lesbian, gay, bisexual transgenders

Section 377 used to target → Unnatural Offences → Not only about LGBT Gay & Lesbian (1)

It has vast Ambit

S. 377 — Whoever Voluntarily has Carnal Intercourse (any sexual activity / Interaction) against the order of nature with any man, woman or Animal, shall be punished with Imp for life, or with Imp of either description for a term which may extend to 10 years & shall also be liable to fine. [Intercourse / = with Male or female with Animal] [Sodomy etc]

[Act of insertion of Penis] in Mouth or Anus of Male or female any object.

Explanation (a) Penetration is sufficient to Constitute the Carnal Intercourse necessary to the offence described in this section.

⇒ The SC — now has decriminalised Consensual adult sex saying sexual orientation is natural and people have no Control over/on it.

(a) Homosexuality get legal approval and recognition.
(b) Allowed Gay sex among Consenting Adults in private.

⇒ The Section Came into force in 1861 during the British rule of India which Criminalised sexual activities "against the order of Nature", including homosexual activities.

The Issue of Section 377 was first raised by an NGO, Naaz Foundation, and AIDS Bedhabhav Virodh Andolan, in the Delhi High Court 2001. Both the petitions were dismissed in the Court

8 years later, the Delhi HC decriminalised sex between Consenting Adults of the same Gender by holding the penal provision "Illegal".

However, the 2009 Judgement of the high Court was overturned in 2013 by the Supreme Court which had also dismissed a review plea.

A2Z Legal knowledge

Scanned by CamScanner

2014 - The LGBT Community got hope in 2014 when the SC directed the govt to declare transgender a 'third gender' and include them in the OBC quota. (2)

2017 - The SC had upheld the Right to privacy as a fundamental right U/ the Constitution. The SC also had called for Equality & Condemned discrimination, stating that the protection of Sexual Orientation lies at the core of the fundamental rights and that the rights of LGBT population are real & founded on Constitutional doctrine

⇒ Gender Rights activists have argued that Section 377 violates different articles of the Indian Constitution.
Art 14 guaranteeing equality before Law to all Individuals.
Art 15 ensuring that no person is discriminated against on the basis of Caste, gender, Creed etc & Art 21 ensuring the right of life & liberty to all the citizens of the Country.

This section is very vague as what is against the order of nature. is not possible to define objectively.
What is natural and what is not is a subject of debate and has led to much Confusion.
S.377 clearly makes homosexuality illegal on the ground that it is against the order of Nature.
In view of arbitrariness of s 377 and violation of Basic fundamental rights the Constitutional validity of this section was challenged in the Court

↳ S. 377 was considered unconstitutional by HC.

Case - NAZ Foundation V. Government of Delhi & Ors - (2010) Cri LJ 94 (Delhi)

2009. ✓ The Constitutional Validity of S. 377 was Challenged in the Delhi High Court.

A2Z Legal knowledge

Scanned by CamScanner

In this Case it was argued that S. 377 on account of Covering Consensual sexual intercourse between two adults in Private, is Violative of f. Rights guaranteed in Art 14, 15, 19, 21 of the Constitution.

The petitioner also Contented that the legislative Intent behind S. 377 is based on stereotypes that are outmoded and have no historical or logical backing.

In this Case it was prayed before the Court that S. 377 of IPC should be declared ultra vires to the Constitution.

S. 377 of IPC by Criminalising homosexuals only on account of their sexual orientation Violates the Constitutional Morality. In the end, Court accepted all the Contentions of the petitioners and declared the part of S. 377 Ultra vires which Criminalised Consensual sexual acts of adults in private. However the Court also ruled out that the provisions of S. 377 will still Continue to govern non Consensual penile non vaginal sex involving Minors. [The same order was revoked by SC in appeal.

Case. Suresh Kumar Koushal & another V Naz Foundation & others — AIR 2014 SC 563

The order of the Delhi High Court was challenged before the SC by groups of religious bodies & individuals including the All India Muslim Pesonal Law Board; They Contended that S. 377 was enacted by the legislature to protect Social Values & Morals. The SC accepted this Contention and setaside the order of the High Court.

The legislature has chosen not to amend the law or revise it. The Court Ultimately declared S. 377 to be Constitutionally valid. However, the Court left it open for the legislature to delete or amend the law.

A2Z Legal knowledge

Scanned by CamScanner

The Naz foundation has filed a Curative petition challenging this Judgement of SC. The Matter is Sub Judice before the Supreme Court

S.377 is Constitutionally Valid & homosexuality is treated as an Unnatural offence. Since, this Section is operative as of now it become pertinent to see the sentencing policy in Case of Unnatural offence.

The punishment - in Case of Un Natural offence is as severe as that of rape.

Unnatural offences Cover all form of Penetration other than penile Vaginal & Consent is immaterial in Case of Unnatural offences. The punishment may extend to imp for life or imp upto 10 years & fine.

Case - Nor Shiwan Irani V Emperor - 1935 Cr LJ 718
It was held that in Case of offences U/S S.377, it is necessary that penetration, however little must be proved Strictly.

Naz foundation — Constitutional Authority Case into Picture
Election Commission of Indian — vote — Male, Female ← earlier they were Contesting election as
Others (now you can choose)
Transgender — first time Contested elections.

Kaushal Judgment 2013 — Supreme Court ↓ is not Constitutional. Its Constitutional -retained on statute book of Country
Continue Homosexuality is Criminalised again.

In 2018 - The SC of India decriminalised homosexuality by declaring S.377 of the Indian Penal Code Unconstitutional]

Initially S.377 Criminalises Homosexuality.
2001 - NGO - NAZ foundation - Petition file - to Struck down S 377. Various Evidences / Arguments - Put by them.
deal with cases → Man having sex with Man. Many people in Country - Homosexual They don't Come forward b/cz of law fear.

AZ Legal knowledge

Scanned by CamScanner

April 2014 – SC recognised transgender as third gender
National legal Service Authority Judgment
is not only social or Medical Issue. It is a human right Issue. SC directed the state to take affirmative action

The age of the accused is a determining factor while giving punishment. In the case of *Raju v State of Haryana*, the appellant who was 20/21 years old was found guilty of committing sodomy upon a female of 9 years and sentenced to three years imprisonment. The court taking into consideration the nature of the offence and age of the appellant held that the accused should be kept in an environment of institution other than jail to ponder and repent over his perversity. Along with age, chances of reformation of accused are also an important factor in determination of sentence. In *Amit v State of UP*, the accused committed unnatural sex with a minor girl of aged 3 years and later killed him. The trial court imposed death penalty for the offence of murder. The Supreme Court converted the death sentence of the accused into imprisonment for life on the ground that accused was a young person aged about 28 years only. Also, there was no evidence to show that he had committed similar offences before and there was also nothing on evidence to show that he is likely to repeat similar crimes in future. The court held that given a chance, he may reform over a period of years.

Policy of Transgender bcz they have been victimized & treated as Minorities

(4) not followed Shashi Tharoor's – Introduces a Private Member Bill.

(5) 2016 – SC – refer – Matter – Constitution Bench.

The intention of the accused is also a determining factor while giving punishment. Also, the age of the victim plays a role while convicting. In the case *of Ou v The State of Maharashtra*, the accused tried to penetrate inside a 14 months old child. The complete penetration did not happen because the child cried out in pain which was heard by outsiders and also her mother in the adjoining house and they prevented further harm. The intention to commit the act was clearly seen in this case. The court also stated that "the extremely tender age of the child makes the acts of the accused even more deplorable calling for stringent punishment". The accused was sentenced to life imprisonment by the lower courts. However, the Supreme Court modified the punishment and reduced it to 10 years because the act of the accused was stopped in between and there was no complete penetration.

will decide the future of homosexuality in Country.

* Privacy Judgement – Rt to Privacy is fundamental right – none of the business of state to Interfere in the bedroom of two Consenting Adult.

Consent is wholly immaterial in the determination of offence; however, in some cases it works as a mitigating factor. In the case of *Fazal Rab Choudhary*, to men were engaged in a consensual relationship. The lower courts sentenced the accused to a rigorous imprisonment of three years. The accused filed a special leave petition in the Supreme Court demanding reduction of sentence. In this case, there was no force used and the act was consensual. The court held that in judging the depravity of the action for determining quantum of sentence, all aspects of the matter including the nature of the offence and whether any force was used by the accused must be taken into account.

Homosexuality – is not against nature the order of nature, disorder;

In *Chittranjan Das v State of Uttar Pradesh*, the accused who was a highly qualified individual suffering from mental aberration committed the offence of sodomy. The Supreme Court while confirming the conviction reduced the sentence to a period of two months in view of loss of service as a result of conviction of the appellant.

They suffer Health Problem. So in order to help them & deal with desi PPl – Its necessary to decriminalise Sec 377

This Judgment of HC was Celebrated by Many.

Held – Unconstitutional declare struck 377 because it violates Art 14, 15 (non discrimination, Art 21 – Rt to life & live with dignity

Scanned by CamScanner

Thus, while convicting an accused under section 377 of IPC all the factors are taken into account which includes nature of the crime, age of the victim and accused, chances of reformation, consequence of the conviction, consent of the victim.

The language of the section 377 is very vague and arbitrary. It is impossible to determine what the order of nature is and what is not. In view of such vagueness, homosexuality has also been treated as against the order of nature. The judgement given by the Delhi High Court in Naz foundation case was a very laudable judgement. I would suggest reforms on the line of Delhi High Court judgement but with a different reasoning. Delhi High Court judgement essentially ruled out that parts of section 377 are unconstitutional as they violate articles 14, 15 and 21 of the constitution. The Delhi High Court never stated that homosexuality is not against the order of nature; it rather stated that section 377 violates the fundamental rights of same sex adults who have consensual relationship. I would suggest that section 377 should be struck down as a whole as the term order of nature is very arbitrary and vague and its meaning is not capable of being made certain. In cases of sexual acts such as paedophilia and bestiality, new provisions should be enacted. The scope of Section 375 should be enlarged so as to include sexual assaults against both boys and girls and the meaning of penetration should be enlarged so as to include forms of penetration other than penile vaginal. In the case of minors, section 377 is ineffective as penetration is required to constitute offence under it. Parliament has however enacted Protection of Children from Sexual Offences Act, 2012 which also covers sexual abuse against children.

A2Z Legal Knowledge

On 24 August 2017, the Supreme Court upheld the right to privacy as a fundamental right under the Constitution in the landmark *Puttaswamy* judgement. The Court also called for equality and condemned discrimination, stated that the protection of sexual orientation lies at the core of the fundamental rights and that the rights of the LGBT population are real and founded on constitutional doctrine.This judgement was believed to imply the unconstitutionality of section 377.

In January 2018, the Supreme Court agreed to hear a petition to revisit the 2013 *Naz Foundation* judgment. On 6 September 2018, the Court ruled unanimously in *Navtej Singh Johar v. Union of India* that Section 377 was unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex".The judgment was given by a five judges bench comprising the then Chief Justice of India Dipak Misra, Justices R F Nariman, D Y Chandrachud, A M Khanwilkar and Indu Malhotra.

Scanned by CamScanner