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PRESS STATEMENT

THE DECISION TO ALLOW THE REGISTRATION OF THE NGO LESBIANS, GAYS AND BISEXUALS OF BOTSWANA (LEGABIBO) IS IMPORTANT FOR ALL OTHER AFRICAN COUNTRIES AND FOR THE HUMAN RIGHTS INSTITUTIONS OF THE AFRICAN UNION

18 March 2016

The Centre for Human Rights (the Centre) is delighted to note that the Botswana Supreme Court of Appeal ruled against the Attorney General of that country, and chose to uphold the decision of a lower court instructing the relevant government department to register the organisation Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) as an NGO in Botswana.

The following extract from the judgment summarises the rationale behind the judges' decision:

The argument that asking an NGO that works for the advancement of the human rights and wellbeing of LGBTI persons in Botswana not to be registered was skewed because there is nothing unlawful about advocating for the law to be changed because that in itself is not illegal. It is the democratic right of every citizen to express their opinion on a law. It does not follow that when an organisation advocates for changes in the law on abortion, the death penalty, or same sex sexual acts, that means the organisation or its members is engaging in abortion, or murder or same sex sexual acts. The respondents made it clear that they respect the laws of Botswana and there is no suggestion whatsoever in the objectives of LEGABIBO that they will encourage their members to commit offences against sections 164 or 167 in the Penal Code of Botswana (unnatural offences). Neither is there an indication that LEGABIBO will indulge in "outreach" to recruit others to commit such offences. There also exist other organisations and politicians in Botswana that already advocate for gay and lesbian rights and there has been no suggestion that any of those is breaking the law.

This is a historic judgement. For the first time in history the highest court of an African country has upheld the right to freedom of expression and association, irrespective of the fact that private activities of members of the group, association or organisation might be considered illegal. It is an important legal precedent for all African jurisdictions, and a new standard to which all other countries should be held.

This ruling is equally important for two reasons:

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1. It serves as an inspiration for African Union (AU) human rights bodies – both the African Commission on Human and Peoples’ Rights (the African Commission) and the African Court on Human and Peoples’ Rights (the African Court) – as they grapple with the question of sexual minorities.

In April 2014, and after avoiding the question of sexual minorities for many years, the African Commission passed the ground-breaking Resolution 275, on Protection against Violence and other Human Rights Violations against Persons on the basis of real or imputed Sexual Orientation or Gender Identity.

One year later, in April 2015, the African Commission granted observer status to the NGO Coalition of African Lesbians (CAL) after an unusually long seven-year period of repeated applications, difficult lobbying and advocacy. The Commission eventually granted observer status to CAL, deciding that the work of CAL was complementary to the African Commission’s protective mandate.

At the 25th African Union summit in June 2015, the Executive Council of the AU– in considering the report of the African Commission – requested the Commission to withdraw the observer status granted to CAL, and to review its criteria for granting observer status to NGOs. It did so on the grounds that the work of CAL was contrary to fundamental African values, identity and good traditions.

In November 2015, and together with CAL, the Centre submitted a request for an Advisory Opinion to the African Court, under article 4 of the Court Protocol, asking the Court to clarify the nature of the "consideration" by the AU's political organs, in particular the Executive Council, of the activity reports of the African Commission on Human and Peoples' Rights. The applicants contend that the AU's political organs must uphold the Commission's independence and respect its role as autonomous interpreter of the African Charter on Human and Peoples' Rights.

The LEGABIBO decision by the Supreme Court of Botswana, coming as it does in anticipation of the African Court’s advisory opinion, should inspire and inform the judges’ consideration of this important matter.

2. It is also an important example for the many other African countries that do not allow LGBTI organisations to operate legally, sometimes contrary to their own constitutional provisions for freedom of expression and association. This decision marks an important step forward in the realisation of other rights contained in many African constitutions, such as the over-arching principles of equality, non-discrimination and dignity, as well as the right of privacy and the right to health.

The LEGABIBO decision is particularly important because it lays down an important precedent, by a respected apex court, whose reasoned judgment can be cited by advocates and organisations elsewhere on the African continent. This is especially so because many African countries use the laws that criminalise sodomy or cross-dressing as a reason to refuse to register LGBTI organisations or to distribute condoms in prison for example. The LEGABIBO judgment finds this argument spurious; it potentially opens the way for the registration of similar NGOs in other countries; and it could lead to actions that will result in greater respect for LGBTI persons and the realisation of relevant rights.

The Centre salutes the decision of the Botswana Supreme Court of Appeal and calls on:

1. the AU political organs to note and support this judgment, and withdraw its request for the African Commission to consider its criteria for granting observer status to NGOs;

2. the African Commission to rely on this judgment in its future consideration of applications for observer status submitted by LGBTI organisations; and to reassert its independence vis-à-vis the AU Executive Council;
 3. all countries with similar restrictions on the registration of LGBTI NGOs to take note of this judgment; to appreciate the contribution of LGBTI organisations to national development, especially in the field of health and wellbeing, and to the fight against HIV and AIDS; and, where applicable, to consider revising the legal and administrative framework to allow for the registration of LGBTI NGOs.
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