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The 'Order of Nature': Discourse on Judgments Relating to Section 377

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	ABSTRACT
Keywords: <i>Homosexuality, Heterosexuality, Laws, Section 377, Normal, Natural, Supreme Court, Order of Nature, Sex, Society, Morality, Procreation, Pleasure, Criminalization.</i> 	Constitutional laws and court judgments, like any film, novel or poetry, are products of the cultural industry. They are influenced by, and in turn, influence culture and society. Therefore, like any other cultural product, laws and legal judgments should also be treated as texts, open to critical examination or diagnosis. This paper attempts to present a discourse, primarily on the three most significant court judgments relating to homosexuality (or, non-heterosexual orientations) in India. While the Delhi High Court had, in 2009 itself, decriminalized homosexuality, it was recriminalized by the Supreme Court of India in 2013. It was only in 2018 that a five-judge bench of the apex court, comprising of the then CJI himself, finally scrapped Section 377 in so far as it criminalizes homosexuality. The paper seeks to present ideas and arguments, both for and against homosexuality. While most of the arguments in favour of Section 377 rely on Indian society's moral code of conduct and the unnaturalness and abnormality of homosexuality, the arguments against the said law aim to challenge the very notions of 'normal' and 'natural.' The arguments made by petitioners, such as Navtej Singh Johar and Naz Foundation, destabilize the status quo and challenge the mainstreaming of ideology. This paper raises some important questions- What is natural and what is normal? Which one of the two is to be preferred? Is homosexuality unnatural/abnormal, or is it natural but not normalized? What mechanisms operate in the normalizing of certain attitudes and behaviours? When does the normal become the natural and the deviant, the unnatural? While trying to find answers to these questions, the paper also strives to study the complex relationship that exists between the notions of good and evil and the notions of natural and normal.

Natural v/s Normal: The Question of Legitimacy

Thou, Nature, art my goddess;
 to thy law
 My services are bound. Wherefore should I
 Stand in the plague of custom, and permit
 The curiosity of nations to deprive me,
 ... Why bastard? Wherefore base,
 ... Why brand they us
 With base? with baseness? bastardy? base, base?
 Who in the lusty stealth of nature take
 More composition and fierce quality
 ... Fine word, 'legitimate'!

-William Shakespeare, *King Lear* [I, ii, ll 1-18]

The debate revolving around the 'order of nature' is as old as nature itself. What is 'natural'? What is 'normal'? And which of the two is supposed to be more authentic, more permissible, or more acceptable? Natural is something that comes out of nature; it is there. Norms, on the contrary, are man-made customs, laws, and traditions that serve as a basis for the social contract among fellow members of a society. The normal is an interference with the natural; the normal is often, over time, naturalised to such an extent that it replaces the natural itself, and becomes the new 'order'. But the latter will, time and again, attempt to reassert itself, demanding adjustments in the established norms. This friction between the two, the natural and the normal, nature and culture, can be fierce, because norms are dictated by a certain ideology (the dominant ideology) which might or might not want to legitimize certain aspects of the natural, aspects that it perceives as a threat to its stability and a challenge to the status quo.

Edmund's invocation to nature, quoted before, is an instance in case. As the bastard of Gloucester, Edmund is branded as an illegitimate child. Edmund demands to know as to why he, born out of passion and lust (nature), should be regarded any lesser than Edgar, who is a result of the social institution of marriage (culture). Edmund's assertion is that natural is more real than normal; and therefore, the invocation to nature. Northrop Frye, while discussing *King Lear* opines that when we speak of 'nature' it makes a crucial difference whether we mean to imply the upper level of nature or the environment that actually surrounds us. In his view, both these levels of nature- the upper level, the world symbolized by the Biblical story of the Garden of Eden and the lower level, the one where we are actually born, constitute the order of nature. To make things clear, what Frye suggests is that the lower level of this order is the real nature that man is born into, whereas, the upper level (the Garden of Eden) is symbolic of the ideal state of being, a desirable standard of living, that man must strive to achieve. However, by virtue of this being an imagined ideal standard of righteous living, inspired by religious narratives, it ought not really qualify as 'natural', although Frye believes otherwise.

Frye's upper level of nature is, in reality, a certain set of norms fixed by society. This is supported by Frye himself when he asserts that certain things, such as morality, education,

and religious scriptures, help a man to reach that higher level. It is already understood that none of these- morality, education, or religion- are natural. These are man-made agents of the dominant ideology, instrumental in the construction of the socio-cultural normal. Frye further adds that many things are 'natural' to man that are not natural to anything else on this lower level, such as living under authority, or even wearing clothes, for that matter. It is clear now that by natural, Frye really means the norms constructed by society, since no man, in his natural state, is born in clothes. By regarding the normal as a standard of the natural, that too, of a higher level, this argument betrays itself by showing us how society often attempts to naturalise what it thinks is normal. This automatically excludes every deviation from the normal as unnatural. In Edmund's case, his being born outside the institution of marriage is a deviation from the normal only, but is categorised as unnatural. Edmund's goddess, therefore, is the real nature, and his challenge is to the normal, which, while being capable of change and flexibility, is largely arbitrary, majoritarian, and discriminatory.

The 'Master Sex' and the 'Deviant It'

Deepali: Bunny, you are a Sardarji. Why do you cut your hair?

Bunny: What has that got to do with ...? Okay. Not because I am ashamed of being a Sardar. I am proud of it ... But because if I had a turban, I will end up playing a stereotypical Sird in all those movies. And that would hurt even more.

Deepali: Thank you, Bunny. I rest my case, Ranjit.

Ranjit: What do you mean?

Deepali: It's not the shame, is it? With us? ... It's fear ... Of the corners we will be pushed into where we don't want to be.

-Mahesh Dattani, *On a Muggy Night in Mumbai*

Homosexuals, or people belonging to the larger LGBT community, are often forced to live a secretive life inside the closet. All their desires, experiences, and expressions blossom, live, and die within the boundaries of the closet. An exceptional few who choose to come out of the closet, are penalised by and cornered in the society. All of this happens in the name of the overarching 'order of nature' and the sanctions that it imposes. It is against this fear of being cornered in society that a group of petitioners chose to fight legal battles, both in the Delhi High Court and the Supreme Court of India, challenging the constitutionality of Section 377 of the Indian Penal Code, in so far as it criminalises homosexuality as an unnatural offence punishable by law.

The section under question finds its origin in the sixteenth-century Buggery Act of England that criminalised sodomy as an unnatural crime not fit to be even mentioned by Christians. The farce in this statement cannot be more highlighted: that, which in itself is unnatural (religion), is de-naturalising a perfectly natural sexual orientation (homosexuality). Religions are, as has been noted before, instruments in the hands of the dominant ideology that serve to establish the normal in society. Religion and education constitute the Ideological State Apparatuses which, according to Louis Althusser, ensure the hegemony of the ruling class through mainstreaming of ideology, behaviour, and attitudes. Section 377, therefore, as a

colonial leftover, continued to be a part of the Indian Constitution even after independence, until the Delhi High Court, in the *Naz Foundation v. Government of NCT of Delhi* (2009), struck it down, thereby decriminalising homosexuality.

The parties in favour of Section 377 argued that the Indian society by and large disapproved of homosexuality, which disapproval was strong enough to justify it being treated as a criminal offence. They believed that according to the high standards of 'morality' in India, homosexuality is viewed not only as abhorrent but also immoral. Moreover, it is contrary to the cultural norms or ethos of our country. The chief argument against homosexuality revolved around the question of procreation. Mainstream ideology believes that the only natural purpose of sex between two adults is procreation or reproduction. Physical intimacy, for that matter, can have no other purpose. Any non-procreative sexual activity [homosexuality] is thus viewed as being against the order of nature. The Delhi High Court, however, observed that "the tests for attracting the penal provisions have changed from the non-procreative to imitative to sexual perversity." To understand the meaning of this remark, we must take a look at Jonathan Ned Katz's *The Invention of Heterosexuality*, where Katz opines, and rightly so, that the concept of heterosexuality is only one particular historical way of understanding the social relations of the different sexes.

Katz attempts to trace the history of terms like 'heterosexuality' and 'homosexuality' to map the journey of sex from a procreative to a pleasure-seeking activity, and from a pleasure-seeking activity to an act of perversion. In Katz' view, by studying the history of a term like 'heterosexuality' we challenge the preconceptions about it, thereby challenging its authority. This helps us in our critical study of its dialectical counterpart, which is, homosexuality. He argues that in the early Victorian period, due to the growth of large machines and industries, the focus of society was on production. While the early Victorians had promoted the value of economic production, that era's procreation ethic had lauded the virtues of human reproduction. This connotes that like the machine in the factory, the human body in bed was thought of as a means towards procreation and production. The penis and the vagina were instruments of reproduction and were not meant for pleasure. During this time, even the act of masturbation was considered illicit and lustful. However, the Victorians soon witnessed a gradual shift from an industrial form of society to a consumer society. Now, under changed circumstances, while on the one hand the economic ethic of the late nineteenth century marketed the pleasures of consuming, its sex ethic promoted an erotic pleasure principle for men as well as for women. This is where the term 'heterosexuality' came into common usage, with the pleasure principle being applicable only for heterosexual activities.

However, the idea of sex as an act of pleasure instead of an act of reproduction alone, can be traced back to the ancient Hindu treatise on erotic art, Vatsyayana's *Kamasutra*. Vatsyayana begins his book by referring to religion, power, and pleasure. In their introduction to the English translation of *Kamasutra*, Wendy Doniger and Sudhir Kakar open their discussion using terms like *dharma*, *artha*, and *kama*, known collectively as the three aims of human life (*purusharthas*). One might call them piety, profit, and pleasure. However, even here, as in the much later Victorian period, the focus is entirely on heterosexual pleasure. The transition in the Victorian understanding of sex from a procreative activity to a pleasure activity leads to the creation of the new Normal Sexual (the heterosexual), as opposed to the late Victorian Sexual Pervert [the homosexual]. This notoriously helps to

distinguish the average him and her from the deviant it. Just like the idea of the 'master race', heterosexuality now began to be projected as the 'master sex' from which homosexuality seems to have deviated, becoming the 'other'. Katz calls this an "erotic apartheid" as it leads to the marginalisation of a perfectly natural sexual orientation as the 'other'.

The Delhi High Court's verdict took into account, and rightly so, not the popular morality, but the constitutional morality derived from the Constitution itself, stating that simple public disapproval or disgust for a certain class of persons or an idea can in no way serve to uphold the constitutionality or legality of a statute. Concluding that the Constitution of India not only recognizes and protects but also celebrates diversity, the Delhi High Court, drawing from the *Maneka Gandhi v. Union of India* case, dictated that no majoritarian government can impulsively and irrationally challenge constitutional humanism and the principles of life and liberty.

Thus, was Section 377, in so far as it criminalises homosexuality, struck down in 2009, followed by great cheer and celebration in the LGBT community.

Breaking the Closet

However, this celebration was short lived because soon, within five years, in 2013, in a review petition, a two-judge bench of the Supreme Court reversed the Delhi High Court order of 2009, examining that Section 377 does not violate the basic principles of the Indian Constitution and is, therefore, legally valid. This verdict was again challenged in the Supreme Court (*Navtej Singh Johar & Ors. V. Union of India*) and was referred to a five-judge bench, comprising of Justice Indu Malhotra, Justice D.Y. Chandrachud, Justice A.M. Khanwilkar, Justice R.F. Nariman, and the then Chief Justice of India, CJI Dipak Misra himself. The verdict pronounced by this bench dealt the final blow to Section 377. The verdict that came out on the 6th of September 2018, is an important and intellectual discourse on the 'order of nature.' The arguments in favour of Section 377, once again, relied on the grounds of public morality and Indian culture. The defenders argued that if homosexuality was legalised in India, the family system would be ruined, the institution of marriage adversely affected, and homosexual activities would corrupt the young citizens. According to them, homosexuality is against the order of nature and prohibition of intercourse involving penetration into non-sexual parts of the body does not constitute discrimination. According to them, if a male is treated as a male, a female as a female and a transgender as transgender, it does not amount to discrimination.

Here the argument is premised on two flawed logics- one that there is a singular 'natural' function of individual body parts and using them for any other function is unnatural; and second, it adheres to the age-old concept of role-playing that demands one to play the role of a standard man or woman, the standard being determined by the socio-cultural construct of the 'gender.' We shall return to the first premise shortly. The second argument is a discourse on role-playing as opposed to individuality and authenticity. The 'social normal' is a yardstick, a standard of measurement against which all social behaviours, attitudes, and orientations are measured. A socially permissible behaviour is one that falls in line with the social normal; a degenerative behaviour is one that is antithetical to the social normal. In this

concept of the social normal, there is no room for individuality. This is not to suggest that the social normal is an unchangeable rigid standard; it changes but only when the majority wants it to change, or when the change is driven by the dominant ideology. This implies that the social normal, more than a matter of principle, is a matter of privilege that is enjoyed by the majority.

Individuals not adhering to heterosexuality are, thus, considered as incomplete or defected beings requiring a certain cure in order to be incorporated into the mainstream. This reminds us of Camus' protagonist from *The Outsider* or *The Stranger*, Meursault, who is 'otherised' by society and the judiciary for being an individual whose behaviour and attitude do not synchronise with the social normal. This also brings to our mind a character from Harold Pinter's play, *The Caretaker*, namely, Aston, who narrates how he was taken to the mental hospital to be cured. We know not why he needed the therapy, but it is said that Aston spoke a lot before he was treated with electric shocks. The doctors assured Aston that after the cure he would be able to go out, mix with others, and even live like the others. This only further explains how individuality or authenticity is often considered as a disease. Parties fighting against the validity of Section 377 had made a similar argument previously before a two-judge bench of the Supreme Court. They informed the court that people who reveal their sexual orientation often have to face denial and rejection and some are even pressurized to cure themselves. They are subjected to conversion therapies, even though homosexuality is no longer considered a disease or a mental disorder. It is only an alternate variant of human sexuality and a natural characteristic which cannot be altered or changed.

In his judgment, CJI Dipal Misra, quoting from Arthur Schopenhauer, declared that no one can escape from his or her individuality. In the court's opinion, whatever comes from nature is natural. Morality cannot be used as an excuse for otherising the LGBT community. The LGBT community needs no cure. The only cure that they deserve is a judicial and social remedy because, as Justice Chandrachud has observed, "[c]ivilisation has been brutal" to them. Civilisation and culture are dominated by the majoritarian ideology of the ruling class. However, the Indian Constitution does not promote the mainstreaming of culture, rather, it provides a safe environment for dissent to grow. Chandrachud takes the bull by the horns and asks the most obvious question- "At the very outset, we must understand the problem with the usage of the term 'order of nature.' What is 'natural' and what is 'unnatural'? And who decides the categorization into these two ostensibly distinct and water-tight compartments?"

Here Chandrachud exposes the ambiguity in terms like 'natural' and 'unnatural'. Burton M. Leiser, in his article, *Is Homosexuality Unnatural?* writes that the very word *nature* has a built-in ambiguity that can lead to grave misunderstandings and misconceptions. Leiser's views on these terms, which are central to our understanding of this discourse, will help us conclude our argument, and can be summarised as follows:

The term 'natural' could mean the descriptive laws of nature as opposed to the prescriptive laws of man. According to Leiser, "These 'laws' merely *describe* the manner in which physical substances *actually behave*." Unlike laws made by humans, natural laws do not prescribe behaviour. For instance, Newton's law of gravitation is not actually Newton's prescribed law of gravity for the earth; it is a natural law *discovered* by Newton. And by virtue of it being natural, it cannot be violated; water *will* freeze at zero degree Celsius and boil at a hundred

degrees. Similarly, homosexuality is something which is out there and because natural laws cannot be violated, the fact that homosexuality exists is reason enough to call it natural. Natural laws, being descriptive of what actually happens, would have to incorporate homosexual behavior if homosexuality does actually take place. Justice Chandrachud, in his judgment, informs that homosexuality has been documented in almost 1500 species. In fact, no species has been found in which homosexual behaviour has not been shown to exist, except for species that never have sex at all (such as sea urchins and aphids).

1. The term 'unnatural' could mean things that are artificial or man-made. Leiser muses that if homosexuality is condemned on the ground of it being man-made, it is difficult and confusing to understand this objection. For the sake of argument, if we accept homosexual behaviour as unnatural, even then, why is it to be regarded as less desirable than the natural? Leiser asserts that sometimes the artificial can be far better than the natural. Interference with nature is not wrong or condemnable in itself. He uses the example of clothing. Clothing is not natural because man, in his natural state, is born naked. Clothes are man-made, and therefore, unnatural. However, this does not make clothing less desirable. On the contrary, in most cultures, staying naked in social gatherings is unacceptable. Therefore, even if homosexuality is unnatural, this is not in itself an eligible ground for its condemnation.

2. The term 'unnatural' could imply anything that is abnormal or uncommon, and therefore, unacceptable. Here the debate is further problematised with the inclusion of terms like 'normal' and 'abnormal'. Brandon Ambrosino, in his article, *The Invention of Heterosexuality* (different from Katz), argues that the term 'normal' is a loaded word and it has been misused throughout history. Hierarchical class ordering in society leading to slavery was at one time accepted as normal. A geocentric universe was pretty normal in the dark ages. It was only by questioning the foundations of the mainstream ideology that the 'normal' was dethroned from its privileged position. As is already understood, norms are conventions set by society to ensure the mainstreaming of behaviours and attitudes. Therefore, the mere fact that a certain activity is considered uncommon does not validate its criminalisation. Artists, poets, and scientists are uncommon. If, therefore, homosexuality is wrong because it is uncommon, it should follow that art, poetry, and science are equally wrong.

3. The term 'unnatural' may suggest any usage of an organ or instrument that is antithetical to its principal or natural function. This understanding of the 'unnatural' is premised on a very simple equation: if an organ is used for its natural purpose, it is a good activity; if not, the activity is both bad and harmful. For example, if legs are used for walking, it is natural as well as good. However, if legs are used for kicking at the wall, it is unnatural, bad, and even harmful for the human body. However, this logic is flawed because this generalization that a given organ or tool has only one proper function does not hold up. A tool may be used for multiple purposes. Drawing from the same example mentioned before, if walking is the sole function of legs, cycling or playing football would then appear to be bad or harmful activities due to the wrong application of legs therein. However, this is not the case, and so it must not be for same-sex intercourse, which although not procreative, is still a source of pleasure.

4. The discourse of natural and unnatural is based on the opposing concepts of good and bad, right and wrong. Whatever is natural is good because it is in its pure and unadulterated form; and whatever is unnatural is bad because it is an artificial interference with nature. Based on this premise, if, for the sake of argument, it is agreed that homosexuality is unnatural, it should follow that it is also wrong. However, as Leiser points out, the artificial is often very good, whereas that which is natural may be very bad indeed. 'Unnaturalness' and 'wrongfulness' cannot be considered as synonyms. They are entirely different concepts. Chandrachud, reflecting on the same issue, refers to Ambrosino when he highlights that many of the things that human beings value, such as medicine and art, are shockingly unnatural. However, at the same time, humans despise many things that are remarkably natural, like death. To extend this argument further, we might add that to have a Constitution, in the first place, is absolutely unnatural. But this, the unnaturalness of the Constitution, does not make it any less desirable in a democratic and inclusive society.

5. People of the LGBT community deserve to live in a more inclusive society, a society where they are not marginalised, where they do not face persecution; a society where they do not fear being what they are, where their value is not estimated based on their sexual orientation only; a society which does not demonise their desires and experiences, but gives them the freedom of expressing love. The judgment of 2018 is not merely a statement; it is a balm for all the pain and suffering that the LGBT people have been through, both inside and outside the closet; it is a document that envisions a world free of closets.

Hidden Kisses (Baisers cachés, in French) is a 2016 film that depicts the painful and troubled love story of two gay teenagers, Nathan and Louis, who fear and suffer from bullying for being gay. There are three very overwhelming scenes in this film. First, when Nathan's father, Stéphane, a strict disciplinarian who does not want his son to be gay, upon finding Nathan wounded by bullies, crying alone, has a change of heart and he reaches out to his son, assuring him by saying, "I'm here." Second, when Catherine, the school teacher, who is also a closet lesbian, marks Nathan's wounds and decides to openly kiss her girlfriend in front of her students to tell Nathan that he is not alone. Third, and last, when Louis is locked inside his room by his father (the locked room figuratively representing the claustrophobic closet) and his mother, after a torment of emotions, breaks open Louis' door to set him free; her striking at the door a symbol of breaking down the closet. The 2018 judgment of the Supreme Court in favour of the LGBT community, is like that father, Stéphane, who says, "I'm here." It is like that teacher, Catherine, who braves the pressure of society to tell her student that he is not alone. This judgment, then, is like that mother, its every word striking at the closet, both from within and without.

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