minimised.

The government should aim at supporting all its citizens by providing amenities such as health care and emotional support facilities to help those homosexuals and their families who find it hard to accept their identities and who continue to be victimised.

The government should undertake to support all educational campaigns which will be embarked on to try to sensitise the public on issues pertaining to homosexuality, learning to accept sexual minorities as full and complete members of their societies.

The government should not turn a blind eye to the fact that men who sleep with other men while still married to their wives is a prevalent phenomenon in prisons. Prevention materials like condoms should be distributed in prisons to be accessed by all prisoners.

### *5.2.3 To NGO's, and civil societies*

Organisations like Ditshwanelo, BONELA and LEGABIBO that are lobbying for the promotion of sexual rights are commended for the good work they have done thus far. It would be important for these organisation to maintain momentum and never allow the government's negative response to kill their voice. The LGBTI community is looking up to them to be their voice in engagement with the government and at international level.

Churches are challenged to be in the forefront of accepting gays and lesbians. In its Resolution 1.10 (d) Anglican bishops worldwide, at its meeting in Lambeth Palace, have cautioned that '[w]hile rejecting homosexual practice as incompatible with scripture, [it] calls on all our people to minister pastorally and sensitively to all irrespective of sexual orientation and to condemn irrational fear of homosexuals....<sup>356</sup> In other words, it is the duty of the church to love and embrace all members of the community regardless of their sexual orientation.

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<sup>356</sup>JM Dyer *The Official Report of the Lambeth Conference* (1999) 381.

## Bibliography

### Primary sources

#### Cases

##### Australia

*Toonen v Australia* Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

##### Botswana

*Agnes Bojang v The State* 1994 BLR 146.

*Ahmed v Attorney General* 2002 (2) BLR 431 (HC).

*Attorney General v Dow* 1992 BLR 119 (CA).

*Diau v Botswana Building Society* 2003 (2) BLR 409.

*Dow v Attorney General* 1991 BLR 233 (HC).

*Kanane v The State* 2003 (2) BLR 67 (CA).

*Mmusi and Others v Attorney General* (BLR) unreported case no. MAHLB-00083-10 of October 2012.

*Molefi Ramantele v Mmusi and others* (BLR) unreported case no CACGB-104-12 of September 2013, available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/Mmusi-Court-of-Appeal-Judgment.pdf> accessed 10 September 2015.

*Petrus and Another v The State* 1984 BLR 14.

*Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* 1996 BLR 190.

*Student Representative Council of Molepolole College of Education v Attorney General* 1994 BLR 178.

*Thuto Rammoge & 19 others v Attorney General* (BLR) unreported case no MAHGB-000175-13 of 14 November 2014.

*Tsodilo Services (Pty) Ltd t/a Sunday Standard and Others v Tibone* 2011 (2) BLR 494 (CA).

##### Nigeria

*Rafiu Rabiu v State* (1981) 2 N.C.L.R 293.

## South Africa

*Bernstein and others v Bester and others* NNO 1996 (2) SA 751 (CC).

*Farr v Mutual Federal Insurance Company Ltd* 2000 (3) SA 684 (C).

*Hoffmann v South African Airways* 2001 SA 1 (CC).

*Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T).

*Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

*National Coalition for Gay and Lesbian v Minister of Justice and others* 1998 (2) SACR 102 (W).

*National Coalition for Gay and Lesbian v Minister of Justice and others* 1999 (1) SA 6 (CC).

*National Coalition for Gay and Lesbian v Minister of Justice and others* 2000 (2) SA 1 (CC).

*S v K* 1997 (4) SA 469 (C).

*S v Makwanyane & another* 1995 (3) SA 391 (CC).

*Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC).

*Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and another* 2014 (1) SACR 327 (CC).

## United Kingdom

*Handyside v United Kingdom* 1976 (1) EHRR 737.

## Zimbabwe

*Banana A v State* 2000 (4) LRC 621 (ZSC).

*Chavanduka and anor v Minister of Home Affairs* 2000 (4) ZS.

## Statutes

## Botswana

Citizenship Act (Cap 01:01).

Constitution of Botswana.

Criminal Procedure and Evidence Act (Cap 08:02).

Employment (Amendment) Act of 2010.

Interpretation Act (Cap 01:04).

Penal Code (Cap 08:01).

Public Holidays Act (Cap 03:07).

Societies Act (Cap 18:01).

South Africa

Civil Union Act 17 of 2006.

Constitution of the Republic of South Africa, 1996.

Immorality (Amendment) Act No 21 of 1950.

Marriage Act No 25 of 1961.

Medical Schemes Act No 131 of 1998.

Sexual Offences Act No 23 of 1957.

United Kingdom

Decriminalisation of Homosexual Acts, 1967.

Secondary Sources

Ako, E Yaw *The Debate on Sexual Minority Rights in Africa: A Comparative Analysis of the Situation in South Africa, Uganda, Malawi and Botswana* (unpublished LLM Thesis, University of Western Cape 2010).

Anonymous 'Botswana debates the relaxation of anti-gay laws' *Johannesburg Daily Mail & Guardian* 19 January 1999 available at <http://www.glapn.org/sodomylaws/world/botswana/bonews001.htm> accessed on 1 July 2015.

Anonymous 'God will not allow Homosexuality and Prostitution in Botswana' Mmegi online 18 November 2011, available at <http://www.mmegi.bw/index.php?sid=6&aid=28&dir=2011/November/Friday18>, accessed 1 July 2015. Anonymous 'Homophobic Bullying' *NoBullying.com* 27 August 2014 available at <http://nobullying.com/homophobic-bullying/> accessed on 13 July 2015.

Anonymous 'Rule of Law in Armed Conflict Projects' available at [http://www.geneva-academy.ch/RULAC/regional\\_treaties.php?id\\_state=33](http://www.geneva-academy.ch/RULAC/regional_treaties.php?id_state=33) accessed 15 July 2015.

Anonymous 'What does it mean to "legislate morality"?' *Freethought Blogs.com*, available at [freethoughtlogs.com/axp/2011/11/07/what-does-it-mean-to-legislate-morality/](http://freethoughtlogs.com/axp/2011/11/07/what-does-it-mean-to-legislate-morality/) accessed on 29 June 2015.

Anonymous 'Woman killed for being a lesbian-report news 24 18 August 2014 available at <http://www.news24.com/SouthAfrica/News/Woman-killed-for-being-a-lesbian-report-20140818>, accessed on 5 August 2015. Anonymous '1000s who died in anti-gay, anti-trans attacks (updates)' *Erasing 76 Crimes* 7 July 2015 available at <http://76crimes.com/100s-die-in-homophobic-anti-gay-attacks-statistics-updates/> accessed on 15 July 2015.

Arc International 3<sup>rd</sup> UPR Session, available at [arc.international.net/global/-advocacy/universal-periodic.../b/Botswana.accessed](http://arc.international.net/global/-advocacy/universal-periodic.../b/Botswana.accessed) 12 March 2015.

Baral, S., Trapence, G., Motimedi, F., Umar, E., Ipinge, S., Dausab, F., & Beyrer, C. (2009). HIV prevalence, risks for HIV infection and the human rights among men who have sex with men (MSM) in Malawi, Namibia, and Botswana. *PloS ONE*, 4(3), available at <http://dx.doi.org/10.1371/journal.pone.0004997> accessed on 18 September 2015.

Barnard -Naudé, Jaco 'Anti-homosexuality legislation in Africa: The Hart-Devlin debate revisited' *Mail & Guardian* 14 September 2014, available at <http://www.thoughtleader.co.za/jacobarnardnaude/2014/09/14/anti-homosexuality-legislation-in-africa-the-hart-devlin-debate-revisited/> accessed 29 June 2015.

Barnard-Naudé, Jaco 'The politics of private law: Sexual minority freedom in South Africa and Scotland' in E Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) Edinburgh University Press, Edinburgh.

Barnard-Naudé, Jaco 'Sexual minority freedom and the heteronormative hegemony in South Africa' in Baxi, Vilhenja & Viljoen *Courting Justice: Brazil-India-South Africa: Comparing the Jurisprudence of the Apex Courts of Brazil, South Africa and India* (2013).

Baxter, Hugh 'Dworkins "one-system" conception of law and morality' 90 *Boston University Law Review* 857.

Blom-Cooper, L & Gavin Drewry (eds) *Law and Morality* (1976) Duckworth London.

Bocci Dominic, 'Quantifying the Effects of Homophobia' Advocate.com 5 May 2014 available at <http://www.advocate.com/politics/2014/05/05/quantifying-effects-homophobia> accessed on 2 July 2015.

Bojosi, K 'An opportunity missed for gay rights in Botswana: *Utjiwa Kanane v The State*' (2004) 20 SAHRJ 466.

Booi, L & CM Fombad 'Update: Botswana legal system and legal research', available at [www.nyulawglobal.org/globalex/Botswana1](http://www.nyulawglobal.org/globalex/Botswana1) accessed 3 March 2015.

Brydum, Sunnivie, 'Gay South African brutally murdered' Advocate.com 31 March 2014 available at <http://www.advocate.com/world/2014/03/31/gay-south-african-brutally-murdered> accessed on 15 July 2015.

Cameron, E 'Unapprehended felons: Gays and lesbians and the law in South Africa' in M Gevisser & E Cameron (eds) *Defiant Desire* (1995). Routledge, New York.

Chatel, Amanda, 'Homophobia and its horrifying impact: 7 good reasons to end the hate' *Huffpost Gay Voices* 3 March 2014 available at [http://www.huffingtonpost.com/2014/03/03/homophobia-impact-\\_n\\_4889287.html](http://www.huffingtonpost.com/2014/03/03/homophobia-impact-_n_4889287.html) accessed on 2 July 2015.

Chilisa, MM 'Two steps back for human rights: A critiques of the Kanane case' in Christine Stegling (ed) *The Botswana Review of Ethics, Law and HIV/AIDS* (2007).

Christiansen, EC 'Ending the apartheid from the closet: Sexual orientation in the South African constitutional process' (1997) 32 *International Law and Politics* 997-1058.

Claiming Human Rights 'When human rights are violated in Africa...', available at [www.claiminghumanrights.org/botswana](http://www.claiminghumanrights.org/botswana), accessed 19 March 2015.

Cock, Jacklyn 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' (2003) 26 *Women's Studies International Forum* 35-43.

Croucher, S 'South Africa's democratisation and the politics of gay liberation' (2002) 28 *Journal of South African Studies* 315-330.

De Ru, H 'A historical perspective on the recognition of same-sex unions' (2013) 19 *Fundamina* 21-220.

De Vos, P & Jaco Barnard 'Same-sex marriage, civil unions and domestic partnership in South Africa: Critical reflections on an ongoing saga' (2006) 124 *SALJ* 795.

De Vos, P 'On the legal construction of gay and lesbian identity and South Africa's traditional Constitution' (1996) 12 *SAJHR* 265.

De Vos, P 'The inevitability of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *SAJHR* 432-465.

Devlin, Patrick *The Enforcement of Morals* (1965) Oxford University Press, Oxford; New York.

Dingake, BKO 'The role of the judiciary and the legal profession in protecting the rights of vulnerable groups of people in Botswana', *Southern African Litigation Centre*, 3 March 2014, available at [http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/3\\_](http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/3_) accessed 23 March 2015.

Dworkin, Ronald 'Lord Devlin and the enforcement of morals' (1996) *The Yale Law Journal* 75.

Dyer JM *The Official Report of the Lambeth Conference* (1999) Morehouse London.

Ehlers, V. J., Zuyderduin, A., & Oosthuizen, M. J. The well-being of gays, lesbians and bisexuals in Botswana. (2001) 35 (6) *Journal of Advanced Nursing*, 848-856.

Elegido, JM *Jurisprudence: A Textbook for Nigerian Students* (1994) 351

Els, CJ & WJ Van Vollenhoven 'The human rights paradox of gays, lesbians, bi-sexuals and transgendered students in South African education' (2013) 46 *De Jure* 263-284.

Emmanuel Quansah 'Law, religion and human rights in Botswana' (2008) 8 *AHRLJ* 486.

Evangelical Fellowship of Botswana Condemns Homosexuality' *Thevoicebw* 16 August 2013, available at <http://www.thevoicebw.com/2013/08/16/evangelical-fellowship-botswana-condemns-homosexuality/>, accessed 1 July 2015.

Fombad, CM *Essays on the Law of Botswana* (2007) Juta, Cape Town South Africa.

Francoeur, RT & RJ Noonan (eds) *The Continuum Complete International Encyclopaedia of Sexuality*, available at [http://books.google.com/books/about/The\\_Continuum\\_Complete\\_International\\_Enc\\_](http://books.google.com/books/about/The_Continuum_Complete_International_Enc_) accessed 12 March 2015.

Gettleman Jeffrey, 'Ugandan Who Spoke Up for Gays Is Beaten to Death' *The New York Times* 27 January 2011 available at [http://www.nytimes.com/2011/01/28/world/africa/28uganda.html?\\_r=0](http://www.nytimes.com/2011/01/28/world/africa/28uganda.html?_r=0) accessed on 15 July 2015.

Gevisser, M 'A different fight for freedom: A history of South African lesbian and gay organisation from the 1980s to the 1990s' in M Gevisser & E Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995) Routledge, New York.

Graham, Stuart 'Gay community still facing many challenges' *IOL* March 11 2004, available at <http://www.iol.co.za/news/south-africa/gay-community-still-facing-many-challenges-1.207527?ot=inmsa.ArticlePrintPageLayout.ot> accessed on 25 June 2015.

Hart, HLA *Essays in Jurisprudence and Philosophy* (2001) Clarendon Press Oxford; Oxford University Press New York.

Hart, HLA 'Immorality and treason: The Listener (July 30 1959)' Reprinted in Wasserstrom, Richard A. (ed). *Morality and the Law*. Belmont, CA: Wadsworth Publishing, 1971.

Hart, Hart 'Social solidarity and the enforcement of morality' (1967) 35 *The University of Chicago Law Review* 1-13.

Hart, HLA *The Concept of Law* (1961) Clarendon Press Oxford.

Hart-Devlin debate, available at [http://sixthformlaw.info/01\\_modules/other\\_material/law\\_and\\_morality/08\\_hart\\_devlin.htm](http://sixthformlaw.info/01_modules/other_material/law_and_morality/08_hart_devlin.htm), accessed on 20 May 2015.

Hoad, Neville Karen Martin & Graeme Reid (eds) *Sex and Politics in South Africa* (2005) Juta Cape Town.

J Mtetwa, Percival 'Is Botswana a Christian nation?' *Mmegi online* 12 April 2010 available at <http://www.mmegi.bw/index.php?sid=2&aid=1603&dir=2010/April/Monday12/>, accessed on 1 July 2015.

Jivan, Usha 'From individual protection to recognition of relationships: Same-sex couples and the South African experience of sexual orientation reform' (2007) 11 *Law, Democracy & Development* 19.

Joshua, Cohen 'For a democratic society' in Samuel Richard Freeman (ed) *The Cambridge Companion to Rawls* (2003) Cambridge University Press Cambridge; New York.

Keorapetse, D 'Botswana: Gay rights are human rights' *Africaveil.com*, 7 March 2012, available at [http://africanveil.com/index.php?option=com\\_content&view=article&id=883:botswana-gay-rights-are-human-rights&catid=88&Itemid=509&lang=en](http://africanveil.com/index.php?option=com_content&view=article&id=883:botswana-gay-rights-are-human-rights&catid=88&Itemid=509&lang=en), accessed on 12 May 2015.

Killiander, Magnus (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) Pretoria University Law Press.

Lee, Simon *Law and Morality: Warnock, Gillick and Beyond* (1986) New York Oxford University Press.

Limpitlaw, J *Media Law and Handbook for Southern Africa* (2012) 93.

Louw, R 'Sexual orientation' (1997) 8 *South African Human Rights Yearbook* 245.

Mavedzenge, AJ & DJ Coltart *A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-Economic and Cultural Human Rights* (2014) The Design House, Zimbabwe.

Michelman Frank 'Law's republic' (1988) 97 *The Yale Law Journal* 1493.

Moipolai, T 'Report on Conference on Constitutional Reforms in Botswana. The Constitution of Botswana; is it time for reform?' *The Law Society of Botswana* 6 June 2012, available at <http://www.lawsociety.org.bw/news/REPORT%20-CONFERENCEONCONSTITUTIONALREFORMSINBOTSWANAMAY2012%28F%29.pdf>, accessed on 16 March 2015.

Motlhagodi, A 'Review of Botswana's Constitution long overdue' *Sunday Standard* 5 November 2012, available at <http://www.sundaystandard.info/article.php/email.php?NewsID=15477>, accessed on 27 July 2015.

Murray, Rachel & Frans Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86.

Ndadi, Uyapo 'Church onslaught on gays regrettable' *Mmegi online* 16 August 2013, available at <http://www.mmegi.bw/index.php?sid=1&aid=48&dir=2013/August/Friday16>, accessed on 1 July 2015.

Nkoli, S 'Wardrobe: Coming out as a black gay activist in South Africa' in M Gevisser & E Cameron (eds) *Defiant Desire: Gay and lesbian lives in South Africa* (1995) Routledge, New York.

Norrie, K Mck 'Marriage and civil partnerships for same-sex couples: The international imperative' (2005) *Journal of International Law and International Relations* 249.

Odunsi, B 'A need to re-examine the voice of the people? Reflections on the interplay of homophobia and the HIV/AIDS pandemic in Botswana' in Christine Stegling (ed) *The Botswana Review of Ethics, Law and HIV/AIDS* (2007).

Quansah, Emmanuel 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2002) 4 *AHRLJ* 216.

Quansah, Emmanuel 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2002) 4 *AHRLJ* 216.

Reddy, Vasus 'Decriminalisation of homosexuality in post-apartheid South Africa: a brief legal case history review from sodomy to marriage' (2006) 67 *Agenda: Empowering Women for Equity* 146.

Reuters 'Supreme Court Rules in Favour of Gay Marriage' *SABC News* 26 June 2015 available at <http://www.sabc.co.za/news/a/5b66238048e35a769ee6fe95551cf013/Supreme-Court-rules-in-favour-of-gay-marriage-nationwide-20152606> accessed on 9 July 2015.

'Review of Homophobic Bullying in Educational Institutions' *UNESCO* 12 March 2012 available at [http://www.coe.int/t/dg4/lgbt/Source/UNrevhomophobicbullying12032012\\_EN.pdf](http://www.coe.int/t/dg4/lgbt/Source/UNrevhomophobicbullying12032012_EN.pdf) accessed on 13 July 2015.

Roberts, Benjamin & Vasu Rendy 'Pride and prejudice: public attitudes towards homosexuality' (2008) *HRSC Review* 6 (4) 9.

SAPA 'Botswana appeal gay rights group ruling', *Iol News*, 19 January 2015, available at <http://www.iol.co.za/news/africa/botswana-to-appeal-gay-rights-group-ruling-1.1806437>, accessed on 23 March 2015.

Selemogwe, M & D White 'An overview of gay, lesbian and bisexual issues in Botswana' (2013) 17 (4) *Journal of Gay, Lesbian Mental Health* 406.

Setsiba, T 'Botswana Gays rejoice RSA victory' *Mmegi* 21 November 2006, available at <http://www.mmegi.bw/2006/November/Tuesday21/247920822741.html>, accessed on 9 May 2015.

Shavell, Stephen 'Law versus morality as regulators of conduct' (2002) 4 (2) *American Law and Economics Review* 227.

Smith, Lydia 'Corrective rape: The homophobic fallout of post-apartheid South Africa' *The Telegraph* 21 May 2015, available at <http://www.telegraph.co.uk/women/womens-life/11608361/Corrective-rape-The-homophobic-fallout-of-post-apartheid-South-Africa.html> accessed on 25 June 2015.

Stewart, C 'Botswana chiefs: Homosexuality has always been here' *Erasing 76 crimes*, 26 July 2013, available at <http://76crimes.com/2013/07/26/botswana/>, accessed on 3 March 2015.

Stewart, C 'Botswana again rejects LGBT anti-AIDS group', *Mamba Online*, 2 May 2012, available at <http://76crimes.com/2012/05/02/botswana-again-rejects-lgbt-anti-aids-group/>, accessed on 2 May 2015.

Stynchin, CF 'Constituting sexuality: the struggle for sexual orientation in the South African Bill of Rights' (1999) 23 *Journal of Law and Society* 455.

Tabengwa, M & N Nicol 'The development of sexual rights and the LGBT movement in Botswana' in C Lennox & M Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (2013) Human Rights Consortium, Institute of Commonwealth Studies London.

Taboola 'Botswana MP says he hates gays and lesbians' *Pink News*, 11 February 2011, available at <http://www.pinknews.co.uk/2011/02/11/botswana-mp-says-he-hates-gays-and-lesbians/> accessed 23 March 2015.

Toms, Ivan 'Ivan Toms is a fairy' in M Gevisser & E Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995) Routledge, New York.

Tshosa, O *National Law and International Human Rights: Cases of Botswana, Namibia and Zimbabwe* (2001) Ashgate/Dartmouth Aldershot.

UNESCO 'Review of Homophobic Bullying in Educational Institutions' 12 March 2012, available at [http://www.coe.int/t/dg4/lgbt/Source/UNrevhomophbullying12032012\\_EN.pdf](http://www.coe.int/t/dg4/lgbt/Source/UNrevhomophbullying12032012_EN.pdf), accessed on 13 July 2015.

UNHCR 'Botswana: Treatment of homosexuals by society and the government; legal recourse and protection available to homosexuals who have been subject to ill-treatment (2003-2006)' *Ref World*, 9 March 2007, available at <http://www.refworld.org/docid/4fa5382c.html>, accessed on 12 March 2015.

Viljoen, Frans & Precious Susan (Eds) *Human Rights Protected? Nine Southern African Country Reports on HIV/AIDS, and the Law* (2007) Pretoria, University Law Press Pretoria.