

Global South:
India decriminalises homosexuality through
Supreme Court verdict



By Sanya Samtani

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.

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