

Criminalisation of Homosexuality

Updated 25 October 2015

Botswana	
	
<p>National Law:</p> <p><i>Penal Code 1964, Chapter 08:01, as amended by the Penal Code (Amendment) Act 5 of 1998¹</i></p> <ul style="list-style-type: none"> - S164: Unnatural Offences² - S165: Attempt to commit Unnatural Offences³ - S167: Indecent practices between persons⁴ 	<p>Maximum Penalties:</p> <ul style="list-style-type: none"> - 7 years' imprisonment - 5 years' imprisonment - 2 years' imprisonment or a fine (or both)
<p><u>Treaty Ratification</u></p> <p>AFRICAN CHARTER⁵</p> <p>CAT⁶</p> <p>CEDAW</p> <p>CEDAW OP⁷</p> <p>CRC</p> <p>ICCPR</p>	
<p>The law applies to both men and women.⁸</p>	
<p>Status of International Law</p>	<ul style="list-style-type: none"> - Botswana is a dualist legal system.⁹ - International treaties that Botswana has ratified do not automatically apply. However, according to <i>Attorney General v Unity Dow</i>,¹⁰ international law must be used in the interpretation of the law and legislation must be interpreted in a manner which does not conflict with the international obligations Botswana has undertaken.
<p>Enforcement</p>	<ul style="list-style-type: none"> - 31 March 2014: A member of LeGaBiBo, an LGBTI organisation working in Botswana, explained the effect of the lack of prosecutions: <i>... one has to use a magnifying glass to read between the lines because it remains unclear whether homosexuality is illegal in our country or not. As a result, many homosexuals hide their feelings, justifying this by saying that the LGBT community is lucky and that they should be grateful that Botswana is not too extreme. They don't want to complain about unfair treatment.</i>¹¹ - 9 April 2014: The Immigration and Refugee Board of Canada highlighted two 2014 cases where individuals were subject to arrest under the country's anti-gay laws. The first was dismissed due to insufficient evidence and the second involved non-consensual sex.¹² - 2014: The US Country Report on Human Rights Practices suggests that police do not actively target gay people on the basis of their sexual activity.¹³ - The last reported case on Botswana's anti-gay legal provisions was in 2003 where the

	<p>Court found:</p> <p><i>no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required a decriminalization of those practices, even to the extent of consensual acts by adult males in private.</i>¹⁴</p> <ul style="list-style-type: none"> - Since the <i>Kanane v. The State</i> BLR 2003 decision there have been no further prosecutions for engaging in same-sex sexual conduct.¹⁵
<p>Statements by Public Figures</p>	<ul style="list-style-type: none"> - 8 May 2014: After stepping down from office, Botswana's ex-President Festus Mogae has openly called for decriminalisation of homosexuality as a means of combating HIV/AIDS: <p><i>We do not give a damn about how they got infected. We have to give them treatment. The reason why I call upon police not to harass sex workers is because that has the potential to deny them access to treatment and prevention of HIV infection and interventions.</i>¹⁶</p> - 20 August 2013: the National Assembly and the National AIDS Council held open debates on homosexuality. The National AIDS Council which consists of the Vice-President, the Minister of Presidential Affairs and Public Administration, the Chairman of Ntlo ya Dikgosi (House of Chiefs), among other prominent office-bearers, discussed the outcome of a report submitted by the Ministry of Health. The findings of the Ministry of Health's study reportedly accepted the existence and reality of homosexuality in the country; an existence which had previously been denied. It was reported that the study will be analysed and aligned with laws, policies and other issues and a policy brief will be presented to the next National AIDS Council meeting in November. - 14 August 2013: Reverend Orebotse Matlhaope, president of the Evangelical Fellowship of Botswana, warned against legislation that would protect gay rights: <i>Apart from encouraging sexual deviation and depravity, we do not see how homosexuality, if decriminalised and recognised, can add value to our existence as a nation.</i>¹⁷ - 17 March 2011: Current President Ian Khama has reportedly stated that gays are 'fine by him' so long as they 'do their things' where nobody can see them.¹⁸ - 11 February 2011: Pono Moatlhodi, deputy speaker of the Botswana National Assembly, reportedly told a meeting on HIV prevention that gay people should be killed: <p><i>On this point I would agree with Zimbabwean President Robert Mugabe who once described that behaviour as that of western dogs; I don't like those gay people and will never tolerate them. They are demonic and evil ... When there are so many</i></p>

	<p><i>women in this country, why would anyone choose to have sex with another man? The Bible does not agree with such a thing and therefore it is evil; if we give prisoners condoms, are we now saying they are free?</i>¹⁹</p>
<p>Persecution and Discrimination</p>	<ul style="list-style-type: none"> - 14 November 2014: the Gaborone High Court delivered a landmark judgment overturning the Department of Labour and Home Affairs' refusal to register the organisation Lesbians, Gays and Bisexuals of Botswana (LEGABIBO).²⁰ The case was brought by 20 individuals who argued that the refusal to register their organisation violated their constitutional rights, including their rights to freedom of association, freedom of expression, and equal protection of the law. The Botswana government had consistently refused to provide registration for the LGBTI organisation LeGaBiBo on the grounds that it '<i>promoted an illegal activity</i>'. The High Court held that this was unconstitutional. The judgment in the High Court did not address the prohibition on same-sex sexual conduct. The decision is being appealed.²¹ - 2014: The US Country report recorded no reports police-targeted persons suspected of same-sex sexual activity, however, civil society organisations claimed there were instances of violence, societal harassment and discrimination based on sexual orientation or gender identity.²² - A number of reports highlighted high levels of societal discrimination and unease with sexual minority issues.
<p>Legislative News</p>	<ul style="list-style-type: none"> - June 2015: The Botswana government and the National AIDS Coordinating Agency (NACA) are considering introducing a policy that will allow the distribution of condoms in prisons. The government had previously refused to distribute condoms to prisoners as a means to fight the spread of HIV and AIDs.²³ - May 2015: The acting Permanent Secretary in the Ministry of Health, Tebogo Banamile, revealed that some international donors had withdrawn their financial aid to Botswana because of the country's anti-homosexuality laws.²⁴ - 24 March 2015: Voted in favour of a failed Russian draft decision at the UN General Assembly's Fifth Committee (Administrative and Budgetary) that would have had the Secretary-General withdraw his bulletin laying out UN staff benefits for same-sex couples.²⁵ - March 2015: The British High Commission in Gaborone is providing financial support to the Botswana Network of Ethics, Law and HIV/AIDS (BONELA) and the Lesbians, Gays and Bisexuals of Botswana to conduct a policy dialogue to create awareness among policy makers on issues of sexual orientation and gender identity.²⁶ - September 2014: The UN Human Rights Council passed a resolution condemning

	<p>violence and discrimination based on sexual orientation and gender identity. Botswana opposed the resolution.²⁷</p> <ul style="list-style-type: none"> - 17 June 2014: Botswana backed an African Commission resolution on protecting sexual and gendered minorities from violence: <p style="margin-left: 40px;"><i>We join the High Commissioner in welcoming the call last month by the African Commission on Human and Peoples Rights, at its 55th Session, for States to take steps to protect persons from human rights violations on the basis of sexual orientation and gender identity.</i>²⁸</p> - 2009, 2013: (UPR) Botswana has undergone two cycles and rejected recommendations to decriminalise at both instances.²⁹ In 2013, Botswana considered further recommendations to: (i) take steps to implement comprehensive anti-discrimination laws, particularly to eliminate discrimination on the basis of sexual orientation (Australia); and (ii) engage in a dialogue to repeal laws which criminalize consensual adult same sex relations (Canada). Ultimately, these recommendations were also rejected by Botswana. The delegation noted that <p style="margin-left: 40px;"><i>Botswana does not accept the recommendation. Botswana, as a predominantly Christian nation, has not reached a stage in which she can accept same sex activities. It will be necessary to conduct educational campaigns on this issue so that when the laws are changed people will be carried along.</i>³⁰</p> - While stressing the democratic process, however, Botswana noted the role of civil society in educating the people and in advocating for change on the issue of the criminalisation of homosexual activities. It repeated its openness towards organisations advocating for the issue. - 9 September 2010 – The Botswana government passed an amendment to its Employment Act (1983)³¹ that prohibits the termination of contracts of employment based on an individual's sexual orientation, or health status (including HIV/AIDs status).³²
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¹ The text of the law is : www.wipo.int/wipolex/en/details.jsp?id=10486.

² Penal Code, Chapter 08:01, s164: 'Any person who- (a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of an animal; or (c) permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.'

³ Penal Code, Chapter 08:01, s165: 'Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years.'

⁴ Penal Code, Chapter 08:01, s167: 'Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or private, is guilty of an offence.' Per s33: 'When in this Code no punishment is specially

provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.'

⁵ Botswana has signed but not ratified Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

⁶ Accepted inquiry procedure under Article 20.

⁷ Acceptance of individual complaints and inquiry procedure.

⁸ In 1998 a review of all the laws affecting the status of women was undertaken by the government with a view to making those laws gender neutral, particularly those relating to sexual offences. As part of this review process, penal provisions relating to same-sex conduct, which had originally criminalized sexual conduct between male persons, were subsequently replaced with gender-neutral provisions to include sexual conduct between women (see. Lennox, C. and Waites, M. (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (Institute of Commonwealth Studies, London, 2013), pp. 341-342).

⁹ *Ibid*, n. 3, p 344.

¹⁰ *Attorney General v. Unity Dow* (1992) BLR 119 CA.

¹¹ Lady???, 'LeGaBiBo Raises Awareness about Homosexuality in Botswana', *HIV Gaps*, 31 March 2014, : <http://www.hivgaps.org/blog/legabibo-raises-awareness-homosexuality-botswana/#.U7p3zvidXUV> accessed on 19 July 2014

¹² Canada: Immigration and Refugee Board of Canada, Botswana: treatment of sexual minorities by society and the government; legal recourse and protection available to sexual minorities who have been subjected to ill-treatment (2006-March 2014), 9 April 2014, BWA104810.E , : <http://www.refworld.org/docid/537333c54.html> accessed on 19 July 2014

¹³ Bureau of Democracy, US State Dept., *Country Reports on Human Rights Practices for 2013: Botswana*, Human Rights and Labor, 2013, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dliid=220084> accessed on 19 July 2014

¹⁴ Immigration and Refugee Board of Canada, *Kanane v the State; Botswana: treatment of sexual minorities by society and the government*, 2006-March 2014), 9 April 2014, BWA104810.E , legal recourse and protection available to sexual minorities who have been subjected to ill-treatment (<http://www.refworld.org/docid/537333c54.html>) accessed on 19 July 2014

¹⁵ *Ibid*, n 3 at 347.

¹⁶ APA, 'Ex-Botswana leader slams ill-treatment of sex workers', *Star Africa*, 8 May 2014, <http://en.starafrica.com/news/ex-botswana-leader-slams-ill-treatment-of-sex-workers.html> accessed on 19 July 2014

¹⁷ Ngwanaamotho, M., 'Pastor says gays are criminals', *Mmegi*, 14 August 2013, <http://www.mmegi.com/index.php?sid=1&aid=514&dir=2013/August/Thursday15> accessed on 19 July 2014

¹⁸ Simon, M., 'Why Botswana Shouldn't Legalize Gay Sex: Sodomy Is For "Western Dogs"', *Queerty*, 17 March 2011, <http://www.queerty.com/why-botswana-shouldnt-legalize-gay-sex-sodomy-is-for-western-dogs-20110317> accessed on 19 July 2014

¹⁹ 'Botswana official says he would kill gay people', *LGBT Weekly*, 3 March 2011, <http://lgbtweekly.com/2011/03/03/botswana-official-says-he-would-kill-gay-people/> accessed 19 July 2014

²⁰ *Rammage and Others v Attorney General of Botswana*, High Court of Botswana, Case no. MAHGB 175-13, Judgment 14 November 2014. The judgment is : www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/11/LeGaBiBo-judgment-low-resolution.pdf.

²¹ Stewart, C., 'Botswana appeals ruling in favor of LGBTI rights group', *76 Crimes*, 22 January 2015, <http://www.76crimes.com/2015/01/22/botswana-appeals-ruling-in-favor-of-lgbti-rights-group/> accessed on 29 July 2015

²² US Department of State, Bureau of Democracy, *Country Reports on Human Rights Practices for 2014: Botswana*, Human Rights and Labor, 2014, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236330> accessed on 29 July 2015

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- ²³ 'Botswana to consider policy on distribution of condoms in prisons', *StarAfrica*, 11 June 2015, <<http://www.starafrika.com/news/botswana-to-consider-policy-on-distribution-of-condoms-in-prisons.html>> accessed on 29 July 2015
- ²⁴ 'Botswana loses donor support over its anti-gay laws', *StarAfrica*, 20 May 2015, <<http://www.en.starafrika.com/news/botswana-loses-donor-support-over-its-anti-gay-laws.html>> accessed on 29 July 2015
- ²⁵ Lavers, M.K., 'Bid to block spousal benefits for gay U.N. employees fails,' *Washington Blade*, 24 March 2015, <<https://www.washingtonblade.com/2015/03/24/bid-to-block-spousal-benefits-for-gay-u-n-employees-fails/>> accessed 25 October 2015
- ²⁶ Gasennelwe, U., 'British Gov't funds gay campaign', *Weekend Post*, 16 March 2015, <<http://www.weekendpost.co.bw/wp-news-details.php?nid=723>> accessed on 29 July 2015
- ²⁷ See UNHRC Resolution 27/32, *Human Rights, sexual orientation and gender identity*, 2 October 2014, UN Doc A/HRC/RES/27/32
- ²⁸ Potts, A., 'Botswana joins international call to protect LGBTI human rights', *Gay Star News*, 17 June 2014, <<http://www.gaystarnews.com/article/botswana-joins-international-call-protect-lgbti-human-rights170614>> accessed on 19 July 2014
- ²⁹ See UNHRC, *Report of the Working Group on the Universal Periodic Review*, 13 January 2009, UN Doc A/HRC/10/69; UNHRC, *Report of the Working Group on the Universal Periodic Review*, (22 March 2013) UN Doc A/HRC/23/7
- ³⁰ UNHRC, *Report of the Working Group on the Universal Periodic Review*, (22 March 2013) UN Doc A/HRC/23/7/Add.1
- ³¹ Employment Act Amendment No. 10 of 2010.
- ³² See Tabengwa, M., Nicol, N., 'The development of sexual rights and the LGBT movement in Botswana', in Lennox, C., Waites, M., (eds.), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change*, 2013, p. 348 for a more in depth analysis.