



# DISCRIMINATION AND THE COURT: SAME-SEX RELATIONS IN INDIA, BOTSWANA AND KENYA

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## Abstract

In recent years, the demand to decriminalise same-sex relations has met with some significant success across the world. In the past 20 years, over 30 countries have decriminalised homosexuality. While the Indian and Botswanan courts declared that same-sex relations are no longer criminal, the High Court of Kenya repelled a similar challenge. In this comment, I will focus on decriminalisation and its interaction with anti-discrimination law. I will examine two obstacles faced by the petitioners in all three cases towards an anti-discrimination argument. The first is that sexual orientation is not a protected ground. The second is that the criminal law provisions are facially neutral and not discriminatory (even if sexual orientation was a protected ground). I discuss how these arguments were responded to by the courts and argue that the Kenyan court's approach was incorrect.

## 1. Introduction

In recent years, the demand to decriminalise same-sex relations has met with some significant success across the world. It is reported that in the past 20 years, over 30 countries have decriminalised homosexuality. Courts have stepped in to strike down laws criminalising homosexuality as unconstitutional. In this note, I will look at the judicial developments in three comparable jurisdictions of Botswana, India and Kenya.

In 2016, Letsweletse Motshidiemang, a gay person approached the High Court of Botswana challenging the provisions criminalising same-sex relations. In this case, the LEGABIBO (Lesbians, Gays and Bisexuals of Botswana) was admitted as an amicus curiae at the court. The Court in 2003 in *Kanane v. the State* had upheld the constitutionality of these provisions, by holding that "... the time has not yet arrived to decriminalise homosexual practices even between consenting adult males in private."

The Indian Supreme Court in 2013 had repelled the challenge against the penal provision criminalising ‘unnatural offences.’<sup>4</sup> However, in 2016, another writ petition was filed by a different set of petitioners challenging the constitutionality of the law. In Kenya, the challenge was made by the National Gay and Lesbian Human Rights Commission.

The penal provisions of all three countries are similarly worded and share their colonial origin and history. As noted by the Botswana court, “S377 of the Indian Penal Code was copied in a large number of British territories, including Botswana.” Even though the United Kingdom decriminalised same-sex relations in 1967, several colonial countries retained their Penal Codes enacted decades ago. Studies have shown that “former British colonies are much more likely to have laws that criminalize homosexual conduct than other former colonies or other states in general.”

<sup>1</sup> ‘Are LGBT rights human rights? Recent developments at the United Nations’ Juneau Gary and Neal S. Rubin, American Psychological Association, June 2012.

<sup>2</sup> Throughout the analysis, I use the term ‘gay’ to mean male or female persons attracted to the same sex.

<sup>3</sup> Suresh Kumar Koushal & Anr. v. Naz Foundation & Others, (2014) 1 SCC 1.

In June 2019, the High Court of Botswana held sections 164 and 165 of its Penal Code to be unconstitutional and violative of fundamental rights. In September 2018, the Indian Supreme Court declared that same-sex relations are no longer criminal. In *Navtej Singh Johar*, the court held Section 377 of the Indian Penal Code to be unconstitutional to the extent to which it criminalises consensual sexual intercourse between same-sex persons. The High Court of Kenya however, dismissed a similar challenge, holding that sections 162(a), 162(c) and 165 of its Penal Code do not suffer from unconstitutionality.

All three judgments are worth studying, in the context of the rights to equality, privacy and personal autonomy. In this comment, I will focus on the decriminalisation of homosexuality and its interaction with anti-discrimination law. The petitioners had two obstacles an equality argument. The first is that sexual orientation is not a constitutionally protected ground. The second is that the criminal law provisions under challenge (collectively ‘the penal provisions’) are in some sense, facially neutral and hence not discriminatory even if sexual orientation was a protected ground. By discussing how these arguments were responded to by the courts, I argue that the Kenyan court’s approach was incorrect.

The relevant parts of s. 162 read as follows:

“Unnatural offences Any person who:

a) Has carnal knowledge of any person against the order of nature; or

...c) Permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years. Provided that, in the case of an offence under paragraph(a), the offender shall be liable to imprisonment for twenty-one years if— i. the offence was committed without the consent of the person who was carnally known; or ii. the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.”

S. 165 reads: “Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.”

<sup>10</sup> Eric Gitari v. Attorney General, 24 May 2019. Available at: <http://kenyalaw.org/caselaw/cases/view/173946/>. Last Accessed: 12 October 2020. (hereinafter ‘*Gitari*’)

## 2. Sex and sexual orientation

The first problem which the petitioners faced in all three cases is one based on the text of the constitution. It is centred around how the constitutional provision on anti-discrimination is formulated. As familiar to us, our Constitution has a list of grounds under Article 15 on which discrimination is prohibited. The Constitution of Botswana guarantees the right of non-discrimination through Section 15. It was argued that the discrimination provisions of both constitutions have a 'closed' list of grounds.

Now, if the constitutions had explicit reference to sexual orientation, this problem would be moot. But none of the three constitutions had 'sexual orientation' written into them. The Kenyan constitution notably did not have a 'closed' list and provided for an inclusive definition holding that the state shall not discriminate on grounds *including* race, sex, marital status etc, revealing a broader approach to anti-discrimination. Even then, in the court, the argument that the court should rely on a South African precedent was resisted saying that the South African Constitution mentions sexual orientation, while the Kenyan one does not.

There are two ways of making the argument that discrimination based on sexual orientation is constitutionally prohibited. I will call them reductionist and non-reductionist. A reductionist argument is one where one argues that sex includes sexual orientation. Non-reductionism would mean asserting that sexual orientation is analogous to sex, and therefore deserves protection.

(a) **Sex Includes orientation:** This argument says that sex includes sexual orientation, either by arguing that sexual orientation discrimination is a type of sex discrimination or by resorting to an interpretation of the word based on the contemporary meaning and social context.

"15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

15. Protection from discrimination on the grounds of race, etc.

The US Supreme Court in *Bostock* resorted to the former method. The court held that: "*it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.*" To put it simply, when one discriminates based on sexual orientation, she is discriminating based on sex.

The Botswana Court takes the latter view. The court was open to generously interpreting the word 'sex'. To strengthen this argument, the court referred to employment legislation that mentioned sexual orientation and gender. The court seemed to have appealed to the sentiment that 'sex' in the contemporary social context, takes in sexual orientation. The Indian court, although engaged a somewhat similar view, went farther and expressly adopted an argument based on analogous grounds.

(b) *Orientation analogous to sex:* The second approach is one of analogous grounds. Grounds that are analogous or comparable to the existing ones of grounds under the anti-discrimination law can be said to be covered. As we can imagine, this can have radical ramifications by bringing new grounds under the ambit of the law which was never mentioned. Are constitutions containing exhaustive protected grounds to be read as limiting protection on only those grounds? (Loosely the 'narrow reading'). It could follow from a narrow reading that since political belief is not mentioned in Article 15(1) of our constitution, the provision cannot be interpreted to protect discrimination based on political belief. Or can constitutions, containing an enumerated list of grounds be read to include something more than the plain linguistic text? (Loosely the 'broad reading').

The objection against a broad reading is this: the constitution is meant to be read as its original text. The argument is that certain protected grounds are specified in the text precisely because the protection is limited to those groups and grounds such as sex, race or religion. If we extend it to other groups, the provision will eventually be redundant, having no salience attached to it. Only constitutional amendments can add anything to these provisions if one has to even slightly deviate from the linguistic text.

But this raises the question of why certain groups are protected in the first place. Why does the constitution extend protection to few groups and not to others? If a particular trait is sufficient to allow constitutional protection, why aren't left-handers a protected group? Or people with green eyes or red hair? What distinguishes them from those belonging to a particular religion or race?

Perhaps, we must look at the nature and scope of the grounds which already stand protected. This is the principle behind analogous grounds. As soon as we identify whether there are unifying features for the provisions which tie them together, we can find analogous grounds of protection. The Indian court was impressed with this argument. It went on to determine what these unifying features are.

One of such principles is historic and social discrimination. Certain grounds are afforded recognition because they are the most visible and prevalent forms of discrimination. Sex discrimination, for instance, is a universally acknowledged ground of discrimination as evidenced by most constitutions. The historical exclusion of 'lower' castes in India led to Article 15 prohibiting caste-based discrimination, while it is absent in other constitutions where caste does not pervade society. This account helps the case of the petitioners since historic (often through non-recognition) and social discrimination of gay persons could be demonstrated. The historical, social and political discrimination suffered by gay persons was acknowledged by the court. In this context, it also becomes clearer why red-haired people are not afforded protection analogous to gay persons and what makes the distinction morally relevant.

Another answer is based on immutable status and fundamental choice. A trait that is a matter of personal autonomy deserves to be protected because liberal constitutions must not allow discrimination based on personal choice. Immutability is understood as status over which you have no control over, which is impossible or very burdensome to alter.

The Indian court had no hesitation to hold these two features unify the constitutional provision of anti-discrimination and that sexual orientation is both a matter of choice and status. The so-called 'closed list' of grounds in the constitution, the court said nevertheless had an underlying commonality. The court accepted that "homosexuality and bisexuality are natural variants of human sexuality. LGBT persons have little or no choice over their sexual orientation. "Race, caste, sex, and place of birth are aspects over which a person has no control, ergo they are immutable. Since sexual orientation is immutable, it deserves to be protected. Therefore, despite an arguably 'closed' list of groups, the Indian and Botswanan courts acknowledged the interpretive potential of their constitutions.

In the Kenyan court, the arguments of the petitioners extended across these aspects of historic and social discrimination, fundamental choice and immutability. Sexual orientation must be treated as a protected ground. The special nature of the Kenyan anti-discrimination provision which is explicitly 'inclusive' easily facilitated this argument. However, the court did not accept the claims persuading it to read 'sexual orientation' as a protected ground under the Constitution. Instead, it relied on the Constitution itself to reject them.

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Para 131. *Gitari* (Supra Note 14). "Counsel argued that the Respondent having acknowledged that the Constitution protects everyone from discrimination based on among others sexual orientation, they cannot turnaround and argue that Article 27 of the Constitution is exhaustive on prohibited grounds of discrimination.

Further, that Article 27(4) uses the word "including" which is defined in Article 259(4) to mean, "Includes, but is not limited to Article 27- Indian Constitution protects everyone from discrimination based on among others sexual orientation, they cannot turnaround and argue that Article 27 of the Constitution is exhaustive on prohibited grounds of discrimination.

Further, that Article 27(4) uses the word "including" which is defined in Article 259(4) to mean, "Includes, but is not limited to."

Peculiarly, Article 45(2) of the Kenyan Constitution recognises the right of adults to marry persons of the opposite sex. The court said: "decriminalizing same-sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45 (2)." The reliance on comparative judgments was rejected by sole reference to this provision, noting other constitutions did not have an equivalent provision.

But this reasoning is flawed. Even if the court's argument that the constitution only recognises marriage between the members of the opposite sex was correct, the court was concerned not with recognition of same-sex marriages, but decriminalisation of homosexuality. These issues are distinct. Further, the court said that "if allowed, it will lead to same-sex persons living together as couples. Such relationships, whether in private or not, formal or not would violate the tenor and spirit of the Constitution." According to the court, in a case where the validity of the same-sex marriage was not in question, same-sex relationships in themselves would violate the spirit of the constitution. But this is a non-sequitur. Merely because the constitution recognises 'X, it does not follow that it prohibits 'Y.' In this context, non-recognition of the right of marriage of homosexual persons has no impact on their right to engage in consensual sex. Non-recognition also does not imply prohibition. By conflating decriminalisation and recognition, the court erred in rejecting the arguments of the petitioners.

### 3. Form or Effect?

The second problem faced by the petitioners was grounded in the distinction between discrimination based on the form of the effect of the law. The former is generally referred to as direct discrimination. An employer who advertises a job and adds 'women need not apply' discriminates against women by disallowing them to apply. Under indirect discrimination, on the other hand, we look at the discriminatory impact of a facially neutral law. A law that refuses to hire persons wearing a headscarf might be indirectly discriminating against Muslim women.

The penal provisions presented this issue: they did not specifically refer to gay persons. It did not address them in plain text. This is to say that by their nature, they were facially neutral provisions criminalising, broadly, 'carnal intercourse against the order of nature, irrespective of the sexual orientation of the persons engaging in it. Both Kenyan and Indian laws used words like 'any person' and 'whoever' and avoid referring to gay persons. On this strength of this, the state argued that there is no direct discrimination while supporting the constitutional validity of the penal provisions. In the Kenyan case, the respondent argued that they "only apply to homosexuals but also heterosexuals hence they are not discriminatory."

### 4. Conclusion

The *Gitari* case presented a momentous opportunity for the Kenyan court to correctly determine the scope of the constitutional prohibition on discrimination. The court had the benefits of a constitution which both recognised 'inclusive' grounds of protection and indirect discrimination. An earlier judgment by the Court of Appeal which expressly held that sexual orientation stands covered under the constitutional guarantee of non-discrimination were also invoked by the petitioners. I have argued that by holding that sexual orientation discrimination is not constitutionally prohibited, the Kenyan court made a mistake. One can only hope that the court will correct itself like our Supreme Court remedied the error of *Koushal*.

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Gitari v. Non-Governmental Organisations Co-ordination Board, Petition No. 440 of 2013. Available at: <https://globalfreedomofexpression.columbia.edu/cases/gitari-v-non-governmental-organisations-co-ordination-board/>. Last Accessed: 12 October 2020.