

Indian supreme court decriminalises homosexuality

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Cheers from campaigners as colonial-era law is struck down after decades of uncertainty

India's supreme court has decriminalised homosexual sex in a landmark judgment for gay rights.

A five-judge bench of the country's highest court ruled on Thursday that a 160-year old law banning sex "against the order of nature" amounted to discrimination on the basis of sexual orientation and was unconstitutional.

"Criminalising carnal intercourse under section 377 Indian penal code is irrational, indefensible and manifestly arbitrary," said the chief justice, Dipak Misra, in his ruling, part of a series of judgments that quoted from Oscar Wilde ("The love that dare not speak its name"), Leonard Cohen ("From the ashes of the gay / democracy is coming"), William Shakespeare ("What's in a name? That which we call a rose by any other name would smell as sweet"), and the German philosopher Johann Wolfgang von Goethe ("I am what I am, so take me as I am").

"Social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by individuals today," Misra said, "and it is only when each and every individual is liberated from the shackles of such bondage ... that we can call ourselves a truly free society."

"History owes an apology to members of the community for the delay in ensuring their rights," stated another judge on the bench, Indu Malhotra.

The announcement of the decision drew loud cheers from a crowd gathered on a lawn outside the supreme court. [India](#) has one of the world's largest populations of gay people.

"It's in our favour," Smriti, 19, who did not give her last name, shouted as she embraced three others before they were mobbed by television cameras. They had seen a text message from a journalist inside the court quoting the judges. "That's when we knew they had lifted it," she said. "It's a positive. There's so much work to be done, but it's a great first step. We're not criminals in our own country."

Indian activists celebrate after the hearing. Photograph: Divyakant Solanki/EPA

Ritu Dalmia, one of the five LGBT Indians who put their name to a legal petition that succeeded on Thursday, said the verdict made her feel hopeful.

"I was turning into a cynical human being with very little belief in the system, but honestly, this has really shown once again that we are a functional democracy where freedom of choice, speech and rights still exist," she said.

"Today is a historic day," said Anand Grover, one of the lawyers who led the case, on the lawn

outside the supreme court in central Delhi. “The future is for everybody to be included, to realise their fundamental rights of equality, privacy, dignity, etcetera. That is what the court has stated and given directions that this be made available and known to everybody.”

The decision appears to mark the end of a [fraught path to legalising homosexuality](#) in modern India. Early cases filed in 1994 and 2001 bounced back and forth for years between higher courts reluctant to rule on the issue.

A flag is held by an activist outside the supreme court. Photograph: Sajjad Hussain/AFP/Getty Images

In 2009, the Delhi high court quashed the cornerstone of section 377 of the Indian penal code, finding that applying its ban on “carnal intercourse against the order of nature” to consenting adults breached the rights to life, liberty and equality enshrined in the country’s constitution.

That decision was overturned four years later by the supreme court, which argued that the 1861 law that came to be associated with homosexual sex had been used so infrequently – fewer than 200 times, according to the judgment – and against such a “minuscule fraction” of the population that it could not be said to violate Indians’ constitutional rights.

Activists were blindsided by the decision and thousands of Indians grappled with a fundamental part of their identity being suddenly restored as a criminal offence, punishable by life imprisonment.

“That was such a ridiculous judgment,” said Anjali Gopalan, whose organisation, the Naz Foundation (India) Trust, filed the case that was decided in 2009 and then overturned in 2013. “How do you re-criminalise homosexuality? What were they thinking?”

Critics of the law say that although prosecutions under section 377 are rare, it is frequently used to blackmail gay and lesbian Indians and contributes to their marginalisation, while also inhibiting efforts to fight diseases such as HIV/Aids.

One LGBT group, the Humsafar Trust, said its crisis response team in Mumbai had attended to 18 cases in the past two years of gay men who were being blackmailed by the police or by people threatening to report them to authorities.

It said it had received at least 52 reports of LGBT Indians experiencing harassment or discrimination in the workplace who were unable to report it because of the ban on homosexuality.

Lawyers working to overturn the supreme court’s decision had a breakthrough in 2017. “What changed everything was last year’s privacy judgment,” said Gautam Bhatia, a Delhi-based lawyer and legal scholar. “In August 2017, the supreme court held there was a fundamental right to privacy, and as part of that, five judges said the 2013 decision was wrong.

Celebrations in Mumbai after the country’s top court struck down the colonial-era law. Photograph: Rafiq Maqbool/AP

“It was unprecedented. The judges commented on a completely unconnected case to say it was wrong. But once they said it, with the imprimatur of a full bench behind it, section 377 was gone, implicitly if not formally.”

When the petition was heard by the supreme court over four days in July, supporters were encouraged when India’s Hindu nationalist government, which had previously expressed support for section 377, chose not to file a submission opposing the gay activists, leaving the decision to “the

wisdom of the court”.

Swami Agnivesh, a Hindu cleric who supported the abolition of section 377, said the Vedas, the scriptures that undergird many [Hindu beliefs](#), contained nothing that barred same-sex relationships.

“According to the Vedas, all human beings constitute one family, irrespective of what country they belong to or their skin colour,” he said outside the supreme court. “If two adults decide to have according to their sexual orientation, to have a relationship in private, why should anyone have an objection?”

The decision legalises behaviour that many Indians say was accepted in their culture before the [imposition of conservative Victorian mores](#) during the British imperial era. The anti-sodomy law was imposed in the Indian colony as part of a raft of laws against public vice and immorality instituted across the British empire.

“I’m elated,” said Harish Iyer, a veteran gay activist and writer. “We have thrown out the British once again.”

But he cast forward to future battles for India’s LGBT community, including marriage, surrogacy, and basic acceptance in more conservative regions of the vast country. “This is the end of the beginning,” Iyer said. “It’s the beginning of many more battles we have to fight.”

Acceptance of homosexuality has slowly increased in India over the three decades, particularly in urban centres, reflected in and encouraged by the growing number of openly gay characters on television and in film.

The supreme court urged the government to “take all measures” to ensure the abolition of the ban on gay sex be publicised in the media, and called for training for police and government officials to eliminate the stigma that persists in what is still a deeply conservative country.

Manaka Guruswamy, one of the lawyers who argued the case, said the judgment was a “big moment for constitutional democracy”.

“Whoever you are, if you are rural or urban, in a small city or big city, or if you are here in the supreme court, the court is very clear: you are not alone, they stand with you,” she said.

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