

Socio Political impact of Unnatural Offences in India

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ABSTRACT

Section 377 of the Indian Penal Code, 1860 which manages unnatural offenses has been examined basically. The paper will likewise manage the protected legitimacy of Section 377 and furthermore recommend changes in it. The way in which this basic accord is to be converted into real strategy, be that as it may, keeps on being misty and even antagonistic. The new influx of legal activism that has been put forward in the previous couple of decades, is pulling under its radar the situation of a specific area of the populace that was already criminalized, yet is presently being perceived as particularly a piece of the Indian individuals, which has rights and its very own character.

Keywords: Social, Political, Unnatural, Offences, development, section 377.

INTRODUCTION

According to Section 377 IPC, we can define the Unnatural offences as:

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. [5]

The sphere of Section 377 extends to any sexual union involving penile insertion. Thus, even consensual sexual acts such as fellatio and anal penetration may be punishable under this law.

Chapter XVI, Section 377 of the Indian Penal Code dating back to 1861, introduced during the British rule of India, criminalises sexual activities "against the order of nature", arguably including homosexual sexual activities. The section was decriminalized with respect to sex between consenting adults by the High Court of Delhi on July 2009. That judgement was overturned by the Supreme Court of India on 11 December 2013 with the Court holding that amending or repealing Section 377 should be a matter left to Parliament, not the judiciary.

On 6 February 2016, the final hearing of the curative petition submitted by the Naz Foundation and others came for hearing in the Supreme Court. The three-member bench headed by then the Chief Justice of India T. S. Thakur said that all the 8 curative petitions submitted will be reviewed afresh by a five-member constitutional bench.

The Indian Penal Code was an imperative test in the bigger frontier venture alongside practices in codification like the Civil Procedure Code and Criminal Procedure Code to apply the aggregate standards of customary law in British India [3].

This Victorian era statute was struck down by the Delhi High Court in 2009 in the famous Naz Foundation case, but the decision was overturned on appeal by the Supreme Court in 2013, which reasoned that the matter relating to LGBT rights and decriminalisation of homosexuality should be left to the legislature [4].

Pertinently, the most glaring error in the Supreme Court decision is the failure of the Court to notice the effect of the amendment in the offence of rape in Section 375, IPC on Section 377.

After the Criminal Law (Amendment) Act, 2013, Section 375 prohibits both penile vaginal and penile-non vaginal sexual acts between man and woman, without consent. By implication, such sexual acts between man and woman, which are consensual, are not criminalized anymore. Therefore, consensual penile non-vaginal acts in a heterosexual context would be out of the ambit of Section 377, otherwise the amendment in Section 375 would become meaningless. Presently, in effect, Section 377 only criminalises all forms of penetrative sex, i.e., penile-anal sex and penile-oral sex, between man and man, which makes it ex facie discriminatory against homosexual men and transgender persons and thus violative of Article 14", the plea filed through senior advocates [5].

HISTORICAL BACKGROUND

The Indian Penal Code was drafted by Lord Macaulay and was presented in 1861 amid the British time. Along these lines, it has been to a great extent affected by the British laws. What was considered wrongdoing in Britain around then was additionally been made wrongdoing under IPC to a huge degree. "Demonstrations of homosexuality were punished by hanging under the Buggery Act of 1533 which was re-ordered in 1563 by Queen Elizabeth I, after which it turned into the sanction for the consequent criminalization of homosexuality in the British states". Along these lines, Section 377 of Indian Penal Code gets its source from the Buggery Act of 1533. It is critical to note here that this law has not been changed by Parliament as far back as its authorization. This law depends on Judeo-Christian good and moral norms which imagine sex on simply practical terms, that is, for reproduction and on this premise homosexuality is considered as unnatural and against the request of nature. With the end goal of usage of Section 377 it winds up plainly imperative to figure out what is common and what is unnatural. Additionally, it ends up noticeably important to decide if homosexuality is against the request of nature or not. Nature and characteristic things are surrounding us. These are not man-made, but rather law is made by man for his own prosperity and to keep up peace and request in the general public. The uncertainty that emerges is about how to recognize normal and unnatural[6][7].

Section 377 has been diversely deciphered by the legal specialists. This Section appeared since the British Raj in India, albeit today, the western world has sanctioned homosexuality and at this point The United States Of America has even authorized same sex relational unions in the year 2015 and furthermore privileges of the LGBT (Lesbian, gay, bisexuals and transgender). Section 377 criminalizes gay intercourse, which mirrors the medieval point of view. As effectively expressed over, the dialect of Section 377 is extremely unclear and subjective. It is difficult to figure out what the request of nature is and what isn't. Because of such ambiguity, homosexuality has dependably been dealt with as against the request of nature. The judgment given by the Delhi High Court in Naz Foundation Case was an exceptionally praiseworthy judgment[8].

The Delhi High Court judgment basically decided out that parts of segment 377 are unlawful as they abuse the essential human rights ensured under Articles 14, 15 and 21 of the Constitution. In any case, The Delhi High Court never expressed that homosexuality isn't against the request of nature; it rather expressed that Section 377 disregards the major privileges of same-sex grown-ups who have consensual relationship. It is in this way in light of a legitimate concern for mankind that Section 377 ought to be struck down all in all as the expression "request of nature," is extremely subjective and dubious and its importance isn't clear. In instances of sexual acts, for example, pedophilia and savagery, new arrangements ought to be authorized[9].

The extent of Section 375 ought to be broadened in order to incorporate rapes against both young men and young ladies and the importance of "infiltration," ought to be augmented in order to incorporate types of entrance other than penile, vaginal. On account of minors, Section 377 is inadequate as infiltration is required to constitute offense under it. In this setting it must be expressed that the Parliament has sanctioned Protection of Children from Sexual Offenses Act, 2012 which additionally covers sexual manhandle against kids[7].

UNNATURAL OFFENCES

Unnatural offenses are shrouded in IPC under Section 377. Section 377 of the IPC states that " whoever deliberately has fleshly intercourse against the request of nature with any man, lady or creature, might be rebuffed with detainment forever, or with detainment of either portrayal for a term which may stretch out to ten years, and should be subject to fine". According to the clarification gave under this area infiltration is adequate to constitute the lustful intercourse[11].

This section corresponds to the offences of sodomy and bestiality under the English law. As evident from the language of this section, consent is wholly immaterial in the case of unnatural offences and the party consenting would be equally liable as an abettor. 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. According to this section, homosexuality is translated as an unnatural offense as it is thought to be against the order of nature. This has prompted numerous contentions and has prompted questions with respect to the protected legitimacy of this segment. In this way, keeping in mind the end goal to decide the sacred

legitimacy of this area and the explanations behind its joining in the IPC it is imperative to take a gander at its recorded premise [12].

The section further makes it clear that penetration would be sufficient to constitute the carnal intercourse necessary to the offence described in the section. The definition uses the word 'against the order of nature' without any elaboration, and leaves it for the judiciary to interpret. The definition is incomplete in this sense that what is natural for a particular society, culture or community may be quite unnatural for another. 'Against the order of the nature' assumes that what is unnatural is to be decided by the majority. It therefore surely imports the element majority code and has the potency of any neglecting minority practices [14].

Section 377 of the Indian Penal Code, punishes unnatural offence. One may run riot after the word "unnatural." The section gives no clue but leaves it to the interpretation of some people. It expresses as well conceals certain things. In doing so it neglects a domain that is constituted by homosexual or people of alternative sexuality; who existed in the world since ancient period. This domain which is constituted by the people of alternative sexuality is also raising their voices around the world is gaining momentum not merely because of the fact that they are increasing in sufficient number. Our law is technically silent on lesbianism, but presumably not, on gay sexuality. In a trial of an accused under this Section, the prosecution must prove that [15]:

accused had carnal intercourse with a man, woman or an animal;
such intercourse was against the order of nature;
the act was done voluntarily by the accused; and penetration had occurred.

These being the essential ingredient of the offence, it may be interpreted in a way whereby consensual sexual intercourse between two adult male or, between two adult female would become an unnatural offence. But technically consensual sexual intercourse between two male adult would come within the ambit of the section. This is because of the fact that the section makes it clear that penetration would be sufficient to constitute the carnal intercourse necessary to the offence described in the section. In other words since man can practically penetrate, sexual intercourse is possible between two male persons and would be considered as an offence under the section. On the other hand since women cannot practically penetrate, this section technically keeps them outside its ambit. To put it differently women cannot penetrate and therefore a consensual sexual intercourse between two female would not be an offence under the section. So what emerges is that the section says a homosexual relation between two adult male would be an offence. It remains silent as to whether homosexual relation between two female would be an offence in view of the technicality [17].

Natural Vs. Unnatural

The Black's law dictionary define natural as:

- (1) "A fundamental quality that distinguishes one thing from another; the essence of something.
- (2) Something pure or true as distinguished from something artificial or contrived.
- (3) The basic instincts or impulses of someone or something".

To figure out what is characteristic, utilitarian premise is referred to which fundamentally implies that each instrument or organ of the body has a specific capacity to perform, and hence, utilizing such an organ for a reason conflicting with its key capacity is unnatural. According to this rationale, each type of sex other than penile vaginal will be considered as unnatural. A similar rationale is utilized to upbraid something besides procreative sex as unnatural. This rationale however at first sight silly has been embraced by courts in different cases. In *Khanu v Emperor* it was held that "the common protest of licentious intercourse is that there ought to be the likelihood of origination of individuals, which on account of copulation per se is inconceivable" [18].

The courts in India have translated the expression "bodily intercourse against the request of nature" so extensively that it now incorporates from oral and butt-centric sex to entrance into simulated holes, for example, collapsed palms or between thighs. Such a wide utilization of section 377 where the dialect itself isn't clear has prompted subjective use of the law and hence addresses were raised with respect to the protected legitimacy of this segment. Aside from this, area 377 unmistakably makes homosexuality illicit on the ground that it is against the request of nature. This has additionally prompted different discussions in perspective of acknowledgment of appropriate to opportunity as a basic human right, it is viewed as world over that criminalization of gay acts is an unmistakable infringement of ideal to security. In perspective of mediation of segment 377 and infringement of essential thing rights the established legitimacy of this area was tested in the court [19].

Basics of the Offense

Unnatural offenses are managed under Section 377 of the Indian Penal Code, 1860. "Entrance is adequate to constitute the fleshly intercourse important to the offense depicted in this segment." One essential exclusion in Section 377 is of any relief for an unnatural offense conferred with the assent of the other. This is builds up that assent is insignificant in the commission of an unnatural offense in India. In other words, that even consensual homosexuality is illicit. Moreover, the offense is cognizable, non-bailable, non-compoundable and triable by a judge of top of the line. Negligible aim to carry out the wrongdoing isn't sufficient to convict the denounced. In a trial of a blamed under this Section, the arraignment must demonstrate that the [20]:

- accused had bodily intercourse with a man, lady or a creature;
- such intercourse was against the request of nature;
- the act was done deliberately by the denounced; and entrance had happened.

SOCIOPOLITICAL IMPACT OF SECTION 377

The definition of sociopolitical is something that involves both social and political factors. An example of something that is sociopolitical is the issue of environmental conservation, which is influenced by both social attitudes towards "going green" and by political policies. The traditional focus of development cooperation on economic growth and the transfer of technology having proved insufficient, it would seem that an international consensus on the objectives and essence of development is now emerging which places strong emphasis on participation of the people and on human rights. The way in which this fundamental consensus is to be translated into actual policy, however, continues to be unclear and even contentious. Whereas private capital flows into developing countries have attained record levels, the official development assistance of almost all the Western donors is currently on the decline [21]. The unresolved economic and budgetary problems in the aftermath of the recession which hit the entire Western world are certainly at the root of that fall in funding. In Germany, there is the additional strain on the government's purse resulting from the redevelopment efforts in the eastern parts of the country. "Development fatigue" is, however, also a factor. Development cooperation cannot boast sweeping successes. Rather at this juncture I think we have to concede that the focus of aid on economic growth and the transfer of technology has proved to be insufficient. Structural deficits in an economy and technological backwardness are ultimately just two development problems among many, two of the diseases which afflict many a developing country. A patient with five diseases cannot be given a clean bill of health if only one of the five is healed, particularly if the treatment itself has already sapped valuable strength. The weaknesses of structural adjustment programmes as they used to be designed in their first generation have become obvious in a number of countries from the grave social impact on the poorer sections of the population [22].

The 11 December 2013 judgement of the Supreme Court, upholding Section 377 was met with support from religious leaders. The Daily News and Analysis called it "the univocal unity of religious leaders in expressing their homophobic attitude. Usually divisive and almost always seen tearing down each other's religious beliefs, leaders across sections came forward in decrying homosexuality and expressing their solidarity with the judgment." [23]

Opposition and criticism

Convictions are extremely rare, and in the last twenty years there have been no convictions for homosexual relations in India. However, Human Rights Watch argues that the law has been used to harass HIV/AIDS prevention efforts, as well as sex workers, homosexuals, and other groups at risk of the disease, [7] even though those found guilty of extortion in relation to accusations that relate to Section 377 may face a life sentence under a special provision of Section 389 of the IPC. [8] The People's Union for Civil Liberties has published two reports of the rights violations faced by sexual minorities [9] and, in particular, transsexuals in India [26].

Legal battle

The movement to repeal Section 377 was initiated by AIDS Bhedbhav Virodhi Andolan in 1991. Their historic publication *Less than Gay: A Citizen's Report*, spelt out the problems with 377 and asked for its repeal. A 1996 article in *Economic and Political Weekly* by Vimal Balasubrahmanyam titled 'Gay Rights In India' chronicles this early history. As the case prolonged over the years, it was revived in the next decade, led by the Naz Foundation (India) Trust, an activist group, which filed a public interest litigation in the Delhi High Court in 2001, seeking legalisation of homosexual intercourse between consenting adults. [15] The Naz Foundation worked with a legal team from the Lawyers Collective to engage in court. [16] In 2003, the Delhi High Court refused to consider a petition regarding the legality of the law, saying that the petitioners, had no locus standi in the matter. Since nobody had been prosecuted in the recent past under this section it seemed unlikely that the section would be

struck down as illegal by the Delhi High Court in the absence of a petitioner with standing. Naz Foundation appealed to the Supreme Court against the decision of the High Court to dismiss the petition on technical grounds [27].

Legislative action

On 18 December 2015, Lok Sabha member Shashi Tharoor of the Indian National Congress, whose leaders Sonia Gandhi and Rahul Gandhi had earlier expressed support for LGBT Rights introduced a private member's bill to replace Section 377 in the Indian Penal Code and decriminalize consensual same-sex relations. The bill was defeated in first reading, 71-24.[28] For his part, Tharoor expressed surprise at the bill's rejection at this early stage. He said that he did not have time to rally support and that he will attempt to reintroduce the bill[27,28].

Right to Privacy

On 24 August 2017, the Supreme Court of India in its landmark judgement held that Right to Privacy is a fundamental right protected under Article 21 and Part III of the Indian constitution. The Supreme Court judgement also found the mention of Section 377 as a discordant note. In the judgement delivered by the 9-judge bench - Justice Chandrachud who authored for Justices Khehar, Agarwal, Abdul Nazeer and himself held that the rationale behind Suresh Koushal (2013 Judgement) is incorrect. In paras 123, 124 and 128 of the judgement, the judges show their disagreement with the judgement delivered by the 2-judge bench in 2013. They hold that sexual orientation is an essential part of one's identity and that LGBT rights are "real rights" founded on sound constitutional doctrine which inheres in the right to life and dwell in privacy and dignity. Justice Kaul agreeing with Justice Chandrachud's views in Para 80 states that the right of privacy cannot be denied, even if there is a minuscule fraction of the population which is affected. He further went on to state that the majoritarian concept does not apply to Constitutional rights and the Courts are often called upon to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy [29].

Sentencing Policy

The punishment in case of unnatural offences is as severe as that of rape. Unnatural offenses cover all type of infiltration other than penile vaginal and assent is insignificant if there should be an occurrence of unnatural offenses. The discipline may stretch out to detainment forever or detainment up to ten years and fine. The court thinking about the idea of the offense and age of the appealing party held that the charged ought to be kept in a domain of establishment other than prison to consider and atone over his perversity. Alongside age, odds of renewal of charged are additionally an essential factor in assurance of sentence [30].

CONCLUSION

The protests against the reinstatement of Section 377 took place across India, and resulted in political activism across political parties to declare their support for the law's repeal. By April 2014, the month of the upcoming election, at least three major political parties - the Aam Aadmi Party, the Congress and the Communist Party of India (Marxist) - had included support for decriminalization of homosexual relations in their election manifestos,[21] while the BJP's leadership supported the law. In July 2014 first book on Genderqueer in Tamil and first Tamil book on LGBTQIA was from Srishti Madurai was released by BJP's state general secretary, Vanathi Srinivasan, at the 6th Hindu spiritual service foundation's sixth service fair, Chennai.

In June 2016, a dating platform called Amour Queer Dating was launched in India, for LGBTIQ people seeking long term companions.[25][26] In May 2017 the first Bhopal Pride March was conducted, gathering the participation of around 200 members.. The Supreme Court is likewise at present considering the Suresh Koushal hearing request, testing the lawfulness of area 377. Notwithstanding, as of late, India's council and official have lost a few chances to reaffirm and reinforce rights assurances for eccentric people, both, in India and all around.

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