**REPORT BY JUSTOCE MABATS’OENENG HLAELE ON THE JUDICIAL DIALOGUE**

The dialogue was organized by the International Commission of Jurists (ICJ) under the banner *“Decolonizing Jurisprudence: Protecting the rights to dignity, privacy, equality, and non-discrimination of marginalized people in post- colonial states.”*

**ATTENDENCE**

Justice Hlaele attended the refereed dialogue held in Seychelles from 25th to 26th March 2023. The dialogue was attended by judges from South Asia and Southern Africa and activist on LGTBIQ+ organisations from Sri Lanka, Nepal, Pakistan, South Africa, Uganda, Botswana, Malawi, Lesotho, Seychelles. Also in attendance was a representative from the sponsor- the USA.

**THE DIALOGUE**

The dialogue took the form of presentations by the attendees. The first session focused on unpacking the myth of LGTBIQ+ being “unafrican” or against Asian culture. Each discussant elaborated on the history the criminalization of sodomy and the laws against same sex partnerships.

In Asia the paper presented traced the colonial roots of discriminatory laws towards sexual minorities in Asia. The full script of the presentation is attached hereto for ease of reference. It traces in detail, using historical photographs, the impact on colonialism on Asian culture in relation to sexual minorities.

In Africa, prof Tamara’s paper discussed some of the African tribes which were homosexual. Where African chief engaged in seme sex marriages. Her paper also proffered that the facial decoration and female apparel of women by men was practiced in traditional African cultures. This dated before colonialism.

Both presentations from Asia and Africa reached a conclusion that the Criminalisation of same sex relationships (sexual) more specifically the criminalization of sodomy came about in Africa as a result of colonization. Foreign religion played a major role in the indoctrination of converts and African people (and Asian). The so-called Abrahamic religions (Christianity, Islam and Judaism) were used to weapons for weaponizing homosexuality, transgender, and also the denial of the right to choose gender for children born bisexual. This was more evident as the presenter from the Sri Lanka civil society organisations reflected that Sri Lanka did not share the same religions criminalization LGTBIQ+ rights on the grounds of religion since the country’s most predominant religions were Hinduism and Buddhism.

The assigning of gender at birth as a result of sexual organs also came into the spot light. This was said to violate the right for individuals to choose a gender of their choice, more specifically those who chose not to associate with either gender(non-binary), those who have undergone gender change(transgender) and wish to identify with the new gender of even none of the ones assigned by law.

**THE JUDICIARY AND JURISPRUDENCE**

Judges from Nepal, India, Sri Lanka, Botswana, South Africa, and Malawi shared judgements from their jurisdictions, most of which were penned by them.

Below is country list of the judgements which are easily available electronically.

A summary of the country jurisprudence is

**NEPAL [02 MARCH 2023]**

The petitioners Tobias Volz and Adhip Pokharel, a gay couple file a writ of mandamus against the Department of Immigration (DOI) at Supreme Court of Nepal in order to grant non-tourist visa to Tobias Volz, who is a German national. Adhip, a Nepali National and Tobias, a German National had tied the nuptial knot on 19 October 2018 in accordance with German laws and got their marriage registered in Germany. However, when this couple came to Nepal and Volz tried to issue the non-tourist visa then DOI rejected the same. Indeed, Pokharel went to the local

government to issue a marriage certificate then the authorities rejected his application by justifying that the law only allows to issue a marriage certificate to a marriage among male and female only. Thereafter, Volz applied for the non-tourist visa at DOI, laying on the precedent of Supreme Court of Nepal (Suman Pant v. Ministry of Home Affairs, DOI and others) but this time also DOI rejected the application for non-tourist visa. Following this, the couple filed a writ of mandamus at Supreme Court against the DOI to grant the non-tourist visa to Volz, one of petitioner of case.

**SUPREME COURT ORDER:**

The division bench of Hon’ble justice Tanka Bahadur Moktan and Honourable justice Hari Prasad Phuyal grant a writ of mandamus and order to issue a non-tourist visa to Volz.

The division bench of the Supreme Court pilloried against defendant, Department of Immigration (DoI), for using binary terms” male and female” in the visa application form, which denied equal rights to members of the sexual and gender minority. The bench issued a directive order to amend the form as the restrictive clause could deprive them of their identity and adversely affect their dignity, marriage, and family life. The court upheld that the constitution S39 equality and equal protection clause ensured equal rights to everyone, including sexual and gender minorities, and criticized the DOI S39 omission in addressing the petitioners S39 grievances.

The court also observed that the existence of human as only male and female binary has been deconstructed. The court accepted that not only does the binary of male and female exist. But rather there is the existence of other sex as well (non-binary). The court also stated that the constitution of Nepal 2015, recognized and acknowledged the identity of gender and sexual minorities within the framework of human rights without discrimination ensuring their access, enjoyment, and practice. The court also relied on the essence of the existing constitution, earlier decisions of the court, the report of the committees, treaties ratified by Nepal which had epitome the acceptance of Same-sex marriage in Nepal.

The court ruled that the term “third gender” did not encompass all categories of sexual and gender minorities and instead, “sexual and gender minority” was the appropriate term to use. The court also noted that many federal laws still use binary language such as “male and female”, “husband and wife” and “sons and daughters” which could create barriers for sexual and gender minorities in terms of their property and other rights. The court further stated that the use of the phrase “unnatural sex” in section 226 of the penal code was derogatory towards sexual and gender minorities. The court concluded that the binary classification of male and female in the immigration form cannot be used as a reason to deny non-tourist visas to members of sexual and gender minorities. Therefore, the court issued a writ of mandamus to grant non-tourist visa to Tobias Volz if he files a petition for spouse visa, and if Adhip Pokharel supports his application by identifying him as his spouse and submitting his citizenship, marriage citizenship and other necessary documents.

The court issued a directive order against the defendant (DOI) to make the necessary arrangements to amend entry 11 of schedule 2 of Immigration Rule 1994, which describes the process for obtaining a non-tourist visa. Entry 11 only allows for the designation of “husband/wife” in the application process for a non-tourist visa, which creates difficulties for individuals who are part of sexual and gender minorities. The court directed the DOI to eliminate these obstacles and make changes to entry 11 to accommodate the requirements and forms for sexual and gender minorities.

The court noted that its previous directive order, issued six years ago in the Sunil Babu Panta case, which required the government to create new laws or amend existing laws to ensure equal rights for sexual and gender minorities, has not been implemented. The court further observed that the civil code acknowledged the validity of marriages conducted in foreign countries, and therefore, the petitioners’ marriage conducted in Germany should be recognized as valid. Despite Vol’s S39 application for a non-tourist visa on July 19, 2022, the DoI failed to respond to his request, prompting him to file a writ petition with the apex court.

**BOTSWANA [KANANE V THE STATE 2003(2) BLR 67] (CA)**

Appellant was charged with committing on unnatural offence with another man contrary to Section 164(c) of the Penal Code. He pleaded not guilty. Particulars of the offence were that he permitted an adult male to have carnal knowledge of him against the order of natural. He was convicted by trial court and he appealed. At the Court of Appeal, appellant submitted that Section 164(c) was discriminatory, that the section violated his right to privacy and assembly.

**ND V THE ATTORNEY GENERAL [MAHGB-000449-15]**

A transgender man (ND) sought to change his gender marker on his national identity card before the Registrar of National Registration. The Registrar refused and he challenged such refusal on grounds that the decision subjected him to severe personal insecurity, was discriminatory, amounted to inhuman and degrading treatment, infringed upon his liberty and dignity. High Court (HC) held that gender marker was incongruous to his gender identity and physical appearance. HC said decision infringed his right to privacy and dignity. HC ordered Registrar to effect the correction.

**RAMMOGE & OTHERS V THE ATTORNEY GENERAL [2016] CACGB 128-14**

LEGABIGO (Lesbians, Gays & Bisexuals of Botswana) and others brought an application against the Minister of Labour and Home Affairs after he upheld the decision to refuse to register LEGABIBO as a society under the Society’s Act. The HC overturned the Minister’s decision and ordered that LEGABIBO be registered as a society.

HC further held that refusal to register LEGABIBO infringed upon the right to freely associate (freedom of association).

HC further held that objectives of LEGABIBO were lawful.

HC further said decision to refuse to register LEGABIBO was unconstitutional.

**MOTSHIDIEMANG V THE ATTORNEY GENERAL & ANOTHER [2019] MAHGB-000591-16**

A homosexual man approached the HC seeking a declaratory relief that sections 164(a)(c) and 165 of the Penal Code, which criminalized anal intercourse were discriminatory against him and violated his right to privacy, dignity, liberty, his right to equal protection of the law and the right not to be subjected to inhuman and degrading treatment.

He asserted that the said penal provisions were unconstitutional; and that they prohibited him from finding and expressing love.

LEGABIBO sought to intervene as amicus curia on the ground that the said society advocated for LGBT rights. LEGABIBO was admitted as amicus curiae.

The High Court upheld the applicant’s case and ruled that sections 164(a) and 165 infringed and impaired applicants’ right to privacy, dignity, liberty and further held that such section indirectly discriminated against the applicant.

HC rejected the Attorney General’s submission that the sections are gender neutral.

HC findings was supported by scientific evidence adduced proving stigmatization of LGBT community. Sections 164 (a) and 165 were struck done as unconstitutional

**SEYCHELLES [ Mervin Jezabel Barbe v Chief Officer of Civil Status (Civil Appeal SCA 08/2015) [2017] SCCA 23]**

Mervin Jezabel Barbe was born and registered as a male in Seychelles, in 1972 under the Civil Status Act. By medical procedure in 2003 (s)he changed sex to become a female and was issued with a medical certificate to that effect. This was recognized (by Court declaration) in Italy, where Barbe was then resident.

In 2010, by marginal entry of her birth certificate, her middle name was changed from Jackson to Jezabel.

Thereafter she applied to the Civil Status Office to change the gender record in her birth certificate from male to female, which was refused. She then turned to the Court seeking that change – it was refused by the Supreme Court, declaring that Civil Status Act does not provide for this. She later went on appeal but lost on appeal on the basis that the provisions on which the original case and the appeal were brought (provision in the law relating to error, whereas this was a change is circumstances)

McGregor, PCA said:

“Despite this, we acknowledge the plea and plight of the Appellant to have his change of gender recognised. To that extent we recommend to the Legislature to consider whether in the Seychelles of today there is a justification for the recognition of gender change, at least in conformity with the Charter of Human Rights in our Constitution.”

However, the Court of Appeal considered Article 27 of the Constitution which provides for equal protection under the law and stated that the Appellant may also consider pursuing the matter in the Constitutional Court along those lines and/or in the alternative in terms of the breach of her inherent right to the respect of her private life and dignity.

**MALAWI (Constitutional Referral 2 of 2021) [2021] MWHC 208**

Jan William Akastel and the other and Attorney General Malawi has a pending case before the Constitutional Court. The particulars of the case are: Constitutional case No. 02 of 2021.

The 1st Applicant was arrested and charged with having carnal knowledge of seven male persons contrary to section 153 (a) of the Penal Code. He has also arrested and charged into attempting to have carnal knowledge contrary to section 154 of the Penal Code. Additionally, the applicant was also arrested and charged for committing an act of gross indecency with one Mr. Kondwani Chaka contrary to section 156 of the Penal Code. The applicant brought the application in which he seeks to challenge the constitutionality of sections 153 (a) and (c), 154 and 156 of the Penal Code on the grounds that they criminalize consensual sexual intercourse between adult males and that they violate his right to privacy, human dignity, and non-discrimination.

The 2nd Applicant was charged and convicted of two counts of obtaining by false pretense contrary to section 318 as read with section 319 of the Penal Code. The Applicant has brought his application in which he seeks to challenge the constitutionality of section 153 (a) and (c), 154 and156 of the Penal Code on the grounds that they criminalize consensual sexual intercourse between adult males and that they violate his right to privacy, human dignity, and non-discrimination.

**2.0 THE ISSUES**

2.1 In the skeleton arguments, the following issues and questions are addressed:

(a) whether section 153 of the Penal Code is unconstitutional or not?

(b) whether section 154 of the Penal Code is unconstitutional or not?

(c) whether section 156 of the Penal Code is unconstitutional or not?

(d) Costs to be decided at the end of the hearing, if at all.

(e) The case is still pending before the constitutional Court in Malawi.

**SRI LANKA**

Saman works at a Salon in Anuradhapura, a city in Sri Lanka. One day in August 2022, he went to the store near the town bus stand to buy some condoms on the request of two of his friends. On the way back from the store, a person on the other side of the road called out to him querying about a bus arrival. Seeing this, two police officers who were off duty but were withdrawing money from an ATM called out to him and when he asked why they called him the officers angrily asked him to show his National Identity Card (NIC). As the store was near his salon he had not brought his NIC. The policemen asked him if he was ‘a bride waiting for his bridegroom to arrive’. They called the police vehicle and took Saman, the other guy and two more persons who were in the vicinity to the police station.

There were 5 police officers at the station. The officers called Saman a faggot, they checked his bag and found 6 condoms and 4 gels. They verbally abused Saman and said these are ‘goods’. Saman informed them he was working on a project with the Ministry of Health and the National STD clinic to promote safe sex. He was asked to remove all his clothes including his underwear. Then they put him in a cell with a previously detained drug dealer.

The police laughed at him asking him to run away before he gets assaulted by the drug dealer and queried if he wanted the condoms. The police also told the drug dealer to have fun with Saman. The drug addict sexually assaulted Saman. He was kept in the cell till 12.30 pm the next day while those who worked at the station came and stared at him. One police officer informed Saman that he would have been released in the morning itself but was kept for longer because he spoke back to them.

During the whole period Saman was denied drinking water and was asked to drink from the toilet tap. The police kept saying that the report was not ready, and they could not provide police bail since no one had come from his home. Finally at 3.30 pm he was verbally threatened and released. He was also given a complaint number.

Law in Sri Lanka:

Sections 365 and 365A of Sri Lanka’s Penal Code of 1883 criminalize “carnal intercourse against the order of nature” and “acts of gross indecency”, respectively. Both sections have been used to criminalize consensual same-sex sexual relations, although the Penal Code does not provide a definition of the terms used by those sections. Those convicted of the ‘crime’ may face up to ten years’ imprisonment.

The Sri Lankan Constitution in Article 12 guarantees the right to equality before the law and equal protection of the law of all persons. It prohibits discrimination on grounds of race, religion, language, caste, sex, political opinion, and place of birth but does not prohibit discrimination on the grounds of sexual orientation, gender identity or gender expression.

The Sri Lankan government though, has indicated before various UN bodies that Article 12 included non-discrimination based on sexual orientation and gender identity.

The Supreme Court of Sri Lanka has sole authority to decide on Fundamental Rights cases. Complaints of human rights violations can also be filed with the Human Rights Commission of Sri Lanka. Sri Lanka is party to all International Human Rights Treaties. Sri Lanka is a dualist state.

**LESOTHO**

Lesotho reported that its ‘courts has never dealt with issues pertaining to the rights of the LGTBIQ+ community. They correctly pointed out that the courts can only pronounce themselves only when cases are brought before them. The Seychelles bench did however note that legal practitioners may be reluctant to bring such cases to court for fear of reprisals and backlash.

**WHAT THE JUDICIAL DIALOGE ACHIEVED**

As stated, the objective of the dialogue was to debunk the myth created and the narrative that gained traction in legal and social circles that anything associated with LGTBI+ rights is unafrican, suggesting that it cannot be discriminilised in African countries.

From a legal perspective, the dialogue was also a platform of exchange of jurisprudence from different jurisdictions to stole strides that the courts have made in recognising the rights of the LGTBI+ community as human rights.

The participants also discussed legislative interventions in national constitutions. However, participants lamented that the International principles, despite being a tool that promotes the rights of thee LGTBI+ community, can at best be used merely as a persuasive tool in court proceedings where they are not adopted or domesticated in national constitutions of domestic law.

The dialogue also served as a platform where civil society groups educated, shared their concerns, and put forward their misgivings about how courts interpreted legal provisions giving rights to LGTBI groups. The civil society groups also pointed some regressive laws. Uganda was pointed out as an example of regressive laws.

The objective of the dialogue as outlined in the invitation to the participants read……

Through the deliberations, presentations, networks formed, I believe the objective was achieved.

I would like to end the report by extending and expressing my gratitude to the Chief Justice for appointing me to attend this judicial dialogue. I believe that the judiciary in Lesotho will gain from the wealth of knowledge for it was not for personal gain but for the advancement of judicial advancement in Lesotho. I would urge that the judgments alluded to in this report to be circulated amongst colleagues so that they gain from the jurisprudence of other countries.