On 6 September 2018, after over twenty-four years of litigation, and several more of advocacy, the Supreme Court of India declared section 377 of the Indian Penal Code unconstitutional to the extent to which it criminalised homosexuality. A constitutional bench of the Court, comprising Justices Malhotra, Nariman, Khanwilkar, Chandrachud, and Chief Justice Misra, held that the criminal provision was used to prosecute, harass, and blackmail the LGBTI+ community, including people who engaged in consensual sexual acts with same-sex partners, and it therefore flagrantly violated the equality, dignity and privacy guarantees of the Constitution of India.
In 2009, the Delhi High Court, in a progressive anti-discrimination decision decriminalised homosexuality, only for this decision to be reversed by the Indian Supreme Court on appeal in 2013. The present decision of the Indian Supreme Court is on the heels of the judicial recognition of transgender rights as well as the extensive ruling on privacy, which crystallised the right to privacy as a fundamental right protected by the Constitution, and expanded upon the notion of privacy as personal autonomy, and affirmed the wrongness of the 2013 reversal of decriminalisation.

Section 377, a part of the Indian Penal Code of 1860, is titled “Unnatural offences” and reads as follows: “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.”

An inquiry into the history of the provision reveals that this colonial-era law has its roots in the anti-sodomy laws enacted by Henry VIII, and subsequently the British Parliament. The criminalisation of “buggery”, as it was called, was exported to most of Britain’s then-colonies through a charter of Queen Elizabeth I. This continued well into the 1800s. It was against this backdrop that Thomas Babington Macaulay, the drafter of the Indian Penal Code, introduced this section. Although the Sexual Offences Act of 1967 reformed the law in England, and decriminalised consensual sexual acts between adults of all genders, this was not done in its former colonies.

More than 70 years after India’s independence from British rule, artefacts of colonialism in the form of legal, cultural, and social aspects remain, and continue to disentitle and oppress. The Indian Supreme Court’s pronouncement is a step in the long process of decolonisation that extends beyond the singular act of political independence from former colonial powers.

Legal remnants of such discrimination are still prevalent in a large number of African countries, some of which are former British colonies. With the exception of South Africa, the track record that most African countries have in relation to criminalisation of homosexuality is abysmal. Thirty-six countries on the continent have criminal sanctions for engaging in same-sex sexual acts. In Southern Africa, homosexuality is criminalised in Botswana, Malawi, Namibia (a former British protectorate following World War I), Swaziland, Zambia, and Zimbabwe using penal provisions that are similar to section 377 of the Indian Penal Code, given
their status as former British colonies or protectorates as the case may be. The judgment of the Supreme Court of India has particular relevance to Southern Africa for this reason.

The five-judge bench of the Indian Supreme Court was unanimous in holding that section 377 contravened the following fundamental rights: the right to equality (Article 14), the prohibition on discrimination on the basis of sex (Article 15), freedom of expression (Article 19(1)(a)), and the right to life and personal liberty, that encompasses dignity (Article 21).

There were several strands of argument that were emphasised by different judges, all of whom held that these rights were violated: the Chief Justice and Justice Khanwilkar highlight the significance of an adult individual’s dignity of choice – in other words, their personal capacity to make autonomous decisions for themselves, which includes sexual preference and orientation. Justice Nariman points out that the distinction between “natural” and “unnatural” sexual acts is entirely arbitrary and has no scientific basis in law or fact. Justice Chandrachud, in adopting a robust anti-discrimination standpoint, highlights the predominance of traditional, fixed gender roles and stereotypes in making and implementing laws, and specifically does so in the use and effect of section 377. Justice Malhotra’s judgment takes a strong position on equality, emphasising that an individual’s sexual orientation and preference are not grounds on which the state may discriminate, and under no circumstances may such discrimination be justified by the state.

Justice Malhotra also acknowledges the historical injustice and prejudice that LGBTI+ individuals have had to face, and in doing so states that, “History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality.”

This judgment has thus been hailed as a victory for love – both by the judges themselves, and by the tireless LGBTI+ community activists, organisers, lawyers, campaigners, and supporters involved in this struggle for equality and dignity. Given India’s position in the Global South, this decision as a “rainbow in the clouds” will hopefully bolster the efforts of activists campaigning for equal sexual citizenship across Southern Africa, and the wider world.
Sanya Samtani is a DPhil candidate in human rights law at the University of Oxford, having completed her BCL at Oxford, and her BA LLB at NALSAR University of Law, Hyderabad. She is currently clerking at the Constitutional Court of South Africa as a foreign law clerk.

The Dialogue Online, is an online extension of SALO’s national, regional and international consensus-building dialogues (typically workshops, seminars and small meetings) on Peace and Security, Development, SA Foreign Policy, Gender (including LGBTI rights), Natural Resource Governance, Human Rights and the rights of migrant communities through weekly written articles and/or commentary. It is a channel through which critical issues raised during dialogue events are synthesised and shared with wider audiences. By taking the dialogue 'online', the conversation is enabled to continue beyond the limits of space and time and to a wider audience. Since SALO’s central focus is peace and security, Dialogue Online articles focus primarily on this theme, but drawing attention to the nexuses with development, natural resource governance, human rights and gender, mediation, environment and climate change. Preference is towards articles that speak to international development and peace building policy and practice, raise awareness about conflict situations and the gender dimensions thereof and provoke fresh thinking and policy debate. Contributions are drawn from SALO’s pool of experts, peace building and development practitioners, activists, academics, former and current diplomats and workshop participants.

Please note that the articles represent views of respective contributors and do not necessarily reflect SALO’s view or position.

Interested contributors are welcome to email articles of 750 to 1000 words in length to info@salo.org.za for consideration.

Please follow us on twitter @salo_info and #DialogueOnline SALO for comments.

SALO would like to thank (in alphabetical order) the Embassy of Denmark; Friedrich-Ebert-Stiftung (FES); the Embassy of Ireland, Pretoria; the Embassy of the Kingdom of the Netherlands in South Africa; Norwegian People’s Aid (NPA); The Olof Palme International Centre; The Royal Norwegian Embassy; among others, for their ongoing support of our Policy Dialogue Series.