

LOVE AND JUSTICE – THE LEGAL AND SOCIAL IMPLICATIONS OF BEING A HOMOSEXUAL IN

INDIA

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The attitude of the Indian state towards Homosexuality is now well known. Section 377 of the Indian Penal Code, 1860¹ (1860) relates to Unnatural Offences and includes homosexuality within its domain. In India this Law relating to homosexuality was adopted from the British penal code dating to 19th century.

Section 377 states: *“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 ten years and shall also be liable to fine.”*

The thrust of Section 377 is to criminalize sexual acts which are “against the order of nature”. This provision is based upon traditional, conservative Judeo-Christian moral and ethical standards, which perceive sex in purely functional terms, that is, for the purpose of reproduction only.² Any non-procreative sexual activity is thus viewed as being “against the order of nature”. Since only penile-vaginal sexual activity is procreative and therefore acceptable, all penetrative sexual activity, other than penile vaginal, between both heterosexual and same-sex couples, is considered to be against the order of nature and thus criminally proscribed under Section 377.

¹ Section 377, Indian Penal Code, 1860.

² Robert Aldrich, “Gay and Lesbian History,” in *Gay Life and Culture: A World History*, edited by Robert Aldrich (New York: Universe Publishing, 2006), at Page 11.

Though Section 377 was held to be unconstitutional by a bench of the Delhi High Court³, the Supreme Court of India, in appeal, reversed the decision of the High Court, effectively re-criminalizing the acts and identities of millions of LGBT Indians and turning the clock back on four and a half years of citizenship affirmed by the Delhi High Court, and three decades of gains made by the LGBT movement in India.

The Indian Supreme Court's decision in the case of *Suresh Kumar Koushal v. Naz Foundation* (hereinafter referred to as *Koushal*)⁴ is significant in many ways. However, the judgment is noteworthy not for what it has achieved, but for all that it has failed to do. Through this paper, I will attempt to throw light on the history of Section 377 in India, the LGBT movement, the major breakthrough, that was the Delhi High Court decision, and the heartache that the Supreme Court decision caused to members of the homosexual community across the country.

³ *Naz Foundation v Government of NCT of Delhi*, 160 Delhi Law Times 277.

⁴ (2014) 1 SCC 1.

CHAPTER 1 – THE ORIGINS OF SECTION 377

A brief look at the historical context to which Section 377 owes its origins and its religious undertones are pertinent for recognising its underlying assumptions and purpose. An overview of these factors reveals how Section 377 is indeed based upon an ancient and archaic conception of sexual relations, which has later been used to legitimize discrimination against sexuality minorities.⁵

In England, the first records of sodomy as a crime are recorded as far back as 1290. Texts from the period prescribed that homosexuals should be burned alive.⁶ Subsequently, homosexuality became penalized by hanging under the Buggery Act of 1533.⁷ After a series of repeals and re-enactments, The Buggery Act of 1533 was again re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for the subsequent criminalization of sodomy in the British Commonwealth. Oral-genital sexual acts were later removed from the definition of buggery in 1817.⁸ And in 1861, the death penalty for buggery was formally abolished in England and Wales. However, sodomy or buggery remained as a crime “not to be mentioned by Christians.”⁹

⁵ Michel Foucault, “The Repressive Hypothesis,” in *The History of Sexuality, Volume I: An Introduction*, translated by Robert Hurley (New York: Vintage Books, 1990), at Page 43.

⁶ Elliott, Dyan. “Sexual Scandal and the Clergy; a Medieval Blueprint for Disaster.” *Why the Middle Ages Matter; Medieval Light on Modern Injustice* (2012) at Pages 90 to 105.

⁷ Beattie, Cordelia. “Gender and Femininity in Medieval England.” *Writing Medieval History* (2005) at Pages 153 to 170.

⁸ Brady, Sean. *Masculinity and Male Homosexuality in Britian, 1861-1913*. Palgrave Macmillan. Basingstoke, England & New York, 2005.

⁹ *LeBarron v. LeBarron*, 35 Vt. 365, at 367 (1862). An English case from the colonial era stated that “Christianity is part of the law”.

Around the same time, in 1861, to be precise, the British crown, which had by then taken formal control over India, introduced its anti-sodomy law in India in 1861 through Section 377 of the Indian Penal Code. With time, English Law was reformed and the Sexual Offences Act of 1967 decriminalized the acts of homosexuality and sodomy between two consenting adults.¹⁰

It is pertinent to note that the introduction of Section 377 in Indian penal law was contrary to then existing Indian traditions, which did not treat sodomy as a crime.¹¹ The introduction of Section 377 and the practices of cultural imperialism by the British resulted in a change in Indian society's conceptions of sexual relations.

Today, homosexuality in Britain has been decriminalized for close to five decades, while the legal system in India continues to treat homosexuals, as indeed anyone with an alternate sexual orientation, as criminals.

¹⁰ Sexual Offences Act, 1967 (1967 c. 60).

¹¹ R. Vanita & S. Kivai, eds. *Same Sex Love in India* (New York: St. Martin's Press, 2000) (hereinafter "Same Sex Love") at Page 194.

CHAPTER 2 – COMING OUT OF THE CLOSET – A DEMAND FOR EQUAL RIGHTS

The Delhi High Court' judgment in 2009 built upon a decade of work by the LGBT activists. As a political demand, the struggle against Section 377 can possibly date back to the protest against police harassment which was organised by AIDS Bedhbhav Virodhi Andolan (ABVA) in 1991 where for the first time the demand for the repeal of the law was raised in a public manner.¹² Since then the LGBT community has engaged the public attention through numerous protests, demonstrations, Fact Finding Reports, Conferences, Film Festivals and the well-known, pride marches.¹³

The legal struggle goes back to the first legal challenge to Section 377 which was filed by ABVA in 1994, in response to a statement by Kiran Bedi that she could not distribute condoms in prison as it would amount to abetting an offence under Section 377.¹⁴ However, the petition was dismissed as the ABVA group became defunct.¹⁵ The next key development was the filing of a petition by the Naz Foundation challenging Section 377 in 2001.

The uniqueness of the Naz petition is that though it began as a legal petition by one NGO it slowly gathered wider support both within the LGBT community as well as within sections of the public. Thus the Naz petition began to carry the burden of the expectations of a

¹² ABVA (1991), 'Less than Gay - A Citizens Report on the Status of Homosexuality in India', ABVA Publication, New Delhi.

¹³ Fernandez, Bina, ed. (1999). *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*. Mumbai: India Centre for Human Rights and Law at page 35.

¹⁴ Friese, Kai; Safe Custody – Tihar Jail Bans Condoms, India Today, dated 31st May, 1994, available at <http://indiatoday.intoday.in/story/tihar-jail-bans-condoms/1/293411.html> accessed on 04.01.2016.

¹⁵ Narrain A, 'Human Rights and Sexual Minorities: Local and Global Contexts', Refereed article, *Law, Social Justice & Global Development (LGD)*, 2001 (2) at Page 3.

community, with each torturous turn in the legal proceedings followed with great interest by members of the community. Initially the way the LGBT community was kept abreast of the legal developments was both through the organising of periodic consultations on the petition by the Lawyers Collective (the Lawyers for Naz Foundation) for LGBT groups as well as by regular postings on an LGBT listserv. However the media soon began to evince more interest and report regularly on the developments.

So, when the Delhi High Court Bench of Chief Justice Shah and Justice Muralidhar heard the final arguments in 2008, they had to contend with the range of opinions, all of which had to be heard and considered before the judgment could be delivered. Though the final arguments were completed in November 2008, the judgment was finally delivered only on July 2, 2009. It was an eagerly awaited judgment both in terms of what it could mean for the LGBT community as well what it would hold for Indian Constitutional law. In both contexts it did not disappoint.

CHAPTER 3 – DELHI HIGH COURT JUDGMENT

On a purely legal basis, the beauty of the judgment, was that it skilfully mixed originalism, rarely invoked by Indian courts, with pragmatism in constitutional interpretation. Additionally, and perhaps more importantly, the judges display great humanism, sensitivity, and empathy — qualities that are now rare in courtrooms in India.

The Court held that criminalisation of consensual sex between adults in private violates the Constitution's guarantees of dignity, equality, and freedom from discrimination based on sexual orientation (Articles 21, 14 and 15). Thus, the Judges 'read down' Section 377 so that it no longer criminalises consensual sex between adults in private.

However the Judges held that Section 377 will continue to govern cases of non-consensual sex between adults as well as any sex with children. The Court held that an adult would be any person above 18 and that any person below 18 would be presumed not to be able to consent to a sexual act.

The Court also noted that this clarification of the law would hold until parliament chose to effectuate the recommendations of the 172nd Law Commission Report, which simultaneously recommended the amendment of rape laws and the repeal of Section 377.¹⁶

The Court also noted that the judgment will not result in the reopening of criminal cases involving Section 377 that have already attained finality.

The Judges quote heavily from progressive judgments both in India and in other countries that have found rights to dignity, privacy, equality, and non-discrimination. These four

¹⁶ Law Commission of India, 172nd Report on Review of Rape Laws, 2000 (March 25, 2000).

concepts form the basis of the Court's judgment. In order for the dignity of each person to be protected, there must be a right to privacy that protects against arbitrary state interference with personal autonomy. Similarly, equality is meaningless without a corresponding prohibition on discriminating against certain classes of people.

The Justices also employ a novel concept of 'constitutional morality' to avoid discussing the religious propriety of homosexual conduct. Basically, they say that the government should only be concerned with the secular values enshrined in the Constitution, not with the moral codes of any particular religion.

More important however, was the impact that the decision had on the social scenario in India. Not only did the Judgment give new meaning to the politics of identity in India, it also, by acknowledging the distinct status of persons, whose only common bond is sexual orientation, and addressing them as a collective body, the judgment recognized the emergence of new social identities in the country.

In doing so, the decision, unlike any other decision before it, went a long way towards diminishing popular, but irrational, moral condemnation of stigmatized groups. The mass publicity and fanfare that heralded the decision presented a rare opportunity for activists to reshape public opinion and influence a wide social debate about gay rights. This was especially important as homosexuals and other disaffected groups cannot only rely on courts to advance their civil rights agenda, but also at some stage need general societal

CHAPTER 4:

BACK TO THE DARK AGES: THE SUPREME COURT DECISION IN KOUSHAL V NAZ.

“If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations... Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the ‘spirit behind the Resolution’ of which Nehru spoke so passionately.”¹⁷

The Supreme Court in the case of *Suresh Kumar Koushal and Another v Naz Foundation and others*¹⁸ held that the aforementioned paragraph is constitutionally untenable. In the days that have elapsed since the judgment, it has already gone down in public discourse as one of the Court’s most reviled decisions.

On a close reading, the judgment is based on a narrow and blindfolded interpretation of the law, ignoring the momentous changes in society and notions of morality that India is witnessing. Further, the judgment, in many parts, relies on shaky precedent, does not explain the logic of its conclusions, and is surprisingly dismissive of substantial evidence that was placed before it. In this chapter, I will attempt to throw light on the reasons given by the Court (or a lack thereof) for arriving at its conclusions.

¹⁷ Naz Foundation v Government of NCT and Ors, 160 (2009) DLT 277 at Paragraph 131.

¹⁸ (2014) 1 SCC 1.

A. JUDICIAL DEFERENCE AND THE PRESUMPTION OF CONSTITUTIONALITY

The Supreme Court in its decision has proceeded on the basis that there exists a presumption of constitutionality in case of Section 377, IPC. At Paragraph 26 of the Judgment, the Court holds: “*However, keeping in mind the importance of separation of powers and out of a sense of deference to the value of democracy that parliamentary acts embody, self-restraint has been exercised by the judiciary when dealing with challenges to the constitutionality of laws. This form of restraint has manifested itself in the principle of presumption of constitutionality.*”

It is the respectful opinion of the writers, that this observation is unsustainable in law. Section 377 was held to be unconstitutional by the Delhi High Court, a Constitutional court, which read down the law to the extent of its unconstitutionality, in its originating jurisdiction. Further, that the Union of India did not appeal the High Court decision and submitted before the Supreme Court that it found “no legal error” in the High Court judgment, bolstering the position that no presumption of validity was attached to Section 377 before the Supreme Court.

It is also pertinent to note that the Court’s finding regarding the presumption of Constitutionality is in conflict with previous decisions of the court delivered in: *Deena alias Deen Dayal v. Union of India*¹⁹ (bench comprising three judges) and *Bachan Singh v. State of Punjab*²⁰ (bench comprising five judges), which held that where a law is challenged under

¹⁹ 1984 SCR (1) 1.

²⁰ AIR 1980 SC 898.

Article 21 and there appears to be a violation of the right to life and personal liberty of a person, there is no presumption of constitutionality, and the burden is on the State to establish the constitutional validity of the law.

What surprises even more, is the Court's invocation of the Doctrine of Separation of Powers, in order to side step its duty as "sentinel on the *quivive*."²¹ It is now well established that when the legislature has not acted, it becomes the prerogative of the courts to step in. The Indian judiciary has a long history of judicial activism and has been touted as a role model for stepping into the legislative domain when the legislature has not acted to protect the rights of vulnerable communities.

Several critics have argued that the Court's sudden zeal for judicial restraint and legislative deference seems misplaced, and even hypocritical. It is pertinent to note that, Justice Singhvi, displayed no such restraint in his "*Red Lights-on-Cars*" judgment²², which he rendered barely 48 hours before *Koushal*. In that judgment, Singhvi issued sweeping orders to regulate the abuse of red lights on government cars. The critics also point to several other Singhvi judgments where he had no qualms in overturning government regulations and policies without showing any modicum of judicial restraint.

Why this sudden reliance on judicial restraint, is a question that has found no answers so far.

²¹ State of Madras v VG Row, 1952 SCR 597 : A Constitutional Bench of the Supreme Court acknowledged the "weight of legislative judgment", but held that having been assigned the role of sentinel on the *qui vive*, it had the power to hold a legislative enactment as violative of the Constitution.

²² *Abhay Singh v State of Uttar Pradesh and ors.*, AIR 2014 SC 427.

B. VIOLATION OF FUNDAMENTAL RIGHTS UNDER ARTICLE 21

Perhaps the most criticized portion of the Judgment is the one that deals with Article 21 and the rights it guarantees.

i. Right to Privacy

The Judges at Paragraph cites *Maneka Gandhi*²³ acknowledging that the U.S. Supreme Court standard of substantive due process has been read into the Indian Constitution and that this is governed by principles of legitimate state interest and proportionality. The Court talks of the privacy-liberty-dignity link, and refers to *Kharak Singh*²⁴ and *Gobind*²⁵, two important cases on the right to privacy, that hold in no unclear terms that the right to privacy is a facet of the right to life and that only compelling state interest can be a justification for its violation. However, there is nothing that in the judgement that shows the presence of compelling state interest which may override Art. 21 in the present case. Instead, the Court cites Para 46 of *Kharak Singh* and Para 47 of *Gobind* as if it is self-evident why privacy and liberty arguments do not apply here. This, as pointed out by a commentator, “*is not a case of bad constitutional law, it is a case of no constitutional law.*”

ii. THE RIGHT TO BODILY INTEGRITY AND SEXUAL CHOICE

The Court again relies on a rights-enhancing judgment to restrict rights. This time it cites *Suchita Srivastava*²⁶, where the Supreme Court had held that women have

²³ 1978 SCR (2) 621.

²⁴ *Kharak Singh v State of Uttar Pradesh*, 1964 SCR (1) 332.

²⁵ *Gobind v State of Madhya Pradesh*, 1975 SCR (3) 946.

²⁶ *Suchita Srivastava and Anr. v Chandigarh Administration*, AIR 2010 SC 235.

the right to dignity, privacy and bodily integrity, the right to contraception and the right to refuse to participate in sexual activity. The Court (presumably, since it does not bother to clarify) instead on focusing on these rights, refers to the fact that these rights were held subject to the provisions of the Medical Termination of Pregnancy Act.

The Court goes on to cite *Mr X v Hospital Y*²⁷, a case that involved a doctor disclosing HIV positive status of a patient to his fiancé. Relying on this case, the Court has observed *“Disclosure of even true private facts has the tendency to disturb a person’s tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter have a disturbed life all through. In the face of these potentialities, as as already held by this Court, in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedoms of others.”*

One would reasonably assume at this stage, that the Court would proceed to tie up the loose ends, and explain how Section 377 is essential for meeting any of the goals listed out above. The Court fails to address this issue once again, and proceeds to answer different question of law all together.

C. ARGUMENTS WITH REGARD TO ARTICLE 14 (RIGHT TO EQUALITY) AND ARTICLE 15 (NON – DISCRIMINATION)

²⁷ AIR 1999 SC 495.

It is now an established principle of law that under Article 14, differential treatment is sustainable only if it satisfies the following two tests, namely that: i) the classification must be based on an intelligible differentia, and ii) that differentia must have a rational nexus with the object of the legislation.²⁸ The Supreme Court at Paragraph 42²⁹ of its judgment has upheld the classification between carnal intercourse in the ordinary course of nature and carnal intercourse against the order of nature without considering the second test, i.e., whether there is a rational nexus with the object of legislation.

In this respect, the High Court had given detailed reasoning on the purported object of Section 377, i.e., protection of public health and protection of public morality and had categorically rejected the stated objects by terming them as unreasonable and arbitrary, as evident in para 91-93 of the High Court decision. The Supreme consider those submissions, let alone coming to contrary findings from the High Court on the purported object of Section 377.

Further, as held in *Kartar Singh v. State of Punjab*³⁰ it is now trite law that a penal law can be declared void for vagueness under Article 14 if its prohibitions are not clear. The Respondents before the Supreme Court had argued that Section 377 is vague and arbitrary, since there is no definition of carnal intercourse against the order of nature. Starting from excluding oral sex, Section 377 was later held to cover both penile sex and oral sex, mutual masturbation, penetration into artificial orifices like thighs, amongst others by judicial interpretation. The tests to

²⁸ *State of West Bengal v Anwar Ali Sarkar*, 1952 SCR 284.

²⁹ *Suresh Kumar Koushal*, Supra at Paragraph 42.

³⁰ (1994) 3 SCC 569.

determine acts covered under Section 377 also broadened, beginning from non-procreative test to imitative/sexual perversity test.

In effect, there was no clarity on which sexual acts are prohibited under the law. This contention was not even considered by the Supreme Court, though the Court itself has recorded that no uniform tests can be culled to classify acts that would be covered under carnal intercourse against the order of nature in para 38 of its impugned judgment.

While addressing the issue with regard to vagueness, the Court in its decision simply cites para 47 of *K.A. Abbas*³¹ (reproduced below) without bothering to link this passage to the facts in the case:

The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases.

³¹ 1971 SCR (2) 446.

A reasonable application of the above passage would be that section 377 is susceptible to a constitutional challenge because of the ‘boundless sea of uncertainty’ it creates and the fact that prima facie it does take away a guaranteed freedom.

The Petitioners before the High Court had argued that Section 377 violates Article 15, since sexual orientation is a ground analogous to sex, therefore discrimination on the basis of sexual orientation is not permitted by Article 15. The idea behind prohibiting sex discrimination is to proscribe sex stereotyping, i.e., the stereotypical gender roles attributed to men and women, including that women would form sexual relationships with men and vice-versa. This was upheld by the High Court in para 104 of the High Court judgment. This contention was not considered by the Supreme Court and simply rejected in limine.

D. NON-RELIANCE ON FOREIGN PRECEDENT

In a highly insular move, the Court criticizes the Delhi High Court’s reliance on foreign precedent to read down Section 377. The Court at Paragraph 77 has observed :

“In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied

blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.”³²

Here the court refers to *Jagmohan v State of U.P.*³³ where the Supreme Court during the course of hearings on the challenge to capital punishment rejected references to the U.S. case law, saying that Western experience cannot be transplanted in India. It also refers to *Surendra Pal v Saraswati Arora*³⁴ where the lawyer relied on the English doctrine of presumption of undue influence in a case where parties were engaged to be married- court’s logic here was that family law has undergone a drastic change in England, while in India it is still largely an arranged affair- social norms and considerations are different. The implication here (again not stated clearly) is that Indian social conditions and morality differ from the west and so Western judgments cannot be used as a point of comparison. This completely ignores the commonalities of LGBT experience and state morality when it comes to this issue, or the transnational history of this laws.

The writers submits, that here the court committed a patent mistake of law in holding that the judgments from other jurisdictions were applied in a blindfolded manner by the High Court in deciding the constitutionality of Section 377. It is well-settled that international jurisprudence can be used to interpret and expand fundamental rights.

³² *Suresh Kumar Koushal*, Supra at Paragraph 37.

³³ (1973) 1 SCC 20.

³⁴ 1975 SCR (1) 687.

The Supreme Court has, in fact, failed to appreciate the fact that initial jurisprudence on right to privacy and dignity under Article 21 has developed from the cases from United States like *Munn v. Illinois*³⁵, *Griswold v. State of Connecticut*³⁶, and *Roe v. Wade*³⁷.

The Court has also failed to consider that international human rights law is not only applicable in India, in view of the ratification of the International Covenant on Civil and Political Rights (hereinafter ICCPR)³⁸ and International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR)³⁹ by India but that ICCPR and ICESCR are now directly applicable as law by virtue of the Protection of Human Rights Act, 1993.⁴⁰

It is further submitted that the Court has further erred in relying upon *Jagmohan v. State of Uttar Pradesh*, which was the first case of constitutional challenge to imposition of death penalty for murder under Section 302, IPC and did not lay down any law on the use of international law principles in domestic jurisprudence. The relevant excerpts from *Jagmohan* cited by the Court only refer to transplantation of western experience, in terms of western studies on the issue of appropriateness of death penalty, when the Constitution of India itself provides for death penalty, into the Indian context. The present case of Section 377 did not seek any transplantation of western experience into India but challenged the law on the basis of violation of fundamental rights and the reliance on judgments from other jurisdictions was on concepts like dignity, which are already incorporated in Article 21 and which have been developed in other jurisdictions.

³⁵ (1877) 94 US 113.

³⁶ (1965) 381 US 479.

³⁷ (1973) 410 US 113.

³⁸ International Covenant on Civil and Political Rights, December 16, 1966, 999 UNTS 171.

³⁹ International Covenant on Economic, Social & Cultural Rights, December 16, 1966, 993 UNTS 3.

⁴⁰ Section 2, Protection of Human Rights Act, 1993.

E. THE RIGHTS OF A MINISCULE MINORITY

The Supreme Court at Paragraph 43 of the Judgment has held that “*since the LGBT persons constitute a miniscule fraction of the country’s population and only 200 persons have been prosecuted under Section 377 in the last 150 years, it cannot be made a sound basis to declare Section 377 ultra vires of Articles 15, 14 and 21.*”⁴¹

This declaration by the Court is as laughable as it is untenable in law. It is an established position in law that the protection of fundamental rights is not subject to numerical calculations. Even if one person’s fundamental rights are adversely affected by a law, such a law is liable to be struck down. It is duty of the Supreme Court to uphold the fundamental rights of each and every person in India. In a constitutional democratic country like India, where legislators are motivated more by the majority electoral considerations than by principles of justice and fairness, the Hon’ble Court remains the most important institution for the protection and preservation of fundamental rights of the minority communities. This is the very essence of the separation of powers wherein the duty of the Superior Court in a constitutional democracy is mandated with a duty to always protect the fundamental rights of the minorities. It would be doing violence to the Constitutional mandate of the Court fails in its duty of protecting the fundamental rights of the persons from the minority community, including the LGBT community.

⁴¹ *Suresh Kumar Kousal*, supra at Paragraph 43.

CONCLUSION : PICKING UP THE PIECES

It is important to understand precisely what the Supreme Court has held – and not held – in *Koushal v Naz Foundation*. The Supreme Court states that it has reversed the High Court's judgment reading down S. 377 to exclude consensual same-sex intercourse. Yet as even a cursory reading of both judgments reveals, the Supreme Court simply hasn't engaged with a number of critical arguments made by Justice Shah in the High Court, which were the foundations of the decision. Therefore, some careful analysis is required to understand what the position of law is after *Koushal*, what parts of the High Court's analysis stand, and which do not.

At the heart of the difference between the judgments of the Supreme Court and the Delhi High Court, is the face of the judiciary that the two courts in question displayed – the first was a court that showed both legal acumen and empathy in invoking its counter-majoritarian role to protect the rights of persons facing prejudice and discrimination, the second was a self-avowed activist court that decided that it did not need to exercise its power to protect the rights of a 'miniscule fraction'. What accounts for this difference?

From the material discussed above, it appears that it had nothing to do with the quality and breadth of the evidentiary material placed before it. The difference lies in something much deeper – an inability (some would say refusal) to step outside of a milieu of 'traditional' social values, and to appreciate the seriousness of the claims being made before it.

Koushal, in this way, stands in stark contrast to *Naz*. Even though both judgments were given by appellate courts and by two judge benches in a small span of four and a half years, they appear to be from parallel worlds. *Koushal* will be remembered for its use of the insensitive language of 'so called LGBT rights' and 'miniscule fraction'. *Naz*, on the other hand, will be

remembered for its path-breaking use of the language of constitutional morality, inclusiveness, autonomy, dignity and self-determination. While Koushal is the law today, it is the spirit of Naz that will stand the test of time.