

Botswana overturns law criminalizing gay and lesbian sexual relationships

Botswana, like dozens of countries worldwide, inherited its law on gay sex from the British Empire. In recent years momentum has been building to repeal those laws.

by [Ryan Lenora Brown](#) in the [July 3, 2019](#) issue



Activists gather outside the High Court in Gaborone, Botswana, on June 11 to hear the ruling revoking a law prohibiting gay sex. Ryan Lenora Brown/*The Christian Science Monitor*.

(The Christian Science Monitor) When Letsweletse Motshidiemang was growing up in a village in northern Botswana, no one used words like *gay* or *queer*. No one called him anything. In that silence was a quiet acceptance.

“People knew I was different, but I was surrounded by people who loved me,” he said. “I was never taught to hate myself.”

In 2016, when he was 21, Motshidiemang approached a law professor at the University of Botswana, where he was a student, and asked for help challenging Botswana's "carnal knowledge" law, a colonial-era prohibition on gay sex.

At the time, he wasn't an activist. He'd never been to pride parades or even had a close gay friend. He was a bookish literature student who dreamed of moving home after graduation to work as a primary school teacher.

"I'm just someone who takes pride in who he is," he said. "I did this so people like me don't need to feel like who we are is a crime."

Three years later, a panel of three High Court judges unanimously affirmed that belief in a June 11 ruling.

"As society changes, the law must evolve," said Judge Michael Leburu, speaking on behalf of the panel. The law in Botswana, he said, was a "British import" and had been developed "without consultation of local peoples."

Botswana, like more than half of the 70-some countries that criminalize gay sex worldwide, inherited its law from the British Empire. In recent years, momentum has been building globally to repeal those laws, which prohibit sex "against the order of nature," arguing that they were imposed without consultation in societies that had sometimes made space for a range of sexualities in the past.

Last year, India struck down its own "order of nature" law, with the judges writing that it had been "irrational, indefensible and manifestly arbitrary" and that "history owes an apology to members of the community for the delay in ensuring their rights."

Tshiamo Rantao, lawyer for the Lesbians, Gays, & Bisexuals of Botswana (LEGABIBO), an advocacy group that joined the case as a friend of the court, pointed out that gay and lesbian sexual relationships were decriminalized in England and Wales half a century ago.

"We've been stuck with these provisions when [the British] have long discarded them," Rantao said.

LGBT rights groups have employed a strategy of incrementally challenging discriminatory laws in order to create precedent. For example, in 2017 a transgender woman brought a successful challenge at the Botswana high court to

have the gender changed on her driver's license.

Two weeks before the Botswana decision, a court in Kenya voted unanimously to uphold that country's prohibition on gay and lesbian sexual relationships, leading many to worry that momentum for global repeal had been scuttled.

In that case, the Kenyan High Court cited a 2003 decision from Botswana, *Kanane v. The State*, in which the court wrote, "Gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution."

This time, the Botswana high court judges returned to that argument and found it lacking.

"We have determined that it is not the business of the law to regulate private consensual sexual encounters" between adults, Judge Leburu said.

The latest ruling in Botswana is particularly significant for African legal activists, who have faced the accusation that LGBTQ rights are an imported Western threat.

"Botswana is being forced to abandon its moral values," argued Sydney Pilane, the lawyer for the state, in a hearing earlier this year.

In the ruling, Judge Leburu countered that "cultural practice cannot justify any violation of human rights."

For many supporters of decriminalization, including Motshidiemang, the idea that their culture was against LGBTQ people was a simplistic one, anyway. Many people have long loved and accepted them, whether or not they'd heard of a thing called "gay rights."

"It's not that most people in this country hate us," Motshidiemang said. "It's just that the people who hate us are very loud."

No sooner had the case concluded than many began to ask what would come next. Would Botswana follow South Africa's lead and legalize gay marriage? Would there be backlash, now that the law had jumped out in front of public opinion? (A 2016 Afrobarometer poll showed that only 43 percent of Botswanans "are not opposed to having homosexual neighbors.")

“We won’t fool ourselves; we know a change of law doesn’t mean the end of discrimination,” said Anna Mmolai-Chalmers, who heads the advocacy group LEGABIBO. “But the law also has power.”

In Kenya, the relevant sections of the penal code “are rarely enforced,” the international research group Human Rights Watch [notes on its website](#). “But they underpin a broad array of human rights abuses and contribute to a climate of discrimination and violence. Police use the laws as a pretext to harass and extort money or sex from LGBT people, or to deny services to LGBT people who are victims of violence.”

In the high court ruling, the three judges there ruled that there was not sufficient evidence of discrimination or denial of basic rights.

The majority of Christian and Muslim leaders approved of the court’s ruling. Yet activists and religious leaders in favor of LGBTQ equality vowed their struggle will continue.

“I am very disappointed,” said John Makokha, pastor of Riruta Hope Community Church in Nairobi, which welcomes LGBTQ people. “Gay people need the freedom to express themselves without fear or victimization.”

A version of this article, which includes reporting from Kenya by [Fredrick Nzwili](#) for Religion News Service, appears in the print edition under the title “Botswana overturns laws against gay sex.” The online version was edited June 17.