



Unnatural Offences vis a vis Homosexuality

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Abstract

The growth of society depends upon the relationship of interdependency of people and the crucial relation amongst them is the relationship of man with the woman. The important institution i.e. marriage is also dependants upon the religious and sacrament bond of man and woman. The institution of marriage has been recognized for the reason that it is the duty of man to procreate and pay the debts which he incurred from his parents and that can't be done until the man gets married and procreates. The relationship of man and woman is also recognized in the law and it is provided that the man and woman have right to consortium. The relation of man and woman is recognized as the natural relation but nowhere the relationship of man with man and woman with the woman is recognized and therefore such relation may be called as unnatural relation. The law i.e. Indian Penal Code makes such type of relation to be an offence and punishable. But by the development of society, the view of judicial system has been changed and such relations have been accepted to be legal to some extent.

Key words: Interdependency, procreation, unnatural relation, sacrament.

Introduction

The relation recognized by the law and society is natural relation such as relation of a man with the woman. Such relation is necessary for the growth of society. It is considered that the man/person can't meet his elders in heaven unless he procreates on the earth. For fulfilling this purpose, the institution of marriage has been recognized in Vedas and in law also. But the relation which is against the natural order of the society is deemed as unnatural one. Section 377 of Indian Penal Code provides that when any person voluntary has carnal intercourse with any man, woman or animal against the order of nature said to have committed unnatural

offence and shall be punished with imprisonment. The term unnatural offence has nowhere defined in the code however it has been provided that which acts are included in the concept of unnatural offences. The concept of unnatural offences is not new in India. It can be traced back from history of pre-independent India. The unnatural acts i.e. sodomy, bestiality etc. are recognized as unnatural offences and made punishable from the time when the criminal law was first codified in India i.e. before independence.

(1) Unnatural offences under section 377

The term unnatural offence has nowhere defined in the penal code. However under the head “unnatural offences” it has been provided that “whoever voluntary has carnal intercourse against the order of the nature with any man, woman or animal, shall be punished with imprisonment and fine.” So what the legislature has provided under section 377 IPC is the carnal intercourse which is against the nature. Carnal intercourse means the physical sexual act done for the physical satisfaction without any feelings of love, affection and without the purpose of conception. The concentration of legislature as well as judiciary from the very beginning was to stop the sexual acts which were against the rule of nature. However the meaning of unnatural offences was restricted to anal sex with man, woman or animal but later on the scope of the meaning has broadened by including oral sex and sex with a thing in it. Through various judgments the apex court has included homosexuality under section 377 and punished the guilty offender. **Anil @ Anthony Ariskswamy Joseph vs. State of Maharashtra**² in which the Apex court upheld the decision of Maharashtra High Court sentencing the accused to death punishment under section 377, 302 and 201 of IPC. In this case the accused, 35 old person committed unnatural act with an 11 years old boy and murdered him. The accused was sentenced to life by Session Judge and the punishment was also confirmed by the High Court. In appeal the decision of High Court was reaffirmed by apex court.

In **State of Kerala vs. Kundumkara Govindan**³ the Kerala High Court tried to interpret what can be called as carnal intercourse and penetration as provided under section 377 of IPC. The High Court stated that carnal intercourse may be explained as such sexual relation which is not social. The relation of man and woman is sexual cum social and therefore open to all the society. The carnal intercourse which is done for the physical satisfaction only and can't be disclosed in the society is carnal and therefore unnatural.

(2) Essentials of Section 377

As per the definition of section 377 in IPC, there are following essentials for completion of offence of unnatural offence.

1. There must be voluntary carnal intercourse
2. The intercourse must be against the nature of order or society

² AIR, 2014, S.C.

³ 1969, CrLJ, 818 Kerala

3. Penetration must be complete

Carnal intercourse is physical sexual intercourse for the physical pleasure only. It is not unnatural when such intercourse has been done in accordance with the rule of nature i.e. between a man and woman but becomes unnatural when the relation sexual intercourse has been done by a man with another man, by a woman with another woman or by a man or woman with an animal. Section 377 requires that such carnal intercourse must have been done voluntary. The term “Voluntary” has been defined under section 39 of IPC as such act which has been done with intention and knowledge. Further the carnal intercourse must be completed by penetration. The actus reus coupled with intention and knowledge must be there for unnatural offence under section 377. “Penetration” used in the explanation means insertion of penis in any part of the body including vagina, mouth etc.⁴ Moreover the act of sexual intercourse must be against the rule of nature.

In **Calvin Francis vs. State of Orisa**⁵, Orisa H.C. expanded the scope of section 377 while including the act of inserting the private part of male person in the mouth of another. The court was of opinion that the act is done for the purpose of sexual satisfaction and placing the penis in any organ of another apart from organs intended for sex may be called penetration as per the explanation under section 377.

(3) Homosexuality

The term homosexuality is neither used nor defined in the criminal code. Homosexuality means romantic and physical attraction of people of same sex towards each other. However, homosexuality has not been made a specific offence in the criminal code but included under section 377 of IPC by the judiciary. The nexus between homosexuality and unnatural offences can be traced back from the judgment passed by the court in **Kanu vs. Emperor**⁶ in which it has been laid down that the natural purpose of sexual relation is consortium and conception which is necessary for the growth of the society. The sexual intercourse in which there is no possibility of conception can't be termed as natural as in the case of homosexual and sex with animals. For a long time after independence, homosexuality has been considered as a crime immaterial it was consented or not. But by the passing of time the view of judiciary has been changed towards the sexual relation between the persons of same sex like LGBT.

In **Naz Foundation vs. Govt. of NCT Delhi**⁷, Delhi High Court for the first time in independent India declared section 377 to be unconstitutional. In this case, PIL was filed by and NGO known as (Naz foundation) in Delhi High Court claiming that provision of section 377 IPC are in violation of Fundamental Rights provided under Article 14 and 21 of the Constitution. The petitioner contented that the right to privacy and intimate with a mate of his/her own choice with his/her consent is enshrined under article 21 and the homosexual should also be

⁴ Lohana Vasantlal Devchand vs. State, 1968, CrLJ, 1277

⁵ AIR, 1992, Orisa H.C., 455

⁶ 1934, Lahore High Court

⁷ AIR, 2009, Delhi H.C.

treated like others as they have also right of equality under article 14 of the Constitution. But section 377 is in violation of both fundamental rights. After considering the arguments of petitioner, the High Court of Delhi declared section 377 as unconstitutional.

In **Justice (Retd.) K. S. Puttaswamy vs. Union of India**⁸, the retired Judge of High Court Justice K. S. Puttaswamy filed a petition before the apex court challenging the constitutional validity of Aadhaar. The petitioner contended that the scheme of Aadhaar is violating of right to privacy as enshrined under article 21 of the constitution. On behalf of the respondent it was argued that right to privacy was never declared and protected as fundamental right under article 21. A list of cases was also produced in which the scope of article 21 was expanded and various rights were accepted as a part of article 21. Such as right to speedy trial⁹, right to free legal aid¹⁰, right to health¹¹, right against handcuffing¹², right to healthy environment¹³ and many others but right to privacy has not been accepted as a part of article 21. But Hon'ble apex court in this case declared right to privacy as fundamental right and a part of article 21 of the constitution. The apex court also stated that the transgender has also equal right to marry and choose their mate and given the transgender the recognition of third gender.

(4) Constitutional Validity of Section 377

Although the term "Unnatural offences" has no where defined in the criminal code, however it has been provided that the carnal intercourse against the order of nature shall be punishable. The sexual intercourse which is permitted by society and according to the rule of nature is the intercourse between man and woman. Therefore in simple word we can say that the sexual intercourse which is not between man and woman is neither social nor natural. What is punishable in the criminal law is the sexual relation which has been established only for physical satisfaction. That may be with a man, woman or even with an animal. Section 377 has incorporated from the time when the criminal law was codified and in pre as well as post independent India, judiciary has decided various cases convicting the accused for unnatural offence. For a long time up to 2009, section 377 included homosexual persons in its ambit. No doubt if the sexual relation is established between two male persons, it shall be an unnatural relation. But no fate has been decided of the relations which are established between the persons of same sex with their consent.

Every person has some feelings of affection and attachment for another. Some males are attracted towards females and vice versa. But sometime such affection and attachment may develop between same sex persons. They may feel comfortable with each other. Such persons come under the category of gays and lesbian.

⁸ AIR, 2018, S.C.

⁹ Husainara Khatoon vs. Home Secretary, State of Bihar

¹⁰ M. H. Hoskot vs. State of Maharashtra

¹¹ Mr. X vs. Hospital Z, 1998. SC

¹² Prem Shankar Shukla vs. Delhi Administration

¹³ Virender Gaur vs. State of Haryana

But if they create sexual relations they may be tried under section 377 of IPC. Apart from gays and lesbians, people of transgender were also suffered a lot as they were not included in any sex category of recognized in the society. Therefore the constitutional validity of section 377 was challenged on the ground that this section is in violation of article 14 and 21 of the Constitution. In an important case *Naz Foundation vs. Govt. of NCT Delhi*¹⁴, Delhi H.C. declared section 377 as unconstitutional.

The judgment passed by Delhi High Court was reversed by Hon'ble Supreme Court while deciding a petition in **Suresh Kumar Koshal vs. Naz Foundation**¹⁵. The apex court stated that decriminalizing the act of act homosexuality can only be done by parliament and section 377 is intended for particular type of acts and not particular class of people. Several curative petitions were filed against the judgment of apex court in the above cited case and during the pendency of the curative petitions some people of LGBTQ community filed a writ petition for amending section 377 so far as it criminalized consented homosexuality.

National Legal Services Authority vs. Union of India¹⁶ is an important case in which upon the writ petition filed by the NLSA the apex court recognized transgender as third gender and gave them legal identification by stating that they should be treated equally. The apex court further stated that homosexuality is not a disease. It is a unique feature in unique persons.

Navtej Singh Johar vs. Union of India¹⁷ is a landmark case in this regard. A writ petition was filed before the Hon'ble Supreme Court during the pendency of curative petitions against the judgment passed by the apex court in *Suresh Kumar Koshal* case. 5 individuals namely Navtej Singh Johar, Ritu Dalmia, Ayesha Kapoor, Aman Nath and Sunil Mehra filed writ petition for scraping section 377 IPC which criminalized consented sex relations between persons of same sex. The apex court formed a Constitution bench for hearing the petition even though the curative petitions were pending. The apex court partially struck down section 377 IPC to the extent it criminalized same sex relations between adults with their consented. The apex court further stated that section 377 will continue to applicable to forceful sexual relation or sex with animal.

In **Arun Kumar vs. Inspector General of Registration**¹⁸ writ petition was filed under article 226 claiming equal right for transwomen and include them in the category of brides as provided under Hindu Marriage Act, 1955. Madras High Court through its judgment recognized transwomen as brides and conferred the right to marry upon them. The court is of opinion that the transgender have right to marry equal to other people.

¹⁴ AIR, 2009, Delhi H.C.

¹⁵ AIR, 2014. SC

¹⁶ AIR, 2014, SC

¹⁷ AIR, 2018, SC

¹⁸ AIR, 2019. Madras H.C.

Conclusion

The law was codified by the legislature keeping in mind the circumstances they were facing at that time. The concept of gay and lesbian was unknown to them however they may know the class of people forming the category of transgender. But in present time equal right and recognition has been given to people of LGBT category. Naz foundation case is an historical case in which the right of gay and lesbian for homosexuality has been recognized. The Naz foundation case was based upon the concept of “Equality among Equals” enshrined under article 14 of the Constitution. Article 14 provides for equality before law and equal protection of law and grants reasonable classification. The court in Naz foundation case opined that the LGBT people can be reasonably classified and can be treated accordingly. Such people may be different from others not included in such category but such people have equal right to marry, mate, consortium etc. Their act of consented sexual relation should not be treated as an offence. The apex court although late but reaffirmed the judgment of Delhi High Court in Navtej Singh Johar case and struck down section 377 partially. The apex court while recognizing the rights of people belonging to LGBT community also appreciated section 377 stating that the section will remain applicable to acts which are unnatural like sodomy, bestiality etc. The apex court permitted sexual relation between the persons of same sex to be legal but simultaneously said that such relation should only be between adults and with their consent. Relation without consent or forceful relation or relation with animal which is against the rule of nature is still an offence and punishable under section 377 IPC.

