

# India's Supreme Court re-criminalizes homosexuality

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28 December 2013

India's Supreme Court has struck down a 2009 Delhi High Court ruling that declared unconstitutional a section of the Indian penal code, adopted in 1860, that criminalized private consensual sex among gay men and women, as well as some sexual acts between men and women. As a result of the Supreme Court ruling, men and women alleged to have engaged in homosexual acts can be arrested and prosecuted and, if found guilty, could be liable to life imprisonment.

The ruling upholding the constitutionality of Section 377 of the Indian Penal Code was issued by a two-judge panel of the Supreme Court in response to a legal challenge to the Delhi High Court ruling launched by Hindu, Muslim, and Christian groups.

In affirming the constitutionality of Section 377 and its claim that homosexual acts are “against the order of nature,” India's highest court is encouraging unbridled anti-homosexual bigotry on the part of backward social layers. It is also exposing India's gays to the danger of harassment, arrest, and blackmail from India's police, which are notorious for their corruption and use of arbitrary beatings and torture.

That such dangers are far from hypothetical was strikingly displayed by a September raid mounted by Andhra Pradesh police on a party of gay men. Although the Delhi High Court ruling had made Section 377 inoperative, the police justified their raid in the name of stopping “illegal and obscene” acts.

In Malaysia, a similar provision—based on the colonialist British Indian penal code and also known as Section 377—was used by Malaysian authorities to jail the former deputy prime minister, Anwar Ibrahim, after he had a falling out with the country's longtime prime minister, Dr. Mahathir Bin Mohamed.

Section 377 was included in the Penal Code imposed on India by British colonial authorities in the early 1860s, as London sought to strengthen its control in the aftermath of the 1857-58 “Mutiny,” a mass rebellion against British rule that engulfed much of northern India.

In addition to proscribing homosexual acts, Section 377 declared a long list of heterosexual acts, including oral sex,

criminal.

In 2009, the Delhi High Court, invoking as legal precedent court-rulings in several western countries, found this Victorian-era, colonialist law to be in violation of articles 14, 15 and 21 of India's constitution, which guarantee equality before law, prohibition against discrimination, and protection of life and personal liberty.

In striking down the Delhi High Court decision, the two-justice Supreme Court panel advanced the specious claim that Section 377 could not be found to be discriminatory because it does not exclusively target homosexuals, since it also outlaws some sexual acts between heterosexuals.

“It is relevant to mention here,” wrote Justice Sanghvi, “that Section 377 ... does not criminalize a particular people or identity or orientation. It merely identifies certain acts, which if committed, would constitute an offence. Such prohibition regulates sexual conduct regardless of gender identity and orientation.”

In other words, India's highest court continues to insist that the state has the legal-constitutional power to regulate the private sexual activities of consenting adults, including declaring some activities criminal.

Knowing full well that their decision would be met with widespread opposition and outrage, the Supreme Court justices said parliament has the legislative power to eliminate Section 377. In the context of their ruling, however, this admission only serves to underline their upholding of the state's power to regulate consensual sexual activity.

Four years ago, the Delhi High Court ruling was widely hailed by both Indian and international gay rights organizations and much of the corporate media. They were euphoric over the fact that the judgment finally removed the stigma associated with homosexuality in a country where the ruling elite has long encouraged and buttressed sexual repression to the point where heterosexuals kissing in public or on the cinema screen is condemned.

However, India's judiciary, as the Supreme Court ruling over Section 377 has again demonstrated, is no ally in the

fight to extend democratic rights. On the contrary, over the last two decades and in lockstep with the Indian bourgeoisie's turn ever further to the right, open celebration of mounting social inequality and demand for the abolition of all regulatory impediments on profit-making, India's Supreme Court has issued one reactionary judgment after another—judgments in which the court has pandered to Hindu fundamentalists and communalist reaction and attacked the democratic rights of the working class.

To recall just a few of the most significant:

By refusing to take a firm stand against violent Hindu fundamentalists, the court essentially countenanced the 1992 destruction of the Babri Masjid (mosque) in Ayodhya, Uttar Pradesh—an act that provoked the worst communal bloodletting in Indian since Partition. The senior leadership of the Bharatiya Janata Party (BJP), especially then party leader L.K. Advani, openly exhorted mobs of communalists to raze the historic mosque; yet to this day none of the BJP leaders and their allies in the leadership of the Hindu supremacist VHP and RSS have been called to account for violating the Court's own injunction prohibiting any attack on the Masjid.

Three years later, the Supreme Court bestowed a stamp of respectability on *Hindutva*, the term coined by the Hindu supremacist ideologue V.D. Savarkar and used by the BJP and its allied organizations to refer to their noxious communalist ideology. The court claimed that *Hindutva* was not at odds with the secular values propounded in India's constitution; it merely signifies a broader "Indian culture" that supposedly subsumes Muslim, Sikh, Christian and other minority religions.

Giving credence to religious mumbo-jumbo, the court in 2007 claimed that the natural chain of limestone shoals between the coast of India and Sri Lanka could have been "built by the ancients" in a case concerning a plan to deepen the channel between the two countries so as to facilitate shipping. The VHP (World Hindu Council) had been agitating against the project, not because of the environmental damage it would cause, but on the grounds that the limestone shoals were in fact a bridge built by an army of monkeys as depicted in the Hindu mythical classic *Ramayana* and hence "holy".

India's Supreme Court has also repeatedly issued authoritarian judgments. In 2003 it sanctioned the Tamil Nadu government's efforts to break a state employees' strike through mass arrests and firings, ruling that public sector workers have no right to strike. In 2007, it declared "bandhs"—24- or 48-hour political general strikes—illegal.

That same year, it issued a sweeping ban on protests and even public debate concerning the dangers shipyard workers would be subjected to if they were made to dismantle the

toxic-laden, retired French aircraft carrier *Clemenceau*. [See [HYPERLINK](http://www.wsws.org/en/articles/2006/02/indi-f18.html)

"<http://www.wsws.org/en/articles/2006/02/indi-f18.html>"]

Indian Supreme Court imposes sweeping ban on public debate on toxic warship]

Unsurprisingly, the Supreme Court ruling upholding the constitutionality of Section 377 and re-criminalizing homosexuality has been hailed by the Official Opposition BJP and by various religious organizations including Muslim and Christian groups.

The behavior of India's Congress Party-led United Progressive Alliance (UPA) coalition government has, on the other hand, been utterly dishonest and duplicitous.

While the government reacted with silence to the 2009 Delhi High Court ruling, Congress Party leaders, including party President Sonia Gandhi, her son and the presumptive Congress Prime Ministerial candidate, Rahul Gandhi, and Finance Minister Chidambaram have all criticized the Supreme Court decision. But the government has no intention of legislating Section 377 out of existence, fearing such action might damage its electoral chances. Instead, it intends to mount a legal challenge, appealing for the Supreme Court to rehear the case, a process that could drag on for years, during which Section 377 will remain in force. Moreover, given the court's long record of sanctioning attacks on democratic rights and pandering to the Hindu right there is no guarantee whatsoever that the whole court will not endorse the reactionary ruling of the two-judge panel.

This ambivalent response is in keeping with the two-faced attitude that the Congress and the government have taken all along. The UPA's Additional Solicitor-General, P.P. Malhotra, argued before the Supreme Court that as per the government homosexual sex is "highly immoral and against the social order" and furthermore it is "against nature and spreads HIV".

Only after a firestorm of criticism from gay activists and politically liberal commentators did the UPA backtrack and claim that Malhotra's statement did not reflect the government's views.



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