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*

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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.

> *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."*[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* –

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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.)

which was the only rationale offered by the Court in **Koushal** – it 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]

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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.

20. Based on the principle in **Puttaswamy** the High Court Of Trinidad and Tobago held:

> *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

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[11] Ibid., ¶¶92 – 93.
[12] NALSA v Union of India, (2014) 5 SCC 438, ¶15.

Koushal, the Division Bench held that since S. 377 only criminalised specific acts, and not individuals, Articles 14 and 15 were irrelevant 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

[13] Ibid., ¶21.
[14] Ibid., ¶22.
[15] Ibid., ¶25.

best expressed by the words of Kennedy J., writing the opinion of the Court in **Lawrence v Texas, 539 U.S. 558, 567 (2003):**

> *"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.

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[16] Lawrence v Texas, 539 U.S. 558 (2003),

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 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*

[17] K.K. Gulia and H.N. Mullick, "Homosexuality: A Dilemma in Discourse", (2010) 54(1) *Indian J. Physiol. Pharmacol.* 5, 8.

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 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

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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

the status of 'unapprehended felons'. What Nehru said about the 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*

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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.

relevant to the way in which men should be treated... [these] are 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*

[39] Lawrence v Texas, supra, pp. 578 – 579 (opinion of the Court, authored by Kennedy J.)

> *377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the 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)**:

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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.

"… when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation."[45]

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."*

[45] Elane Photography v Vanessa Willock, 309 P.3d 53 (NM 2013), ¶17.

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*

[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

> *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 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

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[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.

[48] Justice K.S. Puttaswamy v Union of India, supra, ¶146.

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, 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*

[49] Suresh Kumar Koushal v Naz Foundation, supra, ¶76.
[50] Suresh Kumar Koushal v Naz Foundation, supra, ¶60.

> *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 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).

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[51] A.K. Roy v Union of India, (1982) 1 SCC 271, ¶65.
[52] Ibid., ¶67.
[53] Shreya Singhal v Union of India, (2015) 5 SCC 1, ¶95.

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.

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."

[54] Deepak Sibal v Punjab University, (1989) 2 SCC 145, ¶20.

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 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, 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."*[55]

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*

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[55] Nagpur Improvement Trust v Vithal Rao, (1973) 1 SCC 500, ¶26.
[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.

> *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 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.

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[60] Govt. of NCT of Delhi v Union of India, supra, ¶¶306, 309.
[61] Dhirendra Nadan v State, Criminal Appeal Case Nos. 85&86 of 2005.

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.

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.

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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.

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.

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

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[64] Joseph Raz, "Free Expression and Personal Identification" 11 *Oxford J Legal Stud.* 303 (1991)

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 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

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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.

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, 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,

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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.

constitutional morality – with its commitment to pluralism and democracy – militates against restricting fundamental rights on grounds of a supposed public morality, or majoritarian sentiment.

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*

[72] Ryan Goodman, "Beyond the Enforcement Principle, supra.
[73] Kenji Yoshino, *Covering*: *The Hidden Assault on our Civil Rights* (Random House 2006).

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 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

[74] Modern Dental College and Research Centre v State of MP, (2016) 7 SCC 353, ¶¶60, 63.

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.

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*

[75] National Coalition for Gay and Lesbian Equality, supra, ¶32.
[76] Ibid., ¶107.

> *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 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*

[77] Lawrence v Texas, supra, p. 567.
[78] Justice K.S. Puttaswamy v Union of India, supra.

> *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 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*

[79] Shafin Jahan v Asokan K.M., supra.

> *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 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

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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.

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 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.

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