

# SECTION 377 AND THE ‘ORDER OF NATURE’: NURTURING ‘INDETERMINACY’ IN THE LAW?

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*This paper lauds the end result of the **Naz Foundation** case in that it decriminalises homosexuality, but questions the continuing problematic legal labelling of it as an activity that contravenes the ‘order of nature’. It argues that terms such as ‘order of nature’ in the context of sexual preferences are inherently indeterminate, vague and arbitrary and are therefore likely to contravene Article 14 of the Constitution of India. The Naz Court endorses a line of Section 377 cases that embody a prudish Victorian morality, under which only ‘procreative’ sex is seen as ‘natural’.*

*By this logic, even condom usage during sex would count as unnatural, an absurd result, given that India suffers a population explosion problem. In any case, it is not the place of the state to regulate such private acts that cause no palpable harm, apart from offending the conservative sensibilities of some sections of society.*

*This paper explores the parameters of Article 14 and argues that it is difficult to locate any intelligible differentia between indeterminate terms such as ‘natural’ and ‘unnatural’. Further, since this problematic distinction envisaged by section 377 has no rational nexus with the object sought to be achieved by the law, it would even flunk the traditional ‘reasonable classification’ test under Article 14. The court did not adopt the more ‘natural’ line of argument above and strike down Section 377 as a whole, as it may have feared the resulting decriminalisation of problematic sexual activities such as paedophilia and bestiality. We argue that although this is a valid concern, it is best addressed by Parliamentary intervention. To this extent, we endorse certain recommendations by the Law Commission that propose the enactment of a new provision to criminalise problematic sexual acts such as paedophilia, without necessarily labelling them as ‘unnatural’.*

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## I. INTRODUCTION

Elephants do it, penguins do it, even butterflies do it. Ancient Greeks practised it freely, as did ancient Indians. Current estimates of the occurrence of exclusive homosexuality range from one to twenty percent of the population.<sup>1</sup> Yet, in many societies down the ages, homosexual behaviour has had to suffer the epithet ‘unnatural’. While some societies accepted homosexual relations, others saw it as a sin, tried to repress it through law enforcement and judicial mechanisms, and even proscribed it under penalty of death.

The Byzantine Emperor Justinian carried homophobia to the extent of pronouncing that the sin of sodomy was responsible for earthquakes.<sup>2</sup> The judgment of the Delhi High Court in *Naz Foundation v. Government of NCT*<sup>3</sup> (*hereinafter* “*Naz Foundation*”) may not have caused actual tremors in the earth’s crust, but metaphorically, its effect on Indian society and popular consciousness could well be described as seismic. The judgment sparked off celebrations and protests, ecstasy and indignation, in almost equal measure. What it also did was launch a million conversations in schools and colleges, households and workplaces, *chai* shops and gentlemen’s clubs – a national conversation about the morality and acceptability of homosexual behaviour.

In essence, this judgement read down Section 377 of the Indian Penal Code (*hereinafter* “IPC”), *insofar it criminalises consensual sexual acts of adults in private*, on the ground that such part criminalisation violates Articles 21, 14 and 15 of the Constitution. Although the Court decriminalised homosexuality for the first time, its ruling does not necessarily stamp homosexuality with social legitimacy. Far from it, as the judgment reaffirms the problematic legal labelling of homosexuality as an act ‘against the order of nature’.

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<sup>1</sup> R.L. Sell, J.A. Wells & D. Wypij, *The Prevalence of Homosexual Behavior and Attraction in the United States, the United Kingdom and France: Results of National Population-Based Samples*, 24 (3) ARCH SEX BEHAV 235–48 (1995); GILBERT H. HERDT, *SAME SEX, DIFFERENT CULTURES: EXPLORING GAY AND LESBIAN LIVES* (1998); EDWARD O. LAUMANN, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* (2000). The National Aids Control Organization estimates that India is home to 2.5 million MSMs (men who have sex with men). See *Legalise Homosexuality: Ramadoss*, TIMES OF INDIA, 9 August 2008 available at <http://timesofindia.indiatimes.com/India/Legalise-homosexuality-Ramadoss/articleshow/3342815.cms> (Last visited on October 18, 2009). Mr. Shyam Divan submitted in the course of proceedings before the Delhi High Court in the matter of *Naz Foundation v. Union of India*, 160 (2009) DLT 277, that the estimated figure of the number of homosexuals was around 5-7 percent of any given population. See *Edited transcripts of day to day proceedings, Day 3* in THE RIGHT THAT DARES TO SPEAK ITS NAME 62 (2009).

<sup>2</sup> Novella 77; *Civil Law* 16 [7] :288, *quoted in* LOUIS CROMPTON, *HOMOSEXUALITY AND CIVILIZATION* 146 (2003).

<sup>3</sup> (2009) 160 DLT 277; W.P. (C) No. 7455/ 2001 of 2009 (Delhi HC).

The principal obstacle now confronting activists representing the interests of LGBT communities, is tackling this problematic legal labelling. While there may not be many Indians who subscribe to the extreme views propounded by Emperor Justinian, it is not uncommon in Indian society for homosexuality to be regarded as a vice, a sin, a perversion, as contrary to our culture, or at the very least, as a disease which can be cured. Such views prevail even though many scientists and sociologists now accept that homosexuality is not necessarily 'unnatural'.<sup>4</sup> All of this begs the question: what is 'natural' and what is 'unnatural'? We argue that these terms are indeterminate, at least in the context of sexual preferences, and no sensible law should ever peg itself to such an indeterminate phraseology. Owing to its indeterminacy and vagueness, the term 'order of nature' is likely to be struck down as violating the equality clause enshrined in Article 14 of the Constitution of India.

## II. LEGAL OPTIONS FOR NAZ

While attempting to decriminalise same sex activities between consenting adults, Naz Foundation had two options:

- i) Argue that the term 'order of nature' itself is inherently vague and arbitrary and ought to be struck down under Article 14;
- ii) Argue that any criminalisation of same sex activities (in the private sphere) violates the right to privacy and dignity under Article 21 and is discriminatory under Articles 14 and 15.

For strategic reasons, Naz Foundation followed the second option above. And the Delhi High Court endorsed this line of reasoning.<sup>5</sup> The net result of the judges' finding is this: although same sex activities may be 'against the order of nature', they cannot be penalised, since they are between consenting adults who have the right to privacy and dignity under Article 19 and the right to equality under Articles 14 and 15.

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<sup>4</sup> See CHUCK STEWART, *HOMOSEXUALITY AND THE LAW: A DICTIONARY* 40-41 (2001) (The American Psychiatric Association (APA) initially classified homosexuality as a mental disorder in the first edition of the Diagnostic Statistical Manual (DSM). However, research has demonstrated that homosexuality is as adaptive and psychologically sound as heterosexuality. A report by the National Institute of Mental Health, along with the efforts of several respected physicians and researchers, was able to convince the board of trustees of the APA in 1973 that homosexuality should be removed from the list of recognised disorders. A vote by the entire membership in 1974 upheld the recommendation of the board, and homosexuality was no longer listed as a mental disorder in the DSM. The DSM is used worldwide as the standard benchmark of mental health practice and is also widely followed by the Indian Psychiatric Association.) See also BRUCE BAGEMIHLE, *BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY* (1999) (which shows how homosexual behaviour has been observed in close to 1500 animal species.)

<sup>5</sup> *Naz Foundation*, *supra* note 3, ¶ 132.

This however begs the question: ought such activities to be construed as contravening the ‘order of nature’ at all? Commentators have pointed out that the *Naz Foundation* judgment does little by way of eradicating the social stigma of homosexuality.<sup>6</sup> In fact, it continues to condemn it by labelling it an ‘unnatural’ sexual activity. This is a concern because the word ‘natural’ is loaded with a positive evaluation, much like the word ‘normal’. So, to call something ‘natural’ is not simply to describe it, but to praise it.<sup>7</sup> Conversely, labelling something as unnatural amounts to denouncing it.

### III. DEFINING THE ‘NATURAL’ ORDER

All of the above leads one to ask: what exactly is the ‘order of nature’? Who defines what is ‘natural’ and what is not? Homosexuality has been documented in almost 1500 species, who unfortunately are not blessed with rational capabilities (and the propensity to ‘nurture’ same sex thoughts) as are found in mankind. An interesting article in this regard notes, “No species has been found in which homosexual behaviour has not been shown to exist, with the exception of species that never have sex at all, such as sea urchins and aphids.”<sup>8</sup>

While interpreting Section 377, the Delhi High Court effectively endorses prudish Victorian moral values, where anything outside of ‘procreative sex’ is denounced as being against the order of nature. This is not surprising, as earlier Indian case law did no better. In *Khanu v. Emperor*<sup>9</sup> it was held that “the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* is impossible.”

Under this logic, using a condom would be against the order of nature. And so would oral sex.<sup>10</sup> Perhaps one might even suggest that barring the

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<sup>6</sup> For example, Justice J.S. Verma, former Chief Justice of India and Former Chairman of the National Human Rights Commission, has argued that “[i]t is a misreading of the Delhi High Court judgment to contend that it approves or legalizes, much less glorify the practice of homosexuality, practiced in privacy.” See <http://lawandotherthings.blogspot.com/2009/07/justice-jsvermas-comment-on-naz.html> (Last visited on October 18, 2009).

<sup>7</sup> See <http://fallacyfiles.org/adnature.html> (Last visited on October 14, 2009).

<sup>8</sup> *1,500 Animal Species Practice Homosexuality* available at <http://www.news-medical.net/news/2006/10/23/20718.aspx> (Last visited on October 18, 2009). See also BRUCE BAGEMIHL, *BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY* (1999), who details homosexual activity among over 470 animal species which include male orang-utans who practice fellatio and lesbian gulls who share nests.

<sup>9</sup> AIR 1925 Sind 286, cited with approval in *Calvin Francis v. State of Orissa*, 1992 (2) Crimes 455.

<sup>10</sup> See *Lohana Vasantlal Devchand v. The State*, AIR 1968 Guj 252, where it was held that the orifice of mouth is not, according to nature, meant for sexual intercourse. See also *Brother John Antony v. The State*, 1992 Cri LJ 1352 (Mad), where anal sex was held to be against the order of nature. However, it must be noted that in spite of these decisions, there are in fact no cases where Section 377 has been enforced against people of opposite sexes for having consensual oral or anal sex. In fact, in *Lohana Vasantlal Devchand*, it was held that

'missionary' position, all other positions of copulation are against the 'order of nature'. Incidentally, the *Kamasutra* describes more than 50 different ways of lovemaking and notes: "If variety is sought in all the arts and amusements, such as archery and others, how much more should it be sought after in the art of love."<sup>11</sup>

Is not the usage of 'natural' in the context of private sexual preferences inherently vague and arbitrary? Would this not be similar to asking: is it natural to bathe in the morning? Or at night? To bathe everyday? Or once a month? And more importantly, does the state have any business regulating such activities in the private sphere?

We contend that that the phrases 'unnatural' offences or 'against the order of nature' are incapable of any objective definition. As Leiser<sup>12</sup> has pointed out, an assertion that *something is unnatural* can mean one of at least four things.

#### 1. It does not conform to the descriptive laws of nature

The laws of nature, in this context, are the laws which describe the way in which physical substances actually behave. Boyle's law of gases and Newton's laws of motion are examples of laws of this sort. In the case of descriptive laws, it is obviously absurd to state that such a law is violated. This is because a law of nature, in this sense, is formulated or rather "discovered" from empirical observation of physical occurrences; it is not the physical occurrence that obeys such a law.

#### 2. It is a product of human artifice

An object or a phenomenon can be called unnatural if it is a product of human artifice. An object that would not exist or an event that would not occur, save with human intervention, would thus be unnatural. A toothbrush in this case would be as unnatural as a contraceptive. In short, unnatural under this interpretation would include the sum total of all of human endeavour.

#### 3. It is not common or normal

An unnatural characteristic in this sense means that the characteristic is statistically rare and not present in the majority. Having six fingers on one hand or an exceptional facility for mental arithmetic could be called unnatural in this sense, since such characteristics are not observed in the majority of human beings.

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oral sex among opposite parties may be considered as a step towards building the sexual urge for coitus, a ground not available for such activity between same sex parties wherein oral sex replaces the desire for sexual intercourse and thus is unnatural.

<sup>11</sup> VATSAYANA, *KAMASUTRA* 71 (Sir Richard Burton & F.F. Arbuthnot, trans.: 1984).

<sup>12</sup> See Burton Leiser, *Homosexuality and the Unnaturalness Argument* in *SEX, MORALITY AND THE LAW* 44 (Gruen & Panichas eds., 1996).

4. It is being used in a manner contrary to its principal purpose or function

This argument flows from the premise that every instrument or organ of the body has a particular function to perform, and therefore, using such an organ for a purpose inconsistent with its principal function is unnatural. As per this meaning, a man who walks on his hands to entertain his friends is using his hands in an unnatural manner. It would be difficult or even impossible to determine the ‘proper’ or ‘principal’ function of an organ. For example a man may use his legs for walking, climbing, kicking a football, standing on stilts or pressing on the accelerator of a car. What is to determine that a particular use of it is ‘unnatural’?

Thus we see that there are at least four different ways in which the words ‘unnatural’ or ‘against the order of nature’ may be interpreted. One of the besetting flaws of Section 377, therefore, is that the operative phrases have multiple and indeterminate meanings.

#### IV. ARTICLE 14 VIOLATION

From a constitutional perspective, one might argue that the phrase ‘order of nature’ in Section 377 is indeterminate, vague and arbitrary and therefore militates against the spirit of Article 14. However, the threshold for establishing ‘vagueness’ or ‘arbitrariness’ for the purpose of Article 14 is a very high one and may not be easily satisfied. Further, some commentators are of the view that Justice Bhagwati’s separate doctrine of arbitrariness ‘hangs in the air’ and has no place within Article 14.<sup>13</sup> However, even assuming this to be the case, a problematic ‘natural versus unnatural’ distinction is likely to flunk the traditional Article 14 test of reasonable classification, as elaborated upon in the section below:

##### A. THE ‘VOID FOR VAGUENESS’ DOCTRINE

According to the principle *ut res magis valeat quam pereat* (that the thing may have effect rather than fail), courts in India are required to strongly lean against any construction which tends to reduce a statute to a futility. If, however, a statute is absolutely vague and its language wholly intractable and absolutely meaningless, it can be declared void for vagueness.<sup>14</sup> In particular, a statute may be struck down as unconstitutional if it is so vague that a man of common intelligence is unable to determine whether or not he is committing the offence.<sup>15</sup>

<sup>13</sup> H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 275 (3rd ed., Vol. I) (1983).

<sup>14</sup> Tinsukhia Electric Supply Co. v. State of Assam, AIR 1990 SC 123 : (1989) 3 SCC 709.

<sup>15</sup> Mohinder Singh Sawhney v. State of Punjab, AIR 1968 P&H 391; Kartar Singh v. State of Punjab, 1994(3) SCC 569. See also D. D. BASU, CONSTITUTION OF INDIA 70 (4<sup>th</sup> ed., Vol. II).

The *void for vagueness* doctrine, perhaps best enunciated under a catena of US constitutional law decisions, is based on the idea that a criminal law should be sufficiently specific to give notice as to what conduct is proscribed.<sup>16</sup> In the U.S., provisions akin to Section 377 have been challenged on this ground, but opinion is divided on the issue. For example *Rose v. Locke*<sup>17</sup> upheld the Tennessee code which prohibits 'crimes against nature' on the ground that there was a recognised common law meaning of the phrase. However the Court in *Balthazar v. Superior Court*<sup>18</sup> held that the Massachusetts statute prohibiting 'unnatural and lascivious acts' was unconstitutionally vague, insofar as it applied to certain acts by the petitioner. Though the US Supreme Court struck down the Texan anti-sodomy law in *Lawrence v. Texas*,<sup>19</sup> the argument of vagueness was not raised and therefore not addressed.

Although the *void for vagueness* doctrine is accepted in India, and although the phrases 'unnatural' offences or 'against the order of nature' are indeterminate and susceptible to differing interpretations, it would still be considerably difficult to convince an Indian court that Section 377 is vague, since the threshold is fairly high. Several decisions stand testimony to the propensity of the Indian judiciary to construe vague laws in a manner as to render it effective and operative.<sup>20</sup>

It also bears noting that Section 377 is, at present, the only provision which deals with problematic sexual activities such as bestiality and paedophilia. Any argument premised on vagueness would necessarily have to strike at the very root of Section 377 and decriminalise the above activities as well. For this reason, any Court is likely to be hesitant in striking down the entirety of Section 377. This also explains why the petitioners in *Naz Foundation* did not argue that Section 377 should be struck down as a whole, and instead limited themselves to pleading that sexual intercourse between two consenting same sex adults in privacy be removed from the ambit of the penal provision.<sup>21</sup>

However, notwithstanding the difficulty in establishing an Article 14 violation on the grounds of vagueness or arbitrariness, the challenge under the traditional 'reasonable classification' pillar underlying Article 14 is a strong one.

## B. ABSENCE OF RATIONAL NEXUS

It is well settled that, in order to pass the test of reasonable classification required by Article 14 of the Constitution, the classification must fulfil two criteria:

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<sup>16</sup> *Balthazar v. Superior Court*, 573 F.2d 698 (1st Cir. 1978).

<sup>17</sup> 423 US 48 (1975).

<sup>18</sup> *Supra* note 16.

<sup>19</sup> 539 US 558 (2003).

<sup>20</sup> *K. A. Abbas v. Union of India*, AIR 1971 SC 481 : (1970) 2 SCC 780; *Mohinder Singh Sawhney v. State of Punjab*, *supra* note 15.

<sup>21</sup> *Naz Foundation*, *supra* note 3, ¶ 10.

(i) the classification must be founded on an intelligible differentia; and (ii) the differentia must have a rational nexus to the objective sought to be achieved by the act in question. In short, there must be a causal connection between the basis of classification and object of the statute under consideration.<sup>22</sup> Using the above principles, one can question whether the classification of sexual intercourse into 'natural' and 'unnatural' forms is an intelligible one. And more importantly, whether it bears a rational nexus to the object underlying Section 377.

The wording of Section 377 is an instance of the *naturalistic fallacy* described by the British philosopher G.E. Moore.<sup>23</sup> There is no reasonable basis for classifying an 'unnatural' act (where unnatural may be understood in any of its various meanings) as being illegal, unacceptable or wrong, and a 'natural' act as legal, acceptable or good.

'Unnatural' cannot be held to be synonymous with wrong, evil or bad. Being 'unnatural' is neither a necessary nor a sufficient condition for an act or occurrence to be socially undesirable. It is not a necessary condition because examples abound of things which are natural, but harmful. Diseases, droughts, natural disasters are all instances of natural occurrences which humans have tried their best to eliminate or avoid as they present dangers to the society.<sup>24</sup> From the fact that something occurs naturally, it does not necessarily follow that it is socially desirable. Similarly, acts that are commonly perceived to be 'unnatural' may not necessarily deserve legal sanction. Illustratively, consider a person who walks on his hands all the time. Although this may be unnatural, it is certainly not deserving of legal censure.

In fact, several activities that might be seen to contravene the order of nature (heart transplants, for example) are beneficial and desirable.<sup>25</sup> Even if an unnatural act is harmful to the extent that it justifies criminal sanctions being imposed against it, the reason for proscribing such an act would be that the act is harmful, and not that it is unnatural.

### C. OBJECT OF THE CLASSIFICATION

The Union of India in *Naz Foundation* sought to rely on the objective of public morality as an argument for retaining Section 377.<sup>26</sup> Indeed, this is the only object which might conceivably bear a rational nexus with the classification. However, in that case, the provision is likely to fall short of meeting the *intelligible differentia* requirement. As the Court noted in *Naz Foundation*, popular morality,

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<sup>22</sup> *Budhan Choudhry v. State of Bihar*, AIR 1955 SC 191.

<sup>23</sup> G.E. MOORE, *PRINCIPIA ETHICA*, § 10 ¶ 1 (1903).

<sup>24</sup> Edmund Standing, *Against Nature: Why Nature Should Have No Say on Human Sexuality*, available at <http://www.butterfliesandwheels.com/articleprint.php?num=111> (Last visited on September 19, 2009).

<sup>25</sup> See TONY HOPE, *MEDICAL ETHICS: A VERY SHORT INTRODUCTION* 69 (2003).

<sup>26</sup> *Naz Foundation*, *supra* note 3, ¶ 13.



as opposed to constitutional morality, "is based on shifting and subjective notions of right and wrong."<sup>27</sup> For this precise reason, it is impossible to assign determinate meanings to the phrases 'unnatural' and 'against the order of nature' on the ground of morality. From one perspective, only the missionary position might be 'natural'.<sup>28</sup> On the other hand, it has been suggested that even paedophilia, which has patently harmful effects, is in fact a natural urge or orientation.<sup>29</sup> These instances illustrate the difficulty of drawing a dividing line between 'natural' and 'unnatural' sexual acts, thereby undermining the intelligibility of the classification.

Furthermore, the objective of public morality may be assailed by a second line of argument: the rationality of the object itself may be questioned. In considering reasonableness from the point of view of Article 14, the court has to consider not just intelligible differentia, but also the objective for such classification. If the objective be illogical, unfair and unjust, the classification will necessarily have to be held as unreasonable.<sup>30</sup> Article 14 requires that State action must not be arbitrary but must be based on some *rational and relevant principle* which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality.<sup>31</sup>

Indeed, the legislative rationale for criminalising 'carnal intercourse against the order of nature' was the very antithesis of rationality – it was motivated by revulsion against what the framers regarded (and many continue to regard) as unnatural, sinful or disgusting. The Court in *Naz Foundation* recognised that Section 377 'was based on a conception of sexual morality specific to Victorian era drawing on notions of carnality and sinfulness'. The Court explicitly held:

"Moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view."<sup>32</sup>

This in itself indicates that the Court endorsed the view that 'unnatural acts' by themselves are not 'harmful'; rather one has to independently make out a case for harm.

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<sup>27</sup> *Id.*, ¶ 79. See also *R. K. Garg v. Union of India*, AIR 1981 SC 2138, 2162 (stating that morality is essentially a subjective value).

<sup>28</sup> This view was propounded by St. Thomas Aquinas. See John Barncroft, *HUMAN SEXUALITY AND ITS PROBLEMS* 306 (1989).

<sup>29</sup> Dr. Frits Bernard, *The Dutch Paedophile Emancipation Movement*, 1(2) PAIDIKA: JOURNAL OF PAEDOPHILIA 35 (Autumn 1987).

<sup>30</sup> *Deepak Sibal v. Punjab University*, (1989) 2 SCC 145. At the same time, it must be noted that this was an incidental observation by the Court. Even if the objective is unreasonable and arbitrary, it has not yet been conclusively established that the Court can strike down a law on that ground.

<sup>31</sup> *Raman Dayaram Shetty v. International Airport Authority of India*, AIR 1979 SC 1628.

<sup>32</sup> *Naz Foundation*, *supra* note 3, ¶ 86.

The argument of unreasonable classification was in fact raised in *Naz Foundation* by the petitioners. However, that argument was different from the one outlined above, in that the petitioners did not take issue with the classification created by the phrases ‘unnatural’ and ‘against the order of nature’. Instead, the petitioners argued primarily that the provision in effect makes no distinction between acts engaged in the public sphere and acts engaged in the private sphere, or indeed between consensual and non-consensual acts between adults. The argument was thus targeted at the *effect* of the provision rather than the *wording* because, as stated already, if the section as a whole were to be struck down on the basis of its wording, there would be a vacuum in the law.

## V. LAW COMMISSION RECOMMENDATIONS

As mentioned earlier, striking down Section 377 in its entirety owing to the indeterminacy of ‘order of nature’ would decriminalise problematic sexual activities such as paedophilia and bestiality. And this fear may have promoted the *Naz Foundation* lawyers to adopt the strategy that they did before judges who were far happier reading down Section 377, rather than decapitating it by stripping it of its ‘unnatural’ essence.

Unfortunately, the Court’s decision still leaves us with the condemnation of homosexuality as breaching the ‘order of nature’. Perhaps the optimal solution is to do what the Law Commission recommends – to abolish a vague and indeterminate Section 377 and to penalise paedophilia and other problematic sexual activities through a separate provision (Section 376E).<sup>33</sup> After all, it is but logical to assume that the criminalisation of paedophilia does not need to hinge on its problematic labeling as an ‘unnatural’ sexual activity.

Interestingly, while the Law Commission carefully details out various sexual activities that ought to be penalised under the new Section 376E, it leaves out ‘bestiality’, curiously noting that “we may leave such persons to their just deserts”.<sup>34</sup> What exactly are these ‘just deserts’? Some karmic consequence that one committing such a heinous act may be reborn an animal and subjected to the same treatment?

## VI. CONCLUSION

In deploying vague phrases such as ‘unnatural offences’ and ‘against the order nature’, Section 377 is constitutionally flawed. Apart from the indeterminacy of the expression ‘unnatural’ in a context such as sexual preferences,

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<sup>33</sup> LAW COMMISSION OF INDIA, 172<sup>nd</sup> Report, *Review of Rape Laws* (2000), ¶ 3.6, available at <http://lawcommissionofindia.nic.in/rapelaws.htm> (Last visited on September 28, 2009).

<sup>34</sup> *Id.*, ¶ 3.6.

there is no connection between the objective that is sought to be achieved (presumably preventing harmful sexual activities) and the classification made between natural versus unnatural sex.

As mentioned above, if the Court in *Naz Foundation* struck down the entire section, there would have been a lacuna in the law, and so the court did what was strategically best under the circumstances. However, the fact that the law continues to label homosexuality and other non-harmful sexual preferences as 'unnatural' is problematic. The optimal solution would be, as the Law Commission recommends, for the Parliament to scrap Section 377 in its entirety and instead introduce other provisions that address specific categories of problematic non-consensual sexual activities. Till then, Indian homosexuals will have to contend with living 'unnatural' lives. Not a bad place to be in, given that righteous 'monogamists' have also been accused of breaching a similar 'natural order'.<sup>35</sup>

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<sup>35</sup> *Monogamy Appears to be Unnatural in the Natural World*, available at <http://news.biomedicine.org/biology-news-2/Monogamy-appears-to-be-unnatural-in-the-natural-world-9953-1/> (Last visited on October 18, 2009).

