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# Unnatural Offences

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## ABSTRACT

*The people of the LGBTQ Community are also humans and they have the right to live freely as they want. This article provides about the Unnatural offences under the Indian Penal Code and the constitutional validity of Section 377 of the Indian Penal Code and the rights of the LGBTQ Community.*

## I. INTRODUCTION

Unnatural offenses are defined under section 377 of the Indian Penal Code, 1860 which states that *if any person has voluntarily carnal intercourse with any man, woman, animal against the order of nature, then it is considered a crime under the Indian Penal code.* Unnatural offences include sterilization, sodomy, bestiality, etc. It criminalizes consensual homosexual acts of adults in private. Penetration is enough for the commission of an unnatural offence.

## II. ESSENTIALS

To constitute the unnatural offenses, the essentials are as follows:

- **Voluntary carnal intercourse:** some penetration is done by the offender which must be voluntary.
- **Against the order of nature:** initially, it was said that sexual intercourse is done for the procreation of nature and not for pleasure and sexual intercourse should be done between opposite sexes. So, if anything is done against the above statement, then it is considered a crime.
- **With any man, woman, or animal:** the sexual intercourse should be done between two men, two women, or of man or woman with the animal.

## III. TYPES OF UNNATURAL OFFENCES

To understand the unnatural offences properly, we should also understand the types of unnatural offences which are as follows:

- **Lesbianism:** In this term homosexuality of females is defined.

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- **Bestiality:** Under this term, sexual intercourse with an animal is defined.
- **Buggary:** anal intercourse with a man/ woman

#### IV. PUNISHMENT OF UNNATURAL OFFENCES:

Whosoever commits unnatural offences under section 377 of the Indian Penal Code shall be punished with imprisonment for life or with the imprisonment of either description which may extend to 10 years and with a fine.

#### **The constitutional validity of section 377 of IPC and the rights of the LGBTQ community**

These are the following cases which deal with the constitutionality of section 377 and the rights of the LGBTQ community:

➤ **Naz Foundation v. Government of NCT Delhi.**<sup>2</sup>

A landmark judgment was given by the division bench of Delhi High Court of decriminalizing homosexuality in India. In this case, the question arose whether we should decriminalize section 377 of the Indian Penal Code.

Regarding this issue the court has two views, the first view was that under Article 21 of the Indian Constitution all persons have their dignity and privacy and it is the same as that of homosexuals. And the second view was that section 377 of Indian Penal Code is violative of Article 14 of the Indian Constitution as it discriminates against homosexuals based on sex/gender. Court also said that under Article 15 of the Indian Constitution no one should be discriminated on the basis of sex, as here sex doesn't only mean biological sex but it also includes sexual orientation.

The Delhi High Court held that that part of section 377 which deals with the criminalization of homosexuality, should be declared unconstitutional.

➤ **Suresh Kumar Koushal v. NAZ Foundation.**<sup>3</sup>

In this case, mainly two arguments were raised by the petitioner which are as follows:

1. Homosexuality is a criminal offence and only Parliament can decriminalize it, the court doesn't have the right to interfere with it.
2. Courts can't extend the right to privacy under Article 21 of the Indian Constitution that much that it should cover an offence.

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<sup>2</sup> 2009.

<sup>3</sup> (2014) 1 SCC 1.

The court, in this case, held that the right of privacy under Article 21 of the Indian Constitution doesn't include homosexuality or homosexual acts.

Many international organizations criticize this judgment and said that it is a significant step that can take India backward.

➤ **NALSA v. UOI and Ors.**<sup>4</sup>

This is the first case in which transgender is recognized as the third gender. The Supreme Court has the view that the existing laws of India are focused on only binary gender i.e. male and female and the rights of transgender are not protected by any existing law. That's why the transgender community is discriminated by society.

Taking the above view in the mind, the Supreme Court recognizes the multi-phase right of the transgender which are as follow:

- Supreme Court has the view that under Article 14 of the Indian Constitution the rights enjoyed by any person are protected whether they are men, women, or transgender.
- Under Article 15 and Article 16 of the Indian Constitution, discrimination based on gender is protected. So, if anywhere discrimination is done on the basis of sexual orientation, then it is considered as the violative of Article 15 and 16 of the Indian Constitution.
- The court said that the right to privacy, gender identity, and integrity are protected under Article 19 (1) (a) of the Indian Constitution.
- Under Article 21 of the Indian Constitution right to live with dignity also includes the Right to choose Gender Identity.

Through this case, Gender Identity gets legal recognition and transgender are recognized as the third gender.

➤ **Justice K.S. Puttaswamy v. UOI.**<sup>5</sup>

This case was heard by the nine-judge bench and Justice D.Y. Chandarchud authors the case and said the Supreme Court must rectify its mistake done in the Suresh Kumar Koushal case.

The Supreme Court held that sexual orientation is the essential attribute of privacy.

➤ **Navtej Singh Johar v. UOI.**<sup>6</sup>

The case was heard by a five-judge bench consists of CJI Deepak Mishra, J. Indu Malhotra, J.

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<sup>4</sup> 2014 5 SCC 438.

<sup>5</sup> (2017) 10 SCC 1.

<sup>6</sup> (2018) 10 SCC 1.

Rohinton Nariman, J. A.M. Khanwilkar, J. D.Y. Chandarchud. In this case, Supreme Court decriminalized all consensual sex among adults in private including homosexual acts.

The Supreme Court said that the view of the Delhi High Court in the Naz Foundation case was right that sex under Article 15 of the Indian Constitution doesn't only mean biological sex but also includes sexual orientation. The court recognized sexual orientation as a natural and inherent biological phenomenon.

UOI argued that it will surge the cases of AIDS and HIV and it is also against morality. The Supreme Court held this argument as irrational, indefensible, manifestly, and arbitrary.

In this case, the Supreme Court partially declared section 377 of IPC unconstitutional.

## **V. CONCLUSION**

As the Supreme Court decriminalized homosexuality but the condition is not much changed for homosexuals. Even after the passing of the above judgment, the LGBTQ community has to fight with society for their rights. Society should accept them as their part and has to give them a place in society.

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