



# The Indian Journal for Research in Law and Management

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## SECTION – 377

### Abstract:

Section 377 has been subject to extensive debate and controversy, particularly regarding its application to consensual same-sex relationships. Despite its contentious nature, Section 377 stands as a unique provision within the legal framework, offering a rare form of protection for men against certain forms of sexual exploitation or assault. While numerous legal provisions exist to safeguard females against various forms of violence and harassment, Section 377 emerges as the sole recourse available to men who may find themselves victims of similar offences. This paper explores the distinctive role of Section 377 as a legal safeguard for men, amidst a legal landscape primarily focused on protecting female rights and interests. Through a critical examination of relevant legal precedents and social contexts, it highlights the significance of this provision in addressing gender-based violence and advancing principles of equality and justice within the Indian legal system.

### Introduction:

Over the years, Section 377 has been a subject of intense scrutiny and debate, especially concerning its implications for consensual same-sex relationships. While discussions often focus on its potential encroachment upon personal freedoms and individual rights, an aspect often overlooked is its role as a rare safeguard for men against certain forms of sexual exploitation. In a legal landscape predominantly geared towards protecting female interests, Section 377 stands as one of the few provisions offering recourse to men who may find themselves victims of sexual assault or coercion. This paper aims to delve into the distinctiveness of Section 377 within the Indian legal framework, examining its historical evolution, contemporary interpretations, and implications for gender-based justice.

**Historical Evolution:** The historical evolution of Section 377 involves tracing its origins back to British colonial rule in India when it was first introduced in 1861. Initially framed as a law to

criminalize certain forms of non-procreative sexual acts, it reflects Victorian-era moral values and societal attitudes towards sexuality.

**Contemporary Interpretations:** In recent decades, Section 377 has been the subject of significant legal and societal debates, particularly regarding its application to consensual same-sex relationships. While the language of the law remains unchanged, its interpretation by courts and legal authorities has evolved, reflecting changing societal attitudes towards sexual orientation and gender identity.

### **Section - 377 of the Indian Penal Code, 1860**

**Unnatural offences** : Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which **may extend to ten years, and shall also be liable to fine.**

**Explanation.**-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

This section is intended to punish certain unnatural offences like sodomy, buggery and bestiality. The offence consists in having carnal knowledge against the order of nature by a person with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal.

**In Childline India Foundation v Allan John Waters,** complaint of beating and sexual abuse to children living in shelter home was made by victim children. They clearly deposed that accused running shelter home for children used to have sex with them and ask for fellatio with them and other boys. Evidence of victim withstood cross-examination. Delay in making complaint was only because of their background of having no shelter to live. Omission in their statement recorded by police was because they were not put relevant questions by Investigating Officer Statement of victims was supported by Advocate for Welfare of Children and member of committee appointed by High Court to inquire into allegations. Statements of victims clearly spell out how accused sexually abused children living in shelter home. Therefore, it was held that acquittal of accused on the ground that statements of victims are not reliable or because they are not corroborated by other inmates of shelter home is not proper. It was also made clear that evidence of victim does not require corroboration. Further it can not be said that ingredients of section 377 are not made out.

**In Brother John Antony v. State,** the petitioner a sub-warden of a Boarding Home was alleged to have committed unnatural offence with the inmates. The acts committed by the petitioner fell in two categories, namely-(1) insertion of the penis into the mouth of the victim boy and doing the act of carnal intercourse upto the point of ejaculation of semen into the mouth, and (2) manipulation and movement of the penis of the petitioner whilst being held by the victim boys in such a way as to create an orifice like thing for making the manipulated movements of insertion and withdrawal upto the point of ejaculation of semen.

It was held that both the above categories of acts fall within the sweep of unnatural carnal offences under section 377. As far as the second category is concerned in the process of such manipulation, the visiting male organ is enveloped at least partially by organism visited, namely, the hands which held tight the penis. The sexual appetite was thus quenched by the ejaculation of semen into the hands of the victims.

### **Constitutionality of section 377.-**

**In Naz Foundation v. Government of N.C.T of Delhi,** the Supreme Court of India observed that the provision of Section 377 Indian Penal Code criminalises the acts of sexual minorities particularly men who have sex with men and gay men. It disproportionately impacts them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the corner stone of our constitution. Section 377 IPC into application to sexual acts of consenting adults in privacy discriminates a section of people solely on the ground of their sexual orientation which is analogous to prohibited ground of sex. A provision of law branding one section of people as criminal based wholly on the States moral disapproval of that class goes counter to the equality guaranteed under Articles 14 and 15 under any standard of review

It was further made clear that if there is one constitutional tenet that can be said to be underlying theme of Indian constitution, it is that of inclusiveness. Indian Constitution reflects this value deeply ingrained in Indian Society, nurtured over several generations. The inclusiveness that Indian Society traditionally displayed literally, in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as “deviants” or different are not on that score excluded or ostracised. Where society can display inclusiveness and understanding such persons can be assured of a life of dignity and non-discrimination. This was the spirit behind the resolution of which Nehru spoke so passionately. Indian constitutional law does not permit the statutory criminal law to be held captive by the popular misconception of who the lesbian, gay, bisexual transgender, hijra and Kothi persons are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

It was also held that Section 377 IPC., in so far as it criminalises consensual sexual acts of adults in private is violative of Articles 21, 14 and 15 of the Constitution. The provisions of section 377 L.P.C. will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By adult means every one who is 18 years of age and above. A person below 18 years would be presumed not to be able to consent to sexual act. This clarification will hold good till of course, Parliament Chooses to amend the law to effectuate the recommendations of the Law Commission of India in its 172<sup>nd</sup> Report which removes a great deal of confusion. Secondly this judgment will not result in the reopening of criminal cases involving section 377 IP.C. that have already attained finality

**The case suresh Kumar Koushal v NAZ Foundation,** concerns the constitutionality of Section 377 of the Indian Penal Code which was enacted during the British administration in India in 1860. Section 377 created an offence of voluntarily having carnal intercourse “against the order of nature with any man, woman or animal, punishable by up to ten years imprisonment or a fine. Although the provision appears to be neutral on its face, It was argued to have a discriminatory effect homosexual men. 801 on LGBT persons, particularly homosexual men.

In 2001 the NAZ Foundation, a non-governmental organisation, working in the field of HIV/AIDS intervention and prevention-filed a writ petition before the Delhi High Court seeking a declaration that Section 377, to the extent that it penalises sexual acts in private between consenting adults, violated the India Constitution, specifically, Articles 14 (equality before the law), 15 (non-discrimination), 19(1)(a)-(d) (freedom of speech, assembly, association and movement) and 21 (right to life and personal liberty). The Naz Foundation argued that the law had a discriminatory effect because it was predominantly used against homosexual conduct, thereby criminalising activity practiced more often by homosexual men and women. This was said to jeopardise HIV/AIDS prevention methods by driving homosexual men and other sexual minorities underground. It was further argued that, as private consensual relations were protected under Article 21 of the Constitution, Section 377 was invalid as there was no compelling state interest to justify the curtailment of a fundamental freedom. The Naz Foundation also argued that Section 377 violated Article 14 on two grounds first, because it was unreasonable and arbitrary to criminalise non-procreative sexual relations, and secondly, because the legislative objective of penalising “unnatural” acts had no rational nexus with the classification between procreative and non-procreative sexual acts.

In 2004, the High Court dismissed the writ petition on the grounds that only purely academic issues had been submitted which could not be examined by the court. It did the same in relation to a subsequent review petition. The NAZ Foundation challenged both orders and the writ petition was remitted for a fresh decision in 2006.

In its 2009 decision, the High Court found in favour of the NAZ Foundation and accepted its arguments that consensual same-sex sexual relations between adults should be decriminalised, holding that such criminalisation was in contravention of the Constitutional rights to life and personal liberty, equality before the law and non-discrimination. In reaching its decision, whilst the court placed a great deal of emphasis on domestic judgements, the court also relied on comparative law in reaching its decision, referring to judgements from various jurisdictions including the European Court of Human Rights, the United Kingdom, the Republic of Ireland, South Africa and the USA. The court also relied upon a number of progressive international legal frameworks including the Yogyakarta Principles and the 2008 Declaration of Principles of Equality produced by the Equal Rights Trust as well as a number of reports and documents demonstrating the discriminatory effect of Section 377. In its reasoning, the High Court stated that Section 377 “grossly violates [homosexual individuals’] right to privacy and liberty embodied in Article 21 in so far as it criminalises consensual acts between adults in private.” The court also held that:

“Section 377 criminalises the acts of sexual minorities, particularly men who have sex with men. It disproportionately affects them solely on the basis of their sexual orientation. The provision runs counter to the constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution.”

The decision was appealed to the Supreme Court and attracted a large number of interveners. Intervenors supporting the Appellants included organisations and individuals who have stated that they had an interest in protecting the moral, cultural and religious values of Indian society. Intervenors for the respondents are composed of individuals and organisations arguing that Section 377 caused harm to the LGBT community and homosexual men in particular.

The panel of two Supreme Court judges deciding the case allowed the appeal and overturned the High Court’s previous decision, finding its declaration to be “legally unsustainable”. The Supreme Court ultimately found that Section 377, IPC does not violate the Constitution and dismissed the writ petition filed by the respondents.

The Court nevertheless maintained that:

“Section 377 does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.”

The Court further held that:

“Those who indulge in carnal intercourse in the ordinary course and those who indulge in canal intercourse against the order of nature constitute different classes [emphasis added] and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification.”

In reviewing the reading down of the Section 377 by the High Court, the Supreme Court stated that the High Court had overlooked the fact that “a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders” and that over the last 150 years, fewer than 200 persons had been prosecuted under Section 377, concluding from this that “this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.” The Court also regarded the discriminatory treatment complained of by the Naz Foundation as a result of Section 377 as being neither mandated nor condoned by the provision itself and the fact that the police authorities and others misuse Section 377 was not a reflection of the vires of the provision but instead may simply be a relevant factor for Parliament to consider whilst judging whether to amend Section 377.

The Supreme Court 2013 ruling had dealt a big blow to the LGBTQ community by overturning the 2009 judgment of the Delhi High Court in NAZ case which had decriminalised Section 377 of IPC to legally permit consensual relationships in private or between adults of the same gender. A bench of CJI Dipak Misra and Justice A.M. Khanwilkar and D.Y. Chandrachud on Monday the 8<sup>th</sup> January, 2018, indicated that it is time for re-look at the ruling as the social morality also changes from age to age and law cannot curtail or temper inherent right embedded in an individual under Article 21 (right to life and liberty). The Bench dropped loud hints that Supreme Court had travelled a long way since the 2013 verdict that had pushed the gay community liberated by the Delhi High Court judgment, back into the zone of police harassment under the 158 year old IPC provision that made expression of their sexual preferences an offence. However, the Court emphasised that there will be no protection to Paedophiles, who sexually exploit children and also it won’t decriminalise carnal intercourse with animals.

Taking all the aspects in a cumulative manner, the Court expressed a view that the decision in **Suresh Kumar Kaushal v. Naz Foundation**, need reconsideration. As the question relates to constitutional issues, the Court thought it appropriate to refer the matter to a larger bench.

The nine-judge bench in 2013 on the privacy issue had found “sexual orientation an essential attribute of privacy and any discrimination against an individual on the basis of sexual orientation as deeply offensive to the dignity and self-worth of the individual.

**In Navtej Singh Johar v. Union of India,**

Supreme Court struck down the 158 years old law on gay-sex (homosexuality) that made carnal intercourse against order of nature a criminal offence. 'Unnatural sex' between male to male, female to female and male to female has been decriminalized provided the conduct is (i) between adults (ii) it is voluntary and (iii) it is in private. In other words, actus reus of unnatural sex is recognised as criminal in the

Following three situations, namely-

- (i) any sexual conduct described under Section 377 between non-adults (below 18 years of age) even if it is voluntary and consensual;
- (ii) if such conduct is with use of force, non-consensual or involuntary, it will be penal; and
- (iii) any sexual conduct with animal is still penal even if an adult is involved in it.

This judgment of the Supreme Court has received mixed reactions. While it is hailed by the LGBT community, legal fraternity is sharply divided. Many feel that this sexual autonomy is not in consonance with the Indian norms of religious morality. However, Justice Nariman has optimistically directed that wide publicity to this judgment would remove ignorance and misplaced believes of Indian society at large in times to come.

**Implications for Gender-Based Justice:** Section 377's implications for gender-based justice are multifaceted. On one hand, it has been criticized for perpetuating discrimination and stigma against LGBTQ+ individuals, particularly men who have historically been targeted under its provisions. On the other hand, it has been argued that Section 377 also serves as a form of protection for men against certain forms of sexual exploitation or assault, filling a gap in legal provisions primarily focused on safeguarding female rights.

### **Conclusion:**

While Section 377 of the Indian Penal Code has been a subject of intense debate and controversy, it serves a crucial role as a provision for protecting males from certain forms of sexual exploitation or assault. Despite its historical origins and evolving interpretations, Section 377 remains one of the few legal safeguards available to men within a legal landscape predominantly focused on protecting female rights.

However, the necessity of Section 377 also highlights broader gaps in legal protections for men against sexual violence and exploitation. As such, there is a pressing need for the creation and implementation of additional provisions that explicitly safeguard the rights and dignity of men in similar contexts. These provisions should be designed to address the diverse forms of sexual violence and harassment experienced by men, ensuring that they have access to justice and support in cases of victimization.

