

# Intersecting Decriminalisation in Botswana

## 1.0 Introduction

Sex related criminalisation remains anchored in culture, religion and law. Despite each having provisions for community, empathy and dignity within society, they remain a challenge in Botswana's context. The criminalisation of sex work and same sex intercourse remain two complex social, political and legal challenges for vulnerable and marginalised groups in Botswana. This policy brief expands on the lived experiences of those affected by these challenges emanate from colonial era laws that prohibited conduct considered immoral, non-normative and unnatural. Under the auspices of the Breaking Bounds Consortium, community members from the Sex Worker (SW) and young Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Gender Non-Conforming, Non-Binary and Othered Communities (LGBTIQ+) communities convened to share their experiences in relation to the environment created by criminalisation. These distinctly different communities remain subject to systemic violence, stigma, discrimination and injustice, despite there being a High Court ruling decriminalising same sex intercourse on 11 June 2019. More importantly, the pending appeal of the High Court judgement further affirms that criminalisation goes beyond the law.

## 2.0 Context

Botswana is an upper middle-income country, considered a democratic success and example to the African continent on issues of fiscal responsibility, natural resource management and peace. CIVICUS recently reporting Botswana's civic space as narrow reflects the nuances of politics, anti-rights populist narratives and prevalent inequities of poverty and gender norms.<sup>1</sup> There have been select successes through strategic litigation asserting the freedom of association,<sup>2</sup> the changing of gender markers for transgender individuals,<sup>3</sup> and the decriminalisation of same-sex intercourse.<sup>4</sup> However, more efforts are needed in areas of inclusion, equality in law and meaningful economic participation. Sex work has not received as much success, given the limited parameters on the inability to register, secure funding and ambiguity in law. Section 155 remains skewed towards the proceeds of sex work, considered a crime despite there not being an explicit provision in law.

As a higher middle-income country, Botswana's civil society remains challenged in resourcing and scaling impact. Prevalent funding remains focused on public health within the HIV response and strategic litigation. Although gender and sexual orientation related rights are gaining progress, these largely remain within binaries and focus on men who have sex with men (MSM). Furthermore, they reflect elitist access and limited reach in influence for many community members based outside of the capital city, Gaborone.

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<sup>1</sup> CIVICUS World Alliance State of Civil Society Report

<sup>2</sup> Rammoge & Others v Attorney General

<sup>3</sup> ND v Attorney General

<sup>4</sup> Letsweletse Motshidiemang v Attorney General

Disparities of income inequality, homelessness and violence remain impediments to the freedoms of LGBT individuals. The freedom of assembly and that of expression remain a challenge for the majority of informal, digital and youth movements; further exasperating those who try to counter religious, cultural and societal perceptions of intolerance.

### **3.0 Approach**

A snowball recruitment process was adopted to ensure trust and rapport among community members. Participants were provided with an overview and rationale on the benefits and value of the policy briefs, safeguarding confidentiality and anonymity. Furthermore, they were free to withdraw from the process at any point during the convening. Expectations were clarified, leading to focus group discussions, scenario playing, and plenary engagements based on lived experiences. This reflects a human centred, exploratory and pedagogical safe space for in depth information. Select literature further strengthened and validated experiences shared.

### **4.0 Community Experiences**

Intersecting challenges of criminalisation explored include same sex intercourse, sex work and abortion. These three are governed by sections 164, 165 (same sex), 155 (sex work) and 160, 161, 162 and 398 (abortion). Although all three are not outright banned, they still pose a risk of persecution in the exercise of autonomy in sex related matters, whether pleasure or reproduction. Similarly, in ambiguity in law. For example, participants reflected on how same sex intercourse had been articulated as homosexuality, gender diversity and expression; where societal perceptions interpreted the entire LGBTIQ+ community to be prohibited as beings. In respect of sex work, the same can be said where the exchange of money is involved, however, gifts in kind or within a relationship could be seen as lawful. Abortion is only allowed under certain circumstances in law, yet many secure unsafe or backdoor abortion alternates. These examples reflect that what is written in law and policy is far from reality. Particularly where norms and standards are concerned.

The policing of bodies remains anchored in gender norms and practices throughout society. Whether in the Northern regions such as Chobe and Ngamiland, or in the Southern regions. LGBTIQ+ youth continue to navigate complex environments. Sexual orientation is often confused with gender identity and/or expression, thus leading to violence and discriminatory treatment. This reflects the patriarchal tenants of how women are treated regardless of community group, geographic disposition or any other social status. Sex workers experience the brunt of violence, where clients and law enforcement alike, can abuse sexually, physically and psychologically. It is clear that none of these two groups have exercised choice in who they are or what they do. However, poverty and bias are common influences on their lives. In some experiences, lesbian, bisexual and sex worker women can find themselves with unwanted pregnancies. This reflects the intersecting and compounding struggles faced by women whether in their being or in their work. Being in conflict with the law, particularly with so many uncertainties in reality and interpretation; leaves opportunity for abuse and injustice against LGBTIQ+ and sex workers with impunity.

Unemployment stands at almost 21% in Botswana, compared to almost 27% for youth under the age of 35.<sup>5</sup> This is in line with LGBTIQ+ youth and sex worker experiences, where over 82% of participants never feel economically safe. Poverty, underemployment and unemployment are recurrent struggles for LGBTIQ+ and sex workers. Only a few expressed the ability to establish small informal enterprises, however stigma and risks from being non-normative remain. Economic participation remains a dream for many community members. This results in sex work, occasional transactional sexual activities and even unsafe abortion. Many MSM end up in relationships seeking stability for a place of residence, seeking opportunities or securing livelihood as a virtue of their sexual or romantic partner. The pressures of social media perceptions of wealth and expectations of families to be supported by community members often led to depending on partners. This often comes with various forms of abuse and violence given the control that money affords over community members.

Unsafe abortion has its own challenges. Ranging from arrests to death; community members often find themselves in cycles of perpetual violence and rejection. Whether Lesbian, Bisexual, Queer, Gender Non-Conforming or Non-Binary, women bear the brunt of toxic masculinity. As it manifests itself in the way clients engage sex workers, or the hate speech hurled at non-normative women; safety is a luxury many community members cannot afford. Sexual assault, difficult clients and abusive partners can lead to unwanted pregnancies. The relative ease to find means for abortion in a restricted environment means that exercising choice can be dangerous. It further results in compounded stigma among peers, future infertility and/or the risk of persecution when complications arise from incomplete abortions. Young women and adolescents are most impacted. Particularly in rural and underserved areas where poverty is the norm and intergenerational relationships are the aspiration. Early unintended pregnancies only compromise education, family relations and opportunities. Many sex workers lament working conditions and the fact that many Botswana deem their profession a choice. Yet the structural impediments to better work, opportunity and social protection remain anchored in benefiting men and the elite.

The costs of criminalisation are wide reaching. Many community members cannot explore their talents and interests because of structural impediments of poverty and norms. The inability to fully express non-normative gender diversity and expression, means young people's developmental years are filled with social isolation, self-conflict, navigating abuse, self-discovery and societal pressure. This leaves many on survival mode, as opposed to fully experiencing learning, exploring and connecting with public society. They often build social resiliency, only to have limited opportunities and avenues to secure livelihood. There are a significant number of foreign national sex workers, increasing competition and limiting negotiation power against difficult clients. The most significant difference between Botswana sex workers and their foreign counter parts, is the compounded nuances of xenophobia – from clients, law enforcement, landlords and their peers. This additional layer also meant that resiliency is built through community care. Where foreign nationals pool resources together when one of their own dies and the body need repatriation, or when one is sick or cannot feed her children. This highlights a hope of solidarity and allyship not just in having a shared cloud of criminalisation, but in economic resourcing to deal with life.

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<sup>5</sup> Statistics Botswana 'Quarterly Multi Modular Survey' 2020

## 5.0 Conclusion and Recommendations

### Conclusion

Human rights discourse is important in ensuring the protection and equality of community members. However, this policy brief reflects just how human rights cannot be consumed, used to pay bills or keep community members safe. Pain and harm remain a perpetual cycle that can only be absolved by economic means. Where safety means affording to take a private cab service rather than a public commuter taxi. It also means working in an office with the ability to secure clients and safely negotiate for part time sex work. Furthermore, it could be the difference between life and death by securing safe abortion in neighbouring South Africa. There is a clear need to further cement experiences of marginalised communities within economic and sustainable development frameworks. This is where political will lies. Where decisions that determine state budget allocations, accountability processes and politics rest with those in power. The ability to engage in the same language, frameworks and ambitions would secure audience and encourage dialogue.

### Recommendations

- There should be increased engagements, learning and collaborative advocacy work between LGBTIQ+ and SW movements in country. This can strengthen solidarity and encourage community care.
- Increased evidence is needed in alleviating poverty, violence and limited affirmative interventions.
- Resources should be expanded, diversified and flexible to allow for community groups, organisations and collectives to better organise, strengthen capacity and scale impact at a national level.
- Communities should be afforded opportunities for navigating state driven initiatives such as the Youth Development Fund, LIMID programme, Citizen Diversification Drive mechanisms and Local Enterprise Authority Incubation programmes among others.
- That the Botswana Government make progress towards Universal Health Coverage to ensure all forms of inequity and disparity are eliminated in law, financing and service delivery provisions.
- The economic implications of criminalisation should be understood within the health and sustainable development frameworks. This would strengthen inclusion of marginalised communities in service delivery and state programming.
- Policies are largely political and skewed towards men and the elite; thus, civil society should be intentionally political and skewed towards the strengthening and efficacy of community members.
- Civil society should be included in larger policy forums, on a rotational basis and with inclusive measures. One example of such forums is the High-Level Consultation Forums spearheaded by the President of Botswana.
- Talent management, succession planning and career building should become the norm across civil society, most notably among LGBTIQ+ and sex worker led organisations.

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