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CASE NOTE

A New Dawn for Gay Rights in Botswana: A Commentary on the Decision of the High Court and Court of Appeal in the Motshidiemang cases

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Abstract

In 2003, the Botswanan Court of Appeal decided in *Kanane v The State* that discrimination on the basis of sexual orientation was not proscribed by the Botswanan Constitution because no evidence had been adduced showing that the society of Botswana was ready for gay individuals. After sixteen years, things changed: in 2019, in *Letsweletse Motshidiemang and LEGABIBO (as amicus) v The Attorney General*, the High Court held that the law criminalizing anal intercourse violated the fundamental rights of gay people. In 2021, the Court of Appeal upheld the High Court decision. This commentary briefly examines these three decisions. It argues that *Kanane* gave too much weight to public opinion to the detriment of constitutional interpretation. Through a robust approach to generous interpretation of fundamental rights, the Motshidiemang decisions partly remedied the flaw in *Kanane*. However, judicial clarification is still required on some aspects of the decision.

Keywords: *Kanane v The State*; *Motshidiemang v The Attorney General*; "carnal knowledge against the order of nature"; LGBTQ+ rights; Botswana

Introduction

Lesbian, gay, bisexual, transgender and queer (LGBTQ+) persons still face human rights violations in most nations in Africa.[1] These violations come in various forms: harassment, beatings and assault, sexual violence and rape, torture and criminal prosecution. Sexual relations between people of the same sex continue to be criminalized in most countries, with some countries imposing the death penalty for such acts.[2] Before 2019, Botswana was counted among African nations where sexual relations between people of the same sex were criminalized. In 2003, this law was challenged without success in *Kanane v The State* (*Kanane*).[3] Things changed in 2019, when the High Court held, in *Letsweletse Motshidiemang v The Attorney General* (*LM / AG*), that the criminalization of sexual relations between people of the same sex was a violation of the right to equality, privacy and liberty.[4] In 2021, the Court of Appeal upheld the decision, in *Attorney General v Letsweletse*

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1 F Viljoen *International Human Rights Law in Africa* (2nd ed, 2012, Oxford University Press) at 259.

2 Specifically, Nigeria, Somalia and Sudan.

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

4 *Letsweletse Motshidiemang and LEGABIBO (as amicus) v The Attorney General* (High Court Civil Case no MAHGB 000591-16, unreported).

Motshidiemang (*AG / LM*).[5] The Motshidiemang case is a major breakthrough for LGBTQ+ rights in Botswana, in Southern Africa and in Africa as a whole.

This commentary has three goals. It briefly examines *Kanane* and contends that the decision overemphasized the role of public opinion to the detriment of constitutional interpretation. It then analyses the reasoning in the Motshidiemang High Court and Court of Appeal decisions. It is argued that through a generous interpretation of fundamental rights and a restrictive reading of derogations, the High Court and the Court of Appeal rectified the error in *Kanane* and afforded full protection to gay men under the Constitution. However, some aspects of the decision are problematic.

The Kanane case: A "wait and see" approach

The facts and decision

In March 1995, Kanane, an adult male, was charged with committing an unnatural offence contrary to section 164(c) of the Penal Code.[6] He pleaded not guilty; in his defence, he challenged the constitutionality of sections 164(c) and 167. At this time, section 164(c) made it a criminal offence for any person to "[permit] a male person to have carnal knowledge of him or her against the order of nature". Kanane argued that the provisions offended against his rights of freedom of conscience, freedom of expression, privacy, and freedom of assembly and association. The High Court dismissed the case on the basis that homosexuality was an unAfrican import from the West, so Kanane appealed. The issue to be determined by the Court of Appeal was whether discrimination on the basis of sexual orientation was proscribed by the Botswanan Constitution.[7] The Court of Appeal dismissed the application; it held that no evidence of public opinion had been adduced showing that the people of Botswana were ready for the decriminalization of homosexual practices between consenting adult males.

The court's approach to the role of public opinion

In furnishing the answer to the question of whether the circumstances demanded the decriminalization of homosexual practices between consenting adult males, the Court of Appeal held that no evidence was put before either the High Court or the Court of Appeal that public opinion in Botswana had so changed and developed that society in Botswana demanded such decriminalization. To support this reasoning, the court relied on the case of *Banana v State* (*Banana*), where a similar question arose before the Supreme Court of Zimbabwe in 2000.[8] The majority in *Banana* decided that from the point of view of law reform, it could not be said that public opinion had so changed and developed in Zimbabwe that laws criminalizing sexual relations between people of the same sex could be annulled. The court in *Banana* observed that Zimbabwe was a conservative society in matters of sexual intercourse and that its social norms and values could not permit decriminalization of anal intercourse.

Drawing inspiration from *Banana*, the Court of Appeal indicated that there was no evidence that the approach and attitudes 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 regarding consensual acts by adult males in private. According to the court, the evidence was to

5 *Attorney General v Letsweletse Motshidiemang and LEGABIBO (as amicus)* (Civil Appeal no CACGB 157-19, unreported).

6 Cap 08:01. He was also charged with committing indecent practices with another male contrary to sec 167, as read with sec 33, of the Penal Code.

7 KN Bojosi "An opportunity missed for gay rights in Botswana: Utjiwa Kanane v. The State" (2004) 20/3 *South African Journal on Human Rights* 466. Bojosi contends that the issues were not properly identified.

8 *Banana v State* [2000] 4 LRC 621.

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the contrary. Prior to the institution of proceedings in *Kanane*, Botswana's Parliament passed the Penal Code Amendment Act, which made several provisions of the Penal Code, including sections 141 (on rape), 144 and 145 (on abduction), 156 (on prostitution) and 164 (on anal sexual intercourse), gender neutral.[9] The amendment also increased criminal penalties for rape convicts. The Court of Appeal used this amendment to reach the conclusion that the legislature was reflecting public concern by broadening the scope and ambit of sexual offences, which showed a hardening attitude towards homosexual offences in Botswana.

It is clear from *Kanane* that without evidence regarding the attitudes of the people of Botswana, the Court of Appeal could not reach a decision on whether section 164 was unconstitutional. This approach is riddled with difficulties. First, the criterion of social readiness had no basis in the jurisprudence of the Court of Appeal; no decision in the country had ever applied it in constitutional analysis. Second, the Court of Appeal failed to clarify what it meant by "the approach and attitude of the society in Botswana". Third, the criterion was not reconciled with the provisions of the Constitution, and the court made no attempt to demonstrate its basis under the Constitution. The main problem in *Kanane* is that by making the absence of evidence of the approach and attitudes of the people of Botswana the basis for dismissing the case, the Court of Appeal failed to engage in the interpretation of the constitutional provisions that ought to have been at the centre of the legal inquiry. This resulted in the court's failure to give a generous interpretation to the rights that were relied upon in *Kanane*. This over-reliance on public opinion led to a failure by the Court of Appeal to read the Constitution in a manner that afforded gay men full protection under it.

A new dawn for gay rights in Botswana: Analysis of *AG / LM* and *LM / AG*

Through a robust and generous interpretation of the affected rights and restrictive reading of derogation clauses, the Motshidiemang decisions remedied the problems in *Kanane* and ensured that gay individuals received full protection under the Constitution.

The facts and decision

The applicant was a 24-year-old student of the University of Botswana studying English (African Languages and Literature) who identified as a homosexual. The applicant contended that sections 164(a), 164(c) and 165 of the Penal Code proscribe him from enjoying and engaging in sexual intercourse with a man *per anaus*. According to him, the provisions prohibited him from expressing the greatest emotion of love through the act of enjoying sexual relations with a consenting male to whom he is sexually attracted. In his application, he argued that his fundamental right to equality, privacy, liberty and dignity were contravened by the law.

The jurisdictional issue: Parliament or the courts?

The Attorney General objected to the jurisdiction of the High Court, arguing that it was Parliament, and not the courts, that ought to resolve the issue through legislative reform. The prospects of Parliament repealing the impugned provisions were non-existent. For more than 16 years since *Kanane*, Parliament had never intimated even tabling the matter for debate, nor was a bill ever suggested. In 2009, the report of the Working Group of the UN Human Rights Council on the Universal Periodic Review recommended that Botswana should consider decriminalizing homosexual relations.[10] The government gave a solid "no" to the recommendation, noting that the laws of

9 No 5 of 1998.

10 Report of the Working Group on the Universal Periodic Review, A/HRC/WG.6/3/L.1, available at: <https://www.refworld.org/docid/497476a00.html> (last accessed 10 July 2022).

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Botswana do not allow same-sex sexual activity.[11] In 2011, in an interview by the BBC,[12] former president Festus Mogae, when asked why he could not change the law, answered that he did not want to lose elections because of gays. This was only eight years after the *Kanane* decision. The position that the government took in *Thuto Rammoge v The Attorney General*, refusing to register the LGBTQ+ civic society organization LEGABIBO, was adequate evidence that the issue was not on the political agenda.[13] Even in the 2018 report of the Working Group on the Universal Periodic Review, Botswana's position had still not changed.[14] It is difficult to see how a parliament whose agenda is heavily controlled by the executive branch could ever have dealt with this issue; there simply was no political will.

The challenge to the jurisdiction of the court was a re-packaging of this societal readiness argument. It was an attempt to refer the question to a majoritarian process where the society would make known its approach and attitudes to the question. In *AG / LM*, the Court of Appeal acknowledged that it was unlikely the popular majority, as represented by its elected members of Parliament, will have any inclination to legislate for the interests of vulnerable individuals. The societal readiness criterion set by the Court of Appeal suffers from the same defect, as it relies on the approach and attitudes of the majority, especially where the court treats the attitudes of society as decisive. Nonetheless, by intervening, the courts signalled the importance and role of the courts in the protection of minorities. The Court of Appeal reinforced the sacred duty of the courts to test any law passed by Parliament against the imperatives of the Constitution, a duty that must be exercised without fear or favour.

The robust approach to constitutional interpretation

The High Court and the Court of Appeal robustly applied two core principles of constitutional interpretation: the principle of generous interpretation of fundamental rights and the principle that limitations and derogations are to be narrowly construed. These two principles constitute the cornerstone of constitutional interpretation in Botswana. They allow courts to interpret the Constitution as a living and dynamic instrument which serves current, past and future generations. This dynamic approach also reflects the Botswanan courts' conception of human rights as not existing solely in text, but existing within the normative understanding of human beings and a broader understanding of humanity, and therefore capable of organic growth and expansion as society progresses. Human rights are seen as existing within the fabric of space and time, forever responding to the human condition.

Dignity – right or core value?

The robust and generous approach has led courts in Botswana to read the right to dignity into the Constitution, which is not among its enumerated rights.[15] The High Court and the Court of Appeal referred to dignity as both a right and a core value underlying fundamental rights. Defining dignity, the High Court noted that it means "worthy of honour and respect" and envisaging "the state or quality of being worthy of honour, respect and legality".[16] The High Court observed that the applicant's sexual orientation lay at the heart of his fundamental right to dignity. It held that by criminalizing anal intercourse, the law denied him the right to sexual expression in the only way

11 Report of the Working Group on the Universal Periodic Review – Botswana, A/HRC/10/69/Add.1, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/121/91/PDF/G0912191.pdf?OpenElement> (last accessed 10 July 2022).

12 G Mezzofiore "BBC World debate: Is homosexuality unAfrican?" (9 March 2011) *Frontline Club*, available at: <https://www.frontlineclub.com/bbc_world_debate_is_homosexuality_unafrican/> (last accessed 10 July 2022).

13 *Thuto Rammoge and Others v The Attorney General* [2017] 1 BLR 494 (CA).

14 Report of the Working Group on the Universal Periodic Review – Botswana, A/HRC/38/8, available at: <https://www.ohchr.org/en/documents/reports/report-working-group-universal-periodic-review-botswana> (last accessed 10 July 2022).

15 CM Fombad "The protection of human rights in Botswana: An overview of the regulatory framework" in CM Fombad (ed) *Essays on the Law of Botswana* (2007, Juta).

16 *LM / AG*, above at note 4, para 145.

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available to him. Such a denial and criminalization went to the core of his worth as a human being. While the High Court and the Court of Appeal treated dignity as a right, there is no decision as yet that demonstrates precisely how this right has been derived from the Constitution; its source, content and scope remain unclear.

Dignity has a twofold nature: it exists as a founding or as an underlying value to human rights. Here, "it remains in the realm of morals, acting as a reminder that the entire edifice of human rights is based on convictions which stabilize the network of legal rules".[17] It is the "central organizing principle in the idea of universal human rights".[18] According to article 1 of the United Nations Universal Declaration of Human Rights, all human beings are born free and equal in dignity and rights.[19] Dignity can also exist as a legal principle. While dignity is not a right under any of the international human rights treaties, under the African Charter on Human and Peoples' Rights, dignity constitutes a right. Some national constitutions, such as the South African Constitution, accord the right to respect of dignity to individuals. The South African Constitution also recognizes human dignity as one of the founding values of the Bill of Rights, in addition to equality and freedom. Human dignity, as a value, is considered in the interpretation of the Constitution and in establishing whether a limitation of a right is reasonable and justifiable.[20] It seems the better approach is for the courts to treat dignity as a founding value, and apply it in construing fundamental rights and weighing these rights with other interests.[21] As an underlying value, dignity constitutes a rich source of diverse norms from which the court can draw. As a right under the Constitution, its basis is difficult to justify either under the constitutional text or the jurisprudence of the courts, and its scope is difficult to demarcate.

The right to privacy

Section 9 of the Constitution of Botswana only protects the spatial aspect of the right to privacy.[22] It protects one's right from being subjected to a search of one's person or property or the entry by another into one's premises. Historically, the right to privacy developed within this narrow compass.[23] The courts interpreted this right generously and expanded its scope to cover the decisional aspects of the right to privacy.

According to the High Court, the right to privacy "gives a person space to be himself / herself without judgment. It allows persons to think freely without hindrance and is an important element of giving people personal autonomy and control over themselves."[24] It then held that the impugned provisions impaired the applicant's right to express his sexuality in private with his preferred adult partner, because the applicant "has a right to a sphere of private intimacy and autonomy".[25] The Court of Appeal endorsed the broader reading of the right to privacy, noting that it "goes far beyond

17 C Tomuschat *Human Rights: Between Idealism and Realism* (2014, Oxford University Press) at 89.

18 C McCrudden "Human dignity and judicial interpretation of human rights" (2008) 19/4 *European Journal of International Law* 655, available at: <http://doi.org/10.1093/ejil/chn043> (last accessed 10 July 2022).

19 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> (last accessed 10 July 2022). There are several other international treaties on human rights that refer to dignity.

20 A Fagan "Human dignity in South African law" in M Düwell, J Braarvig, R Brownsword and D Mieth (eds) *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (2014, Cambridge University Press) 401.

21 C O'Mahony "There is no such thing as a right to dignity" (2012) 10/2 *International Journal of Constitutional Law* 551.

22 BT Balule and B Otlhogile "Balancing the right to privacy and the public interest: Surveillance by the state of private communications for law enforcement in Botswana" (2016) 37/1 *Statute Law Review* 19, available at: <https://doi.org/10.1093/slr/hmv023> (last accessed 10 July 2022).

23 O Diggelmann and MN Cleis "How the right to privacy became a human right" (2014) 14/3 *Human Rights Law Review* 441 at 441, available at: <https://doi.org/10.1093/hrlr/ngu014> (last accessed 10 July 2022).

24 *LM / AG*, above at note 4, para 113.

25 Id, para 127.

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the concept of a man's home being his castle (that is spatial privacy), or merely the right to be left alone. It extends also to the protection of the right to make personal choices about one's lifestyle, choice of partner, or intimate relationships, amongst a host of others."[26]

This approach accords with international human rights standards which recognize the right to spatial and decisional privacy regardless of sexual orientation.[27] It also enables fuller and richer protection of individuals' close and intimate relationships as long as they occur within private confines.

The right to liberty

The High Court generously read the right to liberty to include sexual autonomy – the freedom to choose sexual behaviours, practices and partners. In dealing with this right, the court observed that the sexual autonomy of an individual to choose their partner is an important pillar and an inseparable facet of individual liberty.[28] According to the court, the law impinged on the applicant's right to choose a sexual partner. The court confirmed that matters of personal intimacy and autonomy are key to personal liberty and warned against laws that cajole people into becoming who and what they are not; it indicated that any criminalization of love or finding fulfilment in love dilutes compassion and tolerance.[29] Accordingly, it held that the applicant's right to choose an intimate sexual partner was abridged. Further, the impugned law forced him to engage in private sexual expression not according to his sexual orientation but according to statutory dictates. This, according to the court, violated the applicant's right to liberty. The extension of the right to liberty to cover sexual autonomy is a positive development in Botswana's law.

The right to protection against discrimination

A generous reading of the definition of discrimination under the Constitution was necessary for the court to reach the conclusion that the criminal provisions impermissibly discriminated against the applicant. Section 15(3) of the Constitution defines discrimination as

> "affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."[30]

The court had to resolve two main questions: whether the word "sex" under the definition of discrimination should be read to include "sexual orientation" and whether the law was discriminatory in effect. In answering the first question, the High Court agreed that the word "sex" could be generously read to include "sexual orientation". It relied on the decision in *The Attorney General v Unity Dow*, where the Court of Appeal held that the grounds listed under section 15(3) were not exhaustive.[31] To support its reasoning, the High Court derived inspiration from decisions in various

26 *AG / LM*, above at note 5, para 112.

27 *Toonen v Australia*, Human Rights Committee, Communication no 488/1992 (CCPR/C/50/D/488/1992), 1994, paras 8.5 and 8.6. The Committee held, after examining international human rights instruments, that the right to privacy under international law protects consensual sexual activity in private.

28 *LM / AG*, above at note 4, para 140.

29 Id, para 141.

30 CM Fombad "The constitutional protection against discrimination in Botswana" (2004) 53/1 *International and Comparative Law Quarterly* 139.

31 [1992] BLR 119; S Coldham "Human rights in Botswana" (1992) 36/1 *Journal of African Law* 91. Coldham claims that the court applied a robust approach to generous interpretation of the Constitution.

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jurisdictions: South Africa, India, Canada and the decisions of the United Nations Human Rights Committee.[32]

As regards the issue of indirect discrimination, the High Court noted that this occurs when conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination. The court held that the impugned provisions "have a substantially greater impact on the applicant as a homosexual, who engages only in anal sexual penetration, than it does on heterosexual men and women".[33] The court found that denying the applicant the right to sexual expression in the only way natural and available to him when heterosexuals are permitted the right to sexual expression in a way that is natural to them amounted to unlawful discrimination.

At the Court of Appeal, the Attorney General relied on a derogation clause that was not raised at the High Court.[34] The Attorney General contended that section 164 was saved by the derogation clause under section 15(9) of the Constitution.[35] Accepting that the derogation clause ought to be narrowly construed, the Court of Appeal read down section 15(9) so as to exclude its operation to section 164(c) of the Penal Code. The Court of Appeal reasoned that the provision had undergone a change of substance when it was amended to become gender neutral.[36] Further, section 15(9) could not protect section 164(a) as its role had fundamentally changed; it had no public interest role to play. This restrictive reading of the derogation provisions paved the way for a more expansive and richer reading of the definition of "discrimination".

What of the "approach and attitudes of the society"?

As argued above, *Kanane* failed to explain the basis and content of the notion of the "approach and attitudes of the society" criterion. After *Kanane*, the question of the role of public opinion in constitutional interpretation became a hotly debated issue between the High Court and the Court of Appeal. To the High Court, deciding according to the public mood was an "apologetic value-oriented model" which was to be condemned.[37] This prompted the Court of Appeal to clarify the concept. By the time *AG / LM* was decided, the Court of Appeal had offered some clarity.[38]

In *Ramantele and Another v Mmusi and Others*, the Court of Appeal noted that "to have due regard to the moral choices of the majority (from which all our laws derive their legitimacy) is an imperative of this Court and all courts, and is the cornerstone of a constitutional democracy and of the rule of law".[39] The sources from which public opinion was to be gathered were narrow. According to the Court of Appeal, the approach and attitudes of the society entailed the prevailing public opinion, as reflected in legislation, international treaties, the reports of public commissions

32 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1999] (1) SA 6 (CC); *Navtey Singh Johar and Others v Union of India, Ministry of Law and Justice* AIR [2018] SC 4321; *Law v Canada, Ministry of Employment and Immigration* [1999] (1) SCR 497; *Toonen v Australia*, above at note 27.

33 *LM / AG*, above at note 4, para 169.

34 See the discussion of the difficulties of interpreting limitation clauses under the Constitution of Botswana by BR Dinokopila and B Kgoboge "Customary law and limitations to constitutional rights in Botswana" (2021) 39/3 *Nordic Journal of Human Rights* 339; GR Lekgowe "Mmusi & Ors: An opportunity missed to begin the burial of Attorney General v Unity Dow" (2012) 15 *University of Botswana Law Journal* 87.

35 Sec 15(9): "Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section – (a) if that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into operation of this Constitution; or (b) to the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution."

36 *AG / LM*, above at note 5, para 102.

37 *Mmusi and Others v Ramantele and Another* [2012] 2 BLR 590 (HC) at 601.

38 *Tapela and Others v Attorney General and Others* [2018] 2 BLR 118 (CA); *ND v Attorney General and Another* [2018] 2 BLR 223 (HC).

39 *Ramantele and Another v Mmusi and Others* [2013] 2 BLR 658 (CA) at 686.

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and contemporary practice. The Court of Appeal did not clarify the function of public opinion or reconcile it with principles of constitutional interpretation.

The High Court in *LM / AG* dealt with this issue. It noted that while public opinion is relevant in constitutional interpretation, it is not dispositive. In the face of "towering and colossal human rights", public opinion was, according to the High Court, rendered Lilliputian.[40] As it was bound by *Kanane*'s *ratio decidendi*, the High Court could only decide in favour of the applicant if there was evidence establishing that society was ready. The court garnered evidence of public opinion from legislation and national vision documents. Section 23(d) of the Employment (Amendment) Act, which forbids the termination of an employee's contract on grounds of sexual orientation, was treated as an indicator of public opinion.[41] The court also referred to Vision 2016, which was prepared following nationwide consultation and which adopted several pillars, including a "compassionate, just and caring nation", an "open, democratic and accountable nation" and "a moral and tolerant nation". Whereas the Court of Appeal in *Kanane* had concluded that the time had not yet come for the decriminalization of homosexual practices, the High Court held that the "time has come that private same sexual intimacy between adults must be decriminalized, as it is hereby proclaimed".[42] This also formed the basis for distinguishing *Kanane* from *LM / AG*. According to the High Court, in its *ratio decidendi*, "the highest court left out a window of opportunity, whenever the imperatives of events and circumstances were apposite and conducive, to decriminalize the same".[43] The Court of Appeal endorsed this finding; however, it expanded its sources of public opinion beyond the limits the Court of Appeal in *Kanane* had set.[44] According to the Court of Appeal, "there can be no better barometer of prevailing public opinion than the utterances of actions of our Head of States". The court took into account statements by the Botswanan president and the fact that the government deported an anti-gay pastor who had visited Botswana, because of comments he had made.

Some support for the view that courts ought to have regard to public opinion in constitutional adjudication to maintain legitimacy exists.[45] However, there are dangers to over-reliance on public opinion in constitutional adjudication. The words of Justice Souter capture these concerns in *Planned Parenthood v Casey*, where he warned that a court must "take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make".[46] The Court of Appeal fell into this error in *Kanane*. Although the Court of Appeal expanded the sources from which public opinion is to be gathered, there is still a lack of clarity on the operations of the principles set by the court.

Conclusion

Kanane demonstrates that if not properly applied in constitutional adjudication, public opinion and a formalistic reading of fundamental rights may constitute a stumbling block in the realization of gay rights. In the Motshidiemang decisions, the robust approach of generously reading fundamental rights and the restrictive reading of derogation clauses cleared the path for an expansive and richer reading of the fundamental rights which gave gay individuals the dignity that they have yearned for for many years. The case has shown the readiness of Botswanan courts to protect fundamental rights when called to do so. In a continent where gay people continue to suffer the most egregious

40 *LM / AG*, above at note 4, para 185.
41 Employment (Amendment) Act no 10 of 2010.
42 *LM / AG*, above at note 4, para 202.
43 Id, para 105.
44 *AG / LM*, above at note 5, paras 60–62.
45 RA Primus "Double-consciousness in constitutional adjudication" (2007) 13/1 *Review of Constitutional Studies* 10.
46 [1992] 112 S Ct 2791.

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violations to their dignity, the decision is a ray of hope for Africa as a whole. Courts elsewhere in Africa should draw inspiration from the approach in the Motshidiemang cases when dealing with gay rights.

Competing interests. The author represented the applicant at the High Court and the author's spouse represented him at the Court of Appeal

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