

UNNATURAL OFFENCES UNDER NATURAL LAW THEORY

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Abstract

The term 'unnatural offence' in itself has generated much debate in the recent times. The law criminalizing homosexuality and the language incorporated thereof, suggesting consensual homosexual acts to be 'crimes against nature' or 'unnatural acts', has its roots in the Natural law theory. The major reason for the non-acceptance of consensual homosexual acts and its criminalization is Natural law theory, which suggests that consensual same-sex activity is against the order of nature and therefore considered to be immoral. More so, in present times, there are adherents of Natural law theory, who not only defend the ongoing discrimination against homosexuals but also make arguments against homosexual marriage. Criminal law in India criminalising homosexuality was drafted during the colonial period and since then such behaviour is condemned not only in the Indian society but also in the other former British colonies. The provision of law in India criminalising consensual homosexuality, i.e. Indian Penal Code based on British criminal law came straight from the Natural law theory. The reason lies in the fact that as per the natural law theory, the law is of divine origin and homosexuality is considered immoral according to Bible. And based on biblical notions, the same was also considered as a criminal offence, prescribed under archaic English law and practiced in the majority of States. Although, the legal system of the United Kingdom has evolved with time so as to decriminalise homosexuality, but the various commonwealth nations and old British colonies are still continuing with archaic laws which were initially developed under the influence of the English laws. Considering the continuing struggle for decriminalization of consensual homosexual acts in many parts of the world including India, it is important to critically analyse the arguments of Natural law theorists on the basis of which the same has been termed as 'unnatural act'.

Keywords: Unnatural Offences, Homosexuality, Human Rights, Natural Rights, Natural Law Theory.

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NATURAL LAW BASED ON REASON OR ABSTRACT NOTION?

Natural law theory is pervasive in almost all the disciplines since the ancient period of Greek civilization¹. In fact, in the present times, it has formed an important instrument of justification and reasoning of various existing political and legal theories. Although, Natural law theory lost its significance in the 19th century with the popularity of Positivism, but the Natural law thinking revived in the 20th century and still remains an important weapon in the present ideologies.

In summary, Natural law theory asserts that the law is of divine origin and can be discovered by reason. During ancient times, the law was necessarily associated with the divine entity. The terms 'Natural law' and 'Eternal law', were considered as synonymous. Hesiod in his writings also pointed out that the chief of Olympian gods, Zeus, gave law to the mankind as his greatest gift². Natural law theory and its association with religion continued till the middle ages, where theological origin theory of law was further developed by St. Augustine and St. Thomas Aquinas. In the middle ages, the church was considered as the guardian of the law given by divine entity. The earliest premises of the Natural law thinking tended to link reason with some notions of theology³. St. Thomas Aquinas explained the law as an authoritative dictate of reason laid down by a person who has the charge of the perfect community⁴. Since God has the charge of the perfect community, the authoritative rule of action coming from him is law. Therefore, Natural law is not only to be understood as a religious notion but as the basis of living a rational life for the betterment of the community. Natural law simply draws a strict theoretical line between right and wrong acts. In simpler words, it talks about morality, i.e., 'what ought to be'. For example, to violate the strictures of Natural law, such as by killing someone or by physically abusing others, is to commit acts which are not only immoral but also unjustifiable. Similarly, consensual same-sex activities were also considered as sinful and irrational. Therefore, such acts were also recognized as a criminal offence in most of the countries. The justification for criminalizing consensual same-sex acts was perceived to be religious norms prescribed in Bible and other forms of *lex divina*. Although, with the emergence of the gay liberation movement in the West, the perception of a considerable percentage of the population across the world, regarding homosexuality and

¹ Michael Freeman, *Lloyd's Introduction to Jurisprudence*, Thomas Reuters, 9th Edition (2014), p. 75

² Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law*, Harward University Press, Revised Edition (2013), p.4

³ Ian Mcleod, *Legal Theory*, Palgrave Macmillan (2005), p.55

⁴ *Id.* at p.52

other sexual minorities, has undergone a drastic change but the criminalization of consensual homosexual acts still remains the central issue of debate for various legal and political structures. In the given changing social order, it is pivotal to probe into the religious norms on the basis of which Natural law theorist support criminalization of consensual homosexuality.

The term 'homosexuality' originated in the 19th century, much subsequent to the era of Bible. It was coined by Karoly Maria Benkert, a German psychologist⁵. Therefore Bible and other holy scriptures do not explicitly use the term 'homosexuality', but condemn the similar sexual behaviour. Nonetheless, substantiating criminalization of homosexuality on the grounds of Natural law thinking of Middle Ages suggesting the law to be of divine origin, in it is contentious. In fact, many people contributed to the writing of Bible. And for other holy scriptures, condemning homosexuality, also owe its existence to human beings. Human writings are not free from flaws and there is a probability of errors in these Holy Scriptures too. Therefore criminalizing homosexuality on the basis of ancient holy texts is like being a mindless follower of a law without probing into the rationale behind such precept. More so, the term 'homosexuality' is not explicitly mentioned in any of the Holy Scriptures, therefore it is also asserted that the references to the same sexual behaviour in Bible and other holy texts are related to violence, idolatry, and exploitation based on same-sex behaviour. Therefore, what is condemned is not consensual homosexuality, but violent homosexual acts which are not consensual, fetishism and sexual abuses based on homosexual behaviour.

Sharia law or Islamic law is one of the oldest substantial legal systems and also influenced western penal law. It also condemns homosexuality as an immoral act. The punishment prescribed by the law includes death by stoning, mutilation of limbs, lashes etc., which are not approved by many developed nations. More so, Sharia law is derived from Quran and Hadith, which are not untouched by human intervention for its present existence.

Nonetheless, the contemporary Natural law thinking emphasizes practical reasons contrary to the speculative knowledge of nature. It is also advocated by many legal theorists that practical reason is the foundation of Natural law theory. For instance, practical reason is also the foundation of Kant's moral philosophy⁶. The rationalistic version of modern natural law

⁵ Pickett, Brent, Homosexuality, The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.), Available at: <https://plato.stanford.edu/archives/fall2015/entries/homosexuality/> (2015), (Accessed on 18.10.17)

⁶ Williams, Garrath, Kant's Account of Reason, The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.), Available at: <https://plato.stanford.edu/archives/spr2016/entries/kant-reason/> (2008), (Accessed on 18.10.17)

theory suggests that law is the dictate of practical reasons. Hugo Grotius, who laid down the ground for the secular and rationalistic version of the modern Natural law, asserted that natural law would subsist even if God did not exist⁷.

HOMOSEXUALITY: NATURAL PHENOMENON VERSUS UNNATURAL OFFENCE

The word ‘unnatural’ means different from what is normal or expected, or from what is generally accepted as being right⁸. It also implies phenomenon which is contrary to the ordinary course of nature; abnormal or not existing in nature⁹. This connotes that the ‘unnatural offences’ mentioned under Section 377 of the Indian Penal Code, covered under the sexual offences means those sexual behaviours which are contrary to nature. The said provision of law defines ‘unnatural offences’ as voluntary carnal intercourse ‘*against the order of nature with any man, woman or animal*’. The given definition of the same-sex sexual act has generated much debate in the present times. It poses a question on the criteria by which consensual same-sex sexual behaviour and acts are treated as against the order of nature. The current controversy related to the decriminalisation of consensual same-sex activities has also raised a question, ‘whether consensual homosexuality is a natural phenomenon or an unnatural act?’

The term ‘natural’ implies things existing in or derived from nature¹⁰. It is still presumed in many States penalising homosexuality that consensual homosexual acts are not ‘natural’ as they are not derived from nature and the same is explained in many legal systems including India. Section 377 under Indian Penal Code, 1860, which criminalises consensual homosexuality, is a product of British colonial-era law based on biblical notions. In the present legal scenario, consensual homosexuality is no more considered as against the order of nature under the English laws following *Dudgeon v. United Kingdom*.¹¹ In fact, in the year 2016, the nation had around more than 30 LGBT members of Parliament, which is

⁷ Edgar Bodenheimer, *Supra* note 2 at 35.

⁸ *Unnatural*, Oxford Advanced Learner’s Dictionary (8th ed. 2015)

⁹ *Unnatural*, English Oxford Living Dictionaries, <https://en.oxforddictionaries.com/definition/unnatural>, (Accessed on 20.10.17)

¹⁰ *Natural*, Available at: <https://en.oxforddictionaries.com/definition/natural> (Accessed on 20.10.17)

¹¹ App No 7525/76 (Official Case No.) (1981) ECHR 5. In this case, European Court of Human Rights held that the law criminalising consensual private homosexual acts violated right to private and family life as enshrined in the European Convention on Human Rights

exceptional in the history of any other parliament around the world¹². However, criminalisation of the same-sex sexual acts has been retained in many nations including India, considering the same to be against the order of nature.

The old school Natural law thinkers considered 'consensual homosexual acts' as unnatural acts on the basis of no procreation generating from such sexual acts. The Natural law theorists' emphasized procreation as the sole object of marriage and sexuality and for them, the sexual acts were to be generative in order to be considered not against moral principles. This implies that the sexual acts and marriage of infertile couples also fall under the category of 'immoral acts' or 'unnatural acts' because of non-generative sex, which is not true. In reality, the sexual acts in which both or one of the partners is infertile are considered morally good. Therefore, 'non-generative sex' argument as the basis of considering consensual same-sex behaviour as an unnatural act, in itself is contradictory. Procreation is not the only purpose of sexuality and marriage. The other objects of sexual acts include pleasure and biological instincts. According to '*Kamasutra*', which is an ancient Hindu text on human sexual behaviour, written by Vatsyayana, there are four important goals of human life. These goals are *Dharma*, *Artha*, *Kama* and *Moksha*. '*Dharma*' refers to virtuous living; '*Artha*' refers to material prosperity, '*Kama*' refers to sensual desires of life and '*Moksha*' refers to liberation¹³. This further connotes that apart from procreation, sensual desire or pleasure is also one of the objects of sexual acts.

Homosexuality is animal species: Previously, it was widely believed that animals indulge into sexual acts for only procreation and not pleasure. However, the same does not holds true. In fact, many scientific studies suggest that all animals have sex for pleasure.¹⁴ It is also argued by many scholars, that most of the animals are not aware of the fact that sexual acts lead to procreation, and hence they do that for pleasure. In fact, masturbation is very common among a considerable number of animal species. There are also many species which are observed to be engaged in autoeroticism¹⁵. And also according to various research studies, homosexuality

¹² Matt Hooper, *The UK has more LGBT MPs than anywhere else in the world*, Gay Times, (Feb. 21, 2016), <http://www.gaytimes.co.uk/news/28378/the-uk-has-more-lgbt-mps-than-anywhere-else-in-the-world/>, (Accessed on 20.10.17).

¹³ Kaustav Chakraborty, *Rajarshi Guha Thakurata, Indian concepts on sexuality*, *Indian Journal of Psychiatry*, 55 (Suppl 2) (2013), S250-S255. <http://doi.org/10.4103/0019-5545.105546>, (Accessed on 20.10.17)

¹⁴ Cara Santa Maria, *Is Sex for Pleasure Uniquely Human?* Huffpost, (November 13, 2011), Available at: http://www.huffingtonpost.in/entry/sex-for-pleasure_n_1090811, (Accessed on 20.10.17)

¹⁵ Id.

has been observed in 1500 species¹⁶. Therefore, homosexuality in animals provides for the foundation of argument in favour of decriminalising consensual homosexuality in human beings and considering the same as a natural phenomenon. Homosexuality in animal species has also been cited by American Psychiatric Association and other groups in the United States Supreme Court for the case *Lawrence v. Texas*¹⁷ which quashed anti-homosexual laws of 14 states¹⁸.

CONCLUSION

The labeling of a 'natural' phenomenon as 'unnatural' is what that is causing hardship to the sexual minorities since ages. This labeling does not only lead to stigmatization but also discrimination based on sexuality. It further conveys that the homosexual behaviour is not acceptable in the society along with the person indulging in such same-sex acts and behaviour, as it is 'unnatural'. Even though it has been scientifically proven and reiterated in the reports of various organizations that 'homosexuality is natural' and it is something, people are born with and not a disease, still the old draconian law criminalizing homosexuality and labelling it as unnatural, is still in force in many parts of the world including India. The law in itself is violative of the principles of natural justice and equality and also discriminatory towards homosexual and transgendered individuals. Thus, the law criminalizing consensual same-sex behaviours and acts between adults is contrary to the principles of the International Human Rights law which prohibits discrimination on the basis of sexual orientation.

Nonetheless, the Natural law argument against homosexuality has no substantial ground as such sexual behaviour is found in nature and prohibiting the same on the grounds of natural law argument is nothing but the misinterpretation of the Natural law theory. In fact, one can find arguments in support of decriminalization of the consensual same-sex acts between adults on the basis of Natural law theory.

Natural law theory basically provides that the law can be discovered by the reasons to be found in nature and decriminalization of consensual homosexual acts is based on the reasons

¹⁶ *Against Nature-An exhibition on animal homosexuality*, Natural History Museum (Feb. 25, 2009), University of Oslo, Norway, Available at: <http://www.nhm.uio.no/besok-oss/utstillinger/skiftende/againstnature/index-eng.html>, (Accessed on 20.10.17)

¹⁷ 539 U.S. 558, 558 (2003)

¹⁸ Brief for Amici Curiae, Available at: <http://www.apa.org/about/offices/ogc/amicus/lawrence.pdf>, (Accessed on 20.10.17)

found in nature itself. Contrasting sexual orientations are found in the nature and punishing a person for something that he or she is born with is a gross violation of the basic principles of natural justice and equality. The law needs to be updated and transformed with the changing social order, where the individuals belonging to the sexual minorities have gained much visibility and cannot be ignored. It's high time when homosexuals should not only be acknowledged by the law but also protected against ongoing discrimination.