IN THE HON'BLE SUPREME COURT OF INDIA

W.P. (Crl.) No. 76 of 2016

In the matter of:

NAVTEJ SINGH JOHAR & ORS. **… PETITIONERS**

versus

UNION OF INDIA **… RESPONDENT**

Compilation of Written Submissions filed in support of the Writ Petitions

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NEW DELHI
DATED 20.07.2018

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1. INTRODUCTION

1.1 All males, as a class and all females, as a class do not have the same sexual orientation i.e. being attracted to the opposite sex. Such individuals are called gay men / lesbian women / bisexual persons. Such orientation is not acquired by way of choice and is genetic. Typically a person becomes aware of such orientation at adolescence. Sexual orientation is immutable and not a medical condition to be "cured". Such individuals live with this orientation and they do not consider the same to be either wrong, unnatural or against the "laws of nature" / "order of nature" because it is nature which has given them this orientation. Reference may be made to para 22 of the *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 ["*NALSA*"].

1.2 Heterosexuality, homosexuality, bisexuality and other sexual orientations are all equally natural, healthy, and normal. In the 2011 census, 490,000 people identified their gender as 'other', or about 0.04% of India's population. However, this figure is suspected to be underreported as people fear revealing a stigmatized status to the government. Studies of male college students and young men living in slums show that 7 to 8 percent of young men reported having had male sexual partners. As per a 2014 World Bank report, there is no data about women who identify as lesbian or bisexual or who have sex with women. The World Bank report suggests that these figures overlap with the range seen in other countries. Further, while some people identify themselves as LGBT, a far greater number report same-sex sexual behaviour. (M.V. Lee Badgett, "The Economic Cost of

Stigma and the Exclusion of LGBT People: A Case Study of India" (October 2014), page 18). Based on international research, it has been estimated that the LGBTQ community constitutes as much as 2 to 13 per cent of the national population. ("Gay count varies from 2% to 13% of population", THE TIMES OF INDIA (03.07.2009), https://timesofindia.indiatimes.com/india/Gay-count-varies-from-2-to-13-of-population/articleshow/4731097.cms?.) These estimates suggest that LGBT persons form 7-8% of the general population of India. To get a sense of what these figures mean, this is about half the size of the Muslim community in India and more than the population of other religious minorities combined, as per the 2011 Census.

1.3 Sexual minorities need protection, more so than those having the more common orientation (heterosexual), to achieve their full potential, to live freely, without fear, apprehension or trepidation and not be discriminated against by society, openly or insidiously, or by the State in its multifarious avatars in the matter of employment, choice of partner, testamentary rights, insurability, medical treatment in hospitals or the like, rights arising from live-in relationships.

1.4 The instant batch of cases relates not only to striking down Section 377 of the Indian Penal Code ["IPC"], but also to the recognition by the court of the full panoply of rights, described in brief above.

In *Navtej Singh Johar & Ors. v. Union of India,* W.P. (Crl.) No. 76/2016, the Petitioners prayed for:

> A. Writ of mandamus declaring the "Right to Sexuality," "Right to Sexual Autonomy" and the "Right to Choice of a Sexual Partner" to be part of the Right to Life guaranteed under Article 21 of the Constitution of India; and
> B. Writ of mandamus declaring Section 377 of the Indian Penal Code, 1860 to be unconstitutional; and/or
> C. Writ of mandamus declaring that Section 377 IPC does not apply to consensual sexual acts of adults in private; and/or
> D. And pass any other order this honorable court may deem fit and unnecessary in the interests of justice.

In *Keshav Suri v. Union of India,* W.P. (Crl.) No. 88/2018 the Petitioner prayed for:

> A. Writ of mandamus declaring the 'Right to Choice of Sexual Orientation' encompasses the Right to Life with Dignity and Right to Privacy and is thus part of the fundamental rights enshrined in Article 21 of the Constitution of India and that any discrimination of any person on the basis of exercising the Right of Choice of Sexual Orientation is violative of Article 21 of the Constitution of India; and;
> B. Writ of mandamus reading down and/striking down Section 377 of the Indian Penal Code as being inapplicable to any intercourse between consenting adults of the same gender; and/or
> C. Pass any other order this Hon'ble Court may deem fit and necessary in the interests of justice.

In *Anwesh Pokkuluri & Ors. v. Union of India*, W.P. (Crl.) 121/2018, the Petitioners prayed for:

> A. Declare that the Petitioners are entitled to equality before the law and equal protection of law, without discrimination on the basis of their sexual orientation, under Articles 14, 15 and 16 of the Constitution of India;
> B. Declare that Section 377 of the Indian Penal Code, 1860 to the extent it penalizes consensual sexual relations between adults, is violative of Articles 14, 15, 16, 19 and 21 of the Constitution of India;
> C. Issue an appropriate writ, order or injunction prohibiting the Respondent arraigned herein by itself, or through its officers, agents and/or servants from in any manner enforcing the law under Section 377 of the Indian Penal Code, 1860 in relation to consensual, sexual conduct between adults;
> D. Grant costs for the present Petition;

E. Pass such further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the instant case in the interest of justice.

1.5 The instant batch of cases relate to a group of individuals, commonly referred to as 'LGBT'. While there is already a declaration as to the rights of transgenders by the *NALSA*, yet, in view of the existence of Section 377 of the IPC, their sexual activities would also be an offence. It may be stated that in *NALSA*, transgenders have been recognized as a third gender, apart from male and female and given certain rights. It is submitted that the same rights inhere in the 'LGB' community also and Section 377 ought to be struck down/ read down qua LGBT as a whole so as to confine Section 377 only to the offence of bestiality and non-consensual sex (because the Protection of Children from Sexual Offences Act, 2012 (POCSO) is already on the statute books in so far as children and minors are concerned).

1.6 It is a matter of common knowledge, apart from what is stated in the *NALSA*, in *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*, (2017) 10 SCC 1 ["*Puttaswamy*"], and in *Naz Foundation v. Government of NCT of Delhi*, 2009 (111) DRJ 1 (Delhi High Court) that individuals belonging to this group suffer discrimination – open, insidious and invidious – throughout their lives, whether it be in school, college, employment (under the State or in private quarters) and even within their family. This is principally because of the existence of Section 377 on the statute books for more than 150 years, which is a remnant of Victorian

morality introduced in India by Macaulay. Seen closely, Section 377 seems to refer to a mindset of societal values of that era, where sexual activities were considered relevant mainly for procreation.

1.7 The *Puttaswamy* judgment, popularly called the privacy judgment, is a nine-judge bench decision. Chandrachud, J., speaking for himself and three other learned judges, refers to *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, of this Hon'ble Court as erroneous (in paras 144-146). Kaul, J., relying on Nariman, J.'s decision, arrives at the same conclusion (para 647). There is no contrary view in this regard in the decision of the nine-judge bench. Thus, it would be deemed to be nine-judge bench verdict in so far as the view in *Koushal* has been termed erroneous.

1.8 It is submitted that the phrase "order of nature" is not sanctioned by the Constitution of India. As submitted above, such sexual orientation is also a product of nature, being a genetic or in-born trait.

1.9 A significant feature of this case is that Section 377 is a pre-constitutional law. Nevertheless, it has been retained post the Constitution coming into effect, by virtue of Article 372 of the Constitution. However, it ought to be noted that the presumption of constitutionality is merely an evidentiary burden, initially on a person seeking to challenge the vires of a statute. Once any violation of a fundamental right or suspect classification is *prima facie* shown, as in this case, such presumption has no role.

1.10 The submissions of the Petitioners are as under:

2. SEXUAL ORIENTATION IS AN INNATE FACET OF INDIVIDUAL IDENTITY

2.1 Sexual orientation is an innate facet of individual identity, for heterosexuals and LGBT persons alike. In *Puttaswamy*, this Hon'ble Court held that "sexual orientation is an essential component of identity" (para 145). In *NALSA*, this Hon'ble Court held that:

> "Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual, etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom…"
>
> (Para 22).

2.2 The impact of sexual orientation on individual's life is not limited to their intimate lives, but impacts their family, professional, educational, social and political life. The Constitutional Court of South Africa recognized this in *National Coalition for Gay and Lesbian Equality* v *Minister of Justice*, 1998 (12) BCLR 1517 (CC) [as cited in In *Naz Foundation* v. *Government of NCT of Delhi*, 2009 (111) DRJ 1, para 47]:

> "While recognizing the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or

> arrange the choice of partner, but for the partners to choose themselves."

2.3 It is now established that neither homosexuality nor bisexuality are a mental or physical illness. Rather they are natural variations of the human condition. Hence, there are not "against the order of nature". The Indian Psychiatric Society, in its statement dated July 2, 2018, also recognized that "there is no scientific evidence that sexual orientation can be altered by any treatment and that any such attempts may in fact lead to low self-esteem and stigmatization of the person."

3. SECTION 377 VIOLATES ARTICLE 21 OF THE CONSTITUTION

3.1 The right to life protects both gender identity and sexual orientation

3.1.1 Article 21 protects sexual orientation on the same footing as it does gender identity.

3.1.2 *NALSA* specifically held that "discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws" (para 83)

3.1.3 *NALSA* held that the prohibition against discrimination on the ground of 'sex' under Articles 15 and 16 includes discrimination on the grounds of gender identity (para 66, 82).

3.1.4 The Court further held that "values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the trans community under Article

19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights" (para 72)

3.1.5 *NALSA* held the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity are consistent with the fundamental rights guaranteed under the Constitution (para 60). The Yogyakarta Principles recognize the right to universal enjoyment of human rights, the rights to equality and non-discrimination (irrespective of sexual orientation and gender identity), the right to recognition before the law, the right to life, the right to privacy, the right to treatment with humanity while in detention, the right to protection from medical abuses, and the right to freedom of opinion and expression.

3.1.6 The protections against gender identity discrimination and the positive rights of transgender persons protected under Article 21 should apply with equal force to sexual minorities. Sexual minorities and gender non-conforming persons stand on the same footing and deserve equal constitutional protections, as recognized by this Hon'ble Court in *NALSA* (para 83).

3.2 <u>Sexual orientation is protected under the right to privacy</u>

3.2.1 Sexual orientation is an aspect of the right to privacy. The constitutional right to privacy protects not only spatial privacy (including intimate spaces like bedrooms and bathrooms) but also decisional and informational privacy. The right to sexual autonomy and choice of sexual partner also stems from the right

to privacy. Section 377 IPC ought to be struck down as violative of the right to privacy.

3.2.2 *Puttaswamy* recognized that "sexual orientation is an essential attribute of privacy" (para 144) and is protected by the right to privacy. This Hon'ble Court has held that "[n]atural rights…inhere in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation." (para 46)

3.2.3 Further, this Court held that *Koushal* struck a "discordant note" with the right to privacy (para 145). *Koushal* had reasoned that a "miniscule fraction" of the country's population had been prosecuted under Section 377 in the last 150 years and hence prosecutions were not a sound basis to declare Section 377 ultra vires Articles 14, 15 and 21. Further, the *Koushal* Court held that the High Court had wrongly relied upon international jurisprudence "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." (*Koushal,* para 77).

3.2.4 In *Puttaswamy,* four judges of this Hon'ble Court, speaking through Chandrachud, J., held that:

> "The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reasons that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the Rule of Law,

their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation life at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.' (para 144)

…

The view in Koushal that the High Court had erroneously relief upon international precedents 'in its anxiety to protect the so-called rights of LGBT persons' is similarly, in our view, unsustainable. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be 'so-called rights'. Their rights are not 'so-called' but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.' (para 145)

…

'The decision in *Koushal* presents a *de minimis* rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The *de minimis* hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfillment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the *Koushal* rationale that prosecution of a few is not an index of violation is flawed and hence cannot be accepted. Consequently, we disagree with the manner in which *Koushal* has dealt with the privacy-dignity based claims of LGBT persons on this aspect." (para 146)

3.2.5 In his concurring opinion, Kaul, J. held that the right to privacy cannot be denied even if a miniscule fraction of the population is affected:

> "The majoritarian concept does not apply to constitutional rights and courts are often called upon to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy." (para 647)

3.2.6 Therefore, a majority of 5 of the 9 judges in *Puttaswamy* found sexual orientation to be a protected aspect of the right to privacy. Nariman, J. also found that the Constitution protects the "privacy of choice". Hence, the right to sexual autonomy and choice of partner are protected by the right to privacy. Privacy protects LGBT persons' right to make intimate decisions, including the choice of partner. It protects against state intrusion in intimate spaces, whether those spaces are private or public. It creates a protected zone for the development of the human personality, including the ability to receive and disseminate information about sex, sexuality, and health care; and a safe space to form personal and professional associations. By contrast, Section 377 defeats these constitutional protections and should be struck down as violative of the right to privacy.

3.2.7 Hence, after *Puttaswamy*, Section 377 is evidently constitutionally unsustainable. It may be noted that in *Puttaswamy,* this Hon'ble Court only refrained from striking down Section 377 "since the challenge to Section 377 [was] pending consideration before a larger Bench of this Court" (para 147).

Right to privacy also protects the exercise of choice in the public sphere

3.2.8 *Puttaswamy* also acknowledged that the right to privacy is not limited to private spaces. This Hon'ble Court (through Bobde, J.) held that the right to privacy protects citizens in the public sphere as well:

> "Every individual is entitled to perform his actions in private. In other words, she is entitled to be in a state of repose and to work without being disturbed, or otherwise observed or spied upon. The entitlement to such a condition is not confined only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he is, even in a public place. Privacy has a deep affinity with seclusion (of our physical persons and things) as well as such ideas as repose, solitude, confidentiality, and secrecy (in our communications), and intimacy. But this is not to suggest that solitude is essential to privacy. It is in this sense of an individual's liberty to do things privately that a group of individuals, however large, is entitled to seclude itself from others and be private." (para 403)

3.2.9 Man is a social animal, and life is lived in the public domain as much as it is in the home. School, family, friends, political and professional life are all domains which come together to create the full human experience.

3.2.10 While the right to privacy can protect LGBT persons against unwanted disclosure of their sexual orientation, in the present case, the Petitioners "seek not a right to be left alone but the right to be acknowledged as equals and embraced with dignity by the law." [*Puttaswamy*, para 201 citing the Constitutional Court of South Africa's decision in *Minister of Home Affairs* v *Fourie* (2006) 1 SA 524 (CC)].

3.2.11 In the public sphere, Article 21 protects the "privacy of choice" [Nariman, J., para 521]. Towards this end, the "privacy of choice"

gives LGBT persons a private domain in which to make decisions as to how they will engage the public sphere including as to how, when and where their LGBT identities.

3.3 <u>Sexual orientation is protected under the right to dignity</u>

3.3.1 Section 377 violates the constitutionally protected right to dignity and personal autonomy. The right to dignity is emphasized in the Preamble itself. In *Prem Shankar Shukla* v. *Delhi Administration*, (1980) 3 SCC 526, this Hon'ble Court held that "[t]he Preamble sets the humane tone and temper of the Founding Document and highlights justice, equality and dignity of the individual" (para 21).

3.3.2 As held by this Hon'ble Court in *Bandhua Mukti Morcha* v. *Union of India,* (1984) 3 SCC 161, the right to live with dignity is founded on the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 (para 10).

3.3.3 The right to live with human dignity is a part of the right to life. This Hon'ble Court held in *Jeeja Ghosh* v *Union of India*, (2016) 7 SCC 761, that 'the right to life is also given a purposive meaning by the right to dignity…human dignity is a constitutional value and a constitutional goal.'

3.3.4 In *Puttaswamy*, this Hon'ble Court held that:

> "Over the last four decades, our constitutional jurisprudence has recognized the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The Constitutional vision seeks the realization of justice (social economic and political); liberty (of thought, expression, belief, faith

> and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a human and compassionate society. The individual is the focal point of the Constitution because it is in the realization of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections on dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).
>
> (para 108)
>
> …
> Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how live should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. 'Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.' (para 118)

3.3.5 This Hon'ble Court has recognized the expression of gender identity to be a facet of the right to live with dignity. In *NALSA,* this Hon'ble Court held:

> "The recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution."
>
> (para 75)
>
> …
> "The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set-up…If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspects of self-determination, dignity and freedom. In fact, there is a growing recognition that the

> true measure of development of a nation is not economic growth; it is human dignity."
>
> (para 106)

3.3.6 Sexual orientation stands on the same footing as gender identity. Like gender identity, sexual orientation also constitutes "the core of one's sense of being as well as an integral part of a person's identity," and is "integral to [an individual's] personality and is one of the most basic aspects of self-determination, dignity and freedom". A person's choice of partner and of sexual orientation should receive the same degree of protection as this Hon'ble Court has accorded to choice of gender identity.

3.3.7 Further, this Hon'ble Court has held that a life with dignity goes beyond mere animal existence to include expression of the human self. In *Francis Coralie Mullin* v *Administrator, UT of Delhi,* (1981) 1 SCC 608 this Hon'ble Court counted "facilities for expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings" amongst the "bare necessaries of life". The right to dignity includes "the right to carry on such functions and activities as constitute the bare minimum of expression of the human self." (para 10)

3.3.8 Recently, in *Common Cause v. Union of India,* (2018) 5 SCC 1, this Hon'ble Court (through Dipak Misra, C.J.) held that:

> "[the] right to life and liberty as envisaged under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity. With the passage of time, this Court has expanded the spectrum of Article 21 to include within it the right to live with dignity as component of right to life and liberty." (para 202.9)

3.3.9 For LGBT persons, the fear of criminalization and stigma can taint all their human interactions. Dignity is not an abstract

concept: these values shape our daily lives. A life with dignity includes the ability to be open with friends, family, colleagues and employees about this core part of one's personality. For LGBT people, their families themselves may not accept them, and the home may be a place of violence. Problems are compounded when seeking police intervention or protection carries the risk of criminalization and state violence. In their professional lives, LGBT persons are held back from reaching their full potential academically and professionally when institutions discriminate against them or do not provide psychological and other support. LGBT persons who are also gender non-conforming may suffer discrimination, and violence on this count as well; moreover, Section 377 gives institutions an excuse not to maintain the safeguards against exploitation, sexual harassment or discrimination that they maintain for non-LGBT persons.

3.3.10 The stigma that attaches to LGBT persons because of Section 377 undermines and destabilizes their intimate relationships. A deep and pervasive indignity attaches to intimate relationships when they are lived in the shadow of criminality. Further, LGBT persons are forced to create private infrastructure to substitute the legal protections that other couples enjoy; for example, making wills because they do not inherit from each other under law, taking out life and medical insurance as individuals instead of as families, not having protection against domestic violence, etc. In *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755, this Hon'ble Court has held that the Protection of Women from

Domestic Violence Act, 2005 would apply to opposite-sex live-in relationships, but not to same-sex relationships:

> (e) Domestic relationship between same sex partners (gay and lesbians).—The DV Act does not recognise such a relationship and that relationship cannot be termed as a relationship in the nature of marriage under the Act. The legislatures in some countries, like the Interpretation Act, 1984 (Western Australia), the Interpretation Act, 1999 (New Zealand), the Domestic Violence Act, 1998 (South Africa), the Domestic Violence, Crime and Victims Act, 2004 (UK), have recognised the relationship between the same sex couples and have brought these relationships into the definition of domestic relationship.
>
> (para 38.5)
>
> …
> Section 2(f) of the DV Act though uses the expression "two persons", the expression "aggrieved person" under Section 2(a) takes in only "woman", hence, the Act does not recognise the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or conduct of any of the parties, would not lead to domestic violence, entitling any relief under the DV Act.
>
> (para 39)

3.3.11 The legal stigma that attaches to their intimate lives holds LGBT persons back from achieving their full potential in the professional and public sphere. LGBT persons' sexual autonomy and choice of partner should be protected by the right to live with dignity.

3.4 LGBT persons enjoy the right to choice of partner

3.4.1 This Hon'ble Court has recognized that the right to choice of partner is part of the right to life. The Petitioners are praying that these well-established rights be extended to sexual minorities and gender non-conforming persons.

3.4.2 This Hon'ble Court has held that the right to choose one's partner is a fundamental right protected under Articles 19 and 21 of the

Constitution. The Petitioners submit that this right to choose a partner extends to LGBT persons as well.

3.4.3 In *Shakti Vahini* v *Union of India,* this Hon'ble Court (through Dipak Misra, C.J.) recognized that an individual's exercise of choice in choosing their partner is a feature of dignity:

> "The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the Constitutional Courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionally valid provisions of law, the life of a person is comparable to the living dead having to endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person." (para 45)
>
> …
>
> "The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation…" (para 46)

3.4.4 In their majority opinion in *Shafin Jahan* v. *Asokan K.M. & Ors.*, 2018 SCC OnLine SC 343, Dipak Misra, C.J. and Khanwilkar, J. held that the expression of choice is a fundamental right under Article 19 and 21 of the Constitution:

> "…when the liberty of a person is illegally smothered and strangulated and his/her choice is throttled by the State or a private person, the signature of life melts and living becomes base subsistence. This is fundamentally an expression of acrimony which gives indecent burial to the individuality of a person and refuses to recognize the other's identity. (para 1)
>
> …
>
> "What is seminal is to remember that the song of liberty is sung with sincerity and the choice of an individual is appositely respected and conferred its esteemed status as the Constitution guarantees. It is so as the expression of choice is a fundamental right under Articles 19 and 21 of the Constitution, if the said choice does not transgress any valid legal framework. Once that aspect is clear, the enquiry and determination have come to an end."
>
> (para 28)
>
> …
>
> "It is obligatory to state here that expression of choice in accordance with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible."
>
> (para 54)

3.4.5 Chandrachud, J. in his concurring opinion in *Shafin Jahan*, held that:

> "The Constitution guarantees the right to life. The right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness…Matters of dress and food, of ideas and ideologies, of love and partnership are within the central aspects of

> identity…Society has no role to play in determining our choice of partners…The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage." (para 90)
> …
> "The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage." (para 93)

3.4.6 This Hon'ble Court has followed *Shafin Jahan* in the recent case of *Nandakumar* v *State of Kerala,* 2018 SCC OnLine SC 492, wherein it recognized that the right of two adults to live together even if they have not attained the marriageable age is a facet of the right to choose a partner.

3.4.7 *Shafin Jahan* and *Shakti Vahini* are the latest in a long line of constitutional cases where this Hon'ble Court has protected the individual's right to choose their partner. In *Lata Singh* v *State of UP,* (2006) 5 SCC 475, this Hon'ble Court has protected a person's right to choose a partner from a different caste or religion against the wishes of their family. Instead, the police have been directed to come to the assistance of such persons. Subsequent to *Lata Singh,* this Hon'ble Court has developed a rich jurisprudence protecting persons who exercise their choice from interference by either the state or private persons: *Ashok Kumar Todi* v. *Kishwar Jahan & Ors.,* (2011) 3 SCC 758; *Arumugam Servai* v *State of Tamil Nadu*', (2011) 6 SCC 405; *Bhagwan Dass* v *State (NCT of Delhi),* (2011) 6 SCC 396; *Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23-01-2014, In Re*, (2014)

4 SCC 786 and *Vikas Yadav* v *State of Uttar Pradesh & Ors.,* (2016) 9 SCC 541. In all these cases, this Court has denigrated khap panchayats and the practice of "honour killings" as both being a violation of the legal process, and also for violating a citizen's right to choose their partner.

3.4.8 Social values cannot curb constitutionally guaranteed freedoms. Social norms change with changing times, and, in the words of this Hon'ble Court, "(s)ocial morality also changes from age to age. The law copes with life and accordingly change takes place." [*Navtej Singh Johar* v. *Union of India,* W.P. (Crl.) No. 76/2016, Order dated 08.01.2018]. In an earlier era, inter-caste or inter-religious marriage – or even dining – violated not only social mores but also personal law. Even marriage between persons from the same caste but from different regions or of the same gotra may have met with social disapproval. However, constitutional morality demands that the "action of a woman or a man in choosing a life partner according to her or his own choice beyond the community norms" cannot invite objection from society and is a constitutionally protected choice (*Shakti Vahini,* para 5). Further, this Hon'ble Court has protected people who defy social mores by entering into live-in relationships, finding that live-in relationships are not an offence and the criminal justice machinery cannot be activated against persons in such relationships.

3.4.9 The Petitioners submit that there is no difference between persons who defy social conventions to enter into an inter-religious or inter-caste alliance and those who choose a same-

sex partner. Society may disapprove of inter-caste or inter-religious unions. However, this Court enforces constitutional, not public, morality. LGBT persons cannot be penalized simply for choosing a same-sex partner. The constitutional guarantee of choice of partner extends to LGBT persons as well.

3.4.10 In fact, the State of Punjab has issued Memo No. 5/151/10-5H4/2732-80 in the Department of Home Affairs and Justice, whereby newly wedded couples who apprehend danger to life and liberty are to receive police protection for at least six weeks after marriage. It is submitted that LGBT persons who defy their families and social norms to assert their choice require such protections as well.

3.4.11 Further, NALSA has enabled transgender persons to access police protection against acts of harm and violence committed against them by family members. The same protections ought to be extended to lesbian, gay, and bisexual citizens as well. LGBT persons also face violence from their own families when they reveal their orientation and choose their partners. A 2003 survey conducted by the Tata Institute of Social Sciences, Mumbai on violence faced by lesbian women in India showed that women commonly faced physical, sexual and emotional violence upon disclosure of their sexual orientation. Lesbians reported being evicted from their homes, imprisoned or deprived of food, other necessities, and even property by their families. They reported being battered, having their hair pulled, being throttled, kicked, pushed, burned, cut, and bound. They were subject to taunts, verbal abuse, threats of abandonment and disclosure of sexual

identity, extortion, blackmail, allegations of mental illness and forcibly being taken to mental health professionals, isolation from their families, and their letters being opened and being prevented from communicating with family and friends. They also faced sexual violence within the family and, in some cases, within their marriages. For instance, the women reported forcibly being shown sexual images, sexual threats being made to them, being called derogatory names, unwanted sexual touching, and unwanted sex. [Bina Fernandez and Gomathy NB, The Nature of Violence Faced by Lesbian Women in India (Tata Institute of Social Sciences, 2003) Page 40 -43.]

3.4.12 Lesbian and bisexual women also suffer physical and mental violence when they choose their partners. One case from Bombay involved a lesbian woman called Anjana who had a long-term relationship with another woman, Vrinda. Anjana's father hit her with a stick when he came to know of her sexual orientation and relationship with Vrinda. She was locked in her home for 4½ months. Either her father or mother would remain at home all the time and a domestic help was employed to keep watch outside. All her correspondence was monitored without her knowledge and she was not allowed to speak on the phone. She was only allowed to have contact with a family friend who took advantage of her vulnerability and sexually harassed her. When a social worker intervened, a notice was sent to her father from the Special Cell. Her father had kept all her letters to Vrinda and handed them over to the police. The TISS Report notes that the police inspector was extremely rude to Vrinda and Anjana and,

encouraged by Anjana's father, referred to both of them in extremely derogatory terms. When she was finally allowed to leave, Anjana was forced to hand over even the jewelry she was wearing to her parents. [Bina Fernandez and Gomathy NB, The Nature of Violence Faced by Lesbian Women in India (Tata Institute of Social Sciences, 2003) Page 47-49.]

3.5 The Right to Reputation

3.5.1 Section 377 by creating a taint of criminality deprives LGBT persons of their good reputations. In *Vishwanath Agrawal* v *Sarla Vishwanath Agrawal*, this Hon'ble Court called reputation 'not only the salt of life, but also the purest treasure and the most precious perfume of life.' [(2012) 7 SCC 288 (para 55)]. In *D.F. Marion* v. *Minnie Davis*, 55 American LR 171, the United States Supreme Court held that:

> "The right to enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to enjoyment of life, liberty and property."

3.5.2 This Hon'ble Court has held the right to reputation to be a facet of the right to life of a citizen under Article 21 of the Constitution. In *Umesh Kumar* v *State of Andhra Pradesh*, this Hon'ble Court held that "a good reputation is an element of personal security and is protected by the Constitution…" [(2013) 10 SCC 591, para 18]. *Kishore Samrite* v *State of UP* also held that reputation to be "an element of personal security and protected by the

Constitution equally with the right to enjoyment of life, liberty and property." [(2013) 2 SCC 398, Para 58]

3.5.3 This could not be truer for LGBT people. The taint of criminality that attaches to LGBT persons because of Section 377 IPC makes them afraid to speak freely and openly about their sexual orientation. It leaves them vulnerable to extortion and blackmail, and unable to access state machineries for either protection or to enjoy the rights and amenities that other citizens take for granted. In Mumbai, three men ran an extortion racket where one would befriend a gay man. The other two would then barge into the victim's house, threatening him with proceedings under Section 377 if he did not cough up money. In another incident, a railway police officer demanded money from a gay man on a train. The report recorded that the victim had been approached because he appeared effeminate. There are also cases of police officers blackmailing sexual minorities just as they do opposite-sex couples in public places. [Bhavya Dore, How Section 377 is Being Exploited by the Police and Blackmailers to Extort Men, 3rd November 2015, http://www.caravanmagazine.in/vantage/how-section-377-became-payday-extortionists-and-police-alike.]

3.5.4 In another case, an employee of Sangama, who was himself transgender, had rushed to a police station in Bangalore when four transgender persons were unlawfully detained by the police. Sangama is a reputed Bangalore-based organization that works with transgender persons. The police stripped him, took away his mobile phone and money, and asked him "whether he had sex

from the rear or the front". When he asked for food, the police officer threw rice and sambhar on the floor and forced him to eat it. An FIR was registered against him under Sections 367/143/147/149 IPC. ["I was beaten at the police station", 05.07.2009 https://www.telegraphindia.com/1090705/jsp/7days/story_11197766.jsp.]

3.6 <u>Right to Shelter</u>

3.6.1 Section 377 impedes the ability of LGBT people to realize the constitutionally guaranteed right to shelter. In *Francis Coralie Mullin* v. *Administrator of the State of Delhi*, [(1981) 1 SCC 608, para 8] this Court held that the right to live with human dignity includes the bare necessities of life such as the right to adequate shelter.

3.6.2 It is pertinent to note that the right requires "adequate" shelter, and not shelter per se. Thus, in *Chameli Singh* v. *State of Uttar Pradesh*, [(1996) 2 SCC 549, para 8] this Hon'ble Court held that the right to shelter included adequate living space, a safe and decent structure, and clean and decent surroundings.

3.6.3 Section 377 prevents LGBT persons from enjoying the right to safe and secure housing. As Petitioner No. 18 Madhansai @ Urvi states in *Anwesh Pokkuluri & Ors.* v *Union of India*, she was forced to leave her school hostel when her transgender identity was revealed. One straight person reported finding their housing threatened merely for socialising with transgender persons:

> "Just yesterday, I had a few friends visiting, one of whom was a transgender. A neighbour walked into the house and clearly threatened us about the kind of people visiting the house and said that though no one in the society had complained so far, if there were any complaints, anything could happen." ["Why its doubly difficult for gay renters to find homes," available at https://www.firstpost.com/living/why-its-doubly-difficult-for-gay-renters-to-find-homes-1224225.html.]

3.6.4 Because LGBT persons are unable to easily access housing in the open market, resources like Gay Housing Assistance Resources (GHAR) have emerged to help LGBT persons find safe housing. GHAR is a website that helps LGBT landlords and tenants to locate each other. GHAR's 2014 report shows a 30% increase in the number of people accessing its facilities between 2013 and 2014. Moreover, the report shows that housing requests are made all over the country –including Jaipur, Ahmedabad, Bangalore, Chennai, Cochin, Hyderabad, Bombay, Calcutta and Delhi. ["Why its doubly difficult for gay renters to find homes," available at https://www.firstpost.com/living/why-its-doubly-difficult-for-gay-renters-to-find-homes-1224225.html.]

3.6.5 However, these private resources cannot substitute the state's obligation to ensure the safety and security of LGBT persons in their homes. In *Chameli Singh* (supra) this Hon'ble Court noted the connection between the right to shelter and a citizen's ability to contribute to society:

> "In a democratic society as a member of the organised civic community one should have permanent shelter so as to physically, mentally and intellectually equip oneself to improve his excellence as a useful citizen as enjoined in the Fundamental Duties and to be a useful citizen and equal participant in democracy. The ultimate object of making a man equipped with a right to dignity of person and equality of status is to enable him to develop himself into a cultured being. Want of

> decent residence, therefore, frustrates the very object of the constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself."

3.6.6 Removing Section 377 from the statute books will both ensure the safety and security of LGBT persons and also improve their material conditions so that they may better contribute to society.

3.7 The Right to Health

3.7.1 The criminalisation of same-sex relations has a detrimental impact on the right to health of LGBT persons.

3.7.2 This Hon'ble Court has held that the right to health is inherent in the right to life under Article 21. In *Consumer Education and Research Centre* v. *Union of India,* (1995) 3 SCC 42, Justice Ramaswamy held that "physical and mental health have to be treated as integral part of right to life, because without good health the civil and political rights assured by our Constitution cannot be enjoyed." In *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal,* this Hon'ble Court held:

> "The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical

> treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21." [*Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal,* (1996) 4 SCC 37, para 9.]

3.7.3 Further, the State has a positive obligation to ensure the delivery of medical aid and provision of healthcare to all persons under the Constitution. [Articles 39, 41, 42 & 47, Constitution of India; *Vincent Panikurlangara* v *Union of India,* (1987) 2 SCC 165.] In *Bandhua Mukti Morcha* v *Union of India,* this Hon'ble Court held that a life with dignity under Article 21 includes "… protection of the health and strength of workers, men and women, … and facilities for children to develop in a healthy manner and in conditions of freedom and dignity…" [(1984) 3 SCC 161, para 10.]

3.7.4 LGBT persons face systemic discrimination and stigma which leads to a plethora of health concerns, include significant rates of depression and mental health issues which are exacerbated by the inability to access health services and indeed, the complete absence of physical and mental health services for LGBT persons in many parts of the country, particularly rural areas where LGBT persons may not even be able to reveal their sexual identities to their health care providers. This aspect has been dealt with in greater detail in the written submissions filed in *Anwesh Pokkuluri* v *Union of India* (the IIT petition).

4. CONSTITUTIONAL MORALITY IS THE LODESTAR OF CONSTITUTIONAL INTERPRETATION

4.1 The Constitution is a dynamic text. The interpretation of the Constitution is enriched by as generation poses new constitutional questions.

4.2 In *Manoj Narula* v. *Union of India*, (2014) 9 SCC 1, this Hon'ble Court held:

> "The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. Dr Ambedkar had, throughout the debate, felt that the Constitution can live and grow on the bedrock of constitutional morality. Speaking on the same, he said:
>
> > "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic." [Constituent Assembly Debates, 1948, Vol. VII, 38.]"
>
> (para 74)
>
> …
>
> "The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality. In this context, the following passage would be apt to be reproduced:
>
> > "If men were angels, no Government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men,

> the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. [James Madison as Publius, Federalist 51] ”
>
> (para 75)

4.3 In *Government of NCT of Delhi* v. *Union of India*, 2018 SCC OnLine SC 661, this Hon’ble Court held:

> 63. Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse.
>
> …
>
> 306. Constitutional morality does not mean only allegiance to the substantive provisions and principles of the Constitution. It signifies a constitutional culture which each individual in a democracy must imbibe.
>
> …
>
> 310. No explanation of constitutional morality will be complete without understanding the uniquely revolutionary character of the Constitution itself. Granville Austin has referred to the Indian Constitution as a “social revolutionary” document, the provisions of which are aimed at furthering the goals of social revolution. Austin described the main features of the Indian Constitution as follows:
>
> > “It was to be a modernizing force. Social revolution and democracy were to be the strands of the seamless web most closely related. Democracy, representative government, personal liberty, equality before law, were revolutionary for the society. Social-economic equitableness as expressed in the Directive Principles of State Policy was equally revolutionary. So were the Constitution's articles allowing abolishing untouchability and those allowing for compensatory discrimination in education and employment for disadvantaged citizens.”
>
> …
>
> 311. The core of the commitment to social revolution, Austin stated, lies in the Fundamental Rights and in the Directive Principles of State Policy, which are the “conscience of the Constitution” and connect India's future, present, and past.21 Constitutional morality

> requires the existence of sentiments and dedication for realizing a social transformation which the Indian Constitution seeks to attain.

4.4 In *Independent Thought v. Union of India*, (2017) 10 SCC 800, this Hon'ble Court, in the context of rape laws referred to constitutional morality to read down Exception 2 to Section 375:

> "We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born from early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 IPC that sanctifies a tradition or custom that is no longer sustainable."

4.5 Indian society is known for its diversity of thought and acceptance and accommodation of the variations of the human experience. The constitutional values of dignity, equality and fraternity enable these rich and varied cultures, people and languages to coexist. Even assuming that some persons disapprove of the Petitioners' sexual orientation or exercise of choice, this Hon'ble Court will uphold and protect constitutional morality over social morality.

4.6 In the event that majoritarian opinion exists, this Hon'ble Court has a counter-majoritarian role. In *Santosh Kumar*

Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498, this Hon'ble Court held that:

> "The constitutional role of the judiciary also mandates taking a perspective on individual rights at a higher pedestal than majoritarian aspirations. To that extent we play a counter-majoritarian role." (para 86)

This was reiterated in *Senior Divisional Commercial Manager, South Central Railway* v *SCR Caterers* (2016) 3 SCC 582*:*

> "This Court, being entrusted with the task of being the counter majoritarian institution, is duty-bound to ensure that the rights of the downtrodden minorities and the members of the weaker sections of the society are not trampled upon." (para 28)

Thus constitutional courts act to protect minorities against the vagaries of majorities.

4.7 In *Shakti Vahini,* this Hon'ble Court, in the context of the prevailing social menace of khap panchayats and the curtailment of the liberty of young couples affirmed that the Court is the protector of constitutional rights:

> "Once the fundamental right is inherent in a person, the intolerant groups who subscribe to the view of superiority class complex or higher clan cannot scuttle the right of a person by leaning on any kind of philosophy, moral or social, or self-proclaimed elevation. Therefore, for the sustenance of the legitimate rights of young couples or anyone associated with them and keeping in view the role of this Court as the guardian and protector of the constitutional rights of the citizens and further to usher in an atmosphere where the fear to get into wedlock because of the threat of the collective is dispelled, it is necessary to issue directives…" (para 54)

4.8 Similarly in *Shafin Jahan*, this Hon'ble Court held that there exists a constitutional obligation on the Court to safeguard the choice of partner:

> "Non-acceptance of her choice would simply mean creating discomfort to the constitutional right by a Constitutional Court which is meant to be the protector

> of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripodal value of liberty should allow an individual to write his/her script. The individual signature is the insignia of the concept." (para 55)

5. ARTICLE 32 –THE SUPREME COURT IS THE PROTECTOR OF THE CONSTITUTION

5.1 Dr. B.R. Ambedkar said that the Constitution would be a nullity without Article 32, which he called "the very soul of the Constitution and the very heart of it". (Constituent Assembly Debates, Vol. VII, pg.953)

5.2 However, Article 32 does not merely confer powers on this Hon'ble Court. As recognized in *Romesh Thapar v. State of Madras,* 1950 SCR 594, Article 32 makes this Court the protector and guarantor of fundamental rights under the Constitution:

> "…That article [Article 32] does not merely confer power on this Court, as Article 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III or for any other purpose, as part of its general jurisdiction. In that case it would have been more appropriately placed among Articles 131 to 139 which define that jurisdiction. Article 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights." (Para 3)

5.3 This Hon'ble Court held in *Powers, Privileges and Immunities of State Legislatures, In re,* (1965) 1 SCR 413, that "the judicial power conferred on the High Courts and this Court is meant for the protection of fundamental rights." (para 127)

5.4 The duty to protect fundamental rights falls upon this Hon'ble Court and cannot be shifted to the legislature. This Court does not infringe upon the domain of the legislature by declaring Section 377 unconstitutional. To the contrary, judicial review has been held to be one of the primary functions of the judiciary, as far back as *Marbury v. Madison*, 5 U.S. 137 (1803):

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each…So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." (paras 130-131)

5.5 In exercising powers of judicial review, Courts do not act "out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution." (*State of Madras v. V.G. Row*, 1952 SCR 597, para 13). This Hon'ble Court held in *Minerva Mills v. Union of India,* (1980) 3 SCC 625, that "the power of judicial review is an integral part of the constitutional system and ensures the rule of law" (para 87).

5.6 Section 377 deprives LGBT persons of their rights under Article 32 of the Constitution, as they fear prosecution and persecution if they reveal their sexual identities. Prior to the present proceedings, LGBT persons never approached this Hon'ble Court as petitioners. Instead, they relied upon their teachers, parents, mental health professionals and a Member of Parliament, to speak on their behalf. The absence of live

petitioners led this Hon'ble Court to assume, in *Koushal*, that LGBT persons constitute only a "miniscule fraction" of the country's population, whereas in fact most studies put the figures between 7-8% (supra).

5.7 Therefore, this Hon'ble Court, in pursuance of its duty to safeguard fundamental rights of LGBT persons, should strike down Section 377 as violative of Part III of the Constitution of India.

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SETTLED BY:
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PETITIONERS

Through

COUNSEL FOR THE PETITIONERS

NEW DELHI
DATED 19.07.2018

IN THE SUPREME COURT OF INDIA

Criminal Original Jurisdiction

W.P. (Crl.) No. 88 of 2018

In the matter of:

Keshav Suri … Petitioner

Vs.

Union of India …Respondent

Written submissions on behalf of the petitioner by Mr.Arvind P. Datar, Senior Advocate

INDEX

I. The historical background:

1.1 The entire history, from 1534 to the present day, has been traced in "*377 and the Unnatural Afterlife of British Colonialism in Asia*" by Professor Douglas Sanders[1]. Similar history is also contained in the Amicus Brief of Professors of History submitted in *Lawrence v. Texas*[2].

1.2 Briefly, the historical background indicates that s. 377 was based primarily on blind prejudice and without any scientific basis. As the Indian Penal Code, 1860 was successful in bringing out an orderly and systematic criminal law, its success lead to its adoption in other British colonies in Asia including section 377.

1.3 Significantly, the criminal code of Napoleon was silent on sexual relations between consenting adults.

1.4 In the US, the efforts of Senator Joseph McCarthy lead to wide-spread persecution of gays and lesbians at every level of government activity. Even private corporations and defence corporations were required to ferret out and discharge homosexual employees by an executive order of President Eisenhower (pp. 75-80 of Module I).

1.5 After 1970, the view that homosexuality was pathological and dangerous was gradually discarded. By 1973, the American Psychiatric Association, American Psychological Association and American Medical Association removed homosexuality from the list of mental disorders. Several Protestant denominations officially condemned discrimination against homosexuals

discrimination in federal and state level government offices. This has been followed by almost all leading private corporations.

II. Constitutional provisions – Article 13:

2.1 Article 13(1) reads as follows:

> ***13. Laws inconsistent with or in derogation of the fundamental rights***
>
> *(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.*

2.2 After January 26, 1950, any existing law which was inconsistent with Part III of the Constitution became void "*to the extent of such inconsistency*". It is submitted that the inconsistencies that are mentioned in Article 13(1) are not only with the provisions of Part III but also with the derivative rights that are found to be inherent in Part III. Laws may also become inconsistent with an interpretation placed upon the provisions of Part III by the Supreme Court.

2.3 When a Court declares a law to be unconstitutional, that declaration does not repeal or amend the law, for to repeal or amend a law is a legislative and not a judicial function.[3] Therefore, striking down the offending portions of section 377 will not amount to judicial legislation.

2.4 With the decisions in *Puttaswamy*[4] and *NALSA*[5], sexual orientation and gender identity are innate attributes of every individual. This has been held also as a facet of the right to privacy which includes, in turn, decisional autonomy. With these decisions, it is submitted that, Articles 14, 15 and 21 will have an extended meaning. Section 377, as submitted later, will therefore be inconsistent with the provisions of Part III of the Constitution to the extent it

makes consensual same-sex relationship a crime/offence on the ground that it amounts to "*carnal intercourse against the order of nature*".

2.5 The proper test will be: can section 377 be enacted by Parliament today after the decisions of the Supreme Court in *NALSA* and *Puttaswamy*? Section 377 would be struck down as unconstitutional under Article 13(2). If a State cannot make a law violating Part III after 1950, pre-constitutional laws, *which become void*, will also have to be struck down under Article 13(1).

III. Article 14 – right to equality:

3.1 Section 377 is *ultra vires* Article 14 as it does not satisfy the twin tests of classification[6] as laid down in *Ram Krishna Dalmia*[7] and numerous other decisions.

3.2 If sexual orientation is a "natural right" as held in *Puttaswamy*, there is no intelligible differentia between opposite sex and same-sex couples. Sexual orientation towards the same sex is, as observed in the *amicus brief* in *Lawrence* (supra), a ***"normal and benign variation of human sexuality"***.

3.3 Even assuming that the differentiation on grounds of sexual relationship constitute intelligible differentia, it has no nexus with the object sought to be achieved. In *Nagpur Improvement Trust v Vithal Rao*[8], it was held that the object of the statute itself should be lawful and it cannot be discriminatory. The Supreme Court held-

> *"if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved."*

3.4 The object of a penal code is to punish a crime. The object of punishment can be retributive, punitive, reformative, preventive etc. The Indian Penal Code, 1860 also intends punishment to be a deterrent against other persons committing similar acts. The essence of the theory of punishment is that a person has a choice in transgressing the limits of law. If he chooses to do so,

punishment is a likely consequence. In the case of sexual orientation or gender identity, it is now well-settled that this orientation is not a matter of choice but is an inherent attribute of persons but who happen to be in the minority.

3.5 It is also well settled by medical science the that sex orientation of a person cannot be changed. The earlier attempts to cure this orientation electric shocks, psychiatric treatment, administration of drugs have proved useless. Thus, same-sex relationships are not "*against the order of nature*". This is conclusively established internationally and accepted by the United Nations as well. Thus, Article 377 fails the test of Article 14.

3.6 There is also no rational differentiation since, medically and biologically, sexual orientation is accepted to be an attribute of an individual just as gender identity is. According to American Psychological Association, the manifestation of sexual attraction towards persons of the opposite sex or same sex starts manifesting itself in early adolescence. Sexual orientation is thus a natural condition – attraction towards the same sex or opposite sex are both equally natural – the only difference is that same sex attraction arises in far lesser number of persons. (Till date, many persons suppress or hide their orientation because of the social stigma attached to same-sex relationships)

3.7 Section 377 is thus liable to be struck down as it results in discrimination and results is denial of equality. The scope of the term "discrimination" is well explained by Justice Aharon Barak in *El-Al Israel Airlines Ltd. v. Jonathan Danielwitz*

3.8 When transgenders have been granted equal protection under Article 14, there is no justification in denying the same to persons who have a sexual orientation towards people of the same sex. Indeed, in *NALSA*, it has been held that discrimination on the basis of *sexual orientation or gender identity* violates the guarantee of equal protection of laws. Section 377, which makes consensual same-sex relationship a crime, denies equal protection of laws to LGBT community. Similarly, the decision in *NALSA* recognizes gender identity as a matter of choice by an individual and an inseparable part of human life. If this is an inseparable part of human life, then sexual orientation and the right to have a same-sex relationship must equally be so. Section 377, to the extent it criminalizes consensual same-sex relationship, is liable to be struck down on the ground of manifest arbitrariness as per the decision of this Hon'ble Court in *Shayara Bano v. Union of India*.[10] Making such relationships criminal on the ground that it is against the "*order of nature*", is a clear case of "manifest arbitrariness". In *Shayara Bano,* this Hon'ble Court held as follows:

> "*Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally, and/or without adequate determining principle.*"[11]

3.9 Treating same-sex relationship as "*carnal intercourse against the order of nature*" is, in 2018, is irrational and/or without adequate determining principle. It is impermissible to have section 377 on the statute book in the light of overwhelming evidence about the origins and nature of sexual orientation.

3.10 **Class legislation:** Article 377 is a classic case of class legislation which is prohibited under Article 14. All persons having sexual orientation towards the same sex are treated as a class who are liable to be punished up to life imprisonment or ten years. A human being's natural orientation is made a crime, they are subjected to serious repercussions which includes matters of public employment.

IV. Articles 15 and 16

4.1 Articles 15(1) and 15 (2) prohibit discrimination against citizens on grounds of, *inter alia,* sex. Similarly, Article 16(2) prohibits discrimination, *inter alia,* on grounds of sex nature matters of public employment. It is submitted that the word "sex" would include sexual orientation and gender identity. This Hon'ble Court has conferred transgenders with the right to be recognized as a third gender. This judgment has also been accepted by the executive by making suitable changes *qua* passports, application forms and even public employment, etc.

4.2 Section 377 renders even a private consensual same-sex relationship as a crime. If such persons are arrested and prosecuted, they can be removed from service under Rule 3 of the All India Services (Discipline and Appeal) Rules, 1969 and Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. Therefore, the existence of section 377 as a valid statutory provision can, merely by filing a criminal case, deny such persons, their right to public employment under Article 16 and other rights under Article 15.

V. Article 21

5.1 According to medical evidence, there is nothing unnatural or criminal about sexual orientation towards persons of the same sex. A fundamental facet of the right to life is the right to choose one's partner. In the cases of heterosexual relationships, this Hon'ble Court has prohibited any impediments on grounds of caste, religion, etc. The decisions of Khap Panchayats have been severely and repeatedly condemned.[12]

5.2 If sexual orientation towards the same sex is as natural as orientation towards the opposite sex, the choice of partner will equally inure to persons of both orientations. Section 377 effectively bars such choice and results in denial of this most fundamental facet of Article 21 on the untenable ground that it is against the "order of nature".

5.3 In the landmark judgment in *Puttaswamy,* it was held that right to privacy includes decisional privacy which is an ability to make intimate decisions primarily consisting one's sexual or procreative nature and decisions in respect of intimate relations.[13]

5.4 The decision in *Suresh Kumar Koushal v Naz Foundation*[14] relies on the earlier judgments of *Gobind v. State of M.P*[15] and *Kharak Singh v. State of U.P*[16] where it was held that there was no fundamental right to privacy. With the *Puttaswamy* decisions, the *Koushal* judgment deserves to be overruled.

5.5 It is submitted that the judgment in *Koushal* is liable to be overruled, *inter alia*, on the following grounds:

i. In para 38, it was held that both pre and post-constitutional laws are manifestations of the will of the people through Parliament, particularly if no amendment is made to a pre-constitutional law.

ii. In para 45, it was held that since Parliament did not amend section 377 despite the recommendation in the 172nd Law Commission Report, it is a guide to the nature and scope of section 377.

iii. In para 60, the Court noted that all the earlier cases under section 377, the victims were women or children. The Court observed- "*All the aforementioned cases refer to non-consensual and markedly coercive situations and keenness of the Court in bringing justice to the victims who were either women or children cannot be discounted while analyzing the manner in which the section has been interpreted"*- but went on to hold that section 377 will apply irrespective or age and consent in view of the plain meaning and legislative history of that section.

iv. In para 65, it was held that persons engaging in the carnal intercourse in the ordinary course and those indulging in carnal intercourse against the order of nature constitute different classes; the later cannot claim that section 377 is arbitrary or irrational.

v. In para 66, the miniscule number of people were prosecuted was a ground to set aside the High Court judgment.

VI. Section 377 of the Indian Penal Code, 1860.

> *"It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."*[17]
>
> *-Oliver Wendell Holmes.*

6.1 As submitted in the note on historic background, this is a colonial law and has been wrongly referred to as representing the will of the people in *Koushal* (para 44.2).

6.2 In *Puttaswamy,* it has been held, at paras 144 to 148, that rights of the lesbian, gay, bi-sexual and transgender population cannot be construed as "so-called rights" but are real rights and part of the right to life and entitled to the benefits of pride, privacy and dignity. It was categorically held that sexual orientation is an essential component of identity.

6.3 These observations of a nine-judge Bench categorically treat the LGBT population as "*persons*" having all the rights which the rest of the population has. This includes all the rights in Part III of the Constitution as well as in other provisions of the Constitution. Making LGBT population alone as liable to criminal action clearly renders part of section 377 is unconstitutional.

6.4 After the decision in *Puttaswamy,* which was rendered on August 24, 2017, section 377, to the extent of its inconsistency with Part III of the Constitution, is void. It cannot be permitted to stand in the way of the exercising of the

Madhav Menon v State of Bombay[18] as cited in para 9 of *Bhikaji Narain Dhakras v State of Madhya Pradesh*[19].

6.5 Section 377 is primarily based on the premise that intercourse between members of the same sex are against the order of nature. As mentioned earlier, this was based on Judeo-Christian beliefs and a blind hatred against same-sex relationship. One example is the note of Macaulay, who called it an "*odious class of offence*".

6.6 Justice Michael Kirby has pointed out that criminalizing same sex relationship is wrong for the following reasons:

> *"[C]riminalisation of private, consensual homosexual acts is a legacy of one of three very similar criminal codes (of Macaulay, Stephen and Griffith), imposed on colonial people by the imperial rules of the British Crown. Such laws are wrong:*
>
> *Wrong in legal principle because they exceed the proper ambit and function of the criminal law in a modern society;*
>
> *Wrong because they oppress a minority in the community and target them for an attribute of their nature that they do not choose and cannot change. In this respect they are like other laws of colonial times that disadvantaged people on the ground of their race or sex;*
>
> *Wrong because they fly in the face of modern scientific knowledge about the incidence and variety of human sexuality; and*
>
> *Wrong because they put a cohort of citizens into a position of stigma and shame that makes it hard to reach them with vital messages about safe sexual conduct, essential in the age of HIV/AIDS."*[20]

6.7 The Supreme Courts of the following countries have struck down laws similar to section 377. In most of these statutes, a reference has been made to *"carnal intercourse against the order of nature"*. These are:

(i) Belize- *Caleb Oroczo v. The Attorney General of Belize,* Claim No. 668 of 2010, Supreme Court of Belize, decision dated August 10, 2016.

(ii) Fiji- *Dhirendra Nadan v. State,* High Court of Fiji, Case No. HAA0085 of 2005, decision dated August 26, 2005.

(iii) Nepal- *Sunil Babu Pant v. Nepal Government,* Writ No. 917 of 2007, decision dated December 21, 2007.

(iv) South Africa- *The National Coalition for Gay and Lesbian Equality v. The Minister of Home Affairs,* Case CCT 10/99, Constitutional Court of South Africa, decision dated December 2, 1999.

ECHR

(v) *Modinos v. Cyprus,* Application No. 15070/89. ECHR decision dated April 12, 2018.

(vi) Norris v. Ireland, Application No. 10581/83, ECHR decision dated October 26, 1988.

(vii) Dudgeon v. The United Kingdom, Application No. 7525/76, ECHR decision dated October 21, 1981.

VII. Statutory interpretation

7.1 The Indian Penal Code, 1860 must be subject to doctrine of updating construction. It has been held that the Indian Evidence Act, 1872[21] and the Code of Criminal Procedure, 1973[22] are continuing acts. The principle of updating construction has been set out in *Bennion on Statutory Interpretations* with reference to certain cases.

7.2 Section 377 is also liable to be struck down on the basis of the Latin Maxim *cessante ratione legis, cessat ipsa lex* (the reason for a law ceasing, the law itself ceases). This maxim has been recognized by this Hon'ble Court in *H.H. Shri Swamiji of Shri Amar Mutt v. Commissioner, Hindu Religious and Charitable Endowments Deptt,* (1979) 4 SCC 646, and *State of Punjab v. Devans Modern Breweries Ltd.,* (2004) 11 SCC 26.

7.3 It is submitted that there is no better occasion to apply/use this maxim than in the context of section 377. At the time of its drafting, same-sex relationships were condemned as unnatural, queer, abhorrent, revolting, etc. Over the years, medical and psychiatric studies have shown that there is nothing "unnatural" or "revolting" about such relationships. The fact that a much smaller percentage of human being have this orientations does not make it against the "order of nature". The "*de minimis"* rationale has been overruled by this Hon'ble Court in *Puttaswamy*.

7.4 In most civilized nations, same-sex relationships have been either de-criminalized or their respective Supreme Court/High Courts have declared

7.5 The United Nations has also called for a repeal of such laws. The *Yogyakarta* principles have also been approved by this Hon'ble Court in *NALSA*.

7.6 In the face of overwhelming and virtually irrefutable evidence, the earlier stamp of criminalization has been internationally replaced by the stamp of approval. Indeed, the British Prime Minister has apologized for making these relationships a crime in the colonial area.[23]

7.7 The very foundation on which the crime of section 377 is built is that same-sex relationships are against the "order of nature". If this foundation is grossly flawed, it has to be removed. Once this is done, consenting same-sex relationships can no longer be a criminal offence.

7.8 The LGBT community not only have the right to be left alone and enjoy all the consequences that follow from their sexual orientations and gender identity but also have the right to be acknowledged as equals and embraced with dignity.

Dated at New Delhi on this the 10th day of July, 2018.

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION
WRIT PETITION [CRIMINAL] NO 88 OF 2018

IN THE MATTER OF:

KESHAV SURI … PETITIONER

VERSUS

UNION OF INDIA … RESPONDENT

SHORT-SUBMISSIONS ON BEHALF OF THE PETITIONER- KESHAV SURI

1. The Petitioner is a responsible, law-abiding and public spirited adult citizen of India. The Petitioner is a well-educated individual who received his primary education in India and pursued his further education [undergraduate and masters degree] in the fields of Law and Business Management from highly ranked Universities in the U.K. The Petitioner is in a committed relationship for nearly a decade with another adult man and has been consensually residing together with him. Thus, the Petitioner himself is a part of the Lesbian, Gays, Bi-sexual, Transgender and Queer [‘**LGBTQ’**] community in India. The Petitioner hails from an industrial background and is engaged in the business of Hospitality as well as Education. The Petitioner works with and is a shareholder of Bharat Hotels Ltd, which promotes the hospitality chain by the name and style of ‘The Lalit’.

2. Battling discrimination on account of his sexual-orientation and being passionate about the cause of inclusion of members of the LGBTQ community in economic and social spheres, the Petitioner has championed a social campaign titled as *‘Pure-Love’* for creating a platform for persons from all walks of life, including the LGBTQ community to come forth and share their life experiences and thereby feeling included in society. The ‘Pure-Love’ campaign is in tandem with the ‘United Nations Guiding Principles on Tackling Discrimination against Lesbians, Gays, Bi-Sexuals, Transgender and Inter-sex people: Standards of conduct Business’. The whole objective behind the ‘Pure-Love’ campaign is to create awareness, acceptance and inclusion for persons belonging to the LGBTQ community in and amongst Corporate India. Persons from the LGBTQ community are otherwise marginalised and continue to live in the shadows of fear of stigma, exclusion, despair and prosecution.

3. Continued criminalisation of homosexuality comes with an economic cost. This is in addition to the socio-psychological adverse impact and deprivation of health access to the LGBTQ community.

4. The economic cost has atleast two facets: i. exclusion and/or limited inclusion of an able and talented work force belonging to the LGBTQ community. This directly impacts personal health-costs, wealth-creation and work-force loss and ii. Loss of contribution to the GDP.

5. Members of the LGBTQ community are left to deal with oppression, exclusion, limited avenues for personal growth, limited opportunities for employment. ***The question really is: are such citizens living a meaningful life of respect and dignity or are they living a life which diminishes the constitutional mandate of inclusiveness, respect for life and the individual.***
6. Thus, the Petitioner has filed the captioned petition seeking an appropriate Writ, Order or direction in the nature of a mandamus declaring that the 'Right to choice of sexual orientation' is a fundamental right enshrined in Part-III of the Constitution of India and that any discrimination of any person on the basis of exercising such choice is violative of Part-III of the Constitution of India. Further, the Petitioner also seeks a mandamus that intercourse between consenting adults of the same gender is not carnal intercourse against the order of nature and thus, Section 377 of the Indian Penal Code ['**Section 377 IPC'**], is not applicable to such consenting adults.

7. It is respectfully submitted that there is overwhelming consensus of international jurisprudence is in favour of decriminalizing sexual acts between consenting same sex individuals in private. The relevant international case-law is discussed hereinbelow in these submissions.

8. This view of various International Courts is based primarily on the understanding that criminalization of homosexuality contravenes certain fundamental human rights, specifically:

    a. the right to equality before the law no matter what one's sexual orientation, and the right against discrimination on the basis of sexual orientation;
    b. the right to freedom of expression and self-actualization through the expression of one's sexual orientation and the articulation of same-sex relationships as a function of this right; and
    c. the right to life and liberty, and the right to private life as a natural and logical application of this right.

9. It is also clear that the commonly held view is that in order to limit any of these rights, it is not enough to show that the individuals whose rights are infringed constitute a separate class. To defend a law against the defect of arbitrariness,

the principles of legitimate reason and proportionality must be successfully deployed. In relation to the criminalization of same-sex relations, the legal precedents set around the globe show that such justification is not arguable.

10. Further, Global Comparative Jurisprudence clearly shows that the limitation on these rights for individuals with same-sex orientation is not invalidated by their being in the minority, on the contrary, the fact of being a minority even more so engages the requirement for the law to protect their rights.

ANALYSIS OF RELEVANT INTERNATIONAL JURISPRUDENCE:

A. Secretary of State for Work and Pensions v. M reported in [2006] UKHL 11

11. M was the mother of two children who spent most of their time with their father. M now lived with her same sex partner. Under the Child Support Act 1991 she, as the non-resident parent, was required to contribute to the costs of maintaining the children incurred by the father as the parent with care. The amount of her contribution was calculated according to rules which took into account the income and outgoings of a heterosexual partner with whom an applicant is living, but not of those of a same-sex partner.

12. M argued that her situation fell within the scope of Article 8 of the ECHR and/or Article 1 of the First Protocol (peaceful enjoyment of possessions) and that her enjoyment of these rights has been the subject of adverse discrimination on the ground of sex, in violation of Article 14 (enjoyment of ECHR rights without discrimination on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status).

13. The ECHR determined that M's claim was within the scope of Art 1 of the First Protocol and Article 14 therefore did apply.

14. Moreover, the House of Lords (then the highest court of judicature in the United Kingdom) discussed and noted with approval the changes in social attitudes across the world to same-sex relationships, and the legislative changes that have been made to reflect these views, summarizing as follows:

> "[152]: *I have little doubt that the Strasbourg Court would see the position now as having changed very considerably, and that, if such an issue were to come before it in respect of the position in 2006, Mrs M's same-sex relationship could very*

well be regarded, in both Strasbourg and the United Kingdom, as involving family life for the purposes of art 8. But that is because there have been continuing changes in social attitudes and in the legislative picture across Europe. The Respondents' schedule of countries legally recognising familial relationships between same-sex couples shows the extent to which there has been a general move towards legal recognition of same-sex relationships across Europe in recent years. Laws were passed providing for registered partnerships in the Nordic countries, Denmark (1989), Norway (1993), Sweden (1994), Iceland (1996) and Finland (2001), for unregistered cohabitation in Hungary (1996), Portugal (2001) and Croatia (2003), for registered cohabitation or partnerships in Belgium (1998), the Netherlands (1998), France (1999), Germany (2001) and Switzerland (2004), for marriage in the Netherlands (2001) and Belgium (2003) and Spain (2005) and for registered cohabitation and marriage Luxembourg (2004). Italy, Greece and a number of the new Eastern European and Baltic democracies still appear to stand on one side, but the picture is overall one of radical change since the beginning of 2001. Outside Europe, the list shows not dissimilar developments. Unregistered cohabitation was the subject of laws in New South Wales (1999), Victoria (2001), Western Australia (2002), Tasmania (2003), Canada (2000) (with a further law on marriage in 2005), New Zealand (2002) (with a further law on registered partnership in 2004) and South Africa (various laws from 1999 to 2003). In Israel court decisions recognised several spousal benefits (1994 to 1996), adoption rights (2001), civil service survivor benefits (1998), insurance compensation survivor rights (1999) and pension rights (2000). The legal restructuring evidenced by this list marks a general recognition by legislatures and societies of the need for equal treatment of opposite and same-sex couples. It is right to add that we were not given sufficient detail to judge how far all relevant inequalities in other countries' legislation, were eliminated (as they appear to have been in the United Kingdom) at the same time as same-sex civil registration, partnership or marriage schemes were introduced. So it may be that the United Kingdom legislation is more advanced than that of some of such other countries. But, on the face of it, a

> *great change has taken place across Europe during the last five or so years, of which any court considering the current scope of art 8(1) would take most careful account."*

B. ***Secretary for Justice v. Yau Yuk Lung Zigo and Lee Kam Chuen, Hong Kong Special Administrative Region Court of Final Appeal reported in [2006] 4 HKLRD 196 (CFA)***

15. The respondents were charged with having committed buggery in violation of Section 118F(1) of the Crimes Ordinance of Hong Kong. They pleaded not guilty on the ground that the law was unconstitutional. The Court held that Section 118F(1) was discriminatory and infringed the constitutional right to equality.

16. The Court commenced with a review of the law of equality. Not all differences in treatment would be discriminatory. However, in order for differential treatment to be justified, a law had to satisfy three tests:
    - first, the law must pursue a legitimate aim, meaning that it has to be established that a genuine need for the different treatment existed;
    - second, the difference in treatment must be rationally connected to that legitimate aim; and
    - third, the difference in treatment must be proportionate, no more than was necessary to accomplish the legitimate aim.

17. The Court stated:

> *"Where the difference in treatment satisfies the justification test, the correct approach is to regard the difference in treatment as not constituting discrimination and not infringing the constitutional right to equality."*

18. The Court also noted that, where the differential treatment was based on grounds such as race, sex or sexual orientation, the Court would scrutinise with intensity whether the difference in treatment was justified.

C. ***Hall v. Bull reported in [2014] 1 ALL ER 919***

19. The UKSC upheld the conclusion of the Court of Appeal that a Christian hotelier's policy of refusing to permit a homosexual couple in a civil partnership

to share a double bed constituted direct and/or indirect discrimination on grounds of sexual orientation.

> "[53] *Homosexuals can enjoy the same freedom and the same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires "very weighty reasons" to justify discrimination on grounds of sexual orientation. It is for that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion."*

FILED BY

[SHALLY BHASIN]
ADVOCATE FOR THE PETITIONER

Prepared by:
Neeha Nagpal, Adv

Date: 19.07.2018
Delhi

IN THE HON'BLE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

W.P. (Crl.) No. 121 of 2018

In the matter of:

ANWESH POKKULURI & ORS. **…**

PETITIONERS

VERSUS

UNION OF INDIA **…**

RESPONDENT

Written Submissions submitted by Dr. Menaka Guruswamy,

Pritha Srikumar and Arundhati Katju

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I. The Petition

1.1 The 20 Petitioners are all Lesbian, Gay, Bi-sexual, Transgender students or alumni of the prestigious Indian Institutes of Technology ("**IIT**"), and are all members of 'Pravritti' – a 350 member strong pan-IIT support group for LGBT members of the IIT fraternity (students, alumni, interns, staff and anyone else who has lived on any of the IIT campuses). They come from diverse backgrounds – regional, social and economic. The petitioners come from Kakinada in Andhra Pradesh, Mandya in Karnataka, Sundergarh and Sambalpur in Odisha, Ranchi in Jharkhand and Korba in Chhattisgarh. They are scientists, entrepreneurs, teachers, researchers, and employees in companies. They are the children of farmers, teachers, home makers and government servants. The youngest petitioner is a 19-year old student from IIT Delhi and oldest is an academic who graduated in 1982.

1.2 The IITs are autonomous institutes of higher learning imparting education in the areas of science and technology. There are 23 IITs in India today, the first one being Kharagpur, set up in 1950. The IITs are regulated under the provisions of the Institutes of Technology Act, 1961. Under Section 2, the Act designates all IITs as institutes of national importance.

1.3 The first Prime Minister of India, Jawaharlal Nehru, is considered the architect of the IITs. Nehru envisioned that in due course, the IITs will "provide scientists and technologists of the highest calibre who would engage in research, design and development to help building the nation towards self-reliance in her technological needs." The graduates of the IITs would build a modern India. The IITs are the most competitive exams anywhere in the world with 1.2 million applying annually for 11,000

seats.[1] Therefore, these Petitioners are amongst the best and brightest in the country. Far from supporting these builders of contemporary India, Section 377 punishes them with the threat of criminal sanction simply for who they love.

1.4 The Petition documents in detail the horrific impact that Section 377 of the Indian Penal Code ("Section 377") has on the lives of these persons, who are amongst the best and brightest minds in the country. Their struggles include depression and mental health issues on account of the rejection of, and denial of their sexual identity, ridicule, bullying and blackmail stemming from homophobia, stigma arising from being treated as abnormal or deviant individuals, insecurity at the workplace etc. which has impelled many members of Pravritti to opt to move abroad, and reside in more accepting jurisdictions, where they may live their lives in peace. [Regard may be had to the averments at **para 16** of WP (Crl.) No. 121/2018, at **p.24-34.**]

1.5 Therefore, this writ petition *inter alia* seeks the following relief (**at p. 62**):

> A. Declare that the Petitioners are entitled to equality before the law and equal protection of law, without discrimination on the basis of their sexual orientation, under Articles 14, 15 and 16 of the Constitution of India;
> B. Declare that Section 377 of the Indian Penal Code, 1860 to the extent it penalizes consensual sexual relations between adults, is violative of Articles 14, 15, 16, 19 and 21 of the Constitution of India;
> C. Issue an appropriate writ, order or injunction prohibiting the Respondent arraigned herein by itself, or through its officers, agents and/or servants from in any manner enforcing the law under Section 377 of the Indian Penal Code, 1860 in relation to consensual, sexual conduct between adults;[…]

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[1] *IIT JEE Main 2018: 10.5 lakh students appeared for the examination*, THE TIMES OF INDIA (April 9, 2018), https://timesofindia.indiatimes.com/home/education/news/iit-jee-main-2018-10-5-lakh-students-appeared-for-the-examination/articleshow/63677318.cms; 11279 seats being offered in the IITs in 2018, an increase of 291 over last year, THE ECON. TIMES (June 6, 2018), https://economictimes.indiatimes.com/industry/services/education/11279-seats-being-offered-in-the-iits-in-2018-an-increase-of-291-over-last-year/articleshow/64483912.cms.

II. LGBTQ persons are entitled to equality before the law and equal protection of the law under Article 14

2.1 The Justice JS Verma Committee, consisting of the late Justices JS Verma and Leila Seth, and Sh. Gopal Subramaniam, Sr. Advocate noted that sexual orientation discrimination violates the right to equality:

> "Thus, if human rights of freedom mean anything, India cannot deny the citizens the right to be different. The state must not use oppressive and repressive labelling of despised sexuality. Thus the right to sexual orientation is a human right guaranteed by the fundamental principles of equality. We must also add that transgender communities are also entitled to an affirmation of gender autonomy. Our cultural prejudices must yield to constitutional principles of equality, empathy and respect...We need to remember that the founding fathers of our Constitution never thought that the Constitution is 'mirror of perverse social discrimination. On the contrary, it promised the mirror in which equality will be reflected brightly.'[2]

A. Section 377 is arbitrary and unconstitutional and violates Article 14 for the following reasons: (i) unlawfulness of legislative object (ii) lack of proportionality (iii) vagueness

2.2 Section 377 of the Indian Penal Code (45 of 1860) provides:

> 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 ten years, and shall also be liable to fine.
> Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

2.3 Firstly, Section 377 is a hostile class legislation which furthers discrimination, and hence is contrary to Article 14. Section 377 discriminates between consensual sexual acts of adults on the basis of the sex of their chosen partner. The hostile legislative object of the Section is evident from its legislative history (see Prof. Douglas Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, November 2008, Sl. 2

[2] JS Verma Committee Report, page 55 para 75.

in Module 1 filed by Sh. Arvind Datar, Sr. Advocate), which establishes that the legislative object, in enacting Section 377, was to criminalise sexual activities between persons of the same sex. Thus, **the legislative object was itself discriminatory**.

2.4 While Article 14 permits classification on the basis of intelligible differentia having a rational nexus to the legislative object, this Hon'ble Court has repeatedly held that the object of the legislation itself must be a legitimate State object and not one that is designed merely to discriminate. It is submitted that where the object of a legislation is itself only to discriminate, as in the case of Section 377, such object would be manifestly arbitrary.

2.5 In *Nagpur Improvement Trust v. Vithal Rao,* (1973) 1 SCC 500, a seven-judge bench of this Hon'ble Court held as follows:

> "It is now well-settled that the State can make a reasonable classification for the purpose of legislation. It is equally well-settled that the classification in order to be reasonable must satisfy two tests: (i) the classification must be founded on intelligible differentia and (ii) the differentia must have a rational relation with the object sought to be achieved by the legislation in question. **In this connection it must be borne in mind that the object itself should be lawful. The object itself cannot be discriminatory, for otherwise, for instance, if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved."**

2.6 In *Subramaniam Swamy* v *Director, Central Bureau of Investigation & Anr.,* (2014) 8 SCC 682 **(pp. 1-59 of the Compilation)**, this Hon'ble Court held,

> "The Constitution permits the State to determine, by process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. There is bound to be some degree of inequality when there is segregation of one class from the other. However, such

> segregation must be rational and not artificial or evasive. In other words, the classification must not only be based on some qualities or characteristics, which are bound to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. Differentia which is the basis of classification must be found and must have reasonable relation to the object of the legislation. **If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial**." (para 58, p. 725) (*emphasis supplied*)

2.7 A constitution bench of this Hon'ble Court noted that arbitrariness is a facet of discrimination in *Union of India* v. *Tulsi Ram Patel,* (1985) 3 SCC 398:

> "90. Article 14 contains a guarantee of equality before the law to all persons and a protection to them against discrimination by any law…What Article 14 forbids is discrimination by law, that is, treating persons similarly circumstanced differently or treating those not similarly circumstanced in the same way or, as has been pithily put, treating equals as unequals and unequals as equals. **Article 14 prohibits hostile classification by law and is directed against discriminatory class legislation.** The propositions deducible from decisions of this Court on this point have been set out in the form of thirteen propositions in the judgment of Chandrachud, C.J., in *In re Special Courts Bill*, 1978 [(1979) 1 SCC 380 : (1979) 2 SCR 476] . The first of these propositions which describes the nature of the two parts of Article 14 has been extracted earlier…In early days, this Court was concerned with discriminatory and hostile class legislation and it was to this aspect of Article 14 that its attention was directed. As fresh thinking began to take place on the scope and ambit of Article 14, new dimensions to this guarantee of equality before the law and of the equal protection of the laws emerged and were recognized by this Court. **It was realized that to treat one person differently from another when there was no rational basis for doing so would be arbitrary and thus discriminatory**. **Arbitrariness can take many forms and shapes but whatever form or shape it takes, it is nonetheless discrimination. It also became apparent that to treat a person or a class of persons unfairly would be an arbitrary act amounting to discrimination forbidden by Article 14**…" (emphasis supplied)

2.8 "Manifest arbitrariness" was defined in *Shayara Bano* v *Union of India*, (2017) 9 SCC 1, as under:

> "**The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14**. Further, there is an apparent contradiction in the three-judge bench decision in *McDowell* when it is said that a constitutional challenge can succeed on the ground that a law is 'disproportionate, excessive or unreasonable', yet such challenge would fail on the very ground of the law being 'unreasonable, unnecessary or unwarranted'. **The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve the law being disproportionate, excessive or otherwise being manifestly unreasonable.** All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution." (Para 87, pp. 91-92) (*emphasis supplied*)

> "**Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally, and/or without adequate determinative principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary**." (Para 101, p. 99) (*emphasis supplied*)

2.9 Secondly, it is submitted that Section 377 is disproportionate and therefore arbitrary and contravenes Article 14. It is pertinent to note that while the same acts, done consensually, between persons of the opposite sex are not criminalised, Section 377 stipulates that such consensual sexual acts between persons of the same sex shall carry punishment of imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and also a fine. Thus, the disproportionate penalty or a savage sentence, on activity that is not criminalised as between persons of the opposite sex also establishes manifest arbitrariness.

2.10 Section 377 is also arbitrary because it imposes a life sentence or imprisonment for 10 years on persons merely for their exercise of choice.

In the words of *Mithu v. State of Punjab*, (1983) 2 SCC 277, "A savage sentence is anathema to the civilised jurisprudence of Article 21" (para 6).

2.11 Lastly, Section 377 is over-broad, vague and falls foul of Article 14 on this ground as well. In *Shreya Singhal* v. *UOI*, (2015) 5 SCC 1, this Hon'ble Court, after referring to American jurisprudence on the argument of vagueness of criminal statutes, quoted with emphasis the following observations in *K. A. Abbas* v. *UOI*, (1970) 2 SCC 780, to conclude that the doctrine of vagueness was established in Indian constitutional law also:

> "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." (emphasis supplied by the Court in *Shreya Singhal, a*t para 68)

2.12 In a constitutional democracy, a statute that protects and furthers the morality of colonial monarchs is per se arbitrary. The language of Section 377 is vague and leaves the persons to whom it is applied in a "boundless sea of uncertainty" for there is no precise definition nor understanding of "carnal intercourse against the order of nature". For the above reasons, Section 377 violates Article 14 and is liable to be struck down as unconstitutional.

B. Article 14 entitles LGBT persons to a declaration of their right to non-discrimination under any law, on grounds of sexual orientation

2.13 The present writ petition seeks a declaration that the Petitioners, as LGBT citizens, are entitled to equality before the law and equal protection of law, without discrimination on the basis of their sexual orientation, under Articles 14, 15 and 16 of the Constitution of India. The writ petition is not restricted to striking down Section 377 of the IPC.

2.14 It is submitted that merely striking down Section 377 does not ensure the fundamental right to equality of LGBT citizens. The declaration prayed for is imperative as LGBT citizens are denied a host of rights available to heterosexual persons, only on account of their identity. For instance, though protections are available to women in a relationship in the nature of marriage (a 'live-in' relationship) under the Protection of Women from Domestic Violence Act, 2005, this protection of the law is not extended to same-sex live-in partners, even though such relationships are also a social reality. In *Indra Sarma* v. *VKV Sarma*, (2013) 15 SCC 755, this Hon'ble Court observed:

> "**Domestic relationship between same sex partners (Gay and Lesbians): DV Act does not recognize such a relationship and that relationship cannot be termed as a relationship in the nature of marriage under the Act.** Legislatures in some countries, like the Interpretation Act, 1984 (Western Australia), the Interpretation Act, 1999 (New Zealand), the Domestic Violence Act, 1998 (South Africa), the Domestic Violence, Crime and Victims Act, 2004 (U.K.), have recognized the relationship between the same sex couples and have brought these relationships into the definition of Domestic relationship. (para 38.5, p. 780)
>
> 39. **Section 2(f) of the DV Act though uses the expression "two persons", the expression "aggrieved person" under Section 2(a) takes in only "woman", hence, the Act does not recognize the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or conduct of any of the parties, would not lead to domestic**

> **violence, entitling any relief under the DV Act.**" (para 39, p. 780)

2.15 In *Suresh Kumar Koushal* v *Naz Foundation*, (2014) 1 SCC 1, the Hon'ble Court noted:

> "… a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.

It is submitted that on the contrary, as noted by this Hon'ble Court while dealing with Article 25, in *Bijoe Emmanuel* v. *State of Kerala,* (1986) 3 SCC 615:

> "…the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's constitution." (para 18, at p.626)

In *Bijoe Emmanuel,* this Court also referenced the judgment of Justice Jackson of the US Supreme Court in *West Virginia State Board of Education* v. *Barnette,* 319 US 624, reversing a previous judgment of that Court in *Minersville School District* v. *Gobitis,* 310 US 586. Disagreeing with the prescriptions for judicial restraint in the matter of protection of rights as held in *Gobitis,* in *Barnette,* Justice Jackson observed as follows:

> "…The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

2.16 It is humbly submitted that it is in this context that a declaration of the right to equality of LGBT persons is prayed for in the present writ petition. A declaration of the right to equality before law and equal protection of the

law is necessary to ensure that social morality is shaped by constitutional morality. The recognition of rights conferred by the Constitution, cannot be conceded or acknowledged only in 'incremental' steps. The declaration prayed for is necessary in the context of the historical discrimination faced by the LGBT community, to secure them full and equal citizenship and to bridge the gap between decriminalisation and emancipation.

III. Section 377 violates Article 15's prohibition of sex discrimination

3.1 Articles 14, 15 and 16 are the composite equality code of the Indian Constitution. Article 15(1) prevents discrimination by the State on the prohibited grounds of religion, race, caste, sex, place of birth or any of them.

3.2 This Hon'ble Court has held that the State has a positive obligation to create a just and equal society under Articles 15 and 16 of the Constitution. Section 377 IPC interferes with this obligation, by creating a section of Indian citizens who have consistently faced discrimination and an inability to exercise constitutional rights. As held in *NALSA v Union of India*, (2014) 5 SCC 438 **(pp. 60-131 of the Compilation)**,

> "The basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community, and social status…There cannot be social reforms till it is ensured that each and every citizen of this country is able to exploit his/her potentials to the maximum." (para 98, p. 496)

3.3 Article 15 must be construed broadly to give meaningful content to the constitutional values enshrined, keeping in mind the settled principles of constitutional interpretation. As far back as *Sakal Papers v Union of India*,

(1962) 3 SCR 842 **(pp. 132-144 of the Compilation)**, this Hon'ble Court has held that the fundamental rights should be interpreted broadly:

> "It must be borne in mind that the Constitution must be interpreted in a broad and not in a narrow and pedantic sense. Certain rights have been enshrined in our constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a matter which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions. (para 28, pp. 138-139 of the Compilation)

3.4 The Constitution is built on a central set of enduring values including forging a just and equal society. The constitutional promise to uphold these values of justice, liberty, equality and fraternity is broken by discrimination on the basis of sexual orientation. The United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 **(pp. 145-186 of the Compilation)**, observed:

> "The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."
>
> (para 4, pg.8)

Therefore, the United States Supreme Court reasons that at the time of drafting constitutional texts, it may not always be obvious to generations past what is the extent of freedoms in all its dimensions that may be necessary for future generations to protect. The guiding principle when there may be a hypothetical discord is that constitutional values of liberty must guide interpretation of the text and when such a claim to liberty is made, it must be addressed by the Court.

A. Section 377 discriminates based on the sex of the partner

3.5 Section 377 discriminates based on the sex of a persons' sexual partner and hence violates Articles 15 and 16. Under Sections 376 to 376E IPC, a person can be prosecuted for certain acts with an opposite-sex partner only if the partner did not consent. However, the same acts with a same-sex partner are criminalized even if the partner consents. Hence, Section 377 IPC discriminates against persons based on the sex of their partners, which is a direct violation of Article 15 on a plain textual reading.

3.6 However, it is not simply sexual acts that the provision criminalises. What it actually criminalises is the loving relationships that LGBT Indians like these petitioners seek to enjoy. For instance, in *Navtej Singh Johar and Ors.* v *Union of India,* [W.P. (Crl.) no. 76 of 2016], the lead petitioner Navtej Singh Johar and his partner Petitioner no. 2 Sunil Mehra have been together 25 years. Petitioner Aman Nath and his partner Francis Wacziarg were together 23 years until the latter's death. How much must these petitioners (and other LGBT Indians) love each other to survive the cruelty of *Suresh Kumar Koushal* v *Naz Foundation*, (2014) 1 SCC 1 and Section 377?

3.7 By discriminating on the basis of the sex of the partner, Section 377 also forces the petitioners in this instant writ petition, the younger IIT students and alumni, to ask whether lives will be better than those of the older petitioners? Or must they also watch their lives go by? Does their love not warrant the protection of their court, their constitution and their country?

3.8 This Hon'ble Court has consistently recognised the autonomy of every Indian to pick a partner of their choice. In two recent decisions, this court affirmed the fundamental right to choose a partner. In *Shafin Jahan* v

Asokan K.M. and Ors., (2018) SCC Online SC 343, decided on 9th April 2018 **(pp. 330-353 of the Compilation)**, the Court observed:

> "The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. **Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness.** Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. **The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity.** The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. **Society has no role to play in determining our choice of partners**." (para 90, p. 350 of the Compilation) (*emphasis supplied*)

3.9 Additionally, in *Shakti Vahini* v *Union of India*, (2018) SCC Online SC 275, decided on 27th March 2018 **(pp. 312-329 of the Compilation)**, the court observed as follows:

> "**The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation**. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the

> ancestors of Caesar or, for that matter, Louis the XIV. **The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law**. (para 46, p. 324 of the Compilation) (*emphasis supplied*)

3.10 There is considerable authority from other jurisdictions that discrimination based on choice of partner is unlawful. In *El-Al Israel Airlines v. Danielowitz*, HCJ 721/94 **(pp. 461-500 of the Compilation)**, the Supreme Court of Israel held:

> Conferring a benefit on a permanent employee for his recognized companion and not conferring it on a permanent employee for a same-sex companion (who complies with all the requirements of a recognized companion apart from the requirement of sex) amounts to discrimination in conditions of employment because of sexual orientation. This discrimination is prohibited. Consider A, a permanent employee of El- Al, who shares his life for several years with a woman B. They cohabit and run a common household (as required by El-Al for complying with the conditions of a recognized companion). A is entitled to an aeroplane ticket for B. Now consider A who lives in the same way with a man C. They too cohabit and run a common household. A is not entitled to an aeroplane ticket for C. How can this difference be explained? Does the one carry out his job as an employee differently from the other? The only explanation lies in A's sexual orientation. This amounts to discrimination in conditions of employment because of sexual orientation. No explanation has been given that might justify this discriminatory treatment. There is nothing characterizing the nature of the job or the position that justifies this unequal treatment (see s. 2(c) of the Equal Employment Opportunities Law).
>
> (pg.14-15)

3.11 In *Toonen v. Australia*, Communication No.488/1992, U.C. Doc CCPR/C/50/D/488/1992 (1994) **(pp. 501-510 of the Compilation)**, the Human Rights Committee held:

> Section 122 of the Tasmanian Criminal Code outlaws sexual intercourse between men and between women. While Section 123 also outlaws indecent sexual contacts between consenting men in open or in private, it does not outlaw similar contacts between consenting women. In paragraph 8.7, the Committee found that in its view, the reference to the term "sex" in article 2, paragraph 1, and in article 26 is to be taken as including sexual orientation. I concur with this view, as the common denominator

> for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating under Sections 122(a), (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant.
> Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time: the designated behaviour none the less remains a criminal offence.
> (pg.9)

3.12 In light of this Hon'ble Court's recent jurisprudence on the right to choice of partner, in addition to authority from other jurisdictions with similar constitutional values, it is submitted that Section 377 IPC places unconstitutional restrictions on this right by criminalizing the choice of an same-sex partner. It therefore violates Article 15 and ought to be struck down by this Hon'ble Court.

B. Section 377 is based on sex-based stereotypes

3.13 Section 377 discriminates against LGBT persons on the basis of gender stereotypes and assumptions about sexual preferences. Section 377 is based on a Victorian morality that assumes that people should have intercourse only with persons of the opposite sex and that sexual intercourse is of the "order of nature" only when it is for the purpose of procreation. By criminalizing certain acts based only on stereotypes of gender and sexual identity, Section 377 violates Article 15's prohibition against sex discrimination.

3.14 The protection against sex discrimination enshrined in Article 15 ought not to be narrowly interpreted, and it is submitted that stereotypes based on sexual role would also fall foul of Article 15. This proposition derives support from the observations of this Hon'ble Court in *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1 **(pp. 354-373 of the Compilation)**:

> "…This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the Court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy…."
>
> (para 41, p. 16)

> "…Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means."
>
> (para 46, p. 18)

3.15 In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) **(pp. 430-460 of the Compilation)** the US Supreme Court held that sex stereotyping cannot be used to discriminate against persons:

> "… As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for, "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[3] (p. 251)

3.16 Therefore the stereotyping in question that Section 377 that a man must be only with a woman and conversely, that women should only be in relationships with men. Such stereotyping draws on "incurable fixations of stereotype morality and conception of sexual role[s]" of men and women. And in the words of this Hon'ble Court in *Anuj Garg*, such

[3] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

stereotyping is "outmoded", and therefore, in our respectful submissions, impermissible and unconstitutional.

C. The prohibition against discrimination on the grounds of 'sex' in Article 15 includes 'sexual orientation'

3.17 It is submitted that the term 'sex' in Article 15 includes 'sexual orientation', keeping in mind the recent jurisprudence of this Hon'ble Court as well as guidance from other jurisdictions.

3.18 Significantly, the Justice JS Verma Committee on the Amendments to Criminal Law dated 23rd January 2013 **(pp. 187-221 of the Compilation)** expressly observed that "sex" in Article 15 includes "sexual orientation" as a prohibited ground of discrimination:

> "We must also recognize that our society has the need to recognize different sexual orientations a human reality. In addition to homosexuality, bisexuality, and lesbianism, there also exists the transgender community. In view of the lack of scientific understanding of the different variations of orientation, even advanced societies have had to first declassify 'homosexuality' from being a mental disorder and now it is understood as a triangular development occasioned by evolution, partial conditioning and neurological underpinnings owing to genetic reasons. Further, we are clear that Article 15(c) of the constitution of India uses the word "sex" as including sexual orientation. (para 65, p. 51)

3.19 In *Shakti Vahini* (supra), this Hon'ble Court has affirmed that the choice of partner and by implication, one's sexual orientation, are core facets of the right of every individual to live with dignity. Further, in *Shafin Jahan* (supra), this Hon'ble Court protected the right of a couple in an inter-religious relationship to choose their partner:

> "Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation

> of that freedom which is ingrained in choice on the plea of faith is impermissible." (para 54, p. 343 of the Compilation)

3.20 In *Common Cause* v. *Union of India*, (2018) 5 SCC 1, this Hon'ble Court held:

> "Our autonomy as persons is founded on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives." (para 346, p. 193-194)

3.21 Therefore, this Hon'ble Court has recognises that integral to one's sense of autonomy is the ability to decide choices of whom to love and whom to partner. Such a choice of whom to love and whom to partner must be necessarily protected from any possible discrimination on grounds of the sex of the partner as prohibited under Article 15. The citizen's sexual orientation in turn will decide the sex of the partner, whether the partner is of the opposite or the same sex. Hence, the prohibited ground of sex discrimination under Article 15 includes sexual orientation.

D. Sexual orientation is a ground analogous to those mentioned in Article 15

3.22 The Hon'ble Delhi High Court in *Naz Foundation* v. *Govt. of NCT of Delhi & Ors.*, (2009) 111 DRJ 1 (DB), as follows:

> "We hold that sexual orientation is a **ground analogous to sex** and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15." (para 104, p. 47)

3.23 The Supreme Court of Canada in *Delwin Vriend and others* v *Her Majesty the Queen in Right of Alberta and others*, [1998] 1 SCR 493 **(pp. 222-264**

of the Compilation), when interpreting a breach of Section 15(1) of the Canadian Charter of Rights and Freedoms concluded that 'sex' includes sexual orientation. Section 15(1) of the Charter reads:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or physical disability."

3.24 In *Vriend,* the Supreme Court of Canada, relying on the reasoning adopted by it in *James Egan and John Norris Nesbit* v *Her Majesty the Queen in Right of Canada and Another* ([1995] 2 SCR 513), applied its now well-known test of grounds analogous to those specified textually. The *Egan* test was applied as follows:

> In Egan, it was said that there are two aspects which are relevant in determining whether the distinction created by the law constitutes discrimination. First, "whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) **or which is analogous to those enumerated**". Second "whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others" (para. 131). A discriminatory distinction was also described as one which is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration" (Egan, at para. 56, per L'Heureux-Dubé J.). It may as well be appropriate to consider whether the unequal treatment is based on "the stereotypical application of presumed group or personal characteristics" (Miron, at para. 128, per McLachlin J.)
>
> (para 89, pg.21)

> In Egan, it was held, on the basis of "historical social, political and economic disadvantage suffered by homosexuals" and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), **that sexual orientation is a ground analogous to those listed in s. 15(1). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (para. 5). It is analogous to the other personal**

> **characteristics enumerated in s. 15(1); and therefore this step of the test is satisfied.**
>
> (para 90, pg.21-22) (emphasis supplied)

3.25 In *National Coalition for Gay and Lesbian Equality & Another v. Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC) **(pp. 265-311 of the Compilation)**, the South African Constitutional Court was concerned with the challenge to South Africa's sodomy provision under Section 20A of Sexual Offences Act 23 of 1957. South Africa's top court looked to the Canadian Supreme Court's decision in *Egan*:

> Despite the fact that section 15(1) of the Canadian Charter 71 does not expressly include sexual orientation as a prohibited ground of discrimination, the Canadian Supreme Court has held that sexual orientation is a ground analogous to those listed in section 15(1):
> "In Egan, it was held, on the basis of 'historical social, political and economic disadvantage suffered by homosexuals' and the emerging consensus among legislatures (at para 176), as well as previous judicial decisions (at para 177), that sexual orientation is a ground analogous to those listed in s. 15(1)."
>
> (para 49, pg.19)

3.26 The South African Constitutional Court takes note of the symbolic as well as the real harm effected by the sodomy statute:

> "Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. **Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men."**
>
> (para 28, pg.15)

3.27 Therefore, the South African Constitutional Court makes the powerful point that in the history of apartheid in South Africa, the lives of interracial couples were perpetually at risk and as a group they suffered vulnerability and degradation. Similarly, the sodomy offence in our jurisdiction creates

the same insecurity and vulnerability that was not just recognised in South Africa, but is familiar to us in India. We are familiar with this vulnerability due to inter-religious and inter-caste relationships, both of which this Hon'ble Court has recognized must be protected from discrimination and degradation of any kind, as set out above. If anything, sexual orientation is not just a ground analogous to the prohibited grounds listed in Articles 15 and 16 of the Indian Constitution, but LGBT relationships also warrant the same kind of constitutional protection and sensitivity that this Hon'ble Court has displayed to relationships that were not traditionally sanctioned.

IV. Section 377 denies LGBT citizens equal participation in professional life

4.1 Section 377 prevents LGBT persons from accessing their constitutional rights and state welfare measures, from pursuing their vocation – including state employment and constitutional office – and from seeking electoral office or even raising their demands through the electoral process. In *Jeeja Ghosh v. Union of India,* (2016) 7 SCC 761 (pp. 374-409 of the Compilation), this Hon'ble Court observed "(d)iscrimination occurs due to arbitrary denial of opportunities for equal participation." (para 40, p. 793)

4.2 This Hon'ble Court in *Supreme Court Advocates-on-Record Association* v *Union of India,* (2016) 5 SCC 1, observed as follows:

> *"*For example, in the recent past, there has been considerable debate and discussion, generally but not relating to the judiciary, with regard to issues of sexual orientation. It is possible that the executive might have an objection with regard to the sexual orientation of a person being considered for appointment as a judge but the Chief Justice of India may be of the opinion that that would have no impact on his/her ability to effectively discharge judicial function or the potential of that person to be a good judge." (para 927, p. 668)

4.3 This Hon'ble Court then noted in footnote 568 (p.668): "Australia and South Africa have had a gay judge on the bench. The present political executive in India would perhaps not permit the appointment of a gay person to the Bench." It is submitted that these observations of this Hon'ble Court clearly portray the extent to which discrimination based on sexual orientation is entrenched in our society and has its roots in Section 377.

4.4 In *Jamil Ahmad Qureshi* v. *Municipal Council Katangi,* 1991 Supp (1) SCC 302 (pp. 427-429 of the Compilation), the Appellant was found to be ineligible for appointment in service due to a prior conviction under Section 377 IPC, which was held to be an offence involving "moral turpitude".

4.5 Further, Rule 3 of the All India Services (Discipline and Appeal) Rules, 1969 **(pp. 410-414 of the Compilation)** and Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 **(pp. 415-426 of the Compilation)** provide for automatic suspension from service upon a public servant's being detained in official custody for more than 48 hours on a criminal charge or on conviction. Moreover, even where a public servant is not arrested and is being merely investigated, s/he may be suspended at the discretion of the Government if the offence involves "moral turpitude". In the current petition, out of the 350+ members of the pan-IIT LGBT support group, Pravritti, about a dozen members are bureaucrats at the topmost levels of government (Annexure P-1, pg.107 of the Petition) all of whom declined to be named for this petition fearing action or stigma on account of the abovementioned rules and Section 377.

V. Section 377 violates Article 19(1)(a) and Article 19(1)(c) of the Constitution

A. The freedom of speech and expression includes expression of sexual identity

5.1 It is submitted that pursuant to the decision of this Hon'ble Court in *NALSA* (supra), the expression of sexual and gender identity comes within the protection of Article 19(1)(a). In addition to observing that "each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom" (para 22, p. 465), the Court in *NALSA* went on to observe:

> "Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution." (para 69, p. 489)

5.2 The Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality & Anr. v. Minister of Justice and Ors* (supra), also recognized that "the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of Section 10 of the Constitution." (para 28, p. 15)

B. Section 377 has a chilling effect on LGBT persons' freedom of speech and expression

5.3 Section 377 impedes the exercise of the freedom of speech and expression by LGBT persons. It has a chilling effect on self-expression of sexual and gender identity. Laws that encourage self-censorship are liable to violate

Article 19(1)(a). In *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, this Hon'ble Court struck down Section 66-A of the Information Technology Act, 2000 because it had a chilling effect on free speech:

> "These two Constitution Bench decisions (*T. Rajagopal v. Tamil Nadu* and *Khushboo v. Kanniammal*) bind us and would apply directly on Section 66A. We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth." (para 94, pp. 169-170)

5.4 Section 377 has a chilling effect on the expression of sexual orientation and gender identity. LGBT people are afraid to be open about their sexual identity and their relationships for fear of coercive state action. By contrast, heterosexuals express their sexual identity constantly, whether explicitly or implicitly. Opposite sex couples receive public affirmation and approval when they appear together at social and professional gatherings. Social recognition and affirmation helps people nurture committed, long-term relationships.

5.5 The inability to express themselves, socially, romantically, and professionally leads to heightened rates of depression amongst LGBT persons. A 2016 report by the Astraea Lesbian Foundation of Justice titled "India LGBTI: Landscape Analysis of Political, Economic & Social Conditions" notes the limited data available regarding the healthcare of LGBT persons. The Report shows that there is a need to address social stigma and violence against LGBT persons that leads to mental harassment and depression. There are serious gaps in the area of mental health including suicide prevention.[4] For instance, Vikranth Prasanna, founder of

[4] Katie Zaman et al., India LGBTI: Landscape Analysis of Political, Economic & Social Conditions (Astraea Lesbian Foundation for Justice, 2016), page 10, https://globalphilanthropyproject.org/wp-content/uploads/2017/01/Astraea-landscape-analysis_India-04_11_16.pdf (last accessed on July 19, 2018).

Chennai Dost, an LGBT organization that provides counselling services to members, reported in 2015 that "suicides among the LGBT community has been increasing and this alarming trend is visible ever since the 2013 Supreme Court verdict on Section 377 of the Indian Penal Code (IPC) which has criminalised same gender sex."[5]

5.6 Dr. Lata Hemchand, a reputed psychologist recounts an instance where homosexuality was diagnosed as a psychotic disorder and the patient was given treatment for it:

> "A bright Computer Science student from Hassan, 22-year-old A came from an upper middle-class, conservative Marwari family. Since his adolescence he felt that his bone structure and distribution of hair on the body was more feminine than masculine. He felt that other males got attracted to him due to this. He came out about it to his parents. They tried physical punishment to change his ideas and finally when they were unsuccessful referred him to a psychiatrist. The psychiatrist diagnosed him as psychotic and put him on treatment. His sexual orientation was never addressed and he continued to be awkward and hesitant in social interaction."[6]

5.7 A study done by doctors at the National Institute of Mental Health and Neurosciences (NIMHANS), Bengaluru found that LGBT persons showed higher rates of depression and other mental health problems as compared to heterosexual persons:

> "… sexual minorities are at a higher risk to develop mental health problems due to the discrimination that they face. Compared to their heterosexual counterparts, gay men and lesbians suffer from more mental health problems including substance use disorders, affective disorders, and suicide."[7]
> …
> A national survey conducted by the advocacy organisation Gay, Lesbian, and Straight Education Network reported that those surveyed experienced verbal harassment (61%), sexual

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[5] 16 LGBT Suicides in 18 months, THE NEW INDIAN EXPRESS (26 October 2015), http://www.newindianexpress.com/cities/chennai/2015/oct/26/16-LGBT-Suicides-in-18-Months-834328.html.

[6] Dr. Lata Hemchand, *A Psychologist's Journey to Understanding Sexual Orientation* in NOTHING TO FIX: MEDICALISATION OF SEXUAL ORIENTATION AND GENDER IDENTITY (Arvind Narrain & Vinay Chandran eds., 2016), p.229

[7] Dr. Ami Sebastian Maroky et al., *Validity of 'Ego-dystonicity' in Homosexuality: An Indian perspective* in NOTHING TO FIX: MEDICALISATION OF SEXUAL ORIENTATION AND GENDER IDENTITY (Arvind Narrain & Vinay Chandran eds., 2016), p.206

> harassment (47%), physical harassment (28%), and physical assault (14%). A majority of them (90%) sometimes or frequently heard homophobic remarks at their schools, with many (37%) reporting hearing these remarks from faculty or school staff.
> Lesbian, Gay and Bisexual (LGB) people were twice as likely as heterosexual people to have experienced a life-event related to prejudice, such as being fired from a job. Gay and bisexual male workers were found to earn from 11 per cent to 27 per cent less than heterosexual male workers with the same experience, education, occupation, marital status, and region of residence."[8]

5.8 The Indian Psychiatric Society by their statement dated dated 02.07.2018 also does not consider homosexuality or bisexuality to be a mental illness. To the contrary, the IPS has recognized that LGBT persons suffer increased rates of suicide, depression and other mental illnesses because of the societal stigma that they suffer on account of their sexual orientation **(p. 511 of the Compilation)**.

5.9 Among the Petitioners, Petitioner No. 1, Anwesh Pokkuluri suffered from acute depression and mental stress which led him to attempt suicide (p.26 of the Petition). Several Petitioners including Petitioner No. 2, Akhilesh Godi, Petitioner No. 8, Udai Bharadwaj, Petitioner No. 13, Vardhaman Kumar and Petitioner No. 15, Viral Jesalpura have been subject to ridicule, bullying, and have faced express instances of homophobia leading to issues such as addiction to self-harm, suicidal thoughts and mental stress (p.25-26 of the Petition). In the case of Petitioner No. 18, Madhansai Marisetty, on account of her gender identity, she was asked to leave the hostel (p. 28 of the Petition).

C. Section 377 impoverishes political discourse

5.10 LGBT people cannot participate in the marketplace of ideas without the lurking fear that they may be prosecuted for self-expression. In *Secretary,*

[8] Dr. Ami Sebastian Maroky et al., *Validity of 'Ego-dystonicity' in Homosexuality: An Indian perspective* in NOTHING TO FIX: MEDICALISATION OF SEXUAL ORIENTATION AND GENDER IDENTITY (Arvind Narrain & Vinay Chandran eds., 2016), p.204

Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal (CAB) (1995) 2 SCC 161, this Court recognized that the freedom of speech and expression enables people to contribute to debates on social and moral issues (para 43, p. 213). However, LGBT persons cannot lobby their elected representatives to seek protection of their fundamental rights or the passage of legislation that would protect their interests. There are also no known cases of persons who openly identify as sexual minorities contesting elections.

5.11 By contrast, following this Court's judgment in *NALSA v. Union of India*, members of the transgender community have sought to participate the democratic process. There are prominent examples of transgender persons who have held elected office, such as C. Devi, who contested in the RK Nagar constituency of Tamil Nadu **(p. 512-514 of the Compilation)**. Mumtaz became the first transgender candidate to contest the Punjab Assembly polls last year **(p. 515-516 of the Compilation)**. In 2015, Madhu Kinnar became Raigarh, Chattisgarh's first transgender mayor **(p. 517-519 of the Compilation)**. Evidently, the continued criminalization of sexual minorities has had a chilling effect on their participation in the democratic process.

D. Section 377 is not a reasonable restriction under Article 19(2)

5.12 Section 377 is not a reasonable restriction in the interest of public order, decency, or morality. The State must discharge a high burden of proof to restrict the freedom under Article 19(1)(a), which it fails to meet in the present case.

5.13 The restrictions under Article 19 are narrowly defined, in contrast to the fundamental freedoms, which this Court interprets broadly. In *S.*

Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574 **(p. 530-556 of the Compilation)** this Hon'ble Court held:

> "our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest." (Para 45, p. 595)

5.14 Since "public order" is of narrower ambit than mere "law and order", the State must discharge a high burden of proof to restrict the freedom under Article 19(1)(a), as laid down by this Hon'ble Court in *The Superintendent, Central Prison Fatehgarh v. Ram Manohar Lohia*, A.I.R 1960 SC 633 **(p. 520-529 of the Compilation)** (para 12, pp. 525-526 of the Compilation). However, Section 377 has no direct or proximate connection to public order. Self-expression by sexual minorities is not "intrinsically dangerous to the public interest". It does not cause riots, turbulence, or acts of violence. It does not affect the security of the State or promote its overthrow. To the contrary, self-expression by minorities is essential to preserve the democratic fabric and to create a vibrant and diverse society.

5.15 Section 377 is also not a reasonable restriction in the interests of decency and morality. As held in *Khushboo v. Kanniammal*, (2010) 5 SCC 600 **(p. 557-578 of the Compilation):**

> "Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co-extensive...the law should not be used in a manner that has chilling effects on the 'freedom of speech and expression'." (Para 46-47, pp. 619-620)

5.16 Section 377 is not intended to preserve any notion of decency or morality that is consistent with the constitutional ethos. At best, it imposes notions

of Victorian morality sought to be imposed upon India by its erstwhile colonial rulers. Indian society has always accepted sexual diversity and gender expression as evidenced by our myths and traditions.

5.17 Hence, Section 377 is not a reasonable restriction in the interest of public order, decency or morality.

E. Section 377 violates the right of sexual minorities to form associations under Article 19(1)(c)

5.18 In its recent decision in *K.S. Puttuswamy v. Union of India*, (2017) 10 SCC 1 (para 374, p. 531), this Hon'ble Court has observed that association has different facets including political, social and personal association. LGBT persons are unable to form or join associations where they must identify as sexual minorities because they fear coercive state action and social stigma.

5.19 The inability to form a legally recognised association deprives LGBT persons of the very tangible benefits that the state extends to such associations, for example, tax exempt status offered to a registered society or charitable trust under Section 80G of the Income Tax Act, 1961. Although such tax exemption can be availed by corporations which promote interests of notified minority communities,[9] LGBT persons are unable to avail of such exemptions because of Section 377.

5.20 Similarly, LGBT persons are hesitant to register companies to provide services for the benefit of sexual minorities. In fact, conviction under Section 377 would render an LGBT person ineligible for appointment to

[9] Section 10(26BB) of the Income Tax Act, 1961. "10. Incomes not included in total income.— In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included— (26-BB) any income of a corporation established by the Central Government or any State Government for promoting the interests of the members of a minority community.
Explanation.—For the purposes of this clause, "minority community" means a community notified as such by the Central Government in the Official Gazette in this behalf;"

directorship of a company. Under Section 164 of the Companies Act, 2013, a person shall not be eligible for appointment if:

> "he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence. If a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company".

5.21 Sexual minorities are also unable to agitate for their rights through the democratic process unlike other historically disadvantaged groups. There is no known case of an elected representative in India who identified as sexual minority.

5.22 LGBT persons, like all citizens, have the right to form meaningful, intimate relationships with persons of their choice. This is an aspect of personal association which ought to be protected by Article 19(1*)(c).*

VI. Section 377 violates Article 21

6.1 We adopt the arguments in the written submissions in *Navtej Singh Johar & Ors. v. Union of India* [W.P. (Crl.) No. 76 of 2016].

VII. Section 377 violates the freedom of conscience under Article 25

7.1 Article 25 of the Constitution guarantees to all persons the freedom of conscience and the right to freely profess, practise, and propagate religion. As an aspect of liberty guaranteed under Article 21, the freedom of conscience is the foundation for the right to choice guaranteed under Article 21. Article 25 enables LGBT persons to acknowledge their own sexual identities both to themselves and to others, and to exercise the right to choice of partner.

7.2 Black's Law Dictionary defines conscience as:

> "1. The moral sense; esp., a moral sense applied to one's own judgment and actions. 2. In law, the moral rule that requires justice or honest dealings between people."[10]

7.3 In *Puttaswamy*, this Hon'ble Court held that the right to conscience, falling within the zone of private thought processes, is an aspect of liberty under Article 21:

> "Constitution of India protects the liberty of all subjects guaranteeing the freedom of conscience and right to freely profess, practise and propagate religion. While the right to freely "profess, practise and propagate religion" may be a facet of free speech guaranteed under Article 19(1)(a), the freedom of the belief or faith in any religion is a matter of conscience falling within the zone of purely private thought process and is an aspect of liberty."[11]

7.4 *Puttaswamy* explicitly noted that freedom of conscience goes beyond religious belief:

> "There are areas other than religious beliefs which form part of the individual's freedom of conscience such as political belief, etc., which form part of the liberty under Article 21".

7.5 As an aspect of liberty, the freedom of conscience embraces a human beings' ethical and moral positions, the choices we make based on these positions, and the outward expression of such choices. In *On Liberty*, John Stuart Mill recognized that the freedom of conscience enables people to make fundamental choices that affect all aspects of their lives:

> "This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.
> …
> Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without

[10] BLACK'S LAW DICTIONARY, (Bryan A Garner ed., 9th ed., 2009), p.345.
[11] Puttaswamy, para 372 (Chelameswar, J.).

> impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."[12]

7.6 The idea that we may enjoy liberty by exercising choice, so long as no harm comes to others, is the foundation of the social compact. The protection of liberty is therefore a fundamental state function. James Madison, the architect of the American Constitution traced the protection of conscience to the origins of the social compact and recognized the protection of liberty as a sacred duty of the State:

> "Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and inalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact."[13]

7.7 Section 377 constrains LGBT persons from enjoying the freedom of conscience and consequently from freely making choices about life's most fundamental decisions. LGBT people struggle to acknowledge their sexual identities to themselves and to others. By criminalizing their identities, Section 377 places additional constraints on the exercise of freedom of conscience.

7.8 The choice of partner guaranteed by the Constitution is also a facet of the freedom of conscience. A partner is one's companion on life's ethical and moral journey. Compatibility between partners is also a matter of conscience, as partners support each other socially, financially, professionally, spiritually and intellectually and guide one another should

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[12] John Stuart Mill, On Liberty and Other Essays (Stefan Collini Edition, 1989) (1859) as cited in *Puttaswamy*, para 408 (Bobde, J.) and para 523 (Nariman, J.).
[13] James Madison, "Essay on Property", in Gaillard Hunt (Ed.), The Writings of James Madison (1906), Vol. 6, at pp. 101-103 as cited in Puttaswamy, para 34 (Chandrachud, J.).

they falter. As John Stuart Mill recognized, the freedom of conscience is an aspect of the freedom of association:

> "Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived."[14]

VIII. Supreme Court's jurisprudence of constitutional morality has an impact on other constitutional courts

8.1 The Indian Supreme Court's judgments act as moral, legal and philosophical trailblazers for courts around the world. Constitutional courts do not arrive at constitutional law jurisprudence in isolation. In that sense, "comparative constitutional law" is a misnomer: all constitutional jurisprudence is inherently comparative. Even when Courts do not explicitly refer to judgments from other jurisdictions, they are participating in an ongoing, rich and sometimes sharply divided conversation about the nature of rights. Post-colonial courts, in particular, confront a large shared body of colonial law that they must continue to interpret. While doing so, they confront the challenges thrown up by their ever-changing post-colonial societies. For instance:

8.2 *Puttaswamy* has quickly become a landmark judgment in comparative constitutional law. In *Jason Jones v Attorney General of Trinidad & Tobago*, (Claim no. CV 2017-00720 decided on 12th April 2018), the High Court of Justice of the Republic of Trinidad and Tobago held that Section 13 of the Sexual Offences Act (which made the offence of buggery punishable with 25 years' imprisonment) and Section 16 (while the offence of serious indecency punishable with imprisonment for five years)

[14] John Stuart Mill, On Liberty and Other Essays (Stefan Collini Edition, 1989) (1859) as cited in *Puttaswamy*, para 408 (Bobde, J.) and para 523 (Nariman, J.).

unconstitutional under the Trinidad and Tobago Constitution. The Hon'ble Court held that:

> "A felicitous exposition of what the right to privacy entails, to this court's mind, is summarized in the Supreme Court of India decision in Puttaswamy v Union of India. In that matter, a nine judge bench of the Supreme Court of India handed down its decision in a 547 page judgment, containing six opinions, and ruled unanimously that privacy is a constitutionally protected right in India despite there being no explicit right to privacy as found in their Constitution. The right to privacy was held to exist based on the principle that the Indian Constitution is a living Instrument and the Court sought to give effect to the values of the Constitution by interpreting express fundamental rights protections as containing a wide range of other rights. As such, Article 21 of the Constitution which provides that 'No person shall be deprived of his life or liberty expect according to procedure established by law', was held to incorporate a right to privacy.'

8.3 Citing paras 297 and 298 of *Puttaswamy*, the Hon'ble Court noted that "the dicta coming out of *Puttaswamy* emphasized the fact that sexual orientation is an essential attribute of privacy, which is inextricably linked to human dignity." The Court also noted that *Puttaswamy* had cast doubt on *Suresh Kumar Koushal v Naz Foundation,* (2014) 1 SCC 1.

8.4 *Puttaswamy* has also been cited before the High Court of Kenya in *Eric Gitari v The Hon. Attorney General* (Petition no. 150 of 2016). Eric Gitari challenged the law criminalizing same sex conduct in Kenya when the registration of an NGO for LGBTIQ persons was rejected. The Attorney General and 9th Interested Party had relied upon *Suresh Kumar Koushal* to argue that these issues should be decided by the legislature. Here, the Petitioner relied upon Puttaswamy (para 144 to 146) as the nine-judge bench now sets out the correct approach in Indian law.

8.5 In *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu*, [2014] eKLR [Judicial Review 147 of 2013] **(p. 579-591 of the Compilation)**, the High Court of Kenya cited the

observations of the Supreme Court of India in *NALSA v Union of India*, (2014) 5 SCC 438 regarding sexual identity and sexual orientation.

8.6 The Supreme Court of Canada, in Reference re: Judicature Act, 1984 ABCA 354 cited *All India Bank Employees Association v. The National Industrial Tribunal* AIR 1962 SC 171 on the question of whether the imposition of compulsory interest arbitration in place of strikes and lockouts has interfered with the freedom of association of the workers involved.

8.7 The Sri Lankan Supreme Court in *Elmore Perera* v. *Major Montague Jayawickrema Minister of Public Administration and Plantation Industries and Others* [1985] 1SLR 285 decided the issue of fundamental rights under Articles 12 and 14(1)(g) of the Sri Lankan Constitution by applying the interpretation placed on Article 14 in *Maneka Gandhi's* case.

8.8 The Pakistan Supreme Court, in *Shehla Zia* v. *WAPDA*, PLD 1994 SC 693, quoted *Kharak Singh* v. *State of UP* (AIR 1963 SC 129), *Francis Coralie Mullin* v. *Union Territory of Delhi* (AIR 1981 SC 746), *Olga Tellis and others* v. *Bombay Municipal Corporation* (AIR 1986 SC 180) and *State of Himachal Pradesh and another* v. *Umed Ram Sharma and others* (AIR 1986 SC 847). The Pakistani Supreme Court observed that "Thus, apart from the wide meaning given by US Courts, the Indian Supreme Court seems to give a wider meaning which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence."

8.9 However, one exception to India being a trailblazer and crafter of global constitutional morality is in the area of colonial-era anti sodomy statutes. In this area, there have been a host of countries that have struck down their colonial era anti-sodomy statutes in the recent past.

8.10 In 2016, the Supreme Court of Belize in *Caleb Orozco* v. *Attorney General of Belize*[15] struck down Belize's colonial era anti-sodomy law. The Court relied on the constitutional protection and right of dignity, privacy, freedom of expression, and equality. The Court appreciated the concept of diversity and difference within the Belize Constitution to carve out private sexual acts between consenting adults from the purview of the law.

8.11 In *McCoskar* v *State*,[16] the High Court of Fiji decriminalised homosexuality as laws criminalising such conduct ran foul of the constitutional guarantees of privacy and equality. Justice Winter held that:

> "the way in which we give expression to our sexuality is the most basic way in which we establish and nurture relationships…the Court should adopt a broad and purposive construction of privacy that is consistent with the recognition in international law that the right to privacy extends beyond the negative conception of privacy as freedom from unwarranted State intrusion into one's private life to include the positive right to establish and nurture human relationships free of criminal or indeed community sanction."

The High Court of Fiji also held that the individual's right to privacy cannot be abrogated on the grounds of religious beliefs or public morality:

> "The judicial function in a case such as this is therefore to lay the impugned statutory provisions down beside the invoked constitutional provisions and if, in the light of the established facts a comparison between the two sets of provisions shows an invalidity, then the statutory provisions must be struck down either wholly or in part to cure that invalidity and make those statutory provisions consistent with the Constitution…while members of the public who regard homosexuality as amoral may be shocked, offended or disturbed by private homosexual acts, this cannot on its own validate unconstitutional law. The present

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[15] *Caleb Orozco v. Attorney General of Belize,* Claim No. 668 of 2010 (10.08.2016). Section 53 of the Belize Criminal Code, Chapter 101 :- "Every Person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years."

[16] [2005] FJHC 500. Section 175 and 177 of the Fijian Penal Code:- 175. Any person who- (a) has carnal knowledge of any person against the order of nature; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony, and is liable to imprisonment for fourteen years, with or without corporal punishment.

177. Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment. [2005] FJHC 500

> case concerns the most intimate aspect of private life. Accordingly there must exist particularly serious reasons before the State or community can interfere with an individual's right to privacy…I find this right to privacy so important in an open and democratic society that the morals argument cannot be allowed to trump the Constitutional invalidity…"

8.12 In Hong Kong, sodomy was decriminalised in 1991, and the age of consent between heterosexual and homosexual conduct was equalised in 2005. In the landmark case of *Leung TC William Roy* v *Secretary for Justice*,[17] the Court of Appeal held the law to be violative of the non-discrimination, privacy and equality guarantees in the Hong Kong Bill of Rights Ordinance:

> "Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way that is natural to them … It is disguised discrimination founded on a single base: sexual orientation."

8.13 In 2015, the Mexican Supreme Court held that the ban on same-sex marriage was unconstitutional as "because it undermined the self-determination of the people and against the right to free development of the personality of each individual."

8.14 Over a decade ago, the Nepal Supreme Court in *Sunil Babu Pant* v. *Nepal Government*, declared that the criminal provisions criminalising homosexual conduct were arbitrary, unreasonable and discriminatory:

> The right to privacy is a fundamental right of an individual. The issue of sexual activity falls under the definition of privacy. No one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural. In the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation. In such a situation, therefore, gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treating the sexual intercourse among them as unnatural.

[17] [2006] 4 HKLRD 211

> When an individual identifies her/his gender identity according to the self-feelings, other individuals, society, the state or law are not the appropriate ones to decide as to what type of genital s/he should have, what kind of sexual partner s/he needs to choose and with whom s/he should have marital relationship. Rather, it is a matter falling entirely within the ambit of the right to self-determination of such an individual. [18]

8.15 Section 9 of the South African Constitution explicitly prohibits discrimination by the State and private parties on grounds of gender, sex or sexual orientation.[19] In the landmark judgment of *National Coalition for Gay and Lesbian Equality* v *Minister of Justice*, the South African Constitutional Court declared the prohibition of sodomy unconstitutional on grounds of equality, privacy and dignity.

8.16 In *Judicial Yuan Interpretation No. 748*,[20] the Constitutional Court of Taiwan in 2017 held that the prohibition on same-sex marriage was violative of the constitutional guarantees of equality, non-discrimination and dignity under its Constitution.

8.17 These are but a few examples where such anti-sodomy laws and other restrictive laws have been struck down in light of the recognition of the rights of LGBT persons. It is respectfully submitted that this Hon'ble Court may consider not only setting aside its previous decision in *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, but also crafting constitutional principles that will protect the rights of LGBT Indians. By doing so, it would continue its jurisprudential trajectory of expanding freedoms and enhancing liberties of all people.

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[18] (2008) 2 NIA LJ 262, WP no. 917 of 2007. Nepal's Criminal Code, Chapter 16, part No. 4 "Whoever commits or cause to commit any other unnatural sexual intercourse save as provided for in other numbers of this chapter shall be punished with an imprisonment up to one year or five thousand rupees."

[19] Section 9(3) of the South African Constitution:- The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
Section 9(4) of the South African Constitution:- No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

[20] JY No. 748, 24 May 2017

IX. Conclusion: Constitutional Morality and the Supreme Court's Emancipatory Jurisprudence

9.1 Before the Constituent Assembly of independent India, the Chairman of the Drafting Committee, Dr. B.R Ambedkar, distinguished between constitutional morality from social morality by quoting Grote:

> "The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendency for themselves."
> "By constitutional morality Grote meant "a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own."
>
> [Constituent Assembly Debates, Vol. VII, November 4, 1948]

9.2 It is this constitutional morality that we commit to as a nation state. This Hon'ble Court has consistently reinforced constitutional morality through its interpretation of the Constitution, never yielding to a majoritarian or social morality. In *Kesavananda Bharati* v *State of Kerala*, (1973) 4 SCC 225 and *Minerva Mills* v *Union of India*, (1980) 3 SC 625, it commenced crafting its renowned basic structure doctrine to protect constitutional democracy from a marauding executive.

9.3 Through its jurisprudence of the last many decades, this Hon'ble Court has emancipated fragile Indian citizens who would otherwise have been left out of the constitutional project. This Court has been the recognised

globally as the unparalleled trailblazer on creating and protecting socio-economic rights in a country of vast dispossession, poverty and inequality.

9.4 The IIT Petitioners are young adults entrusted with the weighty task of building modern India. They now approach their Court, with the Constitution in their hearts, asking not merely for the reading down of a penal provision that has for so long made them 'unconvicted felons' for who they choose to love. Instead, they pray for a declaration that the constitutional guarantees of equality, non-discrimination, life, liberty, dignity and conscience apply with equal force to LGBT Indians. They hope to be full citizens, warmly embraced by the promises of their Constitution.

9.5 In the lead petition, *Navtej Singh Johar* v *Union of India*, these much older petitioners learnt to protect and celebrate their love despite the darkness of section 377 and the indignities of *Suresh Kumar Koushal*. Navtej and Sunil have persevered in a relationship of 25 years. Aman's partner passed before this Writ could be filed. For Keshav Suri, even his family members were unable to accept his sexual orientation. Yet they all come to this Court with optimism and hope, praying that their love be constitutionally recognized. They simply ask that you emancipate them.

DRAWN BY:
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Pritha Srikumar Iyer
Arundhati Katju
Advocates

PETITIONERS

Through

COUNSEL FOR THE PETITIONERS

NEW DELHI
DATED 19.07.2018

IN THE SUPREME COURT OF INDIA

(CRIMINAL APPELLATE JURISDICTION)

WRIT PETITION (CRL) NO.100/2018

IN THE MATTER OF:

Arif Jafar …Petitioner

VERSUS

Union of India & Ors. …Respondents

AND

WRIT PETITION (CRL.) NO.101/2018

Ashok Row Kavi and Ors …Petitioners

VERSUS

Union of India & Ors. …Respondents

AND

IA NO. 10779 of 2018 in W.P. (Crl.) 76 of 2016

Naz Foundation (India) Trust …Intervenor

Navtej Singh Johar & Ors. …Petitioner

VERSUS

Union of India …Respondent

NOTE OF ARGUMENTS BY MR. ANAND GROVER, SENIOR COUNSEL, ON BEHALF OF THE PETITIONERS

I. ORIGIN AND INTERPRETATION OF SECTION 377, INDIAN PENAL CODE, 1860 ("IPC")

a. Origins of the anti-sodomy law in England:

1. The first records of sodomy as a crime can be found in *Fleta (1290);* the text categorically prescribed for the burning alive of

the 'sodomite'. Records of sodomy as a crime also found in the *Britton (1300);* the text also prescribed for the burning of the 'sodomite'.

2. The Buggary Act of 1533 was passed during the reign of Henry VIII, which penalized acts of sodomy by hanging. The statute took over the offence of buggary from ecclesiastical law. The term '*abominable'* was borrowed from Book of Leviticus (18:22 and 20:13), therefore the rationale of the provision is unmistakably religious. The law prohibited the '*abominable vice of buggary'* (a term which was associated with sodomy by the 13th century) committed with mankind or beast.
3. The term 'buggary' traces back to 'bougre', or heretic in old French, and to the Latin Bulgarus for Bulgaria (depicted as a place of heretics). By the 13th century, the term was clarified to mean anal sexual intercourse.
4. In 1563, when Henry VIII's daughter Mary succeeded her brother and restored England's papal allegiance, all Protestant laws were repealed. But when Henry's daughter Elizabeth became queen, a new version of the Act was passed. The law was enacted one year after the Parliament ended the papal jurisdiction over English Church. Catholic Courts were unsympathetic to Henry VIII's divorce case. The buggary law was part of a widening campaign against Catholics, which lead to the expropriation of monasteries.
5. In 1644 the crime was described by the English jurist Sir Edward Coke as "*a detestable and abominable sin amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with brute beast, or by woman with brute beast".* This was clarified to mean anal sex between two men, a man and a

woman and beastiality. In 1767, The English jurist Sir William Blackstone in his commentaries on the Laws of England described the Buggary Act as prohibiting the "infamous crime against nature".

6. In 1835, English MP Henry Labourchere proposed amendment to the law to also punish '*any male person who in public or private commits or is party to the commission of or procures or attempts to procure the commission by any male person of any act of* ***gross indecency*** *with another male person"*, i.e., non-penetrative sex between men. This offence was so unrelated to and disproportionate to the debate on regulating sexuality in England at the time, the press quickly dubbed it as the 'blackmailer's charter'. Later penal codes in British colonies incorporated versions of this law. However, even though Labouchere's amendment only sought to criminalize male-male sex, some colonial governments extended the law to sex between women.
7. The Offences Against Persons Act, 1861 consolidated the law on physical and violent offences in Britain. It included the consensual and non-violent offence of buggary, however substituted the death penalty for a prison sentence of 10 years.

b. ***Origins of the anti-sodomy law in India***

8. The codification of sexual offences in British Colonies began in 1825, when the mandate to devise law for Indian colony was handed to politician and historian Thomas Babington Macaulay. Macaulay chaired the first Law Commission of India and was the main draftsperson of the Indian Penal Code, 1860 ('IPC') – the first codified criminal law developed in any part of the British Empire.

9. In 1837, first draft of Indian Penal Code contained the anti-sodomy law in Clauses 361 and 362, as follows:

"*Of Unnatural Offences:*

361: Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.

362: Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine."

10. Macaulay, stated in the draft report that "*Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said…We are unwilling to insert, either in the next, or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury that would be done to the morals of the community by such discussion would far more than compensate for any benefit which may be deprived from legislative measures framed with the greatest precision."*

11. Section 377 (*Unnatural Offence*) was enacted in its present form by the British Colonial Government, which reads as:

"*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 ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

12. The jurist Edward Coke in his treatise on English law phrases explained it as "*acts committed by carnal knowledge against the ordinance of the Creator, and order of Nature…"* He specified that anal sex between two men or a man and a woman, along with beastiality were comprised in the expression.

13. The offence in Section 377, IPC was different than the 1837 draft, as it required 'penetration' as opposed to 'touching'. In comparison to the offence of buggary under ecclesiastical law in England, Section 377, IPC was overbroad depending on the interpretation Courts may give to "*carnal intercourse against the order of nature".*

c. Victorian morality of IPC exported to other British colonies:

14. Section 377 of the Indian Penal Code, 1860, became a model anti-sodomy law for the Commonwealth countries in Asia, Pacific Islands and Africa. (***See***: *This Alien Legacy: The Origins of Sodomy Laws in British Colonialism, Human Rights Watch, 2008*).

15. In Africa, countries that inherited versions of the anti-sodomy law from the British Empire are: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. Between 1897 and 1902, British administrators also broadly applied IPC-based codes to African colonies, in particular to Kenya and Uganda.

16. Colonial legislators brought the law because they felt 'native' cultures did not punish 'perverse' sex severely. The colonized needed compulsory re-education in sexual mores according to Judeo-Christian morality. Imperial rulers believed that as long as they lived and travelled through their settler colonies, 'native viciousness' and 'white virtue' had to be segregated: the former policed and the latter acclaimed.

17. It is well-documented that the personal views on morality of the colonial officials, rather than logic or respect for indigenous traditions, led to application of IPC-based penal codes uncritically across the Asian and African continent.

18. Almost none of these laws modelled on Section 377, Indian Penal Code, 1860 expressly mention '*homosexuality*' or '*homosexual acts*', as the term '*homosexual*' was only coined in 1869.

19. The so-called anti-sodomy laws universally make no distinction based on age or consent of persons, thereby conflating and identifying homosexuality by association with violent sexual offences like paedophilia or rape, and intensifying socio-legal stigma.

20. An explanation to why criminalization of homosexuality was important to colonial governments and post-colonial states is to look at some other laws and practices the colonial governments imported along with the anti-sodomy laws. These laws seen together served '*civilizing mission*' of Europe over its '*barbaric*' colonial subjects. Vagrancy laws, public nuisance laws and anti-begging laws target people whom officials see as wandering or loitering in public with no purpose. Enforcement was always, and continues to this day in India and other former colonies, selectively targeting despised and vulnerable groups such as

homeless, beggars, indigenous people, migrant labourers, transgender persons, sex workers, nomadic tribes or travellers. These laws in effect criminalize poverty and 'despised' identities, to keep the social and economic inequality out of public sight.

d. Scope of Section 377, IPC in India expanded by judicial interpretation

21. Initially oral sex was held not to be covered by Section 377 [***Govt. v. Bapoji Bhatt*** *1884 (7) Mysore* LR 280, Para nos. 281 and 282]. Later various other acts were read into Section 377 vide judicial pronouncements as follows:

    i. Oral sex [***Khanu v. Emperor*** *1925 Sind* 286, para 2 at page 286].

    ii. Coitus per nose of a bullock [***Khandu v. Emperor*** AIR 1934 Lahore 261 at page 262].

    iii. Intercourse between the thighs of another (intra crural) [***State of Kerala v. Kundumkara Govindam*** 1969 Cri LJ 818 at paras 18 – 22].

    iv. Acts of mutual masturbation [***Brother John Antony v. State*** 1992 Cri LJ 1352 at paras 18, 20 – 24].

    v. Penetration into any orifice of anyone's body except the vaginal opening of a female [***State of Gujarat v. Bachmiya Musamiya*** 1998 (3) Guj L.R. 2456 at para 48].

    vi. In later judgments, the orifice could be created artificially by the human body such as thighs joined together, the palm folded etc.

22. Penetration has to be by the human penis. Penetration is enough to constitute the offence. Completion of the act, or seminal discharge is not necessary. [***Noshirwan Irani v. Emperor*** AIR 1934 Sind 206 at page 208; ***Lohana Vasanthlal v. State*** at para 6]

23. The rationale for holding acts as covered under Section 377 has undergone change over the years:

    i. Initially a *procreative test* was used, whereby acts having no possibility of conception of human beings were covered. [***Khanu v. Emperor*** at para 2; ***Lohana Vasanthlal v. State***, AIR 1968 Guj 352 at para 9].

    ii. Subsequently, *imitative test* was formulated, i.e., acts of oral and anal sex become imitative of the desire of sexual intercourse. *[**Lohana Vasanthlal v. State*** at para 6-9].

    iii. Later, a *test of sexual perversity/ immorality/ depravation of mind* was sought to be used. [***Fazal Rab Choudhary v. St. of Bihar***, AIR 1983 SC 323 at para 3; ***Mihir @ Bhikari Charan Sahu v. St. of Orissa***, 1991 Cri LJ 488 at paras 6 and 9; ***Khandu v. Emperor*** at page 262].

e. Meaning of words 'carnal intercourse' and 'order of nature'

24. The Concise Oxford Dictionary (Ninth edition 1995), defines 'carnal' to mean, *of the body* or *flesh*; *worldly* and *sensual*, *sexual*.

25. The expression 'carnal intercourse' in Section 377, IPC is distinct from the expression 'sexual intercourse', which appears in Sections 375 (*Rape*) and 497 (*Adultery*), IPC. The expression, 'carnal intercourse' is broader than 'sexual intercourse'.

26. All the three sections presuppose that penetration is sufficient to constitute carnal intercourse. This is in contrast to the full act of sexual or carnal intercourse, which would mean the discharge of semen. This implies that the penetration contemplated in all the three sections is that of the penis and that even partial penetration would be sufficient. Non-penile penetration does not come within the purview of penetration in 375 (prior to 2013 amendment) or 377 or 497, IPC.

27. Section 375 and 497, IPC on the one hand and Section 377, IPC on the other operate in different fields. Section 375, IPC explicitly applies only to intercourse between a man and a woman. Therefore, the expression '*sexual intercourse'* means '*penile-vaginal sex*'.

28. The expression 'carnal intercourse' is therefore all sexual acts penile non-vaginal. The expression carnal intercourse against the order of nature may refer to '*penile non-vaginal sexual acts*' that do not result in procreation.

f. Persons to whom the law applies [man, woman, animal, explanation

29. The text of Section 377, IPC makes clear that the 'victim' contemplated in the law can be male, female or animal. The 'offender' contemplated in the law is male, as according to the Explanation to the provision, (penile) penetration is sufficient to constitute the offence.

30. Judicial interpretation also covered minors in cases of child sexual abuse [***Calvin Francis v. State of Orissa, 1992 (2) Crimes 455***].

31. In recent times, Section 377, IPC is also used by married women to seek remedy for non-consensual anal or oral sexual acts.

32. Though facially neutral and ostensibly applying to both heterosexual persons and homosexual persons, an analysis of judgments on Section 377 shows that over the years, heterosexual couples have been practically excluded from the ambit of Section 377 while primarily targeting homosexual men on the basis of their association with proscribed acts.

g. Law Reforms

The Wolfenden Committee Report (1957):

33. The Wolfenden Committee Report particularly recognized how the English anti-sodomy law created at atmosphere for blackmail, harassment and violence against homosexual men, as it noted "*English law has recognized the special danger of blackmail in relation to buggary and attempted buggary in Section 29 of The Larceny Act, 1926 …We know that blackmail takes places in connection with homosexual acts. Most victims of the blackmailer are naturally hesitant about reporting their misfortunes to the police, so that figures relating to prosecutions do not afford a reliable measure of the amount of blackmail that actually goes on…We have found it hard to decide whether the blackmailer's primary weapon is the threat of disclosure to the police, with attendant legal consequences, or the threat of disclosure to the victim's relatives, employers or friends, with attendant social consequences. It may well be that the latter is the more effective weapon, but it may yet be true that it would lose much of its edge if the social*

consequences were not associated with the present legal position".

34. England and Wales themselves decriminalized sexual relations between consenting, adult males in 1967, on the recommendation of The Wolfenden Committee that urged "*homosexual conduct between consenting adults should no longer be a criminal offence…The law's function is to preserve public order and decency, and to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior…".*

35. However, this came too late for most of Britain's colonies who gained independence in 1950s and 1960s, who uncritically retained such laws.

36. Anti-sodomy laws, even when unenforced, express contempt, create inequality, increase vulnerability and reinforce second-class citizen status in all areas of life for lesbian, gay, bisexual and transgender persons. They relegate people to inferior status in law and society, by declaring their most intimate feelings as 'unnatural' and 'illegal'.

37. As England and Wales decriminalized sexual acts between consenting adults in private in 1967, Scotland followed in 1980 and Northern Ireland in 1982. However, these legal reforms set the age of consent for homosexual men at 21 years of age. This was lowered to 18 in 1990s.

38. At the same time, the age of consent for heterosexual couples was set of 16 years of age across Britain.

Law Commission Report (42nd):

39. In 1971, the 42nd Law Commission of India Report deferred to the public morality of the 'community' on homosexuality and recommended continued criminalization under Section 377, IPC, albeit less severely.

Law Commission Report (172nd):

40. In 2000, the 172th Law Commission of India Report raised questions on the rationale of the law in treating child sexual abuse as morally and legally equivalent to sexual acts between consenting adults in private under Section 377, IPC. The Report broadly looked at overhauling the sexual assault law in India, and in recommending amendments to existing laws to cover all forms of non-consensual, penetrative and non-penetrative sexual acts for male as well as female victims of sexual assault law, recommended deletion of Section 377, IPC.

41. The European Court of Human Rights ruled in 2001 that separate legal age of consent violated the right to equality and right to privacy for homosexual men. United Kingdom adopted the ECHR's directive by legislative amendment in 2004 (*See Euan Sutherland v. United Kingdom, 2001 ECHR 234).*

42. In 2004, a law allowing civil partnerships for same sex couples was passed throughout UK.

43. On 2nd July 2009 the Hon'ble High Court of Delhi declared that Section 377 of IPC, in so far as it criminalizes consensual sexual acts of adults in private is violative of Articles 14, 15 and 21 of the Constitution of India (*Naz Foundation (India) Trust v. NCT of Delhi, 160 DLT 277*). Pertinently, the Union of India, did not file any appeal against the order of the Delhi High Court.

44. On 20th June, 2012, the Parliament passed the *Protection of Children against Sexual Offences Act* (hereinafter 'POCSO'), 2012 that sought to protect children, *inter alia*, from penetrative sexual assault and sexual harassment, and provides a comprehensive child-centric redressal mechanism to deal with such offences. It included acts also covered under Section 377, IPC and is gender neutral.

45. The Justice Verma Committee Report, 2013 recommended that the proposed Criminal Law Amendment Act, 2012 shall be modified to include sexual assault on male and transgender persons to effectively provide access to justice.

Parliamentary debates in 2013 – section 377 not amended as matter was 'sub-judice':

46. It is clear from the parliamentary debates on the Criminal Law Amendment Bill, 2013 that when the question of unnatural offences under Section 377 was raised in Lok Sabha, the Hon'ble Speaker of the House said "*this matter is currently sub-judice. We do not need to deliberate on the same*", as evident from the Lok Sabha debates. In effect, Parliament did not amend the Section 377, during the 2013 Amendment process, precisely because this Hon'ble Court was seized of the issue and the judgment was reserved. The fact of Parliament not amending the law cannot be interpreted as evidence of the legislative endorsement of the existing Section 377.

Supreme Court Judgment, 2013:

47. On 11th December 2013, this Hon'ble Court reversed the decision of the Hon'ble High Court of Delhi and held that Section 377 of IPC does not suffer from the vice of

unconstitutionality and the declaration by the High Court is legally unsustainable. (***Suresh Kumar Koushal v. NAZ Foundation & Ors***., (2014) 1 SCC 1).

48. On 24th December 2013, NAZ Foundation (India) Trust filed Review Petition No. 41-55 of 2014 pointing out glaring errors on the face of the record and patent errors of law. Others also filed review petitions. On 28th January 2014, this Hon'ble Court dismissed the review petitions by circulation.

49. In the same year, The Marriage (Same Sex Couples) Act, 2013 legalized marriage of same sex couples in England and Wales.

50. On 31st March 2014, NAZ Foundation (India) Trust filed the curative petition (Civil) No. 88-102 of 2014 against the judgment dated 11.12.2013 along with the judgment and order in review petitions dated 28.01.2014. Several others filed curative petitions.

51. By an order dated 2 February 2016, this Hon'ble Court referred the Curative Petitions to the Curative Bench.

52. Writ Petitions came to be filed by various people challenging the validity of Section 377 IPC.

53. On 24 August 2017, this Hon'ble delivered the judgment in ***Justice KS Puttaswamy v Union of India,*** holding that the privacy is a protected fundamental right in the Constitution and that ***Suresh Kumar Koushal*** has been decided incorrectly on a number of issues including privacy.

54. On 8 January 2018, this Hon'ble Court in ***Navtej Singh Johar & Ors. v. Union of India,*** W.P (Crl.) No. 76 of 2016 decided to refer the examination of the constitutional validity of Section 377, IPC to a 5-judge constitutional bench.

55. On 1 May 2018, this Hon'ble Court ordered that the petition of the present Petitioner be tagged with Writ Petition (Crl.) No. 76/2016.

II. SECTION 377 VIOLATES ARTICLES 14, 15, 19 AND 21 OF THE CONSTITUTION

a. Fundamental Rights protected in Chapter III must be viewed in light of Constitutional goals and aspirations

56. The Constitution of India and its various chapters including the Preamble, Fundamental Rights (Part III) and Fundamental Duties (Part IV-A) is infused with humanism, i.e. the spirit to respect and cherish one another as human beings.
57. The Constitution is a living document. Constitutional provisions must be interpreted in a liberal and expansive manner, so as to anticipate and respond to changing circumstances, emerging challenges and evolving aspirations of the people.
58. Provisions under Part III must be interpreted so as to "*expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content.*"
59. The Preamble to the Constitution incorporates certain core and abiding values that pervade all other provisions in the document. The Preamble also lays down the vision and goal of the Constitution, which is, the *"realisation of a social order founded in* justice, *equality and the dignity of the individual."*
60. Respect for the dignity of all persons is a constitutional principle as well as a constitutional goal.
61. In the same vein, the Constitution enjoins the State and citizens to show respect for diversity, accepting and valuing people's

differences rather than censuring or discriminating against them. In ***Subramanian Swamy v. Union of India*** (2016) 7 SCC 221 (hereinafter "*Subramanian Swamy*"), this Hon'ble Court proclaimed:- "*Respect for the dignity of another is a constitutional norm."* The reference to fraternity in the Preamble is nothing but the "*constitutional assurance of mutual respect and concern for each others's dignity*."

62. The Preamble sets the humane tone and temper of the founding document. [***Prem Shankar Shukla v. Delhi Administration***, (1980) 3 SCC 526 at paras 1 and 21]. It aspires to secure:- "*Justice*", "*Liberty*", "*Equality*" and "*Fraternity assuring the dignity of the individual and the unity of the nation*." In ***Justice KS Puttuswamy v Union of India*** (2017) 10 SCC 1, this Hon'ble Court observed that:-"*Fraternity is to be promoted to assure the dignity of the individual."* Fraternity under the Constitution is not built on conformity or sameness but is borne out of respect for and appreciation of differences in society.

63. Fundament Rights under Part III are infused with the humanistic spirit and democratic values enunciated in the Preamble. Fundamental rights not only derive meaning and content from such values but also serve as the means by which the constitutional vision laid down in the Preamble is realised. **[*Justice KS Puttuswamy v Union of India*** (2017) 10 SCC 1 at para 126**]**

64. Fundamental Rights do not operate in *silos* but are interlinked and intertwined in a manner that contributes to the blossoming of the individual and the human personality.

65. The Constitution of India envisions a society based on plurality, diversity and fraternity. The fundamental right to freedom of speech and expression must be understood in this context.

Article 19 of the Constitution not only protects popular forms of speech and expression but also protects unpopular forms of speech and expression. Unpopular forms of speech and expression require a higher degree of protection as in the absence of unpopular forms of speech and expression, a diverse and plural society as envisaged by the Constitution, cannot be realised.

66. Articles 14, 15, 19 and 21 of the Constitution they must be read together.

67. International human rights law is to be read into Part III of the Constitution. This Hon'ble Court has long rejected judicial–insularity, in favour of accepting international law and comparative jurisprudence especially in adjudicating the nature and content of fundamental rights. "*In the view of this Court, international law has to be construed as part of domestic law in the absence of legislation to the contrary, and perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content of international conventions to which India is a party*." [See ***Justice KS Puttuswamy v Union of India*** (2017) 10 SCC 1at para 103]

III. SECTION 377, IPC VIOLATES ARTICLE 14

a. *Section 377 is vague*

68. Section 377, IPC criminalises a person who 'voluntarily engages in '*carnal intercourse against the order of nature'* with any man, woman or animal'. What constitutes '*carnal intercourse against the order of nature'* is neither defined in the section, nor in the IPC or any other law for that matter.

69. The language of section 377 is so vague that ordinary persons do not know what conduct would invite penal prosecution. Similarly, authorities who enforce the law remain uncertain as to what actions are lawful and what are prohibited by the law.

70. Laws should give persons of ordinary intelligence a reasonable opportunity to know what is prohibited. Similarly, those who administer the law must know whether and what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place. [***Kartar Singh v. State of Punjab*** (1994) 3 SCC 569 at para 130].

71. Vague law that does not offer clear construction and offers boundless sea of uncertainty taking away guaranteed freedom, violates the constitution [***K.A. Abbas v. The Union of India and Anr***. (1970) 2 SCC 760] at para 46].

72. Where the language of a provision is vague, the Court must construe it in a manner that accords with the legislative intent. The rationale behind the introduction of section 377, is however, equally vague. Debates at the time of adopting the IPC do not offer any guidance in this regard. In the context of section 377, which was originally numbered as clauses 361 and 362 in the Draft Penal Code, the only record available is Lord Macaulay's statement, which reads:-" *Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgement of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by*

such discussion would far more than compensate for any benefit which be derived from legislative measures framed with the greatest precision."

73. No legislative intent is discernable except that the subject matter of section 377, i.e *'carnal intercourse against the order of nature'* was considered repugnant by the draftsmen of the Penal Code. Such an inexplicit and subjective reference hardly offers any aid to Judges to interpret the expression '*carnal intercourse against the order of nature'* with precision or certainty.

74. The expression "*order of nature*" in section 377 is open-ended, vague and undefined. 'Order of nature' implies something that is 'natural'. What is natural to one person, may not be to another. For gay persons, attraction towards a person of the same-sex is as 'natural' as it is for heterosexual persons to feel attracted towards someone of the opposite sex. There is no demarcating line to decide what is within or outside the 'order of nature'. (***Shreya Singhal, para 79***)

75. An individual's liberty cannot be restricted by a law which is nebulous and uncertain in its definition and application [See ***A.K. Roy v. Union of India*** (1982) 1 SCC 271 at para 58, 61].

76. Section 377 is unconstitutionally vague and must be struck down.

b. Section 377 is overbroad

77. Section 377 is cast very widely so as to take into its sweep private, intimate conduct of a consensual nature between adults as well as sexual acts that are non-consensual or involve a minor. This is amplified by the expression:- "*Whoever, <u>voluntarily</u>*

has carnal intercourse against the order of nature with any man, woman….."

78. The former is an expression of one's intimate personality, privacy and autonomy, which is protected under the Constitution. On the contrary, actions of the latter kind i.e. non-consensual sex violate the dignity, privacy and autonomy of the victim. Section 377 is overbroad for it prohibits conduct, which is constitutionally protected. [***Shreya Singhal* paras 87, 94**]
79. The validity of a law that imposes a blanket ban on any act, innocent or otherwise, cannot be upheld. [See ***Kamlesh Prasad v State of Bihar*** AIR 1962 SC 1166].

c. Section 377 is manifestly arbitrary

80. Section 377, IPC contains no determination or guidance on what constitutes unlawful conduct and why. With punishment extending up to imprisonment for life, section 377 subjects law-abiding persons, who are simply exercising their constitutionally protected freedom and personal choice to punitive treatment at the hands of the State. This is arbitrary and violative of equality and equal protection of the law.
81. In ***Shayara Bano v. Union of India & Ors****., (2017) 9 SCC 1,* this Hon'ble Court held: "*The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.".*
82. The proscription of consensual sexual expression under section 377, IPC is not founded on any known or rational principles. *Reasonable implies intelligent care, and deliberation, i.e the choice of a course which is guided by reason.* The only apparent reason

for section 377 is demanding conformity to 'the order of nature', a standard which itself is vague and incomprehensible.

83. An arbitrary act is unequal both according to political logic and constitutional law and is therefore violative of Article 14. [***E.P. Royappa v. State of T.N***., (1974) 4 SCC 3 at para 67].

84. Failure to protect from arbitrary state action violates right of equality under Article 14. [See ***KS Puttaswamy (retd.) v. Union of India*** at para 298].

d. Section 377 does not satisfy the test of classification under Article 14

85. Section 377 classifies '*carnal intercourse' on the basis of whether it is within the order of nature or against it.*

86. The marginal note, as well as title of the section, suggests that what is 'against the order of nature' is what is 'unnatural'. Conversely what is within the order of nature is natural.

87. There is no intelligible difference between 'natural' and 'unnatural' sex. What is natural to one may be unnatural to another. It is personal and subjective.

88. In ***Anuj Garg v Hotel Association of India*** **[(2008) 3 SCC 1 at para 26**], this Hon'ble Court had held that a criteria for classification which may have been valid at the time of its adoption, may not be on account of changing social norms. The distinction, if any, between sex within and against the order of nature under section 377 may have been palpable in the 19th century under colonial rule but not in the 21st century under a constitutional scheme.

89. Besides the classification under section 377 has no rational nexus with the object sought to be achieved. More so, when the object [of prohibiting sex against the order of nature] itself is

illogical, irrational and cannot be countenanced in a liberal, democratic and plural society.

90. It is settled law that if the object is illogical, unfair and unjust, necessarily the classification will have to be held unreasonable. [***Deepak Sibal v. Punjab University*** (**1989) 2 SCC 145, at para 20**)].

e. Section 377 treats unequals equally

91. While equals cannot be treated unequally under Article 14 of the Constitution, unequals cannot be treated equally. Treating unequals as equals offends the doctrine of equality enshrined in Article 14 [***Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and Anr***. (2008) 10 SCC 139 at para 40]

92. Sexual expression and intimacy of a consensual nature cannot be treated the same way as non-consensual sex. Similarly, intimate relations between adults cannot be equated to situations involving sexual acts with minors.

93. Section 377 blurs this difference and treats unequals equally, thereby violating Article 14.

f. Criminalisation under section 377 constitutes discrimination on the basis of sexual orientation

94. In ***Puttaswamy***, this Hon'ble Court held:- "*Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.*"(para 145)

95. In ***National Legal Services Authority v Union of India*** **2014 (5) SCC 438 (hereinafter "NALSA")**, this Hon'ble Court held

that: - "*discrimination on the ground of sexual orientation and gender identity, therefore impairs equality before law and equal protection of law and equal protection of law and violates Article 14 of the Constitution of India.*"

96. Section 377, IPC *per se* as well as when read with section 375 of the IPC (as amended by the Criminal Law (Amendment) Act, 2013 w.e.f. 3.2.2013) discriminates against similarly situated persons, on the basis of their sexual orientation, in contravention of Articles 14 and 15 of the Constitution.

97. On the face of it, section 377 prohibits sexual acts that are 'against the order of nature', which has been understood to mean 'penile-anal' and 'penile-oral' sex between a man and another man as also between 'a man and a woman', irrespective of consent. Yet, prosecution of consenting, heterosexual adults under section 377 is rare and the law has been associated with the prohibition of same-sex conduct, making it discriminatory in its effect and impact.

98. The expression: "W*hoever voluntarily engages in carnal intercourse against the order of nature..*" criminalises some forms of intimate sex among heterosexual persons, in the case of non-heterosexual persons, section 377 criminalises all forms of sexual expression.

99. Section 375 and 376 of the IPC, as amended by the Criminal Law (Amendment) Act, 2013 (w.e.f. 3.2.2013), expressly recognize 'consent' in relation to sexual acts enumerated under section 375. These include 'anal' and 'oral' sex between a man and a woman' [heterosexual persons]. Consequently, anal and oral sex between a 'man and a woman' are punishable only when if they are engaged in 'against woman's will or without her consent'. Consent itself is expressly defined in Explanation 2 to section

375. Therefore, there is no prohibition on heterosexual persons, who are adults, from engaging in 'anal' or 'oral' sex consensually. However, the same activities, when practiced by adult males [homosexual persons] invite punishment under section 377, IPC though there is consent. This is patently discriminatory, as it singles out homosexual persons as a class, upon whom penal law [under section 377] is imposed.

100. Being both 'later' and 'special' provisions in relation to sexual acts between 'a man and a woman' [heterosexual persons], the amended sections 375 and 376 will override section 377, if there is an inconsistency. [***Sharat Babu Digumarti v. Govt NCT of Delhi* (2017) 2 SCC- 18 at paras 32-38**].

101. Consequently, consensual sexual acts between 'a man and a woman' [heterosexual persons] which are exempt under section 375, cannot be criminalised under section 377. [***Sharat Babu Digumarti***]

102. After the adoption of the Criminal Law [Amendment] Act, 2013, section 377 is no longer neutral or blind to sexual orientation. It applies to sexual acts between 'a man and a man' on the basis of sexual orientation and identity. As it stands today, section 377, IPC is violative of Articles 14 and 15 of the Constitution.

IV. ARTICLE 15 PROHIBITS DISCRIMINATION ON THE GROUND OF 'SEX' WHICH INCLUDES 'SEXUAL ORIENTATION'

103. In ***IR Coelho v. State of Tamil Nadu (*2007) 2 SCC 1 @ para 42**, this Hon'ble Court held:-"*The Constitution is a living document. The constitutional provisions have to be construed having regard to the <u>march of time</u> and the <u>development of law</u>.*"

104. In ***M. Nagaraj v. Union of India,* (2006) 8 SCC 212 @ para 19,** this Hon'ble Court further held:-"*A constitutional provision*

must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges".

105. In ***Puttaswamy,*** this Hon'ble Court made it clear that the meaning and scope of fundamental rights under Part III cannot be guided by the text or written words alone.
106. Further in ***Puttaswamy,*** this Hon'ble Court held that the interpretation of constitutional provisions cannot be limited by the views and perceptions of the founding fathers, which were expounded in a historical context. *"As society evolves, so must the constitutional doctrine." [***para 130, Puttaswamy**
107. Importantly, this Hon'ble Court held: - *"The interpretation of the Constitution cannot be frozen by its original understanding. The Constitution has evolved and must continuously evolve to meet the aspirations and challenges of the present and the future. Nor can judges foresee every challenge and contingency which may arise in the future. This is particularly of relevance in an age where technology reshapes our fundamental understanding of information, knowledge and human relationships that was unknown even in the recent past."*
108. Article 15(1) provides that the State shall not discriminate against any citizen on grounds only of "*religion, race, caste, sex, place of birth or any of them"*. The general purport of Article 15(1) is to prohibit discrimination against citizens on the basis of the grounds enumerated therein.
109. It would be fair to say that while incorporating the grounds of 'sex' under Article 15(1), members of the Constituent Assembly

did not imagine or conceive of discrimination on the basis of sexual orientation.

110. That however, does not preclude this Hon'ble Court from giving the expression 'sex' under Article 15(1) a purposive and expansive meaning in line with contemporary social and legal developments.

111. Article 15(1) uses the expression 'sex' but Article 15(3) uses the expression 'women'. The two cannot be collapsed into one.

112. Neither can Article 15(3) control or restrict the application of Article 15(1). The expression _'sex' in Article 15(1) cannot be reduced to binary norm of man and woman only.

113. In ***NALSA @ para 66***, this Hon'ble Court held: *"Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with 64 stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. <u>The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity.</u> The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female."*

114. Under the ICCPR, the protection of equality is articulated in Articles 2 and 26, which together, prohibit any distinction of any kind and discrimination on any ground such as "*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*"

115. In ***Toonen v. Australia***, at para 8.7, the Human Rights Committee held that the reference to 'sex' in Articles 2 (1), and 26 of the ICCPR is to be taken as including sexual orientation.

116. India has ratified the ICCPR and incorporated it domestically under the Protection of Human Rights Act, 1993. The decision in ***Toonen*** holds more than persuasive value and must inform the interpretation of Article 15(1) of the Constitution.

117. While interpreting Title VII of the Civil Rights Act.1964 (law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion), the U.S Court of Appeal for the Seventh Circuit held that:- "*Discriminating against an employee because they are homosexual constitutes discrimination because of: (i) such employee's sex and, (ii) such employee's sexual attraction to persons of the same sex. And "sex," under Title VII, is an enumerated trait.* [***Kimberly Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d page-37]**

118. In a similar vein, the US Court of Appeals for the Second Circuit ruled that sexual orientation is a function of 'sex' and can also be understood as "*a subset of actions taken on the basis of sex".* [***Zarda v. Altitude Express*, No. 15-3775 page- 22**].

119. Just as 'sex' and 'gender' are an immutable part of one's personality, so is 'sexual orientation'.

120. Discrimination against persons [whether men or women or transgender] because they are not heterosexual amounts to

discrimination on the grounds of 'sexual orientation' which is embraced within the category of 'sex' under Article 15.

V. SECTION 377 HAS A CHILLING EFFECT ON THE ENJOYMENT OF FUNDAMENTAL RIGHTS

121. In ***K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1**, **para 146,** this Hon'ble Court noticed the chilling effect of section 377 in the following words:- "*The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place.... The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime.*"

122. Section 377 attaches criminality to the everyday lives of LGBT persons. The constant fear of police and getting into 'trouble with the law' perpetuates their vulnerability.

123. This Hon'ble Court in ***Shafin Jahan v. Asokan K.M. and Ors., 2018 SCC Online SCC 343* @ para 95** has emphasized:-, "*Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms. Others are dissuaded to exercise their liberties for fear of the reprisals which may result upon the free exercise of choice. The chilling effect on others has a pernicious tendency to prevent them from asserting their liberty. Public spectacles involving a harsh exercise of State power prevent the exercise of freedom, by others in the same milieu. Nothing can be as destructive of freedom and liberty. Fear silences freedom."*

124. In ***National Coalition for Gay and Lesbian Equality v. the Minister of Justice & Ors.*,1998 (12) BCLR 1517 (CC) at para 28],** the Constitutional Court of South Africa acknowledged how criminalization of sodomy impacted not only the sexual conduct of non-heterosexual persons, but all walks of life: " *… In so doing, it punishes a form of sexual conduct, which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy because they seek to engage in sexual conduct, which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men*."

125. Section 377 creates an environment of hostility and revulsion towards LGBT persons, resulting in exclusion and marginalisation. This cannot be countenanced under the Constitutional order, which is founded on the values of liberty, dignity, equality and fraternity.

VI. SECTION 377 VIOLATES FREEDOMS UNDER ARTICLE 19(1)

1. Section 377 violates freedom of speech and expression under Article 19(1)(a)

126. Article 19(1)(a) does not specify what forms of speech and expression are protected. It will not be incorrect to say that Article 19(1)(a) not only protects words - written or spoken but

also protects all forms of political, artistic, scientific and intimate expression which also includes sexual expression.

127. By condemning certain expressions of human intimacy as 'unnatural', section 377 imposes a singular and rigid hetero-normativity in human relations, denying the existence and expression of any other sexual orientation or gender identity. This in contravention of an individual's right to be different and to stand against the tide of conformity, which this Hon'ble Court recognized in **Puttaswamy.**

2. Section 377 violates freedom to form association under Article 19(1)(c)

128. The right to association under Article 19(1)(c) is not limited to form professional associations like societies, trade unions but also includes the freedom to form personal and intimate associations of one's choice.

129. The United States Supreme Court in ***Roberts v. United States Jaycees*** 468 U.S. 609 (1984) at page 468 U.S. 618 has held that freedom of association includes the freedom to enter into and maintain certain intimate human relationships.

130. In ***Shakti Vahini v. Union of India***, **2018 SCC Online SC-275 at para 44 & para 46,** this Hon'ble Court has held that two adults consensually choosing each other as life partners is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution.

131. Because of Section 377, LGBT persons cannot form intimate human relationships or romantic associations with a partner of their choice. Even peer-support groups attract suspicion and ridicule and are labelled 'gay sex rackets' under the stern eye of

the law. Section 377 thus violates Article 19(1)(c) of the Constitution.

3. Section 377 is not protected by any of the exceptions under Article 19(2) and Article 19(4)

132. Under Article 19(2) and Article 19(4) reasonable restrictions can be imposed on the exercise of rights guaranteed under Article 19(1)(a) and Article 19(1)(c) respectively, in the interest of the sovereignty and integrity of India or public order or morality. A failed attempt can be made to argue that Section 377 would be covered by the morality exception to the said Articles.

133. In ***Naz Foundation v. Government of India*** **and Ors., 2009 SCC Online Del 1762 at para 75-87 ("*Naz Foundation*"),** the Hon'ble High Court of Delhi has discussed and clarified the contours of morality as a ground of restriction to fundamental rights. The Court differentiated "public morality" from "constitutional morality" and held that 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".

134. Constitutional morality is derived from Constitutional values such as liberty, dignity, autonomy, fraternity etc. as opposed to public morality which is based on shifting and subjective notions of right and wrong.

135. The learned ASG in ***Delhi High Court in Naz Foundation*** at para 86 made the argument that homosexual conduct might open floodgates of delinquent behaviour. The Hon'ble Delhi High Court found the argument without merit and held that moral indignation, howsoever strong, cannot be the basis to override an individual's fundamental right.

136. Section 377 violates the fundamental rights under Articles 19(1)(a) and (c), read with Article 21 and is not saved by the any of the exceptions in Articles 19(2) and (4) including morality.

VII. ARTICLE 377 VIOLATES ARTICLE 21

a. Section 377 violates the Right to Privacy, Dignity and Autonomy

129. In ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1, a nine-judge bench of this Hon'ble Court has held that privacy is an intrinsic element of the right to life and personal liberty under Article 21. [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at paras 96, 313, 320, 322, 406, 407, 411, 535 and 536]

130. The right to personal liberty under Article 21 also includes the right to autonomy. [See ***NALSA v. Union of India and Ors.,*** (2014) 5 SCC 438 at para 73]

131. The right to privacy protects the autonomy of individuals and enables them to make choices on matters intimate to human life. It protects the right of the individual "*to be different and to stand against the tide of conformity in creating a zone of solitude*." [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at paras 271, 297, 298, 299, 521]

137. Dignity is the core principle which unites the fundamental rights of the Constitution. The right to dignity includes the right of the individual to develop to the full extent of their potential and the right to autonomy over fundamental personal choices. [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at paras 119, 525]

138. Privacy is an essential aspect of dignity and entails the freedom of self-determination including the right to choose one's sexual partner. This Hon'ble Court has held that, *"The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised."* [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at paras 119, 127, 146, 271, 298, 323]

139. Further, the Court has recognized that sexual orientation is an essential component of identity, and is deeply intertwined with the right to life, liberty and freedoms, privacy and dignity. [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at para 145, 647]

140. Enumerating the relationship between sexual orientation and fundamental rights enshrined in Part III of the Constitution of India, Hon'ble Justice D.Y. Chandrachud has held that, *"Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual.…The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.*" [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at para 144]

141. Section 377 criminalizes individuals' right to choose their sexual partners, which is one of the most personal and inviolable aspects of one's personality. It denies them respect and impacts their sense of self-worth.

142. Thus, Section 377 violates the right to privacy, dignity and autonomy under Article 21 of the Constitution of India.

b. Sec 377 violates the Right to Health

Right to Health in Domestic and International Law

135. The right to health is an inherent part of the fundamental right to life, guaranteed under Article 21. [See: ***Vincent Panikurlangara v. Union of India***, (1987) 2 SCC 165, at para 16; ***Consumer Education & Research Centre v. Union of India***, (1995) 3 SCC 42 at para 24; ***Paschim Banga Khet Mazdoor Samity v. State of West Bengal***, (1996) 4 SCC 37 at paras 9 and 16; ***Surjit Singh v. State of Punjab***, (1996) 2 SCC 336 at para 11; ***Dr Ashok v. Union of India***, (1997) 5 SCC 10, at paras 4–5; ***State of Punjab and Others v. Ram Lubhaya Bagga***, (1998) 4 SCC 117 at paras 5, 6 and 30]

136. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

137. The ICESCR has been domesticated in India, via Section 2 of The Protection of Human Rights Act, 1993 that clearly provides that human rights that are enforceable in India include the rights contained in the ICESCR. Indian courts can, apart from incorporating human rights under the ICESR into Fundamental Rights while interpreting the fundamental rights, enforce human rights under the ICESR directly.

138. Further, any international convention not inconsistent with the fundamental rights and in harmony with the spirit of the Constitution must be read into Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Constitutional provisions must be read and interpreted in a manner which

would enhance their conformity with the global human rights regime. [See ***Vishaka and ors., v. State of Rajasthan and Ors.***, (1997) 6 SCC 241 at para 7; ***NALSA v. Union of India v. Ors***., (2014) 5 SCC 438 at paras 51-60; ***K.S. Puttaswamy and Anr. V. Union of India and Ors.***, (2017) 10 SCC 1 at para 154]

139. Article 12 of the ICESCR has been interpreted in General Comment No. 14. The Right to Health, as interpreted by General Comment No. 14, requires States to take measures to respect, protect and fulfil the health of all persons. States are obliged to ensure the availability and accessibility of health-related information, education, facilities, goods and services, without discrimination, especially for vulnerable and marginalized sections of the populations. [See: **General Comment No. 14 to Article 12 ICESCR**, at para 33]

140. Thus, India is obligated to provide marginalized populations including gay men, other men who have sex with men, and transgender persons health facilities, goods and services which are Available (in sufficient quantity), Accessible (physically, geographically, economically, and in a non-discriminatory manner); Acceptable (respectful of culture and medical ethics); and of Quality (scientifically and medically appropriate and of good quality). [See: **General Comment No. 14 to Article 12 ICESCR,** at para 12].

Vulnerability of contracting HIV is higher among High Risk Groups

141. According to a 2012 report of the United Nations Development Programme titled "**Global Commission on HIV and the Law: Risks, Rights and Health**", Men who have Sex with Men (a term used by National AIDS Control Organization which includes gay

and bisexual men) were found to be nineteen times more likely to be infected with HIV than other adult men. [See **Global Commission on HIV and the Law: Risks, Rights and Health**, United Nations Development Programme, July 2012, at page 45].

142. Criminalization of same sex relations leads to an increase in HIV prevalence amongst MSM. In 2008, UNAIDS had reported that in the Caribbean countries where homosexuality was criminalized, almost 1 in 4 MSM were infected with HIV. In the absence of such criminal law the prevalence was only 1 in 15 among MSM. [See **Global Commission on HIV and the Law: Risks, Rights and Health**, United Nations Development Programme, July 2012, at page 45].

143. According to the Annual Report of National AIDS Control Organization (NACO), 2016-2017, coverage for Men Who have Sex with Men was the highest at 65%. [See **National AIDS Control Organization (NACO) Annual Report of 2016-17**, p. 342].

144. Despite extensive coverage, HIV prevalence among MSM and transgender persons is disproportionately higher than the general adult prevalence. HIV prevalence among MSM is 4.3% and among transgender persons it is 7.5 % as opposed to the overall adult HIV prevalence of 0.26%. [See **National AIDS Control Organization (NACO) Annual Report of 2016-17**, p. 340, 341].

145. Section 377 criminalizes sexual relations among members of the same sex, and even those abetting such conduct are liable to criminal punishment. This would include health care workers and organizations working on HIV prevention and reduction by providing Men who have Sex with Men with access to condoms.

146. The Parliament of India has recognized the susceptibility of HIV prevention interventions for High Risk Groups (including Men who have Sex with Men) due to such undue criminalization and has sought to address the same by virtue of the **Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017**.

147. Section 22 of Act states that any strategy carried out for reduction of risk of HIV AIDS shall not amount to a criminal offence or attract civil liability. Such strategies include—

(i) the provisions of information, education and counselling services relating to prevention of HIV and safe practices;

(ii) the provisions and use of safer sex tools, including condoms;…

148. The Illustrations to Section 22 of the Act explicitly highlight the need to decriminalize measures aimed at improving the health of vulnerable groups, including Men who have Sex with Men.

149. Illustrations include:

(a) A supplies condoms to B who is a sex worker or to C, who is a client of B. Neither A nor B nor C can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the strategy.

(b) M carries on an intervention project on HIV or AIDS and sexual health information, education and counselling for men, who have sex with men, provides safer sex information, material and condoms to N, who has sex with other men. Neither M nor N can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the intervention.

Impact of criminalization of the Right to Health

150. Criminalization of consensual sexual activity between persons of the same sex leaves them vulnerable to police harassment and renders them unable to access essential HIV/AIDS prevention material and treatment, thereby infringing their right to health under Article 21.

151. Section 377 creates a fear of law enforcement due to which there is under-reporting of male to male transmission of HIV. This lack of data results in the inability to provide sufficient health services.

152. The risk of criminalization leads to a fear of discrimination, breach of confidentiality and police-reporting which in turn may dissuade persons from seeking health services. Fear of arrest drives high risk groups underground, away from HIV and harm reduction programmes. [See **Global Commission on HIV and the Law: Risks, Rights and Health**, United Nations Development Programme, July 2012, at page 8]

153. Section 377 creates an atmosphere of stigma and prejudice. Studies conducted in India reveal that due to structural and societal factors, the vulnerable population of Men who have Sex with Men are at a higher risk for depression and other mental health problems, which may affect the degree to which they may benefit from HIV prevention interventions. [See **Factors Associated with Mental Depression among Men Who Have Sex with Men in Southern India**, Sangram Kishor Patel et al., Health, (7) 2015, at pages 1119- 1121; **Suicidality, clinical depression, and anxiety disorders are highly prevalent in men who have sex with men in Mumbai, India: Findings from a community-recruited sample**, Murugesan Sivasubramanian et al., Psychol Health Med., 16(4) 2011, at pages 6-7; **Depressive**

symptoms and human immunodeficiency virus risk behavior among men who have sex with men in Chennai, India, Steven A. Safren et al., Psychol Health Med., 14(6) 2009, at pages 5-6]

154. The infringement of Right to Health by criminalization of sexual conduct between people of the same sex has been well-recognized in international law.

155. In ***Toonen v. Australia***, the UN Human Rights Committee found that criminalization of same-sex activity runs counter to the implementation of effective educational programmes in respect of HIV prevention. [See ***Toonen v. Australia***, Communication No. 488/1992, decision dated 31/03/1994 at Para 8.5]

156. In ***R. v. Morgentaler***, the Supreme Court of Canada overturned Section 251 of the Criminal Code [abortion provisions] for violating the right to life, liberty and security under S. 7 of the Canadian Charter. In a concurring opinion, Beetz J. held that:- "*Security of person within the meaning of s. 7 of the Charter must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate or no treatment at all, the right to security of the person has been violated.*" [See ***R. v. Morgentaler***, [1998] 1 S.C.R. 30 at p. 81]

157. The UN Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health has observed: *"Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights, including the right to health. These laws are generally inherently discriminatory and, as such, breach the*

requirements of a right-to-health approach, which requires equality in access for all people. The health-related impact of discrimination based on sexual conduct and orientation is far-reaching, and prevents affected individuals from gaining access to other economic, social and cultural rights." [See **Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health**, A/HRC/14/20, dated 27th April 2010 at Para 6]

c. Section 377 limits the right to choice of partner

158. Human beings are social beings; intermingling and exchange with others is an essential and natural part of life. The right to interact, engage and cohabit is a natural right, which is protected under the right to life and liberty under Article 21 of the Constitution.

160. Social connections include associations of an intimate nature such as friendships, peer groups and companionship. Forming and nurturing personal relationships is essential to the human experience.

161. In ***Shafin Jahan v Asokan KM & Ors*, (2018) SCC Online SC-343** ("***Shafin Jahan***"), this Hon'ble Court held:-*"The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity."*

162. Right to choice of partner is recognised as a fundamental right under Article 21 of the Constitution. This Hon'ble Court has found that the right to choice of partner is protected under the right to liberty, autonomy and dignity of an individual. (***Shafin Jahan* at para 54 & para 88, *Common Cause (A Regd.***

***Society) v. Union of India*, 2018 SCC Online SC 208 at para 346, *Shakti Vahini v. Union of India*, 2018 SCC Online SC-275 at para 44 & para 46).**

163. Section 377, IPC restricts individuality and expression in the most personal realm, i.e. a person's sexuality and choice of partner, in contravention of Article 21 of the Constitution.

165. In ***Shafin Jahan***, this Hon'ble Court held: - "*Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution.*" …. "*Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognizing them. Indeed, the Constitution protects personal liberty from disapproving audiences*."

166. It is fairly common for disapproving parents and family members to use section 377 to threaten and coerce LGBT persons to marry a person of the opposite gender against their wishes. Where LGBT persons resist such pressure and assert their choice of a same-sex partner, it is not uncommon for parents to use the oppressive machinery of criminal law like filing false complaints of theft, kidnapping and abduction to interfere and forcibly separate adult, consensual partners.

167. The choice of partner whether within or outside marriage lies within the exclusive domain of each individual. (***Shafin Jahan* at para 88**).

168. Yet, for LGBT persons section 377 hangs as a sword – irrespective of whether their personal and intimate choice of partners is known or hidden from others.

169. In a poignant observation, this Hon'ble Court in ***Puttaswamy* @ *para 118*** noted:- "*Life is precious in itself. But life is worth living*

because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life."

170. Section 377 enables the State and society to interfere and impose in the most important and personal decisions of a person's life, i.e the choice of partner. It is therefore violative of Article 21.

d. That in respect of Section 377 Substantive Due Process test is not met

171. This Hon'ble Court has held that test of substantive due process is to be applied to the fundamental right to life and liberty (***Mohd. Arif v. Registrar of Supreme Court of India-, (2014) 9 SCC 737, para. 28***).

172. Article 14 has been held to animate the content of Article 21, interpreting 'procedure established by law' to mean fair, just and reasonable' procedure. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21, but to the content of the law itself. In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable *procedure* under the law, and a law which does so may yet be susceptible to challenge on the ground that its *content* does not accord with

the requirements of a valid law. A law is open to substantive challenge on the ground the content of the law violates fundamental rights (***Justice KS Puttaswamy (retd.) v. Union of India, (2017) 10 SCC 1, para. 291***).

173. Challenges to validity of laws on substantive grounds as opposed to procedural grounds has been dealt with in varying contexts, such as:

a. Death penalty (***Bachan Singh v. State of Punjab, 1980 SCC (Cri) 580***),
b. Mandatory death sentence (***Mithu v. State of Punjab, (1983) 2 SCC 277; Indian Harm Reduction Network v. Union of India, (2011) 4 AIR Bom R 657***),
c. Restrictions on speech (***Shreya Singhal v. Union of India, (2015) 5 SCC 1***), and
d. Non-consensual sex with minor wife (***Independent Thought v. Union of India, 2017 SCC Online SC 1222***).

174. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. An invasion of life or personal liberty must meet the threefold requirement of (***Puttaswamy, para. 325, 638***):

a. **Legality**, which postulates existence of valid law,
b. **Necessity**, defined in terms of legitimate State aims, and
c. **Proportionality**, which ensures there is a rational nexus between the objects and the means adopted to achieve them.
d. **Procedural safeguards,** to prevent abuse of State interference.

e. Doctrine of Necessity & Proportionality

175. The test of substantive due process as laid in India is analogous to the ***doctrine of necessity and proportionality*** as applied by the European Court of Human Rights. The expression '***necessary in a democratic State***' (Article 8, European Convention on Human Rights) - two hallmarks of which are tolerance and broadmindedness - implies the existence of a ***pressing social need,*** and every restriction imposed must be ***proportionate to the legitimate aim*** pursued ***(Handyside v. United Kingdom*** *at para 48****)***.

176. A list of legitimate State aims may be national security, public safety, prevention of crime and protection of rights of other persons (***Uzun v. Germany, ECHR 2010 @ para. 76***).

177. In ascertaining the nature and scope of morality and its necessity as a legitimate State aim, the ECHR jurisprudence has held that the conception of morality changes from time to time and from place to place, and there is no 'uniform' morality in any particular region or culture (***Modinos v. Cyprus, ECHR 1993 @ para. 11***).

178. If State action destroys the essence of a right, it may be held as disproportionate interference. (***Uzun v. Germany, ECHR 2010 @ para. 26***).

179. The degree of State interference in view of the gravity of the offence complained of also indicates proportionality of the act (***Uzun v. Germany, ECHR 2010 @ para. 28***).

180. A measure of the necessity of criminalization of sexual acts of consenting adults in private can be arrived at by comparing its relevance in the era the law was enacted to the changes and developments that have occurred in society up to the present (***Dudgeon v. United Kingdom, para 60***).

181. On ***proportionality***, the test is to assess if the alleged benefits of criminalization outweigh the detrimental effects which the law has on the life of persons. Although members of public may regard homosexuality as immoral, but this cannot by itself warrant the application of penal law in context of consenting adults (***Dudgeon v. United Kingdom, para 60***).

Criminalization of sexual acts between consenting adults in private fails the test of substantive due process

182. Section 377, IPC fails the test of substantive due process.
183. In criminalizing sexual acts between persons regardless of age or consent, Section 377, IPC destroys the essence of Article 21 of the Constitution. The law violates the right to dignity and privacy of consenting adults and deprives persons of the fundamental right to personal autonomy in matters of choosing one's partner.
184. There is no stated aim of the law. If at all there is an aim, it has been articulated as public morality. The Constitution, however, envisages *constitutional morality* based on principles of dignity equality, non-discrimination, fraternity and pluralistic society based on values in the Constitution Public morality espoused in the law is antithetical to constitutional morality.
185. Section 377 also serves no *pressing social need* such as public safety, i.e., application of criminal law is not necessary in a democratic State like India.
186. Therefore the aim of Section 377 is not legitimate.
187. Section 377 not only results in the criminalization, stigmatization and impairing the dignity of homosexuals and transgender persons but it also impedes the access to HIV-related healthcare services for them.

188. Therefore Section 377, IPC does not pass the test of proportionality.

f. Impact of Section 377 on Transgender Persons

189. ***Queen Empress v. Khairati****, ILR (1884) 6 All 204* is the earliest recorded cases on Section 377, IPC in relation to the socio-legal harassment of transgender persons. Khairati was arrested and prosecuted under the anti-sodomy law on the suspicion of being a 'habitual sodomite', merely on basis of appearing in feminine clothing and singing in a public place, but later acquitted for lack of evidence. This is a case in point on the misconceptions and stigma of the colonial administrators on the plurality of gender and sexuality.

190. The Humsafar Trust has conducted a study in 2017 with the Transgender community in three cities (Mumbai, Delhi and Bangalore) assessing the needs and situation of the Transgender communities, particularly in the backdrop of the coming into force of Section 377, IPC in 2013. In this study, violence related question referred to all forms of violence like physical beating, sexual assault, teasing, bullying, threat, blackmail, extortion and financial abuse for creating public nuisance, soliciting and citing Section 377, IPC as a tool for harassment. In the study 59 percent of Transwomen experienced violence of which highest reporting was from Bangalore. Across the three cities, most common perpetrators of violence were family and relative (22%), common public (21%), Panthi (18%), police (13%) Hijras from other (9%) and own (7%) Gharanas. Despite the favourable judgement of this Hon'ble Court in *NALSA* the transgender community recognize that they still continue to be covered under Section 377, IPC and that having consensual sex with their

partners in private spaces continues to criminalize a fundamental aspect of their identity.

191. The anti-sodomy law (Section 377, IPC) hinders the ability of transgender persons to organize and participate meaningfully in the design and implementation of HIV/AIDS related healthcare programmes. The right to health cannot be realized without the active participation of vulnerable groups and communities.

192. Even as Section 377, IPC facially only criminalizes 'sexual acts', it effectively results in criminalization of 'identity' of transgender persons as penile non-vaginal is the only form of expression of sexuality available to transgender persons. Once actions that are closely associated with an identity or class of persons based on one or more characteristics (here, sexual orientation and gender identity), the threat of criminalization directly leaps to identity as well.

193. This Hon'ble Court has held that discrimination on basis of sexual orientation or gender identity is impairs equality before law and therefore violates Article 14 of the Constitution (*National Legal Services Authority v. Union of India, (2014) 5 SCC 438, para 62, 66*).

194. This Hon'ble Court has found the Yogyakarta Principles to be jurisprudentially consistent with the fundamental rights contained in the Constitution of India, and therefore they are applicable in India (*National Legal Services Authority v. Union of India, (2014) 5 SCC 438, para 60*). Principle 1 (Right to Universal Enjoyment of Human Rights), Principle 2 (Right to Equality & Non-Discrimination), Principle 4(Right to Life), Principle 6 (Right to Privacy), Principle particularly require States to repeal or amend criminal and other legal provisions that prohibit, or are in effect employed to prohibit consensual sexual activity between

people of same sex and transgender persons who are above the age of consent.

195. This Hon'ble Court has held that gender identity lies at the core of one's personal liberty. The Constitution states that all persons have the freedom of speech and expression, which includes the right to expression of self-identified gender. The self-identified gender can be expressed through dress, words, action or behaviour or any other form (*National Legal Services Authority v. Union of India, (2014) 5 SCC 438, para 69, 72*). 'Any other form' of expression of self-identified gender includes expression of sexuality, as it is an inseparable component of one's bodily integrity and personal autonomy.

196. This Hon'ble Court has held that Article 21 guarantees protection of personal autonomy of an individual, which includes both the negative right of not to be subject to interference by State and non-State actors and the positive right of individuals to make decisions about their life.

197. It is demonstrably clear that Section 377, IPC in so far as it criminalizes consensual, sexual acts of adult transgender persons in private is violative of the right to equality and non-discrimination on basis of gender identity and sexual orientation, right to free speech and expression and the right to personal autonomy.

VIII. Criminalization of LGBT persons violates the fundamental right of Access to Justice

198. Rights cannot exist without a remedy.

199. '*Ubi jus ibi remedium,* i.e Every right when it is breached must be provided with a right to remedy.

200. The right to seek remedies for violation of fundamental rights is itself a fundamental right under Article 32 of the Constitution.

201. A constitution-bench of this Hon'ble Court has recognized access to justice as a fundamental right under Articles 14 and 21. [***Anita Kushwaha v Pushap Sudan*** **(2016) 8SCC 509 @ paras 9 -31**].

202. LGBT persons face a host of rights violations on account of their sexuality and sexual orientation.

203. Breach of privacy and unlawful intrusion into one's private life, extortion, blackmail, coercion, threats, harassment – physical, mental and sexual, domestic and partner violence, assault and rape are not uncommon experiences among LGBT persons, especially those belonging to poor and marginalized sections. These violations are almost always connected to their sexuality, identity and expression.

204. Most of aforesaid acts are identified as 'crimes' under the IPC or other criminal laws. Ordinarily, a person has been a victim of such crimes should be able to report to the Police and register a complaint. That is a remedy available in law to all.

205. However, where the victim is an LGBT person, the fear of recrimination under section 377 looms large. Criminalisation of one's sexual orientation and identity precludes persons from approaching legal authorities and seeking remedy.

206. A report by the ***International Commission of Jurists*** titled:- **"Unnatural Offences" Obstacles to Justice in India Based on Sexual Orientation and Gender Identity", published in February 2017**, documents many such experiences and finds:- "*The fact that section 377 exists also operates as a threat that prevents people from accessing rights and protections that they are entitled to. For example, section 377 stops queer individuals*

from approaching the police when they are the victims of criminal acts. Two notable instances are that of blackmail and intimate partner violence. Queer individuals subjected to intimate partner violence or otherwise assaulted or harassed following same-sex encounters are unable to report it to the police because of fears of effectively exposing themselves to charges under section 377."

207. A case that demonstrates the impact of criminalization on access to justice is that of late Prof. Shrinivas Ramchandra Siras, Reader and Chair of the Department of Modern Indian Languages at Aligarh Muslim University (AMU), who identified as gay. On 08.02.2010, three persons claiming to be television reporters broke into the Professor's home and photographed him with a male partner. Prof. Siras was suspended on grounds of alleged immoral sexual conduct, which, according to the authorities in AMU, "undermined the pious image of the teacher community and tarnished the image of the University".

208. Prof. Siras was encouraged to seek judicial relief because at that time, the Delhi High Court's decision in ***Naz Foundation*** was in force and the right to be with one's partner [of the same sex] in the privacy of one's home was a protected fundamental right.

209. Consequently, Prof Siras approached the Allahabad High Court, which stayed the suspension. [***Dr. Shrinivas Ramchandra Siras & Ors. v. The Aligarh Muslim University & Ors,*** **Civil Misc. Writ Petition No.17549 of 2010, Order dated 01.04.2010].**

210. After the ***Koushal*** decision, LGBT persons have been hesitant and fearful of approaching State authorities and have continued to suffer injustice in silence.

211. Section 377 violates the fundamental right to access justice under Articles 14 and 21.

IX. *Suresh Kumar Koushal* must be declared *per incuriam*

212. The 9 judge bench in ***KS Puttaswamy*** expressed disagreement with the manner in which the 2 judge bench in ***Koushal*** dealt with the right to privacy-dignity claims of lesbian, gay, bisexual and transgender persons (***KS Puttaswamy, paras. 144-147***).

213. ***Koushal*** held that Section 377, IPC does not criminalize a class of persons or identity or orientation, and merely identifies certain acts as an offence (***para. 60***). However, criminalization of the only form of expression of sexuality available to homosexual and transgender persons constitutes *de facto* criminalization of their personhood and identity, in light of ***KS Puttaswamy*** declaring that sexual orientation is an essential component of identity (**para 145**).

214. The principle that a facially neutral provision of law or State action which may disproportionately affect a class of persons constitutes indirect discrimination / disparate impact is now well accepted under Indian law (***Madhu and Ors. v. Northern Railways and Ors., 247 (2018) DLT 198, paras. 20-28***). The concept of indirect discrimination is evolved to deal with situations where discrimination lays disguised behind apparently neutral criteria, or where persons already adversely hit by patterns of historic subordination have their disadvantage intensified by impact of otherwise facially neutral laws such as Section 377, IPC.

215. This Hon'ble Court has on several occasions refused to defer to the Parliament for amending laws purportedly infringing on fundamental rights or violating the Constitution, and has read-down or struck-down provisions of laws found to be violative of

Constitutional principles in Articles 14, 15, 19 and 21, as described in paragraph 170 hereinabove.

216. ***Koushal*** fails to defend the validity of Section 377, IPC on ground of Article 14, as it only facially satisfies the first level of enquiry of the twin-test under Article 14, i.e., Section 377, IPC is ostensibly based on the intelligible differentia of *carnal intercourse in order of nature* in contrast to *carnal intercourse against the order of nature.* However, ***Koushal*** wholly ignores the second level of enquiry, i.e., the classification must have a rational nexus with the object sought to be achieved. Therefore, ***Koushal's*** analysis of Section 377, IPC in respect of Article 14 of the Constitution cannot be held to be valid (***para. 65***).

IN THE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) NO. 572/2016

CONNECTED WITH
W.P. (CRL) NO. 76/2016, W.P. (CRL.) 88/2018, W.P. (CRL.) 100/2018, W.P. (CRL.) 101/2018, W.P. (CRL.) 121/2018

IN THE MATTER OF:

DR. AKKAI PADMASHALI & ORS. …PETITIONERS

VERSUS

UNION OF INDIA & ANR. …RESPONDENTS

WRITTEN ARGUMENTS OF JAYNA KOTHARI -

COUNSEL FOR THE PETITIONERS

Summary of Arguments

I. Section 377 has been used historically, in a disproportionate manner against transgender persons
   1. Section 377 and Transgender Persons
   2. The Criminal Tribes Act
   3. Other Criminal legislations and Presumption of Criminality under Sec. 377
II. Section 377 violates Article 14 of the Constitution
   1. Formal and Substantive Equality
III. Section 377 amounts to Sex discrimination under Article 15
   1. NALSA and the inclusion of gender identity in Article 15
   2. Comparative Jurisprudence on inclusion of gender identity within sex discrimination
   3. Sex discrimination would also include gender non-conformity and sex stereotyping:
IV. Section 377 obstructs the enjoyment of the freedom speech and expression under Article 19(1)(a).
   1. *NALSA*
   2. Yogyakarta Plus 10 Principles:
V. Section 377 violates the right to autonomy, privacy, & dignity under Article 21.
   i. Right to Life and Dignity includes the right to gender identity
   ii. Right to Privacy and Dignity
   iii. Yogyakarta Principles on Dignity

I. Section 377 has been used historically, in a disproportionate manner against transgender persons

1. Section 377 and Transgender Persons

1.1 Section 377 of the IPC states as follows:

> *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 ten years, and shall also be liable to fine.*
> *Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*

1.2 Transgender persons are people whose gender identity is different from the sex assigned to them at birth. Some transgender persons identify themselves as male or female, whereas some other identify themselves as transgender. People who are intersex can have many types of intersex conditions, who are born with XY chromosomes but have female genitals and secondary sex characteristics or with XX chromosomes and no uterus or have external genitalia that is not clearly male or female. Due to their adoption of different gender identities, transgender persons have been ostracized, criminalized and subjected to severe violence.

1.3 Transgender persons have been criminalized historically by Section 377 and other criminal legislations. They were referred to as 'eunuchs' under colonial legislations.

2. The Criminal Tribes Act:

2.1 The earliest legislation referring to them was the Criminal Tribes Act 1871 ("Act") which branded a number of marginalized population groups as innately criminal and made elaborate arrangements for their surveillance. The Criminal Tribes Act entailed registration of all members of notified tribes irrespective of their criminal precedents and imposed restriction on their movements. "Eunuchs" or transgender persons were specifically included as a criminal group.

2.2 The Preamble of the Act states that it is "An Act for the Registration of Criminal Tribes and Eunuchs." Part II of the Act deals with "Eunuchs" and Section 377 of the IPC. It states in Section 24 that the local government shall maintain a register of the names and residences of all eunuchs who are reasonably suspected of kidnapping or castrating children, or of committing offences under Section three hundred and seventy seven of the Indian Penal Code, or of abetting the commission of any of the said offences.

2.3 "Eunuchs" were defined as persons of the male sex who admit themselves or on medical inspection clearly appear, to be impotent. In common parlance, these were transwomen – or persons who were born male but identified as women and had feminine characteristics, or transwomen.

2.4 It goes on to provide in Section 26, that any “eunuch” who appears dressed or ornamented like a woman in a public street or place, or in any other place, who dances or plays music or takes part in any public exhibition in a public street or place or for hire in a private house may be arrested without warrant and shall be punished with imprisonment for a term extending to two years. Section 27 provides that any ‘eunuch’ who has in his charge or keeps in his house any boy who has not completed the age of sixteen years shall be punished with imprisonment for a term, which may extend to two years. Section 29 states that no ‘eunuch’ shall be capable of being or acting as a guardian to any minor, of making a gift, of making a will or of adopting a son.

2.5 In this manner, transgender persons were criminalized as a group, irrespective of whether they had committed crimes or not. As a class, they were suspected for having committed offences under Section 377. Their cross-dressing, dancing or even appearing in public in female clothes or having female mannerisms, was criminalized. They were not deemed to have legal capacity for carrying out routine property transactions such as making a will or a gift or to have a family. Their fundamental freedoms were taken away and they were not considered as full human beings. The Criminal Tribes Act 1871 was repealed in 1949. However, Section 377 continued to remain on the statute books.

2.6 Even the earliest cases of Section 377 were registered against transgender persons. In the case of ***Queen Empress v. Khairati***, (1884) ILR 6 All 2014 a person was charged and tried for an unnatural offence under section 377 and convicted without any proof or particulars of the charge and the only facts against him were that he habitually wore women's clothes. The conviction was held to be not sustainable.

3. <u>Other Criminal legislations and Presumption of Criminality under Sec. 377</u>

3.1 There were other criminal legislations where provisions similar to the Criminal Tribes Act were retained. The Andhra Pradesh (Telangana Area) Eunuchs Act 1329F and Section 36A of the Karnataka Police Act 1963 are examples. Both these legislations contain language identical to the Criminal Tribes Act, stating that the government shall maintain a register of all 'eunuchs' ...who are reasonably suspected of committing unnatural offences or abetting the commission of the said offences. These unnatural offences are carnal intercourse against the order of nature, under section 377 of the IPC. Section 36A of the Karnataka Police Act was amended in 2016 to remove the word 'eunuchs' from the Section. The Andhra Pradesh (Telangana Area) Eunuchs Act 1329F is currently under challenge in W.P. No 44 / 2018 pending before the High Court of Andhra Pradesh and Telangana in Hyderabad.

3.2 Since historically transgender persons have been suspected of committing offences under Section 377, this presumption of criminality against the transgender community has persisted with the continued presence of Section 377 in the IPC. Even without committing offences, transgender persons are charged with Section 377. Even where it is not used to register FIRs, Section 377 is an ever-present ideological and physical threat in the lives of particularly transgender persons, whose livelihood comes from the street and in public places, where it forms part of the arsenal for police harassment of hijras and kothis.

3.3 There are many documented reports of violence against the transgender community by the police: The Report of the Ministry of Social Justice and Empowerment, (2014) Report of the Expert Committee on the Issues relating to Transgender Persons, the PUCL Report, the India Exclusion Report, among others.

II. Section 377 violates Article 14:

1. Formal and Substantive Equality

1.1 Section 377 is a serious violation of the right to equality and non-discrimination guaranteed under Article 14 of the constitution to transgender persons. Article 14 of the constitution reads: The State shall not deny to any

person equality before the law or the equal protection of the laws within the territory of India." Transgender persons are in fact viewed as 'non-persons', with no rights to work, to use a public bathroom or even walk down the street in safety. People whose gender identities and gender expression do not conform to their assigned birth sex are not even seen to count as humans or persons, who can seek the protection of equality. Often dehumanizing arguments are used that transgender persons cannot be classified as either male or female and therefore, do not fall into a protected category.

1.2 Section 377 may seem to comply with the requirement of formal equality since the Section is facially gender neutral and seems to be and related to 'acts' against the order of nature. However it does not comply with substantive equality as it is used mainly against the transgender community, who are visible and whose non-conforming gender identity is obvious in public spaces. Section 377 is targeted against transgender persons even when they have not committed any offence, only based on the centuries of stigma and presumption of criminality against them that they are committing acts under Section 377, based on their appearance, mannerisms and gender expression and thus treats them unequally. It also treats them unequally as it regards their acts of intimacy to be

'against the order of nature' which presumes that only penile-vaginal sexual intercourse to be in the order of nature. Transgender persons who have not had gender re-assignment surgery or those who have had partial reassignment would fall under the category of having carnal intercourse against the order of nature while having consensual sexual relations with their partners and this amounts to manifest arbitrariness.

1.3 Prof. Sandra Fredman has expounded on the concept of substantive equality in her book "Human Rights Transformed: Positive Rights and Positive Duties" (2008 OUP Oxford) proposes a four dimensional approach. According to her approach, substantive equality should aim to a.) redress disadvantage, b.) address stigma, stereotyping and prejudice, c.) enhance voice and participation and d.) accommodate difference and achieve structural change. This 4-pronged conception of the right to equality is one that is responsive to those who are disadvantaged, excluded or ignored. Using the framework of substantive equality in this manner, Section 377 would have to be declared unconstitutional and by doing so, it would result in removing the stigma, stereotypes and disadvantages faced by the transgender community for their gender non-conforming identity, would enhance their voice and participation in society and accommodate their difference

and achieve structural change in public and private life for transgender persons.

III. "Sex" under Article 15 includes gender identity and Section 377 amounts to a violation of Article 15:

1. *NALSA* and the inclusion of gender identity in Article 15

1.1 In *NALSA v. Union of India*, this Hon'ble Court held that 'sex' in Article 15 would include 'gender' and gender identity. It held:

> ***"...Both gender and biological attributes constitute distinct components of sex. The biological characteristics of course include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of sex under Article 15 therefore includes discrimination on the ground of gender identity."*** *[Para 66]*

1.2 The expression 'sex' used in Articles 15 is not just limited to the biological sex of male or female but intended to discrimination based on gender identity and thus include transgender persons. If sex discrimination is understood to include 'gender' and 'gender identity' then the impact of Section 377 on transgender persons who are targeted and criminalized by this section, only because of their gender identity not conforming to their biological sex, is due to sex discrimination based on Article 15, and is unconstitutional.

1.3 Under *NALSA*, while a person has the right to self-identify herself as a woman even without sex reassignment surgery,

she would be hit by Section 377 for having any consensual sexual intercourse with a man, as it would not fall within the definition of penile-vaginal intercourse. This is discrimination on the ground of sex under Article 15.

2. Comparative Jurisprudence on inclusion of gender identity within sex discrimination:

2.1 Even comparative jurisprudence shows that discrimination on the basis of gender identity has been held to be sex discrimination. Many equality legislations in other countries include "gender identity" within sex discrimination. They are as follows:

(i) The *Canadian Human Rights Act 1985* was amended on 9 February 2011 to include 'gender identity' and 'gender expression' as prohibited grounds of discrimination.

(ii) The *Equality Act 2010* in the United Kingdom prohibits discrimination on grounds of 'sex' and 'gender reassignment. This is defined to include a person who is, proposes to change, or is changing their sex and a transgender person would be able to receive protection from discrimination.

(iii) The *Human Rights Act 1993* (New Zealand) prohibits discrimination on the grounds of 'sex' or 'sexual orientation' and the Solicitor General issued public advice on 2 August 2006 that sex discrimination covers transgender people.

2.2 In May 2012, the Equal Employment Opportunity Commission of the United States delivered a landmark ruling in ***Macy vs. Holder*** EE-CA-3054, recognizing that denial of employment to a transgender woman on account her gender identity would amount to sex discrimination under Title VII of the Civil Rights Act, 1964***.***

3. Sex discrimination would also include gender non-conformity and sex stereotyping:

3.1 An individual who experiences discrimination due to his or her perceived gender nonconformity as in the case of section 377 in the manner in which impacts the transgender community, should also be understood to be sex-based discrimination under Article 15.

3.2 The US Supreme Court in the case of Price Waterhouse v. Hopkins, held that a person who has been discriminated against based on his or her nonconformity to gender stereotypes would amount to sex discrimination

4. Section 377 and Violation of Article 19 – Right to Freedom of Expression:

1. NALSA protects freedom of expression of one's self-identified gender

1.1 Article 19(1) (a) guarantees the right to freedom of speech and expression. Expression has been held in

NALSA to include one's right to expression of one's self-identified gender. The self-identified gender can be expressed through dress, words, action or behavior or any other form. In *NALSA*, it was observed that

"***69…Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. The self-identified gender can be expressed through dress, words, action, or behavior or any other form…". [para 69]***

1.2 This Hon'ble Court has thus held that since gender identity lies at the core of one's personal identity, gender expression and presentation would have to be protected under Article 19(1)(a).

1.3 The Criminal Tribes Act, and other criminal legislations have always criminalized even the gender expression of transgender persons. In the case of transgender persons, their chosen gender identity is outwardly visible through their features, clothes, mannerisms and behavior, which also exposes them criminalization under Section 377. While on the one hand, the freedom of speech and expression under Article 19(1) (a) protects their right to express their self-identified gender, and their gender identity is protected as an inherent part of their right to life, the expression of it makes them vulnerable to arrest under Section 377, as they have been historically criminalized. Thus, the very existence of Section 377 has

a chilling effect on the transgender community, to not express themselves freely, or risk the harm of being arrested.

2. Yogyakarta Plus 10 Principles:

2.1 The Yogyakarta Plus 10 Principles in Principle 33 states "***Everyone has the right to be free from criminalization and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics."***

2.2 Section 377, in the manner that it operates against the transgender community, clearly violates their freedom of speech and expression protected under Article 19(1)(a) as it renders them vulnerable to arrest and threats of arrest and compels them to not express their gender identity and gender expression.

IV. Section 377 violates the right to life, dignity and privacy guaranteed under Article 21:

1. Right to Life and dignity includes the right to gender identity:

1.1 In ***NALSA*** this Hon'ble Court held that each person's self identified sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of

self-determination, dignity and freedom and no one shall be forced to undergo medical procedure, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. This Hon'ble Court held:

"***The recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender constitutes the core of one's sense of being and as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution***." [para 74]

1.2 The right to gender self-determination encompasses the right to *indetermination* and must extend to persons whose gender expressions are not named and not conforming.

2. Right to Privacy and Dignity:

2.1 The right to personal liberty and privacy as part of Article 21 has been held to include the right to marry and to decide on one's intimate relationships. If transgender persons are to have the right to have intimate relationships and even marry as many of them are indeed married, then Section 377 would criminalize them for exercising the right to have sexual and intimate relationships with their partners and the persons they marry. For transgender persons, any sexual intercourse even with their partners would fall within Section 377 as carnal intercourse against the order of nature and be a criminal offence. Transgender persons who do not have gender reassignment would be termed as

having sexual intercourse against the order of nature. This is in violation of their right to life and dignity, as their intimacy and sexual relations with their partners cannot be termed as being 'against the order of nature'.

2.2 If there is a right to gender identity, one cannot be criminalized for expressing it and living in the gender one identifies with. This would include living and having sexual relations with one's partner, and for a transwoman or a transman, having sexual intercourse with a male or female would invariable fall foul of section 377 and be a crime. Section 377 therefore denies transgender persons the right to live with dignity where their most intimate relations are criminalized.

2.3 This was also held by the European Court of Justice in ***P v. S and Cornwall County Council***, Case C-13/94, [1996] IRLR 347 where the Court held that where a person is treated unfavourably due to her gender reassignment, to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard.

2.4 In ***Muhamad Juzaili Bin Mohd Khamis and Others v. State Government of Negeri Sembilan and Others***, Civil Appeal

No. N-01-498-11/2012, the Court of Appeal in Malaysia had a constitutional challenge to Section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) held that, "Any male person who, in any public place wears a woman's attire or poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringitt or imprisonment for a term not exceeding six months or both." In this case, the Court relied on the this Hon'ble Court's rulings on dignity and held, "

"The existence of a law that punishes the gender expression of transsexuals, degrades and devalues persons with GID in our society. As such section 66 directly affects the appellants' right to live with dignity, guaranteed by Art. 5 (1) by depriving them of their value and worth as members of our society.
We find merit in this argument. As long as section 66 is in force the appellants will continue to live in uncertainty, misery and indignity. They now come before this Court in the hope that they may be able to live with dignity and be treated as equal citizens of this nation. We therefore hold that section 66 is inconsistent with Art. 5 (1) of the Federal Constitution in that the section deprives the appellants of their right to live with dignity."

2.5 A 9 Judge Bench of this Hon'ble Court has held that the right to privacy is a fundamental right granted constitutional protection under Part III of the Constitution. In ***Justice K.S. Puttaswamy (Retd.) & Anr vs. Union of India & Ors.*** (2017) 10 SCC 1, this Hon'ble Court while referring to the reasoning adopted in the decision in ***Suresh Kumar Koushal vs. Naz Foundation*** (2014) 1 SCC 1 this Hon'ble Court observed:

"....That a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as

observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favorably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties…… [para 144]

….The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called rights" seems to suggest the exercise of a liberty in the grab of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population…"[para 145]

2.6 In ***Puttaswamy*** (supra) this Hon'ble Court has further held held that every individual is entitled to the intimacy and autonomy protected by a privacy right. Elucidating on the essential nature of the privacy right, it has been held that ***"298….The intersection between one's mental integrity privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of an individual…"*** held that the rights of the LGBT community were inherent in the right to life and constitutes the essence of liberty and freedom.

2.7 This Hon'ble Court in ***Shafin Jahan vs. Asokan K.M. & Ors*** 2018 SCC OnLine SC 343 has taken the forward the jurisprudence on the right to autonomy over intimate personal choices. Noting that autonomy and liberty are constitutionally recognised rights inherent in each individual, it was observed that the choice of a partner, whether within or outside of marriage, would be one such aspect of personhood over which the individual must have an absolute right. In a concurring opinion delivered by Chandrachud J. it has was held:

"***Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognizing them. Indeed, the Constitution protects personal liberty from disapproving audiences. [para 88]***
xxx
xxx
.....The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage."[para 93]

2.8 Section 377 in placing a restrictive meaning on sexual activity as permissible under the order of nature and in criminalizing consensual sexual activity between individuals, thus denies them such autonomy over choice of partner to share intimacies with.

2.9 The European Court of Human Rights in the case of ***Van Kuck v. Germany,*** Application No. 35968/97; (2003) 37

EHRR 51 where the question related to reimbursement of gender reassignment surgery the Court held:

> " ..***the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person....Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world***..." [para 69]

3. Yogyakarta Principles on Dignity

3.1 The Yogyakarta Principles under Principle 1, state that "All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights. States shall amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of human rights.

3.2 They state in Article 2 that States shall repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent and ensure that an equal age of consent applies to both same sex and different sex sexual activity.

3.3 Principle 6 of the Yogyakarta principles states that "The right to privacy ordinarily includes the choice to disclose or

or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's body and consensual sexual and other relations with others.

3.4 The Yogyakarta Principles have been held in NALSA to be binding and also as per the rulings of this Hon'ble Court in ***Vishaka v. State of Rajasthan and others***, AIR 1997 SC 3011 wherein it was held that international conventions and treaties would be binding where there was a vacuum in municipal law.

3.5 Hence under all the above grounds, it is prayed that Section 377 be held to be unconstitutional and in violation of the fundamental rights of the Petitioners.

Place: New Delhi

Date: 11.7.2018 Counsel for the Petitioners

IN THE SUPREME COURT OF INDIA

CRIMINAL (ORIGINAL) JURISDICTION

WRIT PETITION (CRL.) NO. 76/2016

IN THE MATTER OF:

Navtej Johar and Ors. … ***Petitioners***

Versus

Union of India … ***Respondent***

AND IN THE MATTER OF:

Voices Against 377 …***Intervenors***
(CRL. M.P. 6603/2018)

WRITTEN SUBMISSIONS ON BEHALF OF VOICES AGAINST 377, THE INTERVENORS IN W.P.(CRL) 76/2016

MOST RESPECTFULLY SHOWETH:

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"*I am glad that the Draft Constitution... has adopted the individual as its unit.*"
- **Dr. B.R. Ambedkar, *Constituent Assembly Debates* (November 1948)**

I. BRIEF BACKGROUND

A. The Intervenors

1. The Intervenors are a coalition of twelve associations working on issues of Child Rights, Women's Rights, Human Rights, Health concerns, as well as the Rights of same-sex desiring people including those who identify as Lesbian, Gay, Bisexual, Transgender, Hijra and Kothi persons (hereinafter LBGT persons). Over the years, in the course of their work, constituent members of the Intervenors realized the seriously harmful effects of section 377 on the lives of LGBT persons. The Intervenors were Respondent 8 before the Delhi High Court in *Naz Foundation v. Govt of NCT of Delhi* and supported the writ petitioners. They participated in the proceedings before the Supreme Court as set out in para 3 of the impleadment application. The activities of the constituents of the Intervenors are set out at Annexure R-1 (page 18) of the impleadment application.

B. Relief

2. The Intervenors support the writ petitioners in these writ petitions and request the Supreme Court to grant the following reliefs.

    a. A suitable declaration that section 377 of the Indian Penal Code ought to be read down so as not to cover consenting adults.

    b. A suitable declaration that the fundamental right to life guaranteed under Article 21 of the Constitution covers the right to intimacy.

    c. A suitable declaration that the Constitution proscribes discrimination on the basis of sexual orientation or gender identity.

    d. A suitable declaration that no person may be discriminated against with respect to education, housing, employment, health care, all facilities and utilities under Article 15(2) and other similar services on the basis of sexual orientation or gender identity.

C. Summary Position of the Intervenors

3. The Intervenors respectfully submit that:

    b. Section 377, IPC is **unconstitutional** being *ultra vires* Articles 14, 15, 19(1)(a) and 21 of the Constitution inasmuch as, in operation and effect, it violates the dignity and personhood of members of the LGBT community.

c. **Sexual rights and sexuality are a part of human rights.** In particular, they are a crucial dimension of the right to life guaranteed under Article 21. Developing close and intimate relationships is an essential aspect of life and there can be no criminalisation of conduct that prevents a section of society from building relationships and expressing physical aspects of their intimacy.

d. Homosexual conduct between two consenting males or two consenting females is ***not*** **"against the order of nature**". It is scientifically established that a certain segment of the population (although a small stable percentage, a large number in the Indian context) have intimate relationships with persons of their own sex and **this is a natural facet of their personality**.

e. LGBT persons are invisible and visible in the context of Section 377. LGBT persons are invisible in the sense that they are physically no different from non-LGBT persons. However, the moment they develop relationships or co-habit with persons of the same gender, they become visible to their friends, neighbours, work colleagues, family and local officials of the state. On the basis of reports by reputed organizations and the material relied on by the Delhi High Court in *Naz Foundation* it is evident that LGBT persons are often targeted under Section 377 for merely being perceived to be different.

f. LGBT persons ask that they **not be criminalised for being who they are.** They seek "equality before the law and equal protection of the laws" and ask that the Right to privacy of intimate spaces and intimate decisions that is enjoyed by the majority of citizens, be extended to them.

g. The Intervenors submit that while this case is ostensibly about the interpretation of the words used in Section 377, and whether consensual sexual acts between persons of the same sex fall within the meaning of 'carnal intercourse against the order of nature' – at its heart, it is about the fundamental freedoms that lie at the heart of our constitutional order: On matters of sexuality or sexual orientation, are all citizens equal? Does our Constitution deny an individual the right to fully develop relationships with other persons of the same gender by casting a shadow of criminality on such sexual relationships?

h. LGBT people in India, who are defined by their different sexual orientation and gender identity, exist across classes, in urban and rural areas, and may belong to different castes and religious communities. They share a commonality in that they express sexual desires towards members of their own sex.

i. Technically, Section 377 criminalises only certain acts and is facially neutral. However, when applied and enforced it is not used against consenting adult heterosexuals. Section 377 as interpreted and applied targets LGBT persons. In doing so, it stigmatises and offends the dignity of LGBT persons as a

> class. Section 377 casts a shadow of criminality, creates second-class citizens, and deprives LGBT citizens of their full moral citizenship. A member of the LGBT community feels stigmatized even when not engaging in any sexual activity by the mere presence of this provision.

D. The Reference

4. On 8th January, 2018, this Hon'ble Court, in the matter captioned above, issued notice, observing that:

> *Taking all the aspects in a cumulative manner, we are of the view, the decision in Suresh Kumar Kaushal's case (supra) requires re-consideration. As the question relates to constitutional issues, we think it appropriate to refer the matter to a larger Bench*.[1]

5. In **Suresh Kumar Koushal v Naz Foundation, (2014) 1 SCC 1**, a two-judge bench of this Hon'ble Court had held that Section 377 of the Indian Penal Code, 1860 ["**IPC**"], which criminalises "carnal intercourse against the order of nature", was consistent with Articles 14, 15, and 21 of the Constitution. This Hon'ble Court set aside the judgment of the High Court of Delhi in **Naz Foundation v NCT of Delhi, (2009) 111 DRJ 1 (DB)**, which had read down S. 377 to exclude same sex relations between consenting adults, in private.

6. It is respectfully submitted that the foundations of the judgment in **Suresh Kumar Koushal** stand eroded by the judgment of the nine-judge bench of this Hon'ble Court in **Justice K.S. Puttaswamy v Union of India, (2017) 10 SCC 1.**

7. In any event, it is respectfully submitted that **Suresh Kumar Koushal** is erroneous on its own terms, and deserves to be set aside. To the extent that S. 377 criminalises consensual same-sex relations between adults, it violates Articles 14, 15, 19(1)(a) and 21 of the Constitution.

II. IMPACT OF THE CONSTITUTION BENCH JUDGMENT IN PUTTASWAMY

8. One of the grounds of challenge in **Suresh Kumar Koushal ["Koushal"]** was that S. 377 violated the fundamental rights to privacy, dignity, and autonomy, guaranteed by Article 21 of the Constitution. However, in its judgment, the Supreme Court doubted both the existence of the right, as well as the consequences that followed even if the right was acknowledged to exist. On the first question, learned Judges observed that:

> *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.*[2]

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[1] Navtej Singh Johar and Ors. v Union of India, (2018) 1 SCC 791.
[2] Suresh Kumar Koushal v Naz Foundation, (2014) 1 SCC 1, ¶77.

9. In **Justice K.S. Puttaswamy v Union of India ["Puttaswamy"]**, while holding that there existed a fundamental right to privacy under the Indian Constitution, the above view was rejected, both by necessary implication and expressly, by all nine judges of this Hon'ble Court. Justice R.F. Nariman wrote that:

> *In the Indian context, a fundamental right to privacy would cover at least the following three aspects ... The privacy of choice, which protects an individual's autonomy over fundamental personal choices.*[3]

10. The plurality opinion, authored by Justice D.Y. Chandrachud, expressly rejected **Koushal's** view. This Hon'ble Court observed that:

> *The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination*.[4]

11. After **Puttaswamy**, therefore, the question of whether sexual orientation is protected under Article 21 of the Constitution is settled beyond dispute.

12. On the second question, the Supreme Court in **Koushal** noted that:

> *While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a miniscule fraction (sic) of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution*.[5]

13. In other words, therefore, **Koushal** linked the existence of a constitutional remedy (that is, the declaration that a provision was *ultra vires* the Constitution) with the number of individuals who would be affected by its denial. This framing of fundamental rights in majoritarian terms was also rejected by the plurality opinion in **Puttaswamy,** in the following words:

> *"The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular.*

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[3] Justice K.S. Puttaswamy v Union of India, (2017) 10 SCC 1, ¶525 (concurring opinion of Nariman J.)
[4] Justice K.S. Puttaswamy v Union of India, (2017) 10 SCC 1, ¶145 (plurality opinion of Chandrachud J.).
[5] Suresh Kumar Koushal v Naz Foundation, supra, ¶66.

> *The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."*[6]

14. It was also rejected by each of the separate opinions in **Puttaswamy**. **Puttaswamy** made clear that the focus of Part III of the Constitution was the individual, and the rights that the Constitution guaranteed inhered in each individual. As Justice R.F. Nariman noted:

> *We have been referred to the Preamble of the Constitution, which can be said to reflect core constitutional values. The core value of the nation being democratic, for example, would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed.*[7]

15. It is respectfully submitted that these observations in **Puttaswamy** are to be read alongside the judgment's test for when the State may validly impose restrictions upon the exercise of a fundamental right. A majority of the Court in **Puttaswamy** accepted that the standard of proportionality must determine this issue. The contours of this standard were laid out in the concurring opinion of Kaul J.:

> *(i) The action must be sanctioned by law;*
> *(ii) The proposed action must be necessary in a democratic society for a legitimate aim;*
> *(iii) The extent of such interference must be proportionate to the need for such interference;*
> *(iv) There must be procedural guarantees against abuse of such interference.*[8]

16. In this context, the observations in **paragraph 144** (cited above) of the plurality opinion in **Puttaswmay** offer a complete answer to the erroneous rationale applied by the Court in **Koushal.** To the extent that the violation of the right to privacy, dignity, and autonomy under Article 21 of the Constitution is sanctioned by looking at *numbers* – which was the only rationale offered by the Court in **Koushal** – it

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[6] Justice K.S. Puttaswamy v Union of India, supra, ¶144. (plurality opinion of Chandrachud J.)
[7] Justice K.S. Puttaswamy v Union of India, supra, ¶522 (concurring opinion of Nariman J.)
[8] Justice K.S. Puttaswamy v Union of India, supra, ¶638 (concurring opinion of Kaul J.)

falls foul of the second limb of the proportionality requirement, which insists that a law restricting Article 21 rights must have "legitimate aim." **Paragraph 144** rules out "majoritarian acceptance" and "popular acceptance" as "legitimate aims" under the proportionality standard.

17. It is respectfully submitted that in **paragraph 647** of his concurring opinion in **Puttaswamy**, Justice Kaul registered in express terms his agreement with the plurality's assessment of *Koushal*. The above remarks, therefore, have the support of a majority of the judges in **Puttaswamy**. Furthermore, none of the concurring opinions registered any dissenting notes on this subject.

18. Consequently, although the plurality opinion in **Puttaswamy** went on to observe that "*since the challenge to Section 377 is pending consideration before a larger Bench of this Court, we would leave the constitutional validity to be decided in an appropriate proceeding*"[9], it is respectfully submitted that the argument above demonstrates that **Koushal** is irreconcilable with the law laid down by the larger bench in **Puttaswamy.** The irresistible conclusion, therefore, is that **Koushal** is no longer good law.

19. It is respectfully submitted, in addition, that the judgment of this Court in **Puttaswamy** has had global influence. In **Jason Jones vs. The Attorney General of Trinidad and Tobago, Claim No. CV2017-00720,** decided on 12th April 2018, the High Court of Trinidad and Tobago declared the British colonial era anti –sodomy legal provisions null and void to the extent that these provisions criminalised any acts constituting consensual sexual conduct between adults. The High Court in arriving at its decision placed reliance on *Puttaswamy v. Union of India*:

> *A felicitous exposition of what the right to privacy entails, to this court's mind, is summarized in the Supreme Court of India decision in Puttaswamy v. Union of India. In that matter, a nine bench of the Supreme Court of India handed down its decision in a 547 page judgment, containing six opinions, and ruled unanimously that privacy is a constitutionally protected right in India despite there being no explicit right to privacy as found in their Constitution. The right to privacy was held to exist based on the principle that the Indian Constitution is a living instrument and the Court sought to give effect to the values of the Constitution by interpreting express fundamental rights protections as contained in a wide range of other rights. As such Article 21 of the Constitution which provides that, "No person shall be deprived of his life or personal liberty except according to procedure established by law', was held to incorporate a right to privacy. The dicta coming out of Puttaswamy emphasized the fact that sexual orientation is an essential attribute of privacy, which is inextricably linked to human dignity.*[10]

20. Based on the principle in **Puttaswamy** the High Court Of Trinidad and Tobago held:

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[9] Justice K.S. Puttaswamy v Union of India, supra, ¶147.
[10] Jason Jones v The Attorney General of Trinidad and Tobago, Claim No. CV2017-00720, ¶¶89 – 90.

> *Parliament has taken the deliberate decision to criminalize the lifestyle of persons like the claimant whose ultimate expression of love and affection is crystallized in an act which is statutorily unlawful, whether or not enforced. This deliberate step has meant, in this circumstance, that the claimants rights are being infringed.*
>
> *The claimant and others, who express their sexual orientation in a similar way, cannot lawfully, live their lives, their private life, nor can they choose their life partners or create the families that they wish. To do so, would be to incur the possibility of being branded a criminal. The act impinges on the right to respect for a private and family life.*[11]

21. The conclusion of the High Court drew heavily from the reasoning of **Puttaswamy** to protect the private lives of persons who choose to express their sexual orientation, choose their partners and create the families they wish. It is submitted that the logical application of the ratio of **Puttaswamy** (based as it is in the protection of both zonal and decisional privacy), would lead to a similar protection for LGBT persons in India by a reading down of Section 377 of the Indian Penal Code to exclude consenting sex between adults.

III. IMPACT OF NALSA V UNION OF INDIA

22. **NALSA v Union of India, (2014) 5 SCC 438**, was a judgment passed by a two-judge bench of this Hon'ble Court, a few months after **Koushal**. NALSA concerned the rights of transgender individual under the Constitution. At the very beginning of his judgment, Radhakrishnan J. referred to an Allahabad High Court judgment dealing with the prosecution of a transgender person under S. 377. Radhakrishnan J. then went on to note:

> *Even though, he was acquitted on appeal, this case would demonstrate that Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons. A Division Bench of this Court in Suresh Kumar Koushal and another v. Naz Foundation and others [(2014) 1 SCC 1] has already spoken on the constitutionality of Section 377 IPC and, hence, we express no opinion on it since we are in these cases concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation.*[12]

23. Although the Division Bench of this Hon'ble Court in **NALSA** correctly declined to comment on **Koushal**, since it was a prior decision by a coordinate bench, it is respectfully submitted that **Koushal** and **NALSA** are irreconcilable. This is because, in **Koushal**, the Division Bench held that since S. 377 only criminalised specific acts, and not individuals, Articles 14 and 15 were irrelevant

[11] Ibid., ¶¶92 – 93.
[12] NALSA v Union of India, (2014) 5 SCC 438, ¶15.

in deciding its constitutional validity. In **NALSA**, this logic was expressly rejected by Radhakrishan J., who categorically held that *"S. 377, though associated with specific sexual acts, highlighted certain identities..."* It is respectfully submitted that, although both judgments were dealing with separate groups of citizens, their underlying rationales cannot *together* hold the field. The issue, therefore, needs to be reconsidered by the present Bench.

24. The contradiction was heightened when, in **NALSA**, Radhakrishnan J. went on to note:

> "... *gender identity is one of the most fundamental aspects of life… it refers to each person's deeply felt internal and individual experience of gender… including the personal sense of the body which may involve a freely chosen modification of bodily appearances or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms."*[13]

25. In other words, the **NALSA** Court made it clear that gender identity is something that is expressed *through conduct* (such as *dress, speech, mannerisms etc.)* The distinction between punishing "acts" and criminalising "identities", therefore, stood rejected. Immediately thereafter, the Court held:

> *"Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person ... each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."*[14]

26. The Court then cited the Yogyakarta Principles:

> *"Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."*[15]

27. The **NALSA** Court thus drew a clear link between sexual conduct, orientation, gender identity, and personality, weaving these concepts together within a broader, constitutional framework of self-determination, dignity, and freedom. The premise of the judgment is best expressed by the words of Kennedy J., writing the opinion of the Court in **Lawrence v Texas, 539 U.S. 558, 567 (2003):**

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[13] Ibid., ¶21.
[14] Ibid., ¶22.
[15] Ibid., ¶25.

> *"When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."*[16]

28. It is therefore submitted that the conceptual clash between **Koushal** and **NALSA** requires authoritative resolution by this Hon'ble Court.

IV. SAME-SEX RELATIONS ARE NOT "AGAINST THE ORDER OF NATURE"

29. Section 377 criminalises 'carnal intercourse against the order of nature.' Therefore, for a sexual act to fall within the prohibition of section 377, that act must be 'unnatural'. A review of the scientific literature would lead to the following conclusions.

    a. Human beings develop a sexual orientation, and this is natural to growing up. An individual's sexual orientation forms or is determined between middle childhood and early adolescence well before attaining adulthood in terms of the Indian Majority Act, 1875. While most humans are heterosexual, a significant minority are homosexual.

    b. A person's sexual orientation is innate to him or her. It is a core of his or her being and identity. It is a vital dimension of a person's character and personality that cannot be altered. Like one's race, being left handed, and the colour of one's eyes - sexual orientation cannot be changed at will.

    c. The range of human sexuality is a continuum running from exclusive homosexuality to exclusive heterosexuality.

    d. The overwhelming technical and medical literature on the record shows that homosexuality is not a disorder or disease (as was once considered) but is another expression of sexuality i.e. natural to a certain narrow minority in society.

    e. Persons belonging to the LGBT community are a permanent minority and have always been present in society, through out history and in all cultures. The estimates of the number of LGBT persons range across surveys, but all the surveys conclude that the LGBT population is always in a numerical minority. While the percentage of LGBT persons is a fraction of the entire population, having regard to India's large population, the number of LGBT individuals would be very large.

    f. Same sex attraction or homosexuality has been observed across several species in nature.

30. Homosexuality is widely prevalent in any given population and is as 'natural' as heterosexual acts. Homosexuality is just a natural variant of human sexuality and occurs in such a significant section of the

[16] Lawrence v Texas, 539 U.S. 558 (2003),

human population, that its occurrence cannot be wished away or irrationally tarred with the brush of being 'against the order of nature'. To read homosexual acts as being against the order of nature and hence coming within the ambit of Section 377 is contrary to the scientific, sociological and medical consensus that homosexuality is a natural variant of human sexuality.

31. According to an article by **K.K. Gulia and H.N. Mallick titled "Homosexuality: A Dilemma in Discourse"** ***Indian J. Physiol Pharmacol*** **2010: 54(1): 5-20**:

> "*In general, homosexuality as a sexual orientation refers to an enduring pattern or disposition to experience sexual, affectional, or romantic attractions primarily to people of the same sex. It also refers to an individual's sense of personal and social identity based on those attractions, behaviours, expressing them, and membership in a community of others who share them. It is a condition in which one is attracted and drawn to his/her own gender, which is evidenced by the erotic and emotional involvement with members of his/her own sex."*[17]

32. The authors further state

> *In the course of the 20th century, homosexuality became a subject of considerable study and debate in western societies. It was predominantly viewed as a disorder or mental illness. At that time, emerged two major pioneering studies on homosexuality carried out by Alfred Charles Kinsey (1930) and Evelyn Hooker (1957)…This empirical study of sexual behavior among American adults revealed that a significant number of participants were homosexuals. In this study when people were asked directly if they had engaged in homosexual relations, the percentage of positive responses nearly doubled. The result of this study became the widely popularized Kinsey Scale of Sexuality. This scales rates all individuals on a spectrum of sexuality, ranging from 100% heterosexual to 100% homosexual…*
>
> *...the American Psychiatric Association (APA) deleted homosexuality from its Diagnostic and Statistical Manual of Psychological Disorders (DSM) in 1973 and released a public statement that homosexuality was not a mental disorder…"*

33. According to the **Corsini Concise Encyclopedia of Psychology and Behavioural Science**:

> *Homosexuality refers to sexual behaviours, desires, attractions, and relationships among people of the same sex, as well as to the culture, identities, and communities associated with them. The term encompasses at least five phenomenon that are often, although not always related. First, it is used to describe any specific instance of sexual behaviour with or attraction to a person of one's same sex. Both*

[17] K.K. Gulia and H.N. Mullick, "Homosexuality: A Dilemma in Discourse", (2010) 54(1) *Indian J. Physiol. Pharmacol.* 5, 8.

homosexual and heterosexual behaviours and attractions are common throughout human societies and across species. Second it refers to ongoing patterns of attraction for sexual or romantic partners of one's own gender, which may or may not be expressed behaviourally.

A third aspect of homosexuality is psychological identity, that is, a sense of self defined in terms of one's enduring attractions to members of the same sex. Individuals who identify as homosexual typically refer to themselves as "gay" with most women preferring the term "lesbian." Some use "queer" as a self-descriptive term, thereby transforming a formerly pejorative label into a positive statement of identity. People follow multiple paths to arrive at an adult homosexual identity. Not everyone with homosexual attractions develops a gay or lesbian identity, and not all people who identify themselves as gay engage in homosexual acts.

A fourth component of homosexuality is involvement in same-sex relationships. Many gay and lesbian people are in a long-term intimate relationship and, and like heterosexual pairings, those partnerships are characterized by diverse living arrangements, styles of communication, levels of commitment, patterns of intimacy and methods of conflict resolution. Heterosexual and homosexual relationships do not differ in overall psychological adjustment or satisfaction. However, anti-gay stigma often denies same-sex partners the social support that heterosexual souses typically receive and even forces many same-sex couples to keep their relationship hidden from others.

Fifth, in the United States and many other societies, homosexuality involves a sense of community membership, similar to that experienced by ethnic, religious and cultural minority groups. Empirical research indicates that gay men and lesbians in the Untied States tend to be better adjusted psychologically to the extent that they identify with and feel part of such a community.

…Moreover, many gay people do not disclose their sexual orientation publicly because they fear discrimination and harassment. Consequently, no accurate estimate exists for the proportions of the U.S. population that are homosexual, heterosexual and bisexual. In North American and European studies during the 1980's and 1990's, roughly 1-10% of men and 1-6% of women (depending on the survey and the country) reported having had sexual relations with another person of their own sex since puberty…

Regardless of its origins, a heterosexual or homosexual orientation is experienced by most people in the United States and other Western Industrialized societies as a deeply rooted and unchangeable part of themselves. Many adults report never having made a conscious choice about their sexual

orientation and always having felt sexual attractions and desires to people of a particular sex…[18]

34. According to the *amicus* brief filed by the **American Psychological Association** before the United States Supreme Court in *Lawrence v. Texas*:

> *"Decades of research and clinical experience have led all mainstream mental health organisations in this country to the conclusion that homosexuality is a normal form of human sexuality. Homosexuality – defined as a pattern of erotic, affectional and romantic attraction principally to members of one's own sex – has consistently been found in a substantial portion of the American adult population. Typically, an individual's sexual orientation appears to emerge between middle childhood and early adolescence. Most or many gay men and lesbians (men and women who identify themselves as homosexual) consistently report that they experience either no or little choice in their sexual attraction to persons of their own sex. Research has also found no inherent association between homosexuality and psychopathology. All of this evidence has lead mental health professional organisations to conclude that homosexuality is simply one normal variant of sexual identity. These organisations long ago abandoned classifications of homosexuality as a disorder and do not support therapies designed to change sexual orientation. Moreover, there is no reliable scientific evidence of effectiveness of such therapies.*
>
> *Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well-being and social adjustment…Like heterosexuals, many gay men and lesbians desire to form long-lasting and committed relationships and succeed in doing so. These relationships manifest the same kinds of psychological dynamics as do heterosexual relationships, and sexual intimacy plays an important role in both kinds of partnerships…*
>
> *As Texas law recognizes, the forms of sexual contact that it targets as "deviate sexual intercourse" are in fact among the means that heterosexual couples can use to express intimacy (as many do). For gay partners, these forms of sexual activity are particularly important for expression of sexual intimacy. The mental health professions do not associate oral and anal sex with any psychopathology and do not view them as 'deviate'.*[19]

35. Further:

> *The exact proportion of heterosexuals, homosexuals, and bisexuals in the adult population of the United States are not*

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[18] *The Concise Corsini Encyclopedia of Psychology and Behavioural Science* 887 (3rd edn., W Edward Craighead & Charles B. Nemeroff eds., 2004)

[19] Brief for the Amici Curiae American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Texas Chapter of the National Association of Social Workers in *Lawrence v Texas*, No. 02-102, in the Supreme Court of the United States, available at https://www.apa.org/about/offices/ogc/amicus/lawrence.pdf, pp. 1 – 3.

known. Different surveys have measured different aspects of sexual orientation, and consequently have reached different estimates. For example, the National Health and Social Life Survey (NHSLS Survey), the most comprehensive survey to date of American sexual practices, found that approximately 5% of men and 4% of women reported having had sex with a same-sex partner since age 18. …A larger proportion of respondents – approximately 8% of men and women alike – reported that they experienced attraction to persons of their own sex, considered the prospect of sex with a same-sex partner appealing, or both…

Heterosexual and homosexual behaviour are both normal aspects of human sexuality. Both have been documented in many different human cultures, historical eras and in a wide variety of animal species. There is no consensus among scientists about the exact reasons why an individual develops a heterosexual, bisexual, or homosexual orientation. According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience…[20]

36. The amicus brief also details the effects of anti-sodomy statutes on LGBT people:

A particularly troubling effect of antisodomy statutes like §21.06 is that they foster a climate of intolerance in which gay men and lesbians feel compelled to conceal or lie about their sexual orientation to avoid personal rejection, discrimination and violence. This compulsion to remain "in the closet" reinforces anti-gay prejudices.[21]

37. While it is difficult to ascertain the exact numbers of self-identifying LGBT persons in a given population, certain governments have generally adopted the position that about 5-7% of an adult population identifies itself as not heterosexual. According to the **Final Regulatory Impact Assessment: Civil Partnership Act 2004** conducted by the Department of Trade and Industry of the Government of the United Kingdom states that a *"…wide range of research suggests that a lesbian, gay and bisexual people constitute 5-7% of the total adult population."*[22]

38. In 1957, the **Report of the Committee on Homosexual Offences and Prostitution** headed by Lord Wolfenden also tried to estimate the size of the homosexual population. After averring to the numerous difficulties in making such an estimate (only small number of homosexuals fall into the hands of the police/ small percentage visit the doctor to treat the their homosexuality/ no guarantee that individuals who are part of the study told the whole truth), comes to the tentative conclusion that:

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[20] Ibid., pp. 6 – 7.
[21] Ibid., p. 28.
[22] Final Regulatory Impact Assessment: Civil Partnership Act 2004, available at http://webarchive.nationalarchives.gov.uk/+/http:/www.berr.gov.uk/files/file23829.pdf, p. 13.

> *No inquiries have been made in this country comparable to those which the late Dr. Kinsey conducted in the United States of America. Dr. Kinsey concluded that in the United States, 4 per cent of adult white males are exclusively homosexual throughout their lives after the onset of adolescence. He also found evidence to suggest that 10 per cent of the white male population are more or less exclusively homosexual throughout their lives after the onset of adolescence. He also found evidence to suggest that 10 per cent of the white male population are more or less exclusively homosexual for at least three years between the ages of sixteen and sixty five, and that 37 per cent of the total male population have at least some overt homosexual experience, to the point of orgasm between adolescence and old age. Dr. Kinsey's findings have aroused opposition and skepticism. But it was noteworthy that some of our medical witnesses expressed the view that something very like these figures would be established in this country, if similar inquiries were made. The majority, while stating quite frankly that they did not really know, indicated that their impression was that his figures would be on the high side for Great Britain*.[23]

39. In 1992, the World Health Organization removed homosexuality from its list of mental illnesses in the International Classification of Diseases (ICD 10). Page 11 of the Clinical Descriptions and Diagnostic Guidelines of the ICD 10 reads: *"Disorders of sexual preference are clearly differentiated from disorders of gender identity, and homosexuality in itself is no longer included as a category."*[24] The Indian Medical fraternity also widely adopts this standard classification.

40. In 2012, the Indian Journal of Psychiatry published an editorial on the issue of homosexuality. It reiterates that homosexuality is a normal expression of sexuality and that

> *... the argument that homosexuality is a stable phenomenon is based on the consistency of same-sex attractions, the failure of attempts to change and the lack of success with treatments to alter orientation.*[25]

41. They question unethical and unwarranted attempts at conversion therapy (which is aimed to change one's sexual orientation) and call for physicians to provide medical service with *"compassion and respect for human dignity for all people irrespective of their sexual orientation."*[26]

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[23] *Report of the Committee on Homosexual Offences and Prostitution*, ¶38 (London: Her Majesty's Stationery Office, 1957)
[24] Gene Nakajima, The emergence of an International Lesbian, Gay, and Bisexual Psychiatric Movement, Journal of Gay and Lesbian Psychotherapy, Vol 7, No1/2 2003. p.180.
[25] T.S. Sathyanarayana Rao & K.S. Jacob, "Homosexuality in India", (2012) 54 (1) *Indian Journal of Psychiatry* 1-3, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3339212/.
[26] Ibid.

V. CRIMINALISING SAME-SEX RELATIONS BEARS STRIKING SIMILARITIES WITH THE CRIMINAL TRIBES ACT

42. In 1871, the Governor-General of India in Council passed the Criminal Tribes Act, 1871. This Act authorized the Government to declare by notification any tribe or class of persons which 'is addicted to the systematic commission of non-bailable offences' as a Criminal tribe. The law therefore deemed persons criminal merely on the basis of membership of a particular community. Once declared a 'criminal' tribe the Government was empowered with vast powers to ensure registration of all members of that tribe, forcibly settle, remove from a particular place, detain and transfer members of the criminal tribe. Furthermore the government was empowered to separate children of a criminal tribe from their parents.

43. The 1897 amendment to the Criminal Tribes Act, 1871, was titled 'An Act for the Registration of Criminal Tribes and Eunuchs'. Under the provisions of this statute, a eunuch was '*deemed to include all members of the male sex who admit themselves, or on medical inspection clearly appear, to be impoten*t.'

44. Under section 24 of the Act, the local government was required to keep a register of the names and residences of all eunuchs who are *'reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 of the Indian Penal Code'.*

45. Under section 26 of the Act, any eunuch so registered who appeared 'dressed or ornamented like a woman in a public street…or who dances or plays music or takes part in any public exhibition, in a public street...may be arrested without warrant and punished with imprisonment of up to two years or with a fine or both'

46. Under section 27, If the eunuch so registered had in his charge a boy under the age of 16 years within his control or residing in his house, he could be punished with imprisonment of up to two years or fine or both. According to section 29, a eunuch was considered incapable of acting as guardian, making a gift, drawing up a will or adopting a son.

47. A glimpse of the racist attitude of the British towards the so called Criminal Tribes is reflected in the words of J.H Stephens; a Member of the Viceroy's Executive Council who was said the following before the enactment of the Criminal Tribes Act:

> *"The special feature of India is the caste system. As it is, traders go by caste; a family of carpenters will be carpenter a century or five century hence, if they last so long. It means a tribe whose ancestors were criminals from time immemorial, who are themselves destined by the usage of caste to commit crimes and whose descendants will be offenders against law, until the whole tribe is exterminated or accounted for in the manner of Thugs. When a man tells you that he is an offender against law he has been so from the beginning and will be so*

to the end. Reform is impossible, for it is his trade, his caste, I may almost say his religion is to commit crime."[27]

48. Another instance of the racist ideology within which the Bill of 1871 (before it became an Act) was planted is evident in the words of T.V. Stephens, a Law Member of the Executive Council who while moving the Bill declared,

> *"…'Professional criminals'…really means…a tribe whose ancestors were criminals from times immemorial, who are destined by the usage of caste to commit crime. Therefore when a man tells you he is a Buddhuk or a Kunjur, or a Sonoria, he tells you…that he is an offender against the law, has been so ever since the beginning, and will be so to the end, that reform is impossible…"*

49. While comparing caste system with the hereditary nature of crime, T.V. Stephens said:

> *"…people from time immemorial have been pursuing the caste system defined job-positions: weaving, carpentry and such were hereditary jobs. So there must have been hereditary criminals also who pursued their forefather's profession."*

50. It has been stated that:

> *'Being a eunuch was itself a criminal enterprise, with surveillance being the everyday reality. The surveillance mechanism criminalised the quotidian reality of a eunuch's existence by making its manifest sign, i.e. cross-dressing a criminal offence. Further, the ways in which eunuchs earned their livelihood, i.e. singing and dancing, was criminalised. Thus, every aspect of the eunuch's existence was subject to surveillance, premised on the threat of criminal action. The police thus became an overt and overwhelming presence in the lives of eunuchs. Further, the very concept of personhood of eunuchs was done away with through disentitling them from basic rights such as making a gift or adopting a son*.'[28]

51. Commenting on the Criminal Tribes Act in a speech made in 1936, Nehru stated

> *"I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty…an attempt should be made to have the Act removed from the statute book. No tribe can be classed as criminal as such and the whole principle as such and the whole principle is out of consonance with civilized principles of criminal justice and treatment of offenders...."*

50. Yet this is precisely the effect of section 377 of the IPC. It renders the entire of class of LGBT persons as criminal and reduces them to the status of 'unapprehended felons'. What Nehru said about the

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[27] Subir Rana "Nomadism, Ambulation and the 'Empire': Contextualising the Criminal Tribes Act XXVII of 1871" *Transcience* (2011) Vol. 2, Issue 2 at page 16.

[28] Peoples' Union for Civil Liberties, "Human Rights Violations against the Transgender Community: A Report" (January 2004), available at http://www.pucl.org/Topics/Gender/2004/transgender.htm

Criminal Tribes in 1936, is equally true of all LGBT persons. While the Criminal Tribes were denotified in 1952, the eunuch community and the rest of the LGBT community continue to be rendered criminal as a class because of section 377, as the provision renders illegal the conduct most closely associated with LGBT persons.

51. The Intervenors submit that condemnation expressed through the law shapes an individual's identity and self-esteem. LGBT individuals ultimately do not try to conform to the law's directive, but the disapproval communicated through it, nevertheless, substantively affects their sense of self-esteem, personal identity and their relationship to the wider society and that section 377 embeds illegality within the identity of homosexuals.[29] This tendency to conflate different sexual identities with criminal illegality marks the history of sodomy laws and exists in many different contexts.[30] According to a study conducted in South Africa prior to the striking down of its criminal proscription of sodomy, sodomy laws (like s. 377) send out *"one clear message that homosexual are delinquents; the law signifies public abhorrence of lesbians and gays…This affects individuals' self-image both in their reflections of themselves…"*[31]

52. Furthermore, the harm inflicted by Section 377 radiates out and affects the very identity of LGBT persons. Sexuality is a central aspect of human personality and in a climate of fear created by Section 377 it becomes impossible to own and express one's sexuality thereby silencing a core part of one's identity. It directly affects the sense of dignity, psychological well being and self esteem of LGBT persons. Mr. Gautam Bhan testifies to the fact that section 377 makes him feel "like a second class citizen in my own country." He further states that:

> *"While society, friends and family are accepting of my sexuality, I cannot be fully open about my identity and my relationships because I constantly fear arrest and violence by the police…Without the existence of this section, the social prejudice and shame that I have faced would have been considerably lessened….The fact that gay people, like me, are*

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[29] Ryan Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics" (2001) 89 *Cal. L. Rev.* 643.

[30] During the Colonial period in India, *hijras* were criminalized by virtue of their identity. The Criminal Tribes Act, 1871, was enacted by the British in an effort to police with those tribes and communities who 'were addicted to the systematic commission of non-bailable offences.' These communities and tribes were deemed criminal by their identity, and mere belonging to one of these communities rendered the individual criminal. In 1897, this act was amended to include eunuchs. According to the amendment, the local government was required to keep a register of the names and residences of all eunuchs who are 'reasonable suspected of kidnapping or castrating children or of committing offences under s. 377 of the Indian Penal Code." While this act has been repealed, the attachment of criminality to the hijra community still continues. See Arvind Narrain *Queer: Despised Sexuality, Law and Social Change* 57-60 (Bangalore: Books for Change, 2004).
See also Rubin, Gayle. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." Pleasure and Danger: Exploring Female Sexuality. Ed. Carole S. Vance. London: Pandora. 1992. 267-293, wherein it is argued that sex is used as a political agent as a means of implementing repression and creating dominance in today's society. She dissects modern culture's stance on sexuality, exposing the hypocrisy and subjugation that victimizes anyone of a different orientation or sexual inclination, by creating a hierarchy, what she calls a sexual caste system, of 'legitimate/natural' and 'illegitimate/unnatural' sexual practices

[31] Ryan Goodman, "Beyond the Enforcement Principle", supra, 689 – 690.

> *recognized only as criminals is deeply upsetting and denies me the dignity and respect that I feel I deserve."*[32]

53. The Intervenors submit that as Section 377 IPC criminalises sexual acts that define LGBT persons, this creates *an association of criminality* with LGBT persons. This is evident from the legislative history of Section 377 and from the widespread violation of the fundamental rights of LGBT persons. The Intervenors state that the continued existence of this provision on the statute book creates and fosters a climate of fundamental rights violations of the LGBT community. LGBT persons have been harassed, blackmailed, raped and tortured under the climate of impunity fostered by Section 377.

VI. S. 377 VIOLATES ARTICLE 14 OF THE CONSTITUTION

54. Article 14 of the Constitution permits reasonable classification. It prohibits class legislation, irrational discrimination, and arbitrary differentiation. It is respectfully submitted, *first*, that because S. 377 singles out personal characteristics that are intimately linked with individual dignity and autonomy, it ought to be subjected to a higher threshold of scrutiny than regular legislative classifications in (say) the economic or commercial realm. In any event, and in the alternative, S. 377 fails the twin tests of rational classification and non-arbitrariness.

A. The constitutionality of S. 377 ought to be tested on a higher threshold of scrutiny under Article 14 of the Constitution

55. In his concurring opinion in **State of West Bengal v Anwar Ali Sarkar, 1952 SCR 284** Vivian Bose J. defined the scope of Article 14 as follows:

> *"... whether the collective conscience of a sovereign democratic republic can regard the impugned law... as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it.*[33]

56. It is respectfully submitted that, in its jurisprudence over the years, this Hon'ble Court has breathed life into the phrase "*a democracy of the kind we have proclaimed ourselves to be*." This Court has clarified, on numerous occasions, that our democracy is founded on the principles of pluralism and inclusiveness, where every individual is granted equal moral membership of the polity. Some of the more recent judgments that crystallise this view include:

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[32] Testimony of Mr. Gautam Bhan, available at http://orinam.net/377/wp-content/uploads/2013/12/SC_VoicesAgainst377_WrittenSubmissions.pdf.

[33] State of West Bengal v Anwar Ali Sarkar, 1952 SCR 284, ¶92 (concurring opinion of Bose J.) followed by a Constitution Bench of this Court in *R. Gandhi v. Union of India,* (2010) 11 SCC 1 at para 103.

a. **Santosh Singh v Union of India, (2016) 8 SCC 253, paragraph 22:** *"Morality is one and, however important it may sound to some, it still is only one element in the composition of values that a just society must pursue. There are other equally significant values which a democratic society may wish for education to impart to its young. Among those is the acceptance of a plurality and diversity of ideas, images and faiths which unfortunately faces global threats. Then again, equally important is the need to foster tolerance of those who hold radically differing views, empathy for those whom the economic and social milieu has cast away to the margins, a sense of compassion and a realisation of the innate humanity which dwells in each human being."* (**per D.Y. Chandradhud, J.**)

b. **Shafin Jahan v Asokan K.M., (2018) SCCOnLine SC 343, paragraph 54:** "*It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obesience to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible*." (**per Dipak Misra CJ and A.M. Khanwilkar J.**)

c. **Shafin Jahan v Asokan K.M. (2018) SCCOnLine SC 343, paragraph 94:** *"The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the state. Courts as upholders of constitutional freedoms must safeguard these freedoms. The cohesion and stability of our society depend on our syncretic culture. The Constitution protects it. Courts are duty bound not to swerve from the path of upholding our pluralism and diversity as a nation."* (**per D.Y. Chandrachud J.**)

d. **Justice K.S. Puttaswamy v Union of India, (2017) 10 SCC 1, paragraph 522:** *"The core value of the nation being democratic, for example, would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed."* (**per R.F. Nariman J.**)

57. It is therefore submitted that any legislative classification that denies to any individual or group full citizenship, or that is premised upon subordination, cannot pass scrutiny under Article 14 of the Constitution. In other words, the *act of classification* itself violates the Constitution, because to classify on this basis is a violation of the very meaning of equality. It is respectfully submitted that where legislation seeks to classify and discriminate on the basis of personal characteristics that are intimately connected with individuality, choice, and personhood, the traditional presumption of

constitutionality must be modified as part of the Article 14 scrutiny. It is respectfully submitted that **Puttaswamy** affirmed this interpretation of Article 14, when it noted that:

> *Equality demands that the sexual orientation of each individual in society must be protected on an even platform*.[34]
>
> *Equal protection demands protection of the identity of every individual without discrimination*.[35]

58. The Delhi High Court, it is respectfully submitted, was operating on the same premise when it observed that laws encoding "*oppressive cultural norms that especially target minorities and vulnerable group*"[36] must be subjected to deeper scrutiny, and that therefore, *"a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy"*[37] would be presumptively unconstitutional.

59. The basis of the High Court's ruling was that *"the grounds that are not specified in Article 15 but are analogous to those specified therein, will be those which have the potential to impair the personal autonomy of an individual."*[38] Consequently, although the grounds stated in Article 15(1) constitute a closed list, nonetheless, they are illustrative to the extent that analogous grounds which "*have the potential to impair... personal autonomy*" cannot be made the bases of discriminatory classifications either – and to the extent that they do so, they shall be hit by Article 14 of the Constitution.

60. It is respectfully submitted that apart from being sanctioned by this Hon'ble Court in **Puttaswamy,** this reasoning is justified on the basis of the constitutional text and history. From the time of the framing of the Constitution, the "Equality Code" has been understood to prohibit discriminatory treatment founded on personal characteristics, which are either beyond an individual's control, or aspects of individual choice and autonomy. As **Professor K.T. Shah** observed in his **Draft Note on Fundamental Rights**, submitted to the **Constituent Assembly** in 1946, "*equality is not merely equality of treatment before the established system of Law and Order but also of opportunity for self-expression or self-realisation that may be inherent in every human being. One important condition for the due maintenance of equality is that no restriction be placed in such matters on any human being on the ground of sex, race, speech, creed or colour. All these have in the past been used as excuses for exclusiveness, which must go if equality is to be real and effective for all persons."* (**B. Shiva Rao, *The Framing of India's Constitution: Select Documents, Vol. 2***). Three years later, in a classic article titled "**The Equal Protection of Laws**", and which was subsequently cited with approval by this Hon'ble Court in **State of Gujarat v Shri Ambika Mills Ltd., (1974) 4 SCC 656,** the scholars **Joseph Tussman and Jacobus tenBroek** pointed out that "*the assertion of human equality is closely associated with the denial that differences in color or creed, birth or status, are significant or relevant to the way in which men should be treated... [these] are*

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[34] Justice K.S. Puttaswamy v Union of India, supra, paragraph 144.
[35] Justice K.S. Puttaswamy v Union of India, supra, paragraph 145.
[36] Naz Foundation v NCT of Delhi, supra, ¶107.
[37] Naz Foundation v NCT of Delhi, supra, ¶108.
[38] Naz Foundation v NCT of Delhi, supra, ¶103.

some classifications which can never be made ..." (**Joseph Tussman and Jacobus tenBroek, "The Equal Protection of Laws", (1949) 37(3) *The California Law Review* 341, 354**).

61. This submission is buttressed by a close reading of the Constituent Assembly Debates. When the Fundamental Rights Sub-Committee first drafted a bill of rights to be placed before the Constituent Assembly, it had a stand-alone non-discrimination clause ("*The State shall not discriminate against any citizen on grounds of religion, race, caste or sex*"), and – along the lines of the American Constitution – the equal protection clause was placed alongside a draft due process clause ("*No person shall be deprived of his life or liberty without due process of law, not shall any person be denied equality before the law within the territories of the Union...*") (**B. Shiva Rao, *The Framing of India's Constitution: Select Documents*, Vol. 2 pp. 171 – 173**). However, after the Draft Constitution was debated in the Constituent Assembly, the Drafting Committee delinked the equal protection clause and shifted it so that it stood beside the non-discrimination clause, as part of an overarching equality code. The non-discrimination clause, in turn, was narrowed by introducing the word "only." It is respectfully submitted, therefore, that Article 14 was always meant to be understood not as a self-contained guarantee of formal equal protection and formal equality before law, but as embodying, in *general terms*, the concrete guarantee of non-discrimination set out under Article 15(1). Article 15(1) provided five specific grounds, which automatically prohibited discriminatory action; however, these five grounds – religion, race, gender, caste, and place of birth – were united by a set of common, underlying principles: they were all personal characteristics that were either beyond a person's control to change, or embodiments of personal choice of autonomy, and they were all historic and present sites of disadvantage and exclusion. While the grounds under Article 15(1) constitute a closed list, it is respectfully submitted that the principles outlined above do not. Consequently, grounds that are *analogous* to Article 15(1) – that is, characterised by the same set of principles – must also be brought within the guarantee against non-discrimination embodied by a combined reading of Articles 14 and 15(1), in the manner articulated by the High Court of Delhi, and confirmed by this Hon'ble Court in **Puttaswamy.** See:
    a. **Tarunabh Khaitan, "Reading Swaraj into Article 15: A New Deal for all the Minorities", (2009) 2 *NUJS Law Review* 419.**
    b. **Gautam Bhatia, "Equal Moral Membership: Naz Foundation and the refashioning of equality under a transformative constitution", (2017) 1(2) *Indian Law Review* 115.**
    c. **Tarunabh Khaitan, "Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement", (2016) 50(2) *Journal of the Indian Law Institute* 177.**

62. The justification for adopting this evolutionary interpretation of Articles 14 and 15 was eloquently provided by Justice Kennedy in **Lawrence v Texas**, where he noted that:

> *"Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known*

> *the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."*[39]

63. Likewise, it is respectfully submitted that the framers of the Indian Constitution provided a specific guarantee of non-discrimination in virtue of grounds that were salient at the time: sex, race, caste, religion, and place of birth. However, the framers were also far-sighted individuals, who were aware that in the course of time, new grounds analogous to these five, would acquire salience. In order allow for a flexible approach, so that every generation could invoke constitutional principles "in [its] own search for greater freedom", Article 14 was placed alongside Article 15(1), to be interpreted in the manner outlined above.

64. Lastly, it is respectfully submitted that such an approach would be in harmony with equality and equal protection jurisprudence that is being adopted all across the world. For example, the Supreme Court of Canada asks whether legislative classification perpetuates existing group disadvantage (**Andrews v Law Society of British Columbia, [1989] 1 S.C.R. 143),** or whether it impedes human dignity (**Law v Minister of Human Resources Development, [1999] 1 S.C.R. 497**); similarly, the Constitutional Court of South Africa has placed dignity as the lodestar of its non-discrimination jurisprudence (**Harksen v Lane (1997) 11 BCLR 1489**).

B. The violation of article 14 must be judged by its effect, and not by its form

65. In **Naz Foundation v NCT of Delhi**, the Delhi High Court ruled that Section 377 of the IPC violated Article 14's guarantee of equal protection of law, and Article 15(1)'s guarantee of non-discrimination on account of sex. The High Court held, *first*, that unequal treatment on the basis of personal characteristics, that were intimately connected with individual autonomy and choice, was impermissible under Article 14 of the Constitution; and *secondly*, that discrimination on the basis of sexual orientation was founded in the same stereotypes about appropriate gender roles that underlay conventional gender discrimination. Consequently, discrimination on the basis of sexual orientation could be traced back to discrimination on the basis of sex, and consequently, violated Article 15(1).

66. The Supreme Court in **Koushal** rejected both arguments on the following basis:

> *"Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the*

[39] Lawrence v Texas, supra, pp. 578 – 579 (opinion of the Court, authored by Kennedy J.)

> *particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution."*[40]

67. As submitted above, the basis of **Koushal's** holding was a distinction between *acts* and *identities*. **Koushal** effectively held that Section 377 only defined "the particular offence" (i.e., "carnal intercourse against the order of nature"), whereas Articles 14 and 15(1) afforded protection to individuals and groups. Consequently, in **Koushal's** view, Articles 14 and 15(1) were simply inapplicable.

68. As a preliminary point, it is respectfully submitted that, apart from the holding in **NALSA**, this finding, too, stands eroded by virtue of the observations in **Puttaswamy**. While criticizing **Koushal** for its treatment of the privacy-dignity argument, the **Puttaswamy** plurality (with which Kaul J. agreed) also observed:

> *Equality demands that the sexual orientation of each individual in society must be protected on an even platform.*[41]

The plurality then went on to note:

> *Equal protection demands protection of the identity of every individual without discrimination.*[42]

69. It is respectfully submitted, therefore, that by necessary implication, **Koushal's** distinction between S. 377 criminalising only "acts" on the one hand, and the constitutional protections of Articles 14 and 15(1) being accorded to "persons" on the other, has been wiped out. It is submitted, in addition, that this distinction was expressly canvassed before the Supreme Court of the United States (**Lawrence v Texas, 539 U.S. 558 (2003)**) and the Constitutional Court of South Africa (**National Coalition for Gay and Lesbian Equality v Minister for Justice, (1998) 12 BCLR 1517**), and rejected in equally affirmative terms by both Courts. In **Lawrence**, the United States Supreme Court held that criminalized "act" or "conduct" *"is closely correlated with being homosexual... there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal"*[43]; the South African Constitutional Court, likewise, noted that ""*it is not the act of sodomy that is denounced by the law, but the so called sodomite who performs it.*"[44] The point was expressed most clearly by the Supreme Court of New Mexico in **Elane Photography v Willock, 309 P.3d 53 (NM 2013)**:

> *"… when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation."*[45]

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[40] Suresh Kumar Koushal v Naz Foundation, supra, ¶66.
[41] Justice K.S. Puttaswamy v Union of India, supra, ¶144.
[42] Justice K.S. Puttaswamy v Union of India, supra, ¶145.
[43] Lawrence v Texas, 539 U.S. 558, 583 (2003) (concurring opinion of O'Connor J.)
[44] National Coalition for Gay and Lesbian Equality v Minister for Justice, (1998) 12 BCLR 1517, ¶108.
[45] Elane Photography v Vanessa Willock, 309 P.3d 53 (NM 2013), ¶17.

70. In addition, the distinction fails on its own terms. **Koushal** ignored binding and established precedent, which holds that the constitutionality of a provision is to be adjudicated not by looking merely to its *legal form*, but also to its *effect*:

    a. **Punjab Provinces v Daulat Singh, (1945-46) 73 Indian Appeals 59, 73:** ***"****The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the subsection, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however laudable, will not obviate the prohibition of sub-section (1)."*

    b. **State of Bombay v Bombay Education Society, 1955 1 SCR 568, paragraph 16:** *"The arguments advanced by the learned Attorney-General overlook the distinction between the object or motive underlying the impugned order and the mode and manner adopted therein for achieving that object. The object or motive attributed by the learned Attorney-General to the impugned order is. undoubtedly a laudable one but its validity has to be judged by the method of Its operation and its effect on the fundamental right."*

    c. **Khandige Sham Bhat v Agricultural Income Tax Officer, (1963) 3 SCR 809, paragraph 7:** ***"****Though a law ex facie appears to. treat all that fall within a class alike, if in effect it operates unevenly on persons or property similarly situated, it may be said that the law offends the equality clause. It will then be the duty of the court to scrutinize the effect of the law carefully to ascertain its real impact on the persons or property similarly situated. Conversely, a law may treat persons who appear to be similarly situated differently; but on investigation they may be found not to be similarly situated. To state it differently, it is not the phraseology of a statute that governs the situation but the effect of the law that is decisive."*

    d. **Anuj Garg v Hotel Association, (2008) 3 SCC 1, paragraphs 46 and 47:** ***"****Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means ... no law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which can not be compromised in the name of expediency until unless there is a compelling state purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases."*

71. Additionally, in 2018, the **United Nations Independent Expert on Sexual Orientation and Gender Identity** presented a report on the P**rotection against Violence and Discrimination based on Sexual Orientation and Gender Identity** to the UN Human Rights Council which recommends the repeal of laws that criminalise consensual

sexual activity between adults of the same sex. The Report noted that LGBT persons are subject to killings, rape, torture, discrimination and harassment. The UN Independent Expert goes on to state that:

> *50. More than 3 billion people, almost half of the world population, live in the 72 countries in which law or other measures criminalizes on the basis of sexual orientation.52 In the cases in which the punishment is not the death penalty, it is usually incarceration that varies from one month to life imprisonment.*
> *51. Consensual same-sex conduct is punishable by death in the Islamic Republic of Iran, Mauritania, Saudi Arabia, the Sudan and Yemen, and parts of Nigeria and Somalia. Death is also the prescribed punishment for homosexuality in the revised penal code of Brunei, although reportedly relevant provisions have yet to take effect.*
> *52. These discriminatory laws derive from French or British colonial systems of justice, or from particular interpretations of sharia or Islamic law, and per se violate international law. In addition, they fuel stigma, legitimize prejudice and expose people to family and institutional violence and further human rights abuses, such as hate crimes, death threats and torture. Such legislation and regulations reinforce gender stereotypes and foster a climate where hate speech, violence and discrimination are condoned and perpetrated with impunity by both State and non-State actors. They contribute to a social environment that explicitly permits and tolerates violence and discrimination based on sexual orientation or gender identity, creating a breeding ground for such acts.*[46]

72. In 2011, the **United Nations High Commissioner for Human Rights** presented a report titled **Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity** to the UN Human Rights Council which stated that:

> *The criminalisation of private consensual homosexual acts violates an individual's right to privacy and to non-discrimination and constitutes a breach of international human rights law. In* Toonen v. Australia, *the Human Rights Committee found that "adult consensual sexual activity in private is covered by the concept of 'privacy'" under the International Covenant on Civil and Political Rights. According to the Committee, it is irrelevant whether laws criminalizing such conduct are enforced or not' their mere existence continuously and directly interferes with an individual's privacy…"*[47]

54. Furthermore, the use of S. 377 to target and stigmatise individuals who engage in same-sex relations was is recorded extensively in the

[46] Report of the UN Independent Expert on Sexual Orientation and Gender Identity, May,2018, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/132/12/PDF/G1813212.pdf?OpenElement

[47] United Nations High Commissioner for Human Rights *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* UN Doc. A/HRC/19/41 (17th November, 2011), ¶¶40 – 41.

judgment both of the Delhi High Court in **Naz Foundation v NCT of Delhi** and in **Suresh Kumar Koushal v Naz Foundation**.

55. Therefore, even if the language of S. 377 is framed in neutral terms ("carnal intercourse against the order of nature"), if in effect it authorizes, within the scope of its wording, the violation of the rights of the LGBT community, then to that extent, it must be declared unconstitutional. It is respectfully submitted that this line of reasoning now bears the imprimatur of the nine-judge bench decision in **Justice K.S. Puttaswamy** and, in particular, is sanctioned by the following observations in the plurality opinion:

> *"The decision in Koushal presents a de minimis rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the Koushal rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted."*[48]

56. What flows from a combined reading of the above observations in **Puttaswamy** and the judgments cited above, is the following: S. 377 may be ostensibly worded in neutral terms, and appear to punish only "acts", and not individuals. Although that distinction is demonstrably flawed, *arguendo*, it is accepted, this Hon'ble Court must scrutinise S. 377 not merely on the basis of its legal form, but also on the basis of its effect. If it is found that, *in effect*, S. 377 operates so as to violate the basic rights of an individual or a group of individuals, its neutral legal form will not save it from unconstitutionality. When scrutinising the effect of the Section, this Hon'ble Court must also keep in mind that specific instances of persecution and violence create a hostile environment that casts a chilling effect upon the LGBT community as a whole, from exercising its fundamental rights under the Constitution.

57. It is respectfully submitted that the question here is not whether an otherwise valid legal provision is being "abused" by law-enforcement authorities, and that therefore, the remedy would lie under administrative law. In **Koushal**, the Supreme Court observed that:

> *Respondent No.1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment,*

[48] Justice K.S. Puttaswamy v Union of India, supra, ¶146.

> *blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section.*[49]

58. It is respectfully submitted that this is an erroneous framing of the issue, and indeed, is undermined by the Supreme Court's own reasoning in **Koushal**. Although in the above paragraph, the Court held that abusive treatment is "neither mandated nor condoned" by the Section, in another part of the judgment, it noted that:

> *"... it is difficult to prepare a list of acts which would be covered by the section. Nonetheless in light of the plain meaning and legislative history of the section, we hold that Section 377 IPC would apply irrespective of age and consent. It is relevant to mention here that the Section 377 IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation."*[50]

59. It is respectfully submitted that this observation is fatal to the constitutionality of S. 377, under the legal position discussed above. The Court's refusal to define sexual conduct (or orientation) that falls within the scope of S. 377 – in view of the consistent inconsistency with which Courts have interpreted it (**discussed below, infra**) – makes it clear that the prosecution (and concomitantly, abuse and harassment) of the LGBT community *is not ruled out* under S. 377, as it stands. This brings it squarely within the reasoning of the Constitution Bench of this Hon'ble Court in **A.K. Roy v Union of India, (1982) 1 SCC 271,** which was dealing with the power of the State to detain individuals for acting prejudicially to the maintenance of supplies and services essential for the community:

> *The particular clause in Sub-section (2) of Section 3 of the National Security Act is, therefore, capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the basis that the authority is of the opinion that the maintenance of supply of that commodity is essential to the community. We consider the particular clause not only vague and uncertain but, in the context or the Explanation, capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be flagrant violation of the fairness and justness of procedure which is implicIt in the provisions of Article 21.*[51]

60. In **A.K. Roy,** the Court moulded the relief by holding that no person could be detained under the NSA unless "the supplies and services", the maintenance of which was deemed essential to the community, were made known to the public in advance through a law, order, or

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[49] Suresh Kumar Koushal v Naz Foundation, supra, ¶76.
[50] Suresh Kumar Koushal v Naz Foundation, supra, ¶60.
[51] A.K. Roy v Union of India, (1982) 1 SCC 271, ¶65.

notification.[52]The precise analogy with the present case is a law, order, or notification setting out which kind of carnal intercourse is "against the order of nature. **Koushal's** acknowledgement that it is impossible to do so makes it clear that Section 377 is – and remains – "*capable of wanton abuse*", and "*to allow the personal liberty of the people to be taken away by the application of that clause would be flagrant violation of... Article 21*."

61. Consequently, the core issue is actually whether the vague and undefinable language of Section 377 ("carnal intercourse against the order of nature") has the effect, in its implementation, of depriving the LGBTI community of their rights to dignity, autonomy, and to sexual orientation, which are now expressly recognised by the judgment in **Puttaswamy**. The distinction is between a constitutionally valid provision that is abuse in its implementation (and where the remedy would be administrative in character), and a provision whose language makes it capable of wanton abuse. This distinction was drawn very clearly by a two-judge bench of this Hon'ble Court in **Shreya Singhal v Union of India, (2015) 5 SCC 1**, while considering the constitutional validity of Section 66A of the Information Technology Act. The Section, which penalised "menacing" or "grossly offensive" speech, was challenged *inter alia* on grounds of over-breadth and vagueness. In the course of arguments, the Additional Solicitor-General argued that the possibility of abuse could not be a ground for invalidating a law. Writing for the bench, Nariman J. held:

> *"In this case, it is the converse proposition which would really apply if the learned Additional Solicitor General's argument is to be accepted. If Section 66A is otherwise invalid, it cannot be saved by an assurance from the learned Additional Solicitor General that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66A goes on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66A must be judged on its own merits without any reference to how well it may be administered."*[53]

62. In **Shreya Singhal,** the Supreme Court held that the language of S. 66A suffered from over-breadth (i.e., it was wide enough to include *both* legal and illegal speech, as judged by the paramatres of Article 19(2) of the Constitution) as well as vagueness (i.e., the language was incapable of precise definition), and consequently, exercised a chilling effect upon the exercise of Article 19(1)(a).

63. In this context, it is submitted that the Interveners have gathered substantial additional evidence – in the form of fact-finding reports by reputed organizations such as the International Commission of Jurists (which this Court has cited on numerous occasions) – which was not available at the time this case was argued in 2011 or decided in 2013, demonstrating that the effect of S. 377 is, indeed, such that violates Articles 14 and 15(1). This evidence is produced in the annexed Compilation.

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[52] Ibid., ¶67.
[53] Shreya Singhal v Union of India, (2015) 5 SCC 1, ¶95.

C. S. 377 fails the test of rational classification

64. It is respectfully submitted that even on an application of the rational classification standard, S. 377 cannot survive.

65. It is by now beyond cavil that the basic threshold under Article 14 that any law must meet in order to survive is the existence of an *intelligible differentia*, which bears a *rational nexus* with a *legitimate goal*.

1. There is no intelligible differentia

66. It is respectfully submitted, *first*, that S. 377 fails the test of "intelligible differentia." There is no intelligible difference between individuals who engage in sexual relations in accordance with "the order of nature", and those who engage in sexual relations against the order of nature. This is because what constitutes "the order of nature" is, itself, impossible to define, and has indeed, been subjected to contrary and conflicting definitions throughout the history of the Section. At the time of the drafting of the Section, its framers refused to provide an Explanatory Note clarifying its scope, on the basis that the issue was "too disgusting." (**Alok Gupta, 'Section 377 and the Dignity of Indian Homosexuals', (November 18, 2006) 41(46) *Economic and Political Weekly* 4817).** In interpreting the scope of the section, the Courts have shifted between holding that "the order of nature" requires that there must be a possibility of the conception of human beings (**Khanu vs Emperor, AIR 1925 Sind 286, ¶2**), to prohibiting "sexual perversions" (**Lohana Vasantlal Devchand vs The State, (1968) 9 CLR 1052**). Even in **Suresh Kumar Koushal**, the Supreme Court noted this divergence of opinion, and held that what constituted "carnal intercourse against the order of nature" would have to be decided on a case-to-case basis.

67. It is respectfully submitted, however, that the Courts' inability to even begin to define the "natural" in the context of sexual relations reveals that the difference is an unintelligible one.

68. Assuming, however, that a definition was available, the word "natural" could mean one of two things: *first*, the word "natural" could be used in its biological sense, as that "which exists in, or is derived from" nature. The question of whether same-sex relations are "natural" in this first sense is a scientific question. The evidence of science is now overwhelmingly in favour of the view that, in the natural world, same-sex relations are not "unnatural".

2. There is no legitimate purpose

69. The second sense in which the word "natural" could be used is by giving it a social meaning: that is, "unnatural" is whatever society considers to be unnatural at any given point of time. It is respectfully submitted that even if there is an intelligible way of differentiating between what society considers to be "rational" and "irrational" at any given point of time, a justification of S. 377 that depends upon social morality must necessarily fail. In **Deepak Sibal v Punjab University, (1989) 2 SCC 145**, this Hon'ble Court held that *"If the*

objective [of the classification] be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable."[54]

70. In this context, it is submitted, *first*, that as pointed out above, the judgment of the nine-judge bench of the Supreme Court in **Puttaswamy** categorically rules out the invocation of *bare* popular morality as a ground for restricting fundamental rights; this justification, therefore, would fall foul of the "legitimate purpose" prong of Article 14. This reasoning has been accepted by Courts worldwide:

a. **Norris vs Ireland, [1988] ECHR 22 (26 October 1988), paragraph 46:** *"Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."*

b. **National Coalition for Gay and Lesbian Equality vs The Minister of Justice, 1999 (1) SA 6 (CC), paragraphs 136 – 137:** *"A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.*

The fact that the state may not impose orthodoxies of belief systems on the whole of society has two consequences. The first is that gays and lesbians cannot be forced to conform to heterosexual norms; they can now break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs - even in moderate or gentle versions - into dogma imposed on the whole of society."

c. **Lawrence vs Texas, 539 U.S. 558 (2003)):** *It must be acknowledged, of course, that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which*

[54] Deepak Sibal v Punjab University, (1989) 2 SCC 145, ¶20.

thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." (**p. 571, Opinion of the Court**)

This case raises a different issue than Bowers: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. See, e. g., Department of Agriculture v. Moreno, 413 U. S., at 534; Romer v. Evans, 517 U. S., at 634–635. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.
Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." Id., at 633. Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake." Id., at 635. And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Id., at 634. (**p. 582, concurring opinion of O'Connor J.)**

A State can of course assign certain consequences to a violation of its criminal law. But the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. **(p. 584, concurring opinion of O'Connor J.)**

71. Furthermore, it is settled law that an "object" which does nothing more than effectuate discriminatory intent is both "unfair" and "unjust", and therefore an illegitimate purpose. As a seven-judge bench of this Hon'ble Court held in **Nagpur Improvement Trust v Vithal Rao, (1973) 1 SCC 500**, *"the object itself cannot be discriminatory, for otherwise, for instance, <u>if the object is to discriminate against one section of the minority</u> the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the, object sought to be achieved."*[55]

[55] Nagpur Improvement Trust v Vithal Rao, (1973) 1 SCC 500, ¶26.

72. It is relevant to note, further, such legislation motivated by "bare animus" towards groups and communities has been held to violate the guarantee of equal protection of laws. As Tussman and tenBoek noted, "hostility" or "discriminatory "intent" towards groups are, by definition, the antitheses of the fundamental purpose of legislation, which is to promote the public good. ("**The Equal Protection of Laws, supra, p. 358**). The justification for this was provided by the High Court of Delhi in **Naz Foundation**, which noted that the Constitution *"recognises, protects and celebrates diversity"*[56]; consequently, legislative purposes contrary to this, and justified by invoking "public morality", would nontheless violate "constitutional morality." In the words of Pratap Bhanu Mehta, "*constitutional morality is the recognition of plurality in its deepest form...* [a] *suspicion of any claim to singularly and uniquely represent the will of the people...* [and a recognition that] *any appeal to popular sovereignty has to be tempered by a sense that the future may have at least as valid claims as the present*."[57]

73. The roots of the idea of constitutional morality in Indian constitutional imagination can be traced back to Dr. B.R. Ambedkar. Apart from his famous and oft-quoted speech in the Constituent Assembly, Ambedkar also said – in a speech – that according to the framework of constitutional morality, "*there must be no tyranny of the majority over the minority... The minority must always feel safe that although the majority is carrying on the Government, the minority is not being hurt, or the minority is not being hit below the belt*."[58]

74. It is respectfully submitted this counter-majoritarian framing of constitutional morality, in the speeches of Dr. Ambedkar and in the opinion of the Delhi High Court, has been subsequently vindicated by this Hon'ble Court. In **Govt of NCT of Delhi v Union of India, 2018 SCCOnLine SC 661,** decided as recently as July 2018, this Hon'ble Court spelt out the contours of constitutional morality, observing that:

> *Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution*.[59] (**per Dipak Misra CJ, A.K. Sikri and A.M. Khanwilkar JJ.)**
>
> *Constitutional morality does not mean only allegiance to the substantive provisions and principles of the Constitution. It signifies a constitutional culture which each individual in a democracy must imbibe ... Constitutional morality balances popular morality and acts as a threshold against an upsurge in mob rule.*[60] (**per D.Y. Chandrachud J.**).

75. Lastly, it is respectfully submitted that the precedence of constitutional morality over popular morals has been accepted by other Courts as well. In addition to the judgments cited above, this

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[56] Naz Foundation v NCT of Delhi, supra, ¶86.
[57] Pratap Bhanu Mehta, What is Constitutional Morality ? *cf*. We the People A symposium on the Constitution of India after sixty years, 1950-2010, Seminar 615 Nov 2010.
[58] Narendra Jadhav, Ed., *Ambedkar Speaks Vol. I,* New Delhi, Konark Publishers, 2013. p.291.
[59] Govt of NCT of Delhi v Union of India, 2018 SCCOnLine SC 661, ¶63.
[60] Govt. of NCT of Delhi v Union of India, supra, ¶¶306, 309.

as articulated in **Dhirendra Nadan vs State, HAA 85&86 of 2005, High Court of Fiji,** which held:

> *"What the Constitution requires is that the Law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are. The acceptance of difference celebrates diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality. The State that embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law ... a country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its necessary duties of keeping sexual expression in check by protecting the vulnerable and penalizing the predator."*[61]

3. There is no rational nexus

76. It is respectfully submitted that *even* if it was held that there exists an intelligible differentia, and even if it is held that enforcing public morals constitutes a legitimate State purpose, S. 377 must fail constitutional scrutiny under Article 14. This is because, as noted in **Santosh Singh, supra**, "morality" and "public morals" are inherently fluid terms, which vary from time to time – and are particularly difficult to determine in a country as vast and diverse as India. Even in circumstances where constitutional courts peg legality on morality, they do so by restricting it to relatively homogenous geographical and cultural units. For example, the test for obscenity in the United States refers to offensiveness as defined by the applicable state law (**Miller v California, 413 U.S. 15 (1973)**), thus acknowledging that public morals vary even between the member states of the USA.

77. This is further buttressed by the fact that there are multiple intellectual and cultural traditions in India that acknowledge, recognize, and celebrate same-sex relations; see, e.g., ***Same-Sex Love in India: Readings from Literature and History*** **(Ruth Vanita & Saleem Kidwai eds., Palgrave MacMillan: 2000**). See also **Madhavi Menon, *Infinite Variety, A History of Desire in India*, Speaking Tiger, 2018**.

78. Consequently, the very plasticity of "public morals", the diversity of India, and the historical evidence of the celebration of same-sex relation in many strands of Indian culture, make it clear that S. 377 bears no rational nexus with the stated legislative objective.

VII. S. 377 VIOLATES ARTICLE 15 OF THE CONSTITUTION

79. It is respectfully submitted that Section 377 violates Article 15(1) of the Constitution, as discrimination on the basis of sexual orientation falls within the meaning of discrimination on grounds of "sex", as understood in the jurisprudence of this Hon'ble Court.

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[61] Dhirendra Nadan v State, Criminal Appeal Case Nos. 85&86 of 2005.

80. As *purely* biological determinants, "sex" and "sexual orientation" are two different concepts. However, it is respectfully submitted that the word "sex" should be understood not simply as a biological fact, but also as a socially-constructed identity (what some scholars call "gender"). For example, in **Walter Alfred Baid v Union of India, AIR 1976 Del. 302**, when considering a constitutional challenge to a Nursing College's decision only to admit women, the High Court of Delhi held that the word "sex" under Article 15(1) applied to legislative classification that was undertaken not only on the basis of *biological* sex, but also on the basis of factors "*arising out of*" sex, or what sex "*implied*."[62] This understanding was clarified by this Hon'ble Court in **Anuj Garg v Hotel Association**, **supra,** where it was held that if legislation perpetuated stereotypes about gender roles, it would fail scrutiny under Articles 14 and 15(1).[63]

81. In this context, it is respectfully submitted that discrimination on the basis of sexual orientation is premised on the same assumptions of "appropriate" gender roles as sex discrimination is (**Sylvia A. Law, "Homosexuality and the Social Meaning of Gender", (1988) 1988 Wisconsin Law Review 187; Kenneth Karst, "The Pursuit of Manhood and the Desegragation of the Armed Forces" (1998) 38 UCLA Law Review 499**). As Professor Wintemute explains, "*the obligation of men to choose emotional-sexual conduct only with women, and the obligation of women to do so only with men, are perhaps the most fundamental (and therefore invisible and unchallenged) aspects of traditional sex roles.*" (**Robert Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the *Charter* in *Mossop, Egan* and *Layland*", (1994) 39 *McGill Law Journal* 429, 471**). This is evidenced by something as straightforward as the use of the word "gay" as an insult that equates to unmanliness, in popular discourse.

82. By reading "sexual orientation" into "sex" on the basis of the above submissions, it is respectfully submitted that this Hon'ble Court will not be engaging in rewriting the Article, or inventing new doctrine. Indeed, this was precisely what was done by the United Nations Human Rights Committee in **Toonen v Australia, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994)**, at **paragraph 8.7**:

> *The Committee confines itself to noting, however, that in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.*

83. Furthermore, in **NALSA**, as submitted above, gender identity, sexual orientation, and sex, were read together within an overarching framework of personal choice and human dignity.

84. Consequently, it is respectfully submitted that by encoding stereotypes about gender roles into penal law *through* the medium of discrimination on grounds of sexual orientation, S. 377 violates Article 15(1) of the Constitution.

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[62] Walter Alfred Baid v Union of India, AIR 1976 Del. 302, 306.
[63] Anuj Garg v Union of India, (2008) 3 SCC 1, ¶¶41, 46, 47.

VIII. S. 377 VIOLATES ARTICLE 19(1) (A) AND 19(1)(G) OF THE CONSTITUTION

85. It is respectfully submitted that sexuality is one of the most intimate forms of expressing one's individual personality. Consequently, sexual orientation is protected under Article 19(1)(a) of the Constitution. This Hon'ble Court has long recognised that Article 19(1)(a) does not merely protect oral or written speech, but also expressive acts and symbolic expression. For example, the flying of the Indian flag, as an expression of patriotism, has been held to fall within the ambit of Article 19(1)(a) (**Union of India v Naveen Jindal**, **(2004) 2 SCC 510**). The refusal to sing the national anthem has been held to be *expressive* of one's religious convictions, and therefore protected by Article 19(1)(a) (**Bijoe Emmanuel v State of Kerala, (1986) 3 SCC 615**).

86. In other words, therefore, the right to freedom of expression protects the right to communicate in public and is understood more broadly than the mere communication of information. As Joseph Raz argues in an article titled **Free Expression and Personal Identification, (1991) 11 OJLS 303:**

> *It includes any act of symbolic expression undertaken with the intention that it be understood to be that by the public or part of the public…It is essentially a right actively to participate in and contribute to the public culture.*[64]

87. Expressive activities function not only as sources of information, but also as reflections and portrayals of people's experiences and ways of life. There are magazines about bodybuilding and television plays dealing with disability, newspapers for political activists and commercials featuring harassed mothers. However questionable in other respects, these share the valuable feature that they give the experiences and ways of life with which they are concerned a place in public culture, and thus some kind of public recognition. This public recognition, which can only be secured through expression, plays a special role in developing people's pride in their ways of life and identification with their own experiences, and hence in their well-being. Section 377 operates thus as a sort of life style censorship which can be understood as an authoritative condemnation of the whole way of life in question. It is submitted that while it is one thing not to have a voice in public culture, it is quite another to have one's life written off by one's society. If the former detracts from the possibilities for pride and personal identification, the latter strikes at the heart of one's membership of society, and deprives one of the sense of ease with one's environment which is essential to a fulfilling life.

88. As Professor Nan D. Hunter argues, legal proscriptions on homosexual conduct prevent people from publicly expressing their sexuality, forcing them to be silent ensuring that all people are seen as heterosexual. This is in effect a structural impediment to free speech:

> *"…like Forced speech, the collective, communal impact of forced silence amounts to more than an accumulation of*

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[64] Joseph Raz, "Free Expression and Personal Identification" 11 *Oxford J Legal Stud.* 303 (1991)

> *violations of individual integrity. It creates forms of state orthodoxy. If speaking identity can communicate ideas and viewpoints that dissent from majoritarian norms, then the selective silencing of certain identities has the opposite, totalitarian effect of enforcing conformity."*[65]

89. Professor Hunter also argues that:

> *"My experience as a lesbian teaches me that silence and denial have been the linchpins of second-class status. In almost any context that a lesbian or gay American faces, whether it be the workplace, the military, the courts or the family, the bedrock question is usually, is it safe to be out?"*[66]

90. She further argues that

> *"Self-identifying speech does not merely reflect or communicate one's identity; it is a major factor in constructing identity. Identity cannot exist without it. That is even more true when the distinguishing group characteristics are not visible as is typically true of sexual orientation. Therefore, in the field of lesbian and gay civil rights, much more so than for most other equality claims, expression is a component or the very identity itself…Suppression of identity speech leads to a compelled falsehood, a violation of the principle that an individual has the right not to speak as well as to speak."*[67]

91. The liberty interest protected by Art 19(1) a is also fundamentally about the right to self expression. As the Court put it in **Secretary, Minister of I & B v. Cricket Association Bengal**, **(1995) 2 SCC 161**:

> *Freedom of speech and expression is necessary, for self expression which is an important means of free conscience and self fulfilment. It enables people to contribute to debates of social and moral issues. It is the best way to find a truest model of anything since it is only through it, that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of any sorts.*[68]

92. Section 377 IPC by criminalizing homosexual acts has a chilling effect on the free speech and expression of LGBT persons. The shadow of criminality cast by Section 377 curtails a free and frank discussion on issues of sexuality, which enables people to publicly own their identity. Whereas, wearing religious symbols or other markers of one's identity is a public expression something that is essential to one's identity and is protected by the law, section 377 does not allow sexual minorities to openly express their sexuality, an aspect that is intrinsic to whom they are, and is hence in violation of their right to expression. Furthermore, section 377 de-values,

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65 Nan D. Hunter "Identity, Speech and Equality" (1993) 79 *Va. L. Rev.* 1695, 1719 (1993).
66 Ibid., 1695.
67 Ibid., 1718.
68 Secretary, Minister of I & B v. Cricket Association Bengal, (1995) 2 SCC 161, ¶43.

stimgatizes and the lives of LGBT people and expresses the idea that LGBT people cannot be a part of society.

93. The real test for Freedom of Speech and Expression lies in its ability to enable speech that may challenge popular opinions. Section 377 serves to criminalise expression of minorities which may challenge dominant opinions. Section 377 prevent sexual minorities to effectively take part in any democratic society that is based on equality and social justice.[69] The Supreme Court has stated that "*It is our firm belief, nay, a conviction which constitutes one of the basic values of a free society to which we are wedded under our Constitution, that there must be freedom only for the thought that we cherish, but also for the thought that we hate*."[70]

94. Furthermore, in **NALSA v Union of India**, **(2014) 5 SCC 438**, while affirming the right of transgenders, this Hon'ble Court held that:

> *Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form.*
>
> *Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality*.[71]

95. Therefore, it is respectfully submitted that after *NALSA*, it is settled law that the expression of personal identity – through dress, behavious, mannerisms and other expressive acts – is protected by Article 19(1)(a) of the Constitution. Sexual orientation and sexual expression, therefore, fall squarely within the scope of the fundamental right.

96. Consequently, by outlawing forms of sexual expression *sans* any justification under Article 19(2) of the Constitution, S. 377 therefore fails the test of constitutionality. The only conceivable clause of Article 19(2) that *might* be pressed into service to defend S. 377 is that of "decency and morality." However, as already submitted above, the words "decency and morality" are to be understood in their *constitutional* sense, and not in the sense of "community decency" or "public morality." For the reasons advanced above, constitutional morality – with its commitment to pluralism and democracy – militates against restricting fundamental rights on grounds of a supposed public morality, or majoritarian sentiment.

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[69] Little Sister Book Emporium v. Minister of Justice [2000] 2S.C.R. It was observed therein, that restrictions of the right to freedom of expression of vulnerable minorities should receive greater scrutiny as expression by these groups faces the threat of being drowned out by the majority and that sexual minority groups feel a greater impact of restrictions on freedom of speech and expression.

[70] S. Rangarajan v. P. Jagjivan Ram (1989) 2 SCC 574, ¶38.

[71] NALSA v Union of India, (2014) 5 SCC 438, ¶¶69, 72.

97. Furthermore, S. 377, in effect, violates Article 19(1)(g) of the Constitution. It is, by now, well-accepted that the impact of a law is not limited to its *legal* consequences, but extends into the social domain. Law has a *signaling* and a *normative* effect, and is closely connected with what is deemed socially acceptable and unacceptable. The criminalisation of the LGBT community, therefore, has a direct bearing upon social ostracism, public humiliation, and institutional harassment. As Professor Ryan Goodman argues, condemnation expressed through the law shapes an individual's identity and self-esteem. LGBT individuals ultimately do not try to conform to the law's directive, but the disapproval communicated through it, nevertheless, substantively affects their sense of self-esteem, personal identity and their relationship to the wider society and that section 377 embeds illegality within the identity of homosexuals.[72] This tendency to conflate different sexual identities with criminal illegality marks the history of sodomy laws and exists in many different contexts.

98. It is respectfully submitted that one of the domains in which this operates is that of the workplace, because it is the workplace where most individuals spend a majority of their waking hours. As the legal philosopher Professor Kenji Yoshino points out, this "culture of harassment" leads to what is known as "covering": in the public sphere – and especially in a cooperative setting such as the workplace – an LGBT individual attempts to "cover" their identities in order to be able to assimilate better; this, in turn, exacts a deep psychological cost.[73]

99. It is therefore submitted that facing harassment and persecution at the workplace has a direct impact upon the effective exercise of the fundamental rights under Article 19(1)(g) of the Constitution. While admittedly this treatment comes at the hands of private individuals, it is triggered by the *shadow of criminality* that is cast by S. 377 of the IPC.

100. In **Modern Dental College v State of MP, (2016) 7 SCC 353**, a Constitution Bench of this Hon'ble Court, while interpreting Article 19(6) of the Constitution, held that the reasonableness of restrictions would have to be adjudicated under the rubric of the standard of proportionality. Justice A.K. Sikri explained the standard in the following terms:

> *"Jurisprudentially, 'proportionality' can be defined as the set of rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four sub-components of proportionality which need to be satisfied[13], a limitation of a constitutional right will be constitutionally permissible if: (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and*

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[72] Ryan Goodman, "Beyond the Enforcement Principle, supra.
[73] Kenji Yoshino, *Covering*: *The Hidden Assault on our Civil Rights* (Random House 2006).

finally (iv) there needs to be a proper relation ('proportionality stricto sensu' or 'balancing') between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.

To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary."[74]

101. It is respectfully submitted that, as pointed out above, the judgment in **K.S. Puttaswamy** adopted the proportionality standard for testing rights violations under Part III of the Constitution. As also submitted above, S. 377 has no legitimate purpose that can justify the restriction of rights under Part III. And even if it does, it is respectfully submitted that S. 377 fails the necessity prong of the proportionality standard. The necessity prong prohibits a law from curtailing rights to any degree *greater* than is strictly required to fulfill the goal, and places the burden of demonstrating necessity upon the State. It is for the State to show, therefore, that whatever it claims are the legitimate purposes underlying S. 377, *criminalization* is necessary and the narrowest possible way in which to achieve them.

IX. S. 377 VIOLATES THE RIGHT TO INTIMACY UNDER ARTICLE 21 OF THE CONSTITUTION

102. It is respectfully submitted that, as argued above **(supra**), after **Puttaswamy**, the question of S. 377's compatibility with Article 21 is no longer *res integra*. It is now settled that sexual orientation is at the heart of the guarantee of dignity under Article 21; and can only be restricted, under the proportionality standard, if there is "legitimate aim", and if the restriction is "necessary" in a democratic society. For reasons discussed in detail above, neither condition obtains in the present case.

103. In addition, one of the core elements of the right to privacy, as spelt out in **Puttaswamy**, is the right to *decisional autonomy*. This means that the individual has the right to determine, make decisions and choices without the interference of the State. This right to privacy refers to the freedom from unwarranted interference, sanctuary and protection against intrusive observation and intimate decision to autonomy with respect to the most personal of life choices.

104. It is submitted, in addition, that the Constitution recognises and protects a **right to intimacy**. In other words, the liberty interest that S. 377 violates involves more than simply prohibiting certain sex acts which may come under the rubric of carnal intercourse against the order of nature. To understand the criminalizing reach of Section 377 as a prohibition of only certain forms of 'carnal intercourse is to misunderstand the pervasive nature of the impact of Section 377 on a person's fundamental right to make decisions about his or her intimate life.

[74] Modern Dental College and Research Centre v State of MP, (2016) 7 SCC 353, ¶¶60, 63.

105. In **National Coalition for Gay and Lesbian Equality vs. Ministry for Justice, supra**, Justice Ackerman observed:

> *Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy. Our society has a poor record of seeking to regulate the sexual expression of South Africans. In some cases, as in this one, the reason for the regulation was discriminatory; our law, for example, outlawed sexual relationships among people of different races. The fact that a law prohibiting forms of sexual conduct is discriminatory, does not, however, prevent it at the same time being an improper invasion of the intimate sphere of human life to which protection is given by the Constitution in section 14. We should not deny the importance of a right to privacy in our new constitutional order, even while we acknowledge the importance of equality. In fact, emphasising the breach of both these rights in the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been.*[75]

106. Justice Sachs in a forceful concurring opinion observed:

> *Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.*[76]

107. The liberty interest involved was also rightly appreciated by Justice Kennedy in **Lawrence v. Texas, supra**, in which the Texas anti sodomy statute was declared unconstitutional. *Lawrence vs. Texas* overruled **Bowers vs. Hardwick, 478 U.S. 186 (1986)**, in which the Court had upheld the Georgia anti sodomy statute. Justice Kennedy rightly distinguished the ratio of *Lawrence v Texas* from *Bowers vs Hardwick* in terms of appreciating the liberty interest at stake :

> *For this inquiry the Court deems it necessary to reconsider its Bowers holding. The Bowers Court's initial substantive statement—"The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ," 478 U. S., at 190—discloses the Court's failure to appreciate the extent of the liberty at stake. To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said*

[75] National Coalition for Gay and Lesbian Equality, supra, ¶32.
[76] Ibid., ¶107.

> *that marriage is just about the right to have sexual intercourse. Although the laws involved in Bowers and here purport to do not more than prohibit a particular sexual act, their penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. They seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons.*[77]

108. In *Puttaswamy*, this Court has rightly apprehended the far reaching impact of Section 377 as its reach extends beyond criminalizing 'carnal intercourse' to criminalizing the intimate lives of LGBT persons.

> *The decision in Koushal presents a de minimis rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the Koushal rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, we disagree with the manner in which Koushal has dealt with the privacy – dignity based claims of LGBT persons on this aspect.*[78]

109. The understanding of the right to make decisions about one's intimate life as part of the freedom under Article 21 was elaborated in *Safin Jahan v. Asokan K.M* in the concurring opinion of Justice Chandrachud:

> *The Constitution recognizes the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one's personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith. The*

[77] Lawrence v Texas, supra, p. 567.
[78] Justice K.S. Puttaswamy v Union of India, supra.

> *Constitution guarantees to each individual the right freely to pratice, profess and propagate religion. Choices of faith and belief as indeed choices in marriage lie within an area where individual autonomy is supreme. …..Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognizing them. Indeed, the Constitution protects personal liberty from disapproving audiences.*[79]

110. It is respectfully submitted that the right to intimacy is set at nought by S. 377. This Section allows state officials cavalierly, and if necessary by force, to make deep and searching inquiries and scrutiny into the most intimate parts of the individual's life. Section 377 denies individuals the right to decide for themselves whether to engage in particular forms of consensual sexual activity. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a society as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. Section 377 seeks to control a personal relationship that is within the liberty of persons to choose without being punished as criminals.

X. THE PRINCIPLE OF NON-RETROGRESSION APPLIES IN THIS CASE

111. As parties to international human rights conventions, states have the primary responsibility to comply with human rights obligations thereunder. The obligation to achieve compliance with these rights is based on, among other principles, the principle of 'non-retrogression': States can progress towards achieving and extending human rights protection to the maximum extent that their resources permit. However, states must not reduce the level of protection that has already been achieved. Such reduction results in violation of human rights guaranteed and a compromise of the state's legal obligations.

112. The principle of non-retrogression is spelt out with particular clarity in the General Comments of the United Nations Committee on Economic, Social, and Cultural Rights. In General Comment No. 3, it is noted that:

> *The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over*

[79] Shafin Jahan v Asokan K.M., supra.

> *time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.*[80]

113. In General Comment No. 22, which specifically deals with the topic of sexual and reproductive health, the CESCR observed:

> *Retrogressive measures should be avoided and, if such measures are applied, the State party has the burden of proving their necessity. This applies equally in the context of sexual and reproductive health. Examples of retrogressive measures include the removal of sexual and reproductive health medications from national drug registries; laws or policies revoking public health funding for sexual and reproductive health services; imposition of barriers to information, goods and services relating to sexual and reproductive health; enacting laws criminalizing certain sexual and reproductive health conduct and decisions; and legal and policy changes that reduce oversight by States of the obligation of private actors to respect the right of individuals to access sexual and reproductive health services. In the extreme circumstances under which retrogressive measures may be inevitable, States must ensure that such measures are only temporary, do not disproportionately affect disadvantaged and marginalized individuals and groups, and are not applied in an otherwise discriminatory manner.*[81]

114. In this context, it is respectfully submitted that the judgment of the High Court of Delhi in **Naz Foundation** was delivered in 2009. By decriminalising consensual same-sex relations, it liberated an entire section of Indian citizens from the shadow of criminality, elevated them to equal moral membership of the polity, and ensured that they could exercise and access their fundamental rights on an equal plane with all other citizens. This position held the field until the end of 2013.

115. It is respectfully submitted that the principle of non-retrogression precludes Courts from condemning the LGBT community to a *reversion* of their status, *taking away* the rights they

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[80] CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), Doc. E/1991/23, ¶9.

[81] Committee on Economic, Social, and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, ¶38.

had gained, and effectively *recriminalising* the community. A Court should refrain from doing this unless there exist compelling reasons – which, it is respectfully submitted – are entirely absent from the present case.

XI. CONCLUSION

116. In **Suresh Kumar Koushal v Naz Foundation**, a Division Bench of this Hon'ble Court upheld the constitutionality of S. 377 of the IPC, and set aside the judgment of the High Court of Delhi in **Naz Foundation v NCT of Delhi**. It is respectfully submitted that this Hon'ble Court now revisit **Koushal**, set it aside, and read down S. 377 to exclude consensual same-sex relations between adults. This is because:

a. The foundations of **Koushal** – that S. 377 only criminalised "acts", that a very small number of people had faced arrests and persecution, and that it was a fit case for judicial deference – all stand eroded by the judgment of the nine-judge bench in **K.S. Puttaswamy v Union of India**.

b. Even otherwise, the foundation of **Koushal** are insupportable on legal and constitutional grounds. **Koushal's** distinction between "acts" and "identities" ignores the long-standing position of law that requires that the constitutional validity of a law be judged not merely by its object and form, but also by its effects on fundamental rights. The *effect* of S. 377 is indisputably to impact the rights under Articles 14, 15, and 21.

c. Under the façade of a legislative division into carnal intercourse "against the order of nature" and in accordance with the order of nature", S. 377 in effect discriminates against individuals on the basis of personal characteristics, which are at the heart of autonomy, dignity, and autonomy. This classification is *ipso facto* ruled out by Article 14 of the Constitution. Article 14 was never meant to be limited to a formal, rule of law guarantee, but was meant to go beyond that, and ensure effective equality to all. This implies that grounds not expressly enumerated by Article 15, but analogous to it, are to be treated with a higher degree of scrutiny than under the traditional classification test, in the manner outlined above.

d. However, even *under* the traditional classification test, S. 377 fails the test of constitutionality:
    i. "Against the order of nature" and "in accordance with the order of nature" is an unintelligible differentia.
    ii. Even if there is an intelligible differentia, the purpose of the classification – to enforce a discriminatory morality through the vehicle of criminal law – is ruled out.
    iii. There is no other purpose that bears a rational nexus with the classification.

e. In addition, S. 377 is founded on the same sets of stereotypes about gender role that are at the root of sex discrimination. Consequently, S. 377 fails scrutiny under Article 15(1) of the Constitution.

f. S. 377 criminalises sexual expression (contrary to Article 19(1)(a) of the Constitution), and has a chilling effect upon the freedom of trade and profession (under Article 19(1)(g)) of the Constitution. S. 377 fails the test of proportionate restrictions, which provide the only justificatory framework for limitations upon these rights.

g. By violating individual dignity, autonomy, personhood, and the right to personal intimacy, S. 377 violates Article 21 of the Constitution.

h. The global principle of non-retrogression provides strong reasons for the judgment in **Koushal** to be set aside.

117. This case involves those principles that animated the framing of the Constitution: a recognition of the inherent, equal value and dignity of all individuals, irrespective of their differences, be they based on religion, race, caste, sex, place of birth, sexual orientation or gender identity. At its root, this case is about the Emancipation of a large segment of our people. The Constitution of India in one of the great emancipatory charters, lifting as it does from the status of wretchedness and subordination -- communities, castes, tribes and women -- to full Citizenship. This case is about an invisible minority of Indians that seek to unlock the assured liberties enshrined in the Constitution, but denied to them in an aspect of life that matters most to them: their own identity; their own sexuality; their own self.

118. The Constitution of India recognizes, protects and celebrates diversity. LGBT persons are entitled to full *moral* citizenship. To blot, to taint, to stigmatize and to criminalize an individual for no fault of his or hers, is manifestly unjust. To be condemned to life long criminality shreds the fabric of our Constitution. Section 377 has worked to silence the promise of the Preamble and Part III of the Constitution. It is the case of the Applicant that it is the liberating, emancipatory spirit underlying the Fundamental Rights, which was invoked by the High Court of Delhi in **Naz Foundation**, which must prevail once again.

NEW DELHI
9th July, 2018

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IN THE SUPREME COURT OF INDIA

CRIMINAL (ORIGINAL) JURISDICTION

WRIT PETITION (CRL.) NO. 76/2016

IN THE MATTER OF:

Navtej Johar and Ors. … ***Petitioners***

Versus

Union of India … ***Respondent***

AND IN THE MATTER OF:

Voices Against 377 …***Intervenors***
(CRL. M.P. 6603/2018)

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12 JULY 2018
NEW DELHI

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Offences Against One's Self

by Jeremy Bentham

Edited by Louis Crompton

First published in the 1978 summer and fall issues of *Journal of Homosexuality,* v.3:4(1978), p.389-405; *continued in* v.4:1(1978)

Editor's Abstract: This is the first publication of Jeremy Bentham's essay on "Paederasty," written about 1785. The essay which runs to over 60 manuscript pages, is the first known argument for homosexual law reform in England. Bentham advocates the decriminalization of' sodomy, which in his day was punished by hanging. He argues that homosexual acts do not "weaken" men, or threaten population or marriage, and documents their prevalence in ancient Greece and Rome. Bentham opposes punishment on utilitarian grounds and attacks ascetic sexual morality. In the preceding article (Journal of Homosexuality, 3(4), 1978, p. 383-387) the editor's introduction discussed the essay in the light of 18th-century legal opinion and quoted Bentham's manuscript notes that reveal his anxieties about expressing his views.

About this document...

OFFENCES AGAINST ONE'S SELF [UNPUBLISHED]
Jeremy Bentham

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OFFENCES AGAINST ONE'S SELF: PAEDERASTY

To what class of offences shall we refer these irregularities of the venereal appetite which are stiled unnatural? When hidden from the public eye there could be no colour for placing them any where else: could they find a place any where it would be here. I have been tormenting myself for years to find if possible a sufficient ground for treating them with the severity with which they are treated at this time of day by all European nations: but upon the principle utility I can find none.

Offences of impurity--their varietys

The abominations that come under this heading have this property in common, in this respect, that they consist in procuring certain sensations by means of an improper object. The impropriety then may consist either in making use of an object

1. Of the proper species but at an improper time: for instance, after death.
2. Of an object of the proper species and sex, and at a proper time, but in an improper part.
3. Of an object of the proper species but the wrong sex. This is distinguished from the rest by the name of paederasty.
4. Of a wrong species.
5. In procuring this sensation by one's self without the help of any other sensitive object.

Paederasty makes the greatest figure

The third being that which makes the most figure in the world it will be proper to give that the principal share of our attention. In settling the nature and tendency of this offence we shall for the most part have settled the nature and tendency of all the other offences that come under this disgusting catalogue.

Whether they produce any primary mischief

1. As to any primary mischief, it is evident that it produces no pain in anyone. On the contrary it produces pleasure, and that a pleasure which, by their perverted taste, is by this supposition preferred to that pleasure which is in general reputed the greatest. The partners are both willing. If either of them be

unwilling, the act is not that which we have here in view: it is an offence totally different in its nature of effects: it is a personal injury; it is a kind of rape.

As a secondary mischief whether they produce any alarm in the community

2. As to any secondary mischief, it produces not any pain of apprehension. For what is there in it for any body to be afraid of? By the supposition, those only are the objects of it who choose to be so, who find a pleasure, for so it seems they do, in being so.

Whether any danger

3. As to any danger exclusive of pain, the danger, if any, must consist in the tendency of the example. But what is the tendency of this example? To dispose others to engage in the same practises: but this practise for anything that has yet appeared produces not pain of any kind to any one.

Reasons that have commonly been assigned

Hitherto we have found no reason for punishing it at all: much less for punishing it with the degree of severity with which it has been commonly punished. Let us see what force there is in the reasons that have been commonly assigned for punishing it.

The whole tribe of writers on English law, who none of them knows any more what they mean by the word "peace" than they do by many other of the expressions that are most familiar to them, reckon this among offences against the peace. It is accordingly treated in all respects as an offence against the peace. They likewise reckon forgery, coining, and all sorts of frauds among offences against the peace. According to the same writers it is doubted whether adultery be not a breach of the peace. It is certain however that whenever a gallant accepts an invitation of another man's wife he does it with force and arms. This needs no comment.

Whether against the security of the individual

Sir W. Blackstone is more particular. According to him it is not only an offence against the peace, but it is of that division of offences against the peace which are offences against security. According to the same writer, if a man is guilty of this kind of filthiness, for instance, with a cow, as some men have been known to be, it is an offence against somebody's security. He does not say whose security, for the law makes no distinction in its ordinances, so neither does this lawyer or any other English lawyer in his comments make any distinction between this kind of filthiness when committed with the consent of the patient and the same kind of filthiness when committed against his consent and by violence. It is just as if a man were to make no distinction between concubinage and rape.

Whether it debilitates--Montesquieu

The reason that Montesquieu gives for reprobating it is the weakness which he seems to suppose it to have a tendency to bring upon those who practice it. (Esp. des Loix, L. 12, ch. 6. "11 faudroit le proscrire quand il ne feroit que donner a un sexe les faiblesses de l'autre et preparer a une vieillesse infame par une jeunesse honteuse." "It ought to be proscribed were it only for its giving to the one sex the weaknesses of the other and paving the way by a scandalous youth for an infamous old age." J.B.) This, if it be true in fact, is a reason of a very different complexion from any of the preceding and it is on the ground of this reason as being the most plausible one that I have ranked the offence under its present head. As far as it is true in fact, the act ought to be regarded in the first place as coming within the list of offences against one's self, of offences of imprudence: in the next place, as an offence against the state, an offence the tendency of which is to diminish the public force.

If however it tends to weaken a man it is not any single act that can in any sensible degree have that effect. It can only be the habit: the act thus will become obnoxious as evidencing the existence, in probability, of the habit. This enervating tendency, be

it what it may, if it is to be taken as a ground for treating the / [192] practise in question with a degree of severity which is not bestowed upon the regular way of gratifying the venereal appetite, must be greater in the former case than in the latter. Is it so? If the affirmative can be shewn it must be either by arguments a priori drawn from considerations of the nature of the human frame or from experience. Are there any such arguments from physiology? I have never heard of any: I can think of none.

What says history?

What says historical experience? The result of this can be measured only upon a large scale or upon a very general survey. Among the modern nations it is comparatively but rare. In modern Rome it is perhaps not very uncommon; in Paris probably not quite so common; in London still less frequent; in Edinburgh or Amsterdam you scarce hear of it two or three times in a century. In Athens and in antient Rome in the most flourishing periods of the history of those capitals, regular intercourse between the sexes was scarcely much more common. It was upon the same footing throughout Greece: everybody practised it; nobody was ashamed of it. They might be ashamed of what they looked upon as an excess in it, or they might be ashamed of it as a weakness, as a propensity that had a tendency to distract men from more worthy and important occupations, just as a man with us might be ashamed of excess or weakness in his love for women. In itself one may be sure they were not ashamed of it. Agesilaus, upon somebody's taking notice of the care he took to avoid taking any familiarities with a youth who passed for being handsome acknowledges it, indeed, but upon what ground? Not on account of the turpitude but the danger. Xenophon in his retreat of the ten thousand gives an anecdote of himself in which he mentions himself as particularly addicted to this practise without seeming to entertain the least suspicion that any apology was necessary. In his account of Socrates's conversation he introduces that philosopher censuring or rather making merry with a young man for his attachment to the same practise. But in what light does he consider it? As a weakness unbecoming to a philosopher, not as a turpitude or a crime unbecoming to a man. It is not because an object of the one sex more than one of the other is improper game: but on account of the time that must be spent and the humiliation submitted to in the pursuit.

What is remarkable is that there is scarce a striking character in antiquity, nor one that in other respects men are in use to cite as virtuous, of whom it does not appear by one circumstance or another, that he was infected with this inconceivable propensity. It makes a conspicuous figure in the very opening of Thucydides's history, and by an odd accident it was to the spirit of two young men kindled and supported by this passion that Athens according to that historian stood indebted on a trying occasion for the recovery of its liberty. The firmness and spirit of the Theban band--the band of lovers as it was called--is famous in history; and the principle by which the union among the members of it was commonly supposed to be cemented is well known. (Plutarch, in vita Pelopidae. Esp. des Loix, L. 4, ch. 8. J.B.) Many moderns, and among others Mr. Voltaire, dispute the fact, but that intelligent philosopher sufficiently intimates the ground of his incredulity--if he does not believe it, it is because he likes not to believe it. What the antients called love in such a case was what we call Platonic, that is, was not love but friendship. But the Greeks knew the difference between love and friendship as well as we--they had distinct terms to signify them by: it seems reasonable therefore to suppose that when they say love they mean love, and that when they say friendship only they mean friendship only. And with regard to Xenophon and his master, Socrates, and his fellow-scholar Plato, it seems more reasonable to believe them to have been addicted to this taste when they or any of them tell us so in express terms than to trust to the interpretations, however ingenious and however well-intended, of any men who write at this time of day, when they tell us it was no such thing. Not to insist upon Agesilaus and Xenophon, it appears by one circumstance or another that Themistocles, Aristides, Epaminondus, Alcibiades, Alexander and perhaps the greatest number of the heroes of Greece were infected with this taste. Not that the historians are at the pains of informing us so expressly, for it was not extraordinary enough to make it worth their while, but it comes out collaterally in the course of the transactions they have occasion to relate.

It were hardly worth while after this to take up much time in proving the same thing with regard to the Romans, in naming distinguished persons of consequence whom

history has mentioned as partakers in this abomination, or in bringing passages to shew that the same depraved taste prevailed generally among the people. Not to mention notorious profligates such as the Antonies, the Clodius's, the Pisos, the Gabinius's of the age, Cicero, if we may believe either his enemy Sallust or his admirer Pliny neither avoided this propensity nor thought proper to dissemble it. That austere philosopher, afler writing books to prove that pleasure was no good and that pain was no evil and that virtue could make a man happy upon the rack, that affectionate husband, in the midst of all his tenderness for his wife Terentia, could play at blind man' sbuff with his secretary (i.e. Marcus Tullius Tiro. Pliny, Letters, VII, 4. Ed.) for pipes and make verses upon this notable exploit of gallantry. / [193]

With regard to the people in general it may be presumed that if the Gods amused themselves in this way--if Apollo loved Hyacinthus, if Hercules could be in a frenzy for the loss of Hylas, and the father ofGods and men could solace himself with Ganymede, it was neither an odious nor an unfrequent thing for mortal men to do so. The Gods we make, it has been well and often said, we make always after our own image. In times much anterior to those of Cicero and in which according to the common prejudice the morals of the people are supposed to have been proportionately more pure, when certain festivals were suppressed on account of their furnishing opportunities for debauchery, irregularities of this kind were observed according to Livy to be more abundant than ordinary intrigues. This circumstance would scarcely perhaps have been thought worth mentioning, had not the idea of excess in this, as it is apt to do on all occasions, struck the imagination of the historian as well as of the magistrate whose administration he is recording.

This much will probably be thought enough: if more proofs were necessary, it were easy to collect materials enough to fill a huge, a tedious and a very disgusting volume.

It appears then that this propensity was universally predominant among the antient Greeks and Romans, among the military as much as any. The antient Greeks and Romans, however, are commonly reputed as a much stouter as well as a much braver people than the stoutest and bravest of any of the modern nations of Europe. They appear to have been stouter at least in a very considerable degree than the French in whom this propensity is not very common and still more than the Scotch in whom it is still less common, and this although the climate even of Greece was a great deal warmer and in that respect more enervating than that of modern Scotland.

If then this practise was in those antient warm countries attended with any enervating effects, they were much more than counteracted by the superiority of [illegible] in the exertions which were then required by the military education over and above those which are now called forth by ordinary labour. But if there be any ground derived from history for attributing to it any such enervating effects it is more than I can find.

Whether it enervates the patient more than the agent

Montesquieu however seems to make a distinction--he seems to suppose these enervating effects to be exerted principally upon the person who is the patient in such a business. This distinction does not seem very satisfactory in any point of view. Is there any reason for supposing it to be a fixed one? Between persons of the same age actuated by the same incomprehensible desires would not the parts they took in the business be convertible? Would not the patient be the agent in his turn? If it were not so, the person on whom he supposes these effects to be the greatest is precisely the person with regard to whom it is most difficult to conceive whence those consequences should result. In the one case there is exhaustion which when carried to excess may be followed by debility: in the other case there is no such thing.

What says history?

In regard to this point too in particular, what says history? As the two parts that a man may take in this business are so naturally convertible however frequently he may have taken a passive part, it will not ordinarily appear. According to the notions of the antients there was something degrading in the passive part which was not in the active. It was ministring to the pleasure, for so we are obliged to call it, of another without participation, it was making one's self the property of another man, it was playing the woman's part: it was therefore unmanly. (Paedicabo vos et irrumabo, Antoni [sic]

pathice et cinaede Furi. [Carm. 16] Catullus. J.B.) On the other hand, to take the active part was to make use of another for one's pleasure, it was making another man one's property, it was preserving the manly, the commanding character. Accordingly, Solon in his laws prohibits slaves from bearing an active part where the passive is borne by a freeman. In the few instances in which we happen to hear of a person's taking the passive part there is nothing to favour the above-mentioned hypothesis. T he beautiful Alcibiades, who in his youth, says Cornelius Nepos, after the manner of the Greeks, was beloved by many, was not remarkable either for weakness or for cowardice: at least, [blank] did not find it so. The Clodius whom Cicero scoffs at for his servile obsequiousness to the appetite of Curio was one of the most daring and turbulent spirits in all Rome. Julius Caesar was looked upon as a man of tolerable courage in his day, notwithstanding the complaisance he showed in his youth to the King of Bithynia, Nicomedes. Aristotle, the inquisitive and observing Aristotle, whose physiological disquisitions are looked upon as some of the best of his works--Aristotle, who if there had been anything in this notion had every opportunity and inducement to notice and confirm it--gives no intimation of any such thing. On the contrary he sits down very soberly to distribute the male half of the species under two classes: one class having a natural propensity, he says, to bear a passive part in such a business, as the other have to take an active part. (Probl. Sect. 4 art. 27: The former of these propensities he attributes to a peculiarity of organization, analogous to that of women. The whole passage is abundantly obscure and shows in how imperfect a state of anatomical knowledge was his time. J.B.) This observation it must be confessed is not much more satisfactory than that other of the same philosopher when he speaks of two sorts of men--the one born to be masters, the other to be slaves. If however there had appeared any reason for supposing this practise, either with regard to the passive or the active part of it, to have had any remarkable effects in the way of debilitation upon those who were addicted to it, he would have hardly said so much / [194] upon the subject without taking notice of that circumstance.

Whether it hurts population?

A notion more obvious, but perhaps not much better founded than the former is that of its being prejudicial to population. Mr. Voltaire appears inclined in one part of his works to give some countenance to this opinion. He speaks of it as a vice which would be destructive to the human race if it were general. "How did it come about that a vice which would destroy mankind if it were general, that an infamous outrage against nature...?" (Questions sur l'Encyclop. "Amour Socratique." J.B.)

A little further on, speaking of Sextus Empiricus who would have us believe that this practise was ''recommended'' in Persia by the laws, he insists that the effect of such a law would be to annihilate the human race if it were literally observed. "No", says he, "it is not in human nature to make a law that contradicts and outrages nature, a law that would annihilate mankind if it were observed to the letter." This consequence however is far enough from being a necessary one. For a law of the purport he represents to be observed, it is sufficient that this unprolific kind of venery be practised; it is not necessary that it should be practised to the exclusion of that which is prolific. Now that there should ever be wanting such a measure of the regular and ordinary inclination of desire for the proper object I as is necessary for keeping up the numbers of mankind upon their present footing is a notion that stands warranted by nothing that I can find in history. To consider the matter a priori [?], if we consult Mr. Hume and Dr. Smith, we shall find that it is not the strength of the inclination of the one sex for the other that is the measure of the numbers of mankind, but the quantity of subsistence which they can find or raise upon a given spot. With regard to the mere object of population, if we consider the time of gestation in the female sex we shall find that much less than a hundredth part of the activity a man is capable of exerting in this way is sufficient to produce all the effect that can be produced by ever so much more. Population therefore cannot suffer till the inclination of the male sex for the female be considerably less than a hundredth part as strong as for their own. Is there the least probability that [this] should ever be the case? I must confess I see not any thing that should lead us to suppose it. Before this can happen the nature of the human composition must receive a total change and that propensity which is commonly regarded as the only one of the two that is natural must have become altogether an unnatural one.

I have already observed that I can find nothing in history to countenance the notion I am examining. On the contrary the country in which the prevalence of this practise I is most conspicuous happens to have been remarkable for its populousness. The bent of popular prejudice has been to exaggerate this populousness: but after all deductions [are] made, still it will appear to have been remarkable. It was such as, notwithstanding the drain of continual wars in a country parcelled out into paltry states as to be all of it frontier, gave occasion to the continued necessity of emigration.

This reason however well grounded soever it were in itself could not with any degree of consistency be urged in a country where celibacy was permitted, much less where it was encouraged. The proposition which (as will be shewn more fully by and by) is not at all true with respect to paederasty, I mean that were it to prevail universally it would put an end to the human race, is most evidently and strictly true with regard to celibacy. If then merely out of regard to population it were right that paederasts should be burnt alive monks ought to be roasted alive by a slow fire. If a paederast, according to the monkish canonist Bermondus, destroys the whole human race Bermondus destroyed it I don't know how many thousand times over. The crime of Bermondus is I don't know how many times worse than paederasty.

That there should be the least colour for supposing of this practise that in any situation of things whatever it could have the least possible tendency to favour population is what nobody I suppose would easily have suspected. Since, however, we are embarked on this discussion, it is fit that everything that can contribute to our forming a right judgment on the question should be mentioned. Women who submit to promiscuous embraces are almost universally unprolific. In all great towns a great multitude of women will always be in this case. In Paris, for instance, the number of these women has been computed to amount to at least 10,000. These women, were no more than a certain quantity of prolific vigour to be applied to them, might all of them stand in as good a way of being prolific as other women: they would have indeed rather a better chance since the women who came to be reduced to the necessity of embracing this profession are always those who by their beauty are more apt than an equal number of women taken at random to engage the attention of the other sex. If then all the vigour that is over and above this quantity were to be diverted into another channel, it is evident that in the case above supposed the state would be a gainer to the amount of all the population that could be expected from 40,000 women, and in proportion as any woman was less prolific by the diverting of any part of this superfluous / [195] vigour, in the same proportion would population be promoted.

No one I hope will take occasion to suppose that from any thing here said I mean to infer the propriety of affording any encouragement to this miserable taste for the sake of population. Such an inference would be as ill founded as it would be cruel. (I leave anyone to imagine what such a writer as Swift, for instance, might make upon this theme, "A project for promoting population by the encouragement of paederasty." J.B.) The truth is, the sovereign, if he will but conduct himself with tolerable attention with respect to the happiness of his subjects need never be in any pain about the number of them. He has no need to be ever at the expense of any efforts levelled in a direct line at the purpose of increasing it. Nature will do her own work fast enough without his assistance if he will but refrain from giving her disturbance. Such infamous expedients would be improper as any coercive ones are unnecessary. Even monks in the countries that are most infested with them are not near so pernicious by the deductions they make from the sum of population, as by the miseries which they produce and suffer, and by the prejudices of all kinds of which they are the perpetrators and the dupes.

Whether it robs women

A more serious imputation for punishing this practise [is] that the effect of it is to produce in the male sex an indifference to the female, and thereby defraud the latter of their rights. This, as far as it holds good in point of fact, is in truth a serious imputation. The interest of the female part of the species claim just as much attention, and not a whit more, on the part of the legislator, as those of the male. A complaint of this sort, it is true, would not come with a very good grace from a modest woman; but should the women be estopped from making complaint in such a case it is the

business of the men to make it for them. This then as far as it holds good in point of fact is in truth a very serious imputation: how far it does it will be proper to enquire.

In the first place the female sex is always able and commonly disposed to receive a greater quantity of venereal tribute than the male sex is able to bestow. If then the state of manners be such in any country as left the exertion of this faculty entirely unrestrained, it is evident that (except in particular cases when no object of the female sex happened to be within reach) any effort of this kind that was exerted by a male upon a male would be so much lost to the community of females. Upon this footing the business of venereal enjoyment seems actually to stand in some few parts of the world, for instance at Otaheite. It seems therefore that at Otaheite paederasty could hardly have footing, but the female part of that community must in proportion be defrauded of their rights. If then paederasty were to be justified in Otaheite it could only be upon this absurd and improbable supposition-that the male sex were gainers by such a perversion to a greater amount than the female sex were losers.

But in all European countries and such others on which we bestow the title of civilized, the case is widely different. In these countries this propensity, which in the male sex is under a considerable degree of restraint, is under an incomparably greater restraint in the female. While each is alike prohibited from partaking of these enjoyments but on the terms of marriage by the fluctuating and inefficacious influence of religion, the censure of the world denies it [to] the female part of the species under the severest penalties while the male sex is left free. (In speaking on this occasion of the precepts of religion I consider not what they are in themselves but what they may happen to be in the opinion and discourse [?] of those whose office it is to interpret them. J.B.) No sooner is a woman known to have infringed this prohibition than either she is secluded from all means of repeating the offence, or upon her escaping from that vigilance she throws herself into that degraded class whom the want of company of their own sex render unhappy, and the abundance of it on the part of the male sex unprolific. This being the case, it appears the contribution which the male part of the species are willing as well as able to bestow is beyond all comparison greater than what the female part are permitted to receive. If a woman has a husband she is permitted to receive it only from her husband: if she has no husband she is not permitted to receive it from any man without being degraded into the class of prostitutes. When she is in that unhappy class she has not indeed less than she would wish, but what is often as bad to her--she has more.

It appears then that if the female sex are losers by the prevalence of this practise it can only be on this supposition--that the force with which it tends to divert men from entering into connection with the other sex is greater than the force with which the censure of the world tends to prevent those connections by its operation on the women. / [196]

In countries where, as in Otaheite, no restraint is laid on the gratification of the amorous appetite, whatever part of the activity of that appetite in the male sex were exercised upon the same sex would be so much loss in point of enjoyment to the female. But in countries where it is kept under restraint, as in Europe, for example, this is not by any means the case. As long as things are upon that footing there are many cases in which the women can be no sufferers for the want of sollicitation on the part of the men. If the institution of the marriage contract be a beneficial one, and if it be expedient that the observance of it should be maintained inviolate, we must in the first place deduct from the number of the women who would be sufferers by the prevalence of this taste all married women whose husbands were not infected with it. In the next place, upon the supposition that a state of prostitution is not a happier state than a state of virginity, we must deduct all those women who by means of this prevalence would have escaped being debauched. The women who would be sufferers by it ab initio are those only who, were it not for the prevalence of it, would have got husbands. (I say ab initio for when a woman has been once reduced to take up the trade of prostitution, she also would be of the number of those who are sufferers by the prevalence of this taste, in case the effect of it were to deprive her of any quantity of this I commerce beyond that which she would rather be without. It is not in this business as in most other businesses, where the quantity of the object in demand is in proportion to the demand. The occupations with respect to which that rule holds good are those only which are engaged in through character, reflection, and upon

choice. But in this profession scarce any woman engages for the[se] purposes. The motive that induces a woman to engage in it is not any such circumstance as the consideration of the probability of getting custom. She has no intention of engaging in it when she takes the step that eventually proves a means of her engaging in it. The immediate cause of her engaging in it is the accident of a discovery which deprives her of every other source of livelihood. Upon the supposition then that a given number have been debauched there would be the same number ready to comply with sollicitation whenever so little was offered as whenever so much was offered. It is a conceivable case therefore that upon the increased prevalence of this taste there might be the same numbers of women debauched as at present, and yet all the prostitutes in the place might be starving for want of customers. J.B.)

The question then is reduced to this. What are the number of women who by the prevalence of this taste would, it is probable, be prevented from getting husbands? These and these only are they who would be sufferers by it. Upon the following considerations it does not seem likely that the prejudice sustained by the sex in this way could ever rise to any considerable amount. Were the prevalence of this taste to rise to ever so great a height the most considerable part of the motives to marriage would remain entire. In the first place, the desire of having children, in the next place the desire of forming alliances between families, thirdly the convenience of having a domestic companion whose company will continue to be I agreeable throughout life, fourthly the convenience of gratifying the appetite in question at any time when the want occurs and without the expense and trouble of concealing it or the danger of a discovery.

Were a man's taste even so far corrupted as to make him prefer the embraces of a person of his own sex to those of a female, a connection of that preposterous kind would therefore be far enough from answering to him the purposes of a marriage. A connection with a woman may by accident be followed with disgust, but a connection of the other kind, a man must know, will for certain come in time to be followed by disgust. All the documents we have from the antients relative to this matter, and we have a great abundance, agree in this, that it is only for a very few years of his life that a male continues an object of desire even to those in whom the infection of this taste is at the strongest. The very name it went by among the Greeks may stand instead of all other proofs, of which the works of Lucian and Martial alone will furnish any abundance that can be required. Among the Greeks it was called Paederastia, the love of boys, not Andrerastia, the love of men. Among the Romans the act was called Paedicare because the object of it was a boy. There was a particular name for those who had past the short period beyond which no man hoped to be an object of desire to his own sex. They were called exoleti. No male therefore who was passed this short period of life could expect to find in this way any reciprocity of affection; he must be as odious to the boy from the beginning as in a short time the boy would be to him. The objects of this kind of sensuality would therefore come only in the place of common prostitutes; they could never even to a person of this depraved taste answer the purposes of a virtuous woman.

What says history?

Upon this footing stands the question when considered a priori: the evidence of facts seems to be still more conclusive on the same side. There seems no reason to doubt, as I have already observed but that population went on altogether as fast and that the men were altogether as well inclined to marriage among the GreciansOA in whom this vitious propensity was most prevalent as in any modern people in whom it is least prevalent. In Rome, indeed, about the time of the extinction of liberty we find great complaints of the decline of population: but the state of it does not appear to have been at all dependent on or at all influenced by the measures that were taken from time to time to restrain the love of boys: it was with the Romans, as with us, what kept a man from marriage was not the preferring boys to women but the preferring the convenience of a transient connection to the expense and hazard of a lasting one. (See Pilati, Traite des Loix Civiles, ch. du marriage. J.B.)

How is it at Otaheite?

To judge how far the regular intercourse between the sexes is probably affected by this contraband intercourse in countries where, as in Europe, the gratification of the venereal appetite is kept upon a footing of restraint, it may help us a good deal if we observe in what degree it is affected by the latter in countries where the gratification of that appetite is under no restraint. If in those countries paederasty prevailed to so considerable a degree as to occasion a visible diminution of the regard that was shewn to women, this phaenomenon, unless it / [197] could be accounted for from other causes, would afford a strong argument to prove that prevalence of it might have the effect of diminishing the regard that might otherwise be paid to them in other countries and that the prevalence of it in those countries was owing not to the comparative difficulty of getting women but to a comparative indifference, such as might turn to the prejudice of the women in any state of things: and in short that what was transferred to boys was so much clear loss to women. But the fact is that in Otaheite it does not appear that this propensity is at all prevalent.

If it were more frequent than the regular connection in what sense could it be termed unnatural?

The nature of the question admits of great latitude of opinion: for my own part I must confess I can not bring myself to entertain so high a notion of the alluringness of this preposterous propensity as some men appear to entertain. I can not suppose it to [be] possible it should ever get to such a heighth as that the interests of the female part of the species should be materially affected by it: or that it could ever happen that were they to contend upon equal ground the eccentric and unnatural propensity should ever get the better of the regular and natural one. Could we for a moment suppose this to be the case, I would wish it to be considered what meaning a man would have to annex to the expression, when he bestows on the propensity under consideration the epithet of unnatural. If contrary to all appearance the case really were that if all men were left perfectly free to choose, as many men would make choice of their own sex as of the opposite one, I see not what reason there would be for applying the word natural to the one rather than to the other. All the difference would be that the one was both natural and necessary whereas the other was natural but not necessary. If the mere circumstance of its not being necessary were sufficient to warrant the terming it unnatural it might as well be said that the taste a man has for music is unnatural.

My wonder is how any man who is at all acquainted with the most amiable part of the species should ever entertain any serious apprehensions of their yielding the ascendant to such unworthy rivals.

Among the antients--whether it excluded not the regular taste

A circumstance that contributes considerably to the alarms entertained by some people on this score is the common prejudice which supposes that the one propensity is exclusive of the other. This notion is for the most part founded on prejudice as may be seen in the works of a multitude of antient authors in which we continually see the same person at one time stepping aside in pursuit of this eccentric kind of pleasure but at other times diverting his inclination to the proper object. Horace, in speaking of the means of satisfying the venereal appetite, proposes to himself as a matter of indifference a prostitute of either sex: and the same poet, who forgetting himself now and then says a little here and there about boys, says a great deal everywhere about women. The same observation will hold good with respect to every other personage of antiquity who either by his own account or that of another is represented to us as being infected with this taste. It is so in all the poets who in any of their works have occasion to say anything about themselves. Some few appear to have had no appetite for boys, as is the case for instance with Ovid, who takes express notice of it and gives a reason for it. But it is a neverfailing rule wherever you see any thing about boys, you see a great deal more about women. Virgil has one Alexis, but he has Galateas [blank] in abundance. Let us be unjust to no man: not even to a paederast. In all antiquity there is not a single instance of an author nor scarce an explicit account of any other man who was addicted exclusively to this taste. Even in modern times the real womenhaters are to be found not so much among paederasts, as among monks and catholic priests, such of them, be they more or fewer, who think and act in consistency with their profession.

Reason why it might he expected so to do

I say even in modern times; for there is one circumstance which should make this taste where it does prevail much more likely to be exclusive at present than it was formerly. I mean the severity with which it is now treated by the laws and the contempt and abhorrence with which it is regarded by the generality of the people. If we may so call it, the persecution they meet with from all quarters, whether deservedly or not, has the effect in this instance which persecution has and must have more or less in all instances, the effect of rendering those persons who are the objects of it more attached than they would otherwise be to the practise it proscribes. It renders them the more attached to one another, sympathy of itself having a powerful tendency, independent of all other motives, to attach a man to his own companions in misfortune. This sympathy has at the same time a powerful tendency to beget a proportionable antipathy even towards all such persons as appear to be involuntary, much more to such as appear to be the voluntary, authors of such misfortune. When a man is made to suffer it is enough on all other occasions to beget in him a prejudice against those by whose means or even for whose sake he is made to suffer. When the hand of every man is against a person, his hand, or his heart at least, will naturally be against every man. It would therefore be rather singular if under the present system of manners these outcasts of society should be altogether so well disposed towards women as in antient times when they were left unmolested. The Helotes had no great regard, as we may suppose, for the Lacedaemonians; Negroes, we may suppose, have not now any violent affection for Negro-drivers; the Russian boors for the Boyards that are their masters; native Peruvians / [198a is blank] / [I98b follows] for Spaniards; Hallashores [?] for Bramins, Bice and Chehterees; thieves for justices and hangmen; nor insolvent debtors for bum-bailiffs. It would not be wonderful if a miserable paederast of modern times should look upon every woman as a merciless creditor at whose suit he is in continual danger of being consigned not to a prison only but either to the gallows or to the flames. The reason which there may be in point of utility or on any other account for treating these people with such severity makes no difference in the sentiments which such severity is calculated to inspire; for whatever reason there may be, they, one may be certain, do not see it. Spite of such powerful incentives it does not appear that the effect of this propensity is in general even under the present system to inspire in those who are infected with it an aversion or even an indifference to the other sex: a proof how powerful the force of nature is and how little reason the sex whose dominion is supported by the influence of pleasure have for being apprehensive of any permanent alienation in the affections of those fugitive vassals, were no harsh measure taken to drive them into rebellion.

The notion that it does has sometimes operated by accident in favor of persons under prosecution

The popular notion that all paederasts are in proportion women haters is the ground of a medium of exculpation which we see commonly adopted in the few instances that occur in England of a man's being prosecuted for this offence. It is common in any such case for those who are concerned in behalf of the defendant to produce as many presumptions as they can collect of his propensity to women. Such evidence may have some weight with those who are under the influence of this prejudice, although the many instances in which it has been opposed by the clearest positive evidence of the fact are sufficient of themselves to shew the weakness of it. It may be of use to mention this to the end that, if it should be thought expedient to punish this offence, those who are to judge it may be put on their guard against a medium of exculpation which appears to be fallacious.

As it excludes not the regular taste, it is liable to disturb marriage

This circumstance, however, which in one set of circumstances tends to the exculpation of the practise in question, in another situation of things, and, in another point of view, operates to the commination of it. I have already given the considerations which seem to render it probable that this propensity does not in any considerable degree stand in the way of marriage: on that occasion we took it for granted for the time that if it did not hinder a man from engaging in matrimonial connection, it was of no prejudice to the I other sex at all. When a man was once lodged within the pale of matrimony, we took no notice of any danger there might be of his deviating afterwards into such

extravagances. This how ever is an event which, from the two propensities not appearing to be exclusive of one another, we have reason a priori to suppose not to be in itself absolutely improbable, and which from occasional observation, but particularly from antient history, we find not to be uncommon. The wretches who are prosecuted for this offence often turn out to be married men. The poet Martial, we find, has a wife with whom he is every now and then jarring on the score of the complaints she makes of his being unfaithful to her in this way. It is to be considered however that it is [not] to the amount of the whole sum of the infidelities the husband is guilty of in this way that a wife is a sufferer by this propensity but only to the surplus, whatever it may be, over and above what, were it not for this propensity, the same man would be guilty of in the natural way. A woman would not be a sufferer by this propensity any further than as it betrays her husband into an act of infidelity to which he would not have been betrayed by the allurements of any female rival. Supposing the degree of infidelity in both cases to be equal, there seems reason to think that a woman would not be so much hurt by an infidelity of this sort as by an infidelity into [199] which her husband had been betrayed by a person of her own sex. An attachment of the former kind could not be lasting, that is confined for any length of time to the same individual; of the other she might not be satisfied but that it might be lasting. It is for the same reason that a woman's affection would not be so much wounded, however her pride might, by her husband's intriguing with a servant wench or other woman of a condition very much her inferior as by his intriguing with a woman of a condition near about the level of her own. It is indeed a general observation that in all cases of rivalry the jealousy is the greater the nearer in all respects the condition of the rival is to your own. It is on the same principle that in matters of religion Jansenists and Molinists are often apt to be more averse to one another than either are to Protestants; Methodists and regular Church of England men than either are to Presbyterians; Protestants and Catholics than either are to Jews; and in general Schismatics in any church than either are to Heretics or to persons of a different religion.

This at least would seem likely to have been the case in times in which the propensity was not held in the abhorrence in which it is held at present, and where consequently the wife would [not] have as at present to add to her other motives of concern the infamy with which under the present system it is one effect of such behavior to cast upon any man who is guilty of it.

Causes of this taste

I have already intimated how little reason there seems to be to apprehend that the preference of the improper to the proper object should ever be constant or general. A very extraordinary circumstance it undoubtedly is that it should ever have arrived at the heighth at which we find it to have arrived. The circumstance is already an extraordinary one as it is: it would be much more so if it were common under equal importunities for the improper object to meet with a decided preference. But such an incident there is every reason, as I have already observ[ed], for not looking upon as likely to become otherwise than rare. Its prevalence, wherever it prevails to a considerable degree, seems always to be owing to some circumstance relative to the education of youth. It is the constraint in which the venereal appetite is kept under the system of manners established in all civilized nations that seems to be the principal cause of its deviating every now and then into these improper channels. When the desire is importunate and no proper object is at hand it will sometimes unavoidably seek relief in an improper way. In the antient as well as the modern plans of education young persons of the male sex are kept as much as possible together: they are kept as much at a distance as possible from the female. They are in a way to use all sorts of familiarities with each other: they are I kept as much as possible from using any sorts of familiarities with females. Among the antients they used to be brought together in circumstances favourable to the giving birth to such desires by the custom of exercising themselves naked. (See Esp. des Loix, L. 8, ch. ii. Plut. Morals. J.B.) On the present plan they are often forced together under circumstances still more favourable to it by the custom of lying naked together in feather beds, implements of indulgence and incentives to the venereal appetite with which the antients were unacquainted. When a propensity of this sort is once acquired it is easier to conceive how it should continue than how it should be at first acquired. It is no great wonder if the sensation be regarded as if it were naturally connected with the object, whatever

it be, by means of which it came to be first experienced. That this practise is the result not of indifference to the proper object but of the difficulty of coming at the proper object, the offspring not of wantonness but of necessity, the consequence I of the want of opportunity with the proper object, and the abundance of opportunity with such as are improper is a notion that seems warranted by the joint opinions of Montesquieu and Voltaire. ''The crime against nature,'' says the former, ''will never make any great progress in society unless people are prompted to it by some particular custom, as among the Greeks, where the youths of that country performed all their exercises naked; as amongst us, where domestic education is disused; as amongst the Asiatics, where particular persons have a great number of women whom they despise, while others can have none at all." (Esp. des Loix, L. 12, ch. 6. J.B.)

"When the young males of our species," says Voltaire, "brought up together, feel the force which nature begins to. unfold in them, and fail to find the natural object of their instinct, they fall back on what resembles it. Often, for two or three years, a young man resembles a beautiful girl, with the freshness of his complexion, the brilliance of his coloring, and the sweetness of his eyes; if he is loved, it's because nature makes a mistake; homage is paid to the fair sex by attachment to one who owns its beauties, and when the years have made this resemblance disappear, the mistake ends.

And this is the way:
Pluck the brief Spring, the first flowers of youth.

[Ovid, Metamorphoses, X, 84-85. Ed]

"It is well known that this mistake of nature is much more common in mild climates than in the icy north, because the blood is more inflamed there and opportunity more also, what seems only a weakness in young Alcibiades is a disgusting abomination in a Dutch sailor or a Muscovite subtler." [Philosophical Dictionary. Ed.]

"Pederasty," says Beccaria, "so severely punished by law and so freely subjected to tortures which triumph over innocence, is based less on man's needs when he lives in freedom and on his own, than on his passions when he lives with others in slavery. It draws its strength, not so much from a surfeit of every other pleasure, as from that education which begins by making men useless to themselves in order to make them useful to others. In those institutions packed with hot-blooded (youth natural vigour, as it develops, is faced with insurmountable obstacles to every other kind of relationship and wears itself out in an activity useless to humanity, and which brings on premature old age." [Of Crimes and Punishments, ch. 36. Ed.]

Whether, if it robbed women, it ought at all events to be punished?

The result of the whole is that there appears not any great reason to conclude that, by the utmost increase of which this vice is susceptible, the female part of the species could be sufferers to any very material amount. If however there was any danger of their being sufferers to any amount at all this would of itself be ample reason for wishing to restrain the practise. It would not however follow absolutely that it were right to make use of punishment for that purpose, much less that it were right to employ any of those very severe punishments which are commonly in use. It will not be right to employ any punishment, 1. if the mischief resulting from the punishment be equal or superior to the mischief of the offence, nor 2. if there be any means of compassing the same end without the expense of punishment. Punishment, says M. Beccaria, is never just so long as any means remain untried by which the end of punishment may be accomplished at a cheaper rate. / [200c and 200d are blank] / [201]

Inducements for punishing it not justfied on the ground of mischievousness

When the punishment [is] so severe, while the mischief of the offence is so remote and even so problematical, one cannot but suspect that the inducements which govern are not the same with those which are avowed. When the idea of the mischievousness of an offence is the ground of punishing it, those of which the mischief is most immediate and obvious are punished first: afterwards little by little the legislator becomes sensible of the necessity of punishing those of which the mis- chief is less

and less obvious. But in England this offence was punished with death before ever the malicious destruction or fraudulent obtainment or embezzlement of property was punished at all, unless the obligation of making pecuniary amends is to be called a punishment; before even the mutilation of' or the perpetual disablement of a man was made punishable otherwise than by simple imprisonment and fine. (It was the custom to punish it with death so early as the reign of' Ed. 1st. See Miroir des Justices, ch. 4, 14. Fleta. J.B.)

But on the ground of antipathy

In this case, in short, as in so many other cases the disposition to punish seems to have had no other ground than the antipathy with which persons who had punishment at their disposal regarded the offender. The circumstances from which this antipathy may have taken its rise may be worth enquiring to. 1. One is the physical antipathy to the offence. This circumstance indeed, were we to think and act consistently, would of itself' be nothing to the purpose. The act is to the highest degree odious and disgusting, that is, not to the man who does it, for he does it only because it gives him pleasure, but to one who thinks [?] of it. Be it so, but what is that to him? He has the same reason for doing it that I have for avoiding it. A man loves carrion--this is very extraordinary--much good may it do him. But what is this to me so long as I can indulge myself with fresh meat? But such reasoning, however just, few persons have calmness to attend to. This propensity is much stronger than it is to be wished it were to confound physical impurity with moral. (I pass without examination from the literal use of the word impunity [to] the figurative. J.B.) From a man's possessing a thorough aversion to a practice himself', the transition is but too natural to his wishing to see all others punished who give into it. Any pretence, however slight, which promises to warrant him in giving way to this intolerant propensity is eagerly embraced. Look the world over, we shall find that differences in point of taste and opinion are grounds of animosity as frequent and as violent as any opposition in point of interest. To disagree with our taste [and] to oppose our opinions is to wound our sympathetic feelings and to affront our pride. James the 1st of England, a man [more] remarkable for weakness than for cruelty, conceived a violent antipathy against certain persons who were called Anabaptists on account of their differing from him in regard to certain speculative points of religion. As the circumstances of the times were favourable to [the] gratification of antipathy arising from such causes, he found means to give himself the satisfaction of committing one of them to the flames. The same king happened to have, an antipathy to the use of tobacco. But as the circumstances of the times did not afford the same pretences nor the same facility for burning tobacco- smokers as for burning Anabaptists, he was forced to content himself with writing a flaming book against it. The same king, if he be the author of that first article of the works which bear his name, and which indeed were owned by him, reckons this practise among the few offences which no Sovereign ever ought to pardon. This must needs seem rather extraordinary to those who have a notion that a pardon in this case is what he himself, had he been a subject, might have stood in need of.

Philosophical pride

This transition from the idea of physical to that of moral antipathy is the more ready when the idea of pleasure, especially of intense pleasure, is connected with that of the act by which the antipathy is excited. Philosophical pride, to say nothing at present of superstition, has hitherto employed itself with effect in setting people a-quarrelling with whatever is pleasurable even to themselves, and envy will always be disposing them to quarrel with what appears to be pleasurable to others. In the notions of a certain class of moralists we ought, not for any reason they are disposed to give for it, but merely because we ought, to set ourselves against every thing that recommends itself to us under the form of pleasure. Objects, it is true, the nature of which it is to afford us the highest pleasures we are susceptible of are apt in certain circumstances to occasion us still greater pains. But that is not the grievance: for if it were, the censure which is bestowed on the use of any such object would be proportioned to the probability that could be shewn in each case of its producing such greater pains. But that is not the case: it is not the pain that angers them but the pleasure.

Religion

We need not consider at any length [the length] to which the rigour of such philosophy may be carried when reinforced by notions of religion. Such as we are ourselves, such and in many respects worse it is common for us to make God to be: for fear blackens every object that it looks upon. It is almost as common for men to conceive of God as a being of worse than human malevolence in their hearts, as to stile [?] him a being of infinite benevolence with their lips. This act is one amongst others which some men and luckily not we ourselves have a strong propensity to commit. In some persons it produces it seems, for there is no disputing a pleasure: there needs no more to prove that it is God's pleasure they should abstain from it. For it is God's pleasure that in the present life we should give up all manner of pleasure, whether it stands in the way of another's happiness or not, which is the sure sign and earnest of the pleasure he will take in bestowing on us all imaginable happiness hereafter ; that is, in a life of the futurity of which he has given us no other proofs than these. / [202]

This is so true that, according to the notions of these moralists and these religionists, that is, of the bulk of moralists and religionists who write, pleasures that are allowed of, are never allowed of for their own sake but for the sake of something else which though termed an advantage or a good presents not to any one so obviously and to them perhaps not at all, the idea of pleasure. When the advantage ceases the pleasure is condemned. Eating and drinking by good luck are necessary for the preservation of the individual: therefore eating and drinking are tolerated, and so is the pleasure that attends the course of these functions in so far as it is necessary to that end; but if you eat or if you drink otherwise than or beyond what is thus necessary, if you eat or drink for the sake of pleasure, says the philosopher, "It is shameful"; says the religionist, "It is sinful." The gratification of the venereal appetite is also by good luck necessary to the preservation of the species: therefore it is tolerated in as far as it is necessary to that end, not otherwise. Accordingly it has been a question seriously debated whether a man ought to permit himself the partaking of this enjoyment with his wife when from age or any other circumstance there is no hope of children: and it has often been decided in the negative. For the same reason or some other which is not apparent, for a man to enjoy his wife at unseasonable times in certain systems of laws has been made a capital offence. Under the above restriction however it has been tolerated. It has been tolerated, but as the pleasure appeared great, with great reluctance and at any rate not encouraged; it has been permitted not as a good but as a lesser evil. It has indeed been discouraged and great rewards offered in a future life for those who will forego it in the present.

It may be asked indeed, if pleasure is not a good, what is life good for, and what is the purpose of preserving it? But the most obvious and immediate consequences of a proposition may become invisible when a screen has been set before by the prejudices of false philosophy or the terrors of a false religion.

Hatred of pleasure

Nero I think it was, or some other of the Roman tyrants, who is said to have offered a reward to any one who should discover a new pleasure. That is, in fact, no more than what is done by those who offer rewards for new poems, for new mechanical contrivances, for improvements in agriculture and in the arts; which are all but so many means of producing new pleasures, or what comes to the same thing, of producing a greater quantity of the old ones. The object however that in these cases is advertised for is not advertised for under the name of pleasure, so that the ears of these moralists are not offended with that detested sound. In the case abovementioned, from the character of the person who offered the reward it is natural enough to presume that the sort of pleasure he had in view in offering it was sensual and probably venereal, in which way no new discoveries would be endured. It is an observation of Helvetius and, I believe, of Mr. Voltaire's, that if a person were born with a particular source of enjoyment, in addition to the 5 or 6 senses we have at present, he would be hunted out of the world as a monster not fit to live. Accordingly nothing is more frequent than for those who could bear with tolerable composure the acts of tyranny by which all Rome was filled with terror and desolation to lose all patience when they come to the account of those miserable devices of lasciviousness which had no other effect than that of giving surfeit and disgust to the contemptible inventor.

How far the antipathy is a just ground

Meanwhile the antipathy, whatever it may arise from, produces in persons how many soever they be in whom it manifests itself, a particular kind of pain as often as the object by which the antipathy is excited presents itself to their thoughts. This pain, whenever it appears, is unquestionably to be placed to the account of the mischief of the offence, and this is one reason for the punishing of it. More than this--upon the view of any pain which these obnoxious persons are made to suffer, a pleasure results to those by whom the antipathy is entertained, and this pleasure affords an additional reason for the punishing of it. There remain however two reasons against punishing it. The antipathy in question (and the appetite of malevolence that results from it) as far as it is not warranted by the essential mischieviousness of the offence is grounded only in prejudice. It may therefore be assuaged and reduced to such a measure as to be no longer painful only in bringing to view the considerations which shew it to be ill-grounded. The case is that of the accidental existence of an antipathy which [would have] no foundation [if] the principle of utility were to be admitted as a sufficient reason for gratifying it by the punishment of the object; in a word, if the propensity to punish were admitted in this or any case as a sufficient ground for punishing, one should never know where to stop. Upon monarchical principles, the Sovereign would be in the right to punish any man he did not like; upon popular principles, every man, or at least the majority of each community, would be in the right to punish every man upon no better reason.

If it were, so would heresy

If this were admitted we should be forced to admit the propriety of applying punishment, and that to any amount, to any offence for instance which the government should find a pleasure in comprisingunder the name of heresy. I see not, I must confess, how a Protestant, or any person who should be for looking upon this ground as a sufficient ground for / [203] burning paederasts, could with consistency condemn the Spaniards for burning Moors or the Portuguese for burning Jews: for no paederast can be more odious to a person of unpolluted taste than a Moor is to a Spaniard or a Jew to an orthodox Portuguese.

The antipathy itself a punishment

Besides this, the antipathy in question, so long as it subsists, draws with it in course, and without having recourse to the political magistrate, a very galling punishment, and this punishment is the heavier the greater the number of persons is by whom the antipathy is entertained and the more intense it is in each person: it increases therefore in proportion to the demand there is for punishment on this ground. Although the punishing it by the hands of the magistrate were not productive of the ill consequences just stated, it would seem hard to punish it in this way upon the ground of that circumstance which necessarily occasions it to be punished another way; its being already punished beyond what is enough is but an indifferent reason to give for punishing it more.

Punishment however not an incentive

Some writers have mentioned as an objection to the punishing of practises of the obscene kind, that the punishment is a means of putting men in mind to make experiment of the practise: the investigation of the offence and the publicity of the punishment being the means of conveying the practise to the notice of a multitude of persons who otherwise would never have thought of any such thing. From the circumstance of its being punished they learn of its being practised, from the circumstance of its being practised they conclude that there is a pleasure in it; from the circumstance of its being punished so severely they conclude that the pleasure is a great one, since it overcomes the dread of so great a punishment. That this must often happen is not to be denied, and in so far as it does happen and occasions the offence to be repeated it weighs against the benefit of the punishment. This is indeed the most popular argument of any that can be urged against the punishment of such practises; but it does not appear to be well-grounded. It proves nothing unless the punishment tends as strongly in the one way to spread the practise as it does in the other to repress it. This, however, does not appear to be the case. We should not

suppose it a priori for at the same time that it brings to view the idea of the offence it brings to view in connection with that idea the idea not only of punishment but of infamy; not only of the punishment which should prevent men's committing it in the face of the public, but of the infamy which should prevent their discovering any inclination to commit it to the nearest and most trusty of their friends. It does not appear to be the case in point of experience. In former times, when it was not punished, it prevailed to a very great degree; in modern times in the very same countries since it has been punished it has prevailed in a much less degree. Besides this, the mischief produced by the punishment in this way may be lessened in a considerable degree by making the trial and all the other proceedings private, which may be done without any danger of abuse by means of the expedient suggested in the book relative to procedure.

Danger of false prosecutions greater in this case than others

A very serious objection, however, to the punishment of this offence is the opening it makes for false and malicious prosecutions. This danger in every case weighs something against the reasons for applying punishment, but in this case it weighs much more considerably than perhaps in any other. Almost every other offence affords some particular tests of guilt, the absence of' which constitutes so in any criterions of innocence. The evidence of persons will be in some way or other confirmed by the evidence of things: in the ordinary offences against property the circumstance of the articles being missing or seen in undue place, in offences against persons the marks of violence upon the person. In these and, in short, in all other or almost all other cases where the offence has really been committed, some circumstances will take place relative to the appearance of things, and will therefore be expected to be proved. In any offences which have hatred for their motive the progress of the quarrel will afford a number of characteristic circumstances to fix the imputation upon the person who is guilty. In the case of rape, for t instance, where committed on a virgin, particular characteristic appearances will not fail to have been produced, and even where the object has been a married woman or a person of' the same sex marks of violence will have been produced by the resistance. But when a filthiness of this sort is committed between two persons, both willing, no such circumstances need have been exhibited; no proof therefore of such circumstances will be required. Wherever, therefore, two men are together, a third person may alledge himself' to have seen them thus employing themselves without fear of having the truth of his story disproved. With regard to a bare proposal of this sort the danger is still greater: one man may charge it upon any other man without the least danger of being detected. For a man to bring a charge of this sort against any other man without the possibility of its being disproved there needs no more than for them to have been alone together for a few moments.

Used as an instrument of extortion

This mischief is often very severely felt. In England the severity of the punishment and what is supported by it, the moral antipathy to the offence, is frequently made use of as a means of extorting money. It is the most terrible weapon that a robber can take in hand; and a number of robberies that one hears of, which probably are much fewer than the ones which one does not hear of, are committed by this means. If a man has resolution and the incidental circumstances are favourable, he may stand the brunt and meet his accuser in the face of justice; but the danger to his reputation will at any rate be considerable. Men of timid natures have often been almost ruined in their fortunes ere they can summon up resolution to commit their reputations to the hazard of a trial. A man's innocence can never be his security; knowing this it must be an undaunted man to whom it can give confidence; a well-seasoned perjurer will have finally the advantage over him. Whether a man be thought to have actually been guilty of this practise or only to be disposed to it, his reputation suffers equal ruin. / [204]

After so much has been said on the abomination of paederasty, little need be said of the other irregularities of the venereal appetite. If it be problematical whether it be expedient upon the whole to punish the former, it seems next to certain that there can be no use in punishing any of the latter.

Between women

Where women contrive to procure themselves the sensation by means of women, the ordinary course of nature is as much departed from as when the like abomination is practised by men with men. The former offence however is not as generally punished as the latter. It appears to have been punished in France but the law knows nothing of it in England. (Code penal, Tit. 35, p 238. J.B.)

Whether worse between men and women than between men

It seems to be more common for men to apply themselves to a wrong part in women and in this case grave authors have found more enormity than when the sex as well as the part of the object is mistaken. Those who go after the principle of the affront, which they say in affairs of any such sort is to God Almighty, assure us that the former contrivance is a more insolent affront than the latter. (See Fort. Rep. qua supra. J.B. [i.e., 187b, in "Notes." Ed.]) The affront should be the same if from necessity or caprice a person of the female sex should make use of a wrong part in one of the male. If there be one idea more ridiculous than another, it is that of a legislator who, when a man and a woman are agreed about a business of this sort, thrusts himself in between them, examining situa- tions, regulating times and prescribing modes and postures. The grave physician who, as soon as he saw Governor Sancho take a fancy to a dish, ordered it away is the model, though but an imperfect one, of such a legislator.

Thus far his business goes on smoothly: he may hang or burn the parties according as he fancies without difficulty. But he will probably be a little at a loss when he comes to enquire with the Jesuit Sanchez (De Matrimonio) how the case stands when the man for example, having to do with a woman, begins in one part and consummates in another; thinks of one person or of one part while he is employing himself with another; begins with a woman and leaves her in the lurch. Without calling in the principle of utility such questions may be multiplied and remain undecided for evermore; consult the principle of utility, and such questions never will be started.

Bestiality

An abomination which meets with as little quarter as any of the preceding is that where a human creature makes use in this way of a beast or other sensitive creature of a different species. A legislator who should take Sanchez for his guide might here repeat the same string of distinctions about the vas proprium and improprium, the imaginations and the simultaneity and so forth. Accidents of this sort will sometimes happen; for distress will force a man upon strange expedients. But one might venture to affirm that if all the sovereigns in Europe were to join in issuing proclamations inviting their subjects to this exercise in the warmest terms, it would never get to such a heighth as to be productive of the smallest degree of political mischief. The more of these sorts of prosecutions are permitted the more scope there is given for malice or extortion to make use of them to effect its purpose upon the innocent, and the more public they are the more of that mischief is incurred which consists in shocking the imaginations of persons of delicacy with a very painful sentiment.

Burning the animal

Some persons have been for burning the poor animal with great ceremony under the notion of burning the remembrance of the affair. (See Puffendorf, Bks. 2, Ch. 3, 5. 3. Bacon's Abridg. Title Sodomy. J.B.) A more simple and as it should seem a more effectual course to take would be not to meddle or make smoke [?] about the matter.

Masturbation

Of all irregularities of the venereal appetite, that which is the most incontestably pernicious is one which no legislator seems ever to have made an attempt to punish. I mean the sort of impurity which a person of either sex may be guilty of by themselves. This is often of the most serious consequence to the health and lasting happiness of those who are led to practise it. Its enervating influence is much greater than that of any other exertion of the venereal faculty, and that on three different

accounts: 1) Any single act of this kind is beyond comparison more enervating than any single act of any of those other kinds. The reason of this is not clear; but the fact is certain. Physicians are all agreed about it. 2) Persons [are] in a way to give into this practise at an earlier age than that in which they are in a way to give in to any of those other practises, that is, at an age when the influence of any enervating cause is greater. As the violence to modesty is rather less in this case than in any of these others, a person will with less difficulty yield to the impulse whether of nature or example. 3) In all those other cases the propensity may be kept within bounds by the want of opportunities; in this case there can scarce ever be any want of opportunities.

Physicians are also agreed that this is not an infrequent cause of indifference in each of the sexes to the other, and in the male sex it often ends in impotence.

It is not only more mischievous to each person than any of those other impurities, but it appears everywhere to be much more frequent.

In popular estimation however the guilt of it is looked upon as much less than that of any of them; and yet the real mischief we see is incomparably greater, and yet it has never been punished by any law. Would it then be right to appoint / [205] punishment for it? By no means; and for this plain reason, because no punishment could ever have any effect. It can always be committed without any danger or at least without any apparent danger of a discovery.

Domestic discipline the proper remedy against impurities

With regard to all the abuses of the venereal appetite while the party is under age, they seem to be the proper objects of domestic discipline; after he is come to be out of that jurisdiction, or even while he is yet under it, these or any other indecencies committed in the face of the public will be proper objects of the coercion of the laws; while they are covered with the veil of secrecy the less that is said about them and particularly by the law the better.

NOTES RELATIVE TO BENTHAM'S ESSAY ON PAEDERASTY

[The following notes were written by Bentham immediately before the above essay, but their substance, though closely related to the essay, was not incorporated into it except for the first three sentences. Ed.]

[187]

Distinction between physical impurity and moral

The propensity is stronger than there is reason to wish it should be, to confound moral impurity and turpitude with physical impurity and turpitude; from observing the latter in any case, especially when combined with pleasure, to impute the [former]. From a man's being thoroughly averse to a practise himself the transition is but too natural to his wishing to see all others punished who give in to it. Any pretense, however slight, which promises to warrant him in giving way to this propensity is eagerly embraced. It is this cause which more perhaps than any other, more even than pecuniary interest, has contributed to produce the persecutions that hath been raised upon the ground of heresy.

Different men will have different opinions but, for my own part, I must confess I can not bring myself to entertain so mean an opinion of the charms of the better part of the species or of the taste of the other as to suppose it can ever be necessary to send a man to make love with a halter about his neck.

Antipathy no sufficient warrant

Non amo te, Sabidi & c. [Martial, I, 32, Ed.] may be quite enough when all the question only is whether one shall see Sabidius or not see him: but when the question is whether

Sabidius shall be buries alive or let alone the reasons which a man should give for burning him alive may be expected to be of a cast somewhat more substantial.

Whether it is an affront to God?

According to some there are two sorts of High Treason, High Treason against God, the Heavenly King, and High treason against the earthly king: and this is High Treason against God. (See a book of old English Law entitled Miroir des Justices, Ch. 1, Sect. 4; Ch. 4, Sect. 13; Ch. 2, Sect. 11.J.B.) According to this account of the matter it is an offence scarce distinguishable from that which the Titans were guilty of when they revolted against Jupiter. Judge Fortescue, an Earl of Macclesfield, Chancellor of England, and other sages of the English law seem to have given into this idea. (Fortescue's Reports for the case of the King against Wiseman. J.B.). His Lordship shews how it comes to be High Treason against the King of Heaven. It is of the nature of a challenge of which that Sovereign is the object--"a direct affront to the Author of Nature and insolent expression of contempt of his wisdom, condemning the provision made by him and defying both it and him." According to this account of the matter, the offence should fall indifferently either within our first class, under the title, offences against the persons of individuals (reckoning God as an individual), or within the fourth class under the title of High Treason. But this account of the matter however ingenious seems hardly to be just.

Whether it hurts population--Bermondus

Bermondus, a canonist cited with approbation by the two great English lawyers above mentioned says that in this point of view it is worse than murder. For a murderer destroys but one man whereas a Sodomite puts to death "every man that lives." "Apud Deum tale peccatum reputatur gravius homicidio, eo quia unum homicida unum hominem tantum, Sodomita autem totum genus humanum delere videtur." This, he assures us, is God's way of taking the account. If this be the case it must be confessed that God's arithmetic is a little different from man's arithmetic.

The author of the article Sodomy in the law abridgement that goes by the name of Bacon's is more moderate. "If any crime," says he, "deserve to be punished in a more exemplary manner this does. Other crimes are prejudicial to society, but this strikes at the being thereof; for it is seldom known that a person who has been once guilty of so unnatural an abuse of his generative faculties has afterwards a proper regard for women."

God's burning Sodom--whether a sufficient warrant?

It has been observed with regard to this offence that God himself punished it with fire; and this has been given as a reason, not only for its being punished but for its being punished with fire.

1. If God according to supposition has punished any practise, it was either on account of the mischievousness of the practise to society or on some other account. If the practise be of the number of those which are prejudicial to society, it will already be punished on that ground; there is no occasion to mention any other. If it be not prejudicial for society, there can be no other reason for society to meddle with it.
2. If it be for any other reason than being prejudicial to society that God has punished the act in question, this can be no reason at all for man's punishing it. For there can be no reason but this to man. If then God punished it, it was for a reason which men can not know.
3. When it is clear that in any individual instance God has punished an act, in that individual instance the very circumstance of its being he who punished it ought with us to be a sufficient reason for his having done so.

But when we can find no / [188] other reason, if, in any other individual instance of the same sort of act, God does not punish it, there is no reason at all for punishing it. The circumstance of his not punishing it in the latter instance proves as much that it

ought not to be punished in that case as the circumstance of his having punished it in the former case proves that it was right to punish it in that former case.

For these or other reasons it is an opinion that seems to spread more and more among divines of all persuasions, that the miraculous and occasional dispensations of an extraordinary providence afford no fit rule to govern the ordinary and settled institutions of human legislators. If they were, simple fornication, sparing enemies taken in battle (the offence of Korah, Dathan and Abiram and their partizans, for which 15,000 of the people suffered death. Numbers ch. 16. J.B.), murmuring against authority, and making mock at old age (the offence for which two and forty children were torn to pieces by bears, at the intercession of Elijah. 2 Kings ch. 2. J.B.), to mention those cases only among a vast number, had need to be made capital offences. If any man, under the notion of its being agreeable to God, would do any act that is prejudicial to society, he should produce a particular commission from God given him in that individual instance. If a man without a special commission from God is to be justified in doing any violent act that has ever been done by a special commission from God, a man might as well kill his son because God commissioned Abraham to kill Isaac.

1. With regard to the offence in question if it had been God's pleasure that it should be punished throughout the earth with the punishment of fire, it seems reasonable to conclude that he would at least have provided for its being punished in that manner among his own people, the Jews. But in the Jewish laws it is only provided that such offenders shall be "put to death" generally, just as several kinds of incest and the offence of performing conjugal duty at an unseasonable conjuncture are to be punished. As a proof that burning was not particularly intended, but rather was meant to be excluded, in the next verse a particular kind of incest is mentioned, that of him who has knowledge of a mother and her daughter: and for this the punishment of burning to death is specially appointed (Levit. ch. 20.J.B.) [The punishment in the Talmud is stoning. Ed.].
2. Even with regard to the cities in question, it is not said that this was the only one nor even the greatest of the offences for which those cities were destroy'd. The offences imputed to them are in the English translation termed by the general names of "wickedness" (Genesis, ch. 18.J.B.), and "iniquity" (Ibid., ch. 19, v. 15, J.B.), and their conduct opposed to "righteousness." In this particular respect the Canaanites in question could not be more culpable than the antient Greeks in that which is deemed the most virtuous period of their history. Yet it appears not that this punishment was ever inflicted by heaven for such a cause upon the antient Greeks.
3. True it is that the only offence which is mentioned as having been committed by them on any individual occasion is an offence of a sort which appears to have originated in the depraved appetite in question. It is not, however, the same offence precisely which in England is punished with simple death, and in France with burning, but one of a very different complexion and of a much deeper die. The offence attempted by the profligate Canaanites carried with it two enormous aggravations: 1. Personal violence, by which circumstance alone it stands raised as much above the level of the offence which under the name in question men ordinarily have in view as rape does above that of simple fornication. 2. A violation of hospitality, an aggravation of much greater odium and indeed of much greater mischief in a rude than in a civilized state of society.

Zeal shewn against it in the English Marine Law

In the Articles of War established for the government of the English Navy, in Art. 32, after providing with respect to this offence and other species of impurity that they "shall be punished with death" it is added without mercy. (By Stat. 13. Car. 2. Stat. 1. Ch. 9. J.B.) Of all the offences of which a man in the maritime service can be guilty, burning a fleet, betraying it to the enemy and so forth, this is the only one which it was thought proper to exclude from mercy. The safety of' the fleet and of the Empire were in the eyes of the legislator objects of inferior account in comparison with the preservation of a sailor's chastity. [188d follows; see my introduction. Ed.] / [189]

Horror of singularity

In persons of weak minds, anything which is unusual and at the same time physically disgustful is apt to excite the passion of hate. Hatred when once excited naturally seeks its gratification in the tormenting or destruction of the object that excited it. Many are the innocent animals who are punished in this way for the crime of being ugly. To this head we may refer the propensity persons of weak and irritable temperament, particularly women, have to the killing of toads and spiders. The offspring of a woman when it has had any singularity whereby it has been distinguished in a remarkable degree from the ordinary race of human beings under the name of monster has often met with the same treatment--hermaphrodites [for example] who, not knowing what sex they were, have performed the functions of both. Envy has here joined with antipathy in letting loose against these unfortunate people the fury of the dissocial appetite.

Any desire to hurt any sensitive object which in any way has happened to become a cause of pain to us, nay even insensitive objects, is the natural instantaneous consequence of such pain and it always breaks out into evil, unless where reason and reflection interfere and check it. But in these cases, reason, far from checking has appeared from some cause or other to dictate such behaviour.

Mischief to population reparable by fine

If population were the only object, the mischief that a rich batchelor did by giving him[self] up to improlific venery might be amply repaired by obliging him to give a marriage portion to two or three couples who wish for nothing but a in order to engage in marriage.

Athenians wanted but permission to marry two wives

When among the Athenians the number of the people had received a dangerous reduction by an unsuccessful war, what was the step taken to repair it? All that was done was to permit to every man that chose it to take two wives. This shews that it was plain enough at that time of day there was no want of inclination on the part of the male sex toward [women] and that there wanted nothing but permission to dispose a man to extend his connections with the other sex. And yet at no time and among no people was the irregular appetite in question more predominant.

How came scratching not to be held abominable?

It is wonderful that nobody has ever yet fancied it to be sinful to scratch where it itches, and that it has never been determined that the only natural way of scratching is with such or such a finger and that it is unnatural to scratch with any other. (As in Russia the only way of making the sign of the cross is with two fingers and it is heterodox to make it with three. J.B.) in antient Persia it was infamous to have a cold and to take those measures which nature dictates for relieving oneself from the inconvenience of such an indisposition. (Xenophon, cyropaedia. J.B.)

Happily for the Persians under the clear and steady atmosphere of that country colds were not altogether so endemical as under the humid and changeable atmosphere of England. But in all countries it is a practise that more or less has always been too frequent to confound misfortune with criminality.

Punishment not necessary for the sake of women

By the mild ordinances of nature the fair sex enjoy already a monopoly as perfect as other monopolies are, and more perfect than they ought to be, of the affections of the other and this monopoly is too well secured by the means that established it to need the support of the harsh constitutions of penal laws. A ribbon or ringlet is a much more suitable and not less powerful tie to bind a lover than the hangman's rope of the executioner. The man may be their friend, but it should seem not a very judicious friend, who would advise them to conciliate affection by horror and by force.

IN THE SUPREME COURT OF INDIA
(CRIMINAL ORIGINAL JURISDICTION)
I.A. NO. 6791 OF 2018
IN
WRIT PETITION (CRL.) NO. 76 OF 2016

IN THE MATTER OF
Navtej Singh Johar and Ors …***Petitioners***
versus
Union of India and Ors …***Respondents***

AND IN THE MATTER OF:
Dr. Alok Sarin …***Intervenor***

WRITTEN SUBMISSIONS ON BEHALF OF SNR. ADV., MR. CHANDER UDAY SINGH, FOR, DR. ALOK SARIN, APPLICANT FOR INTERVENTION (I.A. NO. 6791 OF 2018) IN W.P. (CRL) 76/2016

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I. Background Of Intervention

1. The Intervenor is a senior psychiatrist, practicing in New Delhi for the last twenty-four years. He is currently, head of psychiatric services at Sitaram Bhartia Institute of Science and Research, New Delhi, a leading multi-specialty hospital in New Delhi. Applicant has been involved in clinical practice, research and teaching for the last two decades.[1]

[1]The Applicant is an MBBS, and an MD in Psychiatry, from the All India Institute of Medical Sciences, New Delhi. He is a Fellow of the Indian Psychiatric Society,

2. Along with 12 other mental health professionals, the Intervenor had participated in Civil Appeal No. 10972/2009, *Suresh Kumar Koushal v Naz Foundation*.

II. Homosexuality is a normal and natural variant of human sexuality.

a. Homosexual behaviour has been documented in a variety of cultures and across civilisations[2]. **[FLAG-E]**

b. Homosexual behaviour has been documented in a variety of animal species[3].**[FLAG-E]**

c. However, before 1973, many mental health professionals reflected societal prejudice in regarding homosexuality as a pathological condition[4].**[FLAG-E]**

d. By 1973, the consensus was that homosexual orientation was normal and natural and the American Psychiatric Association's Board of Trustees voted to remove homosexuality from the psychiatric Association's, Diagnostic and Statistical Manual of Mental Disorders.[5] **[FLAG-E]**

e. Until 1992, homosexuality was classified as a disorder by the WHO's ICD Guidelines. In 1992, homosexuality as a diagnostic category was removed from the ICD-10 Classification of Mental and Behavioural Disorders.[6]

f. The Indian Psychiatric Association made the following statement on 2 July, 2018: **[FLAG-B]**

> *"The IPS recognized same sex sexuality as a normal variant of human sexuality much like heterosexuality and bisexuality. There is no scientific evidence that sexual orientation can be altered by any treatment and that any such attempts may in fact lead to low self-esteem and stigmatization of the person."*

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a member of the Indian Medical Association, the World Psychiatric Association, the Indian Association of Private Psychiatry, the Indian Association of Biological Psychiatry, the Indian Association of Social Psychiatry, a corresponding member of the American Psychiatric Association and the International Board Member of the World Association of Psychosocial Rehabilitation

[2] Amici Curiae brief of the 'American Psychological Association', 'American Psychiatric Association', 'National Association Of Social Workers, And Texas Chapter Of The National Association Of Social Workers', in support of petitioners in John Geddes Lawrence And Tyron Garner V. State Of Texas, in the Supreme Court of the United States, No. 02-102 (***internal page number 6***)

[3] Ibid (***internal page number 7***)

[4] Ibid (***Internal page number 10***)

[5] Ibid (***Internal Page Number 11***)

[6] World Health Organization, The International Classification of Mental and Behavioural Disorders, Clinical Descriptions and diagnostic guidelines) (***internal page number 8-11***)

III. The Mental Healthcare Act, 2017, has provided legislative acknowledgement of the scientific consensus that homosexuality is a natural variant of human sexuality.

1. By enacting the ***Mental Healthcare Act, 2017***, parliament has provided legislative acknowledgement of the scientific consensus that homosexuality is a natural variant of human sexuality and that LGBT persons need protection against discriminatory treatment. The Mental Healthcare Act, 2017, has, *inter alia*:

    a. Legislated that sexual orientation is not a mental illness: Section 3 of the act mandates that mental illness is to be determined in accordance with 'nationally' or 'internationally' accepted medical standards and lists the International Classification of Disease of the World Health Organisation as an 'internationally' accepted medical standard. As stated above, The International Classification of Diseases (ICD-10) does not consider non-peno-vaginal sex between consenting adults either a "mental disorder" or an "illness".

    b. Provided for protection against discrimination on the grounds of sexual orientation –

        i. section 18 (2) stipulates that there shall be no discrimination in the matter of providing access to mental health care and treatment on several listed grounds, including, gender, sex, religion, etc. One of the grounds of discrimination forbidden by section 18 (2) is "sexual orientation".

        ii. Section 21 legislates the right to equality and non-discrimination in treating persons with mental illness and sub clause (a) lists forbidden grounds of discrimination. This list includes "sexual orientation".

IV. Criminalising homosexuality denies LGBT the right to share intimacies with persons of their choice.

a. The right to share intimacies with persons of one's choosing is a part of the right to life.[7]

b. Sexual intimacy is an important part of the development of the self and of the establishment of close relationships.[8] **[FLAG-E]**

c. LGBT individuals engage in forms of sexual activity other than oral and anal sex but research shows that anal sex is a primary means of expressing sexual intimacy for gay men. Research also shows that for gay people in particular, oral sex and anal sex provide emotional satisfaction and promote the formation of long-term bonds.[9] **[FLAG-E]**

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[7] ***Shafin Jahan v Asokan K.M.***, (2018) SCCOnLine SC 343, concurring opinion, J. Chandrachud, paragraph 88.

[8] Amici Curiae brief of the 'American Psychological Association', Supra, n. 1 (***Internal page number 2***)

[9] Ibid.(***Internal Page number 3)***

d. Sexual satisfaction in intimate relationships is linked not just with a sense of satisfaction with those relationships but also with a sense of general satisfaction with life.[10] **[FLAG-E]**

V. Criminalising homosexuality has a debilitating effect on the mental health of members of the LGBT community.

a. Section 377 renders members of the LGBT community vulnerable to blackmail, violence and abuse. Abuse is often from the family, or at the workplace, or at the hands of public authorities such as police, health care workers et cetera. [11]**[FLAG-H]**

b. Section 377 fosters a climate of prejudice in which dubious and discredited practices in the medical health setting, such as electroshock therapy, revulsion therapy et cetera, proliferate[12]. This is contrary to International Human Rights Law in relation to sexual orientation and gender identity[13].**[FLAG-A] & [FLAG-D]**

c. Research has shown that prejudice against a community decreases with contact with that community. By compelling people to suppress their sexual orientation for fear of discrimination, violence, harassment, and arrest, section 377 reinforces stigma and prejudice[14]. **[FLAG-E]**

d. Section 377 'stigmatises' LGBT by criminalising sexual acts close identified with the group. A stigmatised condition or status is one that is negatively valued by society, fundamentally defines a person's social identity, and disadvantages and this disempowers those who have it. [15]**[FLAG-F]**

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[10] Ibid, (***Internal Page number 3***)

[11] Vinay Chandra, "Contexts of Distress for LGBT People: A Coiunsellor's Guide in Arvind Narrain and Vinay Chandran", in Nothing to Fix: Medicalisation of Sexual Orientation and Gender Identity. New Delhi: Yoda Press and SAGE Publications, 2015, (i***nternal page number 250***) and Vinay Chandran, No need for treatment,:A year after re-criminalization, mental health emerges as an important concern for LGBT youth, Fri, Dec 05 2014, Live Mint

[12] Ketki Ranade, Medical Response to Male Same-sex Sexuality in Western India:An Exploration of 'Conversion Treatments' for Homosexuality, in Nothing to Fix: Medicalisation of Sexual Orientation and Gender Identity. New Delhi: Yoda Press and SAGE Publications, 2015

[13] 'The Yogyakarta Principles Plus 10', 'Additional Principles And State Obligations On The Application Of International Human Rights Law In Relation To Sexual Orientation, Gender Identity, Gender Expression And Sex Characteristics To Complement The Yogyakarta Principles', as adopted on 10 November 2017, Geneva

[14] Amici Curiae brief of the 'American Psychological Association', Supra, n. 1 (***internal page number 3***)

[15] Amici Curiae brief of the 'American Psychological Association', 'National Association of Social Workers', And National Association of Social Workers Colorado Chapter, as Amici Curiae in support of respondents in Masterpiece Cake Shop Limited and Jack C Phillips v. Colorado Civil Rights Commission, Charlie Craig and David Mullins, In the Supreme Court of the United States No. 16-111

e. In the US, studies have shown that large numbers of gay men and lesbians experience stigma in the form of violence, discrimination and other negative acts against them.[16] **[FLAG-E]**

   i Sexual orientation bias crimes were the third most common type of hate crimes recorded by the Federal Bureau of Investigation and comprised approximately 18% of all hate crime victims although they constituted only 2%-4% of the adult population. [17]This is despite the fact that much of the violent crime against gay and lesbian people goes unreported.[18] **[FLAG-E]**

   ii Gay, lesbian, and bisexual high school students were twice as likely as their heterosexual counterparts to be attacked with weapons on school property, and nearly 3 times as likely to say they had not attended school on at least one day during the previous month because they feared they would be unsafe while on their way to work from school.[19] **[FLAG-E]**

   iii Stigma also results in psychological and physical illness.[20] **[FLAG-E]**

   iv One study in the US found that LGB individuals living in states with constitutional amendments banning gay marriage on the ballot in the 2004-2005 elections experienced increased rates of psychiatric disorders when compared to states that had not.[21]

   v The US suffers persisting health disparities based on sexual orientation and gender identity.[22] **[FLAG-E]**

f. Professor Dinesh Bhugra, president of the World Psychiatric Association, and a former president of the Royal College of Psychiatrists, called for "radical solutions" to combat the high levels of mental illness among the LGBT population. He described a "clear correlation between political and social environments" and how

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[16] Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (***internal page number 10***)

[17] Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (***internal page number 14***)

[18] Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (***internal page number 15***)

[19] Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (***internal page number 16***)

[20] Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (***internal page number 20-23***)

[21] Katie A. McLaughlin et al. "The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations"

[22] Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (***internal page number 23***)

persecutory laws against LGBT people are leading to greater levels of depression, anxiety, self-harm, and suicide.[23] **[FLAG-J]**

VI. Proscribing homosexual intimacy is arbitrary, unscientific, and perverse.[24]

VII. Section 377 is motivated by animus towards LGBT.

Note M on Clauses 361 and 362 - which were to later become section 377 of the IPC - of the Draft Penal Code presented by Lord Macaulay reads as follows*:*

> *"Clauses 361 and 362 relate to an **odious class of offences** respecting which it is desirable that as little as possible be said. We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this **revolting subject**; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision." (Emphasis supplied)*

Self-evidently, this part of the Indian Penal Code was motivated by an irrational *animus* towards those whose sexual choices did not comport with Victorian morals.

VIII. The 'presumption of constitutionality' of all laws is undercut in the case of section 377.

a. The presumption of constitutionality is based on two prongs –
   i. an assumption that the legislature understands and correctly appreciates the needs of its own people
   ii. laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds
b. In the case of section 377, the law was not made by "legislature" and the makers of the law were not making law for their "own people". Further, section 377 cannot be said to have been directed to problems made manifest by "experience", or that its discriminations are based on adequate grounds.

IX. Relief.

In light of the fact that the impact of Section 377 travels well beyond arrest and prosecution to harm intimate aspects of the human personality which are entitled to constitutional protection under the Right to Dignity under Article 21, Intervenor joins the petitioners to pray that this Court be pleased to declare that -

a. Section 377 be read down to exclude consenting sex between adults; and,

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[23] https://www.buzzfeed.com/patrickstrudwick/top-psychiatrist-calls-for-radical-solutions-to-address-ment?utm_term=.dax1mnGeY#.st8yVG2wa, accessed on 11 July 2018

[24] *Natural Resources Allocation, in Re, Special Reference Number 1 of 2012*, (2012) 10 SCC 1.

b. Discrimination on the grounds of sexual orientation and gender identity is prohibited.

New Delhi
11 July 2018 **Snr. Adv. Chander Uday Singh**

IN THE SUPREME COURT OF INDIA

(CRIMINAL ORIGINAL JURISDICTION)

WRIT PETITION (CRL.) NO. 76/2016

IN THE MATTER OF:

Navtej Johar and Ors. … ***Petitioners***

Versus

Union of India … ***Respondent***

AND IN THE MATTER OF:

Dr. Alok Sarin … ***Intervenor***

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2.	Indian Psychiatric Society's Position Statement on Same Sex Attraction, Orientation, Behaviour and Life Style, 2 July, 2018	
3.	"Homosexuality", W. Edward Craighead and Charles B. Nemeroff*The Concise CorsiniEncylopedia of Psychology and Behavioural Science*, New Jersey: John Wiley and Sons, 2004	

4.	"NHRC, The Law and the Police", Law and Other Things Blog, Dr.TarunabhKhaitan, 24 July 2009, https://lawandotherthings.com/2009/07/naz-foundation-and-nhrc/#comments (accessed 10 July 2018).	
5.	Amici Curiae brief of the 'American Psychological Association', 'American Psychiatric Association', 'National Association Of Social Workers, And Texas Chapter Of The National Association Of Social Workers', in support of petitioners in *John Geddes Lawrence And Tyron Garner V. State Of Texas*, in the Supreme Court of the United States, No. 02-102	
6.	Amici Curiae brief of the of the 'American Psychological Association', 'American Psychiatric Association', 'National Association Of Social Workers, And Colorado Chapter Of The National Association Of Social Workers', in support of petitioners in *Masterpiece Cakeshop Ltd. And Jack C. Philips*v. *Colorado Civil Rights Commission, Charlie Craig, And David Mullins*	
7.	"Process of Sexual Identity Development for Young People with Same-Sex Desires: Experiences of Exclusion",KetkiRanade, Psychological Foundations – The Journal (2008). Issue 1, Vol. X	
8.	"Contexts of Distress for LGBT People: A Counsellor's Guide", Vinay Chandran and Arvind Narrain, *Nothing to Fix: Medicalization of Sexual Orientation and Gender Identity*, Delhi: Sage Yoda Press, 2016	
9.	"The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study", Mark L. Hatzenbuehler, *American Journal of Public Health*, March 2010, Vol. 100, No. 3, pp. 452-459.	
10.	"Sexual Orientation and Mental Health: Current Evidence and Misconceptions", Brian R. Davis, *Social Science and Public Policy Center at Roosevelt House*, September 2015.	
11.	"Top Psychiatrist Calls For Mental Health Workers To Go Into Gay Clubs", Patrick Strudwick, 15 October 2015, *https://www.buzzfeed.com/patrickstrudwick/top-psychiatrist-calls-for-radical-solutions-to-address-ment*(accessed 10 July, 2018)	

11 JULY 2018

NEW DELHI

COUNSEL FOR THE INTERVENOR, DR. ALOK SARIN

IN THE SUPREME COURT OF INDIA

CRIMINAL (ORIGINAL) JURISDICTION

I.A. No 6946/2018

IN

WRIT PETITION (CRL.) NO. 76/2016

IN THE MATTER OF:

Navtej Johar and Ors. … Petitioners

Versus

Union of India … Respondent

AND IN THE MATTER OF:

Minna Saran … Intervenor

WRITTEN SUBMISSIONS ON BEHALF OF ASHOK H. DESAI (SR. ADVOCATE) FOR THE INTERVENOR, MINNA SARAN

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Index of Cases

1. In **Suresh Kumar Koushal v Naz Foundation,** (2014) 1 SCC 1, a two-judge bench of this Hon'ble Court had held that Section 377 of the Indian Penal Code, 1860 ["**IPC**"], which criminalises "carnal intercourse against the order of nature", was consistent with Articles 14, 15, and 21 of the Constitution. This Hon'ble Court set aside the judgment of the High Court of Delhi in **Naz Foundation v NCT of Delhi,**(2009) 111 DRJ 1 (DB), which had read down S. 377 to exclude same sex relations between consenting adults in private.

2. This Hon'ble Court, On 8th January, 2018, in the matter captioned above, issued notice, observing that:

> *Taking all the aspects in a cumulative manner, we are of the view, the decision in* ***Suresh Kumar Koushal's*** *case (supra) requires re-consideration. As the question relates to constitutional issues, we think it appropriate to refer the matter to a larger Bench*.[1]

3. The intervenor **Minna Saran** is a parent of a lesbian gay bisexual and transgender (LGBT) person and is concerned by the impact of s 377, on the lives of LGBT persons and their families. The intervenor's son, Nishit Saran was a filmmaker and gay rights

[1] *Navtej Singh Johar and Ors*. v. *Union of India*, (2018) 1 SCC 791.

activist who was well known for his documentary called *Summer in My Veins*, which is about how he "comes out" (discloses his sexuality) as gay to the intervenor,and how the intervenor begins to accepts his sexuality. The intervenor's son Nishit Saran died in a tragic road accident in 2002 when he was just 25 years old. After her son's death, the intervenor set up the Nishit Saran Foundation, a registered charitable trust, whose aim is to dispel myths about homosexuality and to organize educational initiatives around the same. The intervenor is thus acutely aware of the social stigma, prejudice, myths and stereotypes that surround the subject of homosexuality in India, and has an immediate and important stake in the outcome of these proceedings.

4. It is submitted that the intervenor has been party before this Hon'ble Court in **Suresh Kumar Koushal v Naz Foundation** at the stages of Appeal by Special Leave (I.A. No. 8 of 2010 in **(**SLP No 10972/2013), review proceedings (Review Petition No. 219/2014) and curative proceedings (Curative Petition 103/2014) which are pending before this Hon'ble Court.

I. The Foundation of s. 377 Stands Eroded by Subsequent Developments, which are Now Part of Our Law:

5. It is respectfully submitted that the foundations of the judgment in **Suresh Kumar Koushal** stand eroded by subsequent judgments of

this nine-judge bench of this Hon'ble Court in **Justice K.S. Puttaswamy** v. **Union of India,** (2017) 10 SCC 1 and the judgment of this Hon'ble Court in **National Legal Services Authority (NALSA)** (2014) 5 SCC 438and in light of legislative amendments through the Criminal Law Amendment Act 2013 and the Protection of Children from Sexual Offences Act (POCSO) 2012.

6. It is submitted that in **Puttaswamy** this Hon'ble Court's decision has been expressly rejected in the plurality opinion by Justice Chandrachud, written for himself and for Justice Khehar, C.J. Justice Agrawal, and Justice Nazeer.

7. Justice Chandrachud in his plurality opinion in **Puttaswamy** addressed the issue of privacy and the right to live with dignity with a specific reference to sexuality. Justice Chandrachud, in the plurality opinion held:

> *Another discordant note which directly bears upon the evolution of the constitutional jurisprudence on the right to privacy finds reflection in a two-Judge Bench decision of this Court in Suresh Kumar Koushal v. Naz Foundation [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1: (2013) 4 SCC (Cri) 1] ("Koushal"). The proceedings before*

this Court arose from a judgment [Naz Foundation v. Govt. (NCT of Delhi), 2009 SCC OnLine Del 1762: 2010 Cri LJ 94] of the Delhi High Court holding that Section 377 of the Penal Code, insofar as it criminalises consensual sexual acts of adults in private is violative of Articles 14, 15 and 21 of the Constitution. The Delhi High Court, however, clarified that Section 377 will continue to govern non-consensual penile, non-vaginal sex and penile non-vaginal sex involving minors. Among the grounds of challenge was that the statutory provision constituted an infringement of the rights to dignity and privacy. The Delhi High Court held that: (Naz Foundation case [Naz Foundation v. Govt. (NCT of Delhi), 2009 SCC OnLine Del 1762 : 2010 Cri LJ 94] , SCC OnLine Del para 48 : Cri LJ p. 110, para 48)

"48. The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right to privacy both are

recognised as dimensions of Article 21." (Para 142 ***Puttuswamy****)*

*Section 377 was held to be a denial of the dignity of an individual and to criminalise his or her core identity solely on account of sexuality would violate Article 21. The High Court adverted at length to global trends in the protection of privacy-dignity rights of homosexuals, including decisions emanating from the US Supreme Court, the South African Constitutional Court and the European Court of Human Rights. The view of the High Court was that a statutory provision targeting homosexuals as a class violates Article 14, and amounted to a hostile discrimination on the grounds of sexual orientation (outlawed by Article 15). The High Court, however, read down Section 377 in the manner which has been adverted to above. (Para 142****Puttaswamy****)*

When the matter travelled to this Court, Singhvi, J. speaking for the Bench dealt with several grounds including the one based on privacy-dignity. The Court recognised that the right to privacy which is recognised by Article 12 of the Universal Declaration and Article 17 of ICCPR has been read into Article 21 "through expansive reading of the right

to life and liberty". This Court, however, found fault with the basis of the judgment of the High Court for the following, among other reasons: (Koushal case [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] , SCC pp. 69-70, para 66) (Para 143 ***Puttaswamy****)*

"66. ... the Division Bench of the High Court overlooked that a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution."(emphasis supplied) (Para 143 ***Puttaswamy****)*

The privacy and dignity based challenge was repelled with the following observations: (SCC p. 78, para 77)

"77. 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."(emphasis supplied) (Para 143**Puttaswamy**)*

Neither of the above reasons can be regarded as a valid constitutional basis for disregarding a claim based on privacy under Article 21 of the Constitution. That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. *The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection.* ***Discrete and insular minorities***

face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the "mainstream". Yet in a democratic Constitution founded on the Rule of Law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. *Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform.* ***The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.****(Para 144****Puttaswamy****)*

The view in Koushal [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] that the High Court had erroneously relied upon international precedents "in its anxiety to protect the so-called rights of LGBT persons" is similarly, in our view, unsustainable. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights".

The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy-based claims of the LGBT population. ***Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity.*** *Equal protection demands protection of the identity of every individual without discrimination. (Para 145**Puttaswamy**)*

The decision in Koushal [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1: (2013) 4 SCC (Cri) 1] presents a de minimis rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-

publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. ***The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime****. Hence the Koushal [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, we disagree with the manner in which Koushal [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] has dealt with the privacy-dignity based claims of LGBT persons on this aspect. (Para 146****Puttaswamy****)*

*Since the challenge to Section 377 is pending consideration before a larger Bench of this Court, we would leave the constitutional validity to be decided in an appropriate proceeding. (Para 147****Puttaswamy****)*

8. Justice Kaul in his concurring opinion in **Puttaswamy** held

> *There are two aspects of the opinion of Dr D.Y. Chandrachud, J., one of which is common to the opinion of Rohinton F. Nariman, J., needing specific mention. While considering the evolution of constitutional jurisprudence on the right to privacy he has referred to the judgment in Suresh Kumar Koushal v. Naz Foundation [Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] . In the challenge laid to Section 377 of the Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High Court, inter alia, observed [Naz Foundation v. Govt. (NCT of Delhi), 2009 SCC OnLine Del 1762 : 2010 Cri LJ 94] that the right to live with dignity and the right to privacy both are recognised as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find favour with the Supreme Court and it was observed that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or*

transgenders and thus, there cannot be any basis for declaring the section ultra vires of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon. The sexual orientation even within the four walls of the house thus became an aspect of debate. ***I am in agreement with the view of Dr D.Y. Chandrachud, J., who in paras 144 to 146 of his judgment, states that the right to privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to constitutional rights and the courts are often called up on to take what may be categorised as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy.*** *(Para 647****Puttaswamy****)*

9. It is submitted that this Hon'ble Court in its decision in **National Legal Services Authority (NALSA)** has held that the rights of transgender persons are protected under Articles 14, 15, 16, 19 and 21 of the Constitution.

10. This Hon'ble Court (Justice Radhakrishan) in **National Legal Services Authority(NALSA)**stated

> *...Section 377, though associated with specific sexual acts, highlighted certain identities, including hijras and* ***was used as an instrument of harassment and physical abuse against hijras and transgender persons****. A Division Bench of this Court in* ***Suresh Kumar Koushal and another*** v. ***Naz Foundation and others*** *[(2014) 1 SCC 1] has already spoken on the constitutionality of Section 377 IPC and, hence, we express no opinion on it since we are in these cases concerned with anal together different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation. (Para 18* ***NALSA****)*

11. While this Hon'ble Court did not expressly overrule **Koushal** in **NALSA**, it is submitted that this Hon'ble Court's decision has created a contradictory situation where the citizenship rights of transgender persons are recognized in law, but their sexual acts remain criminalized under section 377 IPC.

12. It is respectfully submitted that the Criminal Law Amendment Act (2013) by widening the scope of the sexual assault law to cover non peno-vaginal sexual assault, and the Protection of Children

from Sexual Offences Act (POCSO) 2012, by criminalizing non-consensual sexual acts between children, have plugged important gaps in the law governing sexual violence in India. These legislative developments have further undermined the basis for retaining s. 377 on the statute book by creating a class of sexual acts that are proscribed between adult homosexual persons and not between adult heterosexual persons.

II. Section 377 is Anathema to the Ideal of Fraternity in the Preamble and the Right to Dignity Guaranteed by Article 21 of the Constitution

13. It is submitted that s. 377 violates the ideal of fraternity in the Preamble to the Constitution. The Preamble was drafted in light of the Objectives Resolution. The understanding of the term fraternity in the Preamble is most clearly articulated by B.R. Ambedkar during the Constituent Assembly Debates. Dr. Ambedkar during the debates stressed the importance of striving to make our political democracy a social democracy as well. Dr. Ambedkar states:

> *"Political democracy cannot last unless there lies at the base of it social democracy.* ***What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life.*** *These principles of liberty, equality and fraternity are not to be*

treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. ***Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.*** *Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty equality could not become a natural course of things. It would require a constable to enforce them." (Constituent Assembly Debates 25 November 1949) (**See Annexure 1, page no.**)*

14. Dr. Ambedkar during the Constituent Assembly Debates went on to state:

The second thing we are wanting in is recognition of the principle of fraternity. What does fraternity mean? ***Fraternity means a sense of common brotherhood of all Indians-if Indians being one people. It is the principle which gives unity and solidarity to social life.*** *(Constituent Assembly Debates, 25 November 1949) (**See Annexure 1 page no.**)*

15. Justice Chandrachud's plurality opinion in Justice Puttaswamy states that dignity as a constitutional value finds its place in the Preamble through the value of fraternity, as the Preamble underlines the value of fraternity assuring the dignity of the individual.

16. It is submitted that in this Hon'ble Court's decision in **Puttaswamy**, Justice Chandrachud, in his plurality opinion held:

> *The Preamble emphasises the need to secure to all citizens justice, liberty, equality and* ***fraternity****. Together they constitute the founding faith or the blueprint of values embodied with a sense of permanence in the constitutional document. The Preamble speaks of securing liberty of thought, expression, belief, faith and worship. Fraternityis to be promoted to assure the dignity of the individual.* ***The individual lies at the core of constitutional focus and the ideals of justice, liberty, equality and fraternity animate the vision of securing a dignified existence to the individual.*** *The Preamble envisions a social ordering in which fundamental constitutional values are regarded as indispensable to the pursuit of happiness. Such fundamental values have also found reflection in the foundational*

document of totalitarian regimes in other parts of the world. What distinguishes India is the adoption of a democratic way of life, founded on the rule of law. ***Democracy accepts differences of perception, acknowledges divergences in ways of life, and respects dissent.*** *(Para 107****Puttaswamy****)*

17. Justice Chandrachud, in his plurality opinion in Puttaswamy held:

To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasizing, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. ***Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence.*** *Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfillment of dignity and is a core value which the protection of life and liberty is intended to achieve. (Para 119****Puttaswamy****)*

18. Justice Nariman, in his opinion in **Puttaswamy** has highlighted the importance of fraternity in our constitutional framework:

> *"...But most important of all is the cardinal value of fraternity, which assures the dignity of the individual.* ***The dignity of the individual encompasses the right of the individual to develop to the full extent of his potential, and this development can only be if an individual has autonomy over fundamental personal choices and control over dissemination of personal information*** *which may be infringed through an unauthorized use of such information. It is clear that Article 21, more than any of the other articles in the fundamental rights chapter that reflects this constitutional value in full, and is to be read in consonance with these values and with the international covenants that we have referred to. (Para 525****Puttaswamy****)*

19. It is submitted that the constitutional value of fraternity has been invoked by Chief Justice Dipak Misra in the judgment of this Hon'ble Court in **Subramanian Swamy v. Union of India**(2016) 7 SCC 221, has upheld the ideal of fraternity, mutual respect and concern; harmony, brotherhood, as homogeneity in a positive sense, without trampling on dissent and diversity.

20. This Hon'ble Court in Subramanian Swamy held

"The term "fraternity" has a significant place in the history of constitutional law. It has, in fact, come into prominence after French Revolution. The motto of Republican France echoes: - 'Liberté, égalité, fraternité', or 'Liberty, equality, fraternity'. ***The term "fraternity" has an animating effect in the constitutional spectrum. The Preamble states that it is a constitutional duty to promote fraternity assuring the dignity of the individual.*** *Be it stated that fraternity is a perambulatory promise." [Para 153**Subramanian Swamy**]*

21. This Hon'ble Court in **Subramanian Swamy** held:

*Fraternity as a concept is different from the other constitutional goals. It, as a constitutional concept, has a keen bond of sorority with other concepts. And hence**, it must be understood in the breed of homogeneity in a positive sense and not to trample dissent and diversity. It is neither isolated nor lonely.*** *The idea of fraternity is recognised as a constitutional norm and a precept. It is a constitutional virtue that is required to be sustained and nourished." [Para 156 **Subramanian Swamy**]*

22. This Hon'ble Court in **Subramanian Swamy** held:

The concept of fraternity under the Indian Constitution expects every citizen to respect the dignity of the other.

*Mutual respect is the fulcrum of fraternity that assures dignity. It does not mean that there cannot be dissent or difference or discordance or a different voice. [SCC Para 161**Subramanian Swamy**]*

*..."It would not amount to an overstatement if it is said that constitutional fraternity and the intrinsic value inhered in fundamental duty proclaim the constitutional assurance of mutual respect and concern for each other's dignity." [Para 166 **Subramanian Swamy**]*

23. It is submitted that this Hon'ble Court has underlined the strong link between fraternity, dignity, and equality of status and opportunity. In an eleven judge Constitutional Bench decision in **Indira Sahwney** v. **Union of India**1992 Supp (3) SCC 217, this Hon'ble Court held:

"The aim of any civilised society should be to secure dignity to every individual. There cannot be dignity without equality of status and opportunity. The absence of opportunities in any walk of social life is a denial of equal status and equal participation in the affairs of the society, and therefore, of equal its equal membership. The dignity of the individual is dented in direct proportion to his deprivation of the equal access to social means. The democratic foundations are

*missing when equal opportunity to grow, govern, and give one's best to, the society is denied to a sensible section of the society. The deprivation of the opportunities may be direct or indirect as when the wherewithals to avail of them are denied. Nevertheless the consequences are as potent. (Para 411**Indira Sahwney**)*

24. In **Indira Sahwney**, this Hon'ble Court went on to say:

Inequality ill-favours fraternity, and unity remains a dream without fraternity. The goal enumerated in the Preamble of the Constitution, of fraternity assuring the dignity of the individual and the unity and integrity of the nation must therefore remain unattainable so long as the equality of opportunity is not ensured at all. *(Para 412**Indira Sahwney**)*

25. It is submitted that in **Nandini Sundar** v. **State of Chhattisgarh** (2011) 7 SCC 547, this Hon'ble Court, in its decision authored by Justice Sudershen Reddy, has highlighted the value of fraternity in the Constitution. This Hon'ble Court held:

*The Constitution itself, in no uncertain terms, demands that **the State shall strive, incessantly and consistently, to promote fraternity** amongst all citizens such that dignity of*

every citizen is protected, nourished and promoted. (Para 16 ***Nandini Sundar)***

26. This Hon'ble Court in **Nandini Sundar** stated

> ***Our Constitution posits that unless we secure for our citizens conditions of social, economic and political justice for all who live in India, we would not have achieved human dignity for our citizens, nor would we be in a position to promote fraternity amongst groups of them.*** *Policies that run counter to that essential truth are necessarily destructive of national unity and integrity. (Para 25* ***Nandini Sundar)***

27. This Hon'ble Court in **Nandini Sundar** held:

> ***The Constitution casts a positive obligation on the State to undertake all such necessary steps in order to protect the fundamental rights of all citizens, and in some cases even of non-citizens, and achieve for the people of India conditions in which their human dignity is protected and***

they are enabled to live in conditions of fraternity*. (Para 52 **Nandini Sundar**)*

28. This Hon'ble Court in a number of its judgments including in **Prem Shankar Shukla** v. **Delhi Administration** (1980) 3 SCC 526 and **Francis Coralie Mullin** v. **The Administrator, Union Territory of Delhi** (1981) 1 SCC 608has recognized **the right to live with dignity** of the individual as protected under the right to life guaranteed under Article 21 of the Constitution.

29. It is submitted that the Delhi High Court in **Naz Foundation** v. **Union of India**2009 (111) DRJ 1 (DB) has recognized that under the Indian Constitution the right to live with dignity and the right to privacy are both recognized as dimensions of Article 21. In **Naz Foundation**, the Delhi High Court in its decision held:

> *Section 377 IPC denies a person's dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. **As it stands s. 377 IPC denies a person full personhood which is implicit in notion of life under Article 21 of the Constitution.** (Para 48 **Naz Foundation**)*

30. It is submitted that the Delhi High Court in **Naz Foundation v Union of Indi**a held

*The criminalisation of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery. ...This vast majority (borrowing the language of the South African Constitutional Court**) is denied "moral full citizenship"**. Section 377 IPC grossly violates their right to privacy and liberty embodied in Article 21 insofar as it criminalises consensual sexual acts between adults in private. **These fundamental rights had their roots deep in the struggle for independence and, as pointed out by Granville Austin in "The Indian Constitution – Cornerstone of A Nation", "they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India". In the words of Justice V.R. Krishna Iyer these rights are cardinal to a decent human order and protected by constitutional armour.The spirit of Man is at the root of Article 21, absent liberty, other freedoms are frozen.** [Maneka Gandhi (supra) at para 76 SCC](Para 52**Naz Foundation**)*

31. It is submitted that the constitutional value of fraternity linked inextricably to the dignity of the individual, the equality of status

and opportunity, and to mutual respect and diversity, is inimical to the spirit and application of section 377 IPC, which criminalizes LGBT persons and renders them “unapprehended felons”

III. Homosexuality and Same-Sex Love is not Alien to Indian Culture:

32. It is submitted that India has a history and culture of tolerance to same-sex love and homosexuality, and it is not homosexuality but section 377 IPC that is alien to Indian culture. There is documentation of extensive historical literature that deals with same-sex love in India, which is part of our rich, varied and tolerant culture. (**See Annexure 2, page**)

RELIEF

33. In the light of these submissions this Hon'ble Court may be pleased to read down Section 377 IPC accordingly.

ANNEXURES

Annexure 1 - Extracts from *Constitutional Assembly Debates*, Official Report, Volume IX, (14 November 1949 – 26 November 1949), pp. 979-980

Annexure 2 - Contents Pages, Ruth Vanita and Saleem Kidwai, *Same-Sex Love in India: Readings from Literature and History*, Macmillan, 2001.

Annexure 3 -Justice Leila Seth, "A Mother and a Judge Speaks Out on Section 377", *Times of India*, 26 January 2014.

Annexure 4 - Anil Divan, "Gay Rights are Human Rights", *The Hindu*, 19 February 2016.

IN THE SUPREME COURT OF INDIA

CRL MP No. 6712 of 2018

IN

WRIT PETITION (CRIMINAL) NO. 76 OF 2016

IN THE MATTER OF:

Navtej Singh Johar & Ors. ...Petitioners

Vs.

Union of India ...Respondent

AND IN THE MATTER OF:

Professor Nivedita Menon & Ors. ...Interveners

WRITTEN SUBMISSION ON BEHALF OF MR. KRISHNAN VENUGOPAL, SENIOR ADVOCATE

"Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level, it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution."

J. Sachs in ***The National Coalition for Gay and Lesbian Equality v. The Minister of Justice,*** Constitutional Court of South Africa (1998)

1. The above statement captures the heart of the contentions raised by the present interveners, who have been party to the proceedings in this Hon'ble Court, since 2010.

2. The interveners are a group of renowned academicians from the central universities based in Delhi, and have engaged with gender and sexuality issues for decades [See: **Nivedita Menon**, "***How Natural is Normal? Feminism and Compulsory Heterosexuality***" at **pages 143-150** of the **Compilation of Documents**]

I. Article 19(1)(a) of the Constitution guarantees the freedom of speech and expression, which includes the freedom to express one's sexual identity and personhood

3. Article 19(1)(a) of the Constitution guarantees that all citizens have the fundamental freedom of speech and expression. In ***Re: Ramlila Maidan*** [2012 5 SCC 1], this Hon'ble Court held:

"the freedom of speech is the bulwark of democratic Government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press.

11. ... The framers of our Constitution, in unambiguous terms, granted the right to freedom of speech and expression and the right to assemble peaceably and without arms. This gave to the citizens of this country a very valuable right, which is the essence of any democratic system. There could be no expression without these rights. Liberty of thought enables liberty of expression."

4. In ***Bennett and Coleman & Co. v. Union of India***, (1972) 2 SCC 788, Mathew J., while dissenting on the conclusion, at para 153 stated:

"The values sought by society in protecting the right to the freedom of speech would fall into four broad categories. Free expression is necessary: (1) for individual fulfilment, (2) for attainment of truth, (3) for participation by members of the society in political or social decision making and (4)- for maintaining the balance 'between stability and change in society. In the traditional theory, freedom of expression is not only an individual good, but a social good. It is the best process for advancing knowledge and discovering truth. The theory contemplates more than a process of individual judgment. It asserts that the process is also the best method to reach a general or social judgment. In a democracy the theory is that all men are entitled to participate in the process of formulating- common decisions. (see Thomas I. Emerson, Toward a General Theory of First Amendment) (supra). The crucial point is not that freedom of expression is politically useful but that it is indispensable to the operation of a democratic system. In a democracy the basic premise is that the people are both the governors and the governed."

5. Importantly, Section 19(1)(a) does not only protect speech, but also other forms of expression, for example expression through the casting of one's vote (***Union of India v. Assn. for Democratic Rights***, (2002) 5 SCC 294).

6. Similarly, Article 19(1)(a) protects the fundamental freedom of LGBT persons to express their sexual identity, orientation and personhood, through speech, manner of dressing, choice of romantic and sexual partner, expression of romantic and sexual desire or any other means.

7. In essence, freedom of expression includes expressing one's identity, intimacy, intellect, interest, tastes, and personality in public, as well as private expression of oneself, being in sanctuary or in seclusion. One should not be forced to hide one's sexual identity.

8. In ***State of Karnataka v. Associated Management of English Medium Primary and Secondary Schools***, (2014) 9 SCC 485, this Hon'ble Court held at para 37:

> "*Freedom of choice in the matter of speech and expression is absolutely necessary for an individual to develop his personality in his own way.*"

9. This Hon'ble Court in ***National Legal Services Authority v. Union of India***, (2014) 5 SCC 438, held that at para 69:

> "*Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.*"

10. Elaborating on the strong linkages between Article 19(1) and Article 21, this Hon'ble Court held in ***K.S. Puttaswamy vs. Union of India*** (2017) 10 SCC 1

> "*The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences.*"

11. LGBT persons should be free to express themselves in society, without the fear of backlash of criminal law and the accompanying stigma that it sanctions.

II. Section 377, in so far as it criminalises the innate sexual expression of gay men and transgender persons, violates the fundamental freedom of expression under Article 19(1)(a)

12. Section 377, under the guise of targeting conduct, actually targets the identity of LGBT persons. Once it is accepted that homosexual orientation is innate, and not learned or deviant behavior, it follows that LGBT persons cannot freely express themselves about their own sexual orientation and, therefore, their identity because they potentially become the target for criminal prosecution under Section 377.

13. Section 377 has been instrumental in the harassment, intimidation, blackmail, rape and torture of homosexual men in India. There have been numerous reported instances of harassment against homosexual men by the police as well as by other persons, including organized gangs specifically. The perpetrators lure persons into situations where the latter fear of prosecution under Section 377 and then use the fear of the law to commit offences of sexual assault, theft and blackmail. The perpetrators take advantage of the atmosphere of stigma, isolation, and silence created by Section 377, preying on those who are most isolated and alone. [See: **Unnatural Offences": Obstacles to Justice in India based on Sexual Orientation and Gender Identity', Report by International Commission of Jurists** (February, 2017) at **pages 31-93** of the **Compilation of Documents**]

14. Because Section 377 exists on the statute book, the police are able to harass the LGBT community through extortion, entrapment, illegal detention, abuse and outing the identity of homosexual men as well as rape and sexual assault. Often, police befriend gay men on social networking sites, and then blackmail them, or subject them to sexual abuse. Other cases include gay men meeting other people on social media applications, and when they meet in person, the other person blackmails or threatens to disclose the identity of gay men to their families. [See: **Violence against MSM, Transgenders & Hijra, a hidden reality', India HIV/AIDS Alliance, New Delhi (2015) at pages 17-30** of the **Compilation of Documents; Police Terror on sexual minorities in Hassan, Karnataka, A Report by Aneka, Bangalore, June, 2014** at **pages 5-16** of the **Compilation of Documents**]

15. The fear of being prosecuted under Section 377 prevents LGBT persons from approaching the police for other offences committed

against them. In effect, Section 377 ousts LGBT persons from the protections criminal law guarantees to other citizens in the country.

16. Thus, fear of criminalisation severely hinders the freedom of LGBT persons, who live their lives in secret, hiding from the world and from their own selves, always fearful that their orientation would be disclosed, resulting in backlash and criminal sanction.

17. In United States and Canada, the Courts have held that denying gay persons their right to bring their same sex partner to school events is a violation of their rights under the First Amendment. One of the critical forms of expression of sexual orientation is through the formation of relationships, and the acknowledgement of such relationships in public.

[See:

— ***Fricke v. Lynch***, 491 F.Supp at 385 (D.R.I. 1980) at **pages 1-6** of **Compilation of International Materials**;

— ***Constance McMillen v. Itawamba County School District***, 702 F.Supp.2d 699 (2010) at **pages 7-13** of **Compilation of International Materials**;

— ***Hall v. Powers***, 59 O.R. (3d) 423, Ontario Superior Court of Justice] at **pages 14-39** of **Compilation of International Materials**;

18. One of the direct effects of Section 377 is to curb discussion around homosexuality and the expression of same sex desire, which is a direct limitation on the freedom to receive information, which has been recognised to be a part of the freedom of speech and expression under Article 19(1)(a) [See: ***Secy, Ministry of Information and Broadcasting v. Cricket Assoication for Bengal and Ors.***, (1995) 2 SCC 161, paras 192 and 193].

19. The **Yogyakarta Principles** in Principle 19 recognise that the freedom of speech and expression in the context of gender identity and sexual orientation includes the expression of identity and personhood, through speech, deportment, dress, and other means as well as to seek, receive and impart information relating to human rights, sexual orientation and gender identity. States are obligated to, amongst others,:

    a. Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a

discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

b. Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.

III. Section 377 has a 'chilling effect on the freedom of expression

20. The entire edifice of Section 377 is built on creating a culture of fear and silence around homosexuality or on same sex relationships, which was evident from even before the enactment of IPC in 1860.

21. In 1837, in Note M of the Report of the Indian Law Commission of the Draft Penal Code of 1837, Lord Macaulay referring to unnatural offences, which were slightly different from the present Section 377, stated that:

> "*Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgement of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefit which be derived from legislative measures framed with the greatest precision.*" [See: **pages 1-4 of the Compilation of Documents**]

22. This remains one of the biggest effects of Section 377, i.e., deafening silence on homosexuality, same sex desires and expression. The culture of fear and silence has resulted in a society, where many people do not know a single homosexual or transgender person amongst their friends, colleagues and family.

23. The mere existence of Section 377 is sufficient to gag an individual's right to self-expression, and creates a climate of fear and panic that has a chilling effect on alternate sexuality.

24. In ***Khushboo v. Kanniammal*** (2010) 5 SCC 60), this Hon'ble Court held at para 46:

> *"If the complainants vehemently disagreed with the appellant's views, then they should have contested her*

views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the `freedom of speech and expression".

25. This Hon'ble Court in ***Shreya Singhal v. Union of India***, (2015) 5 SCC 1 at para 11 has quoted the concurring judgment of Brandeis J. in Whitney v. California (274 US 357 (1927)) with approval, wherein it was stated:

> "*Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.*
>
> *Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the*

probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." (at page 1105, 1106)"

26. This Hon'ble Court in ***Shafin Jahan v. Asokan K.M. & Ors.*** [2018 SCCOnLine SC 343] has recognised the chilling effect of State control on the exercise of rights, by holding:

> *"95. Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms. Others are dissuaded to exercise their liberties for fear of the reprisals, which may result upon the free exercise of the choice. The chilling effect on others has a pernicious tendency to prevent them from asserting their liberty. Public spectacles involving a harsh exercise of State power prevent the exercise of freedom, by others in the same milieu. Nothing can be as destructive of freedom and liberty. Fear silences freedom."*

IV. Section 377 constitutes an 'unreasonable restriction' and is not covered under Article 19(2)

27. Section 377, to the extent it criminalises adult consensual sexual conduct, does not constitute a 'reasonable restriction' within the meaning of Article 19(2), and is unreasonable. It cannot be justified on the ground of 'morality', or any other restriction mentioned in Art. 19(2).

28. With respect to 'morality' in Article 19(2), the term 'morality' should be construed as 'constitutional morality' and not public morality. Constitutional morality means strict and complete adherence to the principles enshrined in the Constitution and not to act in a manner violative of the rule of law.

29. In ***Manoj Narula vs. Union of India*** [(2014) 9 SCC 1], this Hon'ble Court at para 75 held that:

"*The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality.*"

30. In ***Independent Thought vs. Union of India*** (2017) 10 SCC 800, this Hon'ble Court, while striking down the Exception 2 to Section 375, IPC, held at para 89 that

> "*Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 of the IPC that sanctifies a tradition or custom that is no longer sustainable.*"

31. In ***Government of NCT of Delhi v. Union of India****, C.A. No. 2357 of 2017, decided on 04.07.2018,* this Hon'ble Court held at para 61 that

> *"constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution."*

32. This was succinctly developed by the High Court in ***Naz Foundation v. NCT of Delhi*** (2009) 111 DRJ 1, wherein the High Court held at paras 79-80:

> "*Popular morality, as distinct from 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 Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals on account of their sexual orientation would be against the constitutional morality*"

33. It is well-settled that penal law cannot be used to impose or sanction social morality. In ***Khushboo*** (supra), this Hon'ble Court held at para 45:

"*Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co-extensive.*

V. Section 377 offers a legal basis to suppress artistic expression around alternate sexuality

34. Section 377, and the stigma associated with homosexuality, severely restricts the freedom of speech and expression of artists and filmmakers, who want to make content on homosexuality, or portray stories about LGBT lives.

35. In 2013, the Government of Gujarat denied tax exemption to a Gujarati film on 'homosexuality' ('*Meghdhanushya*'). Though the High Court of Gujarat struck down the government's decision, the Gujarat Government appealed to this Hon'ble Court on the ground of reinstatement of Section 377, and got a stay on that High Court's order. In May, 2018, this Hon'ble Court was pleased to dismiss the SLP filed by the Gujarat Government against the High Court order. [See: **Gujarat High Court decision in *Kiran Kumar Devmani v. State of Gujarat* at pages 109-125; and decision of this Hon'ble Court in *State of Gujarat vs. Kiran Kumar* (Civil Appeal No. 7208 of 2018 dated 03.05.2018)** at **pages 126-127** of the **Compilation of Documents]**

36. Similar such instances of censorship of homosexual content in films, including an affidavit of a filmmaker, Shridhar Rangayan who faced such censorship, are mentioned here. [**pages 94-108**, **128-142** of the **Compilation of Documents**]

37. All these instances show that the fundamental freedom of expressing and communicating one's ideas, thoughts, messages, information, feelings and emotions, guaranteed under Article 19(1)(a) is completely thwarted by Section 377, which impedes any public discussion or exhibition of films talking about homosexuality or LGBT persons. Words like 'gay' or 'lesbian' cannot even be uttered in a film.

VI. International human rights law protects the fundamental right to speech and expression to all persons, irrespective of sexual orientation

38. It is well-settled that the limitations on the right to expression, on the basis of sexual orientation, violate the right guaranteed under Article 19 of the International Covenant on Civil and Political Rights ('ICCPR').

a. Office of the United Nations High Commissioner for Human Rights, **"Born Free and Equal",** 2012 (**pages 40-99** of the **Compilation of International Materials**)

b. United Nations Human Rights Committee, '***Irina Fedotova v. Russian Federation***', **Communication No. 1932/2010** (November, 2012) (CCPR/C/106/D/1932/2010) at para 10.7 and 10.8 (**pages 100-116** of the **Compilation of International Materials**)

c. United Nations Human Rights Committee, **"Concluding Observations on the Fourth Periodic Report of Georgia**", August, 2014 at para 8 [CCPR/C/GEO/CO/4] (**pages 117-124** of the **Compilation of International Materials**)

d. Report of the Special Rapporteur in the field of Cultural Rights (March, 2013) at paras 101-104 (A/HRC/23/34/Add.1) (**pages 125-146** of the **Compilation of International Materials**)

e. Report of the Office of the United Nations High Commissioner for Human Rights, **"Discrimination and violence against individuals based on their Sexual Orientation and Gender Identity**" (May, 2015) at paras 18, 48 and 49 (A/HRC/29/23) (**pages 147-168** of the **Compilation of International Materials**)

f. ***Kaos GL v. Turkey***, European Court of Human Rights (Application No. 4982/07, date of decision: 22.11.2016) (**pages 169-171** of the **Compilation of International Materials**)

g. ***Bayev And Others v. Russia***, European Court of Human Rights (Application No. 67667/09, date of decision: 20.06.2017) at paras 61-90 (**pages 172-218** of the **Compilation of International Materials**)

VII. Section 377 violates the fundamental freedoms of peaceful assembly and association guaranteed under Articles 19(1)(b) and (c)

39. It is well-settled that freedom of assembly is an essential element of any democratic system. It performs a vital function in our constitutional system, and public streets are the 'natural' places for expression of opinion and dissemination of ideas [***Himat Lal Shah v.***

Commissioner of Police, Ahmedabad (1973) 1 SCC 227 at para 69-70]

40. Freedom of assembly to organize gay pride marches has been categorically recognised by the European Court of Human Rights.
    a. ***Alekseyev v. Russia*** (Application No. 4916//07, date of decision: 21.10.2010), European Court of Human Rights, at para 68-88 (**pages 219-248** of the **Compilation of International Materials**)
    b. ***GenderDoc-M v. Moldova*** (Application No. 9106/06, date of decision: 21.06.2012), European Court of Human Rights, at para 48-55 (**pages 249-268** of the **Compilation of International Materials**)
    c. ***Identoba & Ors. v. Georgia*** (Application No. 73235/12, date of decision: 12.05.2015), European Court of Human Rights, at para 91-99 (**pages 269-303** of the **Compilation of International Materials**)

41. Freedom of association of LGBT persons has been recognised in many countries.
    a. ***Gay Alliance of Students v. Matthews***, 544 F.2d 162, United States Court of Appeals, Fourth Circuit (1976) (denial of official recognition to a gay student group by Virginia Commonwealth University) (**pages 304-311** of the **Compilation of International Materials**)
    b. ***Gay Student Services v. Texas***, 737 F.2d 1317 (5th Cir. 1984), United States Court of Appeals for the Fifth Circuit (denial of registration as a student group by Texas A&M University) (**pages 312-329** of the **Compilation of International Materials**)
    c. ***Ang Ladlad LGBT party v. Commission of Elections***, G.R. No. 190582, Supreme Court of Philippines (2010) (denial of registration as a political party) (**pages 330-355** of the **Compilation of International Materials**)
    d. ***Thuto Rammoge v. Attorney General of Botswana,*** MAHGB-000175-13, High Court of Botswana (2014) (denial of registration as a NGO on LGBT rights) (**pages 356-382** of the **Compilation of International Materials**)
    e. ***Eric Gitari v. NGO Coordination Board & Ors.,*** Petition No. 440 of 2013, High Court of Kenya (2015) (denial of registration

as a NGO working on LGBT rights) (**pages 383-410** of the **Compilation of International Materials**)

42. Section 377 directly impinges on the freedom of assembly and association of LGBT persons because they fear being criminally prosecuted.

VIII. Section 377 violates the fundamental right to freedom of conscience protected under Article 25 of the Constitution

43. Article 25 of the Constitution guarantees the freedom of conscience to all persons. Conscience is not necessarily limited to religious beliefs, but refers to the moral compass of a person with respect to her core beliefs. Accordingly, deeply and sincerely held beliefs derived from purely ethical sources can be termed as 'conscience', thereby entitled to protection under Article 25.

44. As evident from Article 25, conscience and religion are related, but cannot be inter-changed. It falls within the domain of '*liberty of thought*', as referred to in the Preamble.

45. This Hon'ble Court in ***Puttaswamy*** (supra) has referred to J.S. Mill's essay 'On Liberty' (1959), which stated:

> "*This, then is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological*" (paras 408 and 523)

46. Pertinently, this Hon'ble Court in ***Puttaswamy*** also held that:

> *"there are areas other than religious beliefs which form part of the individual's freedom of conscience such as political belief, etc, which form part of liberty under Article 21" (para 372)*

47. Accordingly, the freedom of conscience guaranteed under Article 25 extends to the entire consciousness of a human, including beliefs of her sexual identity, which, in fact, go to the core of each individual's sense of self, as well the intensely personal nature of her own sexual orientation. In this regard, conscience refers to the liberty and

autonomy, which inheres in each individual, and the ability to take decisions on matters that are central to the pursuit of happiness.

48. Article 1 of ***Universal Declaration of Human Rights*** (1948) states:

"*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience, and should act towards one another in a spirit of brotherhood.*"

49. Section 377, by prohibiting sexual acts that are innate to homosexual men and transgender persons, thereby penalizing their ways of life and beliefs on love, intimacy and desires, violates the freedom of conscience of such individuals protected under Article 25 of the Constitution. It impairs their moral sense of self, personhood and personal integrity, by treating them as a second-class citizens for being who they are.

50. As J. Sachs in ***The National Coalition for Gay and Lesbian Equality v. The Minister of Justice (***1998), at para 117 notes:

> "*The Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the State to choose or to arrange the choice of partner, but for the partners to choose themselves*".

IX. Private parties cannot defend the constitutionality of Section 377, IPC

51. Only the State has locus to defend the constitutionality of a law. No private parties have such standing in law.

— ***Diamond v. Charles,*** 476 US 54 (1986, US Supreme Court) (**pages 411-427** of the **Compilation of International Materials**)

— ***Hollingsworth v. Perry***, 133 S.Ct. 2652 (2013, US Supreme Court) (**pages 428-462** of the **Compilation of International Materials**)

52. The Union of India, vide its affidavit dated 11.07.2018 submitted in this Hon'ble Court, has clarified that "*so far as the constitutional validity of Section 377 to the extent it applies to "consensual acts of adults in private is concerned, the Union of India would leave the said question to the wisdom of this Hon'ble Court*" (para 6).

53. Private parties possess no locus to defend the constitutionality of laws, and ought not to be allowed to do so.

X. Section 377 undermines the democratic framework by targeting a minority community

54. In ***NALSA*** (supra), this Hon'ble Court held at para 129:

> "*Our Constitution inheres liberal and substantive democracy with the rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. The rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human beings.*"

55. The essence of democracy lies in its celebration of diversity and plural values and norms. Section 377, by criminalizing sexual practices that are usually associated with sexual minorities, impairs the democratic foundation of this country, by imposing majority social and sexual mores, and negatively impacts the free exchange of ideas, and views on myriad forms of sexuality.

XI. Section 377 is not about only about 'prosecution', but about the real damage done to LGBT persons, which is unreported

56. The oft-repeated phrase '*unapprehended felon*' to describe the effect of Section 377 fails to capture the sheer devastating impact the law has had on the rights and health of LGBT persons, with lives destroyed, bodies brutalized, and minds scarred forever. No act of decriminalization itself can compensate for the decades lost, bullying in childhood, loneliness and isolation suffered, and constant feeling of being considered *'less than human'*.

57. The pressure of pretending to be somebody else, to hide one's true feelings, to constantly watch one's gestures and behaviour, so as not to reveal one's sexuality, engaging in risky sexual activity in secret, basically to lead a life of a lie, is excruciating. The pain of being

different, having no one to talk to, feeling dirty and guilty about oneself, coming to terms with one's sexuality after years, realising that homosexuality is both socially and legally disapproved, not being able to live freely, and having no legal recognition of same sex relationships, all these make LGBT persons either resign to a closeted life or to embark on a life of struggle and violence, without any social, legal or institutional support. Only few have the courage or tenacity to go through the latter.

XII. The decision in *Koushal* ought to be overruled and the fundamental rights of LGBT persons affirmed

58. This Hon'ble Court's decision in ***Koushal*** needs to be overruled. The damage done by the said decision is unimaginable. In one stroke, thousands of gay men and transgender persons became recriminalized in 2013, after almost five years of freedom. The Number of cases of harassment and violations saw a sharp rise, especially cases of blackmail and extortion. From 260 cases in 2012, the numbers went up to 1155 in 2014 [See: **pages 19-20** of the **Compilation of Documents**].

59. This Hon'ble Court in ***Puttaswamy***, in effect, has removed the entire basis of ***Koushal*** but refrained from making a determination on the constitutional validity of Section 377, specifically because the curative petitions were pending.

60. The Supreme Court of United States in ***Lawrence vs. Texas***, while categorically overruling *Bowers vs. Hardwick*, held:

> "*Bowers was not correct when it was decided, and it is not correct today. It ought not to remain a binding precedent. Bowers vs. Hardwick should be and now is overruled*".

61. Further, in ***Obergefell vs. Hodges*** [576 US __(2015)], the United States Supreme Court held that

> "*Yet, in effect, Bowers upheld state action that denied gays and* lesbians *a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the Bowers Court. That is why Lawrence held Bowers was "not correct when it was decided." Although Bowers was eventually repudiated in Lawrence, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after Bowers*

was overruled. Dignitary wounds cannot always be healed with the stroke of a pen."

62. Similarly, in the present case, ***Koushal*** was not correct when it was decided, and it is not correct today, as held in ***Puttaswamy***. It ought to be overruled with immediate effect.

63. And Section 377, to the extent it criminalises sexual acts between consenting adults, ought to be struck down for violating the fundamental rights guaranteed under Articles 14, 15, 19(1), 21 and 25 of the Constitution.

64. This case is not just about 'consensual sexual acts', but essentially about the freedom to live, express oneself, love, intimacy, and association. For far too long, far too many people have been denied the benefits of being full citizens of this country, and this Hon'ble Court, in its jurisdiction as the guarantor of the fundamental rights, be pleased to rectify that.

Date: 19.07.2018
Place: New Delhi

Drawn By:
Amritananda Chakravorty, Advocate
Mihir Samson, Advocate

Settled By:
Krishnan Venugopal, Senior Advocate

IN THE SUPREME COURT OF INDIA

ORIGINAL JURISDICTION

WP(Crl) No. 76 of 2016

NAVTEJ SINGH JAUHAR. ... Petitioners

Versus

UNION OF INDIA ... Respondents

SUBMISSIONS OF MS. MEENAKSHI ARORA, SR. ADV.

A. Section 377 of the IPC is in violation of Article 14 of the Constitution because:

(a) It is unconstitutionally vague

(b) The classification of offenses based on "the order of nature" is not based on any rational differentia. To the extent an object is discernible from the vague wording of section 377, such object is discriminatory and thus unconstitutional.

(c) Section 377 suffers from the vice of manifest arbitrariness.

1. In order to determine the determine the validity of section 377 on the touchstone of Article 14, it is pertinent to try and determine its true purpose or objective, which can perhaps be arrived at by a brief examination of its history[1].

A brief history of section 377:

2. The laws against buggery and sodomy owe their origin to Biblical injunctions and were for the longest time enforced in England by ecclesiastical courts[2].

[1] This exercise is fortified by the judgment of this Hon'ble Court in *Shashikant Laxman Kale* v. *Union of India*, (1990) 4 SCC 366, para 17 quoted with approval in *Harsora* v. *Harsora*, (2016) 10 SCC 165.

[2] See generally, Michael Kirby, *The Sodomy Offence: England's least lovely law export*, [2011] Journal of Commonwealth Criminal Law; *Human Rights Watch, The Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, NY, December 2008

2.1 The medieval treatise by Fleta called *Seu Commentarius Juris Angicani* which (circa 1290 during the reign of King Edward I) provided "*Apostate Christians, sorcerers, and the like should be drawn and burnt. Those who have connections with Jews and Jewesses or are guilty of bestiality or sodomy shall be buried alive in the ground, provided they be taken in the act and convicted by lawful and open testimony.*[3]"

2.2 In the treatise by Britton, death by burning was prescribed for sodomy. "*Note, it appeareth by Britton in his book, that those persons shall be burnt who feloniously burn others Corn or others Houses, and also those who are Sorcerers or Sorceresses; and Sodomites and Hereticks shall be burnt*[4]"

2.3 In the treatise called *Mirrour of Justices* by Andrew Horne[5], (recognised as authoritative by Coke, Plowden and others[6]) sodomy is classed as a "crime of majesty""against the king of heaven"[7] along with heresy.

2.4 Footnote 3 in Justice Blackmun's dissenting opinion in *Bowers* v. *Hardwick*[8] states, "*The theological nature of the origin of Anglo-American antisodomy statutes is patent. It was not until 1533 that sodomy was made a secular offense in England. 25 Hen. VIII, ch. 6. Until that time, the offense was, in Sir James Stephen's words, "merely ecclesiastical." 2 J. Stephen, A History of the Criminal Law of England 429-430 (1883). Pollock and Maitland similarly observed that "[t]he crime against nature . . . was so closely connected with heresy that the vulgar had but one name for both." 2 F. Pollock & F. Maitland, The History of English Law 554 (1895). The transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding*

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[3] *Fleta,* quoted in Leslie Moran, *The Homosexual(ity) of Law (*London: Routledge, 1996), p. 213, n. 2; Also William Hawkins, *Pleas of the Crown*, (6th edn. 1788) Part I, Ch. 4 pp 9.
[4] Fitzherbert, *New Natura Brevium*, (1687) at p. 269.
[5] Andrew Horne, *Mirrour of Justice* (1646)
[6] See 12 Rep. 37; 1 Plow. Com. 1 at 8.
[7] Andrew Horne, *Mirrour of Justices* Ch1 Sect. 4 at p. 15.
[8] 478 US 186 (1986)

of the sovereign's interest in preventing or punishing the behavior involved. Cf. *6 E. Coke, Institutes, ch. 10 (4th ed. 1797).*"

2.5 The offense of sodomy was not limited to sexual acts between men, but could include almost any sexual act seen as polluting. In some places it encompassed intercourse with Turks and "Saracens" as well as Jews[9].

3. In the sixteenth century following the severance by Henry VIII of the link between the English church and Rome, the common law crimes were revised so as to provide for the trial of previously ecclesiastical crimes by secular courts.[10]In this context, Sodomy and buggery were first made felonies by statute in the year 1533 under King Henry VIII who had enacted by Parliament "An Act for the Punishment of the Vice of Buggery[11]" which provided, "*Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this realm, for the detestable and abominable Vice of Buggery committed with mankind or beast*". The conversion of the previously ecclesiastical offence to a felony did not fundamentally alter the essentially religious/ moral nature of the offence though it prescribed the same punishment as any other felony for the offence. The law was deleted during the reign of Queen Mary in 1553,[12] when jurisdiction went back to the ecclesiastical courts but was reinstated in 1563 by Queen Elizabeth I.

3.1 In his reports, Coke describes the offence as "*If any person shall commit the detestable sin of buggary with mankind or beast, it is felony....*". As per Coke the indictment for the offence is "*contra ordinationem Creatoris et naturae ordinem rem habuit veneream, dictumque puerum carnaliter cognovit*[13]". In his Third Part of Institutes of the Laws of England[14], Coke states, "*Buggery is a detestable and*

[9] DF Greenberg, *The Construction of Homosexuality*, Chicago, 1988, 274ff.
[10]*Supra* Note 2
[11] (1533) Hen. VIII Cap. 6
[12] (1553) 1 Mary c. 1
[13] 12 Rep. 36,37 while discussing *Stafford's case* (1607)
[14] 6th edn. 1680 at pp. 58-59.

abominable sin, *amongst Christians not to be named*, *committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast or by woman kind with brute beast*". The same is referred to as *Horrendum Illud Peccatum*, which translates to horrible sin. (emphasis supplied).

3.2 In Fitzherbert's *New Natura Brevium*, the punishment for buggery remained described under the *writ de heretico comburendo*[15] along with the punishment for heresy again emphasizing the close link of this so called offence with religious law.

3.3 Hawkins[16] in his *Pleas of the Crown* describes Sodomy under the "*Offences more immediately under God*", which could be capital or non-capital. The capital offences were heresy, witchcraft, sodomy[17].

3.4 Blackstone in the Fourth Part of the *Commentaries on the Laws of England* writes, "*What has been here observed, especially with regard to the manner of proof...may be applied to another offence of a still deeper malignity; the infamous crime against nature, committed either with man or beast...I will not act so disagreeable a part to my readers as well as myself as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments as a crime not fit to be named, peccatum illud horrible, inter christianos non nominandum*[18]*...This the voice of nature and of reason, and the express law of God determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept...*[19]" (emphasis supplied)

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[15] *Supra* Note 4

[16] The works of Hawkins, Fleta, Britton, Coke, Plowden, Fitzherbert, Andrew Horne, and Blackstone are, amongst others, recognised as "bokes of authority", which mean that they are treated in the courts as authoritative statements of the law as it was at the time they were written.

[17] William Hawkins, *A Treatise of the Pleas of the Crown*, Vol. I, (6th edn 1787) ed. Thomas Leach, Ch. IV, pp. 9-10

[18] See in Rot. Parl. 50 Edw. III n. 58, a complaint that a Lombard did commit the sin "that was not to be named" (12 Rep. 37)

[19] William Blackstone, *Commentaries on the Law of England*, Book IV, pp. 215-216.

3.5 The law in the English colonies derived from English law. The earliest statutes dealing with sodomy in the American colonies were biblical and similar to England[20]. In 1697, Massachusetts revised its laws to provide for "*the detestable and abominable sin of buggery with mankind or beast, which is contrary to the very light of nature*.[21]" It is respectfully submitted that this formulation owes a great deal to how the law was dealt with by Coke and later by Blackstone.

4. The utilitarian and positivist legal philosopher Jeremy Bentham, in part as a reaction against the conservative Blackstone, began a movement towards codification of laws. Even though he did not succeed in England, various codes were evolved which were applied to various colonies such as India. Michael Kirby[22] identifies 5 codes in the 19th century that formed the basis of laws in these colonies. As regards same sex offences, a common thread existed in all the laws- moral disapproval of same sex activity by the British colonial authorities without any consultation with the local population[23]. The Indian Penal Code, 1860 was formulated by Lord Macaulay and section 377 was a distillation of English law at the time based on English attitudes towards same sex activity. Similar laws abound in every country of the commonwealth. The colonial environment was the perfect field for experiments in rationalizing and systematizing law[24]. The colonies were passive laboratories. A nineteenth-century historian observed that the Indian Penal Code was a success because there, unlike at home, the British government could express "a distinct collective will" and could "carry it out without being hampered by popular discussion."[25]This autocratic imposition of a unified code took

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[20] George Painter, *The sensibilities of our forefathers: The History of sodomy laws in the United States* available at https://www.glapn.org/sodomylaws/sensibilities/introduction.htm#fn21

[21] *Ibid*

[22] *Supra* Note 2

[23] *Supra* Note 2

[24] *Supra* HRW Note 2

[25] J. F. Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883), vol. III, p. 304.

advantage of the "absence of a developed and contentious Indian public opinion around questions of criminal law," allowing Macaulay a "free field for experimentation."[26]

5. Fears of moral infection from the "native" environment made it urgent to insert anti-sodomy provisions in the colonial code. A sub-tradition of British imperialist writing warned of widespread homosexuality in the countries Britain colonized. The explorer Richard Burton, for instance, postulated a "Sotadic Zone" stretching around the planet's midriff from 43 degrees north of the equator to 30 south, in which "*the Vice is popular and endemic .... whilst the races to the North and South of the limits here defined practice it only sporadically amid the opprobrium of their fellows.*[27]"

6. The European codifiers certainly felt the mission of moral reform-to correct and Christianize "native" custom. Yet there was also the need to protect the Christians from corruption. Historians have documented how British officials feared that soldiers and colonial administrators-particularly those without wives at hand-would turn to sodomy in these decadent, hot surroundings. Lord Elgin, viceroy of India, warned that British military camps could become "replicas of Sodom and Gomorrah" as soldiers acquired the "special Oriental vices.[28]"

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[26]Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (London: Oxford University, 1998). See also Elizabeth Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review,* Vol. 23, No. 3 (2005), http://www.historycooperative.org/journals/lhr/23.3/kolsky.html (accessed August 8, 2008).

[27]Quoted in Robert Aldrich, *Colonialism and Homosexuality* (London: Routledge, 2003), p. 31. Or, as Lord Byron theorized about a similar but heterosexual "vice": "What men call gallantry, and Gods adultery / Is much more common where the climate's sultry." *Don Juan,* Canto I, stanza 63.

[28]Quoted in Ronald Hyam, *Empire and Sexuality: The British Experience* (London: Manchester University, 1990), p. 116; see also Hyam, "Empire and Sexual Opportunity," *Journal of Imperial and Commonwealth History,* Vol. 14, No. 2 (1986), pp. 34-89.

7. About what became section 377, Lord Macaulay[29] said:

Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said … [We] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision[30].

8. How section 377 has been interpreted by various courts in India has been examined by this Hon'ble Court in para 59 and 60 of *Suresh Kumar Koushal* v. *Naz Foundation* (2014) 1 SCC 1. This court concluded that "*no uniform test can be culled to classify acts as "carnal intercourse against the order of nature*". In *Khanu* v. *Emperor*[31], for example, the court seemed to be of the view that all acts that could not result in the birth of a person were against the course of nature. On the other hand, in *Lohana Vasantlal* v. *State of Gujarat* (1968) 9 CLR 1052, the court seemed to indicate that all "sexual perversions" were covered. Section 377 is thus a catch-all, omnibus provision that catches everything from child abuse to bestiality, regardless of perpetrator or consent depending upon what the authority deems to be "unnatural" or immoral or unworthy.

9. The judgment of the Court of Judicial Commissioner Sind in *Khanu* v. *Emperor*, AIR 1925 Sind 286 bears greater study as it seeks to identify a common thread and purpose to section 377. It holds:

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[29] In an earlier draft, Macaulay had tried to use consent as a touchstone but this never formed part of thte bill that was eventually adopted in 1861. See Kirby, Supra Note 1 for further details.
[30] *Report of the Indian Law Commission on the Penal Code*, October 14, 1837, pp. 3990-91.
[31] AIR 1925 Sind 286.

"*2. S. 377 punishes certain persons who have carnal intercourse against the order of nature with inter-alia human beings. Is the act here committed one of carnal intercourse? If so, it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings...Not very much can be gathered from a consideration of English authorities which are all affected by the fact that the offence of unnatural vice was originally one of the three offences dealt with by the ecclesiastical tribunals and that the Civil Courts, when called on to deal with those offences, showed their usual tendency to look with much jealousy on the criminal legislation of the church. The cognate offences of heresy and usury are now not dealt with by the Criminal Courts at all. And the third is held only to have been committed when the offender is proved to have committed the sin of Sodom. And it was this vice in particular which was rendered punishable by the early Christian state, for it was par excellence the vice of the Hellene and the Saracen, By making this vice particularly punishable, therefore, the State not only protected good moral but struck at its enemies. It is this vice, therefore, which attracted severest censures of State and Church, but in mediaeval times all emission other than in vas legitimum was considered unchristian because such emission was supposed ultimately to cause conception of demons.*

3. It will be seen how little help can be extracted from Christian sources in deciding this question. But why is it that most modern states, now freed from the influence of superstition, still make the sin of Sodom punishable. Partly I suppose of the desire of princes to encourage legitimate marriage. Partly because there is an idea (perhaps erroneous) that the public or tolerated practice of that vice creates a tendency in the citizens of the State, where it is practiced, to adopt an unmanly and morbid method of life and thinking, so that a person saturated with those ideas is less useful a member of society, partly because of the danger that men put in authority over other men nay use their power fir the gratification of their lusts, but principally I suppose be of the danger

to young persons, lest they be indoctrinated into sexual matters prematurely..." (Emphasis supplied)

An analysis of the "purpose" of section 377

10. The historical evolution of the law dealing with sodomy and how that law became the law in India brings forward three propositions.

10.1 *Firstly*, the "crime against nature" phraseology has clearly religious antecedents and is based on the moral and religious judgments of the medieval and early modern times in Europe. The extraordinary judgment in *Khanu* quoted above contains the limited "secular" purpose or object for section 377, i.e. allegedly to protect children, encourage marriage and discourage the morbid and unmanly way of life of those who are "saturated with such ideas."

10.2 *Secondly*, the crime being one which is not to be named, is vague to say the least and it is not at all clear what is covered[32]. The crime that cannot be named contains ingredients that have never been conclusively defined and works primarily to punish the love that dare not speak its name. This conspiracy of silence surrounding section 377 has enabled to become the "blackmailer's charter" and a tool by which persons of alternate sexuality are stigmatized and punished as per whim and fancy.

10.3 *Thirdly*, there are no distinctions drawn between voluntary and non-voluntary conduct as both are tarred with the same brush. There is also no distinction based on age. Further, the section does not distinguish between same sex activities and bestiality. It appears that the moral sin of sodomy was such that no distinction was drawn between consenting adults in private and violation of children by paedophiles.

[32] For example, even though India never had an offence called "gross indecency" (the offence for which Oscar Wilde was convicted), in *Khanu* v. *Emperor*, AIR 1925 Sind. 286 the Court of the Judicial Commissioner Sind held that such an offence would be covered under section 377 (para 4 and 5).

11. The 20th and 21st centuries have not been kind to the assumptions, objects and purposes of the sodomy laws and they have fallen like dominoes in much of the world, both by legislative action and by the application of human rights law by the courts.

12. *Firstly*, research has established that same sex desire is not "unnatural" in the scientific or biological sense. Abuse of the "blackmailers charter" to harass homosexual persons, the "lavender scares" in the US, as well as empathy with persons who live with alternate sexualities has deservedly removed much of the stigma associated with same sex desire, resulting in a change in public attitudes resulting in legislative action as well as sympathy from the courts. It is probably libellous to suggest that that all LGBT people who fall into the crosshairs of section 377 are paedophiles, and it is far from clear how decriminalisation impacts the institution of marriage. The fear that "those who are saturated with those ideas" will abuse their power to gratify their lusts is quaint in the "Me Too" era and is in any case utterly misplaced. Increased awareness has also negated the old stereotype of gay people leading morbid and unmanly lives. Such stereotypes are embarrassing relics of a less free and more prejudiced time.

13. *Secondly*, the evolution of human rights law, based in part on the application of Enlightenment principles on residual enlightenment prejudices on issues such as homosexual activity, has resulted in a widespread almost universal consensus that the rights to personal autonomy, liberty, dignity, equality and privacy all militate against punishing people for private consensual acts. The state is not and cannot be in the business of moral policing. Many eloquent paeans to the right to choose and to personal liberty add lustre to the Constitutional law of India and of human rights law across the world[33]. As the Wolfenden Committee reported in England, "*Unless a*

[33] See for example, *KS Puttaswamy* v. *Union of India*, (2017) 10 SCC 1; *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438; etc.

deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.[34]"

14. Pursuant to the above analysis, it is pertinent to examine the provisions of section 377 against the touchstone of Article 14.

15. Vagueness

15.1 Vagueness of criminal statutes have been used to strike them down[35]. In *KA Abbas*, the test laid down was:

"*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*."

15.2 As discussed above, Section 377 provides authorities and persons with no "manageable standards"[36] to regulate their conduct. Interpretation of Section 377 depends upon the discretion of the

[34] Wolfenden Report, CMND247, HMSO 157, pp 187-188
[35]See *Shreya Singhal* v. *Union of India*, (2015) 5 SCC 1, para 55-68, 85; *KA Abbas* v. *Union of India,* (1970) 2 SCC 780 para 44-46
[36] This useful term has been applied in *Shreya Singhal's case, supra.*

adjudicating authority and the prosecutor to an unacceptable degree, particularly as it relates to one of the most intimate choices that is expressly protected under human dignity and human choice. Abuse of the provisions of section 377 as well documented in the Delhi High Court judgment[37], has shown the mischief wreaked by the uncanalised powers[38] given to prosecutors.

15.3 As such section 377 is liable to be struck down as being unconstitutionally vague.

16. Manifest arbitrariness:

16.1 In *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1, this Hon'ble Court has clarified what is meant by "manifestly arbitrary" and has held that legislations that are manifestly arbitrary[39] can be struck down as *contra* Article 14. In *Anuj Garg* v. *Hotel Association of India*, (2008) 3 SCC 1, this Hon'ble Court laid down that criteria once constitutional could become unconstitutional over a period of time and criteria which passed muster historically may no longer be valid under present conditions[40].

16.2 None of the "secular" bases of section 377 as discussed in *Khanu* v. *Emperor* have withstood the test of time. It is absurd to believe that homosexual persons are not useful and contributing members of society. It is probably libellous to suggest that they are more likely to be paedophiles. Even if one assumes, though this is vigorously disputed, that the sanctity of marriage is impacted by gay rights, the same is no reason to keep section 377 on the books as the desirability of social policy cannot be a ground to deny basic Constitutional rights of equality, equal treatment, dignity and liberty to a historically disenfranchised minority.

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[37] *Naz Foundation* v. *Govt.*, 2010 Cr LJ 94

[38] This Hon'ble Court has always struck down uncanalized power. See, for example, *Jagdish Pandey* v. *Chancellor*, (1968) 1 SCR 231

[39] Para 101-104 of the judgment

[40] Para's 21 and 26.

16.3 Just as this Court did not hesitate in striking down another religious based law that has long outlived its utility in *Shayara Bano*, it ought not to do so with section 377.

17. Unreasonable classification and discriminatory object:

17.1 A Constitution Bench of this Hon'ble Court in *Subramanian Swami* v. *Union of India*, (2014) 8 SCC 682 has held that if the object of classification is discriminatory, it is in violation of Article 14[41].

17.2 In *Anuj Garg* v. *Hotel Association of India*,(2008) 3 SCC 1 this Hon'ble Court held that "*Legislation should not be only assessed on its proposed aims but rather on the implications and the effects*[42]." *A fortiori*, in order to determine whether or not the object of a particular legislation is discriminatory, its effects need to be looked at rather than sole reliance upon the language of such legislation[43].

17.3 This Hon'ble Court has laid down in the landmark case of *State of West Bengal* v. *Anwar Ali Sarkar*, (1952) SCR 284 at p. 324 "*If it is established that the person complaining has been discriminated against as a result of the legislation and denied equal privileges with others occupying the same position, I do not think that it is incumbent upon him…to assess and to prove that in making the law, the legislature was actuated by a hostile or inimical intention against a particular person or class.*" It was further held at p. 310 "…*that it would be extremely unsafe to lay down that unless there was evidence that discrimination was 'purposeful or intentional' the equality clause would not be infringed…it should be noted that there is no reference to intention in Article 14 and the gravamen of that Article is equality of treatment.*" Further, as laid down by this Hon'ble Court in *Aashirwad Films* v.

[41]See also *Nagpur Improvement Trust* v. *Vithal Rao*, (1973) 1 SCC 500

[42] Para 46.

[43]See also *Khandige Sham Bhat* v. *Agricultural ITO*, (1963) 3 SCR 809; *Indian Aluminum Co* v. *Karnataka Electricity Board*, (1992) 3 SCC 580, *Namit Sharma* v. *Union of India*, (2013) 1 SCC 745 etc.

Union of India, (2007) 6 SCC 624, when a classification is *ex facie* arbitrary, the burden of proof shifts to the State to defend the same.

17.4 Applying the above tests to Section 377 we find that the classification of sexual activities on the touchstone of "course of nature" is no longer sustainable in law, if it ever was sustainable to begin with. As this Hon'ble Court held in *Anuj Garg*'s case[44], "*The impugned legislation suffers from incurable fixations of stereotyped morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means*."It is further submitted that the mere presence of the unread down section in statute books perpetuates a stigma over homosexuality and gives legal sanction to discrimination and contemptuous treatment that is contrary to the spirit of equality that is a brooding omnipresence over the Constitution. Laws that, by design or effect, single out small and discrete minorities for discrimination are the epitome of laws that are struck due to Article 14 violations.

17.5 The phraseology of S. 377 is not determinative of whether it is a discriminatory classification. S. 377 may not specifically state that it is criminalizing homosexuality but it is obvious that it has a disproportionate impact/ effect on homosexuals. There is an extensive record of the abuses gay persons have suffered because any sexual activity is caught within section 377.While heterosexual couples can, without the stigma of illegality, have sexual relations unless the same are forced or without consent, homosexual persons simply cannot have any sexual relations regardless of consent or privacy. To say that this does not disproportionately impact homosexual persons who are stigmatized in their sexual expression is to ignore the essential meaning of the restriction on a facile reading of the face of a statute instead of a consideration of its merits. In this regard it is pertinent to consider the dissenting observations of Justice Stevens of the US Supreme Court in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 US 701 (2007): *"There is a cruel irony in The*

[44] (2008) 3 SCC 1 para 46

Chief Justice's reliance on our decision in Brown v. Board of Education,349 U. S. 294 (1955) . The first sentence in the concluding paragraph of his opinion states: "Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin." Ante, at 40. This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, The Chief Justice rewrites the history of one of this Court's most important decisions. (internal citations removed)"

17.6 Section 377 is bad for violating Article 14 because of an unreasonable classification for an illegal object.

B. Section 377 impinges on the human right of LGBT people to be recognised as persons.

18. Article 6 of the Universal Declaration of Human Rights, which has been incorporated into Article 16 of the International Covenant of Civil and Political Rights provides:

"*Everyone has the right to recognition everywhere as a person before the law.*"

19. Recognition as a person means that each person must be treated with basic human dignity.

20. A perusal of the *travaux preparatoire*[45] of this Article reveals that it was introduced and adopted to avoid any repetition of the Nuremberg Edicts that denied the citizenship and humanity of Jews under the third Reich by placing unprecedented restrictions on their right to enter into contracts, to marry and all manner of basic civil rights. This was clearly a worthy lesson from the tragedy of the Holocaust. And yet, this is a lesson that has yet to be learned with respect to another

[45]See William A Schabas, *The Universal Declaration of Human Rights: The Travaux Preparatoires*, Cambridge, 2013.

community of victims in Nazi concentration camps- people of homosexual persuasion.

21. Unlike the other victims of the Holocaust, the persecuted homosexuals did not have the option to reveal their stories to the world for fear of prosecution.

22. Before this Hon'ble Court is a chance to set right a historic wrong. LGBT persons are equal in human dignity to all other people and they are entitled the same civil and constitutional rights as are available to all others. A ringing endorsement of this basic fact is long overdue.

IN THE HON'BLE SUPREME COURT OF INDIA

W.P. (Crl.) No. 76 of 2016

In the matter of:

NAVTEJ SINGH JOHAR & ORS. **… PETITIONERS**

versus

UNION OF INDIA **… RESPONDENT**

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