IN THE SUPREME COURT OF INDIA

SLP(C) NO. 15436 OF 2009

In the Matter of

Suresh Kumar Koushal & Another… Petitioners

Versus

Naz Foundation & Others… Respondents

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Written Submissions on behalf of 'Voices Against 377', Contesting Respondent No. 11 in SLP(C) 15436/2009

I Introduction

1. These written submissions broadly follow the oral arguments presented by Senior Counsel for Respondent No. 11.
2. At the outset, the Respondent No. 11 would like to state its position on certain issues in the clearest possible manner:
   a. Respondent No. 11 supports the Writ Petitioner, namely Naz Foundation and urges this court to dismiss these appeals and affirm the judgment of the High Court of Delhi. However, since a general declaration of unconstitutionality would also impact a legitimate sphere of operation of the provision it is desirable and legally correct to make an **appropriately tailored declaration that eliminates the unconstitutional effect of Section 377**.
   b. Section 377, IPC is **unconstitutional** being *ultra vires* Articles 14, 15, 19(1)(a) and 21 of the Constitution inasmuch as, in operation and effect it violates the dignity and personhood of members of the Lesbian, Gay, Bisexual and Transgender (LGBT) community. A finding to this effect was correctly rendered by the High Court in respect of Section 377 being *ultra vires* Articles 14, 15 and 21 of the Constitution.
   c. **Sexual rights and sexuality are a part of human rights.** In particular, they are a crucial dimension of the right to life guaranteed under Article 21. Developing close and intimate relationships are an essential aspect of life and there can be no criminalisation of conduct that prevents a section of society from building relationship

and expressing physical aspects of their love for one another.

d. Homosexual conduct between two consenting males or two consenting females is ***not*** **"against the order of nature**". It is scientifically established and uncontroverted on the basis of the record that a certain segment of the population (although a small stable percentage, a large number in the Indian context) have intimate relationships with persons of their own sex and **this is a natural facet of their personality**.

e. LGBT persons are invisible and visible in the context of Section 377. LGBT persons are invisible in the sense that they are physically no different from non-LGBT persons. However, the moment they develop relationships or co-habit with persons of the same gender, they become visible to their friends, neighbours, work colleagues, family and local officials of the state. The Respondent No. 11 has produced extensive documentation in the form of affidavits, FIR and court records which demonstrate that LGBT persons are often targeted under Section 377 for merely being perceived to be different.

f. LGBT persons do ***not*** seek any special rights. They do not seek any protection of the law, beyond that which is already accorded to the vast majority of citizens. LGBT persons ask that they **not be criminalised for being who they are.** They seek "equality before the law and equal protection of the laws" and ask that the Right to privacy of intimate spaces and intimate decisions that is enjoyed by the majority of citizens, be extended to them.

3. The Respondent No. 11 submits that while this case is about the interpretation of the words used in Section 377; and whether consensual sexual acts between persons of the same sex in private fall within the meaning of 'carnal intercourse against the order of nature'; at its heart, this case is about the fundamental freedoms that lie at the heart of our constitutional order: On matters of sexuality or sexual orientation, are all citizens equal? Does our Constitution

deny an individual the right to fully develop relationships with other persons of the same gender by casting a shadow of criminality on such sexual relationships?

4. Justice Vivian Bose in his opinion in *Krishnan v. State of Madras*, 1951 SCR 621, stated:

> *Brush aside for a moment the pettifogging of the law and forget for the nonce all the learned disputations about this and that, and "and" or "or", or "may" and "must". Look past the mere verbiage of the words and penetrate deep into the heart and spirit of the Constitution. What sort of State are we intended to be? Have we not here been given a way of life, the right to individual freedom, the utmost the State can confer in that respect consistent with its own safety? Is not the sanctity of the individual recognised and emphasised again and again? Is not our Constitution in violent contrast to those of States where the State is everything and the individual but a slave or a serf to serve the will of those who for the time being wield almost absolute power? I have no doubts on this score. I hold it therefore to be our duty, when there is ambiguity or doubt about the construction of any clause in this chapter on Fundamental Rights, to resolve it in favour of the freedoms which have been so solemnly stressed.*

5. There are two paramount issues in this case. The first issue is one of identity and dignity of the individual. LGBT people in India, who are defined by their different sexual orientation and gender identity, exist across classes, in urban and rural areas, and may belong to different castes and religious communities. They share a commonality in that they express sexual desires towards members of their own gender. The great question before this Court is whether the state is justified in criminalizing LGBT persons merely for being who they are.

6. Technically, Section 377 criminalises only certain acts and is facially neutral. However, when applied and enforced it is not used against consenting adult heterosexuals. Section 377, in its interpretation, operation and working targets

LGBT persons. In doing so, it stigmatises and offends the dignity of LGBT persons as a class. Section 377 creates a class of second-class citizens and deprives LGBT citizens of their full moral citizenship. This is overwhelmingly evident from the vast body of material on the record. A member of the LGBT community feels stigmatized even when not engaging in any sexual activity by the mere presence of this provision *without* any suitable declaration by a Constitutional Court.

7. The second paramount issue is this Court's Constitutional role as the guardian of Fundamental Rights, including its primary role in protecting of the dignity of each and every person in India. It is submitted that this case ranks with the great cases that come before a Constitutional Court where a section of the citizenry seeks emancipation or the attainment of full civil rights. This Court has developed a great human rights jurisprudence and in the past in cases concerning undertrials, manual scavengers, bonded labourers has invariably employed its powers and jurisdiction to interpret the notion of 'dignity' to enable each of these segments to enjoy the fruits of the constitutional order.

8. In this case, the High Court of Delhi has already exercised its constitutional jurisdiction to separate out the offending portion of Section 377 through a process of declaration and interpretation so that the provision now operates in a legitimate sphere. There is almost no case to the knowledge of the Respondent No. 11 where the Supreme Court has *reversed* a High Court judgment to denude or restrict liberties or to *recriminalise a segment of the citizenry*.[1] The Preamble assures every generation of Indians that the Constitution will secure justice, liberty, dignity, equality and fraternity for *all* citizens. A reversal of the impugned

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[1] Perhaps the only case where the Supreme Court has reversed a High Court judgment to restrict fundamental rights is the case of *ADM Jabalpur* (1976) 2 SCC 521. Commenting on this judgment, Ganguly, J. in *Ramdeo Chauhan v. Bani Kanta Das* (2010) 14 SCC 209, at para 52 stated:

> *There is no doubt that the majority judgment of this court in the ADM Jabalpur case violated the fundamental rights of a large number of people in this country.*

judgment would erase this promise of the Preamble of the Constitution.

II List of Documents Submitted and Relied upon by Respondent 11 during Oral Hearing

9. The Respondent No. 11 read the following documents which are annexed to the **Counter Affidavit filed by Respondent No. 11 in SLP(C) 15436/2009**

   a. **Annexure R6:** "*Note on the Constituent Assembly Debates and Equality*" submitted by Respondent No. 11 before the Hon'ble High Court
   b. **Annexure R7**: "*Note on the Criminal Tribes Act and the Constitution*" submitted by the Respondent No. 11 before the Hon'ble High Court
   c. **Annexure R8:** "*Supplementary Note by Voices Against 377 on the Doctrine of Severability*" submitted by Respondent No. 11.
   d. **Annexure R10**: Report by Human Rights Watch titled *Epidemic of Abuse: Police Harassment of HIV/AIDS outreach Workers in India,* submitted by Respondent No. 11 before the Hon'ble High Court.
   e. **Annexure R12**: Affidavit of Ms. Kokila, a Hijra social worker from Bangalore
   f. **Annexure R13**: Affidavit of a gay man from Delhi who was raped by police officers because he was gay
   g. **Annexure R14**: Judgment of the Hon'ble High Court of Madras in the case of *Jayalakshmi v. State* (2007) 4 MLJ 849
   h. **Annexure R19**: Affidavit of Ms. Madhumita
   i. **Annexure R20**: Affidavit of Mr. Gautam Bhan

10. In addition Senior Counsel for Respondent No. 11 handed over and read portions from the following volumes during the course of oral arguments

   a. <u>Volume I: Index of Documents on the Natural Basis for Sexual Orientation</u>

i. K.K. Gulia and H.N. Mullick “Homosexuality: A Dilemma in Discourse” *Ind. J. Physiol. Pharmacol.* 2010 54(1): 5-20

ii. Final Regulatory Assessment Civil Partnership Act, 2004

iii. *The Concise Corsini Encyclopaedia of Psychology and Behavioural Sciences* (3rd Edn., W. Edward Craighead and Charles B. Nemeroff eds., John Wiley and Sons, Inc, 2004)

iv. *Amicus* brief of the American Psychological Association filed in *Lawrence v. Texas* 539 US 558 (2003)

b. Volume II

i. Professor Upendra Baxi “Dignity in and with *Naz*” in *Law Like Love: Queer Perspectives of Law in India* (New Delhi: Yoda Press, 2011)

ii. Professor S.P. Sathe, “Sexuality, Freedom And The Law”, in *Redeeming Family Law in India* (Routledge, 2008)

iii. Professor Upendra Baxi, Introduction to “Human Rights violations against the Transgender Community”, Peoples Union for Civil Liberties - Karnataka, September, 2003.

iv. Report of the United Nations High Commissioner on Human Rights titled “Discriminatory Laws and Practices and Acts of Violence against Individuals based on Their Sexual Orientation and Gender Identity”, dated 17th November, 2011.

v. Professor Ryan Goodman, “Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics,” California Law Review, 2001, Vol. 89: 569.

vi. True Copy of the Passport Application Form issued by Ministry of External Affairs of Government of India.

vii. True copy of Aadhar enrolment form

c. List of well known LGBT people

d. Glossary of Terms

e. Submissions on Relief

f. Chapter 7, Granville Austin. *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, 1999

g. Table of Supreme Court Judgments Expanding Fundamental Rights

h. Preliminary Written Submissions on Behalf of Respondent No. 11 Objecting to the Maintainability of the Petitions

i. Index of Relevant Literature submitted by Respondent No. 11, 'Voices Against 377'

While the arguments in this case inevitably revolved around interpretation, legislative history and constitutional content as is usual in any legal challenge, there is a human dimension underlying the core issues in the matter. This human dimension is brought out sensitively in a range of contemporary Indian writing that was supplied by Respondent No. 11 in this volume. Some of the themes from this literature is summarised below

i) Extracts from Leila Seth *On Balance: An Autobiography*: This extract describes the struggle of Leila Seth (former Chief Justice of the High Court of Delhi) to accept her son Vikram Seth's bisexuality and the fear Leila Seth experiences knowing that homosexuality was a crime in India.

ii) Maya Sharma *She came from a world of spirits*: This extract describes same sex relationships among women from a lower class, non-English speaking, often rural, background. Sharma makes the point that culturally sanctioned spaces for the expression of same sex relationships have always existed in India and that ordinary lesbian women often battle with the threat of being disgraced and ostracised even as they try to realize their dreams.

iii) Raj Rao, *Whistling in the dark*: Rao interviews Bindu Madhav Khire a gay activist and documents the painful struggle of a person to come to terms

with his sexuality, the process of telling his family that he is gay and finally becoming a gay activist.

iv) *My brother is gay*: This article shows that the notion of the Indian family is changing. A young woman Priya explains how she came to march in a gay pride march in support of her brother Praveen who is gay.

v) *My sister is a lesbian*: Bharat a young man explains why he supports his sister Anita who is a lesbian. He says that most hatred of LGBT persons comes from people who have never seen or worked with or had a family member who is Lesbian, Gay, Bisexual or Transgender.

11. Along with these written submissions, the Respondent No. 11 is annexing the following Annexures on Indian and Religious approaches to homosexuality

a. **Annexure A:** T.S. Sathyanarayana Rao & K.S. Jacob, "Homosexuality and India" *Indian Journal of Psychiatry* 54(1), Jan-March, 2012

b. **Annexure B:** Ruth Vanita, "Hinduism and Sexuality," in Brill's Encyclopedia of Hinduism (Brill, Leiden, The Netherlands).Forthcoming, 2012

c. **Annexure C:** Theologial Roundtable on Churches' Response to Human Sexuality: Message to the Indian Christian Communities

d. **Annexure D:** Leonard Zwilling and Michael Sweet, "Like a city ablaze: The third sex and the creation of sexuality in Jain religious literature" *Journal of the History of Sexuality*, Vol. 6, 1996

e. **Annexure E:** Extracts from Vatsyayana, *The Complete Kamasutra* translated by Alain Danielou (Park Street Press, Rochester, 1994)

f. **Annexure F:** Extracts from *Encyclopedia of Homosexuality and Religion* (Jeffrey S. Siker Ed.,Greenwood Press, 2007)

g. **Annexure G:** Scott Siraj al haq Kugle, "Sexuality, diversity and ethics in the agenda of progressive Muslims" in Omid Safi Ed., *Progressive Muslims On*

Justice, Gender and Pluralism (One World, Oxford, 2003)

h. **Annexure H:** Extracts from John Boswell, Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century (University of Chicago Press, Chicago, 1980)

III Background of Respondent 11, 'Voices Against 377'.

12. On 22 November 2006, 'Voices Against 377', the Respondent No. 11 in SLP(C) 15436/2009 was impleaded as Respondent No. 8 before the High Court.

    A true copy of the order allowing the Application for Impleadment filed by Voices Against 377 is annexed at **Flag 8 of Volume II** submitted by the Respondent 11 at the time of Oral Hearing.

13. The Answering Respondent, 'Voices Against Section 377' is a coalition of twelve registered and unregistered associations representing Child Rights, Women's Rights, Human Rights, health concerns as well as the Rights of same sex desiring people including those who identify as Lesbian, Gay, Bisexual, Transgender, Hijra and Kothi persons (hereinafter LBGT persons).

14. On February 23, 2006, the Answering Respondent held a public discussion titled "Lesbian and Gay Human Rights in India: International and Comparative Perspectives," held at the India Habitat Centre, New Delhi. Speakers/Panelists included Akshay Khanna (Voices Against 377), Kirti Singh (Advocate), Prashant Bhushan, (Advocate), and Prof. Robert Wintemute (School of Law, King's College London, UK).

15. On January 29, 2006, the Answering Respondent conducted a workshop titled "Criminalization of sodomy and Human Rights violations in India," at the British Council Division, New Delhi.

16. On December 17, 2005 the Answering Respondent held a workshop titled "Criminalization of sodomy and Human

Rights violations in India" at the Women's Development Cell, Lady Shri Ram College, University of Delhi, New Delhi.

17. The Answering Respondent has also published a campaign document titled *Rights for All: Ending Discrimination Against Queer Desire under Section 377.*

18. The particulars and the activities of the constituent organisations of 'Voices Against 377' are detailed at **page 6 of the Counter Affidavit filed by Respondent No. 11 in SLP(C) 15436/2009**.

19. The Respondent No. 11 asserts that homosexuality is a normal expression of human sexuality. A number of important persons in India and abroad, and through history have been gay, lesbian, bisexual or transgender

Indian & South Asia	Literature	Judges & Lawyers	Sports	Science & Humanities
1) Vikram Seth 2) Bhupen Khakkar 3) Onir 4)Ismail Merchant 5) Amir Khusro 6) Sunil Babu Pant 7)Hoshang Merchant	1) Oscar Wilde 2) Virginia Woolf 3) Truman Capote 4) James Baldwin 5) C.P. Cavafy 6) E.M. Forster	1) HLA Hart 2) Justice Michael Kirby 3) Justice Edwin Cameron 4) Kenji Yoshino	1) Martina Navratilova 2) Billie Jean King 3) Greg Louganis 4) Steven Davies	1) Alan Turing 2) John Maynard Keynes 3) Michel Foucault

IV Section 377 targets LGBT persons

20. On its face, S. 377 does not name any community or class of persons, does not create any classification between heterosexual and homosexual, and apparently only criminalises certain sexual acts. The Respondent No. 11 demonstrates that this provision, while facially neutral has been consistently interpreted and operationalised to both

criminalise sexual acts that are the core sexual expression of LGBT persons as well as to target persons who are or are perceived to be LGBT. Therefore, Section 377 targets LGBT people as a class.

21. In 2011, the United Nations High Commissioner for Human Rights presented a report titled *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* to the UN Human Rights Council which recommends the repeal of laws that criminalise consensual sexual activity between adults of the same sex. The Report noted that LGBT persons are subject to killings, rape, torture, discrimination and harassment. The High Commissioner goes on to state that

> *Seventy-six countries retain laws that are used to criminalise people on the basis of sexual orientation and gender identity. Such laws, including so-called "sodomy laws" are often relics of colonial-era legislation. They typically prohibit either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex. In some cases, the wording used refers to vague and undefined concepts, such as "crimes against the order of nature" or "morality", or "debauchery". What these laws have in common is their use to harass and prosecute individuals because of their actual or perceived sexuality or gender identity. Penalties range from short-term to life imprisonment, and even death penalty.*
>
> *The criminalisation of private consensual homosexual acts violates an individual's right to privacy and to non-discrimination and constitutes a breach of international human rights law. In* Toonen v. Australia, *the Human Rights Committee found that "adult consensual sexual activity in private is covered by the concept of 'privacy'" under the International Covenant on Civil and Political Rights. According to the Committee, it is irrelevant whether laws criminalizing such conduct are enforced or not' their mere existence continuously and directly interferes with an individual's privacy…"*[2] (emphasis supplied)

A true copy of this report is at **Flag 9 of Volume II** submitted by the Respondent No. 11 at the time of oral arguments.

22. The Respondent No. 11 produced instances of prosecutions and registrations of FIR's under Section 377 against LGBT

[2] United Nations High Commissioner for Human Rights *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* UN Doc. A/HRC/19/41 (17th November, 2011)

persons. More substantively, the Respondent No. 11 asserts that as Section 377 IPC criminalises sexual acts that define LGBT persons, this creates *an association of criminality* with LGBT persons. This is evident from the legislative history of Section 377 and from the widespread violation of the fundamental rights of LGBT persons. The Answering Respondent states that the continued existence of this provision on the statute book creates and fosters a climate of fundamental rights violations of the LGBT community. LGBT persons have been harassed, blackmailed, raped and tortured under the climate of impunity fostered by Section 377.

23. The fact that laws such as Section 377 can be used to harass, extort and blackmail LGBT persons is known through the history of these laws. Writing in 1785, Jeremy Bentham states that "*Wherever, therefore, two men are together, a third person may allegede himself to have seen them thus employing themselves without fear of having the truth of his story disproved. With regard to a bare proposal of this sort the danger is still greater: one man may charge it upon any other man without the least danger of being detected.*" He goes on to explain how the "*severity of the punishment*" and "*the moral antipathy to the offence*" is a "*means of extorting money*." Peter Alldridge places 'sexual blackmail' on the axis of information and power. He explains that 'the power of a secret rests with its potential revelation. Blackmail, which threatens guilt with shame by the revelation of a secret, provides an axis in the relationship between information and power.' The fact that the information pertains to a private, intimate space gives the blackmailer his power. This intimate space gains further prominence in India where everything sexual often invites shame and therefore must be kept bound up in a secret vault in the private realm. Therefore, armed with the information that LGBT people often are forced lead a parallel or double lives, and the need of LGBT persons to keep this intimate knowledge a secret gives the blackmailers immense power over LGBT people.

True copies of these documents are at **Flags 10 and 11,** respectively of, **Volume II** submitted by Respondent No. 11 at the time of oral arguments.

24. By reference to various incidents of abuse and harassment of LGBT persons, the Respondent No. 11 argued that the continued existence of section 377 IPC allowed for the brutalization of a vulnerable, segment of the citizenry for no fault on its part. A section of society has been so criminalised and stigmatised to a point where LGBT individuals are forced to deny the core of their identity and vital dimensions of their personality.

25. The incidents and testimonies detailed below indicate that the deletrious impact of section 377 extends across socio-economic backgrounds. In many instances, the use of Section 377 intensifies existing vulnerabilities of socio-economic status, caste, gender, ability, and religion.

A Lucknow Incident 2002: Deleterious Impact on HIV/AIDS prevention efforts

26. Human Rights Watch in their report titled *"Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India"*[3] dated July 2002 documents numerous instances of harassment of HIV/AIDS social workers in India, directly hampering efforts to prevent the spread of HIV/AIDS. In one instance in June 2001, the Lucknow police investigated a complaint under Section 377 and learned of the existence of a local NGO, namely Bharosa Trust, which was working in the area of HIV/AIDS prevention and sexual health among MSMs. The police then raided offices of this NGO, seized safe sex advocacy and information material and arrested four health care workers. The police filed chargesheet under sections 377 read with 511, and 292 IPC against the NGO workers, even though there was no prima facie evidence that would link them to the crime under Section 377. Moreover the allegedly 'obscene' material was in reality nothing more than educational literature related to safe sex practices and HIV/AIDS awareness. Since 377 is a non-

[3] See "India: Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India" available at http://www.hrw.org/reports/2002/india2.

bailable offence these health care workers remained in custody for forty seven days and according to the reports relied upon by the Answering Respondent, were subject to verbal abuse and physical harassment while in custody. A copy of this report is annexed at **Annexure 10 of the Counter Affidavit filed by Respondent No. 11 in SLP (C) No. 15436/2009.**

B Bangalore Incident, 2004: Custodial Torture of LGBT persons

27. **Annexure R12 of the Counter Affidavit of Respondent No. 11 in SLP (C) 15436/2009,** is the personal testimony of Kokila, a hijra from Bangalore. Kokila is a community mobiliser with Sangama, a registered society which works on human rights of sexual minorities. According to her, on 18th June, 2004 at around 8 pm while she was dressed in women's clothing and waiting on the road, she was raped by 10 goondas. They threatened to kill her if she wouldn't have sex with them and was forced to have oral and anal sex with all of them. While she was being raped, two policemen appeared and the goondas ran away, though two of them were caught. Upon telling the police of the rape, the police, instead of registering a case against the goondas, took her to the Byappanhalli Police Station in Bangalore, and began to torture her. She states on oath that she was stripped naked, and handcuffed to the window. They began to hit her with lathis and kick her with their boots. They called her "khoja" (derogatory word used against transgender persons) and "gaandu" (derogatory word to describe one who gets penetrated anally) indicating that she was being tortured merely because of her sexual identity. As a result of the torture, she suffered severe injuries on her hands, palms, buttocks, shoulder and legs. The police also burned her nipples and chapdi (vaginal portion of hijras). One Sub-Inspector positioned a rifle on her chapdi and threatened to shoot her. She states on oath that he pushed the rifle butt into the chapdi, saying 'do you have a vagina, can this go inside', indicating this was done with the specific purpose of insulting her because she is a transgendered

woman and not a 'real' woman. It was only after she was forced to confess to a crime foisted upon her, that she was finally released by the police.[4] At the time of oral hearing, Senior Counsel for Respondent No. 11 submitted a press release which detailed the abovementioned incidents and the subsequent protests against the police.

C Delhi Incident, 2006: Custodial Rape of LGBT persons

28. In **Annexure R13 of its Counter Affidavit**, the Respondent No. 11 produced the affidavit of the personal testimony of a gay man. He states that, on 19th September, 2006 he was standing at a bus stand waiting to take a bus to Mahipalpur at around 10 pm. He was picked up by two policemen who accused him of being a homosexual. They started assaulting him with lathis, targeting his groin and buttocks. They took him to a police chowki and began to verbally abuse him using sexual and degrading language. He states on oath that the police state that he had stolen a mobile phone, a gold chain and Rs. 30,000 from a resident of that area. They accused him of being a part of a homosexual gang and kept demanding that he produce the 'gang leader' to them. The police constables kept beating him through the night. The deponent further asserts that he was taken into a room where other policemen were sleeping. The policemen accompanying him woke the rest of them up and told them "Dekh main tere liye tofa laya hoon" (See, I've brought you a gift) and was forced to take off all his clothes. The deponent further states on oath that the four policemen proceeded to rape and sexually abuse him. One of them forced him to have oral sex, while the rest had forcible anal and oral sex with the deponent. This went on for 2 hours. The next morning the deponent was forced to sign a declaration where in it was written "Main Gaandu hoon, aur main shaukiya taur se yaha gaand marvaane aata hoon." The deponent further asserts that he cannot even go past the police chowki for fear of further violence and abuse and was afraid to make any complaint of this incident. The deponent further states that he cannot publicly disclose his

[4] Annexure R12 of the Counter affidavit in SLP (C) No. 15436/2009.

identity as a gay man because he is terrified that the police may further harass, intimidate and humiliate him and his friends.[5]

D ***Chennai, 2006: Suicide of LGBT person due to custodial torture by Police***

29. At **Annexure 14 of the Counter Affidavit filed by the Respondent No. 11** the case of *Jayalakshmi* v. *State of Tamil Nadu* (2007) 4 MLJ 849[6] has been annexed. In this case the High Court of Madras ordered the State of Tamil Nadu to pay compensation of Rs. 5 lakhs to the petitioner, who was the sister of Pottai, an Aravani (the Tamil name for a Hijra), who had committed suicide due to the harassment and torture at the hands of police officers. The petitioners alleged therein that on 1.5.2006 Pottai was arrested by the police as there were allegations that he had committed a theft. On 19.5.2006 he was enlarged on bail on the condition that he report to the local police station everyday. It later emerged that the police personnel had tortured Pottai and assaulted him everyday.

30. On 12.06.2006 the petitioner's brother had poured kerosene and immolated himself inside the Police Station. She went to the hospital where he was admitted and found that her brother was treated for the burn injuries in the Intensive Care Unit. When the petitioner enquired the reason, her brother told her that the Sub-Inspector of Police attached to the Police Station had tortured him by inserting the lathi inside his anus and few other police personnel have forced him to have oral sex. The petitioner's brother finally succumbed to the burn injuries on 29.6.2006.

31. In its judgment the High Court of Madras found that

> *"there are abundant evidence to show that the respondents 4 to 8 have in fact committed drastic inhuman violence on the body of the petitioner's brother Pandian, which is not only a human right violation, but also not expected of the police personnel like respondents 4 to 8, who are to safeguard the interest of the public…we have no hesitation to come to the*

[5] Annexure R 13 of the Counter Affidavit of Respondent No. 11 in SLP(C) No. 15436/2009.

[6] SLP(Crl) No. 7151-7152/2009 and SLP(C) No. 7362-7363 of 2009 against this judgment has been admitted by this Court.

conclusion that only because of the conduct of respondents 4 to 8, the said Pandian has attempted to commit suicide and ultimately succumbed to the injuries on 29.06.2006, and the same has happened due to the conduct of respondents 4 to 8, which is unbecoming of police officials and they are deserved to be condemned and are liable for suitable action in the interest of maintaining decency, discipline and civilisation among the disciplined force like, the Police Department."

E ***Bangalore, 2006: Arbitrary arrest and Illegal Detention of LGBT Persons***

32. **Annexure R18 of its Counter Affidavit of Respondent No. 11,** is a complaint filed by Mr. Ratnakar Shetty, Inspector of Police, Cubbon Park, Bangalore on 11.09.06.[7] In his complaint before the VIII Chief Metropolitan Magistrate, at Bangalore, he states that he raided Cubbon Park and found 10-12 'khojas', who with an 'intention to engage in unprotected, unnatural sex, were standing in the shade of trees and soliciting passerby on K.B. Road foot path and that they engaged in such unnatural sexual business for the purposes of earning money and that they by such unsafe, immoral sexual acts they may spread immoral diseases like AIDS, which may case severe harm to the general public and thereby they are likely to affect the public health…" Crime No. 151/06 under sections 270, 294, 290, 377, 511 and r/w 34 IPC was filed against 5 'hijras'.

33. The Respondent No. 11 has relied upon the affidavit of one Madhumita, who was one of the arrested in the above mentioned case in Bangalore.[8] Madhumita identifies herself as a kothi, i.e. that though born a male, prefers to dress as a woman and is sexually attracted to men. Right from her childhood, the deponent asserts that she felt that she is a girl. She further states she was merely standing at a bus stand near Bangalore Corporation Circle and at around 7 pm she was surrounded by around 4 to 5 police constables. She further asserts that she was arrested without giving any reason for the arrest.

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[7] FIR No. 151/2006. Annexure R18 to the Counter Affidavit of Respondent No. 11 in SLP(C) No. 15436/2009.

[8] Annexure R19 to the Counter Affidavit of Respondent No. 11 in SLP (C) No. 15436/2009.

34. The deponent states on oath that the police filed a false case under Section 377 against her simply because she is a kothi and that she does not hide her identity as a kothi. The deponent asserts that it is an expression of her identity to dress as a woman and to be sexually attracted to men and as a result she has been targeted by the police. She further asserts that she has suffered great mental and emotional harm and that the existence of section 377 brands her as a criminal and makes her vulnerable to harassment and persecution from the police. This affidavit is annexed at **Annexure R19 to the Counter Affidavit of Respondent 11 in SLP (C) No. 15436/2009.**

F Delhi Incident, 2006: Section 377 criminalises the identity of LGBT persons and not merely certain sexual acts

35. While it may be argued that Section 377 technically only criminalizes only certain penetrative sexual acts, it is the effect of Section 377 that all LGBT persons are branded as criminal.

36. The Answering Respondent draws attention to an incident in Delhi in April 2006. X and Y, both adult women were lesbians who were in a romantic relationship with each other. A complaint was made by the father of X – who was a 21 year old woman – stating that she had been abducted by another woman Y. An FIR was recorded under Section366 IPC. Y was arrested by the police and produced before a Magistrate. X wished to record a Section164 CrPC statement before the Magistrate stating that she had left her parental home of her own free will. However, her application was refused and in his order the Magistrate recorded that “it appears prima facie that under the guise of the aforesaid section there are hidden allegations of an offence under Section 377 as well.” To constitute an offence under Section 377 there needs to be penetration and hence cannot apply to a woman accused. However, since Section 377 serves to criminalize all homosexuality and not merely certain sexual acts, Section 377 is applied to lesbians as well. Copies of the FIR and of the order of the Magistrate are annexed at

Annexure R11 to the Counter Affidavit of Respondent No. 11 in SLP(C) 15436/2009. The Answering Respondent craves leave of this Court to suppress the identities of the individuals mentioned and the FIR No so that the identities of the persons is not disclosed.

G Goa, 2007: Criminalisation of Consensual Sexual Acts

37. In *Desmond Hope* v. *State of Goa*[9] decided by the Goa Bench of the High Court of Bombay involved consensual sexual acts between adults and despite the fact that the sexual acts were consensual, they were arrested by the Goa Police. As per the facts alleged by the Respondents therein, a police officer saw the Applicant, aged 32 years and one Anwar, aged about 24 years holding each others private parts. According to the State of Goa, the said Anwar complained of the commission of unnatural sexual assault by the applicant by introducing his penis into the mouth of the said Anwar.

38. Justice Britto, of the Goa Bench of the Bombay High Court, noted that the sexual contact between the two men, if there was any at all, must have been consensual and if either party did not wish to answer the call of the other, he may not oblige. Justice Britto held that that it

> *"Basically it appears that both parties were adults and were consenting parties to the offence under S. 377. IPC…"*

A copy of the order at **Annexure R15 to the Counter Affidavit of Respondent No. 11 in SLP(C) No. 15436/2009.**

H *Lucknow, 2006: Harassment of LGBT Persons*

39. At **Annexure R16 of its Counter Affidavit**, the Respondent No. 11 also draws attention to the arrest of gay men in Lucknow in January 2006. As per the FIR lodged on January 4, 2006 at 12:40 am by the Gudamba police in Lucknow, they arrested 4 men on charges of violation of Section 377. The four men were allegedly indulging in unnatural sex in a picnic spot and were arrested at 8:30 pm on 3 January, 2006. On inquiry by the police, the first

[9] Crim. Misc. App. (Bail) No. 55 of 2007

accused allegedly stated that he contacted the other three persons on the internet and they indulged in homosexual sex. Apart from these three persons he allegedly gave the names and phone numbers of 13 other persons who got in touch with in the same manner and with whom he had homosexual sex, all of whose names and mobile numbers were listed in the FIR. It was also stated that they were all part of an association of more than 1600 people who between themselves talked about homosexual sex and related issues.

40. According to Human Rights Watch, whose report is annexed at **Annexure R 16 to the Counter Affidavit of Respondent No. 11**, an undercover police posing as a gay man on a website used by gay men to engage in internet chatting, entrapped one man and then forced him to call others and arrange a meeting where they were arrested. The gay man provided an easy target as he could not complain of the harassment for fear that he may be subject to further harassment by the police and the wider society.[10] As per the report of the National Coalition for Sexuality Rights[11], whose report is annexed at **Annexure R17 of the Counter Affidavit of Respondent No. 11,** it was clear that none of the men involved were having public sex, much less present at the alleged spot of the crime. The police under the supervision of the SSP Ashutosh Pandey arrested the first accused on the evening of January 2, 2006 from his home. Thereafter, names and mobile numbers of other men mentioned in the FIR were forcible obtained from him. He was then arrested at 11:30 pm. On the following day, January 4, 2006, at 10:30 am he was forced to call the other men and requested them to met him at Classic Restaurant, Mahanagar, Lucknow, on pretexts such as ill health. The others were arrested by the police on arrival at the restaurant. The Report draws attention to the fact that the

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[10] Human Rights Watch *India: Repeal Colonial Era Sodomy Law,* 2006. Annexure R16 to the Counter Affidavit of Respondent No. 11 in SLP(C) 15436/2009.

[11] *Report of the Fact Finding Team on the Arrest of Four Men in Lucknow under IPC 377,* 2006. Annexure R17 to the Counter Affidavit of Respondent No. 11 in SLP No. 15436/2009.

FIR was lodged on the previous night at 12:40 am, a full 10 hours before the entrapment at the restaurant.

I Aligarh, 2011: Violation of the privacy of LGBT persons

41. On 9.02.2010, the newspapers widely reported the story of Professor Ramchandra Shrinivas Siras a 64 year old Reader & Chairman, Department of Modern Indian Languages, Aligarh Muslim University (AMU) being filmed having consensual sex with a rickshaw puller and subsequently suspended by the Aligarh Muslim University.

42. On 9.02.2010 he was served with a suspension notice under Section 40 (3) (c) of the Aligarh Muslim University Act, 1920 and also ordered not to leave Aligarh without obtaining the permission of Prof. PK Abdul Azis, the Vice Chancellor of AMU. On the same day, he was also issued a memo ordering him to vacate the University Quarters occupied by him within a week. Though Dr. Siras requested on humanitarian grounds a month's relaxation of the time period to allow him to search for a new house, the University was unrelenting. On 13.02.10, the University instructed its Electrical Engineer to depute staff to remove the meter and fans and to check the electrical fittings of Dr. Siras's house.

43. Following this notice, Dr Siras was left with no option but to move out. When he moved out to another place, he was asked to vacate the same as the owners were uncomfortable with the 'reputation' Dr Siras had attained. It was only when he shifted to another place that Dr Siras was able to solve his travails with respect to accommodation.

44. On 24.02.10, the University served Dr.Siras with a chargesheet with the formal charge against him being that Dr. Siras *"has committed act of misconduct in as much as he indulged himself into immoral sexual activity and in contravention of basic moral ethics while residing in Quarter No. 21-C, Medical College, AMU, Aligarh thereby undermined pious image of the teacher community and as a whole tarnishing the image of the University".*
A copy of the Chargesheet is annexed at **Flag 18 of Volume II**

45. Thereafter, Dr. Siras moved Civil Misc. Writ Petition No. 17549/2010 before the High Court of Allahabad seeking to

quash the order placing him under suspension, the chargesheet and the memo ordering him to vacate the University premises. The interim order dated 1.04.2010 records Dr. Siras' reply to the chargesheet wherein he clearly states that he is "*gay (or of homosexual orientation)*". The High Court was pleased to stay the effect and operation of the order placing him under suspension and the memo ordering him to vacate the university premises and further directed that the inquiry be held expeditiously. Unfortunately, Dr. Siras passed away several days later.

A true copy of this order is annexed at **Flag 17 of Volume II.**

J ***Legislative History of Section 377***

46. Prior to the British Raj, there are no recorded cases of criminalisation of consensual same-sex behaviour. Indian scholars Ruth Vanita and Saleem Kidwai in *Same Sex Love in India* document that a range of sexual expressions including love between of the same gender was accepted and recognised in pre-colonial times.

47. In Britain, the criminalization of sodomy dates back to English law with the earliest record of sodomy as a crime being in 1290. The law on sodomy went through a series of repeals and re-enactments before being christened as the offence of buggery under the Buggery Act of 1563.[12] This law was finally repealed in Britain following the recommendations of the Wolfenden Committee with the enactment of the Sexual Offences Act, 1967. Thus it was as early as 1967 that Britain effectively decriminalized homosexuality, while India retained the colonial offence.

48. It is submitted that laws similar to section 377 were imposed upon peoples colonised by the British. More than half of the countries that continue to have anti-sodomy laws do so only because they were once British colonies. Prior to their colonisation by the British, none of these countries punished consensual homosexual behaviour

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[12] Peter Bartlett, "Sodomites in the Pillory in Eighteenth- century London", *Social Legal Studies.*1997; 6: 553-572

49. Colonial legislators introduced such laws because they believed that their native subjects were more prone to commit such 'immoral acts'. They believed laws could inculcate European morality into their resistant subjects. They brought in the legislation, in fact, because they thought "native" cultures did not punish "perverse" sex enough. The British Empire believed that the colonized needed compulsory re-education in sexual mores. Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies, "native" viciousness and "white" virtue had to be segregated: the latter praised and protected, the former policed and kept subjected.

50. Section 377 was, and is, a model law in more ways than one. It was a colonial attempt to set standards of behavior, both to reform the colonized and to protect the colonizers against moral lapses. It was also the first colonial "sodomy law" integrated into a penal code—and it became a model anti-sodomy law for other British colonies. Its influence stretched across Asia, the Pacific islands, and Africa, almost everywhere the British imperial flag flew.

The spread of anti-sodomy laws with the spread of the British Empire has been documented in a report titled *This Alien Legacy: The Origins of Sodomy Laws and British Colonialism* published by Human Rights Watch. A true copy of this report is annexed here at **Flag 12 of Volume II.**

51. The offence of sodomy found mention in the Indian context through "An Act for Improving the Administration of Criminal Justice in the East-Indies, 1828". This was a law passed by the British Parliament which defined the criminal law in the jurisdictions of the Kings Courts in the territories of the East India Company. Clause 63 of this Act read

"Sodomy LXIII
And be it enacted, that every person convicted of the abominable crime of buggery committed with either mankind or with any animal, shall suffer death as a felon."

52. In 1837, a draft penal code was prepared which defined the offence of unnatural lust.. Clause 361 of the draft code stated that,

> *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.'*

53. Clause 362 stipulated the punishment for the same offence when it is committed or attempted without the other person's consent

54. Lord Macaulay, in commenting on the provision, noted that

> *"Clauses 361 and 362 relate to offences respecting which it is desirable that as little as possible be said…we are unwilling to insert either in the text or in the notes anything which could give rise to public discussion on this revolting subject, as we are decidedly of the opinion that the injury which could be done to the morals of the community by such discussion would more than compensate for any benefits which might be derived from legislative measures framed with greatest precision."*[13]

55. However the law which was finally enacted in 1860 eschewed the terminology of 'unnatural lust' in the text of the section and instead used the terminology of 'carnal intercourse against the order of nature'. It is to be noted that while section 377 is contained in Chapter 16 of the Indian Penal Code, 1860 titled 'Of Offences Affecting the Human Body, Of Offences Affecting Life'. Within this chapter, section 377 is categorised under the subchapter titled 'Of Unnatural Offences' and is the only section within this subchapter.

56. It is clear that section 377 was imposed upon the Indian subjects of the British Raj purely out of disgust and hatred for LGBT persons. It was based on a conception of sexual morality specific to a Victorian era, drawing on archaic notions of carnality and sinfulness, and is an expression of animus towards certain sexual acts and towards the class of people, namely LGBT persons.

57. In 1934, the High Court of Sindh pronounced judgment in the case of *Nowshirwan Irani v. Emperor* AIR 1934 Sind 206. In that case, according to the prosecution, Nowshirwan was accused of voluntarily having "carnal intercourse

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[13] Thomas Macaulay, *Report on the Indian Penal Code*, (La Vergne: Kessinger Publishing, 2011) at page 351..

against the order of nature" with one Rattansi. While the Court acquitted Nowshirwan of an offence under section 377 for lack of evidence, the High Court made the following observations regarding Rattansi:

> "*the young man Ratansi, I must say that he appears to be a despicable specimen of humanity. On his own admission he is addicted to the vice of a catamite. The doctor who has examined him is of the opinion that the lad must have been used frequently for unnatural carnal intercourse.*"

58. It is submitted that the legislative history of section 377 and its subsequent use indicate that it was enacted purely out of prejudice towards LGBT persons.

K The Criminal Tribes Act, 1871

59. In 1871, the Governor-General of India in Council passed the Criminal Tribes Act, 1871. This Act authorized the Government to declare by notification any tribe or class of persons which 'is addicted to the systematic commission of non-bailable offences' as a Criminal tribe. The law therefore deemed persons criminal merely on the basis of membership of a particular community. Once declared a 'criminal' tribe the Government was empowered with vast powers to ensure registration of all members of that tribe, forcibly settle, remove from a particular place, detain and transfer members of the criminal tribe. Furthermore the government was empowered to separate children of a criminal tribe from their parents.

60. The 1897 amendment to the Criminal Tribes Act, 1871, was titled 'An Act for the Registration of Criminal Tribes and Eunuchs'. Under the provisions of this statute, a eunuch was '*deemed to include all members of the male sex who admit themselves, or on medical inspection clearly appear, to be impoten*t'

61. Under section 24 of the Act, the local government was required to keep a register of the names and residences of all eunuchs who are *'reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 of the Indian Penal Code'.*

62. Under section 26 of the Act, any eunuch so registered who appeared 'dressed or ornamented like a woman in a public

street…or who dances or plays music or takes part in any public exhibition, in a public street...may be arrested without warrant and punished with imprisonment of up to two years or with a fine or both'

63. Under section 27, If the eunuch so registered had in his charge a boy under the age of 16 years within his control or residing in his house, he could be punished with imprisonment of up to two years or fine or both. According to section 29, a eunuch was considered incapable of acting as guardian, making a gift, drawing up a will or adopting a son. The Criminal Tribes Act, 1871 as amended in 1897 is annexed here as **Flag 14 of Volume II.**

64. A glimpse of the racist attitude of the British towards the so called Criminal Tribes is reflected in the words of J.H Stephens; a Member of the Viceroy's Executive Council who was said the following before the enactment of the Criminal Tribes Act:

> *"The special feature of India is the caste system. As it is, traders go by caste; a family of carpenters will be carpenter a century or five century hence, if they last so long. It means a tribe whose ancestors were criminals from time immemorial, who are themselves destined by the usage of caste to commit crimes and whose descendants will be offenders against law, until the whole tribe is exterminated or accounted for in the manner of Thugs. When a man tells you that he is an offender against law he has been so from the beginning and will be so to the end. Reform is impossible, for it is his trade, his caste, I may almost say his religion is to commit crime."*[14]

65. Another instance of the racist ideology within which the Bill of 1871 (before it became an Act) was planted is evident in the words of T.V. Stephens, a Law Member of the Executive Council who while moving the Bill declared,

> *"…'Professional criminals'…really means…a tribe whose ancestors were criminals from times immemorial, who are destined by the usage of caste to commit crime. Therefore when a man tells you he is a Buddhuk or a Kunjur, or a Sonoria, he tells you…that he is an offender against the law, has been so ever since the beginning, and will be so to the end, that reform is impossible…"*

66. While comparing caste system with the hereditary nature of crime, T.V. Stephens says,

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[14] Subir Rana "Nomadism, Ambulation and the 'Empire': Contextualising the Criminal Tribes Act XXVII of 1871" *Transcience* (2011) Vol. 2, Issue 2 at page 16.

> *"…people from time immemorial have been pursuing the caste system defined job-positions: weaving, carpentry and such were hereditary jobs. So there must have been hereditary criminals also who pursued their forefather's profession."*

67. It has been stated that

> *'Being a eunuch was itself a criminal enterprise, with surveillance being the everyday reality. The surveillance mechanism criminalised the quotidian reality of a eunuch's existence by making its manifest sign, i.e. cross-dressing a criminal offence. Further, the ways in which eunuchs earned their livelihood, i.e. singing and dancing, was criminalised. Thus, every aspect of the eunuch's existence was subject to surveillance, premised on the threat of criminal action. The police thus became an overt and overwhelming presence in the lives of eunuchs. Further, the very concept of personhood of eunuchs was done away with through disentitling them from basic rights such as making a gift or adopting a son*.'

This has been extracted from a report of the PUCL titled *Human Rights Violations Against the Transgender Community*.

68. Commenting on the Criminal Tribes Act in a speech made in 1936, Nehru stated

> *" I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty…an attempt should be made to have the Act removed from the statute book. No tribe can be classed as criminal as such and the whole principle as such and the whole principle is out of consonance with civilized principles of criminal justice and treatment of offenders...."*

A copy of the excerpt is annexed hereto at **Flag 15 of Volume II.**

69. Yet this is precisely the effect of section 377 of the IPC. It renders the entire of class of LGBT persons as criminal and reduces them to the status of 'unapprehended felons'. What Nehru said about the Criminal Tribes in 1936, is equally true of all LGBT persons prior to the impugned judgment. While the Criminal Tribes were denotified in 1952, the eunuch community and the rest of the LGBT community continue to be rendered criminal as a class because of section 377, as the provision renders illegal the conduct most closely associated with LGBT persons.

L Section 377 perpetuates violations of the Fundamental Rights of LGBT persons

70. The Petitioners before this Court and the contesting respondents before the High Court contended that section 377 has not been used against LGBT persons, but at the same time argued that the existence of the provision deters the spread of homosexuality. They have further contended that instances of blackmail, harassment, extortion, rape and torture of LGBT persons at the hands of police officials and members of the public are merely instances of abuse of section 377 and can have no bearing upon the constitutional *vires* of the provision.

71. The Respondent No. 11 asserts that condemnation expressed through the law shapes an individual's identity and self-esteem. LGBT individuals ultimately do not try to conform to the law's directive, but the disapproval communicated through it, nevertheless, substantively affects their sense of self-esteem, personal identity and their relationship to the wider society and that section 377 embeds illegality within the identity of homosexuals.[15] This tendency to conflate different sexual identities with criminal illegality marks the history of sodomy laws and exists in many different contexts.[16] According to a study conducted in South Africa prior to the striking down of its criminal proscription of sodomy, sodomy laws (like s. 377) send out

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[15] Ryan Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics" 89 *Cal. L. Rev.* 643.

[16] During the Colonial period in India, *hijras* were criminalized by virtue of their identity. The Criminal Tribes Act, 1871, was enacted by the British in an effort to police with those tribes and communities who 'were addicted to the systematic commission of non-bailable offences.' These communities and tribes were deemed criminal by their identity, and mere belonging to one of these communities rendered the individual criminal. In 1897, this act was amended to include eunuchs. According to the amendment, the local government was required to keep a register of the names and residences of all eunuchs who are 'reasonable suspected of kidnapping or castrating children or of committing offences under s. 377 of the Indian Penal Code." While this act has been repealed, the attachment of criminality to the hijra community still continues. See Arvind Narrain *Queer: Despised Sexuality, Law and Social Change* 57-60 (Bangalore: Books for Change, 2004).
See also Rubin, Gayle. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." Pleasure and Danger: Exploring Female Sexuality. Ed. Carole S. Vance. London: Pandora. 1992. 267-293, wherein it is argued that sex is used as a political agent as a means of implementing repression and creating dominance in today's society. She dissects modern culture's stance on sexuality, exposing the hypocrisy and subjugation that victimizes anyone of a different orientation or sexual inclination, by creating a hierarchy, what she calls a sexual caste system, of 'legitimate/natural' and 'illegitimate/unnatural' sexual practices

"one clear message that homosexual are delinquents; the law signifies public abhorrence of lesbians and gays…This affects individuals' self-image both in their reflections of themselves…"

This study is at **Flag 16 of Volume II.**

72. Furthermore, the harm inflicted by Section 377 radiates out and affects the very identity of LGBT persons. Sexuality is a central aspect of human personality and in a climate of fear created by Section 377 it becomes impossible to own and express one's sexuality thereby silencing a core part of one's identity. It directly affects the sense of dignity, psychological well being and self esteem of LGBT persons. Before the High Court, the Answering Respondent relied upon the affidavit of several LGBT persons. Mr. Gautam Bhan testifies to the fact that section 377 makes him feel "like a second class citizen in my own country." He further states that

> *"While society, friends and family are accepting of my sexuality, I cannot be fully open about my identity and my relationships because I constantly fear arrest and violence by the police…Without the existence of this section, the social prejudice and shame that I have faced would have been considerably lessened….The fact that gay people, like me, are recognized only as criminals is deeply upsetting and denies me the dignity and respect that I feel I deserve."*

A true copy of this affidavit is at **Annexure R20 to the Counter Affidavit of Respondent No. 11 in SLP(C) No. 15436 of 2009.**

V Consensual sexual acts between adults of the same sex are not covered by the phrase 'carnal intercourse against the order of nature'

73. Section 377 criminalises 'carnal intercourse against the order of nature.' Therefore, for a sexual act to fall within the prohibition of section 377, that act must be 'unnatural'. A review of the scientific literature would lead to the following conclusions

a. Human beings develop a sexual orientation, and this is natural to growing up. An individual's sexual orientation forms or is determined between middle childhood and

early adolescence well before attaining adulthood in terms of the Indian Majority Act, 1875. While most humans are heterosexual, a significant minority are homosexual.

b. A person's sexual orientation is innate to him or her. It is a core of his or her being and identity. It is a vital dimension of a person's character and personality that cannot be altered. Like one's race, being left handed, and the colour of one's eyes - sexual orientation cannot be changed at will.

c. The range of human sexuality is a continuum running from exclusive homosexuality to exclusive heterosexuality.

d. The overwhelming technical and medical literature on the record shows that homosexuality is not a disorder or disease (as was once considered) but is another expression of sexuality i.e. natural to a certain narrow minority in society.

e. Persons belonging to the LGBT community are a permanent minority and have always been present in society, through out history and in all cultures. The estimates of the number of LGBT persons range across surveys, but all the surveys conclude that the LGBT population is always in a numerical minority. While the percentage of LGBT persons is a fraction of the entire population, having regard to India's large population, the number of LGBT individuals would be very large.

f. Same sex attraction or homosexuality has been observed across several species in nature.

74. Homosexuality is widely prevalent in any given population and is as 'natural' as heterosexual acts. Homosexuality is just a natural variant of human sexuality and occurs in such a significant section of the human population, that its occurrence cannot be wished away or irrationally tarred with the brush of being 'against the order of nature'. To read homosexual acts as being against the order of nature and hence coming within the ambit of Section 377 is contrary to

the scientific, sociological and medical consensus that homosexuality is a natural variant of human sexuality

75. According to an article by K.K. Gulia and H.N. Mallick titled "Homosexuality: A Dilemma in Discourse" *Indian J. Physiol Pharmacol* 2010: 54(1): 5-20 (at **Flag 1 of Volume I)**:

> "*In general, homosexuality as a sexual orientation refers to an enduring pattern or disposition to experience sexual, affectional, or romantic attractions primarily to people of the same sex. It also refers to an individual's sense of personal and social identity based on those attractions, behaviours, expressing them, and membership in a community of others who share them. It is a condition in which one is attracted and drawn to his/her own gender, which is evidenced by the erotic and emotional involvement with members of his/her own sex."*

76. At **page 4 of Volume I**, the authors further state

> *In the course of the 20th century, homosexuality became a subject of considerable study and debate in western societies. It was predominantly viewed as a disorder or mental illness. At that time, emerged two major pioneering studies on homosexuality carried out by Alfred Charles Kinsey (1930) and Evelyn Hooker (1957)…This empirical study of sexual behavior among American adults revealed that a significant number of participants were homosexuals. In this study when people were asked directly if they had engaged in homosexual relations, the percentage of positive responses nearly doubled. The result of this study became the widely popularized Kinsey Scale of Sexuality. This scales rates all individuals on a spectrum of sexuality, ranging from 100% heterosexual to 100% homosexual…*
>
> *...the American Psychiatric Association (APA) deleted homosexuality from its Diagnostic and Statistical Manual of Psychological Disorders (DSM) in 1973 and released a public statement that homosexuality was not a mental disorder…"*

77. According to the *Corsini Concise Encyclopedia of Psychology and Behavioural Science* (at **Flag 5, Volume I)***:*

> *A third aspect of homosexuality is psychological identity, that is, a sense of self defined in terms of one's enduring attractions to members of the same sex. Individuals who identify as homosexual typically refer to themselves as "gay" with most women preferring the term "lesbian." Some use "queer" as a self-descriptive term, thereby transforming a formerly pejorative label into a positive statement of identity. People follow multiple paths to arrive at an adult homosexual identity. Not everyone with homosexual attractions develops a gay or lesbian identity, and not all people who identify themselves as gay engage in homosexual acts.*

A fourth component of homosexuality is involvement in same-sex relationships. Many gay and lesbian people are in a long-term intimate relationship and, and like heterosexual pairings, those partnerships are characterized by diverse living arrangements, styles of communication, levels of commitment, patterns of intimacy and methods of conflict resolution. Heterosexual and homosexual relationships do not differ in overall psychological adjustment or satisfaction. However, anti-gay stigma often denies same-sex partners the social support that heterosexual souses typically receive and even forces many same-sex couples to keep their relationship hidden from others.

Fifth, in the United States and many other societies, homosexuality involves a sense of community membership, similar to that experienced by ethnic, religious and cultural minority groups. Empirical research indicates that gay men and lesbians in the Untied States tend to be better adjusted psychologically to the extent that they identify with and feel part of such a community.

…Moreover, many gay people do not disclose their sexual orientation publicly because they fear discrimination and harassment. Consequently, no accurate estimate exists for the proportions of the U.S. population that are homosexual, heterosexual and bisexual. In North American and European studies during the 1980's and 1990's, roughly 1-10% of men and 1-6% of women (depending on the survey and the country) reported having had sexual relations with another person of their own sex since puberty…

Regardless of its origins, a heterosexual or homosexual orientation is experienced by most people in the United States and other Western Industrialized societies as a deeply rooted and unchangeable part of themselves. Many adults report never having made a conscious choice about their sexual orientation and always having felt sexual attractions and desires to people of a particular sex…[17]

78. According to the *amicus* brief filed by the American Psychological Association before the United States Supreme Court in *Lawrence v. Texas* (at **Flag 6, page 54, Volume I)**

"Decades of research and clinical experience have led all mainstream mental health organisations in this country to the conclusion that homosexuality is a normal form of human sexuality. Homosexuality – defined as a pattern of erotic, affectional and romantic attraction principally to members of one's own sex – has consistently been found in a substantial portion of the American adult population. Typically, an individual's sexual orientation appears to emerge between middle childhood and early adolescence. Most or many gay

[17] *The Concise Corsini Encyclopedia of Psychology and Behavioural Science* 887 (3rd edn., W Edward Craighead & Charles B. Nemeroff eds., 2004)

men and lesbians (men and women who identify themselves as homosexual) consistently report that they experience either no or little choice in their sexual attraction to persons of their own sex. Research has also found no inherent association between homosexuality and psychopathology. All of this evidence has lead mental health professional organisations to conclude that homosexuality is simply one normal variant of sexual identity. These organisations long ago abandoned classifications of homosexuality as a disorder and do not support therapies designed to change sexual orientation. Moreover, there is no reliable scientific evidence of effectiveness of such therapies.

Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well-being and social adjustment…Like heterosexuals, many gay men and lesbians desire to form long-lasting and committed relationships and succeed in doing so. These relationships manifest the same kinds of psychological dynamics as do heterosexual relationships, and sexual intimacy plays an important role in both kinds of partnerships…

As Texas law recognizes, the forms of sexual contact that it targets as "deviate sexual intercourse" are in fact among the means that heterosexual couples can use to express intimacy (as many do). For gay partners, these forms of sexual activity are particularly important for expression of sexual intimacy. The mental health professions do not associate oral and anal sex with any psychopathology and do not view them as 'deviate'.

79. At **Page 59 of Volume I,** the *amicus brief states*

The exact proportion of heterosexuals, homosexuals, and bisexuals in the adult population of the United States are not known. Different surveys have measured different aspects of sexual orientation, and consequently have reached different estimates. For example, the National Health and Social Life Survey (NHSLS Survey), the most comprehensive survey to date of American sexual practices, found that approximately 5% of men and 4% of women reported having had sex with a same-sex partner since age 18. …A larger proportion of respondents – approximately 8% of men and women alike – reported that they experienced attraction to persons of their own sex, considered the prospect of sex with a same-sex partner appealing, or both…

80. At **page 60 of Volume I**, the *amicus brief states*

Heterosexual and homosexual behaviour are both normal aspects of human sexuality. Both have been documented in many different human cultures, historical eras and in a wide variety of animal species. There is no consensus among scientists about the exact reasons why an individual develops a heterosexual, bisexual, or homosexual orientation. According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle

> *childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience…*

81. At **page 81 of Volume I**, the amicus brief details the effects of anti-sodomy statutes on LGBT people:

> *A particularly troubling effect of antisodomy statutes like §21.06 is that they foster a climate of intolerance in which gay men and lesbians feel compelled to conceal or lie about their sexual orientation to avoid personal rejection, discrimination and violence. This compulsion to remain "in the closet" reinforces anti-gay prejudices.*

82. While it is difficult to ascertain the exact numbers of self-identifying LGBT persons in a given population, certain governments have generally adopted the position that about 5-7% of an adult population identifies itself as not heterosexual. According to the *Final Regulatory Impact Assessment: Civil Partnership Act 2004* conducted by the Department of Trade and Industry of the Government of the United Kingdom states that a "…wide range of research suggests that a lesbian, gay and bisexual people constitute 5-7% of the total adult population." Relevant excerpts of the report are at **Flag 4 of Volume I.**

83. In 1957, the *Report of the Committee on Homosexual Offences and Prostitution* headed by Lord Wolfenden also tried to estimate the size of the homosexual population. After averring to the numerous difficulties in making such an estimate (only small number of homosexuals fall into the hands of the police/ small percentage visit the doctor to treat the their homosexuality/ no guarantee that individuals who are part of the study told the whole truth), comes to the tentative conclusion that:

> *No inquiries have been made in this country comparable to those which the late Dr. Kinsey conducted in the United States of America. Dr. Kinsey concluded that in the United States, 4 per cent of adult white males are exclusively homosexual throughout their lives after the onset of adolescence. He also found evidence to suggest that 10 per cent of the white male population are more or less exclusively homosexual throughout their lives after the onset of adolescence. He also found evidence to suggest that 10 per cent of the white male population are more or less exclusively homosexual for at least three years between the ages of sixteen and sixty five, and that 37 per cent of the total male population have at least some overt homosexual experience, to the point of orgasm between adolescence*

> *and old age. Dr. Kinsey's findings have aroused opposition and skepticism. But it was noteworthy that some of our medical witnesses expressed the view that something very like these figures would be established in this country, if similar inquiries were made. The majority, while stating quite frankly that they did not really know, indicated that their impression was that his figures would be on the high side for Great Britain*.[18]

84. In 1992, the World Health Organization removed homosexuality from its list of mental illnesses in the International Classification of Diseases (ICD 10). Page 11 of the Clinical Descriptions and Diagnostic Guidelines of the ICD 10 reads: "Disorders of sexual preference are clearly differentiated from disorders of gender identity, and homosexuality in itself is no longer included as a category."[19] The Indian Medical fraternity also widely adopts this standard classification.

85. After the conclusion of oral arguments, the Indian Journal of Psychiatry published an editorial on the issue of homosexuality. It reiterates that homosexuality is a normal expression of sexuality and that

> *"the argument that homosexuality is a stable phenomenon is based on the consistency of same-sex attractions, the failure of attempts to change and the lack of success with treatments to alter orientation"*

86. They question unethical and unwarranted attempts at conversion therapy (which is aimed to change one's sexual orientation) and call for physicians to provide medical service with *"compassion and respect for human dignity for all people irrespective of their sexual orientation."*

    A true copy of this article is at **Annexure A** to these written submissions.

87. It is a fundamental principle in criminal law that one must have knowledge or intention in order to commit a crime, and the State could not have intended to criminalise something which is an inborn aspect of the human personality and which the individual could not have chosen Since homosexuality is as 'natural' as heterosexuality neither of which are based on a conscious choice (which is the very

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[18] *Report of the Committee on Homosexual Offences and Prostitution* (London: Her Majesty's Stationery Office, 1957)

[19] Gene Nakajima, The emergence of an International Lesbian, Gay, and Bisexual Psychiatric Movement, Journal of Gay and Lesbian Psychotherapy, Vol 7, No1/2 2003. p.180.

essence of intention or knowledge) they cannot fall within the ambit of section 377. Homosexuality, like heterosexuality is not 'against the order of nature' and cannot fall within the term 'carnal intercourse against the order of nature' as used in Section 377

VI Indian opinion on S. 377 and the impugned judgment

88. The Respondent No. 11 seeks to draw attention to academic writings, reports and speeches by government officers and authorities in India.

89. Commenting on the impugned judgment, **Prof. Upendra Baxi**, says

> *Neither their Lordships of the Supreme Court of India who fortunately mandated a fuller examination of the Naz contention, nor even Chief Justice A. P. Shah and (Dr) Justice S. Muralidhar of the Delhi High Court, may have consciously intended a new jurisprudence against stigmatisation; yet this is what preciously results. In this sense at least, one may justifiably compare* Naz *as a much-awaited avatar of the* Kesavananda Bharathi *decision and its fecund normative progeny. If* Kesavananda Bharathi *restricts the plenary power of Parliament to amend the constitution in ways inimical to the future of human rights in India,* Naz *further develops this potential by a new jurisprudence of equality as judicially calibrated orders of emancipation from the state/society co-production of the cultural politics of stigmatisation*.[20]

A true copy of this article is at **Flag 1 of Volume II**

90. Prior to the impugned judgment, numerous government bodies and noted jurists increasingly saw the rights of LGBT persons as a part of the universal human rights. As eminent jurist **Upendra Baxi** noted in 2003,

> *'At stake is the human right to be different, the right to recognition of different pathways of sexuality, a right to immunity from the oppressive and repressive labeling of despised sexuality. Such a human right does not yet exist in India; this work summons activist energies first towards its fully-fledged normative enunciation and second towards its attainment, enjoyment, and realisation.'*[21]

A true copy of this article at **Flag 3 of Volume II**

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[20] Upendra Baxi, *Dignity in and with Naz*, Justice HR Khanna Memorial Lecture, February 25, 2010 published at *Law Like Love: Queer Perspectives of Law in India* (Yoda: New Delhi, 2011)

[21] People's Union For Civil Liberties-Karnataka, *Human Rights Violations Against the Transgender Community*, 2003. Foreword by Upendra Baxi.

91. Writing soon after the Delhi High Court dismissed the writ petition in 2006, well known legal scholar S.P. Sathe observed that

> *Sexuality encompasses desire and capacity to enter into sexual relations with another person. The desire is as integral to human life as hunger or thirst. Whereas hunger and thirst are considered legitimate and therefore can be openly talked about, the sexual desire is morally taboo. Instead, sexual drive is linked to procreation and only considered acceptable when indulged in as a means to that end. Any talk of sexuality without procreation is considered blasphemous. It is this writer's submission that sexuality is an integral component of the human personality, hence its development is an important aspect of individual's freedom.*

A true copy of this article is annexed here at **Flag 2 of Volume II.**

92. At page 33 of **Volume II**, Prof Sathe continues

> *The human rights discourse has expanded to include some unpopular rights such as those of homosexuals and transsexuals. Both morality as well as the law refuses to recognise other than heterosexual orientation. Gays, lesbians and transsexuals are subjected to physical torture, ridicule, antipathy and denial of access to gainful employment. The right to be different is now being canvassed as an integral part of the right to live with dignity, recognition of varied sexual orientations being an important aspect of pluralism.*[22]

93. At page 34 of **Volume II,** Prof. Sathe states:

> *It seems that both Parliament and the Supreme Court are reluctant to undertake legal reform out of fear of offending the existing social morality. Should human rights be a prey to existing social prejudices? Decriminalization of consensual homosexuality means recognition of a human right to be different. A movement for recognition of this right will continue, and ultimately proper legislation decriminalizing consensual sex between adults and criminalizing sex with a child will have to be passed. Section 377, as it exists today, fails to achieve either of these ends. To say that Section 377 is necessary for protecting children is to make no distinction between paedophiles and homosexuals. There is no evidence to prove that homosexuality promotes AIDS. Yet both the Parliament and the Supreme Court are fighting shy of taking a position on the issue. This may be because upholding the rights of persons with different sexual orientation runs counter to the dominant public opinion*

94. Sathe concluded by noting:

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[22] S.P. Sathe "Sexuality, Freedom and Law", in Archana Parashar and Amita Dhanda eds., *Redefining Family Law in India* 190 (New Delhi: Routledge, 2008)

This article has explored the legal regulation of some sexual choices and demonstrated how, in the main, this regulation has occurred oblivious of the jurisprudence of fundamental rights. The indifference is not just of the leglislature but also of the judiciary. The courts have not only failed to provide voice to excluded groups and unpopular rights, rather a number of judicial pronouncements have further reinforced populist understanding and social prejudice. Judicial activism obtains its legitimacy from the fact that the courts provide voice to those issues, interests and groups whose own voices would be drowned in the pell mell of majoritarian democracy. If these voices start to get silenced in judicial discourse then a major justification for judicial activism would stand defeated.

We have examined the relevance of fundamental rights in the context of sexual choices to demonstrate the artificiality of the public-private dichotomy, and how values of dignity and respect are common to all arenas. If is not possible to have a polity which is informed with the norms of fairness and equity, if oppression and indignity are allowed to rule in the home and family. After all, what one can get away with at home is what one will let pass abroad (Nussbaum 1999: 55-80). The courts as sentinels of constitutional values have to guard against the infringement of these values at all sites. It is those who make unpopular choices that require the protection of rights and courts. Conformity to the populist is obtained by social sanctions and the numerical force of the majority. Judges do not need to add to their numbers.

95. Several Indian statutory bodies as well as Government officials have recommended the decriminalization of homosexuality in India. The 172nd Report of the Law Commission of India categorically recommended that section 377 be deleted. Excerpts from the 172nd Report of the Law Commission of India are annexed to these written submissions at **Flag 4 of Volume II.**

96. Notably, on June 30, 2008, the Prime Minister Manmohan Singh in a speech delivered at the release of the Report of the Commission on AIDS in Asia acknowledged that homosexuals are victims social prejudice. He stated “The fact that many of the vulnerable social groups, be they sex workers or homosexuals…face great social prejudice has made the task of identifying AIDS victims and treating them

very difficult."[23] A true copy of it is annexed to these written submissions at **Flag 5 of Volume II.**

97. The National Commission of Women in its 'Recommendation on Amendments to Laws Relating to Rape and Related Provisions' also recommends that Section 377 be deleted and is annexed to these written submissions at **Flag 6 of Volume II**.

VII The declaration granted by the High Court is maintainable

98. Section 377 as it stood prior to the High Court judgment, covered numerous sexual acts including but not limited to, consensual sexual acts between adults, sexual acts by an adult with another non-consenting adults, and sexual acts by an adult with a minor. The High Court declaration merely excludes the first category of persons from the ambit of S. 377.

99. The High Court relied upon the doctrine of severability to reach its conclusion. The Special Leave Petitioners have aver that under the doctrine of severability, the High Court could have struck down certain words or phrases of the provision, but could not have excluded the application of the provision to only certain classes of persons.

100. At para 127 of the impugned judgment, the High Court was correct in relying upon the doctrine of severability as discussed in H.M. Seervai's *Constitutional Law of India* (Fourth edn., Vol. I, pages 266-267) which are extracted below:

> "3.7 *Severability*. We have seen that where two interpretations are possible, a Court will accept that interpretation which will uphold the validity of the law. If, however, this is not possible, it becomes necessary to decide whether the law is bad as a whole, or whether the bad part can be severed from the good part. The question of construction and the question of severability are thus two distinct questions"
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> *******

[23] Full text of the speech is available at http://www.pmindia.nic.in/lspeech.asp?id=691

"3.9 There are two kinds of severability; a statutory provision may contain distinct and separate words dealing with distinct and separate topics, as for example, one sub-section may provide a rule of law for the future and another sub-section may apply it retrospectively. The first sub-section may be valid and the second void. In such a case, the Court may delete the second sub-section by treating it as severable"

"3.10 There is however another kind of severability, namely, severability in application, or separability in enforcement. The question of this other kind of severability arises when an impugned provision is one indivisible whole, as for instance, the definition of a word. Here severability cannot be applied by deleting the offending provision and leaving the rest standing. It becomes necessary therefore to inquire whether the impugned definition embraces distinct classes or categories of subject matter in respect to some of which the Legislature has no power to legislate or is otherwise subject to a Constitutional limitation. If it is found that the definition does cover distinct and separate classes or categories, the Court will restrain the enforcement of the law in respect of that class of subjects in respect of which the law is invalid. This might be done by granting a perpetual injunction restraining the enforcement of the law on the forbidden field, as held in *Chamarbaugwalla's case."*

"3.11 The principle of severability in application was first adopted by our Sup. Ct. when dealing with the contention that a tax law must be declared wholly void if it was pad in part as transgressing Constitutional limitations. Sastri, C.J., delivering the majority judgment observed: "It is a sound rule to extend severability to include separability in enforcement…and we are of the opinion that the principle should be applied in dealing with taxing states…" He referred to the decision in

Bowman v. Continental Oil Co. (1920) 256 US 642. In *Chamarbaugwalla's Case* it was argued that this rule was exceptional and applied only to taxing statutes. But Venkatarama Aiyar J. rejected this contention"

101. The doctrine of severability of enforcement is well established in Indian law. The Supreme Court in *The State of Bombay v. The United Motors (India) Ltd. & Others* 1953 SCR 1069 used the doctrine of severability in enforcement where part of the operation of a taxing statute passed by the State of Bombay was violative of Article 286 of the Constitution. The Court held that

> *It is a sound rule to extend severability to include separability in enforcement in such cases, and we are of opinion that the principle should be applied in dealing with taxing statutes in this country*.

102. In *Chamarbaugwalla's Case* [1957] SCR 930 it was argued that the rule of severability of enforcement applied only to taxing statutes. In this case, the petitioners challenged the constitutionality of certain provisions framed under the Prize Competitions Act and rules framed thererunder. Their contention was that the 'prize competition' as defined in s. 2(d) of the Act included not merely competitions that were of a gambling nature but also those in which success depended to a substantial degree on skill and the sections and the rules violated their fundamental right to carry on business, and that they constituted a single inseverable enactment and consequently must fail entirely. The Supreme Court framed the issue thus:

> *But where the legislation falls in part within the areas allotted to it and in part outside of it, it is undoubtedly void as to the latter; but does it on that account become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the court on a consideration of the provisions of the Act.*

103. The Supreme Court ultimately extended the rule of severability of enforcement to non-taxing statutes as well and held that *"When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid."* The Supreme Court in these case severed the enforcement of the provisions of the Act and rules from

applying to *"competitions in which success does not depend to any substantial extent on skill"*

104. The rule of severability of enforcement was extended to criminal law as well. In *Kedar Nath v. State of Bihar* 1962 Supp (2) SCR 769 the vires of S. 124A IPC was challenged as violative of Article 19(1)(a). The Supreme Court held that a plain reading of the provision would criminalise even words which had the tendency or have the effect of bringing the Government into hatred or contempt, in addition to inciting public disorder. The Supreme Court observed that *"it will be true to say that the section is not only within but also very much beyond the limits laid down in the clause (2) aforesaid"*. The Court further observed that only that speech which tended to cause public disorder could be constitutionally defended on the grounds of 19(2).

105. Citing the ratio of *Chamarbaugwalla's Case* the Supreme Court held:

> *"Viewed in that light, we have no hesitation in so construing the provisions of the sections impugned in these cases as to limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence."*

106. The ratio in *Kedar Nath's case* and *Chamarbaugwalla's case* was reiterated and applied this Court in *Indra Dass v. State of Assam* (2011) 3 SCC 380

107. Section 377 covers a number of sexual acts, including but not limited to consensual sexual acts between adults, sexual acts between an adult and a minor, and non-consensual acts by one adult upon another. The Respondent No. 11 submits that the State has no authority to criminalise consensual sexual acts between adults. The High Court therefore correctly applied the doctrine of separability and removed consensual sexual acts between the adults from the scope of s. 377.

VII S. 377 is an unconstitutional infringement of the Right to Privacy.

108. It has been held that the Right to Privacy is an integral part of the Right to Life under Article 21. In *Kharak Singh v. State of Uttar Pradesh*[24] Justice Subba Rao held that

> *"It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty."*[25]

109. The Right to Privacy was reiterated in *Govind v. State of Madhya Pradesh*[26]. In this case this Court has held that the Right to Privacy clearly means one has a right to be left alone within one's home. Justice Matthew in *Govind v. State of Madhya Pradesh*, held that

> *"There are two possible theories for protecting privacy of the home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities. However such harm is not constitutionally protectable by the state. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the value of their peers rather than the realities of their natures."*[27].

110. It is therefore respectfully submitted that the submission of the Special Leave Petitioners that there is no Right to Privacy or that the High Court erred in relying upon the existence of a Right to Privacy is clearly not founded in any reading of the judgments of this Court.

111. It is further submitted that as per the judgments of this Court, there are two types of the Right to Privacy – the right to privacy of the home and the right to privacy of decisions and conduct.

A *The Right to Privacy of the Home*

112. The Supreme Court has held that within the zone of the home the citizen has a right to privacy. It is within the zone of the home that the individual can make independent determinations with regard to intimate and personal life,

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[24] 1964 (1) SCR 332
[25] Ibid.
[26] (1975) 2 SCC 148.
[27] Ibid.

should feel most at ease with himself and should be free from all societal constraints on his personality.

113. Justice Ayyangar in *Kharak Singh's* case held

> *Is then the word "'personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human value as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories.*

114. Justice Subba Rao, concurring with the conclusion of Justice Ayyangar held

> *Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where lie lives with his family, is his "castle": it is his rampart against encroachment on his personal liberty…If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures…*

115. Section 377 is clearly in violation of the Right to Privacy in the home since it criminalises consensual homosexual sexual acts done even in the privacy of the home. Section 377 does not draw any distinction between acts committed in public or in the privacy of the home. Section 377 allows the police and state officials to recklessly intrude into the

privacy of a person's home to determine what intimate acts took place in that space. Section 377 directly, unjustly and unfairly restricts the right of an individual to satisfy his emotional needs within the privacy of his home.

116. *Kharak Singh's case* has been positively relied upon by a 5 judge bench of this Court in the case of *State of West Bengal v. Committee for the Protection of Democratic Rights* (2010) 3 SCC 571.

B ***The Right to Privacy of Decisions and Conduct***

117. In the case of *District Registrar and Collector, Hyderabad v. Canara Bank* (2005) 1 SCC 632 the Supreme Court observed that while older notions of privacy were premised upon theories of property, in the modern constitutional sense the right to privacy is also premised upon the personhood of the individual. The Supreme Court made this determination on the basis of several decisions of the United States Supreme Court, in particular *Griswold v. State of Connecticut*[28], where it was held that the right to privacy included the right to make decisions about the intimate aspects of one's life. The Indian Supreme Court similarly expanded the Right to Privacy to mean that the individual has the right to determine, make decisions and choices without the interference of the State. This right to privacy refers to the freedom from unwarranted interference, sanctuary and protection against intrusive observation and intimate decision to autonomy with respect to the most personal of life choices.

118. The majority of the Court in *Lawrence,* in overruling *Bowers v. Hardwick* [29] held that

> *"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."*

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[28] 381 US 278 (1965)
[29] 478 U.S. 186 (1986)

119. It was further held that,

> *"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 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."*

120. Section 377 allowed state officials cavalierly, and if necessary by force, to make deep and searching inquiries and scrutiny into the most intimate parts of the individual's life. Section 377 denied individuals the right to decide for themselves whether to engage in particular forms of consensual sexual activity. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a society as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. Section 377 as it stood prior to the impugned judgment sought to control a personal relationship that is within the liberty of persons to choose without being punished as criminals.[30]

121. Indeed most of the instances of harassment and abuse of LGBT persons that the Answering Respondent has drawn attention to, are not because the individuals concerned has committed the act under Section 377, but because they 'looked' or 'appeared' to belong to the LGBT community. Not only does being gay, lesbian, bisexual or transgender mean that there is a presumption of committing the offence under Section 377 but that one can rendered criminal

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[30] Charles Fried "Privacy" 77 *Yale Law Journal* 475 (1968) at 477:
"…privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence. To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion."

merely for acting ‘gay’ or looking like a hijra. Section 377 allows the police and other officials of the state to unfairly and unjustly detain people merely because of their sexual orientation or on the mere suspicion that they conduct the most intimate aspects of their lives in a way proscribed by the provision.

122. Section 377 directly impedes the ability of individuals to fully express love and affection towards another person. It allows the state and police officials to intrude upon the privacy of the individual, and question and criminalise the love of one human being towards another. If happiness can be found in the intimacies of love, then Section 377 criminalises this love and one’s right to pursue happiness is thwarted.

VIII S. 377 is an unconstitutional infringement of the Right to Dignity

123. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others* (1981) 1 SCC 608 Justice P.N. Bhagwati explained the concept of right to dignity in the following terms*:*

> *“... 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…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.”*

124. The Special Leave Petitioners have also assailed the Impugned Judgment on the ground that the Constitution does not recognize any right to life with dignity and hence they argue that the High Court has erroneously held that section 377 violates the right to dignity of LGBT persons. This averment is clearly at odds with the law laid down by this Court. It is further submitted that the centrality of the concept of dignity to the constitutional protection of the fundamental rights of citizens was recognized by this Court in *Kharak Singh’s case*, where it was stated that the

"*Constitution assured the dignity of the individual"* in order to ensure the individual's full development and evolution.

125. The importance of the link between privacy and dignity as formulated by the Supreme Court and as articulated in the impugned judgment is also noted by eminent jurist, Upendra Baxi

> *Any claim to a 'full personhood' makes both moral and ethical sense only when intimate relations are liberated from the sovereign public gaze. 'Privacy' as a right to live with dignity, mean in and with* Naz, *an amplitude of free choice of lifestyles—or more heavily put, the modes of creating and being in the world of one's own choosing. Put another way, the right to privacy is an integral component of the right to live with dignity; to take it out or away is to diminish the value of dignity, both as a moral and as a juridical idea.*[31]

126. The notion of human dignity has been enunciated by the Constitutional Court of South Africa. In the *National Coalition for Gay and Lesbian Equality and others v. Minister of Home Affairs*[32] where the immigration law that allows the spouses of heterosexual married persons to enter South Africa, but denies the same right to permanent same-sex life partners, was challenged, the South African Constitutional Court held

> *"The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to*

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[31] Upendra Baxi, "Dignity in and with Naz", in *Law Like Love: Queer Perspectives of Law in India* (Yoda: New Delhi, 2011) at **Flag 1 of Volume II**

[32] 2000 (1) BCLR 39. See also *National Coalition for Gay and Lesbian Equality and others v Minister of Justice and others* where it was held that

> *"The criminalization of sodomy in private between consenting adults is … at the same time a severe limitation of a gay man's rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self identification and self fulfilment. 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 goods and services and the award of social opportunities for gays"*

See also *Vriend v Alberta*(1998) 156 DLR (4th) 385 where it was held that

> *"It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or color or sexual orientation are less worthy."*

heterosexuals and their relationships. … It denies to gays and lesbians that which is foundational to our Constitution … namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways"

127. It is respectfully submitted that the Impugned Judgment rightly acknowledged that Section 377 created and fostered social stigma by creating a pervasive association of criminality with LGBT persons. The harm inflicted by Section 377 radiates out and affects the very personhood of LGBT people. Section 377 creates a class of second-class citizens and communicates the message that LGBT persons are not of the same value as other individuals. Section 377 by its very existence chills the expression of one's sexuality and its presence directly relates to the sense of dignity psychological well-being and self esteem of LGBT persons.

IX The State has no interest to justify an infringement of the Right to Life, Privacy and Dignity of LGBT persons.

128. In the written submissions submitted to this Court by the Attorney General on March 22nd 2012 it is stated

Accordingly it is submitted that the Government of India does not find any legal error in the judgment of the High Court and accepts the correctness of the same. This is also clear from the fact that it has not filed any appeal against the judgment of the High Court

129. Therefore, the Union of India itself is of the opinion and admits that it has no legitimate reason to criminalise consensual sexual acts between adults in private.

130. In the case of *Govind v. State of Madhya Pradesh*, this Court held

There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. 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. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right. (emphasis supplied)

131. It is submitted that a law that infringes a right under Article 21, must be just, fair and reasonable. This Court in the case

of *VG Row v. State of Madras* AIR 1952 SC 196 elucidated the ingredients the reasonableness test.

132. It is submitted that all the Special Leave Petitioners before this Court, have advocated the same positions argued by the Union Ministry of Home Affairs before the High Court.

a. That section 377 prevented the spread of HIV/AIDS by deterring 'high risk behaviour'

b. That section 377 filled a lacuna in rape laws. They argue that section 377 was essential to protect women and children from non-vaginal sexual assault, as section 375 only punished rape, i.e. the vaginal sexual assault upon women.

c. That homosexuality being a mental illnesss, would spread through the general population.

d. That popular morality and opinion was against homosexuality and that the Union could justifiably criminalise activity that the majority of the population saw as immoral.

133. It is submitted that there is no stay of the impugned judgment and that it has occupied the field since July 2, 2009. In the 2 1/2 years since the impugned judgment was given, there has been no deleterious impact on society. Neither have the rates of HIV/AIDS infections increased as a result of the impugned judgment, nor has the incidence of child sexual abuse nor the sexual assault of women. It is submitted that in the repeated iterations, the Special Leave Petitions are not able to make out a case of actual harm which results from Section 377. The Special Leave Petitioners have sought to elide over the difference between a difference of sexual morality and a palpable harm to society. The Petitioners have sought to argue that the homosexuality, being in their opinion immoral, will lead to the spread of HIV/AIDS, increased drug abuse, child sexual abuse, incest, rape, and to the collapse of society and marriage. There is no evidence whatsoever to indicate that a divergence from what is perceived to be the majoritarian morality will lead to any of the consequences.

A ***Section 377 impedes HIV/AIDS prevention efforts***

134. The affidavit filed by the National AIDS Control Organisation (NACO) before the High Court unequivocally states that *"It is submitted that the enforcement of Section 377 of IPC can adversely contribute to pushing the infection under ground, making risky sexual practices go unnoticed and unaddressed.*" Thus the premier national agency which deals with HIV/AIDS prevention and treatment is of the opinion that S. 377 adversely effects HIV/AIDS prevention efforts. The Special Leave Petitioners have merely made bald assertion that as NACO has classified Men who have sex with Men (MSM) as a High Risk Group to make the tenuous assertion that that homosexuality in and of itself, leads to the spread of HIV/AIDS. In fact, instances of HIV/AIDS among MSM are high only because of Section 377 as it forces "sexual practices to go unnoticed and unaddressed." Both homosexual sex and heterosexual sex if unprotected may lead to the transmission of HIV/AIDS. There is nothing inherent in sex with between men which leads to the spread of HIV/AIDS.

B ***The Impugned Judgment does not affect the continued criminalization of Child Sexual Abuse and non-consensual sexual acts***

135. With regard to the contention that the impugned judgment will lead to an increase in cases of child sexual abuse or that section 377 filled a lacuna in rape law, it is submitted that the impugned judgment in no way permits sexual activity between an adult and a person below the age of 18 years. The impugned judgment at para 132 specifically states that a person below the age of 18 years "*would be presumed not to be able to consent to a sexual act".* Hence Section 377 still will still continue to criminalise cases of child sexual abuse. Furthermore, it is submitted that the High Court is limited to holding that section 377 was unconstitutional insofar as it applied to *"consensual sexual acts of adults in private"* (emphasis supplied). Hence the contention that the impugned judgment decriminalizes anal or oral sexual assault on men and women is wholly

unfounded since only **consensual** sexual acts between adults have been removed from the ambit of section 377.

136. The protection of women and children, while being a legitimate state interest, has nothing to do with the criminalisation of LGBT persons.

C ***The Impugned Judgment will not lead to the 'spread of homosexuality'***

137. With regard to the plea by the Special Leave Petitioners, that as a result of the Impugned Judgment, homosexuality will spread through the general population, it is submitted that such an argument is not based upon any scientific fact and is wholly at odds with modern understandings of human sexuality.

138. Homosexuality like heterosexuality cannot spread from one person to another and the Petitioner's fears that more and more people will 'become' homosexual is wholly unfounded. The scientific literature shows that LGBT persons form a constant minority of any given population. There is no scientific literature which shows that LGBT persons may become a majority in a society or that the number of LGBT persons may dramatically increase. On the contrary, all scientific literature shows that the proportion of LGBT persons is constant and always a numerical minority.

X Popular morality is not a valid state interest for restricting a Right under Article 21

139. The Special Leave Petitioners have advanced arguments in favour of retaining Section 377 as it stood prior to the impugned judgment on the ground that homosexual runs counter to popular morality. Morality is not based on harm caused to any person but is instead based on societal perceptions and apprehensions.

a. All the Petitioners have sought to depict homosexuality as similar to rape, incest, child sexual abuse, drug abuse, sati, and the giving of dowry. The Petitioners have drawn their notion of popular morality from an appeal to emotions such as disgust, disapproval, revulsion or squeamishness.

b. Additionally, the Petitioners draw their understanding of popular morality from religion and argue that homosexuality is immoral as it is prohibited by certain scriptures of certain religions.

140. The two justifications which stand behind the notion of popular morality have to be submitted to constitutional scrutiny. The notion of morality finds explicit mention as a limiting principle to various fundamental rights. Morality is specifically mentioned as a ground for limiting the rights under Articles 19(1) (a) and (c), Article 25(1) and Article 26(1). Thus morality is a specific ground for limiting the right to freedom of speech and expression, the right to form associations and unions as well as the right to freedom of conscience and the right to freely profess, practice and propagate religion.

141. It is submitted that Articles 19, 25 and 26 refer to those compelling standards by which a state may justify the curtailing of fundamental rights. But the compelling standards have to be high and in consonance with the constitutional objectives. For example, if a temple denies entry rights to Dalits, then the state may curtail the rights of the temple (right to religion) to achieve a constitutional objective of securing the right of entry to Dalits in the temple. The limiting grounds of morality cannot mean that LGBT persons can be denied their fundamental rights, contrary to the constitutional mandate of ensuring justice, liberty, equality and fraternity to all citizens.

142. 'Morality' can be a restriction on a fundamental right recognized by the Constitution, but that morality can be derived neither from the feelings of disgust, revulsion or moral indignation, nor can they been derived from readings of religious texts. Instead, that 'morality' as mentioned in the Constitution must be a morality that is derived from the constitutional text.

143. The Special Leave Petitioners may feel disgust, revulsion, shocked or hatred towards LGBT persons, but this does not and cannot have any bearing on whether the rights of LGBT persons may be infringed. Furthermore, it is submitted that

the *vires* of a statute cannot be tested against popular morality or religious teachings but against the text and ethic of the Constitution. It has been consistently held by this Court that the law and the constitution alone form the basis of adjudication by the Courts of India and public opinion.

144. This Court in the case of *RK Garg v. Union of India* (1981) 4 SCC 675 at para 17 held:

> *It was then contended that the act is unconstitutional as it offends against morality by according to dishonest assessees who have evaded payment of tax, immunities and exemptions which are denied to honest tax payers. Those who have broken the law and deprived the state of its legitimate dues are given benefits and concessions placing them at an advantage over those who have observed the law and paid the taxes due from them and this according to the petitioners is clearly immoral and unwarranted by the Constitution. We do not think this contention can be sustained. It is necessary to remember that we are concerned here only with the constitutional validity of the Act and not with its morality. Of course, when we say this we do not wish to suggest that morality can in no case have relevance to the constitutional validity of a legislation. There may be cases where the provisions of a statute may be so reeking with immorality that the legislation can be readily condemned as arbitrary or irrational and hence violative of Article 14. But the test in every such case would not be whether the provisions of the statute offend against morality but whether they are arbitrary and irrational having regard to all the facts and circumstances of the case. Immorality by itself is not a ground of constitutional challenge and it obviously cannot be, because morality is essentially a subjective value, except in so far as it may be reflected in the Constitution or may have crystallized into some well accepted norm of special behaviour.*

145. It is submitted that this Court has correctly held that validity of an act can only be tested against the constitution, and not morality unless that morality is "reflected in the constitution." It is submitted that the High Court's test of 'constitutional morality' is nothing but morality "as reflected in the Constitution" as laid down by this Court in *RK Garg*'s case.

146. It is further submitted that this Court has expressed its opinion on the link between morality and criminal law in the case of S. *Khushboo v. Kanniammal & Others* (2010) 5 SCC 600. It was held by this Court that morality and criminality are not coextensive and that merely because a large section of society deemed certain acts as immoral, does not necessarily mean that that act must attract criminal

liability. This Court has correctly stated that revulsion for a particular act cannot form a sufficient basis for criminalizing that act. In this judgment, this Court stated:

> *45. Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as 'decency and morality' among others, we must lay stress on the need to tolerate unpopular views in the socio-cultural space. The framers of our Constitution recognised the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance in the political sense, we must also promote a culture of open dialogue when it comes to societal attitudes.*
>
> *46. Admittedly, the appellant's remarks did provoke a controversy since the acceptance of premarital sex and live-in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in premarital sex. 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.*
>
> *47. In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the 'freedom of speech and expression'...*
>
> *50. Thus, dissemination of news and views for popular consumption is permissible under our constitutional scheme. The different views are allowed to be expressed by the proponents and opponents. A culture of responsible reading is to be inculcated amongst the prudent readers. Morality and criminality are far from being co-extensive. An expression of opinion in favour of non-dogmatic and non-conventional morality has to be tolerated as the same cannot be a ground to penalise the author.* (emphasis supplied)

147. The Answering Respondent argues that the protection of shifting popular morality does not form a valid state interest for restriction of Rights under Articles 14 and 21. Popular

morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. For centuries, popular morality has condoned the caste system, *sati* and dowry. If there is any type of 'morality' that can pass the test of compelling state interest, it must be, as this Court pointed out in ***RK Garg's case*** on '*morality as is reflected in the constitution*', not popular morality.

A ***"Morality" as understood in the Constitutional Assembly Debates***

148. It is further submitted that legislative history of the term 'morality' as used in the constitution bears out the interpretation of the High Court. It is submitted that a scrutiny of the Constitutional Assembly Debates would conclusively demonstrate that 'morality' as used in the constitution does not refer to popular morality, but instead to a morality that is based upon Constitutional principles.

149. The possible confusions and the constitutional infirmities to which the notion of morality could be subject to were recognised by members of the Constituent Assembly themselves. The use of the term morality as a limiting principle finds a place in the Objectives Resolution moved by Pandit Jawaharlal Nehru in the Constituent Assembly. The 'Objectives Resolution' according to Pandit Jawaharlal Nehru was *'not a law; but is something which breathes life in human minds'*[33] Section (5) of the Resolution read:

> *WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and <u>public morality</u>*[34] (emphasis supplied)

150. The Objectives Resolution itself is derived from the 1928 Nehru Report known as the Swaraj Constitution drafted by a Committee chaired by Motilal Nehru. This was one of the first attempts at drafting a Constitution for India by Indians. In the Chapter titled Fundamental Rights, 4 (iv) reads:

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[33] Constituent Assembly Debates Book No 1, Lok Sabha Secretariat, 1999, p. 59.
[34] Constituent Assembly Debates Book No 1, Lok Sabha Secretariat, 1999, p. 59.

> *"The right of free expression of opinion, as well as the right to assemble peacefully and without arms, and to form associations and unions, is hereby guaranteed for purposes not opposed to public order and morality."*[35]

151. In the Debate on the Objectives Resolution, Dr. Ambedkar referred particularly to the use of the qualifying phrases 'law' and 'morality'.

> *"These fundamental rights set out are made subject to law and morality. Obviously, what is law, what is morality will be determined by the Executive of the day and when the Executive may take one view another Executive may take another view and we do not know what exactly would be the position with regard to fundamental rights if this matter is left to the Executive of the day."*[36]

152. Apprehensions around the use of the phrase morality was also expressed during the deliberations of the Sub Committee on Fundamental Rights. Prof K.T. Shah noted:

> *"Article 9, dealing with several of the primary freedoms or civil liberties makes them subject to 'public order and morality'. The last named is a very vague term. Its connotation changes substantially from time to time. There have been many instances, in this as well as in other countries, wherein in the name of public morality, essential freedoms of thought and expression have been denied to citizens. The example of the bar placed by the Lord Chamberlain in England against the staging of some of Bernard Shaw's plays need hardly be cited to lend point to my objection. In a land of many religions, with differing conceptions of morality, different customs, usages and ideals, it would be extremely difficult to get unanimity on what constitutes morality. Champions of the established order would find much in the new thought at any time, which might be considered by them as open to objection on grounds of public morality. <u>If this is not to degenerate into a tyranny of the majority, it is necessary either to define more clearly what is meant by the term 'morality', or to drop this exception all together</u>.*[37] (emphasis supplied)

153. Dr. Ambedkar in the context of the amendment moved for removing personal laws completely from the ambit of the fundamental rights chapter noted

> *The religions conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in*

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[35] B. Shiva Rao, Ed., The Framing of India's Constitution, Vol I, Universal Law Publishing, 2010, p. 59.
[36] Constituent Assembly Debates, Book No 1, Vol I, Lok Sabha Secretariat, 1999, p. 100.
[37] Shiva Rao, Ed., The Framing of India's Constitution, Vol V, Universal Law Publishing, New Delhi, 2010, p. 212.

> *saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion.....I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, discriminations and other things, which conflict with our fundamental rights*.[38]

154. It is submitted that from the discussions at the Constituent Assembly, it emerges that

a. There is a fear that the fundamental rights can become a dead letter through the interpretation of the exceptions such as morality and that popular morality may ride roughshod over fundamental liberties of citizens

b. Religion cannot be the basis to restrict fundamental rights and that laws based on religion cannot then trump the Constitution. This is apparent in the statement by Dr. Ambedkar as well as the decision of the Constituent Assembly not to accept the amendment exempting personal laws from the ambit of fundamental rights.

c. There is the injunction that limitations to the fundamental rights must be read keeping in mind the spirit of the Constitution. This is explicitly stated by both Prof K.T. Shah and also forms the very basis of any reading of the Objectives Resolution moved by Pandit Jawaharlal Nehru.

B *Popular morality alone is not a sufficient basis for limiting Fundamental Rights*

155. It is respectfully submitted that constitutional courts the in modern democracies have held that popular morality or opinion, absent any other state interest, is not a valid ground for restricting fundamental rights. As the South African Constitutional Court noted in a decision which struck down the death penalty as unconstitutional,

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[38] Ibid. p. 781.

> *'Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour... By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected'*[39]

156. The question of the State in fact being a protector of constitutional morality was also made in another decision of the South African Constitutional *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Court which struck down the anti sodomy law,

> *'A State that recognises difference does not mean a State without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil… The Constitution certainly does not debar the State from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.'*[40]

(During Oral arguments, Mr. H.P. Sharma, Counsel for the Petitioner in SLP No. 22267/2009 argued that this case has already been rejected by this Court in *Sakshi v. Union of India* (2004) 5 SCC 518. This is incorrect. This Court only considered a case of a similar cause title, i.e. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39, which dealt with an immigration law, and not with the criminal prohibition of sodomy)

157. Thus it is submitted that popular morality, or public disapproval of certain acts is not a valid justification for restriction of the rights under Articles 14, 15 and 21.

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[39] *S v Makwanyane and Another* (South African Constitutional Court) 1995 (6) BCLR 665 (CC) at para 88

[40] *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 6 BHRC 127 (CC, 1998), 1998 (12) BCLR 1517 (CC) at para 136.

Instead, it is the moral values of the Constitutional framework, deeply rooted in a commitment to preserving pluralism, diversity and difference, and protecting the vulnerable against majoritarianism, which must serve to protect LGBT persons from the climate of violence, animus and discrimination against them.

158. The case of *Lawrence v. Texas* too considered the place of morality in determining the validity of law. Justice Kennedy cites with approval, Justice Stevens' dissent in the case of *Bowers v. Hardwick* where Justice Stevens states

> *"the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."*

159. Thus the United States Supreme Court decisions lay down the clear propositions that popular morality alone cannot define the limits to liberty under the due process clause of the United States' Constitution and that laws must be tested against the values contained in the Constitution. Whether or not certain practices or certain people are looked upon as immoral or sinful, this does not constitute a legitimate reason for the deprivation of liberty under Article 21[41]

160. The Wolfenden Committee, which was constituted to consider the law and practice relating to homosexual offences in the United Kingdom, in considering this same question was of the opinion that

> "*moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind"* [42]

161. In the case of *Dudgeon v. United Kingdom*[43], the European Court of Human Rights held that *"Although members of the public who regard homosexuality as immoral may be*

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[41] See *Planned Parenthood v. Casey,* the United States Supreme Court considered whether the provisions of an abortion statute were unconstitutional when tested against the United States Constitution's due process clause. Justice O'Connor speaking for the majority held that

> *"Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."*

[42] Wolfenden Committee report, 1957 at para 24.

[43] 45 Eur. Ct. H.R. (ser.A) (1981) p. 149

shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."[44]

XI Popular opinion is not uniformly against LGBT persons

162. The Special Leave Petitioners assail the impugned judgment on the grounds of popular morality and opinion. It has been asserted by all these petitioners that the majority of the Indian populace is considers LGBT persons as immoral and that homosexuality stands at odds against public morality and the mores of Indian society.

163. It is unfortunate that these Respondents seek to portray public opinion and Indian morality and uniform, conservative and intolerant of difference.

164. Prior to colonialism, there were vibrant traditions in India where love between persons of the same-gender were accepted and celebrated. Numerous instances of such love have been documented in *Same-Sex Love in India* (Ruth Vanita & Saleem Kidwai eds., Penguin: New Delhi, 2008)

165. The Answering Respondent, relying on academic treatises, newspaper reports and public statements by eminent public figures and intellectuals has demonstrated Indian society and popular morality has historically been and continues to be is diverse, evolving and open in its attitude to different sexualities.

166. Popular opinion does not uniformly favour the criminalization of homosexuality. Many Indian educational institutions and companies have also prohibited discrimination on the ground of sexual orientation. The prestigious Tata Institute of Social Sciences, Mumbai in its guiding principles has noted, 'Equal opportunities for all and non-discrimination on grounds of caste, class, gender, sexual preference, religion and disability.' This is annexed at **Flag 21 of Volume II.**

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[44] Ibid.

167. In 2006, the State of Tamil Nadu *vide* G.O. (Ms) No.199 dated 21.12.2006, recognizing that "aravanis[45] are discriminated by the society and remain isolated" issued directions that

a. counseling be given to children who may feel different from other individuals in terms of their gender identity.
b. Family counseling by the teachers with the help of NGOs sensitized in that area should be made mandatory so that such children are not disowned by their families. The C.E.O.s , D.E.O.s, District Social Welfare Officers and Officers of Social Defence are requested to arrange compulsory counseling with the help of teachers and NGOs in the Districts wherever it is required.
c. Admission in School and Colleges should not be denied based on their sex identity. If any report is received of denying admission of aravani's suitable disciplinary action should be taken by the authorities concerned.

A true copy of this G.O. is annexed and marked as **Flag 20 of Volume II.**

168. In 2006 an open letter protesting the continued criminalisation of homosexuality was issued by Vikram Seth, Swami Agnivesh, Soli Sorabjee and about 142 other eminent Indian citizens and persons of Indian origin called for the overturning of section 377. It was stated therein that

169. "It has been used to systematically persecute, blackmail, arrest and terrorise sexual minorities. It has spawned public intolerance and abuse, forcing tens of millions of gay and bisexual men and women to live in fear and secrecy, at tragic cost to themselves and families…Such human rights abuses would be cause for shame anywhere in the modern world, but they are especially so in India, which was founded on a vision of fundamental rights applying equally to all, without discrimination on any grounds. By presumptively treating as criminals those who love people of the same sex, section 377 violates fundamental rights, particularly the rights to equality and privacy that are enshrined in our Constitution…"

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[45] Hijra's are known as Aravani's in Tamil Nadu.

170. In 2006 Nobel Laureate Shri Amartya Sen issued a statement supporting this letter. In his statement, Shri Amartya Sen states

> *"The criminalization of gay behaviour goes not only against fundamental human rights, as the open letter points out, but it also works sharply against the enhancement of human freedoms in terms of which the progress of human civilization can be judged…It is surprising that independent India has not yet been able to rescind the colonial era monstrosity in the shape of Section 377, dating from 1861."*

171. Various government agencies and departments have already acknowledged and given a degree of legal recognition to LGBT persons. For example, individuals no longer must mark themselves as only either male or female passport forms issued by the Ministry of External Affairs since hijra's and other transgender persons can tick on the 'Other' box under the heading of Sex. A similar provision is made on the Aadhar enrolment form. Therefore even the Union of India acknowledges and provides legal sanction to LGBT persons. A true copy of a passport application form is annexed and marked at **Flag 22 of Volume II** and the Aadhar form is marked at **Flag 23 of Volume II.**

172. In February, 2011, the a news channel - TV9 - carried out a "sting operation" on the "gay culture" in Hyderabad. The material for programme was sourced from a social networking website and showed clips purportedly from a party where gay men were in attendance. The programme also contained telephonic conversations with gay men. Several complaints were filed with the News Broadcasting Standards Authority. Justice Verma, the Chairperson of the authority, censured the channel, imposed a fine of Rs. 1 lakh on TV9 and mandated that it issue an apology. He further held that

> *In effect what the content of the Programme clearly did was, instead of carrying a "crime story" it merely carried evidently gratitious depiction and reportage of homosexuality among men without any underlying message for the society; the Programme needlessly violated the right to privacy of individuals with possible*

alternate sexual orientation, no longer considered a taboo or criminal act; and the programme misused the special tool of a "sting operation" only to subserve the larger public interest.

A true copy of this order is annexed at **Flag 19 of Volume II**

XII Section 377 targets LGBT persons as a class and thus violates Article 14 of the Constitution.

173. It is submitted that though on a bare reading of Section 377 it is facially neutral and appears to target acts not identities, in its interpretation, operation and working it unfairly targets a particular community, i.e. LGBT persons. The fact is that these sexual acts which are criminalized by Section 377 define one class of persons, namely the class of LGBT persons and the statute in its effect and intent, is an expression of animus towards LGBT persons as a class.

174. As Justice O' Connor succinctly stated in her concurring opinion in *Lawrence v. Texas*,

"While it is true that the law applies only to conduct, the conduct targeted by this law is conduct, which is closely correlated, with being homosexual. Under such circumstances, Texas's sodomy law is targeted at more than conduct. It is instead targeted at gay persons as a class. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[46]

175. Justice Albie Sachs in *National Coalition For Gay and Lesbian Equality vs. Minister of Justice*, noted,

'It is important to start the analysis by asking what is really being punished by the anti sodomy laws. Is it an act or is it a person?... it is not the act of sodomy that is denounced by the law, but the so called sodomite who performs it.'[47]

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[46] 539 U.S. 558 (2003)

[47] *NCGLE* v. *Minister of Justice*, at para 108. See also *Leung T C William Roy* v. *Secretary for Justice*, CACV 317/2005 where it was held

'For gay couples the only form of sexual intercourse available to them is anal intercourse. For heterosexuals, the common form of sexual intercourse open to them is vaginal intercourse. This is obviously unavailable as between men…Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as 'disguised discrimination'. It is I think an apt description. It is disguised discrimination founded on a single base: sexual orientaition.'

See also *Toonen* v. *Australia Communication No. 488/1992*, Decision by the Human Rights Committee, under the International Covenant on Civil and Political Rights at para 6.13 where it was held that

'the state party takes issue with the argument of the Tasmanian authority that the challenged laws do not discriminate between the classes of citizens but merely identify acts which are unacceptable to the Tasmanian community. This according to the State party, inaccurately reflects the

176. In the Indian context, academic opinion has also noted that, *'Section 377 is not merely about certain sexual acts committed between men but also about an identity....It is in fact about all sexual acts committed between men, with consent- which would be tantamount to a criminalisation of homosexuality in general and even its associated expressions.*'[48] Therefore, if certain acts define a particular group, and if those acts are prohibited or criminalized by law, then that law is clearly targeted against that particular group of persons.

177. Section 377 therefore unfairly targets the LGBT community. There is a correlation between the acts criminalized under Section 377 and the identities of that group of people who are most closely associated with these sexual acts, namely LGBT persons.

178. The question before this Court, is whether the majority's revulsion for a certain portion of the population can constitutionally justify a law under Article 14 that targets that community or renders activities that define that community, as criminal.

179. The United States' Supreme Court in *Romer v. Evans*[49], relying upon *Department of Agriculture v. Moreno*[50], held that

> *"laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. If the constitutional conception of `equal protection of the laws'*

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domestic perception of the purpose or the effect of the challenged provisions. While they specifically target acts, their impact is to distinguish an identifiable class of individuals and to prohibit certain of their acts. Such laws are clearly understood by the community as being directed at male homosexuals as a group.'

[48] Alok Gupta, Section 377 and the Dignity of Indian Homosexuals , Economic and Political Weekly, Nov 18,2006. See also Christopher Leslie, Creating criminals: The injuries inflicted by 'Unenforced' Sodomy Laws, 35 Harv. C.R.-CL.L. Rev 103. "*'sodomy laws serve to codify and enforce social ordering through the creation of a criminal class. By inflicting the taint of criminality on homosexuals, sodomy laws have produced the following effects: (1) creating a social hierarchy that diminishes the value of the lives of gay men and lesbians, imposing severe psychological injury on many gay men and lesbians; (2) encouraging physical violence and police harassment against gay men and lesbians; (3) justifying employment discrimination against gay and lesbian employees…*"
Also See, Cass Sunstien, On the expressive function of law, 144 U. Pa. L. Rev. 2021, Kendall Thomas, Beyond the privacy principle , 92 Colum l Rev 1431 (1992) at 1461.

[49] 517 U.S. 620 (1996)

[50] 413 U.S. 528, 534 (1973)

means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."

180. Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground of classification let alone a valid law under article 14. Section 377 targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people. Section 377 is sought to be justified by those the Petitioners on the ground that the majority of Indians do not approve of homosexuality. Even if this was factually true, disgust for a vulnerable class of people cannot constitute a legitimate object for a reasonable classification under Article 14.

181. The legislative object of criminalizing LGBT persons for no other reason than purported public prejudice towards LGBT persons formed an arbitrary and unreasonable legislative object and hence rightly concluded that section 377 violated Article 14 insofar as it criminalised LGBT persons.

XIII Section 377 violated Article 15(1) as it discriminates against persons on the basis of sexual orientation

182. Article 15 (1) must be read expansively to include a prohibition on discrimination on the ground of sexual orientation. This is in consonance with International Law and comparative jurisprudence.[51]

183. As has been demonstrated from its interpretation, operation and working, Section 377 discriminates on the ground of 'sexual orientation', which although not specified in Article 15, is analogous to the grounds mentioned therein. It has been consistently held over a long period of time now that Articles 15 and 16 are facets of the general guarantee of equality in Article 14.[52] The grounds that are not specified in

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[51] *Toonen* v. *Australia Communication No. 488/1992*, *Decision by the Human Rights Committee, under the International Covenant on Civil and Political Rights*; The Canadian Supreme Court in interpreting Section 15 (1) of The Canadian Charter of Rights and Freedoms has held "sexual orientation" to be an analogous ground of non-discrimination similar to race, sex, ethnic origin etc. See *Egan v Canada* [1995]2 SCR 513.
Section9 (3) of the South African Constitution reads, ***"****The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."*

[52] *Indra Sawhney v. Union of India*, 1992 Supp. 3 SCC 217, paras 263, 287, 713, 742.

Article 15, but are analogous to those specified therein, are therefore similarly protected by Article 14. The thread running through the grounds specified in Article 15 is personal autonomy. The Supreme Court in *Anuj Garg* held that

> '*The bottom-line in this behalf would a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or <u>any other like basis</u>.*'[53] (emphasis supplied)

184. Thus any autonomy impinging personal characteristics that deny people the ability to 'pursue varied opportunities and options without discrimination' are analogous to Article 15 grounds. Discrimination on the basis of sexual orientation denies people the ability to pursue varied opportunities and shape their lives autonomously and therefore must be treated analogously to those specified in Article 15.

185. It is submitted that the High Court correctly held that provisions of the constitution which expand fundamental rights should be read liberally and those that restrict fundamental rights should be read narrowly.

186. In *I.R. Coelho v. State of Tamil Nadu* (2007) 2 SCC 1, at para 60, it was stated by a 9 judge bench of this Court:

> *It is evident that it can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses by State authorities. Thus post-Menaka Ganidhi's case, it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise by they collectively form a comprehensive test against arbitrary exercise of State power in any area that occurs as an inevitable consequence. The protection of fundamental rights has, therefore, been considerably widened.*

187. *I.R. Coelho's case* cites *M. Nagraj* where the principle of interpretation of fundamental rights has been evidenced. In *M. Nagraj v. Union of India* (2006) 8 SCC 212 this Court noted at para 20

> *This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the fact*

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[53] (2008) 3 SCC 1 at para 51.

> *that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts…A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be given a generous and purposive construction…the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure.*

188. In *PUCL v. Union of India* (2003) 4 SCC 399, at para 42, it was held

> *"…it should be properly understood that the fundamental rights enshrined in the Constitution such as the right to equality and freedoms have no fixed contents. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant. Since the last more than 50 years, this Court has interpreted Article 14, 19 and 21 and given meaning and colour so that the nation can have a truly republican democratic society…For this we would refer to the discussion by the discussion by Mohan, J, in Unni Krishnan, J.P. v. State of AP while considering the ambit of Article 21, he succinctly placed it thus:*
>
> > *'25. In Keshavananda Bharati v. State of Kerala Mathew, J. stated therein that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in light of its experience…'"*

189. The word 'sex' used in Article 15(1) should be interpreted broadly. At oral hearing, Senior Counsel for Respondent No. 11 submitted the *Collins English Dictionary and Thesaurus* and relied upon the synonymous for the word 'sex' which included the word 'sexuality'. The Respondent No. 11 submits that Article 15(1) prohibits discrimination on the grounds of sexuality or sexual orientation as well, and hence S. 377, insofar as it criminalised consensual sexual acts between adults, must fall on this count as well.

190. The Supreme Court in *Anuj Garg* held that:

> *The Court's task is to determine whether the measures furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity,*

*right to privacy et al. The bottom-line in this behalf would a functioning modern democratic society <u>which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis</u>**.** In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued...*[54] (Emphasis added)

"… the issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over."[55]

191. The judgment establishes the following propositions:

a. The principle underlying the grounds in Article 15 is the protection of personal autonomy. The Article ensures the 'freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis'. Any discrimination on the specified or analogous grounds denies personal autonomy.

b. If the target of discrimination is a politically, socially or materially vulnerable group defined by one of the specified or analogous grounds, strict judicial scrutiny will ensue.

c. Strict scrutiny requires that

   i. the law should serve a compelling state purpose

   ii. should be necessary in a democratic society, i.e. there should be no alternative method of achieving this compelling state purpose

   iii. and finally, that the means employed to achieve the legitimate objective should be proportionate

192. Section 377 is not necessary in a democratic society, and by reading down the provision the compelling state purpose of protection of women and children is preserved. The High Court correctly found that Section 377, insofar as it criminalizes adult consensual sex, has no logical relationship to the objective of protecting women and

[54] Ibid. para 49.
[55] Ibid. para 39.

children, or public health. There is no harm done to children, women, or to public health by decriminalizing consenting sex between adults.

193. Section 377 bears no relation to the aims sought to be achieved. The interest harmed by Sec. 377, that is the freedom to choose ones intimate partner, is so basic and the state interest served non existent, which makes the provision a violation of the non discrimination guarantee under Art 15.

XIV Section 377 is an unreasonable restriction on the right recognized by Article 19(1)(a) of the Constitution.

194. While it was averred before the High Court that section 377 was an unreasonable restriction on the Right to freedom of speech and expression, the High Court was pleased not to make any pronouncements on the issue of whether section 377 was an unreasonable restriction on the right to freedom of speech and expression.

195. It is contended by the Answering Respondent that section 377 is an unreasonable restriction on the Freedom of Speech and Expression and hence violates Art 19 (1)(a). If the jurisprudence under Art 19(1)(a) is examined, it is clear that the Court has read the liberty interest with the widest possible amplitude. Attempts at restricting free speech may either be in the form of direct curtailment, or structural impediments to the free expression of one's opinions in a meaningful manner.

196. In *Bennett Coleman and Co.* v. *Union of India*[56], this Court held that a newsprint policy which controlled how the newspaper was to manage content including restrictions such as number of pages, page areas and periodicity was in effect a control of newspaper which was violative of the right to freedom of expression. This point was reiterated in *Sakal Papers (P) Ltd.* v. *Union of India*[57].

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[56] (1972) 2 SCC 788.

[57] AIR 1962 SC 305 at 306 and 311. It was observed that

> *"a bare perusal of the Act and the Order thus makes it abundantly clear that the right of a newspaper to publish news and views and to utilize as many pages as it likes for that purpose is made to depend upon the price charged to the readers. Prior to the promulgation of the Order every newspaper was free to charge whatever price it chose, and thus had a right unhampered by State regulation to publish news and views. The*

197. The Answering Respondent submits that the Right to freedom of expression protects the right to communicate in public and is understood more broadly than the mere communication of information. “It includes any act of symbolic expression undertaken with the intention that it be understood to be that by the public or part of the public…It is essentially a right actively to participate in and contribute to the public culture.”[58] Expressive activities function not only as sources of information, but also as reflections and portrayals of people's experiences and ways of life.[59] There are magazines about bodybuilding and television plays dealing with disability, newspapers for political activists and commercials featuring harassed mothers. However questionable in other respects, these share the valuable feature that they give the experiences and ways of life with which they are concerned a place in public culture, and thus some kind of public recognition. This public recognition, which can only be secured through expression, plays a special role in developing people’s pride in their ways of life and identification with their own experiences, and hence in their well-being. Section 377 operates thus as a sort of life style censorship which can be understood as an authoritative condemnation of the whole way of life in question. It is submitted that while it is one thing not to have a voice in public culture, it is quite another to have one's life written off by one's society. If the former detracts from the possibilities for pride and personal identification, the latter strikes at the heart of one's membership of society, and deprives one of the sense of ease with one's environment which is essential to a fulfilling life.

198. Prof Nan D. Hunter in an article makes the argument that legal proscriptions on homosexual conduct prevent people from publicly expressing their sexuality, forcing them to be silent ensuring that all people are seen as heterosexual.

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liberty is obviously, interfered with by the Order which provides for the maximum number of pages for the particular price charged.”

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

[59] *Indian Express Newspapers (Bombay) Pvt. Ltd v. Union of India* (1985) 1 SCC 641, at 686.

This is in effect a structural impediment to free speech. She argues *"…like Forced speech, the collective, communal impact of forced silence amounts to more than an accumulation of violations of individual integrity. It creates forms of state orthodoxy. If speaking identity can communicate ideas and viewpoints that dissent from majoritarian norms, then the selective silencing of certain identities has the opposite, totalitarian effect of enforcing conformity."*[60]

199. Prof. Nan D. Hunter in the article cited above, writes *"My experience as a lesbian teaches me that silence and denial have been the linchpins of second-class status. In almost any context that a lesbian or gay American faces, whether it be the workplace, the military, the courts or the family, the bedrock question is usually, is it safe to be out?"* She further argues that *"Self-identifying speech does not merely reflect or communicate one's identity; it is a major factor in constructing identity. Identity cannot exist without it. That is even more true when the distinguishing group characteristics are not visible as is typically true of sexual orientation. Therefore, in the field of lesbian and gay civil rights, much more so than for most other equality claims, expression is a component or the very identity itself…Suppression of identity speech leads to a compelled falsehood, a violation of the principle that an individual has the right not to speak as well as to speak."*

200. The liberty interest protected by Art 19(1) a is also fundamentally about the right to self expression. As the Court put it in *Secretary, Minister of I & B v. Cricket Association Bengal*,

> *"Freedom of speech and expression is necessary, for self expression which is an important means of free conscience and self fulfilment. It enables people to contribute to debates of social and moral issues. It is the best way to find a truest model of anything since it is only through it, that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it*

60 Nan D. Hunter "Identity, Speech and Equality" 79 *Va. L. Rev. 1695* (1993).

plays in facilitating artistic and scholarly endeavours of any sorts."[61]

201. Section 377 IPC by criminalizing homosexual acts has a chilling effect on the free speech and expression of LGBT persons. The shadow of criminality cast by Section 377 curtails a free and frank discussion on issues of sexuality, which enables people to publicly own their identity. Whereas, wearing religious symbols or other markers of one's identity is a public expression something that is essential to one's identity and is protected by the law, section 377 does not allow sexual minorities to openly express their sexuality, an aspect that is intrinsic to whom they are, and is hence in violation of their right to expression. Furthermore, section 377 de-values, stimgatizes and the lives of LGBT people and expresses the idea that LGBT people cannot be a part of society.

202. The real test for Freedom of Speech and Expression lies in its ability to enable speech that may challenge popular opinions. Section 377 serves to criminalise expression of minorities which may challenge dominant opinions. Section 377 prevent sexual minorities to effectively take part in any democratic society that is based on equality and social justice.[62] The Supreme Court has stated that "*It is our firm belief, nay, a conviction which constitutes one of the basic values of a free society to which we are wedded under our Constitution, that there must be freedom only for the thought that we cherish, but also for the thought that we hate*."[63]

203. The freedoms guaranteed under Article 19(1) must be interpreted broadly. The question to be then considered is whether Section 377 is saved under Article 19(2). Section 377 is sought to be justified on the ground that it protects 'decency and morality' In this regard, the Answering Respondent adopts the arguments above.

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[61] (1995) 2 SCC 161.

[62] *Little Sister Book Emporium v. Minister of Justice* [2000] 2S.C.R. It was observed therein, that restrictions of the right to freedom of expression of vulnerable minorities should receive greater scrutiny as expression by these groups faces the threat of being drowned out by the majority and that sexual minority groups feel a greater impact of restrictions on freedom of speech and expression.

[63] *S. Rangarajan v. P. Jagjivan Ram* (1989) 2 SCC 574, at para 38.

204. It is further submitted that the Special Leave Petitioners fail to demonstrate how consensual sexual acts, done in the privacy of one's home, can or does offend popular morals. None of these parties can contend that prosecution of same sex acts in private is essential for the purpose of preserving popular morality. The proscribed consensual sexual acts have been done in the past and continue to be done today, but no evidence has been adduced by any of these parties to demonstrate that this has been injurious to the moral standards of our society.

XV Role of the Supreme Court

205. The Supreme Court of India plays a unique Constitutional role that transcends the functions of an Apex appellate Court. The Supreme Court of India is constitutionally mandated to protect Fundamental Rights (Article 32), to search out and correct errors committed by other Courts or Tribunals (Article 136) and to do "complete justice" where the circumstances warrant. The Constitutional responsibilities and duties of the Indian Supreme Court demand of this great institution that whenever a section of people come before it and seek vindication of their right to live with dignity, the Court exercises its enormous jurisdiction to deepen and extend the reach of liberty. It is submitted that within the contours of this case, arises such a challenge.

206. Granville Austin in *The Indian Constitution: Cornerstone of a Nation* (OUP: 1999) at page 164 has stated

> *The members of the Constituent Assembly brought to the framing of the Judicial provisions of the Constitution an idealism equaled only by that shown towards the Fundamental Rights. Indeed, the Judiciary was seen as an extension of the Rights, for it was the courts that would give the Rights force. The Judiciary was to be an arm of the social revolution, upholding the equality that Indians had longed for during colonial days, but had not gained – not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule.*
> *The courts were idealized because as guardians of the Constitution, they would be the expression of the new law created by Indians for Indians. During the British period, despite the presence of Indians in government, Indians had not been responsible for the laws that governed them. Indians had neither law nor courts of*

their own, and both the courts and the law had been designed to meet the needs of the colonial power. Under the Constitution, all this would be changed. The courts were therefore, widely considered to be one of the most tangible evidences of independence. And to the lawyers with which the Congress – and the assembly – abounded, the opportunity to draft a judicial system under which they would function must have seemed the chance to write their own scriptures. Nor must it be forgotten that the Judicial provisions were framed during a period of the most appalling lawlessness that India had ever seen. The orderly processes of the Courts must have seen doubly haven in days when tens of thousands were dying by the rifle, the kirpan and the club.

207. At page 169, he further highlights the importance of the Supreme Court in protecting fundamental rights

The Supreme Court first appeared in the proceedings of the Assembly in its role as guardian of the social revolution: even before a committee was established to enquire into its functions, it was called upon to safe-guard civil and minority rights. The Advisory Committee's report on Fundamental Rights showed the powerful appeal of a Supreme Court to a people attempting to establish their own just society.

208. At the inaugural sitting of the Supreme Court held in 1950, the Attorney General for India, Mr. M.C. Setalvad, addressed the Court

Your foremost task will be to interpret the Constitution which is but a means of ordering the life of a progressive people. The Federal Court has already laid down that a Constitution is to be interpreted in no narrow spirit. For, in the words of Justice Holmes of the United States: 'The Provisions of the Constitution are not mathematical formulas having their essence in the form; they are organic living institutions…Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth"…Scarcely less important will be the role in which the Court will be called upon to play in mediating between the individual and the Government. The detailed enumeration of fundamental rights in the Constitution and the provisions which enable them to be reasonably restricted will need wise and discriminating decisions…(1950 SCR 1, at 3)

209. Chief Justice Kania, addressing the gathering stated, at page 9

The Supreme Court will declare and interpret the law of the land and with the high traditions behind the judiciary of this country, we are convinced that the work will be done in no spirit of formal or barren legalism. It will be our endeavour to interpret the Constitution, not as a rigid body, but as a living organism, having within itself the force and power of self-government. We trust that the in doing so we shall allow the constitutional usages and

conventions recognised in all civilized independent countries to be respected.

210. This Court from its inception has almost always been sensitive to the plight of the weaker sections of society. *Rashid Ahmed v. The Municipal Board, Kairana* 1950 SCR 566 is possibly the first case for the enforcement of Fundamental Rights. This petition – Original Jurisdiction Petition No. 10 of 1950 – was brought by a fruit and vegetable vendor, from Muzzafarnagar in Uttar Pradesh.

211. In *State of West Bengal v. Committee for Protection of Democratic Rights* (2010) 3 SCC 571, at para 53, the Supreme Court held:

> *It is pertinent to note that Article 32 of the Constitution is also contained in Part III of the Constitution, which enumerates the fundamental rights and not alongside other articles of the Constitution which define the general jurisdiction of the Supreme Court. Thus, being a fundamental right itself, it is the duty of this Court to ensure that no fundamental right is contravened or abridged by any statutory or constitutional provision. Moreover, it is also plain from the expression "in the nature of" employed in clause (2) of Article 32 that the power conferred by the said clause is in the widest terms and is not confined to issuing the high prerogative writs specified in the said clause but includes within its ambit the power to issue any directions or orders or writs which may be appropriate for enforcement of the fundamental rights. Therefore, even when the conditions for issues of these writs are not fulfilled, this Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress.*

212. During the oral arguments, Senior Counsel for Respondent No. 11 handed over a list of judgments passed by this Court, which had expanded the scope of Fundamental Rights and had extended the protection of fundamental rights to marginalized communities such as bonded labourers, night soil workers, labour, sewerage workers, illegitimate children, prisoners, divorced women, and street hawkers. The Respondent No. 11 asserts, that the High Court has rightly extended the protection of the Fundamental Rights to LGBT citizens who's right to privacy, dignity and equality have been denied by Section 377.

213. It is further submitted that this Court and the High Courts have consistently held that the role of the judiciary protect those parts of the populations whose rights may be

adversely affected by majoritarian opinion. It has been recognized by this Court that public opinion may run counter the spirit and text of the constitution and hence it has been held by this Court and the High Courts that public opinion or popular morality alone is not a sufficient interest for the restriction of a fundamental right.

214. In the case of *Anuj Garg* Court has held that

> *"[T]he issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over."*

215. In *Jammu & Kashmir National Panthers Party v. Union of India* (2011) 1 SCC 228, this Court was pleased to observe that

> *The judgment of this Court in* His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another, *(1973) 4 SCC 225, which introduced the concept of Basic Structure in our constitutional jurisprudence is the spontaneous response of an activist Court after working with our Constitution for about 25 years. This Court felt that in the absence of such a stance by the constitutional Court there are clear tendencies that the tumultuous tides of democratic majoritarianism of our country may engulf the constitutional values of our nascent democracy. The judgment in Kesavananda Bharti (supra) is possibly an "auxiliary precaution against a possible tidal wave in the vast ocean of Indian democracy"*

216. In the case of *Santosh Bariyar v. State of Maharashtra* (2009) 6 SCC 498 it was held by this Court

> *The constitutional role of the judiciary also mandates taking a perspective on individual rights at a higher pedestal than majoritarian aspirations. To that extent we play a countermajoritarian role. And this part of debate is not only relevant in the annals of judicial review, but also to criminal jurisprudence. Justice Jackson in West Virginia State Board of Education v. Barnette, [319 U.S. 624 (1943)] also opined on similar lines: "The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly*

and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

217. A similar view was adopted by the Supreme Court in the case of *Kailash v. State of Maharashtra* (2011) 1 SCC 793, wherein it was observed that

> *32. Since India is a country of great diversity, it is absolutely essential if we wish to keep our country united to have tolerance and equal respect for all communities and sects. It was due to the wisdom of our founding fathers that we have a Constitution which is secular in character, and which caters to the tremendous diversity in our country.*
> *33. Thus it is the Constitution of India which is keeping us together despite all our tremendous diversity, because the Constitution gives equal respect to all communities, sects, lingual and ethnic groups, etc. in the country…*

XVI Conclusion

218. Lastly, the Special Leave Petitioners assail the judgment on the ground that the High Court has unsettled a law that has remained undisturbed for over 150 years. However, this Court in *Satyawati Sharma v. Union of India* (2008) 5 SCC 287 has held that

> *It is trite to say 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 equity 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.*

219. It is submitted that the declaration granted by the High Court ought to be upheld by this Court. If, however, this Court finds that the declaration as granted by the High Court is inadequate, then the Respondent No. 11 seeks permission of this Court to suggest declarations that the Court may consider issuing in addition to the declaration granted by the High Court:

a. It is declared that the expression “carnal intercourse against the order of nature” appearing in Section 377 IPC does not cover consensual sexual acts involving adult male, adult females or adult transgenders.

OR

b. It is declared that an adult person who engages in consensual sexual acts with another adult person, does not commit an offense under Section 377, IPC

OR

c. It is declared that the expression “carnal intercourse against the order of nature” appearing in Section 377, IPC does not cover consensual sexual acts between adults, regardless of their sexual orientation or gender identity.

220. This case involves those principles that animated the framing of the Constitution: a recognition of the inherent, equal value and dignity of all individuals, irrespective of their differences, be they based on religion, race, caste, sex, place of birth, sexual orientation or gender identity.

221. While in the Constitution, the inherent indignity inequality of the caste system and practices of untouchability were explicitly recognized, no comment was made on a social and legal system that allows for the persecution of individuals of a non-conforming sexual orientation or gender identity, condemning them to live as modern day outcastes. It is only with the impugned judgment that the promises of the constitutional guarantees of dignity, equality and diversity were extended to LGBT persons.

222. At its root, this case is about the Emancipation of a large segment of our people. The Constitution of India in one of the great emancipatory charters, lifting as it does from the status of wretchedness and subordination -- communities, castes, tribes and women -- to full Citizenship. This case is about an invisible minority of Indians that seek to unlock the assured liberties enshrined in the Constitution, but denied to them in an aspect of life that matters most to them: their own identity; their own sexuality; their own self.

223. The Constitution of India recognizes, protects and celebrates diversity. LGBT persons are entitled to full *moral* citizenship. To blot, to taint, to stigmatize and to criminalize an individual for no fault of his or hers, is manifestly unjust. To be condemned to life long criminality shreds the fabric of

our Constitution. Section 377 has worked to silence the promise of the Preamble and Part III of the Constitution. It is the case of the Answering Respondent that it is the liberating, emancipatory spirit underlying the Fundamental Rights invoked by the High Court of Delhi that must prevail and it is prayed that this Court may be pleased to uphold the impugned judgment of the High Court and dismiss these Special Leave Petitions.

New Delhi
April 10, 2012

Counsel for Respondent No. 11
'Voices Against 377'