IN THE HIGH COURT OF DELHI AT NEW DELHI

(EXTRAORDINARY ORIGINAL WRIT JURISDICTION)

WRIT PETITION NO. ____ OF 2001

IN THE MATTER OF:

1. Naz Foundation, a trust]
Registered under the Indian]
Trust Act, and having]
Its registered office at D-45,]
Gulmohar Park,]
New Delhi 110 049]

Petitioner

Versus

1. Government of NCT of]
Delhi, Through the Secretary]
Social Welfare]
Delhi Secretariat]
ITO,
New Delhi

2. Commissioner of Police,]
Police Headquaters,]
ITO]
New Delhi]

3. Delhi State AIDS Control Society]
11,Lancess Road,Timarpur,]
Delhi-110054]

4. National AIDS Control]

Organization, set up by the]
Union of India, having its office]
9th floor, Chandralok Building,]
Opp. Imperial Hotel]
New Delhi]

5. Union of India, through Secretary]
]
a) Ministry of Home]
North Block, India Gate]
b) Ministry of Health]
Welfare, having its office at 344]
Nirman Bhavan, Maulana Azad]
Road, New Delhi]
c) Ministry of Social]
Welfare]
New Delhi]

Respondents

IN THE MATTER OF:

INFRINGEMENT OF FUNDAMENTAL RIGHTS GUARANTEED UNDER ARTICLE 14, 15, 19, 21 OF THE CONSITUTION OF INDIA

AND

IN THE MATTER OF:

SECTION 377OF THE INDIAN PENAL CODE

AND

IN THE MATTER OF:

CIVIL WRIT PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA FOR THE ISSUE OF A WRIT/ORDER/DIRECTION IN THE NATURE OF AN APPROPRIATE WRIT/ORDER/DIRECTION TO THE RESPONDENTS

TO,

THE HON'BLE THE CHIEF JUSTICE AND HIS

COMPANION JUSTICES OF THIS HON'BLE COURT

THE HUMBLE PETITION OF THE PETITIONER

ABOVENAMED

MOST RESPECTFULLY SHEWETH THAT:

1. This petition is filed in public interest. It challenges the constitutional validity of Section 377 of the Indian Penal Code (hereinafter "IPC"), (hereinafter "Section 377"), which criminally penalizes what is termed as "unnatural offences", in so far as the provision affects private sexual acts between consenting adults.

ARRAY OF PARTIES

2. The Petitioner is a Non-Governmental Organization (hereinafter "NGO") registered under the Indian Trust *Act, 1882*. It works in the field of HIV/AIDS intervention and prevention, which involves interacting with specific populations that are vulnerable to contracting HIV/AIDS. As a part of their HIV/AIDS intervention work, the Petitioner began working with gay men and men who have sex with men (hereinafter "MSM"), amongst others, as this population segment is extremely vulnerable to contracting HIV/AIDS.

3. During its first five years of work on HIV prevention, the Petitioner came to appreciate the validity and

benefits of the universally recognized “Integrationist Policy”. This policy postulates that the best way to prevent the spread of HIV-infection is to promote, respect, and protect the human rights of vulnerable populations, especially the MSM community. Strengthened human rights enable vulnerable populations to be better positioned and equipped to negotiate safer sexual behaviour. It is submitted that the policies formulated by the Respondents towards the prevention of the spread of the HIV/AIDS pandemic also follow the integrationist policy.

4. The Petitioner’s HIV-prevention work has particularly focussed upon targeting the MSM community in consonance with the integrationist policy. For example, in 1997, the Petitioner encouraged a number of gay men in the city of Delhi to meet regularly on a specified day of the week. The Petitioner provided a safe space for such meetings in its offices. The objective of these meetings was to develop a support network where gay men could meet and discuss the problems and issues affecting them. The meetings were ideally suited to disseminate information regarding safer sex and how HIV/AIDS can be prevented. Gradually these meetings gained strength and their number of participants grew. The support group later gave itself a nomenclature and began calling itself ‘Humrahi’. Today, Humrahi has made a significant contribution to addressing issues that affect gay men, including HIV/AIDS prevention.

5. Clearly, the Petitioner is intimately involved with the gay community. However, it has been the sad experience of the Petitioner that its HIV/AIDS prevention efforts have been severely impaired by discriminatory attitudes exhibited by state agencies towards sexuality minorities, which often include gay men, MSM, lesbians and transgendered individuals. This attitude has resulted in the denial of basic fundamental human rights of sexuality minorities, which involves abuse, harassment and assault from the public and public authorities. It is submitted that unless the self-respect and dignity of sexuality minorities is restored by doing away with discriminatory laws such as Section 377, it will not be possible to promote HIV/AIDS prevention in the community - the consequences of which are disastrous.

6. It is submitted that all Respondents are necessary and proper parties to the petition.

7. All Respondents under enumeration 6 are wings of the Union of India. They bear the responsibility of ensuring the protection of the fundamental rights of life, privacy and human dignity for every member of the community, including the gay community.

8. Respondent No. 5 is the National AIDS Control Organization (hereinafter “NACO”), a body formed under the aegis of Respondent No. 6 (b) herein. NACO is charged with formulating and implementing policies for the prevention of HIV/AIDS in India. It is submitted that Respondent

No. 5 has recognized that the MSM community is particularly susceptible to contracting HIV. NACO itself has undertaken initiatives to ensure that proper HIV intervention and prevention efforts are directed at the MSM community by, amongst other things, protecting and promoting their rights.

9. Respondent No. 1 is the Government of Union Territory, Delhi. Respondent No. 4 is the Delhi State AIDS Control Society. These bodies carry the responsibility for HIV/AIDS prevention in their respective region.

10. Respondent No. 2 is the Commissioner of Police, Delhi and Respondent No. 3 is the Inspector General of Police, Capital Territory, under whose overall charge the police force functions and enforces Section 377.

11. It is submitted that these bodies are vitally concerned with the issues raised in this petition.

SECTION 377

12. Unnatural offences is defined and punishable under Section 377 as follows:

"***Unnatural Offences, -*** *Whoever voluntarily has carnal intercourse against the order of nature, with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

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

QUESTIONS OF LAW

13. This petition raises several substantial questions of law of constitutional and public importance as they concern the protection of fundamental rights encompassing human dignity, privacy and personhood, which may be summarized as follows:

A. Private, consensual sexual relations lie at the heart of the privacy – zone protected by the right to liberty

Whether Section 377's prohibition of certain private, consensual sexual relations violates the right to privacy, as guaranteed within the ambit of the right to liberty within Article 21?

B. Infringement of the right to privacy not justifiable

Whether Section 377's enforcement of "public morality" is a sufficiently compelling state interest to justify infringement of the fundamental right to privacy under Article 21?

C. The criminalization of non-procreative sexual relations is unreasonable and arbitrary and therefore violative of Article

I. Whether no rational nexus exists between Section 377's classification between procreative and non-procreative sexual acts and its legislative objective (that non-procreative sex is unnatural and therefore should be punished) is unreasonable and arbitrary, as required under the right to equal protection of the law, as guaranteed under Article 14?

II. Whether the punishment prescribed by Section 377 of 10 years or life imprisonment is grossly disproportionate to the activity prohibited and thus renders the provision violative of Article 14?

D. <u>Section 377 violates the prohibition of "sex discrimination" because equality on the basis of sexual orientation is implied in Article 15</u>

I. Whether Article 15's prohibition of discrimination on the ground of sex includes prohibition of discrimination on the basis of sexual orientation?

II. Whether Section 377's criminalization of predominantly homosexual activity is discriminatory on the basis of sexual orientation and thus violative of Article 15?

E. <u>Section 377's damaging impact upon the lives of homosexuals violates the right to life under Article 21</u>

I. Whether Section 377 is violative of the right to life because it drives homosexual activity underground,

which jeopardizes HIV/AIDS prevention efforts, and thus renders gay men and MSM increasingly vulnerable to contracting HIV/AIDS?

II. Whether Section 377's proscription of non-procreative sexual activities is violative of Article 21 because sexual preferences are an inalienable component of the right to life?

III. Whether the social stigma and police/public abuse perpetuated by Section 377 is violative of the right to life, as guaranteed under Article 21?

F. <u>Section 377's criminalization of homosexual conduct is violative of the fundamental liberties guaranteed under Article 19(1)(a-d)</u>

I. Whether Section 377's criminalization of predominantly homosexual conduct curtails the enjoyment of Article 19 liberties and thus renders Section 377 violative of Articles 19(1)(a), (b), (c) and (d)?

III. Section 377's prohibition of homosexual conduct raises the following questions concerning the fundamental freedoms guaranteed under Articles 19(1)(a), (b), (c) and (d):

a) Whether Section 377's restriction of an individual's ability to make personal statements about one's sexual preferences, as well as broadcast, circulate and publish materials respecting sexual preferences, is

violative of Article 19(1)(a) and not saved by Article 19(2)?

b) Whether the punitive likelihood attached to the advocacy by sexuality minority groups (political, social or cultural) is violative of the rights of association and assembly, as guaranteed under Article 19(1)(b) and (c) and not saved by Article 19(3)?

c) Whether the punitive likelihood attached to engaging in homosexual conduct restricts and is thus violative of the right to move freely throughout the territory as guaranteed under Article 19(d) and not saved by Article 19(4)?

G. <u>Lacuna filled by Section 377 concerning the Indian Penal Code and child sexual assault</u>

Whether Section 377 must be read down to criminally penalize only those sexual acts which are non-consensual or between adults and child sexual assault and abuse?

<u>PURPOSE AND EFFECT OF SECTION 377</u>

14. The thrust of Section 377 is to criminalize sexual acts which are “against the order of nature”. This provision is based upon traditional Judeo-Christian moral and ethical standards, which conceive of sex in purely functional terms, that is, for the purpose of procreation only. Any non-procreative sexual

activity is thus viewed as being “against the order of nature”. Since only penile-vaginal sexual activity is procreative and therefore acceptable, **all penetrative sexual activity, other than penile-vaginal, between both heterosexual *and* same-sex couples**, is considered to be against the order of nature and thus criminally proscribed under Section 377.

HISTORY OF SECTION 377

15. Both the historical context from which Section 377 owes its origins and its religious underpinnings are relevant to identifying its underlying assumptions and purpose. It is submitted that an overview of these factors reveals how Section 377 is indeed based upon a doctrinaire and outmoded conception of sexual relations, which has later been used to legitimize discrimination against sexuality minorities. Accordingly, the basis for, and existence of, Section 377 does not enjoy justification in contemporary Indian society.

16. At common law in England, the first records of sodomy as a crime are in the *Fleta,* 1290, and later in the *Britton*, 1300. Both texts prescribed that sodomites should be burned alive. Later, a petition of the English Parliament, *circa* 1376, was made to banish foreign artisans and traders, who were accused of having introduced “***the too horrible vice which is not to be named***”.

17. Acts of sodomy later became penalized by hanging under the *Buggery Act of 1533*, ch.6 (renacted in 1536, 1539 and 1541), which states:

> *"Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the Law of this Realm,* ***for the detestable and abominable Vice of Buggery*** *committed with mankind or beast*." (25th Act of Parliament of Henry 8th)

18. After a series of repeals and reenactments, *The Buggery Act of 1533* was again reenacted in 1563 by Queen Elizabeth I, after which it became the charter for the subsequent criminalization of sodomy in the British Commonwealth. Oral-genital sexual acts were later removed from the definition of buggery in 1817. And in 1861, the death penalty for buggery was formally abolished in England and Wales. However, sodomy or buggery remained as a crime "***not to be mentioned by Christians***."

19. It submitted that the foregoing evidence reveals how anti-sodomy provisions were fundamentally based upon the then-existing Christian abhorrence of all non-procreative sexual acts. The severity of the historically prescribed punishments for sodomites illustrates how the criminal sanction was harshly employed to rid society of sexual practices that were viewed as reprehensible and contrary to the tenets that were then held by the Christian Church.

20. In acknowledgement of modern understandings of sexual relations, the English law was reformed in

Britain by the *Sexual Offences Acts, 1967*. By this act, legislators decriminalized homosexuality and acts of sodomy between consenting adults.

21. The British Raj introduced its anti-sodomy law in India in 1861 through Section 377 of the Indian Penal Code. Similar colonial laws were introduced in other colonized countries in that period. Influenced by Victorian campaigns for sexual purity, and based upon an essentially anti-pleasure and anti-sex bias, the British sought to rectify Indian marital, familial and sexual arrangements which they viewed as "primitive".

22. It is submitted that the introduction of Section 377 in Indian penal law was contrary to then existing Indian traditions, which did not treat sodomy as a crime:

"The texts we have compiled thus far indicate a set of generally tolerant traditions in pre-colonial India. As far as we know, not a single person has ever been executed for homosexual behaviour in India."

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

23. The introduction of Section 377 and the practices of cultural imperialism by the British resulted in a shift in Indian cultural conceptions of sexual relations, including tolerating homosexuality. For example, there had historically existed Indians with homosexual inclinations who were honoured and

successful members of society. Indeed, Vanita & Kiwai note:

"Although we are aware of the limitations of an analysis that blames all modern ills on colonialism, the evidence available to us forces us personally to conclude that homophobia of virulent proportions came into being in India in the late nineteenth and early twentieth century and continues to flourish today."

Same Sex Love at 200.

24. On the foregoing basis, it is submitted that the origins and continued presence of Section 377 can not be justified. The provision's historical and moral underpinnings do not resonate with historically held values in Indian society concerning sexual relations.

APPLICATION OF SECTION 377

25. By prohibiting non-procreative sexual practices, Section 377 requires the presiding judge to determine whether indeed the impugned sexual practice is "against the order of nature". As a result, Section 377 invites the judiciary to apply out-dated conceptions of sex and sexual relations in order to incarcerate individuals. Therefore, it is submitted that Section 377 positions the court in a realm within which it does not constitutionally belong: the enforcement of 'sexual morality'.

26. Indeed, based upon a plain reading of Section 377, sexual acts "against the order of nature" encompass non-procreative penetrative sex, including oral and anal sex between a heterosexual couple.

27. Precisely where is the line drawn between “normal“ and “abnormal” sexual acts? Clearly, Section 377 invites the court to make very *subjective* value judgements on sexual practices, which is beyond its constitutional competence. It is submitted that the presence of Section 377 in the IPC raises the question as to whether a court of criminal law is the appropriate forum to entertain the following:

What is Order? What is nature? Would the male genital to female mouth (fellatio) and female genital to male mouth (cunnilingus) position be against the order of nature? Nature conceived by whom? Order perceived by whom?
If homosexual sex is thought depraved because of its non-reproductive consequences, then masturbation, celibacy, insertion of the finger into the anus, contraception, non-procreative sex within marriage must all be similarly proscribed.

> *Less than Gay: A citizen’s report on homosexuality in India*, citing Shrikant Bhat, “Indian Law and the Homosexual”, *Bombay Dost*, No. 2, 1990.

28. The above-listed considerations also apply to couples who are physically unable to have children or who choose not to. By definition, the practice of sex by such couples would likewise be considered ‘against the order of nature’; clearly, however, contemporary opinion would disagree.

29. It is submitted that these considerations highlight how, drawn to their logical extension, Section 377's underpinnings are outmoded and absurd. Specifically, Section 377 is not reflective of modern societal understandings of sex and sexual relations. Indeed, the impugned provision requires the court to make parallel moral pronouncements concerning sex and sexual relations *which are not in keeping with the views and realities of contemporary society*.

30. In fact, studies of Section 377 jurisprudence reveal that, on the contrary, it has increasingly been employed in the last decade for allegations of child sexual assault and abuse. The Petitioner requests leave to refer and rely upon such studies, annexed hereto and marked as Annexures "A-1" and "A-2".

31. Finally, the submission that legislation criminalizing consensual oral and anal sex is outdated and has no place in modern society is reinforced by the fact that many countries have repealed such provisions. Countries where homosexual acts are no longer criminalized are annexed hereto and marked as Annexure "B".

SECTION 377 AND HOMOSEXUALITY

32. Notwithstanding recent prosecutorial use of Section 377, its presence in the Indian Penal Code remains detrimental to peoples' lives and an impediment to public health due to its direct impact upon the lives of homosexuals.

33. These realities form the fundamental basis of the Petitioner's Writ Petition, which submits that Section 377's prohibitions of homosexual conduct harms the Petitioner's services, and the public generally, because:

By criminalizing private, consensual same-sex conduct:

- Section 377 serves as a weapon for police abuse: detaining and questioning, extortion, harassment, forced sex, payment of hush money; and
- Section 377 perpetuates negative and discriminatory beliefs towards same-sex relations and sexuality minorities generally; which consequently,
- Drive the activities of gay men and MSM, as well as sexuality minorities generally, underground which cripples HIV/AIDS prevention efforts.

a) Section 377 implemented against predominantly homosexual conduct

34. Despite the fact that Section 377 is equally applicable to sexual acts committed between heterosexual and homosexual couples, the provision is implemented against predominantly homosexual conduct. This effect remains because the provision "criminalizes an activity practiced more often by men sexually active with other men than by men or women who are heterosexually active". Indeed, anal intercourse is a basic form of sexual expression for gay men.

[See *Toonen* v. *Australia*, Communication Number 488/1992 (31 March 1994) UN Human Rights Committee Document No. CCPR/c/50/488/1992. (hereinafter "*Toonen*").]

b) Section 377's damaging impact upon the lives of homosexuals

35. The out-dated presumptions underlying Section 377 include a blatantly prejudicial perception of same-sex relations and sexuality minorities. Thus, the presence of Section 377 has led to the systematic harassment, intimidation, blackmail and extortion by enforcement agencies, family members and the public generally of sexuality minorities, gay men and MSM in particular. Clearly, Section 377 creates a class of vulnerable people that is continually victimized and directly affected by the provision.

c) Homosexual relations are not 'unnatural'

36. Underlying the human rights abuses perpetuated by the presence of Section 377 are discriminatory attitudes towards sexuality minorities, which often manifest themselves in dangerous physical and psychological abuse. Central to dispelling such attitudes is demonstrating that homosexual behaviour is not "unnatural", but in fact, a personal and private manifestation of an individual's personality that demands respect from both the public and the law.

37. In this respect, evidence exists to refute the assumption underlying Section 377: that non-procreative sexual acts, in particular oral and anal

sex between consenting adults, are “unnatural”. Socio-scientific and anthropological evidence points to the widespread, and indeed “natural”, presence of homosexuality amongst society at large.

Socio-anthropological Evidence

38. The following socio-anthropological factors illustrate that homosexuality has long been present and tolerated in societies, and therefore cannot be considered “unnatural”:

- Homosexuality has existed throughout history, indeed, prominent historical figures have engaged in homosexual conduct (Alexander, Nero, Pepy the 2nd, Sapho, Socrates, Leonardo da Vinci, Oscar Wilde, E.M. Forster and John Maynard Keynes);
- The presence of homo-erotic literature in the Vedic era;
- Anthropological research has found homosexual subcultures in Native American cultures, ancient Greece, Chinese traditions, Subsaharan Africa, and the Samurai traditions of Japan; and
- The considerable presence of homosexual subcultures today across India.

Socio-scientific Evidence

39. The following socio-scientific evidence collectively defeats the notion that same-sex sexual relations are “unnatural”:

- The Kinsey, Geghard and other socio-scientific studies illustrate that homosexuality is prevalent in mainstream society:

- The study of Dr. Alfred Kinsey, Institute of Sex Research of Indiana University, conducted in the late ‘40s postulates a continuum of sexuality, sexual expression and behaviour which spans heterosexual to homosexual behaviour. The “Kinsey Studies” evaluated the overt behaviour of persons interviewed, as opposed to how many considered themselves to be explicitly heterosexual, homosexual or lesbian. Considering only sexual experiences after puberty, Dr. Kinsey found that 37% of the males and 20% of the females had had at least one adult experience with the person of the same sex. It was also found that 13% of men and 7% of the women were “predominantly homosexual” for at least three occurrences in their lives, and that homosexuality had a “significant dimension” in their lives.
- Later, Dr. Paul Geghard, also of the Institute of Sex Research of Indiana University, revisited the Kinsey statistics and found that 9.13% of the sample had “extensive” to “more than incidental” homosexual experiences. While the Kinsey sample has been criticized for having a significant number of prisoners as respondents, a figure of 5% of homosexuals amongst the sample is now generally accepted.
- Studies in other countries also show that the percentage of persons who indulge in homosexual acts is approximately around 5%.

Medical Evidence

40. Indeed, the fields of psychiatry and psychology no longer treat homosexuality as a disease and regard sexual orientation to be a deeply held, core part of the identities of individuals. It is commonly considered to be an immutable personal characteristic, which is innate to the character of the individual, dispelling the notion that it is purely by choice when individuals engage in same-sex behaviour. Consequently, it is submitted that same-sexual relations may not rationally be considered as "unnatural", as is presumed by Section 377.

    - The Diagnostic and Statistical Manual of Mental Disorders (DSM) has long since deleted homosexuality as an illness; as has the World Health Organization in its classification of diseases;

41. The Petitioner requests leave to refer and rely upon additional socio-scientific studies and literature in this behalf as and when produced.

HIV/AIDS PREVENTION

42. By criminalizing predominantly homosexual behaviour, Section 377 drives same-sex relations underground, and creates societal conditions that significantly impede HIV/AIDS prevention efforts. Section 377 is a dangerous and irresponsible legislation because it results in:

    A. An increased vulnerability of MSM and gay men to HIV-infection due to the impaired

ability of such individuals to engage in safe-sex practices;

B. HIV-prevention work becoming near impossible because of an inability to identify targeted vulnerable populations and provide “safe” spaces for such work;

C. The subsequent spread of HIV to married or otherwise unmarried partners of MSM.

A. <u>Increased High-Risk Sexual Behaviours</u>

Men who have sex with men (MSM)

43. MSM have sex with men but do not necessarily consider themselves to be homosexual or gay; nor do they consider their sexual encounters with other men in terms of sexual identity or orientation. Many MSM are married or are also having sex with women.

Vulnerability of MSM and gay men to HIV

44. MSM and gay men are extremely vulnerable to HIV infection. Socially, openly gay men experience stigma and marginalization; while legally, the sexual behaviour of MSM and gay men is criminalized. As a result, the sexual and social activities of MSM and gay men are driven underground, often involving secret networks and meeting places. These practices have arisen in order to avoid stigma, blackmail, extortion and/or threats of physical violence.

45. Consequently, there exist few private spaces for MSM or gay males to meet wherein safer-sex may be negotiated. Moreover, it is difficult for these

individuals to have open and long-lasting relationships. In such circumstances there exists a strong likelihood of less safe, multi-partner sexual relationships, rendering individuals (and their partners) extremely vulnerable to HIV-infection.

46. It is therefore submitted that Section 377 restricts the availability of “safe spaces” for MSM and gay men, and indeed all sexuality minorities. The presence of such spaces would permit the negotiation of safer sex and also ensure availability of medical services related to sexually transmitted diseases that can be provided free of discrimination and social censure. Thus, it is submitted that the criminalization of homosexual activity directly results in the vulnerability of the MSM and gay male population to HIV-infection. Since many MSM are married or have sex with women, their female sexual partners are consequently also at risk for HIV-infection.

B. <u>Detrimental Impact Upon HIV-Prevention</u>

47. A direct consequence of driving the activities of sexuality minorities, MSM and gay men in particular, underground is that Section 377 renders it difficult to identify such groups and thus target HIV/AIDS interventions. The situation is exacerbated by the strong tendencies created within the community to deny MSM behaviour itself. These tendencies arise as a result of the strong social stigma attached to same-sex sexual preferences.

48. In acknowledgement of the subsequent vulnerability of MSM and gay men to HIV infection, Respondent No. 2 and various State Aids Control Societies (SACS) have supported HIV interventions in the MSM/gay community.

49. Indeed, SACS sponsor many NGO's in order to increase MSM and gay male awareness of HIV, its risk of transmission, the need for condom use and other safe sexual practices. These SACS realize that it is imperative that the MSM and gay communities have the ability to be safely visible through which HIV/AIDS prevention may be successfully conducted. Clearly, the major stumbling block for the implementation of such programmes is that the sexual practices of the MSM and gay community are "hidden" because they are subject to criminal sanction.

50. It is submitted that Section 377 serves as a serious impediment to successful public health interventions. Social non-acceptance of sexuality minorities denies them the liberty to court or have relationships openly, thus driving them underground, limiting their choice and restricting their freedom to have safe-sex; which thereby increases the spread of HIV/AIDS. Having been driven underground, safe sex campaigns aimed at the MSM and gay community are extremely difficult to implement.

51. A recent report of the National Consultation on Human Rights and HIV/AIDS, held 24-25 November

2000 in New Delhi and organized by the National Human Rights Commission, in collaboration with other organizations, affirms these submissions. The conference report also recognizes that the outreach difficulties in HIV prevention discussed above are compounded by the legal framework, by perpetuating the 'underground' character of MSM activities and permitting harassment from law enforcement. The report concludes, the relevant pages of which are annexed hereto as Annexure "D":

"Therefore, to more successfully prevent and manage HIV/AIDS among these marginalized populations (intravenous drug users and MSM), a revision of the existing laws and processes is strongly recommended. … In terms of preventing HIV/AIDS among men who have sex with men, it would be most useful to make section 377 IPC obsolete, and instead review the legislation and endeavour to define more clearly the age of sexual consent.

…

In a nutshell, the protection of Human Rights and the empowerment of marginalized populations would, in the context of HIV/AIDS prevention, create an environment that would enable India to reach the most vulnerable with HIV/AIDS messages and supporting mechanisms."

52. Clearly, Section 377 is an assault on the ability to protect public health. In *Toonen* v. *Australia*, the United Nations Human Rights Committee explicitly rejected the claim that legislation against

homosexual acts constituted reasonable or proportionate measures to achieve the prevention and spread of HIV/AIDS. Indeed, the Committee stated that such laws drive people at risk of infection underground.

53. The recent arrests and detention in Lucknow of HIV/AIDS activists under Section 377 are also illustrative of how the improper use of Section 377 impedes public health efforts. The presence of Section 377 provides a tangible threat to individuals and NGO's who wish to target the MSM or gay community as part of HIV interventions.

GROUNDS

54. In these circumstances, the Petitioners approach this Honourable Court for the relief prayed for herein on the following grounds, amongst others, which are without prejudice to one another:

A. PRIVATE, CONSENSUAL SEXUAL RELATIONS ARE PROTECTED UNDER THE RIGHT TO LIBERTY UNDER ARTICLE 21

I. The fundamental right to liberty prohibits the State from interfering with the private, personal activities of the individual:

"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."

Kharak Singh v. *State of U.P.*, [1964] 1 SCR. 332 at 359 per Subba Rao, J. (hereinafter "*Kharak Singh* v. *State of U.P.*").

II. Although not enumerated, the right to privacy has been held as falling within the right to liberty guaranteed under Article 21.

[See *Kharak Singh* v. *State of U.P.*; *Govind* v. *State of M.P.* (1975) 2 SCC 148 at 155 (hereinafter "*Gobind* v. *State of M.P.*"); *Malak Singh* v. *State of P&H* (1981) 1 SCC 420: 1981 SCC (Cri) 169; *Mr. X* v. *Hospital Z* 1980 Ker LT 45 (hereinafter "*Mr. X.* v. *Hospital Z*").]

"The right to privacy is implicit in the right to life and liberty and guaranteed to thecitizens of this country by Article 21. It is a "right to be let alone."
Rajagopal v. *State of Tamil Nadu*, (1994) 6 SCC 632 at 632 (hereinafter "*Rajagopal*").

III. The concept of "privacy" is broad. Indeed, no definition can encompass all instances that are so protected. Accordingly, the scope of the right to privacy and whether a privacy-claim is upheld will be determined on a case-by-case basis.

"The right to privacy in any event will necessarily have to go through a process of case-by-case development."
Rajagopal v. *State of Tamil Nadu* at 641.

IV. Both Indian and foreign privacy-rights jurisprudence have derived the nature and breadth of the right to privacy from two principles: “ordered liberty” and “individual autonomy”. These principles are key to the right to privacy on the following basis:

a) Central to the concept of “personhood” exists a universal human need for an intimate, personal sphere wherein “the pursuit of happiness” may be fulfilled:
“Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.”
National Coalition for Gay and Lesbian Equality v. *Minister of Justice*, 1999 (1) SA 6 (CC); 1998 (1) BCLR 1517 (CC), (Constitutional Court of South Africa- CCT 11/98) at paragraph 32 (hereinafter “*National Coalition for Gay and Lesbian Equality*”).

b) The Supreme Court has acknowledged the presence of and need for protecting the “pursuit of happiness” in the Indian Constitution:
“There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness”.

Gobind v. *State of M.P.* (1975) 2 SCC 148 at 155 (hereinafter “*Gobind* v. *State of M.P.”*).

"It might not be inappropriate to refer to the words of the preamble of the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human values as the means of ensuring his full development and evolution."
Kharak Singh v. *State of U.P.* at 348.

c) To be meaningful, the pursuit of happiness must encompass:

- the ability to *choose* how to achieve personal happiness, from which the principle of "individual autonomy" is based; and

- the guarantee of a private space within which to make these choices, whose boundaries are drawn in accordance with the principle of "ordered liberty". Ordered liberty establishes the scope of freedom of action from state interference - provided harm to others is not committed.

d) Thus, central to facilitating the citizen's pursuit of happiness is ensuring a private sphere within which rights to life and liberty may be enjoyed. This private sphere is thus established in accordance with these two above-mentioned principles: **individual autonomy** and **ordered liberty**.

e) Indian jurisprudence, in interpreting the right to privacy, has relied upon both such principles in adjudicating whether a privacy-claim indeed falls within Article 21 protection.

> "Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit constitutional guarantees.
>
> …
>
> Perhaps, the only suggestion that can be offered as a unifying principle underlying the concept has been the assertion that the claimed right must be a fundamental right implicit in the concept of ordered liberty."
> *Gobind* v. *State of M.P.* at 156.

f) It is submitted that the privacy-dignity claim concerning private, consensual sexual relations is entitled to protection as a fundamental right because it falls within both aspects to the right to privacy: ordered liberty and individual autonomy.

Ordered Liberty

V. The right to privacy guaranteed under Article 21 includes private, intimate associations in accordance with the principle of ordered liberty on the following basis:

a) The right to privacy has been held as the "sphere where the individual may be let alone"; and essentially, "the freedom to live one's life without governmental interference".

[See *Kharak Singh* v. *State of U.P.; Gobind* v. *State of M.P.*]

b) The principle of 'ordered liberty' determines the boundaries of the privacy sphere protected from outside interference under the Constitution. It is submitted that these boundaries embrace private, consensual sexual relations.

"[T]he right to satisfy [one's] intellectual and emotional needs in the privacy of [one's] own home… [T]he right of an individual to conduct intimate relationships in the intimacy of his or her home seems to me to be the heart of the Constitution's protections of privacy."

Bowers v. *Hardwick*, 478 US 186 (1986) at 205-06, per Blackmun J.'s dissenting judgment (hereinafter "*Hardwick* v. *Bowers*").

c) Private, consensual sexual relations and sexual preferences figure prominently within an individual's personality and those things "stamped with" one's personality.

"The rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality, and those

things stamped within his personality shall be free from official interference except where a reasonable basis for intrusion exists."
Gobind v. *State of M.P.* at 156.

d) Specified elements that have been held to fall within the right to privacy such as familiar and marital relationships, by definition, encompass *intimate* relationships. Since private, consensual sexual relations are at the core of the intimate relationships conducted in one's life, it is submitted that they too are included within the right to privacy.
"A citizens has a right to safeguard the privacy of his own, his **family, marriage, procreation, motherhood, child bearing** and education among other matters."
R. Rajgopal v. State of Tamil Nadu at 649, 650; affirmed in *Mr. X v. Hospital Z*.

e) While an *explicit* right to preference over one's sexual relations may not have been within contemplation of the makers of the Constitution, it is submitted that a meaningful interpretation of Article 21 requires acknowledgement that such activities are indeed included within the right to privacy.

f) Indeed, "(i)n the application of the Constitution, our contemplation cannot only be of what has been but what may be".
[See *Gobind* v. *State of M.P.* at 156.]

Individual Autonomy

VI. It is submitted that the right to privacy guaranteed under Article 21 includes private, consensual sexual relations in accordance with the principle of individual autonomy on the following basis:

a) The right to privacy has been held to protect a "private space in which man may become and remain 'himself'". The ability to do so is exercised in accordance with individual autonomy.

[See *Gobind* v. *State of M.P.* citing the Warren & Brandeis paper.]

b) No aspect of one's life may be said to be more private or intimate than that of sexual relations. Individual choices concerning sexual conduct, preference in particular, are easily at the core of the 'private space' in which people indeed decide how they become and remain "themselves".

"Only the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare and the development of human personality. The way in which we give expression to our sexuality is at the core of this area of private intimacy. **If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.**"

Paris Adult Theatre I. v. *Slaton,* 413 US 49 at 63 (1973); cited by Blackmun J in *Hardwick* v. *Bowers*.

c) Privacy has also been held to be "an essential ingredient of personal liberty" and that "nothing is more deleterious to man's physical happiness and health than a calculated interference with his privacy"(sic). Without doubt, consensual sexual relations are important to our physical happiness and health.

[See *Kharak Singh* v. *State of U.P.* at 359 per Subba Rao, J.]

d) Accordingly, it is submitted that the exercise of individual autonomy includes the ability to define one's identity and engage in intimate associations, which include private, consensual, sexual relations.

VII. Therefore, it is submitted that consensual, private sexual relations squarely fall within the intimate associations protected from state interference under the right to privacy, as guaranteed by Article 21. By prohibiting such conduct, it is further submitted that Section 377 is violative of the right to privacy under Article 21.

Application of International Law to the Interpretation of Fundamental Rights

VIII. Constitutional protections in India, Article 21 in particular, have commonly been repeatedly interpreted and expanded with the aid of international law. Based upon domestic jurisprudence and principles of international law, it is submitted that international human rights instruments to which India is a signatory and their interpretation are indeed applicable to the interpretation and scope of fundamental rights, especially Articles 14, 15 and 21.

a) The doctrine of incorporation recognizes that rules of international law are incorporated into national law and considered part of national law, unless the two conflict. It is also well established that where there are International Covenants to which India is a signatory and there is no existing Municipal law or none in conflict with such covenants, these covenants may be read to give effect to the fundamental rights under Chapter III.

[See *Doreen D'Souza (In the Matter of)* v. *Guardianship Petition* 2000 (3) Bom. C.R. 244; *Jolly George Varguese and Anr.* v. State Bank of Cochin, AIR 1980 SC 470; *Gramaphone Company of India Limited* v. *Birenda Behadhur Pandey and Ors.*, AIR 1984 SC 667; *Peoples Union for Civil Liberties* v. *Union of India & Anr.* (1997) 3 SCC 433; *Vishaka and Ors.* v. *State of Rajasthan & Ors.* AIR 1997 SC 3011 (hereinafter " *Vishaka and Ors.* v. *State of Rajasthan & Ors."*); *Gita Harihan* v. *Reserve Bank of India* AIR 1999 SC 1149.]

b) Indian jurisprudence has relied upon International Covenants, to which India is a signatory, to read and give effect to national laws, including what Part III of the Constitution.

[In addition to the decisions referred to above, see *Citizens for Democracy* v. *State of Assam*, (1995) 3 SCC 743; *Chairman, Rlwy Board* v. *Chandrima Das*, (2000) 2 SCC 465 (reliance upon Universal Declaration of Human Rights, Covenant on Civil and Political Rights and Convention of Economic, Social and Cultural Rights).)

c) "It is an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when no inconsistency is between them and there is a void in domestic law."

Vishaka and Ors. v. *State of Rajasthan & Ors.* AIR 1997 SC 3011.

d) Thus, it is submitted that the Court may rely upon International Covenants and their interpretation by international bodies as facets of fundamental rights guaranteed under Part III of the Constitution, which elucidate and effectuate such rights.

Interpretation of the Right to Privacy Under International Law

IX. The *Universal Declaration of Human Rights*, to which India is a signatory, and the *European*

Convention for the protection of Human Rights and Fundamental Freedoms, contain strong protections of the right to privacy, which have been interpreted to include private, consensual sexual relations. Both instruments and their accompanying jurisprudence offer important interpretative tools to Article 21 and the right to privacy.

a) Article 12 of the *Universal Declaration of Human Rights*, drafted under the *International Convention on Human Rights (1948)* and ratified in 1978, provides:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

b) "It is "undisputed" that private, adult, consensual sexual activity falls within the concept of 'privacy'."

[See *Toonen* v. *Australia* at para 8.2.]

c) Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this

right except in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

d) The following decisions of the European Court of Human Rights have found legislation criminalizing sodomy, or homosexual conduct generally, to be repugnant to Article 8 and the cause of serious injury to the lives of homosexuals:

1. ***Dudgeon* v. *United Kingdom*** 4 Eur. HR Rrp. 149 [1982] at paras 41, 52, 60 (hereinafter "*Dudgeon"*).

"The maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of par.1 (Art. 8.1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life. ... The Government right affected by the impugned legislation protects an essentially private manifestation of the human personality. ... **The present case concerns a most intimate aspect of private life.**"

2. ***Norris* v. *Republic of Ireland*** 13 Eur. HR Rep. 149 [1991] (hereinafter "*Norris* v. *Republic of Ireland*").

The right to respect for private life under Article 8 was violated by Irish buggery laws prohibiting male-to-male sodomy. The Committee ruled: "in the personal circumstances of the applicant, **the very existence of this legislation continuously and directly affects his private life**".

3. ***Modinos* v. *Cyprus*** 16 Eur. HR Rep. 186 [1993] at para 20 (hereinafter "*Modinos*").

"(I)t cannot be excluded, as matters stand, that the applicant's private behaviour may be the subject of investigation by the police or that an attempt may be made to bring a private prosecution. Against this background, the court considers that **the existence of the prohibition continuously and directly affects the applicant's private life.**"

IX. The following American judgments have also found provisions criminalizing sodomy to be repugnant to the right to personal privacy (recognized as one aspect of the 'liberty' protected by the Due Process Clause of the 14th Amendment of the American Constitution), which are of interpretative aid to Article 21 of the Indian Constitution:

a) ***Campbell* v. *Sundquist et al*** 926 S.W. 2d 250 (Tenn. App. 1996) at 262 (hereinafter "*Campbell* v. *Sundquist*").

"An adult's right to engage in consensual and non-commercial sexual activities in the privacy of the home is **an intimate and personal matter** that lies at the heart of Tennessee's protection of the right to privacy."

b) ***Powell* v. *The State*** 270 Ga. 327 at 333, per Chief Justice Benham (hereinafter "*Powell*").

"Adults who withdraw from the public gaze to engage in private consensual behaviour are exercising a right "embraced within the right of personal liberty. **We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity.**"

X. Therefore, it is submitted that the prohibition by Section 377 of private sexual relations between consenting adults is violative of the right to privacy, as guaranteed by the right to liberty under Article 21.

B. <u>FUNDAMENTAL RIGHT TO PRIVACY UNDER ARTICLE 21 MAY ONLY BE ABRIDGED BY A COMPELLING STATE INTEREST</u>

I. The fundamental liberties guaranteed under Article 21 may only be abridged or suspended in accordance with a "procedure established by law". 'Procedure established by law' has been interpreted as that which should be reasonable, fair and just.

[See *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597, para 56 (hereinafter *Maneka Gandhi*); *Gopalanachari* v. *State of Kerala*, AIR 1981 SC 674, para 6 (hereinafter "*Gopalanachari*"); *Collector of Malabar v. Erimmal Ebrahim Hajee*, AIR 1957 SC 688 at 690 para 9.]

II. It is well established that where the right to privacy is infringed, the impugned law will be found to be fair, just and reasonable only where there exists a compelling state interest. Thus, the question becomes whether there exists a state interest that is of such paramount importance as would justify an infringement of this important fundamental liberty.

[See *Maneka Gandhi*; *Gopalanachari*; *Kharak Singh* v. *State of U.P.*; *Gobind v. State of M.P.*]

a) "Privacy-dignity claims deserve to be examined with care and to be denied only when an important counter-veiling interest is shown to be superior."
G*obind* v. *State of M.P.* at 155.

b) "Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental

right must be subject to restriction on the basis of a compelling public interest."
G*obind* v. *State of M.P.* at 157.

III. All individuals have a fundamental interest in controlling the nature of their intimate associations with others. It is submitted that Section 377's enforcement of "public sexual morality" is not a sufficiently compelling state or public interest to justify the curtailment of private, consensual sexual relations of adults.

a) It is not the role of the criminal law to enforce "morals" concerning the private, consensual sexual relations of adult individuals:
"It is not, in our view, the function of the law to intervene in the private lives of citizens. … Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality which is, in brief and crude terms, not the law's business."
Wolfenden Committee Report, 1957 England.

b) Majoritarian morality is not a valid basis for curtailing the fundamental freedoms of an unpopular minority in the absence of any evidence of palpable harm from such actions.

"A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."

Wisconsin v. *Yoder*, 406 US 205, 223-224 (1972), cited by Blackmun J. in *Bowers* v. *Hardwick*.

c) It is not within the competency of the state to invade the privacy of citizens' lives or regulate conduct *to which the citizen alone is concerned* on the basis of public morals.

d) A plethora of international judgments have rejected the regulation public morals as justification to the criminalization of homosexual relations or sodomy:

1. ***Campbell* v. *Sundquist et al*** at 266.

"In this case, since the law in question infringes upon the plaintiff's right to privacy, a fundamental right, the law must be justified by a compelling state interest and must be narrowly drawn to advance that interest. Even if we assume that the *Homosexual Practices Act* represents a moral choice of the people of this state, we are unconvinced that the advancement of this moral choice is so compelling as to justify the regulation of private, noncommercial, sexual choices between consenting adults simply because those adults happen to be of the same gender."

2. ***Powell*** at 338.

"Simply because something is beyond the pale of 'majoritarian morality' does not place it

beyond the scope of constitutional protection. To allow the moral indignation of a majority (or, even worse, a loud and/or radical minority) to justify criminalizing private consensual conduct would be a strike against freedoms paid for and preserved by our forefathers. **Majority opinion should never dictate a free society's willingness to battle for the protection of its citizens' liberties.** To allow such a thing would, in and of itself, be an immoral and insulting affront to our constitutional democracy."

3. ***Gryczan* v. *The State***, 942 P.2d 112 (Mont. 1997) at 125-6.

"The right of consenting adults, regardless of gender, to engage in private, non-commercial sexual conduct strikes at the very core of [the] constitutional right of individual privacy; absent an interest more compelling than a legislative distaste of what is perceived to be offensive and immoral sexual practices on the part of homosexuals, state regulation, much less criminalization of this most intimate social relationship will not withstand constitutional scrutiny."

4. ***Dudgeon*** at para 60.

"As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour … Although members of the public who

> regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, **this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.**"

IV. Based upon the foregoing, it therefore submitted that Section 377 is not a valid law because there exists no sufficiently compelling state interest to justify the curtailment of such an important fundamental freedom.

C. CRIMINALIZATION OF CONSENSUAL, NON-PROCREATIVE SEXUAL RELATIONS IS UNREASONABLE AND ARBITRARY AND THEREFORE VIOLATIVE OF ARTICLE 14

I. Infringement of the right to equal protection before the law requires a determination of whether there is some classification introduced has a rational and objective basis and bears a just and reasonable relation, or nexus, to the object sought to be achieved by the legislation. The impugned law must not be arbitrary, unreasonable or unfair. Indeed, reasonableness is an essential element of equality.

[See *Kasturi* v. *State of J. & K.*, A. 1980 SC 1992; *Babula* v. *Collector of Customs*, A. 1957 SC 877; *Gopi Chand* v. *Delhi Administration*, A. 1959 SC 609.]

Legislative Objective of Section 377

II. Section 377 penalizes all sexual activities that are "against the order of nature". The legislative object appears to be criminally punish unnatural sex. In so doing, the provision prescribes a public code of sexual morality.

Nature of the Classification Created Under Section 377

III. Section 377 is thus premised upon the belief that the only "natural" sexual act is that performed for procreation. Thus, the provision prohibits *all* non-procreative sexual acts, including oral and anal intercourse between consenting adults, including amongst heterosexuals, for reason of being "against the order of nature". By so doing, Section 377 creates a classification between "natural" (penile-vaginal) and "unnatural" (penile-non-vaginal) penetrative sexual acts.

IV. It is submitted that Section 377's legislative objective of penalizing "unnatural" sexual acts has no rational nexus to the classification created between "natural" (procreative) and "unnatural" (non-procreative) sexual acts, and is thus violative of Article 14 of the Indian Constitution. This absence of a rational nexus between the classification and its legislative object is based upon the following basis:

A. Section 377's legislative objective is based upon sexual stereotypes and misunderstandings that are outmoded and

enjoys no historical or logical rationale, which render it arbitrary and unreasonable;

B. Section 377's legislative objective of prescribing public sexual morality is itself vague and therefore arbitrary;

C. Section 377's prohibition of non-procreative sexual acts predominantly criminalizes the sexual relations of homosexuals, which renders the provision discriminatory against homosexuals and thus there can be no rational nexus to the classification; and

D. Section 377's legislative object to punish unnatural or non-procreative sex is *ultra vires* because discriminating on the grounds of public sexual morality is arbitrary and unreasonable and can not rationally justify the classification created.

V. It is further submitted that the punishment prescribed by Section 377 is unconscionably harsh and therefore disproportionate to the activity prohibited by Section 377 and renders Section 377 violative of Article 14 of the Constitution of India.

A. <u>The Objective of the Legislation is Arbitrary and Unreasonable</u>

VI. Section 377's objective of penalizing what are classified as "unnatural" sexual acts for reason of being non-procreative is **arbitrary and unreasonable** on the following basis:

a) By penalizing ‘unnatural’ sexual acts, Section 377 is based upon an out-dated understanding that sex is only to be engaged for the purpose of procreation and not for pleasure.

b) It is submitted that there is no rationale underlying this classification because it is now universally accepted that sex is not engaged for the purpose of procreation alone. Indeed, the State itself has so recognized through national family planning policies and the state distribution of contraceptive devices, which has included the donation of condoms by Respondents to the Petitioner.

c) The basis of the legislative object of prohibiting “unnatural” sexual activity for reason of being non-procreative is not justified because existing socio-scientific evidence demonstrates how non-procreative sexual acts are *not* unnatural:

   i) Modern understandings in psychiatry and psychology no longer view homosexuality as a disease or disorder. Indeed, the Board of Trustees of the American Psychiatric Association (APA) have removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders (DSM).

ii) Psychological and biological research illustrate that homosexual relations, including acts of sodomy between men, are not “against the order of nature”. Such research posits that sexual orientation is a deeply rooted and intrinsic feature of the core identity and personality of a significant segment of the population:

“Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. … I conclude that allowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws.”

Watkins v. Evans, 875 F.2d 699 at 727 (US Crt Appeals 9th Circ.) (hereinafter “*Watkins* v. *Evans*”).

iii) Homosexual sub-cultures have been present in civilizations throughout the ages. The presence of such practices throughout history illustrates that they clearly are *not* unnatural and collapses the classification between procreative and non-procreative sex.

d) The objective of Section 377 to punish those sexual acts that are “against the order of nature” is facile, unscientific and based upon prejudice alone. Although the scientific evidence is not completely conclusive, all of the above factors illustrate that the legislative object of criminally penalizing consensual, sexual acts on the basis of being “unnatural” is unjust and unreasonable and have no rational nexus to the legislative objective.

e) Section 377 proscribes a doctrinaire and singular conception of tolerated lifestyle choices, which is antithetical to the Indian ethos. Until the enactment of Section 377, there had been no record in Indian culture of the harsh criminal punishments employed in Europe and the Americas for persons engaging in the sexual acts encompassed by Section 377. Indian ethos and culture do not share the same historical intolerance of alternative sexual behaviours. Thus, the legislative object of Section 377 enjoys no historical rationale in Indian society prior to its introduction in the IPC by the British Raj.

B. <u>Legislative Object Discriminatory and therefore Arbitrary and Unreasonable</u>

VII. Section 377 prohibits all acts that are “against the order of nature”. In so doing, the object of the legislation is to maintain a public code of sexual behaviour. It is submitted that no rational nexus

exists between this code of behaviour and Section 377's classification between procreative and non-procreative sex because:

a) The legislative objective is to punish "unnatural" sexual acts because they are non-procreative, which thereby encompasses predominantly homosexual sexual acts. In so doing, Section 377 constitutes discrimination against homosexuals because it adversely affects their right to engage in private sexual acts between consenting adults. Indeed, the stigma perpetuated by the presence of the provision considerably damages the dignity of homosexuals.

b) The purpose of Article 14's equal protection clause is to offer redress to vulnerable groups assailed by discriminatory practices. Indeed, vulnerable minorities require protection from prejudice that will not be corrected by the workings of the ordinary political process. Based upon the harm described earlier resulting from the application of Section 377, it is submitted that sexuality minorities, including MSM and gay men, constitute such a 'vulnerable group'.

[See *United States* v. *Carolene Products Co* 304 US 144 (1938).]

c) Section 377's legislative objective is grounded in discriminatory attitudes concerning homosexuality. Section 377's prohibition of

non-procreative sexual acts criminalizes predominantly homosexual sexual relations and is propelled by a prejudicial and irrational notion of sex.

d) Finally, sexual orientation discrimination is untenable: sexual preferences should be a matter of no concern morally or constitutionally.

C. <u>Objective of prescribing Sexual Morality is Vague and therefore Arbitrary</u>

VIII. The legislative objective of prescribing public sexual morality that underlines the classification created under Section 377 is vague and therefore **arbitrary** on the following basis:

a) Article 14 ensures fairness of action and freedom from arbitrariness. Indeed, the principles of natural justice have been held to be implicit in Article 14 and require that decisions should be predictable and made by known principles.

[See *Maneka Gandhi*; AIR 1978 SC 1427 (1434).]

b) The very basis for judicial application of Section 377's prohibition of "unnatural offences" is vague. Previous application and interpretation of this provision by the courts is illustrative of how its scope has varied, resulting in uncertainty as to exactly which sexual acts are sanctioned.

> "Courts around the world have always found it notoriously difficult to accrately define 'the homosexual' or 'a homosexual act'. The changing faces of the sodomite, and the varied specifications of the bugger, are clear examples of the necessity for this discourse of morality to define and redefine specific acts of perversion."
>
> Oliver Phillips, "Constituting the Global Gay" in Law and Sexuality: The Global Arena, Stychin & Herman, eds. (Great Britain: University of Minnesota Press, 2001) at 23.

c) It is submitted that this vagueness and uncertainty renders Section 377's objective arbitrary and therefore there exists no rational nexus to the classification created.

D. Discrimination on the Ground of Public Morality *Ultra Vires*

IX. The criminalization of private sexual relations between consenting adults absent any evidence of palpable harm deems the provision's objective both arbitrary and unreasonable. As submitted earlier under Article 21 arguments, It is not within the constitutional competency of the state to invade the privacy of citizens' lives or regulate conduct *to which the citizen alone is concerned* on the basis of public morals. Since Section 377's legislative objective is itself *ultra vires*, it is submitted that there

cannot exist a rational nexus to the legislative object sought by the provision.

X. Based upon the arguments above, it is submitted that Section 377's legislative objective of criminally punishing "unnatural" sex for reason of being non-procreative is both arbitrary and unreasonable. Therefore, it is submitted that there exists no rational nexus justifying the provision's classification of "natural" (procreative) and "unnatural" (non-procreative) sexual acts.

Prescribed Punishment Disproportionate to Proscribed Activity

XI. Section 377 prescribes a minimum punishment of imprisonment up to 10 years or life. It is submitted that such punishment is unconscionably harsh, especially since the impugned provision encompasses private sexual activity between consenting adults *absent any evidence of palpable harm*. Therefore, it is submitted that the punishment prescribed under Section 377 is grossly disproportionate to the crime committed and thus violative of Article 14 of the Indian Constitution.

Comparative Jurisprudence of Other Countries

XII. Decisions in foreign jurisdictions have held legislation adversely affecting homosexuals, including those criminalizing private, consensual sexual relations, to be violative of the right to equal protection under the law. These decisions are of interpretative value to Article 14, since its counterparts in other countries are enshrined on

similar principles. Indeed, it has been held that in interpreting Article 14, it is permissible to refer to decisions of American Courts upon the equal protection clause of the American Constitution.

[See *State of UP* v. *Deoman*, *A*. 1960 S.C. 1125 (1131).]

a) ***The National Coalition for Gay and Lesbian Equality v. Minister of Justice*** at para 26(a).

"The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe affecting dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate."

b) ***Watkins* v. *Evans*** at 725 (1989).

"The equal protection clause, in contrast, protects minorities from discriminatory treatment at the hands of the majority. Its purpose is not to protect traditional values and practices, but to call into question such values and practices when they operate to burden disadvantaged minorities. … In all probability, homosexuals are not considered a deeply-rooted part of our traditions precisely because homosexuals have been subjected to individuous discrimination."

XIII. Section 377's legislative object is both arbitrary and unreasonable, and thus there exists no rational nexus to the object of the provision. It is submitted that the factors discussed above demonstrate this

absence of rational nexus, which established that Section 377 is violative of the guarantee of equal protection under the law, as guaranteed under Article 14 of the Indian Constitution. Further, the punishment prescribed under Section 377 is also disproportionate to the provision's proscribed activity

D. SECTION 377'S SEXUAL ORIENTATION DISCRIMINATION FORBIDDEN UNDER PROHIBITION OF SEX DISCRIMINATION

I. Article 15 prohibits discrimination on several enumerated grounds, which include "sex". It is submitted that this constitutional protection against sex discrimination includes the prohibition of discrimination on the basis of sexual orientation.

a) A *prima facie* reading of "sex" as a prohibited ground of discrimination reveals that sex-discrimination cannot be read as applying to gender *simpliciter* for several reasons. First, on a literal reading, "sex" encompasses males or females collectively, as well as sexual intercourse, characteristics, desires and their manifestations. Accordingly, "sex" is by definition understood to be broader than "gender".

b) By prohibiting discrimination on the basis of sex, Article 15 establishes that there is no standard behavioural pattern attached to gender. Understandings of sexual behaviour

and sex-relations are intricately related to gender stereotypes, since traditional gender roles consider women to be the only appropriate sexual partners for men, and men to be the only appropriate sexual partners for women. Accordingly, discrimination on the ground of sex necessarily includes prohibiting sexual orientation discrimination, since alternative sexual orientations challenge traditional conceptions of gender.

c) Indeed, the purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalizations concerning “normal” (or “natural”) gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalizations about the conduct of either sex.

d) Like gender-discrimination, discrimination on the basis of sexual orientation is directed against a characteristic that is deeply rooted in the personal core and identity of the individual discriminated against.

e) Finally, historical oppressions of women and sexual minorities are both grounded in confronting societal problems concerning normative-heterosexuality and the patriarchy.

f) Indeed, the court is well-positioned to "mould the law" in order to respond and be responsive to the "felt and discernible compulsions of circumstances that would be equitable, fair and just".
[See *Pomal Kanji Govinji* v. *Vrajlal Karsandas Purohit*, (1989) 1 SCC 458.]

II. Section 377's prohibition of non-procreative sexual acts prescribes traditional sexual relations upon men and women. In so doing, the provision discriminates against homosexuals on the basis of their sexuality and therefore constitutes discrimination on the basis of sexual orientation.

a) Section 377 discriminates on the basis of sexual orientation because it adversely affects individuals of alternative sexual orientations, namely sexuality minorities. Specifically, despite being facially neutral in its application, Section 377 is discriminatory legislation because it because it criminalizes predominantly homosexual acts.

b) Section 377's criminalization of non-procreative sexual acts forces MSM and gay men, and other sexuality minorities, to comply with an overly broad generalization about sexual preferences. Thus, the provision contains an impermissible basis for criminalizing individuals. Sexual stereotypes cannot justify gender-based line-drawing.
[See *U.S.* v. *Virginia*, 518 U.S. at 533.]

c) "The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves."
National Coalition for Gay and Lesbian Equality, per Ackerman J. at para 25.

d) "When everything associated with homosexuality is treated as bent, queer, repugnant or comical, the equality interest is directly engaged. People are subject to extensive prejudice because of what they are or what they are perceived to be. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned-in on itself."
National Coalition for Gay and Lesbian Equality, per Ackerman J.

III. It is therefore submitted that equality on the basis of sexual orientation is included in Article 15's prohibition against sex discrimination. It is further submitted that Section 377's prohibition of non-procreative acts constitutes discrimination on the basis of sexual orientation and is therefore violative of Article 15's protection against discrimination on the ground of sex.

E. SECTION 377 VIOLATES THE FUNDAMENTAL FREEDOMS GUARANTEED UNDER ARTICLE 19(1)(a), (b), (c), (d) AND IS NOT SAVED BY ARTICLES 19 (2), (3), (4), (5) and (6)

I. It is submitted that Section 377's criminalization of homosexual conduct violates the fundamental freedoms guaranteed under Articles 19(1)(a), (b), (c) and (d). The threat of criminal sanction for engaging in homosexual activity severely curtails the ability of homosexuals to fully enjoy those civil rights protected under Articles 19(1)(a), (b), (c) and (d).

a) Application and effect upon Specific Civil Rights

i) Freedom of expression extends to oral and written speech that contains themes touching upon sexual orientation. Personal statements concerning one's own sexual orientation, as well as the ability to broadcast, publish and circulate materials pertinent to sexual orientation, merit the freedom to so speak without fear of criminal sanction.

ii) Sexual orientation pervades all areas of an individual's life, from intimate personal associations, to political assembly and activism. Section 377's independent proscription of certain forms of homosexual activity also creates a punitive likelihood of engaging in such activity on the ground of

alleged promotion of the prohibited conduct. In this respect, the effect of Section 377 is to deny homosexuals the ability to freely enjoy those fundamental freedoms guaranteed under Article 19(1)(b), (c) and (d).

b) Detrimental effect of Section 377 upon the lives of homosexuals

i) Section 377's legislative object of prohibiting non-procreative sex is doctrinaire and arbitrary. As previously submitted, Section 377 is based upon, and perpetuates, outmoded and discriminatory notions respecting sexual behaviour, gender and sexual relations.

"The discriminatory prohibitions on sex between men reinforce already existing societal prejudices and severely increases the negative effects of such prejudices on their lives."

National Coalition for Gay and Lesbian Equality, per Ackerman J, at para 23.

ii) Homosexuals are confronted with negative attitudes, which manifest themselves into physical and emotional harm and abuse, on a daily basis. Anti-homosexual feelings and beliefs motivate these actions, as recognized by Justice Cory of the Supreme Court of Canada:

"Perhaps the most important is the psychological harm which may ensue from

this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion of gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates [sic] the view that gays and lesbians are less worthy of protection in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination."

Vriend v. *Alberta*, [1998] 1 S.C.R. 493 per Cory J at para 102.

iii) In prohibiting consensual homosexual acts, the very presence of Section 377 serves to reinforce homophobic attitudes. By providing legal sanction to such prejudices, Section 377 justifies oppressive conduct committed against homosexuals.

"The criminalization of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's 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-fulfillment."

National Coalition for Gay and Lesbian Equality, per Ackermann J, at para 36.

iv) The threat posed to homosexuals from societal anti-homosexual sentiment forces most homosexuals to lead a "closeted" life, where their sexual orientation is kept hidden.

Violations of Fundamental Freedoms under Article 19 (1) are not saved by Article 19(2), (3), (4), (5) or (6)

II. It is submitted that Section 377's infringements upon the fundamental freedoms protected under Articles 19(1)(a), (b), (c) and (d) are not saved by the provisions of Articles 19(2), (3), (4), (5) and (6) for the following reasons:

(a) It is well established that constitutionally guaranteed freedoms have to interpreted broadly and the reasonable restrictions restrictions under thereupon be construed narrowly.

(b) In assessing whether the restrictions imposed upon fundamental freedoms by the impugned provision are reasonable and therefore saved under Articles 19(2), (3), (4), (5) and (6) it is necessary to interpret the impugned

legislation on a pith and substance analyses. This pith and substance analysis permits the conclusion as to whether indeed the impugned legislation has been enacted in order to impose the reasonable restrictions specified in Articles 19 (2), (3), (4) and (5) or not.

(c) Articles 19(1)(a), (b), (c) and (d) specifically guarantee civil and political freedoms that, in the ultimate analyses have their origins in the right to life and liberty, as guaranteed under Article 21. However, the bundle of rights protected under Article 21 are broader than those guaranteed under Articles 19(1)(a), (b), (c) and (d). In other words Article 21 occupies a broader and larger scope of fundamental freedoms than Article 19 (1).

(d) On an pith and substance analyses of Section 377, which illustrates its proscription of private sexual acts between consenting adults, it is not the narrow rights guaranteed under Article 19 (1) which are sought to be curtailed, but the broader ones of life and liberty, which fall under Article 21, are sought to be curtailed.

(e) In pith and substance, Section 377 aims at criminally prohibiting the “unnatural” (non-procreative) sexual activities, as opposed to their regulation in related to civil and political freedoms.

(f) More importantly, the impugned provision does not, on the pith and substance analyses, impose reasonable restrictions specified under Articles 19(2) and (4).

(g) Therefore, Section 377's violations of the fundamental freedoms guaranteed under Articles 19(1)(a), (b), (c) and (d) cannot be justified by Articles 19(2), (3), (4), (5) and (6) because they are clearly not within their contemplation in pith and substance.

III. There is no demonstrable or compelling justification for the criminalization of private, consensual adult sexual acts. The prohibition of non-procreative sex is not a legitimate legislative aim because it is based upon a dichotomy between public and private morals and an outdated notion that the purpose of sex is purely functionally procreative. Furthermore, public moral sentiments, and the enforcement of such, cannot suffice to curtail the fundamental freedoms guaranteed under Articles 19(1)(a), (b), (c) and (d).

IV. On the foregoing basis, it is therefore submitted that Section 377 is violative of Articles 19(1)(a), (b), (c) and (d), nor can they be saved by Articles 19(2), (3), (4), (5) and (6).

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F. SECTION 377 IS VIOLATIVE OF THE RIGHT TO LIFE GUARANTEED UNDER ARTICLE 21

a) Increased vulnerability to HIV violative of the right to life

I. The presence of Section 377 drives sexual practices of a vulnerable population underground and threatens HIV/AIDS prevention efforts. Section 377 is therefore dangerous and irresponsible legislation which infringes upon the right to life.

"Moreover, the appellees and the American Public Health Association, as *amicus curaie*, forward a compelling argument that the statute (criminalizing sodomy) is actually counter-productive to public health goals. The appellees introduced evidence that due to fear of prosecution, some homosexual individuals infected with sexually transmitted diseases do not seek medical treatment for the infection or report the infection, and that others are reluctant to be tested to determine if they are infected."

Campbell v. *Sundquist* at 264/5.

b) Private, consensual sexual relations at core of the right to life

II. The preamble to the Constitution recognizes that the rights enshrined within are designed to "assure the dignity of the individual" and protect "those cherished human values as the means of ensuring his (the individual) full development and evolution".

III. Private sexual relations, including preference and orientation, are deeply held matters and are a core part of an individual's identity. In this respect, sexual orientation invokes individual rights of

personhood, liberty, privacy, equality, conscience, expression and association. On this basis, it is submitted that sexual relations are an inalienable component of the right to life.

C. By prohibiting non-procreative, private, consensual sexual acts between adults, which would include oral and anal sex, it is submitted that Section 377 is violative of the right to life as guaranteed under Article 21.

V. Furthermore, by targeting predominantly homosexual acts, the presence of Section 377 in the IPC curtails the ability of homosexuals to fulfill basic needs, which is violative of their right to life.

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

Norris v. *Republic of Ireland* at para 21, quoting with approval the finding of an Irish Judge.

VI. Curtailment of private, consensual sexual relations between adults where there exists no evidence of palpable harm constitutes a denial of the right to life. Further, enforcing majoritarian morality on persons whose conduct does not harm others is an improper exercise of the state's police power.

[See *Commonwealth* v. *Bonadio*, 415 A.2d. 47, 50 (Pa. 1980).]

VII. For the grounds stated above, it is therefore submitted that Section 377 is violative of the right to life, as guaranteed under Article 21.

G. <u>SECTION 377 AND CHILD SEXUAL ASSAULT</u>

I. According to the submissions made by this petition, private, consensual, adult sexual relations are constitutionally out of the ambit of Section 377. At present, there exists a lacuna in the IPC respecting existing rape provisions and allegations of child sexual assault. Therefore, it is submitted that Section 377 should be read down to exclude *private*, *consensual* sexual activities between adults; as their prohibition by the provision is violative of fundamental freedoms.

[See *M.C. Mehta* v. *Union of Indian (Shriram-Oleum Gas)*, (1987) 1 SCC 395.]

55. The Petitioners and the Respondents have their office in New Delhi. The substantial cause of action has arisen in the jurisdiction of this court.

56. The Petitioner has paid the requisite court fees on this petition.

57. The Petitioner has no other alternative efficacious remedy but to approach this Hon'ble Court for the relief prayed for herein and if the same are granted they shall be complete.

58. The Petitioner has not filed any petition in this Court or any other High Court or in the Supreme Court of India in respect of the subject matter of this Petition.

PRAYER

In light of the above facts and circumstances it is humbly prayed before this Hon'ble Court:

(a) For a declaration that Section 377 of the Indian Penal Code, to the extent it is applicable to and penalizes sexual acts in private between consenting adults, is violative of Articles 14, 15, 19 (1)(a-d) and 21 of the Constitution of India;

(b) That Notice be issued to the Attorney General;

(c) For a permanent injunction restraining the Respondents Nos. 1 and 2 herein by themselves, or through their officers, agents and/or servants from in any manner enforcing the provisions of Section 377 in respect of sexual acts in private between consenting adults;

(d) For costs of this Petition;

(e) For such further and other orders as the court may deem fit in the circumstances of the present case may require.

AND FOR THIS KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY

: PETITIONER

THROUGH

ADVOCATE

Place:

Date:

Petition Drafted By

Ms. Sharanjeet Parmar
Advocates

Petition Settled By

Mr. Anand Grover
Advocate