

HUMAN RIGHTS VIOLATIONS IN LESOTHO

The following was written by Motebo Ntabe, a graduate of legal studies at the National University of Lesotho, of which he made a research on LGBTI rights in Lesotho society. What follows is excerpted from that larger research.

EXECUTIVE SUMMARY

Sexual orientation and gender identity are neither protected nor overtly criminalised in Lesotho's Constitution. Sodomy laws are in place that could be used to prosecute homosexual behaviour but reported sodomy offences are due to rape between men.

Though there are no specific protections for sexual orientation or gender identity, there are general clauses talking to freedom from discrimination of any sort and the overall rights of equal treatment, fairness before the law and respect. These clauses could be gateways into explicit freedoms and protections for the LGBTI community in Lesotho.

BACKGROUN

There is currently an LGBTI support group that has established their national office and is waiting on a decision from the Cabinet on registration. An MSM and WSW study is presently being conducted nationally.

1.1 INTRODUCTION

Lesotho's legal system has made strides to incorporate issues of class and gender into both research and teaching. Under our constitutional dispensation, the legal system has made massive efforts to eradicate instances of discrimination and unequal treatment in almost all areas except in issues of homosexuality.

1.2 THE CONSTITUTION OF LESOTHO

This subtopic will only deal with those provisions of the constitution which have a bearing on the freedom and position of homosexuals in Lesotho.

All the constitutional provisions which have a bearing on the freedom and treatment of homosexuals in Lesotho are found under the constitution's bill of rights. The treatment of homosexuals in Lesotho touches upon many provisions of the constitution, but the most conspicuous of those provisions are a trilogy of interrelated rights, namely the right to equal treatment and equality before the law under Section 19, the right to the respect of one's dignity under Section 8 and the freedom from discrimination of any kind under Section 18. Moreover, there is also the freedom of association under Section 16 and the right to the respect for private and family life under Section 11. The freedom of association is included here as a matter of inference. Male homosexuality is illegal in Lesotho by virtue of the sodomy law, therefore a case could be made that homosexuals may not purport to form lawful associations in Lesotho. The truth is that the gay and lesbian association in Maseru is yet to be attacked and legally registered and it is only then when its position under the law and public morals will be discovered.

The general understanding is that all these rights and freedoms are enjoyed by all persons in Lesotho without any distinction on any ground. Nothing in our constitution explicitly provides for or prohibits homosexuality. As a result, the position of homosexuals as far as the constitution is concerned will be a matter of inference.

1.3 HOMOSEXUALITY AND CRIMINAL LAW

The only law which explicitly deals with homosexuality in Lesotho is the common law offence of sodomy. In itself this law only deals with a certain portion of homosexuality, namely consummation of a sexual relationship by men. In Lesotho sodomy is an offence against the law and morality. The prohibition on male homosexuality in Lesotho has been given a statutory flavour by Section 187 (5) of the Criminal Procedure and Evidence Act¹. Under Schedule 1 part II of the same Act, sodomy has been listed as one of the offences in respect of which arrests may be made without a warrant. Female same-sex conduct has never been illegal, as with other former English Colonies. The law in Lesotho is totally silent on female homosexuality. The arguments that are raised against male homosexuality are not convincing because they can equally be raised against female homosexuality.

However, this is not to say that the situation is better for lesbians. As much as their sexual acts are not criminalised they are also subjected to the minority prejudice suffered by gay men as a result of the legal position in Lesotho. As was stated in the South African case of National **Coalition for Gay and Lesbian Equality v Minister of Home Affairs**² although the main focus of the sodomy case (a case in which abolished the sodomy law) judgement was on the criminalisation of sodomy and other proscriptions of erotic expression between men, the conclusions regarding the minority status of gays and the

¹ Supra n44

² 2000 (2) SA 1 (CC)

pattern of discrimination to which they had been continued to be subjected were also applicable to lesbians.

The fact is that the non criminalisation of lesbianism does not make it legal in Lesotho; neither does it mean that lesbians enjoy the same rights as heterosexuals under various legislations.

The other problem with the sodomy law is that it does not seem to have ever been enforced at any time in Lesotho save where it was not consensual. Between April 2007 and February 2009 there have been twenty one (21) instances of sodomy reported to the Police in Lesotho. None of these was consensual³.

The sodomy law prohibits gay men from having their preferred sexual intercourse and forces them to go for heterosexual sexual intercourse which they do not like or that they should be celibate. The sodomy law is just one of an array of quite material ways by which the dominance of heterosexual men is highlighted over gay men. The vacuum in the constitution as far as homosexuals are concerned means that the sodomy law still prevails even though the law has obviously become redundant with the introduction of the Sexual Offences Act⁴. This Act would therefore mean that any man complaining against another man on grounds of sexual offence will have an avenue under this Act and this makes the sodomy law useless.

³ Information obtained from the press office of the Lesotho Mounted Police Headquarters in Maseru on the 16th April 2009

⁴ Supra n 61

1.4 HOMOSEXUALITY AND MARRIAGE LAWS

The marriage institution in Lesotho is governed by customary law and the common law. The common law aspect of marriage, also known as a civil marriage is governed by the Marriage Act.⁵ The common law definition of marriage is “a union of one *man* with one *woman*, to the exclusion, while it lasts, of all others”⁶. This remains the definition of marriage as understood in the civil marriage sphere in Lesotho. This shows that marriage is an exclusive domain of heterosexuals in Lesotho.

Under Customary Law, marriage must be between a man and a woman, no matter how many wives a man may want to have. Under Lesotho’s customary law no people of the same sex may marry each other. Sesotho custom strongly condemns homosexuality by both men and women

1.5 HOMOSEXUALITY AND ADOPTION

Adoption is governed by the Adoption Proclamation⁷. Section 2 of the proclamation lists people qualified to adopt and those that are disqualified from adopting children. No mention of homosexuals is made anywhere in the proclamation. The only inference available is that homosexuals may not adopt as a couple. Because they are not allowed into the marriage institution and because of the criminalisation of male homosexuality

⁵ Supra n2

⁶ Cronje J Heaton, (2002), “South African Family Law”: Butterworth’s, Durban at 21

⁷ Order 62 of 1952

and the societal hostility towards homosexuals in general, it may be safe to conclude that they may not adopt as a couple.