CHAPTER-9

EFFECTS OF LEGALIZING HOMOSEXUALITY

9.1 INTRODUCTION

The legal and social terrain has changed irrevocably in light of the Delhi High court decision on section 377 and nothing is more poignant than the personal and collective testimonies about the meaning and impact of this decision. One positive indication of this is the media coverage and national debate on homosexuality that the judgment has sparked off in very diverse social and political spaces. This 105 page document has in a sense ousted an issue that has previously only been talked about in hushed and embarrassed tones in most households. The public debate about the decision in the media has made conversations about homosexuality and the impact of section 377 possible in homes, offices and schools. Even the gay children also became more open talking and revealing their sexuality to their parents, family and friends. The judgment has meant newfound respectability and legitimacy for the issue of homosexuality.

This chapter discusses the periodical effects of partial recognition of homosexuality in India between 2009 till 2013 and also discusses the positive and negative effects of legalization of homosexuality in India.

9.2 HOMOSEXUALITY LEGALIZED IN INDIA- PERIODICAL EFFECTS (2 JULY 2010- 13 DECEMBER 2013)

- Homosexuality and homosexuals were a lot more visible in 2009 than before. More queer people spanning multiple professions 'came out' as gay, bisexual,
transgender or lesbian.\textsuperscript{380} Homophobia which feeds on the invisibility around discussions on sexuality was increasingly being countered by more and more people 'coming out'. The larger political ramifications of the personal act of coming out cannot be underestimated. The most fitting illustration of the role that coming out plays in changing social attitudes is the fact that in 1986, when the US Supreme Court voted to retain the anti-sodomy law in \textit{Bower's v. Hardwick},\textsuperscript{381} not a single judge knew anyone who was gay or lesbian.\textsuperscript{382} However by 2003 in \textit{Lawrence v. Texas},\textsuperscript{383} when the US Supreme Court voted to strike down the anti-sodomy law every judge knew someone who was gay or lesbian. By 2009, due to the nature of media publicity and the interaction with gay and lesbian judges from other jurisdictions, it was likely that judges in India too knew people who were queer.

- The judgement has come at a time when mainstream culture is increasingly being queered. Literature,\textsuperscript{384} plays,\textsuperscript{385} movies,\textsuperscript{386} dance performances\textsuperscript{387} and

\textsuperscript{380} On 3 February 2006 the Supreme Court of India by an unreported order in Special Leave Petition (Civil) No. 7217/7218 of 2005 set aside the order of dismissal of the Delhi High Court, and directed the High Court to hear the constitutional challenge to Section 377 on merits. Gautam Bhan captured the significance of the order: 'beyond a technical ruling the judgement is a reminder to the Court and to the nation that the rights of the citizen cannot be ignored and that debate cannot be silenced.' See: Bhan, Gautam. 2006, 'Section 377 is Unnatural', Hindustan Times, 9 February 2006; Singh, Sanghita. 2006, 'A Ray of Hope for Gay Rights Activists', DNA, 7 February, 2006.

\textsuperscript{381} Bhupen Kakhar, one of India's most famous and gifted artists, never shied away from the subject of sexuality in his work. Homo-eroticism is prominent in his painting along with the anguish of being rejected from society. See: 'Bhupen Kakhar: A Retrospective' by Usha Mirchandani, The Fine Art Resource, Mumbai (2003). Vikram Seth, one of India's leading writers became increasingly open about his sexuality. See: 'An Equal Swing', Hindustan Times Sunday Magazine, 16 October 2005; The most public coming out though has been of the Prince of Rajpipla, in Gujarat. See: 'Out of the Closet', India Today, 10 July 2006; also see: Miss India USA contestant and Miss Congeniality, 2003 winner, Kashish Chopra, comes out as a lesbian in a story titled 'Out of Closet', Society, July 2006.

\textsuperscript{382} 478 U. S. 186 (1986).

\textsuperscript{383} As Justice Stevens who dissented from the Bowers majority noted, 'Unfavourable opinions about homosexuals have ancient roots. Like equally atavistic opinions about certain racial groups, these roots have been nourished by sectarian doctrine. Over the years however interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, [has] modified these views., in Joyce Murdoch and Deb Price, Courting Justice: Gay Men and Lesbians v. the Supreme Court, New York: Basic Books, 2002, p. 513.

\textsuperscript{384} 539 U.S.558 (2003).

\textsuperscript{385} Rao, R. Raj. 2003, The Boyfriend. New Delhi: Penguin.; Mukherjee, Neel. 2009, Past and Continuous. Picador India, April 2009, (Winner of the Crossword Book Award 2009); Ambai. 'The One and the Other', In a Forest a Deer (Translated from Tamil to English); Murugan, Perumal. 2004, Current Show.
other forms of entertainment increasingly have queer themes and openly queer characters. Mainstream Bollywood cinema is perhaps the best symbol of how queerness has found representation in mass culture. The hit film of 2008, *Dostana*, which depicted a love triangle between two leading male stars of Bollywood and a female star, was perhaps the first instance in Bollywood cinema where the word 'gay' was used in an almost casual everyday sense. This was in stark contrast to the first official mainstream gay film called *My Brother Nikhil*, which is about a gay athlete who succumbs to AIDS, and did not use the terms 'gay' or 'homosexual' even once. *Dostana* introduced queerness to the Indian public and initiated conversations around sexuality in homes and offices. This was not confined to writings in English or cinema in Hindi alone, as seen by the work of the noted Marathi playwright, Chetan Datar who repeatedly dealt with queer themes in his productions.

- A few days after the judgments the stakeholders of Naz foundation were invited at various forums such as, schools, colleges, media organizations and NGO's to speak on critical issues involved with homosexuality. The judgment has also provided leverage in interaction with the police.

- Combined with this change in public culture was a growing sense of entitlement in the queer community. Prior to 2009, there was a visible sense of fear in the community; fear when it came to publishing gay news letters, with

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*Chennai: Tara Publishing; Dawesar, Abha. The Three of us, Penguin India (2000) and Babyji, Penguin India (2005).*


*388 For example, Laundas are traditional male dancers, who dance as women across Bihar in weddings. However, their lives are without the abuse and violence that accompanies gender transgression. See: Poddar, Kakoli. 2005, The Laundas of Bihar', Society, August 2005. Similarly, a troupe called 'Bin Baikancha Tamasha' in Maharashtra is an all male traditional Lavani troupe. See: Jiwani, Subuji. 2006, 'It's a pity we can't whistle', DNA, 9 July 2006.*

*389 Dostana has been acknowledged as one of the highest grossing gay-themed movies. See: Doctor, Vikram. 2008, 'Dostana cracks the genre game', Economic Times, 27 December 2008.*

those involved worrying about what the printer would say and whether the publication itself might be considered obscene and even lead to arrests. As of now, a lot has changed. The community itself was much more visible and vocal. The sense of an ever present, subterranean fear had considerably diminished to be replaced by a tentative new confidence. One could describe this as a process whereby queer people increasingly felt that they have rights.

- Between 2009 and 2013 print media also covered numerous stories of Gay People ‘coming out’; many bollywood celebrities had extended their support to LGBT Community openly. Few psychologists and counsellors have started counseling columns with regard to homosexuality. Few stories of social acceptance and few other of non-acceptance were also published; marking visibility of the community in our culturally homophobic country.

- While the court’s decision was technically only to decriminalize homosexuality, arguments around equality and the judges’ reading of gender and sexuality have implied a far wider impact. Even those fighting the case were taken aback when the Hindustan times and times of India reported homosexual couples across India suddenly getting married, and citing the judgment as a proof they could do so.

- Naz judgment had a potential power. The historical judgment of Naz foundation has granted unprecedented constitutional protection (though for a short period of 4 years only), and represents a new deal for all minorities. This minority group (minority because the official number of gays in the country is 25 lakhs in India, only a miniscule fraction of India’s total population) is a vulnerable class, as one suffers prejudices and discrimination just because of membership to this group. Apart from numerical strength, other facets of

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391 Bhattacharya, Roshmilla., “Mallika Sherawat to host Gay bash”, front pg., HT CITY, Hindustan Times, New Delhi, 11th March, 2012; Marwah, Navdeep Kaur., “why are we peeping into bedrooms?”; Farhan Akhtar famous writer and director extended his support when he said, I feel Section 377 of the IPC is a primitive law and does not have any place in today’s society”, Front page, HT City, Hindustan Times, New Delhi, 19th December, 2013.


393 Ahuja, Sanjeev K., “Lesbian Couple returns home as family accepts marriage”, Pg. no. 05, Hindustan Times, New Delhi, 17th August, 2011.
vulnerability include, political vulnerability (often disclosed by the level of representation in political institutions), social vulnerability (indicated by the degree of social prejudice and negative stereotypes prevalent against a group), and economic vulnerability (inferred from wealth, income, land and house ownership, occupation, education, and other material indicators).

9.3 PERIDICAL EFFECTS (RE-CRIMINALIZATION OF HOMOSEXUALITY IN INDIA (12 DECEMBER 2013- FEBRUARY 2015)

➢ The first Queer Pride Parade after the disheartening Supreme Court judgment on 30th November. 2014 witnessed hundreds of people protesting against section 377 at Barakhamba Road, Delhi. The supporters were school children along with teachers of Tagore International School Delhi, people from LGBT community, lawyers, people from US and Canadian Embassy. “This huge colorful turnout itself proves we haven’t lost. We are going to win the fight for LGBT community. And we are not going to be quiet about it.” Said, Anand Grover, Founder of Lawyer’s collective & petitioner lawyer in Naz Foundation case.

➢ After the Supreme Court’s verdict recriminalizing gay sex, LGBT community vows to fight on after SC verdict. The famous social Networking site, FACEBOOK introduced new gender options apart from traditional male/female. This move is widely appreciated by LGBT community. This can be seen as a democratic move to recognize special genders, in tune with recognition of LGBT community globally. One of the LGBT members on condition of anonymity said: “This move will send a subtle psychological message that other genders are also normal. Gradually, people will become more accepting of us”.

395 Dahiya, Medha Shri. “LGBT groups hail FB’s new move”, front page, HT CITY, Hindustan Times, New Delhi, February 16, 2014 (Sunday).
Many supports of gay rights including bollywood celebrities were shocked and reacted strongly on social media & print media saying Apex court judgment is a letdown. The ruling spurred strong reactions from across the country, with social media leading the protest. Supporters and celebs lashed out on Facebook and Twitter, calling it a regressive move.  

On the contrary, as a positive move, Indian supreme court in March 2014 has recognized the transgender as a ‘Third Gender’ and has also included them as a class component of OBC, by which they are eligible to claim reservation in various jobs against 27% quota.

On 11th December, 2014 (a year after the apex court judgment) LGBT community members organized an event in new Delhi was organized in which experience sharing, community performance, and speeches by community leaders, who discussed strategies to address the crisis involving people belonging to LGBT community. They focused on issues like access to Health care services and increased efforts for safeguarding human rights and providing immediate crisis response. Speaking at the event, K G Balakrishnan, chairperson of the National Human Rights Commission of India and former chief justice said: “Human rights of the LGBT community need protection and they should not be categorized as criminals.”

Few world famous celebrities like, Tim crook comes out as gay, publicly acknowledging his sexuality. He wrote to a Bloomberg Businessweek magazine: “So let me be clear. I am proud to be Gay, and I consider being gay among the greatest gifts god has given to me. Tim being the CEO of World renowned APPLE Company, has been supporting workplace equality bills in the US Congress, backed marriage equality in California and opposed an Arizona state bill that targeted gays.

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396 Actor Kalki Koechlin tweeted “SC’s job is to uphold the right and freedom of every individual, not to decide what is culturally acceptable or not. In this case they failed”; Goyal, Samarth,” SHOCKED! NOW CRIMINAL TO BE GAY”, Front Pg, HT CITY, Hindustan Times, New Delhi, 12th December, 2013
397 “LGBT community protests abuse year after apex court held sec 377”, HT Correspondent, Pg. no.10, Hindustan Times, New Delhi, December 12, 2014( Friday).
398 Ibid.
399 Raj, Yashwant., “ Tim comes out, says he is proud to be gay”, Front Page, Hindustan Times, Noida &Ghzbd., October 31, 2014. (Friday).
On star plus channel, a famous TV Programme titled ‘Satyamev Jayate’ hosted by Aamir was aired on ‘alternate Sexuality’ on 19th October, 2014. This episode has closely touched upon the real issues involved with the LGBT Community. A writer, an LGBT activist, a psychologist, a social worker along with representative from Naz Foundation who won a historical battle for LGBT Rights in 2009 were present to deliver upon various facets and struggle through which the members of this community usually passes through. There was interesting discussion on general perceptions about homosexuals, sex change, improving standard of eunuch in society, LGBT Rights etc. This episode has again advocated for the rights relating to LGBT community in India.

On the contrary, the government of Goa has announced in early 2015 that they have initiated a campaign which will cure LGBT people from homosexuality. The sports minister of Goa Mr. Ramesh Tavedkar has confirmed that their government is shortly opening a special centre for LGBT people in which proper treatment will be given to them so that they can live a normal life.

9.4 EFFECTS OF LEGALIZATION OF HOMOSEXUALITY IN INDIA

The advocates for and against legalization of homosexuality in India has put forward various arguments to substantiate their claim, not only with respect to what is going to be the immediate effect but also what will be the longer/ remoter effect which will be brought by legalization of homosexuality in Indian legal and social system. This section of this chapter is an attempt to foresee and answer the effects for the same.

9.4.1 Encountering Negative claims of Legalizing Homosexuality in India

The first argument which is contested here is that If Sec. 377 is decriminalized, offences of sodomy, bestiality etc. may go unpunished leading to complete uncivilization. I would like to emphasize here that the right which is supported is ‘fundamental rights of human beings’ which includes right not to be
discriminated\textsuperscript{400}, right to privacy and right to life and personal liberty\textsuperscript{401}. Forceful acts of sodomy, or sodomy acts against minors must continue to be penalized. Similarly, acts of bestiality are not supported as they are not acts between human beings & by any interpretation of constitutional law can never be brought within the ambit of constitutional protection. Here, we are advocating for ‘only private homosexual acts between consenting adults’ and not otherwise.

- The second argument against homosexuality is that deletion of section 377 would open floodgates of delinquent behavior and misconstrued as providing unbridled license to the same as a result, homosexual activities will mushroom in society and male prostitution will also be on rise. This is also a misnomer as it is a natural orientation and not an adopted behaviour as proved in many researches. Just because legalization gives a license people will not follow it until they have such sexual orientation. Secondly, as far as male prostitution is concerned, inspite of increasing, rather male prostitution will decrease as legalization will check discrimination, exploitation, torture and will provide better conducive work environment and better job opportunities for the LGBT people. It is noteworthy here that many members of the LGBT community are into male prostitution because of the social exclusion which the community is facing. Nobody wants to employ a homosexual because their identity itself is criminalized and they are left as a subject of mockery, hatred and prejudism. ‘Social inclusion’ will work positively for the community and they will be able to explore other options to earn their livelihood.

- The third argument that \textit{Indian social system and traditional institution of marriage may be highly affected by homosexuality} also does not hold well against criminalization of the same. If homosexuality should continue to be penalized for the sake of Indian society or marriage system, then what to say for live-in-relationship, sexual acts prior to marriage by young people? It must

\textsuperscript{400} ARTICLE 14 & 15, CONSTITUTION OF INDIA.
\textsuperscript{401} ARTICLE 21, CONSTITUTION OF INDIA.
be noted that the duty of the law is to regulate and safeguard ‘constitutional morality’ and not ‘public morality’, which is based upon evolving subjective notions of society.

➢ The fourth argument against legalization that Indian political system will be affected as the LGBT people may enter openly into politics & may fight to claim special or privileged rights or reservation in jobs for their community, need not answer now. Indian supreme court in March 2014 has recognized the transgender as a ‘Third Gender’ and has also included them as a class component of OBC, by which they are eligible to claim reservation in various jobs against 27% quota.

➢ The last argument against homosexuality is that the record of fatal diseases, including AIDS, Hepatitis B, Syphilis (venereal disease) & genital herpes will rise. This argument hold good if an unprotected sexual act takes place between homosexuals. This is as true for unsafe sexual acts between heterosexuals as well.

9.4.2 Anticipated Positive Effects of Legalizing Homosexuality in India

1. Less exploitation and discrimination: The legalization of private homosexual acts between consenting adults will check exploitation, violence and discrimination against LGBT community to a much extent. LGBT people have been a target of violence mostly by police and public authorities under section 377 of Indian Penal Code. Even when they are cruising in public parks, meeting and gathering whereby they do not purport to commit an act defined under section 377 IPC, they are booked under it. It is one of the most exploited laws which are used to blackmail and extort homosexuals in India. Legalization will cut short all exploitation, discrimination⁴⁰², blackmail and extortion.

⁴⁰² See: Marwah, Navdeep Kaur., “I was voted out because I am a transgender”, Front Pg., HT City, New Delhi, 14th November, 2011.
2. The LGBT people will get motivation & confidence to come out of closet: The first positive effect of legalizing homosexuality in India will be on LGBT community itself. Such people will feel more confident and motivated to come out of closet. ‘Coming out of closet’ is extremely important as closet is dark and encompasses a person with abundant fears and inhibitions. They will get courage to face homophobic reactions of people and their self esteem will boost up Standup comedian Vidhur kapoor shared, “I think you are either born gay, or you are not. I was born gay. Guys started calling me homo. My self esteem dipped every passing day. I was made to do tests to check I was normal male. The counsellor said I cannot kill myself for the way I am born. I finally told my mother that I was with a man and I wasn’t willing to lie. My parents have come a long way and so, hopefully, should a lot of people.”

3. The families of LGBT people will no more face shame & stigma due to sexual orientation of their ward: The families of LGBT People will feel streamlined with other members of the society. The inclusiveness of this minority community into mainstream will slowly shed away stigma and humiliation faced by their family members. Mockery of LGBT People does exist in the society because we have permitted it to prevail so. Funny representation, non serious and loose portrait of homosexuals in TV and Media has not only lowered down the image of LGBT but has also crushed the confidence of their families to face the society and relatives. Collectively, if the law and the society give respect to LGBT, protect and safeguard their rights then the morale of the family will also go up and they will no more face shame and stigma associated with their ward’s sexual orientation.

4. Better job opportunities: Once homosexuality is legalized the employers will also adopt policy of inclusiveness towards LGBT People in their Human resource policies. Because of discomfiture in society towards this minority

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403 See: COVER STORY: FROM DARKNESS TO LIGHT, Brunch Magazine, Hindustan Times, New Delhi,(November2011)

404 A Jaipur based TV actor who played a role of Gay, in a movie ‘DUNNO Y’, was outcaste by family and parents as the parents had a firm belief that their son has brought shame for them and their families, by playing a role of a Gay man in a movie.
community, even the companies/organizations/institutions are reluctant to hire LGBT among their workforce. The legalization will help in ensuring equality of opportunity in jobs for this community.⁴⁰⁵

5. There are little (if any) negative consequences of decriminalisation and studies have shown a reduction in STDs (sexually transmitted diseases) and increased psychological adjustment in countries where homosexuality is legalized. Not to mention, only the consensual homosexual acts in private between adults is being advocated for legalization. Forceful sexual acts or sexual acts between minors are not supported at all.

6. The LGBT people will come in mainstream sharing equal rights &opportunities in every sphere of life: The legalization will foster LGBT people with equal rights and opportunities in every sphere of life. The law is not sufficient to change the mindset of the people, but undoubtedly it is instrumental in putting the ball in motion. Criminality of one’s identity makes him/her criminal in the eyes of the society, which as a result carries a lot of hatred, prejudices and exploitation beneath for the members of the LGBT Community. They are not offered jobs, discriminated at school, home and workplace which crush their confidence. They are devoid of equal rights and opportunities; all because the constitutional law which is a custodian, protector of fundamental rights of all has chosen to disapprove their rights. If homosexuality is legalized the society has to approve it sooner or later, the community members will feel confident and will be more accepted in society. They will no more be treated with prejudices and will join the main stream sharing equal rights and opportunities in life.

7. Last but not the least, Population control can be assured without any measures, as homosexual acts are void of procreation: As the homosexual acts are devoid of procreation, it will help benefit Indian society in two ways:

⁴⁰⁵ Recently companies like GOLDMAN SACHS, IBM, GOOGLE & FACEBOOK have advertised that they have created a Inclusive workplace for LGBT Employees in India.
The unintended birth of children due to unprotected sex can be controlled, as homosexual acts are devoid of procreation.

Inability to have a child by natural ways will push couples to adopt orphans. According to a survey about 20 million children, about 4% of their population in India and higher than people living in Delhi, are orphans; who are living a poor, miserable life and constitute a vulnerable class in themselves. These destitute children are more prone to crimes, as victims well as a criminal. Even the government is also not able to adequately provide better education and life to all due to scarcity and non-access of resources.

9.5 CONCLUSION

The guarantee of human dignity forms a part of Article 21 and our constitutional culture. It seeks to ensure full development and evolution of persons. It includes right to carry on functions and activities which constitute the bare minimum of expression of the human self. The right is intimately related to the right to privacy. Dignity is linked to personal self realisation and autonomy. Personal intimacies and sexual relations are an important part of the expression of oneself. In light of the right to privacy, dignity and bodily integrity, there should be no restriction on a person’s decision to participate or not participate in a sexual activity. By making certain sexual relations between consenting adults a crime, Section 377 by its existence demeans and degrades people and imposes an examination on sexual intercourse. This is regardless of whether it is enforced. By denying sexual expression which is an essential experience of a human being, discrimination takes place in the name of society, culture, morality, health or posed negative effects; although the positive effects will outweigh the negatives.

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The figure is result of a study done by SOS Children’s Village by analyzing data from National Family Health Survey-3 for the year 2005-06 and the population estimation by the Census of India to find the dark spots for children below the age of 18 in India. (Accessible at: http://www.hindustantimes.com/newdelhi/about-20m-kids-in-india-orphans-study/article1-725905.aspx).
We must remember that our constitution stands for the principle of minority protection, whoever they might happen to be, and this time it is the question of protection of fundamental rights of LGBT community. Therefore, in the light of anticipated effects of legalizing homosexuality in India, it is strongly pleaded that it should be decriminalized.