

THE LAW ON HOMOSEXUALITY AND ITS IMPACT ON SOCIETY

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INTRODUCTION

Section 377 of the Indian Penal Code was authored by Lord Macaulay, the President of the Indian Law Commission, in 1860, as part of Britain's efforts to impose Victorian values on its biggest colony (similar laws were imposed on most of its colonies, including the United States). It is also interesting to note that Britain, the author of the Indian Penal Code and Section 377 during the colonial period, decriminalized homosexuality in its own jurisdiction as long ago as 1967.² The section reads as follows:

“Section 377: Unnatural offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

Although not explicitly defined, “carnal intercourse against the order of nature” has been taken by the Indian courts in the intervening years to include anal sex, oral sex, and in some cases other non-procreative sexual acts, such as mutual masturbation.³ Although heterosexual couples also partake in these acts, the weight of the law over the centuries has fallen on homosexual sex. The term homosexuality denotes sexual attraction to a member of one’s own sex.⁴ The term “order of nature” has evolved in meaning: the only Court judgment to interpret this phrase was in *Khanu v. Emperor*⁵ in which it was held that the natural object of carnal intercourse is that there should be possibility of conception of human beings. The Indian Constitution has since then made provisions for family planning, clearly indicative of the fact that the definition of the order of nature had evolved past sex-for-procreation. Hadn't we then evolved past considering homosexuality against the order of nature?⁶

By its very existence, Section 377 has crystallised the deep societal repugnance towards homosexuality, considering it to be perverted, animal-like behaviour. If people in law

1 National Law University, Jodhpur

2The Sexual Offences Act, 1967 (United Kingdom Statute).

3Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, 46 Economic and Political Weekly 4815- 4823 (2006).

4Oxford Dictionary, 2016, available at: <http://www.oxforddictionaries.com/definition/english/homosexuality>.

5*Khanu v. Emperor*, A.I.R.1925 Sind 286.

6Danish Sheikh, *The Road to Decriminalization: Litigating India's Anti-Sodomy* 16(1) Yale Hum. Rts. & Dev. L.J. 3 (2014).

enforcement⁷, medical practice⁸ and the judiciary treat homosexuals as people without rights, the power of the societal mindset comes from the law.⁹ Even without its enforcement and the arrest and prosecution of homosexuals, the law expresses social disdain.

Needless to say, such a law is not in consonance of our Constitutional values and needs to be amended by the legislature immediately. The Supreme Court has referred curative petitions filed against its 2013 ruling in *Suresh Kumar Koushalv. Naz Foundation* to a five judge Constitution bench, as of 2nd, February 2016.¹⁰ Additionally, on 28th June, 2016, a group of well-known members of the LGBT community filed a petition in the Indian Supreme Court seeking to quash Section 377.¹¹ These important developments call for a detailed understanding of the issue.

The scope of this paper is divided as follows: 1. The Current Position: An analysis of Suresh Kumar Kaushal and its societal impact, 2. The Earlier Position: An analysis of Naz Foundation case and its societal impact and 3. Conclusion: Focussing on the need to decriminalise homosexuality and a suggestion for the way forward.

⁷Nita Bhalla, *Persecution of India's sexual minorities surges after court ruling – activists*, REUTERS, Dec. 11, 2014, available at: <http://in.reuters.com/article/india-rights-persecution-idINKBN0JP21R20141211>.

⁸Lipa Mehta & Anugraha Hadke, *Disturbing Excerpts About The LGBT Community From India's Medical Textbooks*, YOUTH KI AWAAZ, Dec. 4, 2015, available at <http://www.youthkiawaaz.com/2015/12/medical-textbooks-on-homosexuality-and-transgenders/>.

⁹ARVIND NARRAIN, NO SHORTCUTS TO QUEER UTOPIA: SODOMY, LAW AND SOCIAL CHANGE IN THE PHOBIA AND THE EROTIC: THE POLITICS OF SEXUALITIES IN CONTEMPORARY INDIA 257 (Brinda & Subhabrata Bhattacharyya Bose eds., Seagull Books, 2007).

¹⁰*Five-judge Constitution Bench to take a call on Section 377*, available at: <http://www.thehindu.com/news/national/supreme-court-refers-plea-against-section-377-to-5judge-bench/article8183860.ece>.

¹¹*Eminent citizens move SC for quashing section #377IPC*, available at: <http://www.livelaw.in/eminent-citizens-move-sc-quashing-section-377ipc/>.

**ANALYSIS AND IMPACT: SURESH KUMAR KOUSHAL & ANR V. NAZ
FOUNDATION &ORS.¹²**

The question regarding the constitutionality of Section 377 of the Indian Penal Code was to be considered by the Indian Supreme Court following an appeal against judgment of the Delhi High Court in *Naz Foundation v. Govt of NCT of Delhi*.

The Delhi High Court had ruled that same-sex consensual sexual relations between adults should be decriminalised on the basis that it violated the constitutional provisions of right to equality and non-discrimination, freedom of speech and expression and right to life which is inclusive of the right to have individual dignity and privacy.

The petitioners in the present case were Suresh Kumar an astrologer, various religious organizations and the Delhi Commission for Protection of Child Rights. The respondents included various NGOs and organisations involved in the LGBT movement as well as mental health professionals. Interestingly, the Government of India did not file any arguments as it did not find any legal error in the order of the High Court.

A. ARGUMENTS ADVANCED BY THE PETITIONERS

1. It was submitted that Section 377 does not violate any constitutional provisions and that the respondents had failed to submit evidence to support their claim. It was submitted that the section is not violative of Article 14 of the Indian Constitution which guarantees Right to Equality as no specific class is targeted; rather specific acts that constitute carnal intercourse are proscribed regardless of the gender or sexual orientation of the person engaging in the activity.
2. It was argued that Article 15 which prohibits discrimination on the basis of sex does not include sexual orientation and the State can promote the majoritarian sexual morality. It was also argued that there can be reasonable restrictions on the acts of homosexuals as it is a “social evil”.
3. Similarly, it was also contended that Article 21 of the Indian Constitution which also includes the right to privacy and dignity cannot be said to have been violated as it does not include the right to commit an offence mentioned by law.
4. The petitioners further rejected the argument of the respondents’ that criminalisation of homosexuality exposed homosexuals to the threat of HIV AIDS and that

¹²*Suresh Kumar Koushal v. Naz Foundation*, AIR2014SC563

decriminalisation would help to counter this problem and regarded the statistics provided to be manufactured and fraudulent.

5. An argument that India's social structure and institution of marriage would be negatively affected if same-sex consensual sexual acts were allowed and that young people to become tempted towards homosexual activities was also advanced. This was on the basis that sex and food are regulated in the society and the rules pre-ordained by nature have to be protected as the man has an obligation to nature.

B. ARGUMENTS ADVANCED BY THE RESPONDENTS

1. It was argued that the fear of criminalisation drives homosexuals and MSMs (men having sex with men) underground, thereby impairing HIV/AIDs prevention efforts, and making this sexual minority vulnerable.
2. It was submitted that the section constitutes an unreasonable abridgment of the right to privacy and dignity of homosexuals guaranteed within the ambit of right to life and liberty under Article 21 of the Constitution. The right to privacy accords protection to consenting adults to indulge in "carnal intercourse against the order of nature". The human dignity is impaired as Section 377 criminalises expression of the core sexual personality of homosexual men.
3. It was also submitted that the section infringes upon the fundamental right to equality under Article 14 because there is no rational nexus between the legislative objective of the section (to penalise 'unnatural sexual acts') and the classification created by this section (differentiating between procreative and non-procreative sexual activities). Hence, though the provision appears to be neutral, in operation it is widely used against homosexuals who are treated as a class.
4. It was argued that the section violates Article 15 which lays down the right to non-discrimination on the basis of 'sex' and the expression 'sex' should be read to include 'sexual orientation'. The section arbitrarily targets the homosexual community, as they are the ones closely associated with the sexual acts criminalized under this section.
5. Lastly, it was argued that it curtails the basic freedoms under Article 19(1)(a)(b)(c) & (d); in that, an individual's ability to make personal statement about one's sexual preferences, right of association/assembly and right to move freely so as to engage in homosexual conduct are restricted and curtailed.

I. THE JUDGMENT AND THE REASONING OF THE SUPREME COURT

1. The court ruled that there is no violation of Article 14 as the State can classify people into classes under Article 14 provided that it was a reasonable classification, such that persons must be grouped together on the basis of certain qualities or characteristics which is unique to that group and such characterisation must have reasonable relation to the object of legislation. Hence, on the basis of this reasoning, those who engage in carnal intercourse and those who do not constitute different classes, which justified Section 377.
2. The court also held that there is no basis to declare Article 14, 15 and 21 ultra vires of the Constitution as only a miniscule fraction of the country's population constitute LGBT and as only fewer than 200 persons had been prosecuted under Section 377 over the past 150 years.
3. Additionally, the court also remarked that mere fact that the homosexuals were exposed to discriminatory treatment and that there was misuse by the police authorities does not reflect on the unconstitutionality of the Section and stated that it for the Parliament to consider amending the Section.

CONCLUSION

Thus, the Supreme Court in the case of *Suresh Kaushal* struck down the position of the Delhi High Court that had legalised consensual same-sex sexual acts. In doing so, it criminalised sexual actions between the homosexuals, persecuting homosexualson the basis of the claim that they fall under the category of carnal intercourse which is against the order of nature.

II. IMPACT OF CRIMINALISATION

This section seeks to analyse the impact of criminalisation of sexual acts between homosexuals on the private and personal lives of homosexuals. The impact on three main facetsis sought to be studied: 1. *The mental health of a homosexual*, 2. *heteronormativity*, and 3. *relationship with public authorities and officials*.

1) The mental health of a homosexual -

A 15-year-old student set himself on fire after being seen by his neighbours who had found him get intimate with a male friend. He was subjected to ridicule and teasing, which led him

to an extreme step.¹³ A survey conducted revealed that one in every five homosexual person attempted to commit suicide.¹⁴ There are various reasons, which lead the homosexuals to take a drastic step or to be depressed, such as:

a. The reaction from the family

Survey¹⁵ reveals that homosexuals experience rejection by parents when upon disclosure of their identity. Additionally, unfavourable parental reactions such as withdrawal of love and physical violence were also found. While some parents reconciled to the situation in time, most of them remain regretful and blame themselves for their offspring being a homosexual. This results to a homosexual being expelled from home or the homosexuals moving away from home to pursue their own way of life. 80 per cent of the gay population in India are too scared to reveal their sexuality to their parents.¹⁶

Hence, many homosexuals have estranged relationship with parents, who are usually one's primary source of comfort or fear from opening up about their homosexual identity as they fear their parents' reaction.

b. The reaction from the society

Homosexual relations are often subjected to societal disapproval and scrutiny. This is because a society is heteronormative, which means that the prevailing view in the society is one that promotes heterosexuality as the dominant, normal or preferred sexual orientation.

Homosexuals are often labelled as "fag" and homosexual men are called "queen" to feminize them. The constant use of such demeaning words has a bearing on the way homosexuals perceive themselves. As per Cooley's "*Looking Glass Self*" theory, one's perception of oneself depends on one's interpretation about the responses of others. Hence, constant exposure to demeaning labels leads to negative self-image as well as self-hate (loathe?), this is known as internalised homophobia¹⁷. The Labelling Theory explores the effect of tendency of majorities to negatively label minorities who do not adhere to the dominant social norms.

13 *Bullied About Being Gay, 15-Year-Old Boy Sets Himself On Fire In Agra*, HUFFINGTON POST, May 19, 2016 available at http://www.huffingtonpost.in/2016/01/05/gay-agra-bullying_n_8916032.html.

14 L. TRENCHARD & H. WARREN, *SOMETHING TO TELL YOU* 133 (London Gay Marriage Group, 1984)

15 *Ibid.*

16 *I am gay. So what?* TIMES OF INDIA, Aug 3, 2015, available at: <http://timesofindia.indiatimes.com/lifestyle/relationships/soul-curry/I-am-gay-So-what/articleshow/47161076.cms>.

17 I.H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36(1) *Journal of Health and Social Behavior* 38–56 (1995).

The theory states that the majority would label any such person as a deviant, which would affect how a person belonging to the minority would perceive themselves.

Homosexuals are more exposed to social rejection and isolation, which is characterised by the American Psychiatric Association to be a punishment with lasting psychiatric symptoms. Due to above reasons, homosexual youths are six times more likely to have high levels of depression and eight times more likely to have attempted suicide.¹⁸ Sahayatrika, a lesbian women's collective in Kerala, has documented twenty-four cases of lesbian couple suicides in Kerala during the period between 1996 and 2004.¹⁹

2) Heteronormativity [The effect of societal norms on a homosexual]

A heteronormative culture is one that "privileges heterosexuality as normal and natural" and fosters a climate where LGBTQ are discriminated against in marriage, tax codes, and employment.²⁰ Heteronormativity is often linked to homophobia and is stated to oppress, stigmatize and marginalize deviant forms of sexuality which makes self-expression more difficult as it imposes the heteronormative norms.

a. Forced into heterosexual marriage

As heterosexuality is seen as the norm, a known gay-rights activist, Harish Iyer confessed that when he realised that he was a homosexual, he did not want accept it as it would involve stigmatization and thus, he forced himself to enter into sexual relations with a woman and be heterosexual.²¹ Similarly, homosexuals are also forced into enter into heterosexual marriage. A suicide of a woman in Bangalore after she realised that she married to a homosexual man²² and the double suicide of a lesbian couple in West Bengal upon one of the partners being forced to get into a heterosexual marriage²³ reveals the rigid binary code of human relationships in India.

b. Psychiatric treatment

¹⁸An Overview of the Experiences of LGBT Youth in the Juvenile Justice System, AMERICAN PROGRESS, June, 2012, available at: <https://www.americanprogress.org/issues/lgbt/report/2012/06/29/11730/the-unfair-criminalization-of-gay-and-transgender-youth/>

¹⁹Supra note4.

²⁰Krupat, Kitty, *Out at Work: Building a Gay-Labor Alliance*, 21 University of Minnesota Press 268 (2001).

²¹Harish Iyer, *Being Gay In India*, INDIA REAL TIME, Dec. 11, 2013, available at: <http://blogs.wsj.com/indiarealtime/2013/12/11/being-gay-in-india>.

²²Amrita Mukherjee, *Is homophobia ruining young lives in India?*, AT TIMES, April 21, 2015, available at: <http://atimes.com/2015/04/is-homophobia-ruining-young-lives-in-india/>.

²³Shamik Bag, *The Love Issue | Love struck Juliet*, Feb. 8, 2014, available at: <http://www.livemint.com/Leisure/H8xiB49bsya0wbmufESgzJ/The-Love-Issue--Love-struck-Juliet.html>.

A homosexual identity is seen a deviant identity due to which homosexuals are often exposed to psychiatric treatment by medical practitioners who claim that it is a result of imbalance in the body or mind, and boast of having a treatment that will solve it and make them heterosexual. In the year 2015, it was reported that doctors in Delhi were claiming to have the treatment for homosexuality and stated that it was a result of having more “female” hormones than “male ones.”²⁴ They are often subjected to conversion methods and electro-convulsive therapy.

However, homosexuality was removed from the World Health Organisation’s International Classification of Disease in 1990 and the American Psychiatric Association [APA] declassified the same from mental disorders in 1973. The APA opposes psychiatric treatment based upon the assumption that homosexuality per se is a mental disorder and that the patients should change their sexual orientation.²⁵

Rather, it is proposed that there should be measures for societal change rather than change of individuals’ sexual orientation.²⁶

c. Suppression of homosexual identity and minority stress

The prevailing homophobia and family pressure force the homosexuals to repress their sexual identity or prevent them from expressing it. A dichotomous stand leads to minority stress, a conflict which arises as the dominant culture does not reflect upon that of minority group. In this case, it is that of absence of social institutions such as marriage and lack of legitimacy of homosexual sexual actions.²⁷ However, sexual orientation forms an immutable part and core of the identity of every person, and its expression should be recognized and protected from discrimination.²⁸

²⁴Manushi Desai, *Doctors In Delhi Are “Treating” Homosexuality Using Procedures*, May 28, 2015, available at: <http://www.youthconnect.in/2015/05/28/doctors-in-delhi-are-treating-homosexuality/>.

²⁵POSITION STATEMENT ON THERAPIES FOCUSED ON ATTEMPTS TO CHANGE SEXUAL ORIENTATION (Reparative or Conversion Therapies), American Psychiatric Association, May 2000, archived from the original (PDF) on 2011-01-10, retrieved 2007-08-28 archived from the original

²⁶JUST THE FACTS ABOUT SEXUAL ORIENTATION & YOUTH: A PRIMER FOR PRINCIPALS, EDUCATORS AND SCHOOL PERSONNEL, Just the Facts Coalition, 1999, retrieved 2010-05-14a

²⁷Ilan H. Meyer, PREJUDICE, STRESS, AND MENTAL HEALTH IN LESBIAN, GAY, AND BISEXUAL POPULATIONS: CONCEPTUAL ISSUES AND RESEARCH EVIDENCE, *Psychol Bull.* 2003 September ; 129(5): 674–697.

²⁸PART I – THE CONTEXT: SEXUAL ORIENTATION, HUMAN RIGHTS PROTECTIONS, CASE LAW AND LEGISLATION (accessed here: <http://www.ohrc.on.ca/en/book/export/html/2878>)

3) The relationship with public authorities and officials

a. Abuse by police officers

The bench in *Suresh Kaushal* noted that: "*Pro-gay activists miserably failed to furnish particulars of incidents of discriminatory attitude consequent denial of basic human rights, harassment and assault from public authorities.*" However, the activists who have filed a curative petition against the judgment of *Kaushal* have highlighted the various tortuous methods employed by the police that had also been highlighted by the petitioners. Homosexuals are often subjected to threat of imprisonment on false charge, rape and physical abuse. Many of them have committed self-immolation and suicide.²⁹ A UN report stated that criminalisation of homosexuality creates a climate which furthers violence against the LGBT community by state and non-state actors. Due to criminalisation, homosexuals live in a constant fear of detention, police intimation, extortion and torture. They also face forms of hostility and discrimination in their communication with government agencies.³⁰

b. Impairment of health benefits

On World AIDS Day, December 1, 2009, UN Secretary-General Ban Ki-moon released the following statement:

*"... I urge all countries to remove punitive laws, policies, and practices that hamper the AIDS response. In many countries, legal frameworks institutionalise discrimination against groups most at risk. We must ensure that AIDS responses are based on evidence, not ideology, and reach those most in need and most affected."*³¹

Criminalisation of homosexuality and environment of homophobia hampers HIV prevention intervention efforts such as condom distribution, HIV education, voluntary HIV counselling and testing, and treatment from STDs due to fear of revelation of gay identity to police authorities who will engage in harassment.³² The National AIDS Control Organisation (NACO) and the Ministry for Health & Family Welfare have highlighted a need for an enabling period to further HIV prevention method, because as per the estimates that the

²⁹Harish V Nair, *LGBTs charge cops with sex abuse, torture*, INDIA TIMES, Feb. 12, 2016 available at: <http://indiatoday.intoday.in/story/lgbts-charge-cops-with-sex-abuse-torture/1/593924.html>.

³⁰SOCIOLEGAL CONTROL OF HOMOSEXUALITY: A MULTI-NATION COMPARISON, (Donald J. West & Richard Green eds., Springer US, 2002).

³¹United Nations, The Secretary-General Message on World Aids Day. Geneva (2009).

³²Chris Beyrer & Stefan D Baral, *MSM, HIV and the Law: The Case of Gay, Bisexual and other men who have sex with men (MSM)*, (Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, Working Paper, 7-9 July 2011), available at <http://www.hivlawcommission.org/index.php/working-papers?task=document.viewdoc&id=95>.

current estimated HIV prevalence among MSM ranges between 7 and 16.5 per cent, with the overall adult HIV prevalence estimated to be 0.31 per cent in 2009.³³

III. CONCLUSION

Therefore, it can be concluded that homosexuals experience social rejection and isolation which adversely affects their mental health and their access to health benefits such as HIV/AIDS prevention intervention programmes is also restricted due to the fear of the homosexuals to reveal their identity. They are also forced to abide by the societal norms that are heteronormative in nature such as heterosexual marriage due to imposition of the same by the society as well as family pressures which force them to suppress their sexual identity and sexual orientation which is a core part of one's identity.

ANALYSIS AND IMPACT: NAZ FOUNDATION V. GOVERNMENT OF NCT³⁴

In this section, we seek to 1) analyse the ruling of *Naz Foundation* in order to discuss the reasoning of the Court and 2) highlight the positive impacts of de-criminalisation of homosexuality on the concerned individuals and the society at large.

The Delhi High Court delivered a landmark judgement on 2nd July 2009 declaring Section 377 as violative of the Constitution *to the extent that it criminalised private, consensual sexual activity between adults*. The petitioner, Naz Foundation, is a Non-Governmental Organisation that works in HIV/AIDS intervention and prevention.³⁵ The arguments of the petitioner are the same as the arguments of the Respondents in the above discussed case, and hence are not being repeated here.

I. REASONING OF THE COURT

1. DIGNITY AND PRIVACY: For every individual, whether homosexual or not, the sense of gender and sexual orientation of the person are so embedded in the individual. The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The way in which one gives expression to one's sexuality is at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy. Section 377 IPC denies a person's dignity and criminalises his or her core identity solely on account of his or her

³³Thomas, Beena et al., *HIV in Indian MSM: Reasons for a Concentrated Epidemic & Strategies for Prevention*, 134(6) The Indian Journal of Medical Research 920-929 (2011).

³⁴*Naz Foundation v. Government of NCT*, 160(2009)D.L.T. 277.

³⁵See: <http://nazindia.org/>.

sexuality. It denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution, and is therefore in violation of the same.

2. POPULAR MORALITY: Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. The Wolfenden Committee (1957) noted that moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind.
3. LAW COMMISSION REPORT: Additionally, in the 172nd report, the Law Commission of India, focused on the need to review the sexual offences laws and recommended deletion of Section 377. Though the Law Commission report would not expressly say so, it is implicit in the suggested amendments that elements of "will" and "consent" are relevant to determine if the sexual contact (homosexual for the purpose at hand) constitute an offence or not.
4. ARTICLE 14: Although, Section 377 IPC is facially neutral and it appears to target certain acts and not identities in its wording, it unfairly targets the homosexual community in operation, in its operation it ends up unfairly targeting the homosexual community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class. Moreover, the nature of the provision of Section 377 IPC and its purpose is to criminalise private conduct of consenting adults which does not cause harm to a third party. The discrimination severely affects the rights and interests of homosexuals and deeply affects their right to be treated as equals.
5. ARTICLE 15: The Court held that 'sexual orientation' is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted under Article 15. Hence, it ruled that homosexuals have a right to non-discrimination which is infringed by Section 377.
6. THE TENET OF INCLUSIVENESS: The Court said that this tenet is the underlying theme of our Constitution which is in consonance with the values of the Indian society, and thereby extended protection to homosexuals.

Therefore, on the basis of the above reasons, the Delhi High Court declared that Section 377 of the Indian Penal Code, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution.

IV. IMPACT OF DECRIMINALISATION

This section analyses the impact of decriminalisation of sexual acts between homosexuals. The impact of decriminalisation on the individual (1) and society (2) is studied below.

1) Impact on the individual

a. Self-acceptance

Within the stakeholder groups, the individuals claimed to feel improvements in self-awareness, self-acceptance, self-confidence and emotional security after the judgment. After the judgment, many respondents took comfort in the knowledge that their natural homosexual or bisexual tendencies were not 'wrong' as the law earlier made them out to be.³⁶ Emboldened by the High Court's ruling, and the increasing number of openly gay people, more Indians found the courage to internally accept their sexuality and come out to their friends and family.³⁷

b. Familial acceptance

Familial acceptance for the homosexuals is still a far off dream, but the ruling acts as a beginning point. One of the major reasons for non-acceptance by families is the fear of social alienation. Many families fear that they may lose respect in society and face ridicule if their children are open about their sexuality.³⁸ However, backed by the new-found confidence that what they are doing is not 'criminal' in law some have been able to change the opinion of their families and receive familial acceptance. Studies have shown that accepting family attitudes and behaviours towards their lesbian, gay, bisexual and transgender (LGBT) children are associated with significantly decreased risk – against depression, substance abuse, suicidal thoughts and attempts in early adulthood, higher levels of self-esteem, self-worth and social support and better overall health in adulthood.³⁹

³⁶Dipika Jain, *Impact of the Naz Foundation Judgement on The Gay, Bisexual and Transgender People in Delhi: An Empirical Investigation*, (Centre for Health Law, Ethics and Technology, Jindal Global Law School, March 2012), 37.

³⁷Diana Boesch, *Creating Dignity Out of Despair: The Impact of the 2009 Decriminalization of Homosexuality in Delhi*, Independent Study Project (ISP) Collection (2012) available at http://digitalcollections.sit.edu/isp_collection/1295.

³⁸*Supra*, note 32.

³⁹Caitlin Ryan & Stephen T. Russell, *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23(4) *Journal of Child and Adolescent Psychiatric Nursing* 205–213 (2010).

c. Reduction in abuse by police officials

Discrimination and harassment in the LGBT community is a world-wide phenomenon, especially in nations where homosexuality is criminalized. Even in India, there have been various instances of abuse of police officials of individuals of the LGBT community. However, the judgement has resulted in a reduction of said abuse, to a certain extent. The most important result of the judgement was that it gave these individuals a weapon and the strength to stand up for themselves against the police.⁴⁰ A study⁴¹ has reported an individual as saying ‘*Police harassment still continues, but now we have the law on our side.*’ The fact that homosexuality is no longer a punishable offence, coupled with increased awareness and assertiveness of people belonging to the LGBT community has resulted in a positive change where the gay community is more confident, aware and even able to negotiate with the police

2) Impact on the society:

a. Economic case:

According to a recent study by the Williams Institute, when LGBT people are denied full participation in society because of their sexual orientation and gender identity, the subsequent violations of their rights are likely to have a harmful effect on a country’s level of economic development.⁴² According to the World Bank, the preliminary estimated cost of homophobia to India, is about 0.1% on the low end, and 1.7% on the high end.⁴³ Decriminalisation would lead to a reduction in violence, prison time, discrimination in the work place and loss of jobs, family rejection, harassment in school and pressure to marry. All of this in turn would lead to increased participation in the labour force, productivity, better health and life longevity, more earnings, and so on. Countries that come closer to full equality for LGBT people have higher levels of GDP per capita.⁴⁴

b. Inclusive society

Often, a comparison is made between *Roe v. Wade*⁴⁵ and the *Naz Foundation* judgement, because both resulted from the judiciary’s use of innovative interpretations of the Constitution to settle a controversial area and establish rights for unpopular minorities and

⁴⁰*Supra*, note 33.

⁴¹*Supra*, note 32.

⁴²M.V. Lee Badgett et al, *The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies*, Nov. 2014 available at <http://williamsinstitute.law.ucla.edu/research/international/lgbt-incl-econ-devel-nov-2014/#sthash.qZgTyfN1.cHPM8cx2.dpuf>

⁴³*Ibid*.

⁴⁴*Ibid*.

⁴⁵*Roe v. Wade*, 410 U.S. 113.

established a ruling against public morality as defined by the majority. Both *Wade* and *Naz* represent moments in the history of struggle that finally culminated in a judicial victory.⁴⁶ Also, the ruling moved debates on sexuality away from an idea of public morality to one of constitutional morality by shifting the focus from whether homosexuality “harmed” abstract notions of family values and social fabric to how the provisions of section 377 harmed members of the LGBT community by marginalising, oppressing and exploiting them. And most importantly, the scope of the judgement far transcended the LGBT issue with its implication of unprecedented protection for all minorities.⁴⁷ By so doing so, the Court upheld the constitutional tenet of ‘inclusiveness’, something that the Indian society has always traditionally displayed and nurtured in its fabric.

CONCLUSION – AN ANALYSIS OF THE RELATIONSHIP BETWEEN LAW AND SOCIETY

The criminalisation of Section 377 restricts the right to dignity, personhood, privacy, equality, health and identity of homosexuals. It also restricts their right to express their sexual orientation which is a core part of their identity.⁴⁸ Additionally, it gives legitimacy and provides for misuse of the provision by the police for harassment. Due to the above reasons, Section 377 targets homosexuals as a class and affects their lives, freedom and rights in an adverse manner. It is important to note that the Law Commission of India in its 172nd report recommended the deletion of Section 377.

We, therefore, propose for decriminalisation of homosexuality and conclude with the two topics: *1. Impact of decriminalisation on the societal outlook and 2. The way forward.*

I. IMPACT OF DECRIMINALISATION ON THE SOCIETAL OUTLOOK.

Criminalization drives the problem underground and discourages rational discussion. It forces many into pretence, leaving the targeted vulnerable to blackmail, discrimination, and exploitation.⁴⁹ The public would feel justified in their discriminatory actions against homosexuals if the law is on the same page as them. As criminalization alienates homosexuals from mainstream values and unnecessarily diminishes their potential for contributing to society, a better solution would be a policy of tolerance and non-

⁴⁶Is the *Naz Foundation* decision the *Roe v. Wade* of India?, LAW AND SOCIAL SCIENCES RESEARCH NETWORK, available at <http://lassnet.blogspot.in/2009/07/is-naz-foundation-decision-roe-v-wade.html>.

⁴⁷Geetanjali Misra, *Decriminalising homosexuality in India*, 17(34) *Reproductive Health Matters* 20-28 (2009).

⁴⁸*Supra*, note 7.

⁴⁹D.J. West, *Homosexuality and Social Policy: The Case for a More Informed Approach*, 51(1) *Law and Contemporary Problems* 181-199 (1988).

discrimination. Moreover, this law creates a criminal class not by virtue of its behaviour but by sexual orientation.⁵⁰

A survey conducted in 1963 before decriminalisation of homosexuality revealed that 63 percent did not want homosexuality to be made legal. However, in 1977, ten years after decriminalization, only 22 percent were in favour of making homosexual relations illegal.⁵¹ This is because law influences public opinion and also acts as an ethical compass that reflects what is morally correct and incorrect. Abolition of anti-homosexual laws and controlling official discrimination will lessen social prejudice and derogatory practices. It is also the law's duty to protect the minority and not be a voice and crusader of justice of only the majority. As maintained in the *Naz Foundation* case constitutional morality requires the court to play the role of a counter majoritarian institution which takes upon itself the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe.

An example in India can be found with respect to Professor Ramchandra Siras of Aligarh Muslim University. Following the *Naz Foundation judgment* which decriminalised homosexuality, he was filmed with a male counterpart and was suspended from the university upon its release. However, following the public outrage the Allahabad High Court reinstated him on the basis that his right to privacy had been violated.⁵² This can be attributed to the societal opinion at that time, which was that gay sex is not illegal and is worthy of respect.⁵³

Hence, decriminalisation of homosexuality will protect homosexuals (do you think the term "sexual minorities" can be used instead?) from discrimination by state and non-state actors alike.

II. THE WAY FORWARD.

Mere decriminalisation of homosexuality will not solve the issue, although it is the first step. The tragic and alleged suicide of Dr. Siras even after the favourable judgment of the Allahabad High Court is a testament to the same. In a society that is highly heteronormative, all the institutions and social practices discriminate against the homosexuals, who find an absence of a homosexual institution of marriage and family which is necessary to have a health family life. They are also often discriminated in work place. The example of United

⁵⁰Animesh Sharma, *Section 377: No Jurisprudential Basis*, 43(46) Economic and Political Weekly 12-13 (2008).

⁵¹*Supra* note 45.

⁵²*Dr. Shrinivas Ramchandra Siras & Ors. v. The Aligarh Muslim University & Ors*, Civil Misc. Writ Petition No. 17549 Allahabad H.C. (2010).

⁵³*Supra* note 4.

States is studied to trace the development of the rights of the homosexuals to enable them to live a meaningful life.

In the United States, The U.S. Supreme Court in 2003 in *Lawrence v. Texas*⁵⁴ struck down the [sodomy law](#) in [Texas](#) and by extension, invalidated [sodomy laws in 13 other states](#), making same-sex sexual activity legal in every U.S. state and territory. The court recognised the liberty granted by the Due Process Clause of the Fourteenth Amendment.⁵⁵ The judgment gave effect to the Declaration of Independence: that all people have certain inalienable rights, including, foremost, the liberty to pursue their own happiness, and that the only legitimate purpose of government is to secure those rights without the intervention of the government.⁵⁶

Further, in 2015, in *Obergefell v. Hodges, Director, Ohio Department of Health*⁵⁷, the Supreme Court ruled that same-sex marriage is a constitutionally granted and effectively nullified all state laws that bar gay and lesbian unions. The Court held that the liberties protected by the right under the Due Process Clause and Equal Protection Clause extend to choices that are central to a person's dignity and autonomy, including intimate choices about personal beliefs and identity and that it would diminish the personhood of same-sex couples and disparage their choices if they were denied the same rights to marry as opposite-sex couples under the Constitution.

Further, a bill has been introduced in the United States House of Representatives and the Senate known as the 'Equality Act of 2015', that if passed would amend the Civil Rights Act of 1964 to include protections that ban discrimination on the basis of sexual orientation, gender identity, and sex in the areas of employment, housing, public accommodations, public education, federal funding, credit, and the jury system.⁵⁸

Therefore, the United States not only decriminalised homosexuality but also granted all the rights necessary to enable the homosexuals to lead a meaningful life. The position of homosexuals in India vis-à-vis to that United States is very bad and needs a lot of change in the policies of State as well as society.

⁵⁴*Lawrence v. Texas*, 539 U.S. (2003).

⁵⁵U.S. CONST. amend. XIV, § 1

⁵⁶Philip Chapman, *Beyond Gay Rights: Lawrence v. Texas and the Promise of Liberty*, 13 (1) Wm. & Mary Bill Rts. J. 245 (2004).

⁵⁷*Obergefell v. Hodges, Director, Ohio Department of Health*, 576 U.S. (2015).

⁵⁸German Lopez, *The Equality Act, the most comprehensive LGBTQ rights bill ever, explained*, VOX EXPLAINERS, available at www.vox.com/2015/7/23/9023611/equality-act-lgbt-rights.

We conclude our paper by stating that in order to enable homosexuals to enjoy all the rights guaranteed under the Constitution of India, homosexuality should be decriminalised and discrimination in various areas such as employment, housing, education, accommodations should be banned, in order to create a society which reflects the norms of homosexuals along with that of heterosexuals.