

Flygtningenævnets baggrundsmateriale

Bilagsnr.:	231
Land:	Indien
Kilde:	Human Rights Watch
Titel:	Supreme Court Ruling Undermines LGBT Rights
Udgivet:	12. december 2013
Optaget på baggrundsmaterialet:	17. januar 2014



India: Supreme Court Ruling Undermines LGBT Rights

Publisher [Human Rights Watch](#)

Publication Date 12 December 2013

Cite as Human Rights Watch, *India: Supreme Court Ruling Undermines LGBT Rights*, 12 December 2013, available at: <http://www.refworld.org/docid/52aaff574.html> [accessed 17 January 2014]

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The ruling by India's Supreme Court on December 11, 2013, that same-sex conduct between consenting adults remained a criminal offense is a setback for the rights of Lesbian, Gay, Bisexual, and Transgender (LGBT) people, Human Rights Watch said today. The court reversed a landmark 2009 Delhi High Court decision that a colonial-era law infringed upon fundamental rights provided under the constitution.

The Indian government should immediately seek to decriminalize adult consensual same-sex relations, Human Rights Watch said. Currently, same-sex relations are subject to section 377 of the Indian Penal Code, which punishes "carnal intercourse against the order of nature" with up to life in prison. The Supreme Court upheld the constitutionality of section 377 and ruled that the Delhi High Court decision was "legally unsustainable." It said it was now up to the legislature "to consider the desirability and propriety of deleting Section 377" of the penal code.

"The Supreme Court's ruling is a deeply disappointing setback for basic rights to privacy, equality, and non-discrimination," said Graeme Reid, director of the LGBT rights program at Human Rights Watch. "Now the government should do what it should have done in the first place and decriminalize consensual same-sex relations between adults."

A nongovernmental organization, the Naz Foundation, had filed a petition against section 377 in 2001. In 2009, the Delhi High Court accepted its request to decriminalize consensual same-sex conduct between adults. Various individuals and groups, most of them religious conservatives, appealed the High Court verdict.

The Indian government had not appealed the Delhi High Court ruling. In 2012, the attorney general told the Supreme Court that the government found no "legal error" in the High Court decision and accepted it. The Naz Foundation could still appeal the Supreme Court judgment by filing a review petition, said Additional Solicitor General Indira Jaising.

"The Naz Foundation judgment had become a reference point for many discussions both in schools and in public debates across the country," said Arvind Narrain, a lawyer with Alternative Law Forum in India. "It has unlocked spaces for openness to LGBT issues, lending a certain legitimacy to demand for more positive rights such as anti-discriminatory measures and socio-economic benefits, among others," Narrain said.

A Supreme Court ruling upholding the High Court decision would have had a positive influence in the courts and legislatures of other former British colonies in Asia, Africa, and the Caribbean that have nearly identical "sodomy" laws, Human Rights Watch said. Although these laws are rarely enforced, they legitimize police extortion, violence, and discrimination.

"Section 377 is a legacy of British rule and it is disturbing that a postcolonial democratic state like India would hold on to colonial morality codes that blatantly violate human rights," Reid said. "India should join countries like Australia and New Zealand that have already abolished this colonial-era sodomy law that they too inherited, and take the lead on ending such discrimination.

Colonies and countries that retain versions of the British sodomy law include:

- In Asia and the Pacific: Bangladesh, Bhutan, Brunei, Kiribati, Malaysia, Maldives, Marshall Islands, Myanmar (Burma), Nauru, Pakistan, Papua New Guinea, Singapore, Solomon Islands, Sri Lanka, Tonga, Tuvalu, and Western Samoa. (Governments that inherited the same British law, but have abolished it since include Australia, Fiji, Hong Kong, and New Zealand.)
- In Africa: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.

Eleven former British colonies in the Caribbean also retain sodomy laws derived from a different British model than the one imposed on India.

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