

UNNATURAL OFFENCE UNDER SECTION 377 IPC

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ABSTRACT

The researcher main aim to deal with the section of 377 of IPC . As I also deal with the legal definition of Unnatural Offence . However I further classified what are the natural offences and what are the unnatural offences .I also deals with the essential elements for committing a unnatural offence . As I come to know for committing a unnatural offence the only Carnal intercourse is a sufficient proof that the accused had been committed a unnatural offence. For more emphasis I also deals with the circumstance in which the wife can also be able to file a case against his husband for doing unnatural sex . While researching it was also come to know that there was also a possibility of misuse of section 377 against the husband for falsely making him accused. Hence it is come to consideration that if wife file a case against his husband for unnatural sex then he must be send behind the bar because IPC in clear word defines that unnatural offence must be amount to a criminal activities . Later on it court will deal whether it was unnatural offence or not . Furthermore I also deal what are the punishment is given by court for these offence . As I also deals with landmark cases .

INTRODUCTION :

Unnatural offences are covered in IPC under section 377 . Section 377 of the IPC states that “ whoever voluntarily has carnal intercourse against the order of nature with any man , woman or animal, shall be punished with the imprisonment for the life , or with imprisonment of either description for a term which may extend to ten years , and shall be liable to fine.”¹

- The title of offence uses the word unnatural offence .
- **The word ‘unnatural’ means contrary to nature , abnormal but not a spontaneous .**
- **‘Voluntarily’ requires that unnatural offence must be accompanied by intention .**
- As the word ‘Carnal’ implies **something relating to the physical , especially the sexual needs , and the activities.**
- When we wholly try to understand the title it simply defined that Unnatural Offence means sexual activities which is contrary to the nature .
- The definition further uses the word **“against the order of nature” without any elaboration and leaves it for the judiciary to interpret .**
- The term unnatural offence is considered sexual perversity.
- As these section correspond to the to the offence of sodomy and bestiality under the English Law.
- The consent is totally 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 a subject of debate and has led to much confusion .
- As per this section homosexuality is constructed as an unnatural offence as it considered to be against the order of nature .

¹ Neerja Gurnani ,Unnatural offence under the IPC (18 July 2018 9:20 p.m.) <https://www.lawctopus.com/academike/unnatural-offences-under-the-ipc/>

- Hence its leads to the question regarding the constitutional validity of these section .
- Thus in order to determine the constitutional validity of these section and the reasons for its incorporation in the IPC it is important to look at its historical basis .

History of the Legislation

- The Indian Penal Code was drafted by the Lord Macaulay and was introduced in 1861 during the British time .²
- As it deeply influenced by the British Law .
- It was also considered that what was the crime in Britain at that time was also been made crime under the IPC to the larger extent .³
- Act of sodomy was chastise by hanging under the Buggery Act of 1533 which was re-enacted in 1563 by the Queen Elizabeth I , after which it became the charter for the subsequent criminalization of the sodomy in the British Colonies .
- Section 377 has been procure its origin from the Buggery Act 1533.
- It also emphasis that **law has not been amended by the parliament ever since its enactment.**
- As it was considered that the law is based on the Judeo –Christain moral and the ethical standard which conceive of sex on purely function terms , that is for the procreation and on the basis of the homosexuality is considered as a unnatural sex and against the law of order.
- For these purpose of implementation it became very essential that section 377 to determine what is natural and unnatural .As it also becomes necessary to determine whether homosexuality is against the order of nature or not .

Essential elements⁴

- I. A person accused of these offence had a carnal intercourse with man, woman , or an animal .
- II. Such intercourse was against the order of the nature and,
- III. Such act by the person accused of the offence was done voluntarily .

Types of Natural and Unnatural Sex Offence

▪ Unnatural Sex Offence⁵

- I. TRIBADISM / LESBIANISM : Female homosexuality
- II. BESTIALITY : Sexual intercourse with the lower animals
- III. SODOMY / BUGGARY : Anal intercourse with a male or female . Only proof is semen in anus .

▪ Natural Sex Offence⁶

- I. INCEST : Coitus with blood relatives . It is not punishable in India .
- II. RAPE
 - When the victim is less than 16 years of age, the sexual intercourse in any case amount to be rape .
 - The consent or non consent doesn't arise as a woman of only 16 yrs and above can give a consent of sexual intercourse and this has been described by the as Statutory rape .

² Ibid

³ Ibid

⁴ Unnatural Offence (18 July 2018 11:50) http://shodhganga.inflibnet.ac.in/bitstream/10603/137067/14/14_chapter_05.pdf,

⁵ Classification of sexual offence, Sexual Perversion,(19 July 2018 12:23 p.m.) <https://gradestack.com/Dr-Bhatia-Medical/Classification-of-Sexual/Classification-of-sexual/15824-3166-7651-study-wtw>

⁶ Ibid

- The slightest penetration of penis within the Vulva with or without the emission of semen or rupture of hymen is required .
 - Rape can be committed even when there is inability to produce the erection of penis .
 - Rape on virgin cause tear at postero –lateral aspect of hymen .
 - In India , there is no age limit under which a boy is considered physically incapable of committing a rape .
 - Medical proof of intercourse is not a legal proof of rape .
 - Rape is a cognizable offence
 - Under the law , rape can only be committed by man and woman cannot rape a man .
 - Except in France where even a female can be charged of rape.
 - In India , a woman can be charged to have a woman can be charged to have committed ‘INDECENT ASSAULT’ on a man .
- **Can A Husband Be Punished For Having ‘Unnatural Sex’ With His Wife ⁷**
1. Since a Marital Rape is not considered to be a crime in India .
 2. As the which arised that can a husband made a punishable for unnatural sex with his wife in front of court in Rewari ,Haryana .
 3. The farcical legal situation in India where a martial rape does not amount to be a rape .
 4. And it does not termed to be a crime .
 5. But unnatural sex between the homosexual is a crime .
 6. In **Indian Express Reported Today** , that judge in Rewari has sought advice from Punjab and Haryana High Court about the cases in which woman is accused her husband of forcing her to have a anal sex , and she filed a complaint after ten years of marriage .
 7. As the blackwash of the Delhi Gang Rape in 2012 the definition of rape under the IPC has been extended to include not just peno –vaginal intercourse, but other form of sexual violence including forced to oral sex and anal sex .
 8. But section 375 does not apply to the married couple.
 9. While a human activists have pushed hard for martial rape to be criminalized in India .
 10. As they have to carry on a long battle for section 377 to be abrogate .
 11. The Judge in Rewari is considered that S. 377 could be misused by a woman who had a consensual anal sex with her husband during their marriage .
 12. But was trying to falsely implicate him after they had a falling out .
 13. The offence under the S.377 is punishable with a imprisonment for life ,there will be no limitation .
 14. **The husband will have to face a trail for none of his fault the Judge said.**
 15. **As there was also misuse of section 377 is possible by women .**
 16. Judge writes that if husband is a exempt under S.375 , making the same act punishable under the S. 377 “by no stretch of imagination” be said to be a logical .
 17. Hence in short it was considered that if husband commit any unnatural sexual activities with his own wife then he can made a liable for such act .
 18. **Now lets try to know that can a wife file a case against her husband .**
 19. **Yes ,as it also emphasis that under the section 377 a wife can file a case against her husband for unnatural sexual offence .⁸**
 20. In the other word of SC the section 377 IPC does not criminalize a particular people or identity or orientation .

⁷ Can A Husband Be Punished For Having ‘Unnatural Sex ‘ With His Wife ,Ask Judge ,(19 July 2018 2:04) , <https://www.huffingtonpost.in/2016/08/09/can-a-husband-be-punished-for-having-unnatural-sex-with-his-wi-a-21447742/>

⁸ Richa Arya ,Can a wife file a case for unnatural sexual offence against the husband under section 377 of IPC?,(19 July 2018 3:37 p.m.) <https://blog.ipleaders.in/section-377-of-ipc-unnatural-sexual-offences/>

21. It merely identifies certain act which is committed would constitute an offence .
22. Such prohibition regulates sexual conduct regardless of gender identity and orientation .
23. Thus section 377 covers homosexual and heterosexual alike and the carnal intercourse against the order of nature among the heterosexual would be punished in the same manner .
24. Further even if victim consented to the act also the offender can be punished under these section .
25. **The consent is wholly immaterial for the application of section 377 and an unlawful act cannot be legitimized by the consent of the victim .**

▪ **Punishment** ⁹

- Imprisonment for life .
 - Or ten years and in addition to fine.
 - This is Non – Bailable
 - As the cognizable offence and triable by Magistrate First Class
 - This offence is not compoundable
- ✓ If an offence is cognizable police has the authority to arrest the accused without a warrant and to start an investigation with or without the permission of a court .
 - ✓ Otherwise Police does not have the authority to arrest the accused without the warrant and an investigation cannot be initiated without the court order .
 - ✓ If an offence is bailable the police has the authority to release the accused on a bail on getting the defined surety amount along with a duly filled bail bond at the concerned police station .
 - ✓ Otherwise the arrested person has to apply for the bail before the Magistrate or Court .
 - ✓ If an offence is compoundable ,a compromise can be done between the accused and the victim and the trial can be avoided.
 - ✓ Otherwise no compromise is allowed between the accused and the victim .
 - ✓ Except under the certain situation where the High Court or the Supreme Court have the authority for quashing matter .

▪ **Cases**

• **Naz Foundation v. Government of NCT of Delhi and Others**¹⁰

On July 2009 , the High Court of Delhi ended over a century of discriminatory treatment against people because of their sexual orientation by declaring the application of significant elements of Section 377 of the Indian Penal Code (IPC) unconstitutional. Section 377 is a relic of the British legal system and in effect it criminalised same-sex conduct. This case note sets out the facts of the case, examines the judicial reasoning behind the judgment and comments on some of the implications of the decision.

• **Facts**

Naz Foundation v. Government of NCT of Delhi and Others WP(C) No.7455/2001 concerned a writ petition (a public interest action taken before the court) brought by the Naz foundation, an NGO working with HIV/AIDS sufferers, which argued that Section 377 of the Indian Penal Code was unconstitutional. Section 377 entitled “Of Unnatural Offences” has been on the statute books since 1861 and has effectively been interpreted as criminalising consensual sexual acts between persons of the same sex. Section 377 states:

⁹ Indian Kanoon Section 377 IPC – Indian Penal Code – Unnatural Offences ,(19 July 2018 4: 32 p.m.), <https://lawrato.com/indian-kanoon/ipc/section-377>

¹⁰ Naz Foundation v. Government of NCT of Delhi and Others , (19 July 2018 8:55p.m.), <http://www.equalrightstrust.org/ertdocumentbank/case%20note.pdf>

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

The Naz Foundation submitted that section 377 violated the fundamental rights guaranteed under the Article 14, 15, 19 and 21 of the constitution of India .It brought the action in the public interest on the ground that its work on combating the spread of HIV –AIDS was been impede by discrimination experienced by the gay community as a result of section 377. This discrimination petitioners submitted resulted in the denial of the fundamental human rights , abuse, harassment and assault by the public authorities thus driving the gay community underground and subjecting them to a greater vulnerability in violation of their fundamental rights .

Legal Arguments submitted

The Naz foundation¹¹

- The Naz foundation submitted that the harassment and the discrimination of the gay and the transgender community in India resulting from the continued existence of section 377 affected the rights of that community .
- Which were guaranteed under the constitution , including the rights to non –discrimination , right to privacy , the right to life and liberty , and the right to health .
- They argued that the constitution protects the right to privacy under the right to life and liberty and the right to health .
- As they argued that the constitution protect the right to privacy under the right to life and the liberty enshrined in Article 21 .
- Furthermore , they submitted that the right to non- discrimination on the ground of sex in article 15 should not be read restrictively but should include the sexual orientation .
- They also profess that the criminalization of homosexual activity by the section 377 discriminated on the ground of the sexual orientation and was there contrary to the constitutional guarantee of non-discrimination under the article 15 .
- Finally the Naz foundation stressed that court in other jurisdiction have stuck down comparable provision relating to the sexual orientation on the ground that they violated the right to privacy , dignity and equality .
- ***The Government of India***
- Both the Ministry of Home Affairs and the Ministry of Health and the Family welfare submitted legal opinion in respect writ petition .
- As the two minister came down on the opposite side of the legal arguments offering completely contradictory affidavits .
- As MHA on one hand argued for the retention of section 377 on several ground .
- First it is provided for the prosecution of the individual for the sexual abuse of children .
- Second it is filled a gap in the rape law.
- Third that if removed it would provide for “ flood gates of slack behavior”. Hence MHA submitted that Indian society does not morally disregard such behavior and law should reflect societal values such as these .
- By variance , the Ministry of Health and Family Welfare (Conjunction with the National Aids Control Organization) presented evidence in a support of Naz Foundation submission that the continued actuality of section 377 is counter –productive to the effort of HIV/ AIDS prevention and treatment .
- As they argued for the expulsion of section 377 stating that it makes a large number of people in high risk categories in relation to HIV/AIDS antipathetic to come forward for treatment due to fear of law enforcement agencies , and that in driving homosexuality undergoes it increases risky behaviour such as unprotected sex.

Judgement

- In a decision that has been praise not only as a landmark victory for the equality and the social justice but also in term of its tough legal reasoning the High Court of Delhi concluded that section

¹¹ *Ibid*

377 IPC , to that extent as it criminalize consensual sexual act of adults in private is violative of Article 21, 14, and 15 of the discrimination .

- A period of time many element of the decision will be far reaching for right of LGBT in India High Court emphasis on the right to equality Article 14 and 15 of the constitution is particularly commendable for at least two reason .
- Firstly the judgement must be estimable for its completeness .In undertaking a comprehensive and detailed analysis of the law of India in respect to discrimination on the ground of sexual orientation , the High court has left little margin for the decision to be overturned on the basis of misinterpretation or misapplication of law .
- Second the High Courts reference to and application of the highest international standard on equality to the Indian context set a positive example which should be inspire the judicial decision making countries which presently criminalise same sex conduct .
- The High Court began its Article 14 analysis by setting out that any distinction must be based on intelligible differentia which has a rational relation to the objective sought and must not be unfair or unjust . S.377 ,the Court said, does not distinguish between public and private acts, or between consensual and non-consensual acts, therefore does not take into account applicable factors such as age, consent and the nature of the act or absence of harm. Thus, such criminalisation in the absence of evidence of harm seemed arbitrary and unreasonable.
- In considering the legal principles urge by Article 14 of the Constitution, the Court took into account the Equal Rights Trust’s Declaration of Principles on Equality as “the current international understanding of Principles on Equality”. Citing in full Principles 1 (right to equality), 2 (equal treatment) and 5 (definition of discrimination) of the Declaration, together with landmark jurisprudence from the Canadian, South African and United States courts, the High Court emphasised that there was a need to include sexual orientation among protected grounds of discrimination and build indirect discrimination and harassment into any consideration of the right to equality.
- Thus, dealing with the argument that Section 377 was neutral, as submitted by the MHA, the High Court stated that although the provision on its face was neutral and targeted acts rather than persons, in its operation it unfairly targeted a particular community, having the result that all gay men were considered criminal and it therefore violated Article 14 of the Constitution.
- Moving on to consider whether the reference to “sex” in Article 15 of the Constitution should be interpreted as including sexual orientation on the basis that discrimination on the grounds of the latter is based on stereotypes of conduct on the basis of sex – as was argued by the Naz Foundation, the High referred to the Human Rights committee decision in ;

▪ **Toonen v. Australia**

Facts

- **In which it was held that the criminalization of sexual act between men was considered a violation of Article of the International Covenant on Civil and Political Rights where a reference to sex was taken as including sexual orientation .On the basis of perusal of Indian and international human rights jurisprudence the High Court declared that S. 377 was also unconstitutional on the basis of Article 15.**
- As it was explained that sexual orientation is a ground of similar to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15 .Further Article 15(2) include the notion of horizontal application of rights .
- In other words it even prohibits discrimination of one citizen by an other matter of entry public place . As by taking a view discrimination on the ground of sexual orientation is unbearable even on the horizontal application of the right incorporate under the Article 15.
- The outlines of its judgment the High Court stressed the importance of endorse the value of equality , tolerance and inclusiveness in Indian Society .

▪ **Suresh Kumar Kaushal v. Naz Foundation¹²**

¹² Anshul Kumar Pandey ,Everything you need to know about the section 377 of Indian Penal Code and the story so far(24 July 2018 12:58), <https://www.indiatimes.com/news/india/lgbtq-everything-you-need-to-know-about-section-377-of-the-indian-constitution-and-the-story-so-far-256826.html>

Facts

- As these case was deal with constitutionality of S. 377 of IPC which was act out in 1860 .
- As in these case petitioner Suresh Kumar Kaushal file a case against the Naz foundation in 10 july 2009.
- In their appeal in a Supreme Court the petitioners argued that section 377 does not categories any particular group or gender .
- Hence they said that it does not violated the rights of Article 14, 15, and 21 of the constitution .
- They also proclaim that if the High Court judgment was approved by in the Supreme Court **“Indian social structure and the institution of marriage will be destructive affected and it would cause young people persuade towards the homosexual activities .**
- At last they finally conform that the Supreme Court could not be legislate and it should left the matter of legality or illegality of section 377 to the parliament .
- As a result Supreme Court accepted the clash which was advanced by the appellants and observed that section 377 is the only law that criminalises pedophilia and crime like sexual abuse and assault .
- It was also reasoned that if S . 377 was a pre –constitutional statue and if it were in violation of any fundamental right , and the composer of the constitution would not included it in the first place.
- As based on such declarations the apex court overturned the decision of Delhi High Court .
- By the decision of Supreme court it impact was met with heavy criticism and general dissent from the intelligentsia .
- As it was welcome by many religious groups .
- Also there are some religious organisation who are favouring decriminalisation of homosexuality .

• Noris v. Republic of Ireland

Facts

- The gay man brings a case before a court from the fear of being arrest as the petitioner Noris explained that he is agonize from a great depression and lonliness .when he has experienced that he is homosexual and his feeling of sexuality would make him criminality .As court accepted and it was held that there must be a decriminalisation of a sodomy law .
- **The leader of Congress Party Shashi Tharoor** has introduced a private member’s bills twice in Lok Sabha to support in favour for decriminalisation of homosexuality .
- But the result does not come in the favour of him .
- It became unsuccessful in getting it passed in Lok Sabha .
- As so many leaders are come to support the decriminalisation of homosexuality .
- One of them is our current Finance Minister Arun Jaitely who was also favour in the support of decriminalisation .
- In today also there was so many petition was filed against the Naz Foundation .
- And the hearing was going on such case .
- Yet the decision on homosexuality neither the supreme court declare clearly it legal nor the illegal.
- As it taking a long time for reannouncing decision by saying that parliament has to discuss whether the section 377 should be abolished or not .
- As it also emphasis whether it should be violated the right of homosexuality orientation or not .
- **Now as a researcher by referring so many legal sites I came to conclusion** that yes there is violation of fundamental rights of homosexuality minorities are happened .As IPC has been introduced in India during the british time in 1860 that the if the same –sex gender commit the intercourse it amount to be a offence . But when they leave India they made rule for them and declared that the same gender person has a right to do marriage with the same gender people . As in English law it is decriminalised . As I also deal with some case from which the prominent case is Naz foundation in which they are appealing from a court for the abolishment of section 377 . They stated that their fundamental rights are violated which is guaranteed by the constitution .

Yes somewhere there rights are violated . As indian society does not accept them as they throw out them from their society . In our constitution it was not mentioned that for homosexuality the fundamental rights are not given. But it was clearly stated that there must be equality article 14 , there not be discrimination on the basis of caste, religion, sex and gender which was mentioned in article 15 and so on articles are giving the guaranteed for the protection of fundamental rights . As it is my opinion that in our India there must be made a law for the right of homosexual people that they can able to marry with a same sex gender like other heterosexual couple .If such decision is passed by supreme court then the homosexual minorities get a new hope for their survival . Still there are hearing are going on the homosexuality subject but yet the final decision has not been . But if the decision came in the favour of Homosexual community then the one of the biggest problem of country will be solved .

