IN THE SUPREME COURTOF INDIA

(CIVIL APPELLATE JURISDICTION)

Special Leave Petition (Civil) No. 15436 of 2009

(And other connected Special Leave Petitions)

IN THE MATTER OF

Suresh Kumar Koushal & Ors. … Petitioners

Versus

Naz Foundation & Ors … Respondents

WRITTEN SUBMISSIONS BY ANAND GROVER, SR. ADVOCATE FOR NAZ FOUNDATION (INDIA) TRUST, RESPONDENT NO.1 IN ALL SLPs

I. INTRODUCTION

1. The present case concerns the criminalisation of certain sexual acts, covered by the expression, “carnal intercourse against the order of nature”, between consenting adults in private. The expression “carnal intercourse against the order of nature” has been interpreted to imply penile-non vaginal sex. Though facially neutral and applicable to all, including heterosexual persons, it is homosexual men, whose sexual practices are identified and perceived by the broader society as penile non-vaginal.

2. Sexual practices covered by Section 377 are an expression of the core sexual personality of homosexual men. By criminalizing such acts, Section 377 makes them out to be criminals with several deleterious consequences on their lives, thereby impairing their human dignity.

3. Article 21 gives liberty to a person to enter into intimate relationships with another in the privacy of their homes and their private lives and still retain dignity as free persons. It protects intrusion into that zone

of privacy. Section 377 therefore violates the right to privacy of all individuals, particularly of homosexual men.

4. The question is therefore not whether one has a fundamental right to engage in "carnal intercourse against the order of nature." The question is whether that protection of the zone of privacy is available to those consenting adult persons who may have "carnal intercourse against the order of nature".

5. Section 377 also does not pass the test of being a fair, just and reasonable law in substance, that is substantive due process, now interpreted to be part of Article 21.

6. Criminalisation also impairs access to health services for gay men who go underground, thereby infringing their right to health under Article 21.

7. Section 377 is in violation of Article 14 as it is vague. The classification introduced by it is not based on rational criteria. The object that it seeks to advance is not a legitimate State interest.

8. Once the expression "sex" in Article 15 is read to include sexual orientation, it violates Article 15, as the Section 377 predominately impacts homosexual men.

II. BRIEF BACKGROUND OF THE PETITIONER AND THE PETITION

9. The Petition was filed in the Delhi High Court by the Respondent No. 1, which is a Non-Governmental Organization (hereinafter "NGO") registered under the *Indian Trusts Act,* 1882. It works in the field of HIV/AIDS intervention and prevention, which involves interacting with specific populations that are most vulnerable to contracting HIV/AIDS, including homosexual men and Men who have Sex with

Men (MSM). While working with these populations, the Respondent No. 1 realised the importance of 'Integrationist Policy', that is premised on the fact that promoting, respecting and protecting the rights of those who are most vulnerable to HIV transmission is the most effective way to prevent its spread and halt the epidemic. [paras 2-3 of the Writ Petition (Civil) No. 4755 of 2001 (hereinafter "Writ Petition")]

10. In the experience of the Respondent No.1, its HIV/AIDS prevention efforts have been severely impaired by discriminatory attitudes exhibited by various State agencies. This has resulted in the denial of the basic fundamental human rights of the sexual minorities. [para 5 of the Writ Petition].

11. This Writ Petition was filed in 2001 to challenge the constitutional vires of Section 377, Indian Penal Code (IPC) that criminalises certain consensual sexual acts between adults in private. The impugned section was challenged on the grounds of violation of right to privacy, dignity and health under Article 21, equal protection of law and non-discrimination under Articles 14 and 15 and freedom of expression under Article 19 of the Constitution. [para 13 of the Writ Petition]. The Petitioner therein contended that:

    a. criminalizing adult consensual acts violates the right to privacy of all, including homosexual men, since protection of personal relations and sexual intimacies with in the protected zone of privacy is guaranteed by our constitutional order under Article 21. The State cannot intrude into the private zone of individuals without a compelling interest of paramount importance. No such interest has been shown by the State. [para 54 A and B of the Writ Petition]

b. penalizing certain sexual acts that are usually engaged by the homosexual men amounts to demeaning and degrading the dignity of an entire class of people. It also interferes with the public health interventions on HIV prevention, since it is difficult to reach out to homosexual persons, who go underground on account of fear of prosecution and stay away from health services, thereby violating their right to health under Article 21. [Para 54A and F of the Writ Petition]

c. Section 377, being overbroad and vague in its ambit by covering acts ranging from anal sex to oral sex to acts deemed to be sexually perverse or imitative, is arbitrary and violative of Article 14. It creates an unreasonable classification between carnal intercourse within the order of nature (penile-vaginal) and carnal intercourse against the order of nature (penile non-vaginal sex) that is not based on any rational criteria. Penalizing penile-non-vaginal sexual acts, in effect, disproportionately impacts the homosexual men as these constitute their primary manifestation of sexual expression, thereby violating Article 14. [para 54 C of the Writ Petition]

d. Section 377 is violative of Article 15 of the Constitution, since the constitutional protection against sex discrimination includes the prohibition of discrimination on the basis of sexual orientation. [Para 54 D of the Writ Petition]

e. Section 377 violates Article 19 by restricting freedom of speech, expression and association of homosexual persons. [Para 54 E of the Writ Petition]

12. This Petition brought to light core human values of equality, respect for privacy and dignity of all, particularly homosexual persons, which till now have been denied to them due to criminalisation under Section 377.

13. This Petition has a long and chequered history. It was filed in 2001 in the Hon'ble High Court of Delhi [Writ Petition (Civil) No. 4755 of 2001] and notice was issued to the Union of India in 2002, wherein the Attorney General of India was asked to appear. On 02.09.2004, the Writ Petition was dismissed by the Hon'ble High Court for lack of cause of action as no prosecution was pending against the Petitioner. The Petitioner filed a review petition (RP 384/2004) in the Hon'ble High Court against the order of dismissal but that too was dismissed on 03.11.2004. Aggrieved by the same, the Petitioner filed a Special Leave to Appeal (C.N. 7217-18/2005) in this Hon'ble Court in 2005. On 03.02.2006, this Hon'ble Court held that "*the matter does require consideration and is not of a nature which could have been dismissed on the ground afore-stated*". Remitting the matter back to the High Court of Delhi to be decided on merits, this Hon'ble Court set aside the said order of the High Court.

14. On 02.07.2009, the Hon'ble High Court of Delhi struck down Section 377 insofar it criminalises consensual sexual acts of adults in private, to be violative of Articles 21, 14 and 15 of the Constitution. The Hon'ble High Court upheld the contentions of the Petitioner on the basis of reasons and materials provided and all these are sustainable. The Hon'ble High Court of Delhi held the following:

    a. Section 377 grossly violates the right to privacy and liberty embodied in Article 21 insofar as it criminalises consensual sexual acts between adults in private. [para 52 of the High Court judgment]
    b. Section 377 denies a person's dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. It denies a gay person a right to full personhood, which is implicit in notion of life under Article 21 of the Constitution. [para 48 of the High Court judgment]

c. Section 377 pushes gays and MSM underground, leaves them vulnerable to police harassment and renders them unable to access HIV/AIDS prevention material and treatment, thereby violating right to health under Article 21. [para 71 of the High Court judgment]

d. Section 377 was not enacted to deal with child sexual abuse or to fill in lacunae in rape law but to enforce particular concept of sexual morality. Public morals cannot be basis of invading privacy of citizens or regulating conduct of citizens. In the absence of any serious harm, the objective of criminalisation of private sexual relations between consenting adults is arbitrary and unreasonable and thus violates Article 14 of the Constitution. [para 92 of the High Court judgment]

e. Though facially neutral and applicable to acts and not identities, section 377 operates unfairly against a particular class, i.e. homosexual men. It disproportionately impacts homosexual persons by perceiving them as criminals, marking the whole gay and lesbian community as deviant and perverse and subjecting them to extensive prejudice. [para 94 of the High Court judgment]

f. Sexual orientation is a ground analogous to sex and discrimination on the basis of sexual orientation is not permitted by Article 15. [para 104 of the High Court judgment]

III. PRELIMINARY SUBMISSIONS ON THE ISSUE OF LOCUS STANDI

15. Although the question of *locus standi* does not arise in the instant writ petition in light of the Supreme Court order dated 03.02.2006, by which the High Court was directed to hear the writ petition on merits. However, the Hon'ble Supreme Court has raised the issue of *locus standi* on that whether an NGO can approach the court for a

declaration that a statute is unconstitutional. The Respondent No.1 humbly submits in the affirmative as follows:

NGOs, acting bona fide, can file a PIL for enforcing fundamental rights of a person or class of persons who cannot approach the court themselves

16. It is submitted that where a person or class of persons have suffered legal injury or to whom legal injury is threatened, is unable to approach the Court for reasons not practicable for her/him to move the Court for some sufficient reason, some other person or body can invoke assistance of the Court for the purpose of judicial redress to the person or class of persons wronged. The Hon'ble Supreme Court has time and again emphasized the importance of bona fide petitions having sufficient interest filed *pro bono publico* for vindication of rights of vulnerable and marginalized sections of society.

    a. The case of ***Janata Dal v. H.S. Chowdhary****,* (1992) 4 SCC 305 at paras 61-97**,** discusses the expansion of the rule of standing in public interest litigation. In para 64, the Supreme Court observed that in public interest litigation:

> *"the strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives the right of locus standi to any member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury, but who is not a mere busybody or a meddlesome interloper; since the dominant object of public interest litigation is to ensure observance of the provisions of the Constitution which can be best achieved to advance the cause of communities or disadvantaged group and individuals by permitting any person, having no personal gain or private interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion."*

b. In the landmark case of ***S.P. Gupta v. UOI***, 1981 Supp SCC 87 at para no. 17**,** it was held that:

> *"It may therefore now be taken as well established that where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reasons of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reasons of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons."*

c. In ***People's Union for Democratic Rights v. Union of India***, (1982) 3 SCC 235 at para 9, this Hon'ble Court followed ***S.P. Gupta's*** case and took the view that it is necessary to evolve a new strategy by relaxing the traditional rule of standing in order then justice may become easily available to the vulnerable and the marginalised sections of society. It was held that:

> *"where a person or class of persons to whom legal injury is caused…is by reasons of poverty, disability or socially or economically disadvantaged position not able to approach the court for judicial redress, any member of the public acting bona fide and not out of extraneous motivation may move the court for judicial*

redress of the legal injury suffered by such person or class of persons…"

d. In ***Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage & Allied Workers & Ors.*****,** (2011) 8 SCC 568 at paras 3 and 19–33, on the issue of PILs filed by NGOs on behalf of people who, for socio-economic reasons, cannot approach the Courts themselves, this Hon'ble Court held that:

"at the threshold we deem it necessary to erase the impression and misgivings of some people that by entertaining petitions filed by social action groups/activists/workers and NGOs for espousing the cause of those who, on account of poverty, illiteracy and/or ignorance and similar other handicaps, cannot seek protection and vindication of their constitutional and/or legal rights and silently suffer due to actions and/or omissions of the State apparatus and/or agencies/instrumentalities of the State or even private individuals, the superior courts exceed the unwritten boundaries of their jurisdictions." The Supreme Court further held that "we may add that the superior courts will be failing in their constitutional duty if they decline to entertain petitions filed by genuine social groups, NGOs and social workers for espousing the cause of those who are deprived of the basic rights available to every human being, what to say of fundamental rights guaranteed under the Constitution. It is the duty of the judicial constituent of the State like its political and executive constituents to protect the rights of every citizen and every individual and ensure that everyone is able to live with dignity."

17. It is therefore, submitted that the rules of standing in public interest litigation have been relaxed in the interest of justice and permit NGOs, acting bona fide, having sufficient interest, to

approach the court for enforcing the fundamental rights of class of persons who for reasons of socio-economic vulnerabilities etc. are unable to approach the Court themselves.

18. There have been instances where writ petitions/public interest litigation filed by NGOs acting bona fide and having sufficient interest, seeking a declaration that a statute is unconstitutional have been entertained by this Hon'ble Court.

    a. In ***People Union for Civil Liberties (PUCL) v. Union of India,*** (2003) 4 SCC 399, an organisation filed a petition in the Supreme Court to challenge the constitutional validity of Section 33-B as inserted by the Representation of the People (Third Amendment) Act, 2002. The said amendment act was held to be unconstitutional by this Hon'ble Court.

    b. In ***Common Cause, A Registered Society v. Union of India***, (2002) 1 SCC 88, Common Cause, a Registered Society, filed a writ petition under Article 32 to challenge the constitutionality of Section 8A in the Salaries, Allowances and Pension of Members of Parliament Act, 1954. A five judge bench of this Hon'ble Court dismissed the petition as devoid of merit but did not raise any issue as to the locus of a society to challenge the constitutionality of a statute.

    c. In ***D.C. Wadhwa and Ors. v. State of Bihar and Ors***, (1987) 1 SCC 378 at para 2, one of the Petitioners in the case, a professor of Political Science, filed a writ petition against the State of Bihar alleging the misuse of ordinance power, and challenged the Constitutional validity of three ordinances issued by the Governor of

Bihar. This Hon'ble Court admitted the petition treating it as PIL and struck down the ordinance (The Bihar Intermediate Education Council Ordinance, 1985). Relying on ***S.P. Gupta's*** case, this Hon'ble Court rejected the contention that the Petitioner had no standing as he was an outsider and not personally aggrieved. The Court held that the:

> *"Petitioner no.1 is a Professor of Political Science and deeply interested in the ensuring proper implementation of the constitutional provisions. He has sufficient interest to maintain the writ petition as a member of the public…"*

In extraordinary circumstances a PIL challenging the constitutional validity of a statue filed by NGOs bona fide and having sufficient interest will be entertained by the Courts

19. This Hon'ble Court has, in some cases, laid down broad guidelines for PILs. In all such cases, the Court has said that there can be no hard and fast rules or 'rigid litmus test' for assessing *locus standi* to govern all cases under all circumstances. [See: ***Janata Dal v. H.S. Chowdhary*** at para 61 and 68]. Determining standing of a petitioner in a public interest litigation has necessarily to be left to the discretion of the Court in each individual case [See ***S.P. Gupta v. Union of India*** *at* para 20]. In ***Guruvayoor Devaswom Managing Committee & Anr. v. C.K Rajan & Ors.,*** (2003) 7 SCC 546 at paras 50 and 55, this Hon'ble Court, laid down broad guidelines for entertaining PILs. It said therein, that "*Ordinarily, the High Court should not entertain a writ petition by way of public interest litigation questioning the constitutionality or validity of a statue or a statutory rule*."

However, the judgment also clarifies that "*We do not intend to lay down any strict rule as to the scope and extent of public interest litigation, as each case has to be judged on its own merits. Furthermore, different problems may have to be dealt with differently."* It is pertinent to note that this Hon'ble Court did not bar PILs challenging constitutional validity as the word used is 'ordinarily'. If extraordinary/peculiar situation exists then such PILs would be maintainable. Further, the judgment clarifies that the guidelines are not strict rules and each PIL will be judged on its own merits and facts and circumstances.

Naz Foundation (India) Trust is sufficiently interested and has *bona fide* filed the PIL challenging the constitutional vires of Section 377 on behalf of a directly aggrieved class of persons who for sufficient reasons could not approach the Court themselves

20. It is submitted that Naz Foundation (India) Trust has the locus to file the writ petition challenging constitutional *vires* of Section 377 on behalf of vulnerable and marginalised class of homosexual men. Naz Foundation carried out HIV prevention interventions with homosexual men and in its experience, homosexual men were reluctant to come forward to access education and information about HIV prevention and tools for safer sexual practices for fear of being identified as homosexual and prosecution under Section 377 and/or discrimination by society [See paras 2-5 at pages 3-4 of the Writ Petition]. Many HIV prevention outreach workers from the community of homosexual men faced severe harassment by the police and were threatened to be booked under Section 377 as they viewed distribution of condoms for male-male sex as aiding the offence under Section 377. In 2001, in Lucknow, HIV prevention outreach workers

working with homosexual men were arrested and booked for conspiracy to commit offence under Section 377 [See para 53 at page 19 of the Writ Petition]. This at an individual level of homosexual men violated their right to health by impeding their access to information and tools by which they could protect themselves against HIV and at a larger level, it hampered preventing the spread of HIV in broader society and adversely impacted public health.

21. Further, through its intimate association with homosexual persons, Naz Foundation became aware of the disproportionate and invidious impact of Section 377 on the rights and lives of homosexual persons. The socio-legal climate in and around the year 2001, when the petition was filed, was repressive and inimical towards homosexual persons. There were numerous incidents of harassment, entrapment, blackmail, extortion, violence and brutality against homosexual persons by State as well as non-State actors. Besides, the understanding of alternative sexual orientations was very low in society which looked down upon homosexuality with disapproval and disgust. This manifested in denial, rejection and violence at home to discrimination at workplaces and public spaces. The large scale stigma and discrimination created and perpetuated a culture of silence around the issue of alternative sexualities and forced homosexual persons to suffer in silence. [See paras 32 – 35 at pages 12 – 13 of the Writ Petition]

22. In the given peculiar circumstances, homosexual persons could not move the Court on their own for fear of being identified and prosecuted by law enforcement authorities or for fear of harassment, ridicule, rejection and discrimination by society at large.

23. Hence, Naz Foundation (India) Trust filed the writ petition on their behalf for challenging the constitutionality of Sec 377. In doing so, Naz Foundation (India) Trust has acted *bona fide* and without any extraneous or oblique motivation.

IV. HISTORY OF SECTION 377

A. Tracing the Developments in England

24. It is submitted that both the historical context from which 377 owes its origins and its religious underpinnings are relevant to identifying its underlying assumptions and purposes.

LIST OF DATES

DATE	EVENT
1290	The first records of sodomy as a crime can be found in the *Fleta*, the text categorically prescribed for the burning alive of the sodomite
1300	Records of sodomy as a crime also found in the *Britton*, the text also prescribed for the burning of the sodomite
1377	A Petition of the English Parliament banished foreign artisans and traders who were accused of having introduced " the too horrible vice which is not to be named"
1533-34	Passing of the Buggary Act of 1533 which penalised acts of sodomy by hanging. British criminal laws covering homosexual acts in the reign of Henry VIII prohibited the abominable Vice of Buggery (A term which was associated with "sodomy" by the thirteenth century) committed with mankind or beast. Buggery was described as a "vice." The term buggery traces back to "bougre," or heretic in old French, and to the Latin Bulgarus for Bulgaria (seen as a place with heretics). By the thirteenth century, the term had become associated with sodomy that is anal sexual intercourse. The 1534 statute took over the offence of buggery from ecclesiastical law. The word "abominable" was taken from Leviticus (18:22 and 20:13).

	The religious character of the provision is thus unmistakable.
1535	Henry VIII, polices and religious morals and the programme encompassed execution of diehard English Catholics including Sir Thomas More
1536, 1539 and 1540	The Buggary Act of 1533 was renewed three times
1548	A new version of the Act was passed (2 & 3 Edward VI. C.29) [See pages 1 to 5 in Compilation - Volume 1]
1563	When Henry's daughter Mary succeeded her brother and restored England's papal allegiance, all these Protestant Acts were repealed. But when Henry's daughter Elizabeth became queen, a new version of the Act (5 Elizabeth, c.17) was passed in 1563 From 1563, it continued as a non-ecclesiastical criminal law. The penalty was death, a common penalty in the period for most offences. It remained a capital offence until 1861. The law was originally enacted one year after Parliament ended Papal jurisdiction over the English Church. Catholic courts had been unsympathetic to Henry VIII's divorce case. The buggery law was part of a widening campaign against Catholics, which led to the expropriation of the monasteries, a campaign that began in earnest in 1536.
1644	The crime was described by Sir Edward Coke as a "detestable and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind, or with brute beast, or by womankind with brute beast." [See pages 6 – 13 in Compilation - Volume 1]
1661	The 1661 Articles of War, governing the navy, as revised in 1749, prohibited "the unnatural and detestable Sin of Buggery or Sodomy with Man or Beast…"
Pre 1720s	Law was barely enforced

1749	The revised Articles of war governing the navy prohibited the unnatural and detestable sin of sodomy with Man or Beast
1767	Sir William Blackstone in his Commentaries on the Laws of England referred to the 1534 law as prohibiting the “infamous crime against nature”. No exact definition of “buggery” or “sodomy” was provided [See pages 14 – 16 in Compilation Volume - No. 1]
1780	The number of men arrested began to rise due to changes in structure of criminal justice
1835	Two men were the last to be executed in Britain for sodomy
Post 1850	Prosecutions shifted to charges of “indecent assault” which was apparently easier to prove
1870	In a famous case, two men were charged with conspiracy to commit buggery and soliciting others to do so by cross-dressing in streets and theatre
1806-1900	8,921 men were indicted for sodomy, gross indecency and “unnatural misdemeanours”. Most of the men convicted were imprisoned but between 1806 and 1861, 404 men were sentenced to death
1957	Report on the Committee on Homosexual Offences and Prostitution, which enumerated the problems faced by homosexuals and provided for a deeper understanding of the issue. The said report can be construed as a stepping stone for the modern understandings of sexual relations [See pages 17 – 44 of Compilation - Volume 1]
1967	The English law was reformed in Britain by the Sexual Offences Act of 1967, which decriminalized homosexuality and acts of sodomy between consenting adults. [See pages 45 - 48 of Compilation - Volume 1]

B. Tracing the developments in India

Tracing the position on homosexuality in India

(Ancient India)

25. It is submitted that homosexuality has been widely prevalent and recognised and tolerated in all its forms during ancient and medieval Indian history. The various texts and works illustrate the same

MANUSMRITI
The Manusmriti scorns female homosexuals. It states, "If a girl does it (has sex) to another girl, she should be fined two hundred (pennies), be made to pay double (the girl's) bride-price, and receive ten whip (lashes). But if a (mature) woman does it to a girl, her head should be shaved immediately or two of her fingers should be cut off, and she should be made to ride on a donkey." And: "If a man has shed his semen in non-human females, in a man, in a menstruating woman, in something other than a vagina, or in water, he should carry out the 'Painful Heating' vow." Further: "If a twice-born man unites sexually with a man or a woman in a cart pulled by a cow, or in water, or by day, he should bathe with his clothes on." The 'Painful Heating' vow is traditionally said to consist of cow's urine, cow dung, milk, yogurt, melted butter, water infused with sacrificial grass, and a fast of one night. Compared to the treatment of female homosexuals, the treatment of male homosexuals is relatively mild. Modern commentators misread the Manusmriti's severe punishment of a woman's manual penetration of a virgin (8.369-70) as anti-lesbian bias. In fact, the punishment is exactly the same for either a man (8.367) or a woman who does this act, and is related not to the partners' genders but to the virgin's loss of virginity and marriageable status. The Manusmriti does not mention a woman penetrating a non-virgin woman. Note that there are no threats of 'eternal' damnation. There is nothing permanent in the Hindu world. There is always another life, another chance. It is thus clear that in ancient India, there was no criminalisation of male homosexual penetrative sexual acts. [See pages 49 – 54 of Compilation - Volume 1]

KAMASUTRA
In the Kamasutra, there is a reference to male masseurs who indulge in oral sex (auparashtika). According to the Hindu sage Vatsayana, author of the renowned treatise on love, the Kamasutra, homosexual practice is allowed by the holy writ (Dharmasutras) with just a few exceptions. Indeed, the Kamasutra devotes an entire chapter to Auparistaka - homosexual intercourse. [See pages 58-61 of Compilation – Volume 1] Kama Sutra, emphasizes pleasure as the aim of intercourse. It categorizes men who desire other men as a “third nature,” further subdivides them into masculine and feminine types, and describes their lives and occupations (such as flower sellers, masseurs and hairdressers). It provides a detailed description of oral sex between men, and also refers to long-term unions between men. In the Kama Sutra sex acts involving homosexuality are regarded in some castes permissible while not in other castes. [See pages 55 - 61 of Compilation - Volume 1]

C. The History of “Unnatural Offences” “against the order of nature” in India

During the Moghul Rule in India

26. The discretionary punishments (Tazeer) which were inflicted at the discretion of the judge as there were no fixed rules to prescribe such punishment, included the following : Offences that were not serious or of a heinous nature and were left to be punished according to the discretion of the judge. The number of such offences was very large e.g. use of abusive language, forgery of deed or letters with a fraudulent design, bestiality, sodomy, offences against human life, property, public peace and tranquility, decency, morals, religion etc.. [See M.P.Jain “Outlines

of Legal History" 5th Edition 1990, page 61C, second column, in Compilation - Volume 1]

27. It is important to note that the entire Muslim criminal law was based on the principle of Tazeer because the Hadd or Kisa or Diya had been prescribed for very limited offences. [See M.P.Jain at pages 61A – 61C in Compilation - Volume 1]

<u>During the British Rule in India</u>

28. The British Raj introduced the law relating to unnatural sex in India in 1861 through Section 377 of the Indian Penal Code. Similar laws were introduced by the British, in other countries during their colonial rule.

29. On October 14, 1837, the all British "Indian Law Commission" (consisting of Macaulay, Macleod, Anderson and Millet) submitted its draft Penal Code to Lord Auckland, the British Governor-General of India. In this draft, buggery has been replaced by two crimes under the heading of "unnatural offences"

> "Of Unnatural Offences
>
> 361. Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.
>
> 362. Whoever, intending to gratify unnatural lust, touché for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine." [page 64 of Compilation - Volume 1]

As opposed to penile – anal sex, it criminalized mere intentional touching for purpose of gratifying unnatural lust. However, it removed death penalty and prescribed two different terms of imprisonment depending on whether or not there was consent.

30. In the introductory report of Lord Macaulay, it was stated as hereunder:

> "Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgement of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefit which be derived from legislative measures framed with the greatest precision." [page 65 of Compilation - Volume 1]

31. The Special Report of the Indian Law Commissioners, 1847 – 1848 at pages 65A – 65D of Compilation – Volume 1, on the Indian Penal Code, reads as hereunder:

> "451. The Law Commissioners observe that Clauses 361 and 362 relate to an odious class of offences, respecting which it is desirable that as little as possible should be said. They therefore leave the provisions proposed therein without comment to the judgement of the Governor-General in Council. Mr. A.D. Campbell in concurrence with Mr. Blane, censures the false delicacy which has in their opinion caused a most improper ambiguity in these clauses, leaving it uncertain whether they apply to the mere indecent liberties, or extend to the actual commission of an offence of the nature indicated.

452. It appears to us clear enough, that it was meant to strike at the root of the offence by making the first act tending to it liable to the same punishment, if the judge shall deem it proper, as the offence actually accomplished. This is a new principle, and it would have been better if the commissioners had explained for what reason they adopted it, in respect to the offences here contemplated in particular. We conceive that there is a very weighty objection to the clauses in question, in the opening which they will afford to calumny, if for an act so slight as may come within the meaning of the word “touches”, a man may be exposed to such a revolting charge and suffer the ignominy of a public trial upon it.

453. Colonel Sleeman advises the omission of both these clauses, deeming it most expedient to leave offences against nature silently to the odium of society. It may give weight to this suggestion to remark that the existing law on this subject is almost a dead letter, as appears from the fact that in three years only sex cases came before the Nizamut Adawlut at Calcutta, although it is but too true, we fear that the frequency of the abominable offence in question “remains”, as Mr. A.D. Campbell expresses it, a “horrid stain upon the land”

454. Mr. Livingstone, we observe, makes no mention of offences of this nature in his code for Louisiana, and they are omitted in the revised Statutes of Massachusetts, of which the Chapter “of offences against the Lives and Persons of Individuals” is appended to the 2nd Report of the English Criminal Law Commissioners. By the French Penal Code, Offences of this description do not come within the scope of the law, unless they are effected or attempted by violence, except the sufferer be under the age of ten years.” [pages 65C-65D of Compilation - Volume 1]

32. The Indian Penal Code became an Act of the (British) Governor-General in (his all British Legislative) Council on October 6, 1860. The final version of Section 377 retained the caption “Unnatural

offences", but merged the two offences in the 1837 draft (presumably because consent was later deemed irrelevant) into a different offence of "carnal intercourse against the order of nature". This offence was different than the 1837 draft, because it required some form of penetration, as opposed to mere "touching". Compared with the 1828 offence of "buggery", Section 377 was potentially broader depending on what interpretation the Courts would give to "carnal intercourse against the order of nature".

33. This provision was based upon traditional Judeo-Christian moral and ethical standards, which conceived of sex in purely functional terms, that is, only for the purpose of procreation. Any carnal sex involving a penile penetration but which was non-procreative was abhorred, viewed as a sin and being "against the order of nature". Since only penile-vaginal sexual activity is procreative, all penile penetrative sexual activity, other than penile-vaginal, between both man and man; man and woman and between man/woman and an animal, is considered to be "against the order of nature" and thus criminally proscribed under Section 377.

34. Prior to the British rule in India, there was no law criminalizing sexual practices *per se*. Indian society has all along been more tolerant than others, including on the issue of sexuality. Criminalisation is in fact a western import. Ironically, although the English law was reformed in Britain by the *Sexual Offences Act* of 1967, Section 377 still remains on the statute books in India and is now seen by some as part of Indian values and mores.

35. As Section 377 was left undefined as "carnal intercourse against the order of nature", it later led to the expansion in the meaning of the term way beyond the common law understanding.

V. INTERPRETATION OF SECTION 377

A. Textual Reading

36. Section 377 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") is placed in Chapter XVI of the IPC. It reads as follows:

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

37. It is important to advert to two other provisions of the IPC, viz. Sections 375 and 497, IPC.

38. The relevant portion of Section 375 of the IPC reads as follows:

> "***375. Rape.—***A man is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—
>
> ……
>
> *Explanation.*—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> *Exception.*—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

39. Section 497 of the IPC reads as follows:

> "***497. Adultery.—***Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be wife of another man, without the consent

or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

40. The key elements of Section 377 are analysed below:

"Unnatural offences":

(a) The marginal note refers to the acts proscribed as "unnatural offences". This expression, however, is not used in the text of section 377.

(b) The expression "whoever" in Section 377 can be a man or a woman. It cannot be an animal as voluntariness has to be associated with the human, covered by the expression "whoever".

(c) The expression "whoever" in Section 377 refers not only to a penetrating person, but also to the person who is penetrated.

(d) The expression "man, woman or animal" that appears later, means that the carnal intercourse could be had with any man, woman or animal.

(e) On the other hand, Section 376 IPC makes it explicitly clear that the offence of rape can only be committed by a man on a woman.

(f) The expression "whoever" in Section 497 IPC necessarily refers only to man.

"Voluntarily":

(a) The expression "voluntarily" is used as opposed to the term "consent".

(b) "Voluntarily" denotes willingness. A person, e.g. a child, may be willing but is unable statutorily to consent.

(c) A voluntary act by a person requires only one person. On the other hand, where the term

"consent" is used, at least two persons are required. However, consent is irrelevant for Section 377. So, even if both parties consent, they could be convicted.

(d) In light of judicial precedents, it will be shown that in some cases, the passive partner is convicted as an abettor. Contrarily, Section 497 of the IPC clearly stipulates that the wife (the passive partner, whether willing or unwilling) shall not be punishable as an abettor.

(e) If a person is coerced, it takes away the element of "voluntariness" and therefore the person cannot be convicted.

(f) "Voluntarily" would also denote the element of *mens rea* for the offence.

"Carnal":

(a) According to the Concise Oxford Dictionary (Ninth edition 1995), the term "carnal" means "of the body or flesh; worldly" and "sensual, sexual".

(b) The expression "carnal intercourse" is used in Section 377, IPC as distinct from the expression "sexual intercourse", which appears in Sections 375 and 497, IPC. The expression, "carnal intercourse" is broader than "sexual intercourse".

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

(d) Section 375 and 497, IPC on the one hand and Section 377, IPC on the other operate in different fields. Section 375, IPC explicitly applies only to intercourse between a man and a woman.

Therefore, the expression “sexual intercourse” is “penile-vaginal sex”.

(e) The expression “carnal intercourse” is all sexual acts other than penile vaginal. This is further evident from the expression “against the order of nature” used in Section 377, IPC.

(f) “Against the order of nature”: The expression “carnal intercourse against the order of nature” refers to penile- non-vaginal sexual acts that do not result in procreation.

“Explanation”: The explanation stipulates that penetration is sufficient to constitute carnal intercourse. As has been judicially interpreted, and also in the context of Section 375, IPC, penetration, as opposed to the full act of sex coupled with seminal discharge, is required for the offence to be committed. Even partial penetration would do.

41. Section 377 also proscribes carnal intercourse [consent being irrelevant] with a woman and penalises it with imprisonment of up to 10 years or life imprisonment. No exception is carved out. Therefore, a husband can also be punished for carnal intercourse, against the order of nature, with his wife.

42. Section 375 suggests that a husband can have sexual intercourse with his wife who is 15 years and above. Section 497 proscribes sexual intercourse with a married woman and penalises it with imprisonment up to 5 years. The only exception to Section 497 is where sexual intercourse is with husband’s consent or connivance. A husband can only consent to sexual intercourse by someone with his wife. There is no question of consent to carnal intercourse with his wife (which he himself cannot engage with his wife).

VI. JUDICIAL INTERPRETATION OF SECTION 377

43. The acts covered under Section 377:

a. Initially oral sex was held not to be covered by Section 377 [***Govt. v. Bapoji Bhatt*** *1884 (7) Mysore* LR 280, para nos. 281 and 282 at page 66 – 70 of Compilation - Volume 1]

b. Later, however, oral sex was included within the ambit of Section 377 [***Khanu v. Emperor*** *1925 Sind* 286, para 2 at page 286]. Therefore, in addition to anal sex, oral sex came to be covered under Section 377.

c. Subsequently, several other acts were held to be covered under Section 377:

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

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

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

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

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

a. Initially a procreative test was used, whereby acts which do not have the possibility of conception of human beings were sought to be covered. [***Khanu v. Emperor*** at para 2; ***Lohana Vasanthlal v. State***, AIR 1968 Guj 352 at para 9]

b. Subsequently, an imitative test was formulated, that is, when acts of oral and anal sex become imitative of and replace the

desire of sexual intercourse. *[**Lohana Vasanthlal v. State*** at para 6-9]

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

45. Similarly, even in cases of orifices, whereas earlier the natural orifices of a human body, excluding the vagina, that is the anus and the mouth, were considered necessary to be penetrated for the purpose of attracting Section 377, in later judgments, the orifice could be created artificially by the human body such as thighs joined together, the palm folded etc.

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

47. As submitted herein above, consent is immaterial under Section 377.

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

49. As noted before, the interpretation of ‘carnal intercourse against the order of nature’ in India has become very uncertain and wide, due to lack of any precise legal definition. In this regard, a comparative perspective might be helpful. In Malaysia, Section 377A of the Penal Code, 1936 provides that:

> “377A. *Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.*
>
> *Explanation—Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.*

50. Most hitherto colonies under British rule also have a provision prohibiting acts of gross indecency between males or between persons. In Saint Lucia, Section 132 (4) of the Criminal Code defines “gross indecency” as:

> “*an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire*.”

51. In contrast to carnal intercourse against the order of nature that covers anal sex and oral sex, acts of gross decency are broader in scope. Most sodomy laws are the legacy of the colonial British rule, especially the laws on buggery (The Punishment of the Vice of Buggery, 1533), carnal intercourse against the order of nature (Offences against the Person Act, 1861) and acts of gross indecency (The Criminal Law Amendment Act, 1885).

52. Below is the summary of some key cases decided under Section 377 IPC:

S. No.	Citation	Held
1	*Govt. v. Bapoji Bhatt* 1884 (7) Mysore LR 280	Oral sex did not constitute the offence under Section 377.
2	*Queen Empress v. Khairati* 1884 ILR 6 ALL 204	A habitual sodomite cannot be prosecuted under Section 377 without proving that he committed the acts covered under Section 377.
3	*Khanu v. Emperor* 1925 Sind 286	Oral sex is covered under Section 377 because there is no possibility of conception of human beings and hence is an act against the order of nature.
4	*Khandu v. Emperor* AIR 1934 Lahore 261	Followed reasoning in Khanu's case and held that Coitus per nose of a bullock is covered under Section 377. Observations that it was a depraved act and a degrading example of sexual immorality.
5	*Nowshirwan Irani v. Emperor* AIR 1934 Sind 206	Penetration, however little should be proved strictly. A mere preparation to commit sodomy should not be seen as an attempt
6	*D.P. Minwalla v. Emperor* AIR 1935 Sind 78	Before a conviction under Section 114 and Section 377 can be recorded, it must be proved, both that the offence was committed and abettor was present. If, however, the magistrate's conclusion is that accused is guilty of no more than an attempt, the conviction of abettor who is present should be under Section 377 read with Section 116 IPC.
7	*Lohana Vasanthlal Devchand & Ors. v. The State,* AIR 1968 Guj 352	Mere penetration is enough, seminal discharge is not necessary. Oral sex is against the order of nature as there is no possibility of conception of human beings and is covered by Section 377 When cunnilinctus or fellatio is used as a prelude to sexual intercourse then it would not be covered by Section 377. However when they become imitative of and replace the desire of sexual intercourse it becomes a 'perversion' and punishable under Section 377
8	*St. of Kerala v. Kundumkara Govindan & Anr*, 1969 Cri LJ 818	Intercourse between the thighs of another is carnal intercourse against the order of nature covered by Section 377

9	*Grace Jayamani v. E.P. Peter* AIR 1982 Karnataka 46	Husband would be guilty of committing sodomy against his wife if she is not a consenting party and the wife would be entitled to divorce
10	*Fazal Rab Choudhary v. St. of Bihar*, AIR 1983 323	The offence (oral sex) is one under Section 377 which implies sexual perversity
11	*Mihir @ Bhikari Charan Sahu v. St. of Orissa,* 1991 Cri LJ 488	The offence of anal sex is one relating to perversity and depravation of mind and covered by Section 377.
12	*Brother John Antony v. The State* 1992 Cri LJ 1352	Acts fall into two categories of sexual perversions a) oral sex and b) manipulation and movement of penis of accused whilst being held by victims in such a away as to create an orifice like thing for making manipulated movement of insertion and withdrawal till ejaculation of semen – both categories fall under Section 377.
13	*Calvin Francis v. St. of Orissa* 1992 (2) Crimes 455	Oral sex is covered under Section 377. Orifice of the mouth is not according to nature, meant for sexual or carnal intercourse.
14	*Biren Lal v. St of Bihar* 1992 (2) Crimes 286	Preparation to commit offence not covered by Section 377. There is no allegation of penetration.
15	*St of Gujarat v. Bachmiya Musamiya* 1998 (3) Guj L.R. 2456	Since Section 377 does not specify any particular opening to which penetration can be made, penetration into any orifice of one's body except the vaginal opening of a female is sufficient for establishment of the crime.
16	*Azadi Bachao Andolan v. All India Radio & Ors.* 13/10/97, Metropolitan Magistrate Delhi	Homosexuality is sexual perversity and repulsive sex. The programme encourages and propagates homosexuality. The law calls it a crime and horrified condemnation and psychiatry calls it sickness….it may be carried out clandestinely and in privacy by few but cannot be permitted to get encouragement and public support.

The full list of cases decided by the Courts under Section 377 is at pages 81 – 90 of Compilation – Volume 1.

VII. THE IMPACT OF SECTION 377

53. The criminalisation under Section 377 has far reaching consequences. The impact is invidious at a deep level, severely restricting the right to dignity, personhood and identity, privacy, equality and right to health of homosexual men. The restriction imposed by Section 377 imposes an unequal burden on homosexual men and impacts homosexual persons as a class.

Section 377 criminalises all forms of sexual intercourse between homosexual men as opposed to some forms of sexual intercourse between heterosexual persons and therefore, impacts homosexual men disproportionately as a class

54. It is submitted that it is clear from the historical underpinnings and judicial interpretation of Section 377 that it proscribes all sexual acts which are penile-non-vaginal. As penetrative sexual acts between men are essentially penile-non-vaginal, in effect, Section 377 criminalises all forms of sexual acts of homosexual men. Homosexual orientation is an innate and immutable characteristic of homosexual persons but the expression of that sexuality is criminalized by Section 377.

Section 377 is associated with homosexuals and extends from criminalizing "acts" to criminalizing "identity"

55. It is further submitted that although, technically, Section 377 criminalises the 'act' and not the 'identity', it ends up criminalizing the 'identity' as well since it is predominantly homosexual/transgender persons who are associated with the sexual practices proscribed under Section 377. In broader society, heterosexuals are not associated with such sexual practices. For this reason, Section 377 is largely applied to homosexuals. Once 'acts' proscribed are associated with an

'identity', the threat of criminalisation extends to the 'identity' as well.

In the case of ***National Coalition for Gay and Lesbian Equality v. the Minister of Justice & Ors***.,1998 (12) BCLR 1517 (CC), the Constitutional Court of South Africa while holding that criminalisation of sodomy violates, inter alia, the dignity of homosexual men, observed that:

> *" The common law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct, which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy because they seek to engage in sexual conduct, which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity…"* [para 28 at page 295 of Compilation – Volume 6]

56. As can be shown from the below mentioned cases, Section 377 is used against not only men who are actually caught in the act, but also those who give the appearance of being homosexual and

therefore likely to commit the act. This has legitimised the manner of police harassment and abuse of homosexual men.

a. In ***Queen Empress v. Khairati*** 1884 ILR 6 ALL 204, a transgender person was arrested and prosecuted under Section 377 on the suspicion that he was a habitual catamite.

b. In ***Noshirwan v. Emperor***, having seen two young men, both adults, walking into the house of one of them, Solomon, the neighbour, peeped “through a chink in the door panels” and noticed that the two were attempting to commit sodomy. He walked into the house and forced them both to the police station. The two accused were released and their conviction set aside as the act of the sodomy was never completed, although the judge did reprimand one of the men, Ratansi, as a “despicable” specimen of humanity for being addicted to the “vice of a catamite” on his own admission. Here once again we come to association of the person – a catamite, with the act, rather than the act in isolation.

57. The privacy of heterosexual relationships especially marriage, are clothed with a veil of legitimacy while homosexual intimacies invite societal disapproval and are subjected to scrutiny. Further, Section 377 has been interpreted in a way to limit its application only to same sex sexual intimacies and to exclude heterosexual adult consensual sexual intimacies from its purview.

a. In the case of ***Govindrajulu, in re****,* (1886) 1 Weir 382, the Court held that oral sex between a man and a woman is not covered by Section 377.

b. Further in ***Grace Jayamani v. E. Peter***, AIR 1982, Karnataka 46, in a divorce petition of the wife against the husband on the ground of non-consensual oral and anal sex, the Court held that if the wife consented to oral and anal sex then the husband will not be guilty of sodomy. Thereby, bringing in the element of consent under Section 377 for heterosexual couples, which is otherwise absent for male-male sex.

c. Also, the imitative test laid down in ***Lohana Vasantlal Devchand v. State***, AIR 1968 Guj 252, which opines that acts of oral sex done as a prelude to sexual intercourse will not be covered under Section 377 is designed to keep heterosexual sexual relationships out of Section 377, as the reasoning flows from the assumption that after oral sex as a prelude, a couple will engage in penile-vaginal sexual intercourse, which is not possible in male-male sex.

Section 377 denies a fundamental human experience to homosexual men

58. Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well being and social adjustment. By criminalising sexual acts engaged in by homosexual persons, Section 377 denies them the very opportunity to participate in a profound and fundamental aspect of human experience. The effect is that homosexual persons either deny themselves a basic human experience to avoid committing a “crime” or otherwise engage in sexual acts and become liable for prosecution under Section 377. It, therefore, denies them the right

to form private intimate sexual relationships, which is otherwise available to heterosexuals.

Section 377 exposes homosexual persons to disproportionate risk of prosecution and harassment by police

59. The paradigm which associates Section 377 with homosexuals has been set by the judicial interpretation and is applied by State machinery of law enforcement, the police.

60. Section 377 has been used to harass, intimidate, blackmail, rape and torture homosexual men in India. There have been numerous reported instances of harassment against homosexual men by the law enforcement and private non-state actors. The police harassment takes the form of extortion, entrapment, illegal detention, abuse and outing the identity of homosexual men. [See A PUCL-K fact finding report about Bangalore: *Human Rights Violation against sexuality minorities in India, 2001at page 13 in Compilation – Volume 5*; *"Structural Violence Against Kothi-Identified Men Who Have Sex With Men in Chennai, India":* A Qualitative Investigation, Venkatesh Chakrapani et al., 2007, at pages 30 -48 in Compilation – Volume 4; *A Survey of MSM HIV Prevention Outreach Workers in Chennai, India*, Steven A. Safren et al, 2006, at pages 19 - 21 in Compilation - Volume 4].

61. Some specific incidents of police harassment are listed herein below:

    a. <u>Lucknow 2001</u>

    On 07.07.2001, an FIR was filed in the Hazratganj Police Station, by one Mr. Rajesh complaining that he had been sexually assaulted by an unknown individual [See FIR dated 7.07.2001 at pages 45-46.in Compilation - Volume 5]. On the

basis of this FIR, the Lucknow police raided a park, which was frequented by homosexual persons and arrested some people. One amongst the arrested was an outreach worker from an NGO called the Bharosa Trust. Thereafter, the Police raided the offices of two NGOs, Bharosa Trust and Naz Foundation International (NFI). Bharosa Trust works in the field of HIV/AIDS intervention with homosexual persons in Lucknow. While NFI is a UK based International agency that has its South Asia Liaison office in Lucknow to provide technical support for development of projects addressing HIV issues with reference to homosexual persons. The police arrested four outreach workers and staff working with Bharosa Trust and NFI, beat them up in the police station and sealed the office of NFI. They also seized literature and materials used for educating homosexual persons on 'prevention of risk of acquiring / transmitting HIV'.

The arrested staff members were charged with criminal conspiracy (Section 120B) to commit unnatural offences under Section 377, abetment (Section 109), sale of obscene books (Section 292) etc. the police failed to produce any evidence to support the charge of criminal conspiracy to commit unnatural offence (Section 377) against the arrested outreach workers. Even the medical report disclosed by the police clearly stated that no clear case of sodomy has been made out. Despite lack of evidence, Chief Judicial Magistrate and the Sessions Court denied them bail on the ground that they were a 'curse on society' [See Order of Court of Sessions and order of Chief Judicial Magistrate denying bail at pages 47-48 and 49-50 respectively in Compilation – Volume 5]. The outreach workers were incarcerated for a total of 45 days.

It is pertinent to point out that both the NGOs were functioning within the policy of NACO and the Ministry of Heath and Family Welfare (MoHFW) on HIV prevention programmes with high-risk groups like, homosexual men. [See *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India, Human Rights Watch, July 2002,* at pages 56 - 58.of Compilation - Volume 5].

b. Lucknow 2006

On 04.01.2006, the national and regional newspapers reported that four homosexual men were caught allegedly having sex in public in Lucknow and arrested under Section 377. As per an FIR lodged by the Lucknow police at Gudamba police station on 4 January 2006 at 12.40 am, they arrested 4 men, Nihal Naqvi, Pramit Bailey, Ashutosh Khanna and Pankaj Gupta, on charges of violation of Section 377. The four men were supposedly engaging in `unnatural sex' in a picnic spot and were arrested. However, a fact finding conducted by the National Coalition for Sexuality Rights (NCSR), noted that 'it was clear that none of the men arrested engaged in public sex and were not even present at the spot of the alleged crime.' The fact finding team arrived at this conclusion by talking to various parties concerned. There was no independent witness and no medical evidence to prove that such an act had indeed been committed. The fact gathered revealed that the police arrested one man on 3rd January at his home. The police then forcibly obtained from him names and numbers of other men mentioned in the FIR. On the following day, he was forced to call the other men and request them to meet him at one restaurant. The men were arrested by the police when they turned up in the restaurant. This was

a clear case of entrapment. A point to note is that the FIR was lodged a full 10 hours before the men were arrested due to entrapment. All the four men were beaten in custody and made to sign blank papers. [*see A Preliminary Report of the Fact Finding Team on the Arrest of Four Men in Lucknow Under Section IPC 377,* at pages 62-69 .in Compilation - Volume 5].

Criminalisation under Section 377 creates a culture of silence and intolerance in society and perpetuates stigma and discrimination against homosexual persons

62. Criminalisation under law radiates out into society translated as stigma and discrimination in the public and private sphere and perpetuates the social perception that homosexuality is illegal and abnormal. In the culture of heteronormativity, there is no space for homosexual persons in society beginning from their homes. Studies have documented that homosexual persons are reluctant to reveal their sexuality to their parents and family for the fear that they will not be accepted. In some cases, where they have confided in their parents/family, they have faced denial, shock and rejection. Some have even been beaten, locked up and pressurized to 'change' their sexuality to conform to heteronormativity. Sometimes parents forcefully get their children married in a bid to cure their 'abnormal' sexuality. [See A PUCL-K fact finding report about Bangalore: *Human Rights Violation against sexuality minorities in India*, para no. 3.1 at pages.18 -19 in Compilation – Volume 5]

Criminalisation under Section 377 and the concomitant social prejudice results in homosexual persons being subjected to forced conversion therapies

63. It is submitted that criminalisation under Section 377 coupled with the social opprobrium that it perpetuates have resulted in several homosexual persons being forced to submit to conversion therapies in a bid to change their sexual orientation. In several instances, homosexual persons have been forcibly taken to mental health professionals by parents to change the sexual orientation of their homosexual children as they regard homosexuality as a disorder, which can be 'cured'.

64. It is pertinent to point out that homosexuality is no longer considered a disease or mental disorder and is instead recognised as an alternative variant of human sexuality and an immutable characteristic which cannot be changed. The American Psychiatric Association (APA) removed homosexuality from its list of disorders in Diagnostic and Statistics Manual IV (DSM – IV) in 1973. The Resolution stated that *"homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities."* [See position statement of APA, Homosexuality and Civil Rights, December 1973 at page 70 in Compilation - Volume 5]. Similarly, the World Health Organisation also removed homosexuality as a disorder from International Classification of Diseases (ICD-10) in 1992. 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"* [See relevant extract of ICD – 10 at second paragraph at page 72 in Compilation - Volume 5]. Both these systems of classification are followed internationally and in India as well.

65. In addition to removing homosexuality from the list of disorders, the American Psychiatric Association has issued additional position statements opposing criminalisation of adult consensual same–sex relations [See *APA position statement on homosexuality*, December 1992 and reaffirmed in July 2011 at page 73 in Compilation - Volume 5] and opposing any psychiatric treatment, such as “reparative” or conversion therapy, which is based on the assumption that a patient should change her/his sexual homosexual orientation [See *APA Position Statement: Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, May 2000, at pages 74-75 in Compilation Volume 5].

66. The American Psychological Association (APA) has also issued position statements endorsing the stand of the American Psychiatric Association on removing homosexuality as a mental disorder in 1973 [See *Resolution of American Psychological Association* dated 24 – 26 January 1975 at page 76 in Compilation - Volume 5]. It has also issued resolution on appropriate and affirmative therapeutic responses to sexual orientation [See *Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, 5 August 2009, at pages 77 – 81 in Compilation - Volume 5].

67. The American Psychiatry Association and the American Psychological Association had together filed an amicus brief in ***Lawrence v. Texas***, 539 US 558. [See Amicus brief in Lawrence v. Texas at pages 82 – 116 in Compilation - Volume 5]. The amici submitted the brief to describe the empirical research from the social and behavioural sciences pertaining to sexuality, sexual

orientation and the social psychology of prejudice. The research demonstrated the harm from and the groundless assumptions behind laws criminalizing same-sex sexual acts. The main points of their submission can be summarized as herein below:

a. Homosexuality is a normal form of human sexuality;
b. An individual's sexual orientation appears to emerge between middle childhood and early adolescence;
c. Sexual orientation is an immutable characteristic and cannot be changed;
d. Suppressing sexual intimacy among same-sex partners would deprive gay men and lesbians of the opportunity to participate in fundamental aspects of human experience;
e. Criminalisation reinforces prejudice, discrimination and violence against gay men and lesbians;
f. Criminalisation causes concealment of orientation, self-denial and psychological distress;
g. Criminalisation discourages homosexuals from seeking legal redress, which will require disclosing their sexual orientation.

68. Homosexual persons are still treated by some doctors in India as persons with disease and at times are subject to Electro-Convulsive Therapy (ECT) without consent because of parental pressure.

69. An Indian study, *Medical Response to Male same – sex Sexuality in Western India: An exploration of 'Conversion Treatments for Homosexuality,* reveals that many young homosexual persons are forced to submit to 'conversion/reparative' therapies and that many mental health professionals attempt a 'conversion' therapy due to pressure from families and society. The study shows that some mental health professionals in India still consider

homosexuality to be a disease and attempt to change it, while some who earlier did ‘conversion’ therapies discontinued with it because they had reservation about its efficacy and did not think it right to treat homosexuality per se. [See at page 117-150 of Compilation - Volume 5].

70. It is submitted that there is an irreconcilable contradiction in treatment of homosexual sexual acts by medical science and by legal provision of Section 377. On one hand, medical science treats homosexuality as a positive variant of human sexuality and manifestation of that sexuality in oral and anal sex, as normal. On the other, Section 377 criminalises oral and anal sex between men. If homosexual sexual orientation is recognized as normal then its expression in only ways possible, i.e. oral and anal sex cannot be continued to be criminalized.

Effect of Criminalisation in the area of Employment

71. Criminalisation driven stigmatisation and discrimination against homosexual persons is witnessed in the area of employment as well. A person convicted for engaging in adult private consensual sexual acts, will be ineligible for several government jobs that disqualify persons who have been convicted for an offence involving moral turpitude.

    a. One incident that drives home the invidious discrimination against homosexuals is that of late Prof. Shrinivas Ramchandra Siras, Reader and Chair of the Department of Modern Indian Languages at Aligarh Muslim University (AMU), who identified as homosexual. On 08.02.2010, three persons claiming to be television reporters broke into the deceased Professor’s home and photographed him with a male

partner. Prof. Siras was suspended on grounds of alleged immoral sexual conduct, which undermined "the pious image of the teacher community and tarnished the image of the University." Subsequently, the Allahabad High Court stayed the suspension. [See ***Dr. Shrinivas Ramchandra Siras & Ors. v. The Aligarh Muslim University & Ors***, Civil Misc. Writ Petition No.17549 of 2010, Order dated 01.04.2010 at page 151 – 156 in Compilation - Volume 5]. Prof Siras however, died under mysterious circumstances two days after the Court's order.

b. In the case of ***Jamil Ahmed Qureshi v. Municipal Council Katangi & Ors***, 1991 Supp (1) SCC 302 at para 6, a person who had been convicted and sentenced under Section 377 had not disclosed this fact while applying for a job. When the employer found out later, he was dismissed from his service. The Court held, that "appellant having been convicted for offence involving moral turpitude was ineligible under the Rules for being appointed in the service."

Section 377 impacts the right to health of homosexual persons psychological harm

72. Section 377 and the resultant stigma and discrimination causes severe mental and psychological health issues with homosexual persons. The tag of criminality associated with homosexuality causes distress and confusion among homosexual persons. Many homosexuals live in self denial or conceal their sexual orientation. The attempt to conceal or deny their sexuality causes immense psychological distress. The rejection by family, forced conversion therapies and prejudice in society, reinforces the

"shame" and "abnormality" associated with homosexuality and can often result in psychological problems and self-destructive behavior. [See PUCL Report, 2001, para 4 at page 26 in Compilation - Volume 5*; APA amicus brief in Lawrence v. Texas* at pages 111-112 in Compilation - Volume 5*],*

In the case of ***National Gay & Lesbian Coalition***, [para 23 at page 292 in Compilation – Volume 6], Ackermann J. observes that:

> *"The European Court of Human Rights has correctly, in my view recognized the often serious psychological harm for gays which results from such discriminatory provisions".*

Ackerman J further quoted with approval from ***Norris v. Republic of Ireland*** (1991) 13 ECHR 186 at para 21 [See *Norris v. Ireland,* para 21 at page 50 in Compilation – Volume 6]*:*

> *"one of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow…"*

Sachs J. further observes in para 127 that [at page 390 in Compilation - Volume 6]:

> *"in the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection. It is the prohibition of the expression of love. It is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group."*

In the case of ***Vriend v. Alberta,*** (1998) 1 S.C.R. 493, [para 102 at page 361 in Compilation – Volume 7], Cory J. observes that:

> *"Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection…"*

Section 377 prevents sexual and reproductive health information and services

73. Section 377 imposes a culture of silence and invisibility around issues of homosexuality. Initiatives to spread awareness and correct information about homosexual sexual practices and initiatives to promote safer sex between them have been seen as encouragement to the offence under Section 377.

    a. Two education and awareness programmes on issues of 'sexual and reproductive health' aired on the All India Radio were seen as 'obscene' and conflicting with Section 377 and were hence discontinued. Upon a complaint, the Chief Metropolitan Magistrate, Delhi took cognizance of an offence under Section 292, IPC. Among other information, the programmes gave information on safer sex practices for gay men in a non-judgmental manner. The Magistrate observed that the talk encourages and propagates homosexuality, which the society treats with jest, supercilious denial and horrified condemnation. He further observed that the law called it a crime and psychiatry calls it sickness. He further observed that the law has classified homosexual intercourse as a crime under Section 377 so even when the broadcaster gives

hygiene information about such illegal act, it amounts to encouraging it. [See Order dated 23 October 1997, pages 157 – 185, in ***Azadi Bachao Andolan Delhi Unit v. All India Radio & Ors.***, at paras 72 – 80 and pages 181-183 in Compilation - Volume 5].

b. An Organization, Aids Bhedbhav Virodhi Andolan, filed a writ petition in the Delhi High Court challenging the constitutionality of Section 377. The immediate given reason for filing the WP was the refusal by the Inspector General of Prisons to distribute condoms in Tihar jail, as it would amount to encouraging homosexuality which is a crime under Section 377 *[See W.P. No. 1784 of 1994, at* pages 186-202, paras 3-4 at page 187 – 188 in Compilation - Volume 5]. The Inspector General (Prisons) Tihar Jail filed a counter affidavit stating that "isolated cases of homosexuality are reported and action is taken in each case on merits." On the issue of condom distribution for HIV prevention, she stated "there is no HIV+ prisoner in the jail…doctors regularly check prisoners for HIV…whenever any such case is brought to the notice of the concerned authorities, the prisoners are separated. In the circumstances, there is no justification and legality for supply of condoms in the prison as it will promote homosexuality." *[See counter affidavit filed by Inspector General Prisons, dated 10.09.1994 at pages 203- 206 in Compilation - Volume 5*]. NACO field an affidavit stating that there is a need to distribute condoms in jails in order to prevent the transmission of HIV *[See counter affidavit fled by NACO* dated 21.09.1994 at pages 207-210 in Compilation - Volume 5].

Section 377 impedes prevention of transmission of HIV and poses a threat to public health

74. In their written submissions, titled "*Concerns of Ministry of Health*", at pages 212 – 216 of Compilation – Volume 5, NACO submits that

> *"Reluctance to reveal same sex behavior has rendered risky sexual practices to go unnoticed and unaddressed in MSM. The fear of harassment by law enforcement agencies mostly leads to sex being hurried, particularly because these groups lack 'safe place' and they often utilize public places for their indulgence. They do not have the option to consider safe sex practices. The hidden nature of such groups hampers interventions under NACP which is aimed at prevention of AIDS. This makes a large section of MSM invisible and unreachable."* [paras 7-9 at page 213]

75. It will be shown in greater detail below, that the threat of prosecution under Section 377 and the stigma/discrimination perpetuated by it pushes homosexual men and transgender persons underground and hampers their access to HIV prevention services and tools leaving them vulnerable to HIV and thereby violates their right to health under Article 21. It further, makes the public health programmes on prevention of HIV ineffective. As many homosexual men are married and are a bridge population, failure in reaching them with information and tools on safer sex and HIV prevention impacts the health of the whole society.

VIII. PRINCIPLES OF INTERPRETATION OF FUNDAMENTAL RIGHTS

76. It is an established position of law that the fundamental rights under the Constitution are to be interpreted in an expansive and purposive manner and not in a narrow and pedantic fashion. Such

liberal interpretation would invest fundamental rights with significance and vitality and enhance the dignity of the individual and the worth of the human person. [***Francis Coralie Mullin v. Administrator, Union Territory of Delhi***, (1981) 1 SCC 608 at para 6]

77. The Constitution is not an ephemeral legal document but a living document intended to endure for ages. It cannot get fossilised or atrophied in its time but has to remain flexible enough to meet the newly emerging problems and challenges and to anticipate and take into account changing conditions and purposes. [***M. Nagaraj v. Union of India*** (2006) 8 SCC 212 at para 19]

78. Further, fundamental rights under Articles 14, 19 and 21 are not distinct or mutually exclusive but they have to be read together. Each freedom has different dimensions and each has to stand the test of other guaranteed freedom. The right to equality, under Article 14, and the rights to dignity and privacy, under Article 21, are interlinked and each of these rights has to be fulfilled for the other rights to be truly effectuated. [***Maneka Gandhi v. Union of India*** (1978) 1 SCC 248 at paras 4-7 and 202]

79. It is also an established position of law that international law can be used to expand and give effect to the fundamental rights guaranteed by our Constitution. [***V/0 Tractor Export v. Tarapore & Co.***1969 (3) SCC 562 at para 15; ***Jolly George v. Bank of Cochin*** (1980) 2 SCC 360 at para 10; ***Gramaphone Company of Indian Ltd v. Birendra Bahadur Pandey,*** (1984) 2 SCC 534 at para 5; ***Vellore Citizens Welfare Forum v. Union of India,*** (1996) 5 SCC 647 at para 15; ***Vishakha & Ors. v. State of Rajasthan & Ors.*** (1997) 6 SCC 241 at paras 7 and 10; ***People's Union for Civil Liberties v. Union of India & Anr.*** (1997) 1 SCC 301 at paras 20-26; ***People's Union for Civil Liberties v. Union***

of India & Anr. (1997) 3 SCC 433 at para 13; ***Apparel Export Promotion Council v. A.K. Chopra*** (1999) 1 SCC 759, at para 26-27; ***Pratap Singh v. State of Jharkhand*** (2005) 3 SCC 551 at para 63-64; ***People's Union For Civil Liberties v. Union of India & Anr.*** [(2005) 2 SCC 436); ***Entertainment Network (India) Ltd. v. Super Cassette Industries***, (2008) 13 SCC 10 at para 70-76, ***Smt. Selvi v. State of Karnataka*** (2010) 7 SCC 263 at para 236]

80. The International conventions, Universal Declaration of Human Rights [(hereinafter 'UDHR') at page 1 of Compilation – Volume 2], International Convention on Economic, Social and Cultural Rights [(hereinafter 'ICESCR') at page 9 of Compilation – Volume 2] and the International Convention on Civil and Political Rights [(hereinafter 'ICCPR') at page 17 of Compilation – Volume 2] have been ratified by India and can be used to aid the construction of fundamental rights.

81. In particular, both ICCPR and ICESCR have been domesticated in India, via Section 2 of The Protection of Human Rights Act, 1993 that clearly provides that human rights that are enforceable in India include the rights contained in both ICESCR and ICCPR. Thus, the Indian courts can, apart from incorporating human rights under ICPPR and ICESR into Fundamental Rights while interpreting the fundamental rights, enforce human rights under ICPPR and ICESR directly.

IX. SECTION 377 VIOLATES ARTICLE 21 OF THE CONSTITUTION OF INDIA

82. Article 21 of the Constitution guarantees the right to life and personal liberty to all persons. It is based on the premise that all

human beings are born with certain inalienable rights like life, liberty and happiness, which are fundamental for the realisation of their full personality. Article 21 has been interpreted to include rights to privacy, substantive due process, dignity and health, amongst others that have been deemed central to the concept of civilised existence in a democratic society.

83. By making sexual acts between consenting adults in private an offence, Section 377 violates the rights of privacy, dignity and health guaranteed under Article 21 of all persons and, in particular, those of homosexual men.

Section 377 Violates the Right to Privacy of everyone including Homosexual Men

84. The right to privacy has been held to be an integral component of right to life and personal liberty under Article 21. The Constitution creates and protects a zone of privacy within the realm of personal liberty of all persons, including heterosexual and homosexual persons, where the State cannot intrude into without showing a compelling interest. This does not only mean protection from direct violation, like domiciliary visits, arbitrary search and seizures, etc, but also those acts, like intimate sexual conduct, which the zone of privacy protects from the intrusion by State.

85. The jurisprudence on right to privacy, first developed in the United States, was later followed by this Hon'ble Court in interpreting Article 21 of the Constitution.

86. Right to privacy is also an entrenched part of international human rights law. Article 17 of International Covenant on Civil and Political Rights (ICCPR), 1966 provides that:

> "*no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation*" (at page 23 of Compilation-Volume 1)

Similar provisions exists in Universal Declaration of Human Rights (Article 12 at page 4 of Compilation - Volume 1) and European Convention on Human Rights, 1950 (Article 8 at page 42 of Compilation -Volume 1). India has ratified the ICCPR and also domesticated the same by enacting the Protection of Human Rights Act.

87. The right to privacy first developed in the US has been accepted by this Hon'ble Court.

88. The right to privacy has evolved in United States from ***Griswold v. State of Connecticut*** [381 US 479 (1965) (prohibition on the use of contraceptives by married women) at pages 5-6 of Compilation - Volume 7] to ***Eisenstadt v. Baird*** [405 US 438 (1972) (prohibition on use of contraception by unmarried woman) at page 43 of Compilation-Volume 7] to ***Roe v. Wade*** [410 US 113 (1973) *(*prohibition on abortion per se for both single and married women) at page 79 of Compilation-Volume 7]. In these cases, the United States Supreme Court struck down these statutes as unconstitutional and held that the fundamental constitutional guarantees have created penumbras of zones of privacy, whereby "the sanctity of a person's home and the privacies of life", is protected from State intrusion. This protected zone of privacy includes "only those personal rights that can be deemed 'fundamental' or 'implicit' in the concept of 'ordered liberty". These rights include marriage, procreation, contraception,

family relationships, child rearing and education [***Roe v. Wade*** (supra) at page 79 of Compilation-Volume 7].

89. This line of reasoning has been accepted by this Hon'ble Court in a number of cases. In ***Kharak Singh v. State of Uttar Pradesh*** [(1964) 1 SCR 332 at para 28], this Hon'ble Court noted the previous US cases pertaining to right to privacy and held that right to privacy is an essential ingredient of personal liberty and envisages the right of an individual to be free from restrictions or encroachments on his person, whether those encroachments are directly imposed or indirectly brought about by calculated measures.

90. This was further developed in ***Gobind v. State of Madhya Pradesh & Anr***. [(1975) 2 SCC 148] wherein, while examining the constitutional validity of regulations that permitted surveillance of certain persons, this Hon'ble Court relied on ***Griswold v. Connecticut*** and ***Roe v. Wade***. It noted that individual autonomy is protected in part under our Constitution and held that "*privacy primarily concerns the individual*" [para 23]. It further held that

> "*any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing … the only suggestion that can be offered as a unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty*" [para 24].

While enumerating certain facets that the right to privacy encompasses, this Hon'ble Court refrained from laying down an exhaustive list and noted that the right to privacy would have to go through a process of case-by-case development. [paras 24 and 28]. The Court also held that

> "[if] the court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test" [para 22].

91. In ***R. Rajagopal v. State of Tamil Nadu*** [(1994) 6 SCC 63 at para 26], this Hon'ble Court interpreted the right to privacy to mean the '*right to be let alone*' and to safeguard the privacy of one's intimate matters while in ***District Registrar and Collector, Hyderabad v. Canara Bank*** [(2005) 1 SCC 496 at para 53], it was held that "*the right to privacy deals with 'persons and not places"*. It is not limited to spatial privacy but encompasses the sphere of private intimacy and autonomy that allows persons to establish and nurture human relationships without State interference.

92. In ***Smt. Selvi v. State of Karnataka*** (2010) 7 SCC 263 at paras 224–225, this Hon'ble Court recognised the importance of personal autonomy, in the context of right to remain silent, within the ambit of right to privacy of one's mental processes.

93. It is submitted that this zone of privacy also includes intimate sexual conduct. Protection of one's personal relations and sexual intimacies lies at the heart of the right to privacy. The way in which one gives expression to one's sexuality is at the core of the area of private intimacy [See: ***National Coalition for Gay and Lesbian Equality & Ors. v. Minister of Justice & Ors.***, at para 32 at page 298 of Compilation - Volume 6]. Though this right is available to everyone and not to particular sections of society, it becomes more significant when certain private adult consensual sexual acts are proscribed by law, even when there is no compelling State interest involved. This was explicitly recognized

by the United Nations Human Rights Committee in ***Toonen v. Australia*** [Communication No. 488/1992, decision dated 31/03/1994 at para 8.2 at pages 120-121 of Compilation – Volume 6] that adult consensual sexual activity in private is covered by the concept of privacy and the same is intruded upon by the penal law criminalising sexual activity between consenting adults in private.

94. In ***Lawrence v. Texas***, the United States Supreme Court struck down a Texas sodomy law that criminalised same sex intimate sexual conduct between consenting male adults in private as unconstitutional. Justice Kennedy noted that:

> *"liberty protects a person from unwarranted government intrusions into dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. It presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct."* (page 99 of Compilation–Volume 7).

The United States Supreme Court further held that:

> *"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 to be said marriage is simply about the right to have sexual intercourse. The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do 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".* (page 103 of Compilation–Volume 7)

The United States Supreme Court further opined that liberty gives protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex (at page 107 of Compilation–Volume 7). It noted that

> *"the case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."* (at page 112 of Compilation–Volume 7)

95. However, the protected zone of privacy can be intruded into by the State if a compelling State interest is shown. While no compelling State interest was found in earlier US cases, in ***Roe v. Wade*** (at page 81 of Compilation–Volume 7), the Court recognised that the State had a compelling interest, in protecting the health of the pregnant woman, after the first trimester, and the foetus, subsequent to 'quickening' of the unborn child, and could regulate abortion procedures to protect these interests.

Section 377 violates the right to privacy of persons as no compelling State interest is shown

96. The very existence of Section 377 continuously and directly affects the privacy of all persons, especially the homosexual men;

either the homosexual men respect the law and refrain from engaging in prohibited sexual acts (even in private with consenting partners) or commit such acts and therefore become liable to criminal prosecution. (***Dudgeon v. United Kingdom*** [(1982) 4 EHRR 149 at para 41 at page 16 of Compilation-Volume 6, ***Norris v. Ireland*** (1991) 13 EHRR 149 at paras 35, 36 and 38 at pages 53-54 of Compilation-Volume 6, ***Modinos v. Cyprus*** (1993) 16 EHHR 186 at paras 20, 23 and 24 at page 67 of Compilation-Volume 6, ***Leung T C William Roy v. Secretary for Justice***, Civil Appeal No. 317 of 2005, date of decision 20th September, 2006, High Court of the Hong Kong Special Administrative Region at para 29 at page 249 of Compilation-Volume 6]

97. The burden is entirely on the State to show that invasion into the private sphere of the individual is necessary and compelling and not just related to the accomplishment of a permissible State policy.

98. The compelling State interest in keeping Section 377, as argued by the Union of India, through the Ministry of Home Affairs, before the Delhi High Court was that the law is primarily used to prevent child sexual abuse and fill the lacunae in the rape laws. [Counter Affidavit dated 06.09.2003 filed by Ministry of Home Affairs in the Delhi High Court at internal page 6, page 11 of Additional Documents filed by Respondent No. 1]

99. The Petitioner was mindful of this concern and therefore sought to read down Section 377 and not strike it down in its entirety. The High Court correctly read down the section and made it applicable only to minors and non-consensual sex and therefore it took into

account the objection of the Union of India through Ministry of Home Affairs and accommodated it.

100. NACO affidavit further shows that there is State interest to remove Section 377 from the statute on the ground of public health, i.e., it impedes delivery of health services. [*Reply Affidavit on behalf of NACO and MoHFW before the Delhi High Court* at para 5 at page 5 of Additional Documents filed by the Respondent No. 1]

101. The admission by the Ministry of Home Affairs that Section 377 is rarely used in cases of consensual private sexual acts shows that no compelling State interest exists. If a penal law is hardly enforced, then the State has no compelling interest to keep it on the statute book. But the stigma associated with a criminal offence is not trivial. It disproportionately impacts the dignity of same sex desiring individuals. The criminalisation of certain sexual acts between consenting adult males or females in private is a severe restriction on a citizen's right to build relationships with dignity and free of State intervention and cannot be justified as necessary. [***Dhirendra Nadan & Anr. V. State***, Criminal Appeal Case Nos.: HAA 85 & 86 OF 2005, High Court of Fiji, decision dated 26th August, 2005 at page 176 of Compilation-Volume 6]

102. Further, the fact that Union of India has not appealed against the impugned judgment also shows that there is no compelling State interest involved. In fact, the Government of India has filed an affidavit, through Mr. R.K. Singh, Home Secretary, Ministry of Home Affairs, in this Hon'ble Court accepting the correctness of the judgment of the High Court of Delhi and the same having no legal error in its opinion. Consequently, the Government has not appealed against this judgment. Thus, there is no question of them pleading or justifying any compelling State interest. [Affidavit

filed on behalf of the Union of India through the Ministry of Home Affairs in this Hon'ble Court on 1st March, 2012 at para 3]

103. Only the State can defend the constitutionality of statute. If the State is not challenging the Delhi High Court judgment, then it is not open to third parties to show 'compelling State interest' in invading the protected zone of privacy including that of sexual conduct. [See ***Diamond and Williams v. Charles*** 476 U.S. 54. (1986) at pages 148-149 of Compilation-Volume 7]. In any event, the petitioners in the Special Leave Petitions in this Hon'ble Court have not attempted, much less to show any compelling State interest.

104. One of the other reasons advanced by the State in the High Court to justify the invasion of privacy is the enforcement of public morality. Moral disapproval, without any other compelling State interest, cannot be the rationale under the Constitution to justify a law intruding into private sphere. Although some people may be shocked or offended by the commission of private homosexual acts by others, this alone cannot warrant the application of penal law in case of consenting adults. [***Dudgeon v. United Kingdom***, at para 60 at pages 21-22 of Compilation-Volume 6, ***Norris v. Ireland*** at para 46 at page 56 of Compilation-Volume 6]

105. Intimate sexual conduct is not a question of public morality but that of private morality. It is not the role of criminal law to intrude into the zone of private morality when individuals consent to have sexual relations in private without intending causing harm to each other or others. The Report of the Committee on Homosexual Offences and Prostitution, 1957 (Wolfenden Committee) that recommended decriminalization of homosexuality in England in 1957 regarded the function of criminal law as:

> "*to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence,*
>
> *but not to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined*."
> [paras 13 and 14 at pages 24-25 of Compilation-Volume1]

106. Further, enforcement of private moral views of a section of society, which could be prejudicial, cannot be deemed to be legitimate State interest. [See: ***National Coalition for Gay and Lesbian Equality & Ors. v. Minister of Justice & Ors.***, at para 37 at page 303 of Compilation-Volume 6; ***Dhirendra Nadan & Anr. V. State***, at pages 170-171 of Compilation-Volume 6; ***Toonen v. Australia*** at para 8.6 at pages 121-122; ***R. M. (C.)***, Ontario Court of Appeal 41 C.R. (4th) 134 (1995) at para 34 at page 298 of Compilation-Volume 7]

107. The notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not co-extensive [***S. Khushboo v. Kanniammal and Anr.*** (2010) 5 SCC 600 at para 46].

108. Thus, there is no compelling State interest shown in prohibiting sexual practices engaged by consenting adults in private and without intending to harm each other.

109. The question is not whether one has a fundamental right to engage in carnal intercourse against the order of nature but whether the Constitution protects a zone of privacy including that of sexual intimacies, which should be outside the ambit of State intrusion. The High Court had correctly found Section 377 to be violative of right to privacy under Article 21 for criminalizing private consensual sexual acts between adults.

Section 377 fails the criteria of Substantive Due Process under Article 21

110. Substantive Due process has been incorporated into the Indian jurisprudence in the last few years. After ***Maneka Gandhi v. Union of India*** (1978) 1 SCC 248 at para 7, the concept of procedural due process was brought in relation to cases of laws affecting life and liberty of persons. This Hon'ble Court held that the procedure established by law in Article 21 has to be just, fair and reasonable and tested on the grounds of Article 14 and Article 19 of the Constitution. It noted that:

> "*The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14*"

111. Substantive due process has now gradually developed into a fully separate judicial enquiry wherein this Hon'ble Court has looked into the substance of the law and decide whether the law itself is just, fair and reasonable, apart from looking into the issue of procedural fairness. This is called the 'substantive due process enquiry'. This Hon'ble Court in ***Mithu v. State of Punjab*** (1983) 2 SCC 277 at para 25, while striking down Section 303, Indian

Penal Code as unconstitutional that provided mandatory death penalty as punishment for murder by life-convicts, held that:

> "*no law that provides for mandatory death penalty without involvement of judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatized as arbitrary and oppressive*."

112. Though this Hon'ble Court did not expressly refer to the doctrine of substantive due process, it was precisely this doctrine that was applied.

113. Substantive due process has become the standard in examining the validity of State action that infringes upon the realm of personal liberty under Article 21 [***Smt. Selvi v. State of Karnataka*** (2010) 7 SCC 263 at para 191]

114. In ***Smt. Selvi v. State of Karnataka*** (2010) 7 SCC 263 at para 263, this Hon'ble Court held that involuntary administration of scientific techniques like narcoanalysis, brain mapping etc amounted to testimonial compulsion, thereby violating the standard of substantive due process that is required for restraining personal liberty. This was reiterated by this Hon'ble Court in ***State of Punjab v. Dalbir Singh,*** 2012 (2) SCALE 126 at para 94, while striking down the mandatory death penalty in the Arms Act as unconstitutional and held that the concepts of 'due process' and the concept of a just, fair and reasonable law have been read into the guarantees of Article 21 and Article 14 of the Constitution.

115. Substantive Due Process has primarily originated in the U.S. cases relating to privacy and personal spheres, since the U.S. Constitution has a '*due process clause*' in the Fifth and Fourteenth Amendments *("[N]or shall any person . . . be deprived*

of life, liberty or property, without due process of law . . . .). It has been interpreted to mean recognition of unspecified substantive rights as a limit to State power. The Constitution guarantees a realm of personal liberty into which the government cannot enter [***Lawrence v. Texas*** at page 112 of Compilation-Volume 7]

116. In other countries, like Canada and South Africa, though substantive due process does not find explicit mention in their Constitutions, the Constitutional Courts in these countries have applied the substantive due process enquiry in deciding questions of fundamental importance. The Supreme Court of Canada in ***In the Matter of the Reference re Section 94(2) of the Motor Vehicles Act, 1979*** [(1985) 2 S.C.R. 486], while interpreting the phrase '*principles of fundamental justice*', was faced with a question whether the term has a substantive or merely procedural content (para 17 at page 491 of Compilation-Volume 7). The Court noted that "*the task of the Court is not to choose between substantive or procedural content per se but to secure for persons "the full benefit of the Charter's protection*" (para 21 at page 493 of Compilation-Volume 7).

117. In South Africa, the Constitutional Court of South Africa in ***Douglas Michael De Lange v. Francois J. Smuts*** (Case CCT 26/97, decided on 28.05.1998) observed that 'section 12 (1), in entrenching the right to freedom and security of the person, entrenches the two different aspects of the right to freedom. The first can be described as the substantive aspect of the protection of freedom, which protects individuals against deprivation of freedom "arbitrarily or without just cause". The other is the procedural aspect of the protection of freedom (para 22 at page 552 of Compilation–Volume 7). The notions of procedural and substantive fairness are based on the fundamental premise that

decisions affecting paramount human interests be made for good reason and in a fair manner (para 129 at page 642 of Compilation-Volume 7).

118. It is submitted that substantive due process is now part of Indian law. In ***Rajesh Kumar v. State through Government of NCT of Delhi*** [(2011) 11 SCALE 182 at para 79], the Supreme Court held that:

> "'*law' as interpreted under Article 21 is more than mere 'lex'. It implies a due process, both procedurally and substantively*".

119. Substantive due process has to be interpreted in case by case development by looking at the nature of the right that is sought to be infringed by the State. In India, it can cover laws, ranging from the ones which intrude into the private spheres of individuals where the State has no compelling interest to enter or which are patently unjust or which violate the basic structure of the Constitution.

120. Section 377 fails the substantive due process enquiry under Article 21, since it infringes upon the most private sphere of individuals by making their intimate consensual sexual conduct a crime, which is not permissible.

Section 377 violates the Dignity of all Persons and of Homosexual Men in Particular

<u>Section 377 violates the dignity of all persons</u>

121. The right to life, guaranteed by Article 21, means more than a guarantee of mere physical survival or a bare animal existence. Instead it includes a guarantee to the right to live with human dignity. [***Francis Coralie Mullin v. Administrator, Union Territory of Delhi*****,** at paras 7 and 8].

122. The guarantee of human dignity forms a part of our constitutional culture. The Preamble of the Constitution was designed to assure the dignity of a human being as a means to ensure the full development and evolution of persons. [See: ***Prem Shankar Shukla v. Delhi Administration***, (1980) 3 SCC 526 at para 1; ***Maharashtra University of Health Sciences and Ors. v. Satchikitsa Prasarak Mandal and Ors*.**, (2010) 3 SCC 786 at para 37 *and* ***Kharak Singh v. State of Uttar Pradesh*,** at para 13].

123. A dignified life includes the right to carry on functions and activities that constitute the bare minimum of expression of the human-self. This includes expressing oneself in diverse forms and comingling with fellow human beings. In ***Francis Coralie Mullin***, this Hon'ble Court held:

> *"… We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the rights to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."* [paras 7 and 8]

124. In ***Noise Pollution (V), In re,*** (2005) 5 SCC 733 at para 9, this Hon'ble Court held that human life has its charm and should be enjoyed along with all its permissible pleasures. A life with human dignity includes all those aspects of life which go to make a person's life meaningful, complete and worth living.

125. This Hon'ble Court, while according the guarantee of dignity great significance in a civilised society, in the case of ***D.K. Basu v. State of West Bengal***, (1997) 1 SCC 416 at para 11, held in the context of custodial violence:

> *"… "Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward – flag of humanity must on each such occasion fly half-mast. "*

126. Acts which degrade or destroy a person's personality or have the effect of dehumanizing him and violating his personhood impair a person's dignity. [See: ***D.K. Basu v. State of West Bengal***, at para 11; **Prem Shankar Shukla v. Delhi Administration**, (1980) 3 SCC 526 at para 1].

127. The right to live with dignity is intimately related to the right to privacy. Privacy-dignity claims deserve to be examined with care and denied only when there is a countervailing State interest. [See: ***Gobind v. State of Madhya Pradesh***, at para 22]

128. Dignity is therefore concerned with the rights of an individual and is linked to personal self-realisation and autonomy. If the respect for human dignity is intrinsically linked to the right to privacy, then

the right to dignity must be considered an individual right, accruing to a person wherever he may be.

129. As submitted herein above, personal intimacies, including sexual relations, are an important part of the bare expression of one's human self and form a core part of the fundamental experience of a human being. The conduct of sexual relations in private should be respected as part of the respect for a person's expression of a part of his or her personality. Section 377 makes certain types of sexual relations offences and in doing so, degrades a person's personality.

130. Further, sexual expression within a private sphere is protected from intrusion from the State. As Section 377 invades the sphere of privacy and prohibits certain private consensual sexual acts between consenting adults, it impairs the right to dignity.

131. This Hon'ble Court has held that the respect of a person's right to privacy, dignity and bodily integrity requires that there be no restriction whatsoever on a person's decision to participate or not to participate in sexual activity. In ***Suchita Srivastava v. Chandigarh Administration***, at para 22, this Hon'ble Court held:

> *"…It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restrictions whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as sterilisation procedures…"*

132. By making a particular type of sexual conduct between consenting adults an offence, Section 377, by its very existence, irrespective of whether it is enforced against consent adults or not, demeans and degrades people as it impairs a part of their personality. Instead of respecting the choices of persons with regard to sexual relations, Section 377 imposes an examination and scrutiny of the types of sexual intercourse consenting adults have with each other.

133. Therefore, Section 377, by making consensual sex between adults an offence, violates the dignity of all persons irrespective of them being heterosexual, homosexual or bisexual.

Section 377 violates the dignity of homosexual men specifically

134. Sexual expression, as submitted herein above, is an essential element of a person's personality and is a fundamental aspect of the experience of a human being. Section 377 denies this experience to homosexual men. Consensual penetrative sexual acts between two men cannot be penile-vaginal and therefore homosexual men do not have a choice of entering into such sexual relations. In effect, Section 377 prohibits all forms of penetrative penile sexual intercourse between consenting males. It denies to them an aspect at the very core of their person and criminalises the expression, core to their sexual being.

135. As a result of Section 377, virtually all sexual penile penetrative acts between homosexual men are offences. Further, broader society identifies acts covered by Section 377 majorly with homosexual men. As a result, each homosexual man becomes a person suspected of committing an offence. An element of

criminality is associated with the daily lives of homosexual men as the law implies that all homosexual men are criminals.

136. Instead of respecting the sexual expression of homosexual men which takes place in private, as guaranteed by the right to privacy and dignity, Section 377 causes intense scrutiny homosexual men, as all penetrative sexual acts between them are offences.

137. The Canadian Supreme Court has held that dignity is at the very heart of individual rights and is violated when a person is demeaned, degraded or treated as a second-class citizen. ***Egan v. Canada***, [1995] 2 SCR 513:

> *"… Equality, as that concept is enshrined as a fundamental human right within s. 15 of the Charter, means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."* (para 36 at page 194 of Compilation – Volume 7)

138. In ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497, the Supreme Court of Canada held in the context of a law that was challenged on the basis that it discriminated on the basis of age:

> *"…Human dignity means that an individual or group feels self respect or self worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when*

> *individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law."* (para 53 at page 439 of Compilation – Volume 7)

139. The US Supreme Court, in ***Lawrence v. Texas***, held that adults may choose to enter a relationship with a person of the same sex in their private lives and still retain the dignity of being free and not being treated as criminals, as follows:

> *"This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of a relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their own homes and their own private lives and still retain their dignity as free persons. 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."* (page 103 of Compilation – Volume 7)

140. The South African Constitutional Court, while considering the constitutional validity of the common law offence of sodomy in ***National Coalition for Gay and Lesbian Equality & Ors. v. Minister of Justice & Ors.***, at paras 28 at page 295 and para 36 at page 303, held *that* dignity, while being a difficult concept to

capture in precise terms, requires, in the least the acknowledgement of the value and worth of all individuals as members of our society. It was further held:

> *[36]. The criminalization of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's right to privacy, dignity and freedom. The harm cause by the provision can, and often does, affect his ability to achieve self-identification and self-fulfillment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social good and services and the award of social opportunities for gays"* (para 36 at page 303 of Compilation – Volume 6)

141. It is pertinent to point out that in South Africa, decisions of the High Court which hold a legislation to be unconstitutional are required to be confirmed by the Constitutional Court of South Africa. While doing so, the Constitutional Court is not bound by the scope of enquiry of the High Court and may give any order which is "just and equitable" [See: Article 172 of the Constitution of the Republic of South Africa, 1996]

142. It is also pertinent to point out that it has been erroneously submitted, on behalf of the Petitioners, that this Hon'ble Court has previously refused to consider the case cited above, that is, ***National Coalition for Gay and Lesbian Equality & Ors. v. Minister of Justice & Ors***., 1998 (12) BCLR 1517 (CC) in ***Sakshi v. Union of India*** (2004) 5 SCC 518. However, the case cited in ***Sakshi,*** was a different case, that is, ***National Coalition***

for Gay and Lesbian Equality v. Minister of Home Affairs, Case CCT 20 of 1999.

143. Section 377 associates criminal law with the everyday lives of homosexual men. First, it creates the fear, and vulnerability, that at any time, the police can barge into the bedroom and arrest them for the commission of an offence. Second, in effect the law implies that every homosexual man is a criminal. It demeans and degrades them and treats them like second class citizens by prohibiting the expression of the core sexual being of homosexual men.

144. It may be argued that the stigma faced by homosexual men is a result of the perception of society, for which the law has little or no role to play. However, it is submitted that this is incorrect. Section 377 prescribes a normative paradigm, which criminalises intimate sexual conduct between consenting adults in private. The broader society identifies sexual acts proscribed by Section 377 with homosexual men. Criminalisation by 377 only reinforces the stigma faced by homosexual men. As submitted herein above, Section 377 has the effect of stating that all homosexual men are criminals in the eyes of the law. Therefore, the law, far from being removed from societal perception, reinforces and fuels stigma against gay men.

145. Section 377, by making all forms of penetrative sex with two consenting men in private, impairs the dignity of homosexual men. It denies to homosexual men a fundamental experience of being human and the expression of the core of their sexual being. Further, Section 377 associates criminal law with the daily lives of homosexual men. In doing so, it demeans them and treats them like second class citizens. Therefore, Section 377 violates the dignity of homosexual men in particular.

146. As will be shown below, Section 377 is not reasonable, fair or just law. Further, it does not stand the test of other fundamental rights.

147. Section 377, by criminalising intimate sexual conduct between consenting adults in private, offends and impairs the expression of the human self of all persons including sexuality minorities, more particularly homosexual men and further demeans and degrades them. Section 377 thus violates the right to live with dignity of all persons and particularly of homosexual men.

Section 377 Violates the Right to Health of Men who have Sex with Men

The State is obliged to respect, protect and fulfil the right to health.

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

149. The ICESCR recognises the right to health for all persons. The ICESCR has been interpreted by the Committee on Economic, Social and Cultural Rights (CESCR), the body in charge of monitoring the implementation of the ICESCR, through General Comments, so as to promote and assist to implementation of the ICESCR. [Article 12, ICESCR, 993 UNTS 3 at page 12 of Compilation – Volume 2; Human Rights Instruments, Compilation

of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev. (Vol. 1), 27th May 2008 at paras 1-3 on page 202 of Compilation – Volume 2]

150. Article 12 of the ICESCR has been interpreted in General Comment No. 14. The right to health, as interpreted by General Comment No. 14, requires States to take measures to respect, protect and fulfill the health of all persons. States are obliged to ensure the availability and accessibility of health related information, education, facilities, goods and services, without discrimination, especially for vulnerable and marginalised sections of the populations. [See: *General Comment No. 14 to Article 12 ICESCR*, at para 33 on page 102 of Compilation – Volume 2]

151. THE ICESCR has been domesticated in India vide Section 2 of the Protection of Human Rights Act, 1993 whereby human rights under the ICCPR and ICESCR are enforceable by Indian Courts. This implies that the State has ensure that the right of everyone to highest attainable standard physical and mental health as enshrined in Article 12 of the ICESCR has to be realised for all**.**

152. The Government has committed to addressing the needs of those at greatest risk of HIV including Men who have Sex with Men and transgendered persons. [See: *United Nations General Assembly Declaration of Commitment on HIV/AIDS, 2001*, A/Res/S-26/2 at para 37 on page 6 and para 58 on page 9 of Compilation – Volume 3; United Nations General Assembly Political Declaration on HIV/AIDS, 2006, A/Res/60/262 at para 14 on page 18 and para 29 on page 19 of Compilation – Volume 3; National AIDS Control Organisation (NACO), Ministry of Health and Family Welfare (MoHFW), *National AIDS Control Programme Phase III*

[2007-2012] Strategy and Implementation Plan, November 2006, at pages 104-105 of Compilation – Volume 3].

Men who have Sex with Men are at Higher Risk of Contracting HIV

153. Men who have Sex with Men, including homosexual men, are at a higher risk of HIV transmission. The risk of transmission of HIV is greater through unprotected penile-anal sexual intercourse than unprotected penile-vaginal intercourse. Men who have Sex with Men are therefore in urgent need of HIV related prevention and care services. [See: *Reply Affidavit on behalf of NACO and MoHFW before the Delhi High Court* at paras 3 and 4, pages 2 and 3 of Additional Documents filed by the Respondent No. 1; UNAIDS, *Policy Brief, HIV and Sex between Men*, 2006 at pages 24-27 of Compilation – Volume 3].

154. It is estimated that, with a prevalence of 0.31, there are 23.9 lakh people living with HIV in India. Between April 2010 – June 2011, there were 3,99,378 new HIV/AIDS infections detected in India. [See: NACO*, Annual Report 2010-2011*, at pages 124-125 of Compilation – Volume 4; Answers of the Hon'ble Health Minister to Starred Question No. 93 on 05.08.2011 in the Lok Sabha, Unstarred Question no. 3035 on 7.12.2010 in the Rajya Sabha and Unstarred Question No. 1552 on 22.08.2007 in the Lok Sabha at pages 1-9 of Compilation – Volume 4).

155. HIV prevalence amongst Men who have Sex with Men is disproportionately higher than the general adult prevalence. HIV prevalence amongst Men who have Sex with Men is 7.3% in India as opposed to less than 0.5% in adults in general. [See: NACO*, Annual Report 2010-2011*, at page 124-126 of Compilation – Volume 4; *Written Submissions on behalf of the Ministry of Health*

and Family Welfare before this Hon'ble Court titled 'Concerns of the Health Ministry' at para 4]

156. Evidence shows that HIV prevalence in Men who have Sex with Men continues to rise in many states of India. [See: National AIDS Control Organisation*, Annual Report 2010-2011*, at page 124-126 of Compilation – Volume 4 and NACO, MoHFW, HIV Sentinel Surveillance and HIV Estimation in India 2007 – A Technical Brief at pages 143-145 and 148-149 of Compilation – Volume 4].

157. It is submitted that higher prevalence of HIV amongst Men who have Sex with Men is due to this population being stigmatized and not being provided with sexual health services, including prevention services such as condom promotion, which results in low condom usage.

158. Additionally social stigma and discrimination have resulted in many Men who have Sex with Men also getting married to women. Men who have Sex with Men in India therefore act as a 'bridge population' for the transmission of HIV. It is therefore essential to have HIV related interventions with Men who have Sex with Men. [See: Commission on AIDS in Asia, *Redefining AIDS in Asia—Crafting an Effective Response, Report of the Commission on AIDS in Asia*, 2008, Oxford University Press, New Delhi, India at pages 90-97 of Compilation – Volume 3; and *Submissions on behalf of the Ministry of Health and Family Welfare before this Hon'ble Court titled 'Concerns of the Health Ministry', at* para 6 at page 213 of Compilation – Volume 5]

159. Criminal law increases stigma and discrimination against Men who have Sex with Men, which in turn fuels the HIV epidemic and is a barrier to HIV prevention programmes [See: *Report of the*

Commission on AIDS in Asia at pages 90-97 of Compilation – Volume 3]

160. The absence of safe spaces leads to risky sex, that is, sex without using condoms, increasing chances of HIV transmission among Men who have Sex with Men [See: *Affidavit in Reply on behalf of NACO and MoHFW before the Delhi High Court in W.P. 7455 of 2001, dated 17 July 2006* at para 5, page 4 of Additional Documents filed by the Respondent No. 1].

161. India has had some success in reducing the rate of new HIV infections. This can be attributed to successful HIV prevention programmes with female sex workers. The interventions with female sex workers could take place partly because they could be accessed in brothel settings. [See: Rajesh Kumar, *Trends in HIV-1 in young adults in South India from 2000 to 2004: a prevalence study,* Lancet, 2006; 367:1164-72 at pages 10, 17-18 of Compilation – Volume 4]. However, Men who have Sex with Men and particularly homosexual men are difficult to access because of criminal law, that is Section 377, as well as the stigma that it perpetuates. They are therefore prevented from accessing basic health services, which violates their right to health.

Section 377 Restricts the Right to Health of Men who have Sex with Men.

162. Criminalisation of same sex activity impedes the State from delivering essential health services to men who have sex with men in the following manner:

    a. Section 377 prevents collection of HIV data, as fear of law enforcement leads to under-reporting of male to male transmission of HIV, which results in the provision of insufficient health services. [See: UNAIDS, *Men who have sex*

with men, The Missing Piece in National Responses to AIDS in Asia and the Pacific, at pages 55-58 and 61 of Compilation – Volume 3; *Monitoring the AIDS Pandemic (MAP), Male-male sex and HIV/AIDS in Asia*, Report 2005, at page 33-35 and 37-42 of Compilation – Volume 3]

b. Section 377 prevents the dissemination of information on the risk of HIV transmission during male to male sex [See: *Azadi Bachao Andolan Delhi Unit v. All India Radio and Others,* Order of the CMM, Delhi, dated 23 October, 1997, at paras 61– 62, 65–66, 79–80 and 85 at pages 179, 180, 183 and 184 of Compilation – Volume 5].

c. Organisations, through which anti HIV interventions are implemented, are subjected to threats, closure and prosecution under Section 377. Further, as a result of Section 377, outreach workers, implementing the interventions, face harassment and violence. This severely limits their ability to provide HIV services. [See: Human Rights Watch, "*Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India*", July 2002, at pages 56-60 of Compilation – Volume 5; SA Safren, *A survey of HIV prevention outreach workers in Chennai, India*, AIDS Educ Prev. 2006 Aug;18(4):323-332 at page 26 of Compilation – Volume 4].

d. The supply of condoms in prisons is perceived to 'aid' the commission of offences under Section 377. [See: *Aids Bhedbhav Virodhi Andolan v. Union of India & Ors*, Civil Writ Petition No. 1784 of 1994, dismissed for non-prosecution by an order of the Delhi High Court dated 22 January 2001 at pages 186 - 211 of Compilation – Volume 5]

e. The denial of information and limited access to services has led to a lower or no risk perception about male-male sex [See Dandona L, et al, "*Sex behaviour of men who have sex with*

men and risk of HIV in Andhra Pradesh, India", *AIDS*, 2005, Vol. 19, No.6, 611–619 at page 138 of Compilation – Volume 3 and Thomas B, *HIV Prevention Interventions in Chennai, India: Are Men Who Have Sex with Men Being Reached?*, AIDS Patient Care STDS. 2009 November; 23 (11): 981–986 at pages 59-60 of Compilation – Volume 4].

163. Section 377 drives men who have sex with men underground, hampering HIV prevention, treatment and care services

a. Men who have sex with men face stigma, discrimination, violence and harassment in multiple settings, from the police, thugs, the community, family and health care settings. A legal system that criminalises sex between consenting men enables discrimination, stigmatisation, disempowerment and marginalization of men who have sex with men. Fear of identification, arrest and prosecution under Section 377 drives same sex activity underground, and causes men who have sex with men to sever contact with the health system. [See: *"Structural Violence Against Kothi-Identified Men Who Have Sex With Men in Chennai, India":* A Qualitative Investigation, Venkatesh Chakrapani et al., AIDS Education and Prevention, 19(4), 346-364, 2007 at pages 35-47 of Compilation – Volume 4; Thomas B, *HIV Prevention Interventions in Chennai, India: Are Men Who Have Sex with Men Being Reached?* at pages 59-60 of Compilation – Volume 4 ; Poteat T, et al, *HIV risk among in Senegal: a qualitative rapid assessment of the impact of enforcing laws that criminalize same sex practices,* PLoS One, 2011; 6 (12) at pages 84-85 of Compilation – Volume 4]

b. Where Men who have Sex with Men remain hidden because their behaviour is illegal, the HIV epidemic amongst them is expected to continue. [See: Chris Beyer, *HIV Epidemic Update and Transmission Factors: Risks and Risk Contexts – 16th International AIDS Conference Epidemiology Plenary,* Clinical Infectious Diseases 44:981-7, 2007 at pages 49, 51and 54].

c. Where there is contact with the health system, Men who have Sex with Men avoid disclosing symptoms which could lead to being reported to enforcement authorities, making them more vulnerable to contracting HIV. The presence of prior sexually transmitted infections is strongly associated with HIV infections in Men who have Sex with men. [See: Steve W Cole, et al, "*Elevated Physical Health Risk among Gay Men who conceal their homosexual identity*", *Health Psychology*, 1996, Vol 15, No.4, 243–251 at page 111 of Compilation – Volume 3 and Setia Maninder Singh, et. al, "*Men who have sex with men and transgenders in Mumbai India: an emerging risk group for STIs and HIV*", *Indian Journal of Dermatology, Venereology and Leprology*, Vol. 72, No. 6, Nov-Dec, 2006, 425–431 at page 91 of Compilation – Volume 4].

d. Criminalisation causes stigma, fear and prejudice against sexuality minorities which has an adverse impact on health. [Thomas B*, HIV in Indian MSM: Reasons for a concentrated epidemic & strategies for prevention,* Indian J Med Res., 2011 Dec;134(6):920-9 at pages 72–73 and 75 of Compilation – Volume 4]

e. Section 377 results in violence against Men who have Sex with Men, especially from the police and thugs, including, verbal and physical harassment, sexual assault and rape, blackmail and extortion, arrest on false allegations and refusal

of protection. Increased sexual violence is linked with an increased risk of contracting HIV. [See: *"Structural Violence Against Kothi-Identified Men Who Have Sex With Men in Chennai, India:* A Qualitative Investigation", Venkatesh Chakrapani et al., AIDS Education and Prevention, 19(4), 346-364, 2007 at pages 35-47 of Compilation – Volume 4; R Chellan, et. al, *The Relationship between Sexual Violence and Symptoms of STI among the Self-Identified Kothis - Men Who Have Sex With Men In Tamil Nadu, India, International Journal of Development Research,* August, 2011, Vol. 1, Issue, 5, pp. 43-49 at pages 64-64 of Compilation – Volume 4]

f. Section 377 results in a high burden of disease among Men who have Sex with Men. A study in Chennai showed HIV prevalence of 6.5% among men who have sex with men as compared to 0.9% among other men. [See Go V.F, et al, "*High HIV Prevalence and Risk Behaviours in Men Who Have Sex With Men in Chennai, India*", *J. Acquir Immune Defic Syndr*, Vol 35, Number 3, March 1 2004, 314–319, at page 127-128 of Compilation – Volume 3]. Nationally, as mentioned above, HIV prevalence amongst Men who have Sex with Men is disproportionately higher than the general adult prevalence. HIV prevalence amongst Men who have Sex with Men is 7.3% in India as opposed to less than 0.5% in adults in general.

g. Where Men who have Sex with Men are provided services, risky sexual practices have reduced [See: Amfar*, Treat Asia, MSM and HIV/AIDS Risk in Asia*, 2006, at pages 77-89 of Compilation – Volume 3].

h. The WHO has recognised that criminalisation plays a role in creating vulnerability of Men who have Sex with Men and acts as a barrier to the provision of health services and further stresses the need for laws which are protective and which

respect the rights of Men who have Sex with Men. [WHO, Prevention and Treatment of HIV and other Sexually Transmitted Infections Amongst Men and Transgender People, Recommendations for a public health approach, 2011 at pages 102 and 118-120 of Compilation – Volume 4]

i. Studies show that there are little, if any, negative consequences of decriminalisation of homosexual consensual sexual activities in private and a number of positive consequences including the reduction in sexually transmitted diseases and increased psychological adjustment, amongst others. [See: Geis G, Wright R, Garrett T, Wilson PR, *Reported consequences of decriminalization of consensual adult homosexuality in seven American states*, J Homosex. 1976;1(4):419-26 at pages 141-148B of Compilation – Volume 3; Sinclair and Ross, "*Consequences of Decriminalisation of Homosexuality: A study of two Australian States*" Journal of Homosexuality, Vol. 12 (1), Fall, 1985 at pages 149 – 157A of Compilation – Volume 3]

164. It is therefore submitted that for all the aforesaid reasons, Section 377 violates the Right to Health of homosexual men.

X. SECTION 377 VIOLATES ARTICLE 14 OF THE CONSTITUTION

165. Article 14 of the Indian Constitution guarantees equality before law and the equal protection of law to all persons. Article 14 forbids discrimination and is a safeguard against vague, arbitrary and unjust State action.

Section 377 is vague and arbitrary

166. It is a cardinal principle of legal jurisprudence that a penal law is void for vagueness if its prohibitions are not clearly defined. Citizens must know with certainty where lawful conduct ends and unlawful conduct begins. A person cannot be deprived of his liberty by a law which is nebulous and uncertain in its definition and application. [***A.K. Roy v. Union of India*** (1982) 1 SCC 271 at para 61]

167. In ***Kartar Singh v. State of Punjab*** (1994) 3 SCC 569 at para 130, this Hon'ble Court held that

> "*vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application*."

168. It is submitted that where a law does not offer a clear construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution. [***K.A. Abbas v. The Union of India and Anr.***, (1970) 2 SCC 760 at para 46]. If a penal statute suffers from vagueness and fails to clearly indicate the prohibitions so that persons affected know the true intention then it amounts to violation of Article 14 of the Constitution. [***Harish Chandra Gupta v. State of Uttar Pradesh***, AIR 1960 All 650 at para 12]

169. Further, in ***Subhash Chandra and Anr v. Delhi Subordinate Services Selection Board*** (2009) 15 SCC 458 at para 89, this Hon'ble Court held that the more inarticulate the State action, the greater would be the intensity of the scrutiny by the Courts under Article 14 of the Constitution.

170. It is submitted that Section 377 criminalises any person who voluntarily has carnal intercourse against the order of nature with a man, woman or animal. It is applicable to both heterosexual and homosexual persons. The expression "*carnal intercourse against the order of nature*" is not defined anywhere in the statute. Section 377 also does not provide any indication as to what constitutes carnal intercourse against the order of nature or what acts are proscribed therein.

171. In the absence of legislative guidance, Courts are left to decide which sexual acts are proscribed and which are not. The judicial interpretation of Section 377 over the last almost 150 years shows that its application has become inconsistent and highly varied. While initially Courts excluded oral sex from the ambit of Section 377, later it was held to cover both anal sex and oral sex. Subsequently, Courts extended its interpretation to include penile penetration of other artificial orifices like between the thighs or folded palm, by terming them imitative acts or acts of sexual perversity.

172. This indicates that the scope of Section 377 has been broadened so much that no person has any reasonable idea of the nature of the acts that are prohibited except the fact that it excludes penile-vaginal sex. Any penetrative sexual act outside penile-vaginal ambit can be said to be proscribed. This results in arbitrariness in the application of the law as well as in imposition of punishment under its penal provisions. It is an established principle in law that

equality is antithetic to arbitrariness. Where a law is arbitrary, it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. [***E.P. Royappa v. State of Tamil Nadu*** (1974) 2 SCR 348 at para 85]

173. Section 377 is vague in its proscriptions and thus void for vagueness and the attendant arbitrariness and violates Article 14 of the Constitution.

Section 377 rests on a classification which is unintelligible

174. It is a well-established position of law that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely (i) that the classification must be found on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. [***D.S. Nakara v. Union of India*** (1983) 1 SCC 305 at para 11]

175. In ***Kartar Singh v State of Punjab*** at para 219, this Hon'ble Court held that classification must not be arbitrary but scientific, and rest upon real and substantial distinction between those covered and those left out. In ***M. Nagaraj v Union of India*** at para 118, this Hon'ble Court held that the concept of equality allows differential treatment but prevents distinctions that are not properly justified. In ***Anuj Garg v Hotel Association of India*** [(2008) 3 SCC 1 at para 26], this Hon'ble Court reiterated that when discrimination is sought to be made on the purported

ground of classification, the classification must be founded on a rational criteria.

176. It is submitted that Section 377 criminalises carnal intercourse against the order of nature but not carnal intercourse within the order of nature. The basis of distinction between sexual acts covered under Section 377 and acts excluded from it is 'the order of nature', which is vague and unintelligible. Due to lack of legislative clarity, Courts have evolved their own standards to determine what constitutes carnal intercourse against the order of nature and what does not. The test applied has shifted from 'acts without the possibility of conception' to 'imitative acts' and then to 'acts amounting to sexual perversity'. These parameters, prima facie, are subjective in nature and cannot be discerned on an objective basis.

177. The classification between carnal intercourse against the order of nature and carnal intercourse which is not against the order of nature under Section 377 is arbitrary and unreasonable and not based on rational criteria, thereby violative of Article 14 of the Constitution.

The Object of Classification under Section 377 itself is Unreasonable

178. In considering the reasonableness of classification under Article 14, Courts also have to consider the object for such classification. If the object is illogical, unfair and unjust, necessarily the classification will have to be held unreasonable. [***Deepak Sibal v. Punjab University*** (1989) 2 SCC 145, at para 20)]

179. It is submitted that the purported legislative object Section 377 was to enforce Victorian notions of sexual morality, which

associated sex with procreation alone. At the time of its enactment in 1861, Section 377 intended to penalise all non-procreative sexual acts and contained an implicit disdain for male homosexual conduct.

180. Condemnation of non-procreative sex is outmoded and cannot be sustained as a legitimate State object in the present times. Today, the State itself promotes the use of birth control measures among heterosexual couples as part of family planning as well as propagating use of condoms to prevent sexually transmitted diseases and HIV transmission. Further, this Hon'ble Court has held the right to use contraceptives as a dimension of personal liberty under Article 21 [***Suchita Srivastava v. Chandigarh Administration*** at para 22]

181. Another legislative object that was advanced was to enforce a particular concept of sexual morality or public morality. It is submitted that morality is inherently subjective and cannot inform penal intrusions into personal autonomy. [***S. Khushboo v Kanniamal and Another*** at para 46] The State cannot use criminal law as an instrument to impose private morality. [See ***Wolfenden Report***, at paras 13 and 14 at pages 24-25 of Compilation-Volume 1; ***Lawrence v Texas*** at page 106 of Compilation-Volume 7; ***National Coalition for Gay and Lesbian Equality & Ors. v. Minister of Justice & Ors.***, at para 37 at page 303 of Compilation-Volume 6; ***Leung T C William Roy v. Minister for Justice***, HCAL 160/2004 (2005) at para 145 at pages 230-231 of Compilation-Volume 6; ***Dhirendra Nadan and Another v. State***, at pages 170-171 of Compilation-Volume 6].

182. In enforcing majoritarian views on sexual morality, the law does not serve any legitimate purpose and cannot be termed as a valid object of classification, thereby violating Article 14.

Unreasonableness is Pronounced with Passage of Time

183. In assessing constitutional validity, Courts may take into consideration subsequent events and circumstances which were non-existent at the time that the law was enacted. The law although may be constitutional when enacted but with passage of time, the same may be held to be unconstitutional in view of the changed conditions. [***John Vallamattom v Union of India*** (2003) 6 SCC 611 at paras 33, 34, 35 and 36, ***Anuj Garg v Hotel Association of India*** at paras 8-9]

184. In ***Satyawati Sharma v Union of India*** [(2008) 5 SCC 287 at para 32], this Hon'ble Court, while underscoring the principle that reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself (at para 34), held that

> "*legislation which may be quite reasonable and rationale at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent*."

185. Assuming without admitting that Section 377 legitimately proscribed sexual acts against the order of nature back in 1861, that justification no longer holds valid today to sustain the constitutional validity of the law.

186. It is further submitted that while interpreting a restrictive law like Section 377, one may consider not only the past history of the legislation concerned but the manner in which the same has been dealt with by the legislature of its origin. [***John Vallamattom v***

Union of India at para 28]. Section 377 enacted by the British colonial regime in India in 1861 was similar to the offence of buggery as part of unnatural offences in the English law of *Offences against the Person Act*, 1861. In 1967, the English law was reformed in Britain by the Sexual Offences Act that decriminalised homosexuality and acts of sodomy between consenting adults in private.

187. An overview of the current international human rights law jurisprudence tilt overwhelmingly towards protection and promotion of rights of equality and non-discrimination of sexual minorities. Non-discrimination on the ground of sexual orientation has become part of international customary and human rights law. The United Nations High Commissioner on Human Rights, Ms. Navanethem Pillay, in her report in November, 2011 has recommended the Member States to repeal laws used to criminalize individuals for engaging in consensual same-sex sexual conduct. [Report of the 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*", A/HRC/19/41, 17th November, 2011 at para 84 at pages 148-149 of Compilation-Volume 2]

188. Passage of time, legislative reforms in England and developments in international law make it evident that Section 377 is completely outmoded and arbitrary in the present times.

Section 377 treats Dissimilar Acts alike, which is Impermissible

189. It is well-settled that equals cannot be treated unequally under Article 14 of the Constitution. It is also an established position of law that unequals cannot be treated equally. Treating of unequals as equals would offend the doctrine of equality enshrined in

Article 14. [***Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and Anr.*** (2008) 10 SCC 139 at para 40]

190. It is submitted that Section 377 clubs together disparate sexual acts. It makes no distinction between:
    a. consensual and non-consensual acts,
    b. between acts engaged in by adults and acts, where at least one of the parties is a minor,
    c. between acts engaged in private and acts engaged in public,
    d. acts that cause harm and acts that do not cause harm.

191. All these are valid distinctions in law otherwise. In liberal, constitutional democracy like ours, it is the presence or absence of harm which constitutes the dividing line between State interference and respect for the zone of privacy. By negating these distinctions, Section 377 violates Article 14 by treating disparate acts (‘unequals’) equally.

Section 377 is Disproportionate and Discriminatory in its Impact on Homosexuals

192. It is an established position in law that when scrutinising the constitutional validity of a provision, the effect or impact of a law must also be looked into. Legislation should not only be assessed on its proposed aims but also on its implications and effects. [***Anuj Garg v Hotel Association of India*** at para 46]

193. In ***Peerless General Finance Investment Co. Ltd. v. Reserve Bank of India*** (1992) 2 SCC 343 at para 48, this Hon’ble Court held that:

> "*wherever a statute is challenged as violative of the fundamental rights, its real effect or operation on the fundamental rights is of primary importance. When a law has imposed restrictions on the fundamental rights, what the court has to examine is the substance of the legislation without being beguiled by the mere appearance of the legislation. The Legislature cannot disobey the constitutional mandate by employing an indirect method. The court must consider not merely the purpose of the law but also the means how it is sought to be secured or how it is to be administered. The court must lift the veil of the form and appearance to discover the true character and the nature of the legislation, and every endeavour should be made to have the efficacy of fundamental right maintained and the legislature is not invested with unbounded power. The court has, therefore, always to guard against the gradual encroachments and strike down a restriction as soon as it reaches that magnitude of total annihilation of the right.*"

194. It is submitted that though facially neutral, Section 377 predominantly outlaws sexual activity between men, which by its very nature is penile-non-vaginal, and therefore non-procreative. While heterosexual persons may, and indeed do, engage in anal and oral sex, their sexual conduct does not attract scrutiny, except where the woman is unwilling or underage and makes a complaint contemplated under law. Social acceptance and the veil of legitimacy around heterosexual relations prevent penal intrusion where a man and woman engage in "unnatural sex". In fact, courts have excluded married heterosexual persons from the ambit of Section 377 if there is consent [***Grace Jayamani v. E.P. Peter*** at para 11].

195. Section 377 disproportionately targets a class of persons, namely homosexual men, based on their sexual expression and identity.

Sexuality of homosexual men finds expression in acts that are criminalised under Section 377 that forbids homosexual men from engaging in penetrative sex. What is contemplated to be within the order of nature and thus lawful, i.e., penile-vaginal sex, cannot be applicable in case of homosexual men. While heterosexual couples have the option of engaging in penile-vaginal sex, that option is not available to homosexual men.

196. By prohibiting penile-non vaginal sexual acts, Section 377 discriminates against homosexual men. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. [***Lawrence v. Texas*** at page 109 of Compilation-Volume 7]

197. It is further submitted that the discriminatory prohibitions on homosexual acts reinforce existing societal prejudices and bias result in added discrimination against homosexual persons in fields of employment, etc (already mentioned in the impact section of the submissions). The impact of criminalisation is severe on homosexual men, affecting their dignity, personhood and identity at a deep level. They are at risk of arrest, prosecution and conviction simply because they seek to engage in sexual conduct which is part of their experience as human. [***National Coalition for Gay and Lesbian Equality & Ors. v. Minister of Justice & Ors.***, at para 23 and 28 at pages 291-296 of Compilation-Volume 6]

198. Section 377 thus disproportionately impacts the lives of homosexual men. Though technically neutral, it is applied unequally since it is primarily used against homosexuals. [***Dhirendra Nadan & Anr. V. State***, at pages 170-171 of Compilation-Volume 6]. This disproportionate burden is

evidenced from the fact that almost all studies among men having sex with men enumerate fear of prosecution under Section 377 as a factor inhibiting access to services. Surveys among heterosexual populations, including female sex workers and their clients do not allude to such a finding.

199. Criminalisation of innate and intimate aspects of gay persons' lives is dehumanizing and offensive to their human worth and dignity. [***Egan v Canada*** at para 36 at page 194 of Compilation-Volume 7]

200. The objective of Section 377 is grounded in discriminatory attitudes concerning homosexuality. Section 377 suffers from incurable fixations of stereotype of sexual morality and conception of sexuality, premised only on the sanctity of procreative sex. This concept is outdated in content and stifling in means. [***Anuj Garg v Hotel Association of India*** at para 46]

201. Section 377 is unduly severe and damaging in its effects for homosexual men, as compared to heterosexual persons. Section 377 infringes Article 14 because of its disproportionate and discriminatory impact on gay men.

202. It is therefore submitted that for the reasons above, Section 377 violates Article 14 of the Constitution.

XI. SECTION 377 VIOLATES ARTICLE 15 OF THE CONSTITUTION

Article 15 (1) prohibits discrimination on the ground of 'sex'

203. Article 15(1) provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. The general purport of Article 15(1) is to

prohibit discrimination against citizens on the basis of the grounds enumerated therein.

204. The specific purpose of non-discrimination of citizens regarding access to specific public places is provided for in Article 15(2). Articles 15(3) to (5) make it clear that specific provisions for women and children or for advancement of Schedule Caste and Schedule Tribes are not hit by Article 15(1) or (2).

205. It has been contended that by reason of Article 15(3) using the expression ‘women’, the expression ’sex’ in Article 15(1) must partake the same character.

206. It is submitted that Article 15(3) cannot control or limit the application of Article 15(1). Therefore, the expression ‘sex’ in Article 15(1) cannot be reduced to binary norm of man and woman only.

207. This becomes even clearer when Article 15(2) is applied to transgender persons. Transgender persons who identify as third gender are neither men nor women. However, they cannot be discriminated in regard to access to public spaces specifically enumerated in Article 15(2). This can only be achieved if the expression ‘sex’ in Article 15(1) is read to be broader than the binary norm of biological sex, i.e. ‘man’ or ‘woman’. For instance, the Government of India has introduced the option of ‘others’ in the sex column in the passport application form.

208. It is submitted that, the Constitution is a living document and new life must be breathed into it, in light of requirements of changing times. The content of rights is defined by the Courts. The final word on the content of the right is that of the Court. **[*M. Nagraj v. Union of India at* paras 19-21].** This Hon’ble Court has through

purposive interpretation continually expanded the ambit of Fundamental rights under Articles 21 and 19(1) of the Constitution and have held many rights to be implicit in the right to life and personal liberty under Article 21 and right to freedom of speech and expression under Article 19(1) of the Constitution of India, which were otherwise not enumerated under the respective Articles.

209. It is further submitted that the general purpose of non-discrimination cannot be fulfilled by a narrow reading of grounds enumerated under Article 15(1) and requires a more purposive interpretation of Article 15(1) keeping in line with International law which recognizes that 'sexual orientation' is implicit in the word 'sex' and a prohibited ground of discrimination.

Prohibition of Discrimination on the ground of 'Sex' includes Prohibition of Discrimination on the ground of 'Sexual Orientation'

210. The expression "sex" is a fluid and not a static concept. It cannot be restricted to only the biological male and female sex, as even this differentiation on biological factors is a limited one. Further, it also includes gender, i.e. the differentiation of humans on the basis of social factors.

211. The purpose underlying the fundamental right against sex discrimination is to prevent behavior that treats people differently for reason of not being in conformity with stereotypical generalizations concerning "normal" (or natural) sexual roles or gender roles. [***Anuj Garg v. Hotel Association of India*** **at paras 41 and 46**]

212. A *prima facie* reading of "sex" as a prohibited ground of discrimination reveals that sex-discrimination cannot be read as

applying to gender *simpliciter* for several reasons. By prohibiting discrimination on the basis of sex, Article 15 establishes that there is no standard behavioural pattern attached to gender. Understandings of sexual behaviour and sex-relations are intricately related to gender stereotypes, since traditional gender roles consider women to be the only appropriate sexual partners for men, and men to be the only appropriate sexual partners for women.

213. Accordingly, discrimination on the ground of sex necessarily includes prohibiting discrimination on the basis of sexual orientation, since alternative sexual orientations challenge traditional conceptions of gender. “Sexual orientation” is implicit in the word “sex”.

214. Like gender- discrimination, discrimination on the basis of sexual orientation is directed against an immutable and core characteristic of human personality.

215. It is established position of law in international law jurisprudence that prohibition of discrimination on the ground of “sex” includes prohibition of discrimination on the ground of “sexual orientation”. The ICCPR imposes an obligation on State parties “to respect and to ensure to all individuals….the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, etc…” *[See Article 2(1) of ICCPR at page no. 19 in compilation-Volume 2].* It further recognises the right to equality and states that “the law shall prohibit any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” [*See article 26, ICCPR at page no. 25 in compilation-Volume 2*]. In ***Toonen v. Australia*****,** at para 8.7, at page 122 of Compilation-Volume 6], the Human Rights Committee, held that

reference to “sex” in articles 2 (1), and 26 [of the ICCPR] is to be taken as including “sexual orientation.” India has ratified ICCPR and incorporated it domestically under the Human Rights Act. This implies that the decision in *Toonen* holds more than persuasive value in India.

216. Proceeding on the basis of analogous grounds, and taking into consideration that the broad objective of non-discrimination cannot be limited by grounds, the Canadian Supreme Court has held that, “sexual orientation” is a prohibited ground of discrimination *[**Egan v. Canada*** at para 5 at page 177 of Compilation-Volume 7; ***Vriend v. Alberta*** (1998) 1 S.C.R. 493, *at* para 107 at page no. 363 of Compilation-Volume 7]

Section 377 violates Art 15(1) by Discriminating on the ground of Sexual Orientation. Even though Facially Neutral, Section 377 treats Homosexual Men unequally compared to Heterosexuals and imposes an Unequal Burden on Homosexual Men

217. As has been shown herein above, impact of the law is a test for determining whether a law is discriminatory. If a law which is facially neutral has a disproportionate impact on a class of persons which is discriminatory, it will be held to violate the equality clause.

218. The determination of the impact of legislation must be undertaken in a contextual manner, taking into account the content of the law, its purpose and the characteristics and circumstances of the claimant. Hence, equality in Article 15(1) is a substantive concept. Differential treatment, in a substantive sense, can be brought about either by a formal legislative distinction, or by a failure to take into account the underlying differences between individuals in society. Section 377 does not take into account the differences

in individuals in terms of their sexual orientation and makes sexual practices relevant to and associated with class of homosexual persons criminal thereby, militating against homosexuals as a class.

219. Section 377 results in differential treatment as it fails to take into account the different sexual orientations of individuals. It criminalises certain sexual practices, which are normal sexual expressions for persons of homosexual sexual orientation. In such cases, it is the legislation's failure to take into account the true characteristics of a disadvantaged group within society (i.e. by treating all persons in a formally identical manner) and not the express drawing of distinction, which triggers the equality challenge.

220. Although Section 377 is facially neutral and applies to homosexuals and heterosexuals alike, its impact on homosexual persons as compared to heterosexuals is unequal and disproportionate. While Section 377 proscribes penile non-vaginal sexual practices for both heterosexuals and homosexuals, the restriction imposed by it is only partial for heterosexuals but complete for homosexuals. Section 377 restricts all forms of penetrative sexual practices of homosexuals but not so of heterosexuals. Homosexual sexual orientation is innate and core part of personality of homosexual men, and the normal expression of that orientation which manifests in sexual activity which are non-penile vaginal is also innate and natural but is prohibited by Section 377. Therefore, the prohibition imposed by Section 377 operates as a restriction on the basis of sexual orientation.

221. It is an established position of law that if the effect of a State action is to infringe a fundamental right and that effect is brought

about by a distinction based on a prohibited ground (e.g. sex, race, etc), it would constitute discrimination on the prohibited ground, however laudable the object of the State action may be [***Punjab Province v. Daulat Singh***, AIR 1946 PC 66 at page 71, and ***State of Bombay v. Bombay Education Society***, (1955) SCR 568 at page 584].

222. It is also an established position of law that it is not essential that the group on which the law operates be a homogenous group consisting only of members of the class who have been classified on a prohibited ground. It is enough for a law to be struck down as being discriminatory on a prohibited ground that the law operates so that its effect in some cases is that some persons are discriminated only on the basis of a prohibited ground [***Punjab Province v. Daulat Singh*** at page 71].

223. It is submitted that the effect of Section 377 is that it disproportionately impacts homosexual men on the basis of their sexual orientation. Therefore, Section 377 constitutes discrimination on the ground of sexual orientation and therefore on the ground of sex under Article 15(1), despite being couched in facially neutral language

XII. The Hon'ble High Court was correct in reading down Section 377 to exclude private adult consensual sexual activities from its purview.

224. It is submitted that Courts have the power to examine constitutionality of statutes [***State of Madras v. V.G. Row*** (1952) S.C.R. 597 at para 13*;* ***Supreme Court Advocates on Record Association v. Union of India*** (1993) 4 SCC 441 at paras 328 – 331*;* ***Government of Andhra Pradesh & Ors. v. P. Laxmi Devi*** (2008) 4 SCC, para 32 – 68].

225. Article 13(1) states that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part III of the Constitution, shall, to the extent of such inconsistency, be void. There is no presumption of constitutionality of a pre-constitution statute. [***John Vallamattom* v. Union of India** at paras 18, 28, 30, 32, 33 & 36**;** ***Anuj Garg v. Hotel Association of India*** at paras 7 – 8]

226. It has been contended that since the Indian Penal Code was amended in the year 1955 (Act 26 of 1955) by which the punishment of 'transportation for life' was substituted with 'life imprisonment' in Section 377, the provisions can no longer be regarded as pre-constitutional statute. It is submitted that the amendment Act 26 of 1955 had substituted punishment of 'transportation for life' with 'life imprisonment' not with particular reference to Section 377 but across the Indian Penal Code for thirty provisions, in a generic manner. The Parliament did not visit Section 377 specifically and there was no application of mind as to the provision in Section 377. Therefore, Section 377 continues to remain a pre-constitutional statute.

227. As has already been shown, Section 377 violates fundamental rights guaranteed under Articles 14, 15, and 21, in so much as it denies adults the right to private consensual sexual activities.

228. Therefore, it is the case of the Respondent No. 1 that Section 377 ought to be struck down as being unconstitutional and therefore void. However, Section 377, as it reads, also covers non consensual penile-non-vaginal intercourse and penile-non-vaginal intercourse where one of the parties is a minor. As there is no law extant which would cover these crimes, it would therefore be

undesirable to completely strike down the provision. It would be in the fitness of things that Section 377 be limited to non-consensual penile-non-vaginal sex and/or where one of the parties is a minor.

229. This Hon'ble Court has, in a number of cases involving constitutional validity of statutes, taken recourse to reading them down to save them, instead of striking down the impugned provisions. The expression "reading down" is a compendious expression and Courts can read down an impugned provision in various ways, including by way of limiting its applicability to areas, which would otherwise be constitutional.

230. In ***D. S. Nakara v. Union of India*** at paras 59–60, where pensioners were classified on the basis of the date of retirement specified in the memoranda to determine eligibility to receive pension on the basis of the revised formula and this was challenged as being violative of Article 14, this Hon'ble Court held:

> *"whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down the words of limitation, the resultant effect may be enlarging the class. In such a situation the Court can strike down the words of limitation in an enactment. That is what is called reading down a measure."*

231. In ***R. M. D. Chamarbaugwalla v. Union of India***, 1957 SCR 930 at para 23, the Court, while determining the constitutional validity of the definition of "prize competition", examined whether the definition ought to be restricted in its application to only those competitions which involved the element of gambling in order to save it from unconstitutionality. It laid down the principles of severability and read down the definition of "prize competition" by

"severing (its) application to competitions in which success does not depend to any substantial extent or skill"

232. In ***Kedar Nath v. State of Bihar***, 1962 SCR Supl. (2) 769 at paras 26–27, while preferring a construction of section 124A of the Indian Penal Code, which would save it from an infringement of Article 19(1)(a), this Hon'ble Court relied on ***R. M. D. Chamarbaugwalla*** and held:

> *"if the impugned provisions of a law come within the constitutional powers of the legislature by adopting one view of the words of the section or Act, the Court will take that view of the matter and limit its application accordingly in preference of the view which would make it unconstitutional on another view of the interpretation of the words in question".*

It construed the impugned provision so as to: *"limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence".*

233. In ***K. A. Abbas v. Union of India*** at para 48, while discussing the constitutional validity of section 5(b) of the Cinematograph Act, 1952, which was challenged on the grounds of being vague, the Court held:

> *"if possible the Court instead of striking down the law, may itself draw the line of demarcation where possible but the effort should be sparingly made and only in the clearest of cases".*

However, in the facts of the case, the Court found that the impugned law was not vague.

234. In ***Rt. Rev. Msgr. Mark Netto v. State of Kerala & Ors***. (1979) 1 SCC 23 at para. 6, this Hon'ble Court saved the constitutionality

of Kerala Education Rules, 1959, Rule 12(iii), by reading it down. The Court held that:

> *"the Rule, therefore must be interpreted narrowly and is held to be inapplicable to a minority educational institution in a situation of this kind with which we are concerned in this case. We do not think it necessary or advisable to strike down the Rule as a whole but do restrict its operation and make it inapplicable to a minority educational institution."*

235. In ***Kartar Singh v. State of Punjab*** at paras 130 - 134, where there was an anomaly and vagueness in the imprecise definition of the words 'abet', 'communication' and 'association', this Hon'ble Court read in the requirement of mens rea and held that:

> "'actual knowledge or reason to believe' on the part of a person to be roped in with the aid of the definition should be read into it instead of reading it down and clause (i) of the definition 2(1)(a) should be read as meaning 'the communication or association with any person or class of persons with the actual knowledge or having reason to believe that such person or class of persons is engaged in assisting in any manner terrorists or disruptionists' so that the object and the purpose of the clause may not otherwise be defeated and frustrated."

236. So also in ***State of Andhra Pradesh v. National Thermal Power Corporation*****,** (2001) 5 SCC 203 at para 31, this Hon'ble Court examined the definition of "consumer" under the State electricity laws which extended its applicability of the laws to other states and therefore violated Articles 286 and 269 of the Constitution. This Hon'ble Court, in order to save the impugned definition from unconstitutionality, read down the definition and restricted its applicability to those who receive electricity for consumption or distribution for consumption within the State.

237. In ***Bhim Singhji v. Union of India***, (1981) 1 SCC 166 at para 17, where limiting the wide import of section 23 of the Urban Land Ceiling Act, Justice Krishna Iyer held *"the limitation on the wide words of Section 23(1) is a matter of semantics and reading down meaning of down with loose lexical* amplitude is permissible as a part of judicial process".

238. In ***Satyawati Sharma v. Union of India*** at paras 41-42, this Hon'ble Court held that Section 14(1) (e) of the Delhi Rent Control Act, 1958 was violative of Article 14 of the Constitution. However, instead of striking down the whole section, the Court saved it from unconstitutionality by severing the offending portion from the Section.

239. The principle of severability, including reading in and reading out, has been followed internationally as well to save a provision from unconstitutionality, as can be seen from the below mentioned cases:

240. In ***Dhirendra Nadan & Anr. v. State***, a provision in the Penal Code of Fiji [Section 175 (a) and (c)] similar to section 377 of the IPC, which the Fijian High Court held to be inconsistent with the Constitution and invalid to the extent that it criminalises private consensual sex. The Court held that:

> *"In the event that adults engage in consensual sexual acts against the order of nature in private and are prosecuted under section 175(a) and (c) of the Penal Code applying general constitutional principles, the relevant sections of the Penal Code are invalid and the prosecutions a nullity.*
> *Invalidity in this context does not mean that the offending sections in the Penal Code ceased to exist rather they are simply rendered inoperative to the*

extent of this inconsistency." [page no. 180 of Compilation-Volume 6]

241. In the case between ***Leung TC William Roy and Secy. for Justice,*** In the Court of First Instance**,** HCAL 160/2004**,** certain provisions of Hong Kong's criminal law contained in Part XII of the Crimes Ordinance. The Court held that all the four sections of the ordinance challenged, discriminated on the basis of sexual orientation and struck down three ordinances as unconstitutional. With reference to Section 118C of the Ordinance, the Court gave a declaration:

> *"that Sec. 118C of the Ordinance, to the extent that it applies to a man aged 16 or over and under 2, is inconsistent with Articles 25 and 39 of the Basic Law and Articles 14 and 22 of the Bill of Rights and is unconstitutional".* [para 47 at page no. 195; para 147 at page no. 231 and conclusion at para 152 at page no. 233 of Compilation – Volume 6]

242. The order of the Court of First Instance was challenged In Civil Appeal No. 317 of 2005 filed in the Court of Appeal. The Court of Appeal affirmed the order of the Court of First Instance. *[**Between Leung T.C. William Roy and Secy. for Justice,*** conclusion at para 56 at page no. 265 in Compilation-Volume 6]

243. It is submitted that the Hon'ble High Court of Delhi was correct in its approach of reading down Section 377. The Delhi High Court, in view of the fact that striking the provisions altogether would also decriminalize non-consensual penile-non-vaginal sex and penile-non vaginal sex involving minors, adopted the alternate remedy of reading down Section 377 by limiting its application to non-consensual penile-non-vaginal sex and penile-non vaginal sex involving minors be taken recourse to, which would exclude private, consensual intercourse between adults from the

applicability of Section 377, which would have to be held unconstitutional.

XIII. JURISPRUDENCE FROM OTHER COUNTRIES

244. It is submitted that Courts in other jurisdictions have struck down similar laws that criminalise same-sex sexual conduct on the grounds of either privacy or dignity or equality or all of them. Courts have also struck down laws providing for discriminatory age of consent for sexual activity between heterosexual persons as compared to that for homosexual persons as well as laws discriminating against homosexual persons on the ground of sexual orientation. A list of such judgments is given below:

	ECHR DECISIONS
1.	*Dudgeon v. United Kingdom*, [1981] ECHR 5 (22 October 1981)
2.	*Norris v. Ireland*, [1988] ECHR 22 (26 October 1988)
3.	*Modinos v. Cyprus*, [1993] ECHR 19 (22 April 1993)
4.	*L & V v. Austria*, Application Nos. 39392/98 and 39829/98, Eur. Ct. H.R. (2003)
5.	*S.L. v. Austria*, Application No. 45330/99, Eur. Ct. H.R. (2003)
	UNHRC
6.	*Toonen v. Australia*, No. 488/1992, CCPR/C/50/D/488/1992 (31 March 1994)
7.	*Young v. Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000 (date of decision 6th August 2003)
8.	*X v. Columbia*, Communication No. 1361/2005, CCRP/C/89/D/1361/2005 (date of decision 14th May 2007)
	FIJI
9.	*Dhirendra Nadan and Another v. State*, August 2005 (Fiji)
	HONGKONG
10.	*Leung T C William Roy v. Minister for Justice*, HCAL 160/2004 (2005)
11.	*Leung T C William Roy v. Minister for Justice*, CACV317/2005, High Court (2006)
	SOUTH AFRICA

12.	*National Coalition for Gay and Lesbian Equality and Another v. The Minister of Justice and Others*, 1999 (1) SA 6 (CC)
	UNITED STATES
13.	*Lawrence v. Texas*, 539 U.S. 558 (2003)

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