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A. Introduction

1. *“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”*¹

The principle cited by the US Supreme Court in the famous decision of *Lawrence v. Texas*, in which by a majority decision the Court struck down the Texas anti sodomy law, captures a contemporary international judicial trend.

A copy of this judgment is annexed at **Flag 1**.

2. The Apex and Superior Courts in key jurisdictions in the developing world have consistently ruled that the anti-sodomy statutes are constitutionally invalid. In 1998 Justice Albie Sachs of the Constitutional Court of South Africa ruled that,

*‘In my view, the decision of this Court to invalidate the sodomy statute should be seen as part of the growing acceptance of difference in an increasingly open and pluralistic South Africa. It leads me to hope that the emancipatory effects of the elimination of institutionalised prejudice against gays and lesbians will encourage amongst the heterosexual population a greater sensitivity to the variability of the human kind.’*²

A copy of this judgment is annexed at **Flag 2**.

3. In 2005, The Fijian High Court found the anti sodomy law of Fiji unconstitutional and in so doing ruled that,

*‘What the Constitution requires is that the Law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are. The acceptance of difference celebrates diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality. The State that embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law.’*³

A copy of this judgment is annexed at **Flag 3**

4. In 2005, the High Court of Hong Kong in adjudicating the constitutional validity of a provision of the law which specifically targetted homosexual sex in public for an exponentially higher penalty, held the provision to be discriminatory and hence unconstitutional. The court noted that there was an absence of an equivalent statutory offence criminalizing forms of heterosexual sex. It went on to hold that the law, *‘singles out male homosexuals as a class of persons and imposes a social and moral stigma which does not apply to anyone else’*. J. Hong Tang went on to note, *‘I can see no justification for Section 118 F.. It stigmatizes homosexuality and distinguishes it from other acts of indecency in public.’*⁴
5. In 2008, in the South Asian region itself, the Nepali Supreme Court followed the global trend in a summary judgment which recognized the rights of lesbian, gay, bisexual, transgender and intersex communities.
6. These recent decisions are themselves based on the global judicial trend established by the European Court of Human Rights which in three decisions overturned the anti sodomy laws in Northern Ireland, Ireland and Cyprus⁵ and the Human Rights Committee which ruled that the anti sodomy law in Tasmania, a state in Australia was invalid.⁶ Copies of these judgments are annexed at **Flags 4, 5, 6 and 7** respectively.

1 539 U.S. 558 (2003) at p. 18

2 *National Coalition For Gay and Lesbian Equality v. Minister of Justice*, [1998] {12} PCLR 1517 at para 138.

3 *Dhirendra Nadan and another v. State*, HAA 85 &86 Of 2005.

4 *Leung T C William Roy v. Secretary for Justice*, CACV 317/2005

5 *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser.A) (1981), *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser.A) (1988), *Modinos v. Cyprus*, 142 Eur. Ct. H. R. (ser.A) 1988)

6 *Toonen v. Australia Communication No. 488/1992*, Decision by the Human Rights Committee, under the International Covenant on Civil and Political Rights

7. On 9 November 2006, the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity was issued, which are annexed at **Flag 8**. Prepared by international law experts, it was noted therein that

“Historically people have experienced these human rights violations because they are or are perceived to be lesbian, gay or bisexual, because of their consensual sexual conduct with persons of the same gender or because they are or are perceived to be transsexual, transgender or intersex or belong to social groups identified in particular societies by sexual orientation or gender identity;”

8. Principle 2B of the Yogyakarta Principles places an obligation upon states to
“Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent...”
9. Within India respected academic opinion is increasingly seeing the rights of LGBT (Lesbian, gay, bisexual and transgender) persons as a part of the universal human rights discourse. As eminent jurist Upendra Baxi notes,
*‘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.’*⁷
10. Several Indian statutory bodies as well as Government officials have recommended the exclusion of adult consensual sexual activity from the criminal domain of section 377. The Respondent No. 8 places reliance upon the 172nd Report of the Law Commission of India, which 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 9**
11. Most 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.”⁸ A true copy of it is annexed to these written submissions at **Flag 10**.
12. On August 8, 2008, Union Minister for Health and Family Welfare, Dr. Anbumani Ramadoss, speaking at the 17th International Conference on AIDS in Mexico City is reported to have stated “Structural discrimination against those who are vulnerable to HIV such as sex workers and MSM must be removed if our prevention, care and treatment programmes are to succeed,” he said. “Section 377 of the Indian Penal Code, which criminalises Men who have sex with Men, must go”⁹. A true copy of the news report documenting his statement is annexed here at **Flag 11**.
13. The National Commission of Women in its ‘Recommendation on Amendments to Laws Relating to Rape and Related Provisions’¹⁰ also recommends that sec 377 be deleted and is annexed to these written submissions at **Flag 12**. The Planning Commission in its official recommendations to the Prime Minister on the 11th Five Year Plan has recommended that sec 377 IPC be deleted¹¹. A true copy of a news item reporting this recommendation is annexed to these written submissions at **Flag 13**. Additionally media reports have quoted Planning Commission Member Syeda Hameed as stating that the government policy towards homosexuality has a ‘changing outlook’¹². The Respondent No. 8 also points out that at the International HIV/AIDS Conference in Toronto, 2006; Union Minister for Health, Shri Anbumani Ramdoss stated that Sec 377 IPC was to be amended as part of the government’s

7 People’s Union For Civil Liberties , Human Rights Violations Against the Transgender Community, 2003. Foreword by Upendra Baxi.

8 Full text of the speech is available at <http://www.pmindia.nic.in/lspeech.asp?id=691>

9 Ramadoss backs gay rights, says Sec 377 must go, <http://www.indianexpress.com/story/346649.html>

10 See Annexure R20 to the Counter Affidavit of Respondent No. 8 at page no. 1438 of volume 5 (Internal page no. 411 of counter affidavit of Respondent No. 8)

11 Times of India, By Subodh Giliyal

12 Id.

measures to prevent HIV/AIDS.¹³ **Flag 14** is a newspaper report which highlights this statement.

14. The Delhi Declaration of 2006 was issued pursuant to an International Consultation on Male Sexual Health and HIV, co-hosted by the Government of India, UNAIDS, and civil society organisations. It was recognized therein that “the stigma, discrimination and criminalization faced by men who have sex with men, gay men and transgender people are major barriers to universal access to HIV prevention and treatment.”¹⁴

15. The Hon’ble Solicitor General of India appearing on behalf of India at the Periodic Review before the United Nations Human Rights Council stated that before the British colonised India, Indian society was accepting of sexual differences. In response to a question from the delegate from Sweden on the state of homosexual rights in India, he states,

*“Around the early 19th Century, you probably know that in England they frowned on homosexuality, and therefore there are historical reports that various people came to India to take advantage of its more liberal atmosphere with regard to different kinds of sexual conduct. ... As a result, in 1860 when we got the Indian Penal Code, which was drafted by Lord Macaulay, they inserted s. 377 in the Indian Penal Code, which brought in the concept of “sexual offences against the order of nature”. Now in India we didn’t have this concept of something being “against the order of nature”. It was essentially a Western concept which has remained over the years. Now homosexuality as such is not defined in the Indian Penal Code, and it will be a matter of great argument whether it’s “against the order of nature”.*¹⁵ (emphasis supplied)

A transcript of his statements are annexed here at **Flag 15**.

B. Background of Voices Against 377

16. The Respondent No. 8 herein, ‘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 LGBT persons).

17. On February 23, 2006, Respondent No. 8 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).

18. On January 29, 2006, Respondent No. 8 conducted a workshop titled “Criminalization of sodomy and Human Rights violations in India,” at the British Council Division, New Delhi.

19. On December 17, 2005 the Respondent No. 8 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.

20. The Respondent No. 8 has also published a campaign document titled *Rights for All: Ending Discrimination Against Queer Desire under Section 377*.

21. The organizations that constitute Voices Against 377 are below.

	Name	Aims of the Organisation	Representative Activities.
1	<u>Haq Centre for Child Rights</u> Registered under the Societies Registration Act (Reg No S/35083;	Dedicated to the recognition, promotion and protection of the rights of all children	- Published Child Budget analyses of the Union Budgets since 2005 incorporated into the National Plan of Action for Children 2005. - Child Budget analyses of Budets

¹³ Aarti Dhar, “Bill on AIDS likely to be tabled in Winter Session”, *The Hindu*, August 16, 2006

¹⁴ See Page no. 1090 – 1094 of Volume 5 (internal page no. 36-40 of counter affidavit of Respondent No. 8)

¹⁵ The video of these proceedings can be viewed at rtsp://webcast.un.org/ondemand/conferences/unhrc/upr/1st/hrc080410pm-eng.rm?start=02:18:32&end=02:37:42 at time index 16:30.

	SRA, 1860; 28 June 1999)		<p>of AP, Orissa, Uttaranchal and Jharkhand. Project supported by Ford-UNDP and CRY.</p> <ul style="list-style-type: none"> - Legal Aid and Resource Centre for Children - Filed PIL along with M.V. Foundation challenging certain provisions of the Child Labour (Prohibition and Regulation Act on the grounds that it violates the Right to Education. - Deposed before the Parliamentary Committee on the National Commission for Children Bill. - Invited as an Expert Group by the Planning Commission to review policies with regard to HIV/AIDS and Children.
2	<u>Sama</u> Registered under the Indian Trusts Act, 1872, and was established in 1999 (Reg No. 3414, ITA 1882; 27 Sept 1999)	Works against discrimination and emphasizes on equality, empowerment and rights of women, especially from marginalized communities.	<ul style="list-style-type: none"> -Submitted recommendations regarding the Communal Violence Bill to the Parliamentary Standing Committee - In the Core coordination committee of Jan Swasthya Abhiyan for the campaign for the right to health care as a fundamental right. -Collaborations with the NHRC towards increasing accountability of the State towards achieving the Right to Health.
3	<u>Partners for Law in Development</u> Registered as a Charitable Trust in 1998 in New Delhi (Reg No 10514/4; ITA, 1882; 16 Dec 1998)	Legal resource group on women's rights. Its work aims to advance women's rights through creation of new knowledge and strengthen capacities of lawyers and paralegals through training programmes and fellowships to district level alternative law strategies.	<p><u>Publications</u></p> <ul style="list-style-type: none"> -Beyond Appearances: An exploration of Alternative Law Practives in India, 2001 -CEDAW: Restoring Rights to Women, 2004 available at www.unifem.org.in/publications. -Mahilaon ke Adhikaro ji Punarsthapana, 2006 <p>Also publishes resources packages on gender and law, women's human rights, law and social action, role of law in development.</p>
4	<u>Breakthrough Trust</u> Established in 1999 and registered under the Income Tax Act, 1961 (Reg No. DIT (E) 99-2000/B-783/99/697; 3 Feb 2000),	Aims to use media, education and culture to promote values of human rights, dignity, equality and justice.	<ul style="list-style-type: none"> -Comprehensive Education Programme: Conducts workshops in schools, colleges, and other organisations to discuss issues around human rights, domestic violence, gender and sexuality -Annual Tricontinental Human Rights Film Festival -Eight language multimedia campaign titled "What kind of man are you?" to talk about men's accountability in preventing HIV/AIDS.
5	<u>Jagori</u> Registered in 1989 under the Society Registration Act, 1860, (Reg No S/20427; SRA 1860; 5 Oct 1989)	Women's resource centre and its main activities include training, documentation, advocacy and communication.	<ul style="list-style-type: none"> -Public workshops and seminars on increasing awareness on issues relating to women. -Research on impact on current economic and social processes on women's lives. -Library and Resource centre on women's issues.
6	<u>Saheli</u> Registered under the Societies Registration	Delhi-based autonomous women's group formed in 1981, working on issues	<ul style="list-style-type: none"> -Campaigns to raise awareness about sexual harassment at the workplace. -Workshops with specific focus on

	Act, 1860, (Reg No. S/13405)	of women's health, violence against women, communalism and militarisation	hazardous contraceptives, coercive population control policies, and the practice of sex determination and sex selective abortions. -Periodic publication of Newsletters in English and Hindi.
7	<u>Creating Resources for Empowerment in Action (CREA)</u> Society registered in 2000 under the Societies Registration Act, 1860. (Reg S/36901; SRA 1860; 4 Apr 2000)	Aims to empower women to articulate, demand and access their rights by enhancing women's leadership by focusing on issues of sexuality, violence against women, sexual and reproductive rights and social justice.	<ul style="list-style-type: none"> - Workshops on gender, sexuality, women's legal rights. - Along with TARSHI edited <i>Sexuality, Gender and Rights: Exploring Theory and Practice in South and Southeast Asia</i>(New Delhi: Sage, 2005) - Along with TARSHI conducts the annual Sexuality and Rights Institute, which attracts eminent faculty from universities such as Columbia University, and University of California at Berkely
8	<u>Nigah</u> Unregistered association of persons	Spreads awareness on issues of gender and sexuality using film, theatre, workshops and trainings.	<ul style="list-style-type: none"> -Annual Queer Fest held in 2007 and 2008 which includes film festivals, photo exhibitions aiming to highlight the lives of LGBT persons -Biweekly public discussions on gender and sexuality in order to create a supportive and save environment for LGBT persons
9	<u>Talking About Reproductive and Sexual Health Issues (TARSHI)</u> Registered under the Societies Registration Act, 1860,(Reg No S/32155; SRA, 1860; 17 Nov 1997)	Works towards expanding sexual and reproductive health choices in people's lives in an effort to enable them to enjoy lives of dignity, freedom from fear, infection and disease, and reproductive and sexual health problems.	<ul style="list-style-type: none"> -Ministry of Youth Affairs and Sports disseminates copies of TARSHI's publications for its Adolescent Development and Empowerment Programme. Nooks used in government schools throughout India. -Runs a telephone helpline that was established in 1996 for people to obtain counseling, information and referrals to mental health and medical professionals. -Conducts trainings to enhance helpline counseling skills and on sexual and reproductive health and related issues.
10	<u>Nirantar</u> Established in 1993, and registered under the India Trusts Act, 1882, (Reg No. 4010; ITA 1882; 19 July 2000)	A resource centre for Gender and Education, works towards empowering women through education by enabling access to information, promoting literacy and engendering education processes.	<ul style="list-style-type: none"> -Organised first public hearing on child sexual abuse in Chitrakut, UP in 2001. -Involved in law reform processes relating to the Protection of Women from Domestic Violence Act and the Sexual Assault Bill.
11	<u>Prism</u> Unregistered association of persons	Works towards raising awareness about issues affecting same sex desiring and transgendered people.	<ul style="list-style-type: none"> -Organised Public meetings addressed by Justice Michael Kirby of the High Court of Australia and Justice Edwin Cameron of the Supreme Court of South Africa -Participated in meeting on Violence against Women in Dhaka. -Co-drafted the CEDAW shadow report in 2006 -Involved in drafting processes of the Sexual Assault Bill.
12	<u>Anjuman</u> Unregistered association of persons	Student group at the Jawaharlal Nehru University that aims at raising awareness among students about issues of sexuality	-Poster campaign explaining the basics of sexuality, on lesbian suicides and persecution, history of LGBT persons, on persecution of homosexuals in Iran, persecutions of homosexuals in Nazi German

			-Film festival on homosexuality where two Indian films on homosexuality – <i>Summer in my Veins</i> and <i>Fire</i> - were screened.
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22. Respondent No. 8 has relied extensively upon specific documented instances of fundamental rights violations including, rape, torture, extortion, blackmail, abuse of judicial processes and discrimination against LGBT persons. Affidavits of LGBT persons from across the country, including from persons residing in the NCT of Delhi, have been placed on record before this Hon'ble Court. These affidavits are personal testimonies of LGBT persons who have faced rape, torture, extortion, harassment and discrimination as a result of section 377. In addition, Respondent No. 8 seeks to place reliance upon reports of local and international human rights organisations documenting violence and discrimination against LGBT persons as a result of section 377.

C. History of Section 377

23. The criminalization of sodomy dates back to English common 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 1563.¹⁶ This law was finally repealed in Britain following the recommendations of the Wolfenden Committee with the enactment of the Sexual Offences Act, 1967.¹⁷ Thus it was as early as 1967 that Britain effectively decriminalized homosexuality, while India retained the colonial offence.

24. The offence of sodomy found its first mention in the Indian context through The Draft Code of 1837, which defined the offence of unnatural lust. Clause 361 of the 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.'

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

25. 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."¹⁸

Relevant excerpts are annexed at **Flag 16**.

26. 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.

27. Thus Sec 377 of the 1860 Code reads,

"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

¹⁶ Peter Bartlett, "Sodomites in the Pillory in Eighteenth- century London", *Social Legal Studies*.1997; 6: 553-572

¹⁷ See Wolfenden Committee Report

¹⁸ Report on the Indian Penal Code, c.f. Vasudha Dhagamwar, *Law, Power and Justice*, Sage Publications, New Delhi, 1992, p.117.

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.”

28. It is clear that section 377, whatever its present pragmatic application was not drafted keeping in mind instances of child sexual abuse or to fill a lacuna in rape law. 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.

D. The Impact of Criminalisation

29. Prof. Ryan Goodman of the Harvard Law School, in his study of the impact of the sodomy laws on LGBT persons in South Africa argues that condemnation expressed through the law shapes an individual's identity and self-esteem. 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. Based on field research, he argues that sodomy laws produce regimes of surveillance that operate in a dispersed manner, and that such laws serve to embed illegality within the identity of homosexuals.¹⁹ This tendency to conflate different sexual identities with criminal illegality marks the history of sodomy laws and exists in many different contexts.²⁰ This article is annexed here at **Flag 17**.
30. Respondent No. 8 argued that section 377 is a direct violation of the identity, dignity and freedom of the individual merely because of sexual difference, and that it fosters widespread violence, including rape and torture, of LGBT persons, at the hands of the police and society. Section 377 allows for the legal and extra-legal harassment, blackmail, extortion and discrimination against LGBT persons. Respondent No. 8 has placed on record numerous factual accounts of the violence, and discrimination against LGBT persons.
31. Furthermore, the harm inflicted by sec 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 sec 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.

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

32. Human Rights Watch in their report titled "*Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India*"²¹ 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 sec 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

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

20 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

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

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 sec 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-bailable offence these health care workers remained in custody for forty seven days and according to the reports relied upon by the Respondent No. 8, were subject to verbal abuse and physical harassment while in custody. A copy of this report is annexed here at **Flag 18**.

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

33. While it may be argued that sec 377 technically only criminalizes only certain penetrative sexual acts, it is the effect of sec 377 that all LGBT persons are branded as criminal.
34. Respondent No. 8 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 a 21 year old woman X, stating that she had been abducted by another woman Y. An FIR was recorded under sec 366 IPC. Y was arrested by the police and produced before a Magistrate. X wished to record a sec 164 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 sec 377 as well." To constitute an offence under sec 377 there needs to be penetration and hence cannot apply to a woman accused. However, since sec 377 serves to criminalize all homosexuality and not merely certain sexual acts, sec 377 is applied to lesbians as well. Copies of the FIR and of the order of the Hon'ble Magistrate are annexed at **Flag 19**. The Respondent No. 8 has taken the liberty to whiten out the FIR No and other references so that the identities of the persons is not disclosed. The Respondent No. 8 undertakes to produce the original documents before this Hon'ble Court for its perusal at the time of hearing.

III. Bangalore Incident, 2004: Custodial Torture of LGBT persons

35. Annexure R12 of the Counter Affidavit of Respondent No. 8, 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.²² This affidavit is annexed here at **Flag 20**.

IV. Delhi Incident, 2006: Custodial Rape of LGBT persons

36. In Annexure R13 of its Counter Affidavit, the Respondent No. 8 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." (I am a gaandu and I come here out of my own will to get f*****). 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 identity as a gay man because he is terrified that the police may further harass, intimidate and humiliate him and his friends.²³ This affidavit is annexed here as **Flag 21**.

V. Chennai, 2006: Suicide of LGBT person due to custodial torture by Police

37. In *Jayalakshmi v. State of Tamil Nadu*²⁴ the Hon'ble 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 (or 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.
38. It was alleged by the petitioners that one Police Constable Sampath, the 8th respondent therein, used to come to the house of the petitioner every day at 8.00 AM and take Pandian to the Police Station and he would be brought back only after 11.00 PM every night. On return, Pandian appeared to be tired and would not take food. It was, on 08.06.2006, when the petitioner insisted the reason, her brother Pottai cried and told her that the police personnel have tortured him and sexually assaulted him every day.
39. 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.
40. In its judgment the Hon'ble 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 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."

This Judgment is annexed here at **Flag 22**.

23 Annexure R 13 of the Counter Affidavit of Respondent No. 8 at page no. 1268 of Volume 5 (Internal Page No. 227).

24 (2007) 4 MLJ 849

VI. Goa, 2007: Criminalisation of Consensual Sexual Acts

41. In *Desmond Hope v. State of Goa*²⁵ decided by the Goa Bench of the Hon'ble 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.
42. 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. The Hon'ble Justice Britto held that that it
- "The learned Additional Sessions Judge concluded that in case the applicant is released on bail, there is every possibility that the applicant will continue to commit such offences...Here it may be stated that the said Anwar, in case he is not willing, he is always free not to attend the calls of the applicant and oblige him by going to places where he is called and therefore, the observations that the applicant, if released on bail will continue to commit such offences and pose a threat to society, appears unfounded."*

A copy of the record is annexed here at **Flag 23 (colly)**.

VII. Lucknow, 2006: Harassment of LGBT Persons

43. The Respondent No. 8 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 sec 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 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.
44. According to Human Rights Watch, whose report is annexed at **Flag 24**, 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.²⁶ As per the report of the National Coalition for Sexuality Rights²⁷, whose report is annexed at **Flag 25**, 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 meet 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 FIR was lodged on the previous night at 12:40 am, a full 10 hours before the entrapment at the restaurant.

VIII. Bangalore, 2006: Arbitrary arrest and Illegal Detention of LGBT Persons

45. The Respondent No. 8 also draws attention to a complaint filed by Mr. Ratnakar Shetty, Inspector of Police, Cubbon Park, Bangalore on 11.09.06.²⁸ In his complaint

25 Crim. Misc. App. (Bail) No. 55 of 2007

26 Human Rights Watch *India: Repeal Colonial Era Sodomy Law*, 2006. Annexure R9 to the Counter Affidavit of Respondent No. 8 at page 1253 of Volume 5 (Internal Page No. 212.)

27 *Report of the Fact Finding Team on the Arrest of Four Men in Lucknow under IPC 377*, 2006. Annexure R 8 to the Counter Affidavit of Respondent No. 8 at page 1244 of Volume 5 (Internal Page No. 203).

28 FIR No. 151/2006. Annexure R 10 to the Counter Affidavit of Respondent No. 8 at Page No. 1256 of

before the Hon'ble 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 cause 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'. A copy of this FIR and its translation is annexed at **Flag 26**.

46. The Respondent No. 8 has relied upon the affidavit of one Madhumita, who was one of the arrested in the above mentioned case in Bangalore.²⁹ 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.
47. The deponent states on oath that the police filed a false case under sec 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 here at **Flag 27**.

IX. Prevalence of Homosexuality in South Asia

48. In addition to the statements made by government officials and statutory bodies that section 377 should be removed mentioned above in these written submissions, the Respondent No. 8 wishes to draw attention to certain other facts.
49. 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.'³⁰ In Annexures R24 and R25, the Respondent No. 8 wishes to draw attention to the non-discrimination policies of Wipro and Infosys, two of India's leading IT companies, wherein they have included sexual orientation/sexual preference as a ground of non-discrimination. These are annexed at **Flag 28** and **Flag 29** respectively.
50. In 2006, the State of Tamil Nadu *vide* G.O. (Ms) No.199 dated 21.12.2006, recognizing that "aravani³¹ are discriminated by the society and remain isolated" issued directions that

- I. counseling be given to children who may feel different from other individuals in terms of their gender identity.
- II. 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.
- III. 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 30**.

51. 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

Volume 5 (Internal Page No. 215)

29 Annexure R11 to the Counter Affidavit of Respondent No. 8 at page 1263 of Volume 5 (Internal Page No. 222)

30 Annexure R23 to the Counter Affidavit of Respondent No. 8 at page 1497 of Volume 5 (Internal Page No. 471)

31 Hijra's are known as Aravani's in Tamil Nadu.

Indian citizens and persons of Indian origin called for the overturning of section 377. It was stated therein that

*"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..."*³²

52. 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..."*³³

A true copy of these open letters are annexed here at **Flag 31**.

53. The Respondent No. 8 also wishes to show that traditional Indian society was tolerant and embraced differences of sexual preference. In Annexure R5, they provide extracts from *Same Sex Love in India: Readings from Literature and History* edited by Dr. Ruth Vanita and Dr. Saleem Kidwai (2001). An affidavit by Dr. Saleem Kidwai summarising their key findings is annexed to these written submissions at **Flag 32**.

54. Homosexuality is also very much a part of contemporary popular Indian culture as well. The Respondent No. 8 also points to the annual Aravani (Hijra) festival in Koovagam, in Villupuram District of Tamil Nadu to show one instance of traditional culture of modern India being accepting of different sexualities. According to the legend of the festival, Arjuna's son, Aravana, offers himself as sacrifice to Kali to ensure victory for the Pandavas. He asked for a boon before he dies, one of which is that he should be married before his death. Since no parent would give a daughter to one who is about to be killed, Krishna appears as Mohini and marries Aravana for a night. This festival is celebrated annually by the hijra community who identify with the transgendered Krishna.

55. Various government agencies and departments have already acknowledged and given a degree of legal recognition to LGBT persons. For example, the *Annual HIV Sentinel Surveillance Country Report* released jointly by the National AIDS Control Organisation and the National Institute of Health and Family Welfare, recognises Men who have Sex with Men (MSM) as a vulnerable population and recommends "Increase the reach and effectiveness of prevention programmes for men who have sex with men (MSM) and transgender populations". A true copy of excerpts from this report are at **Flag 33**.

56. Furthermore, 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. 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 34**.

E. Propositions

57. Based on the facts and pleadings, the substantive issues which arise for the Court to consider are

- I. Whether homosexual acts are covered by the phrase 'carnal acts against the order of nature as used in Sec 377?
- II. Whether Sec 377 is violative of the Constitutional guarantee of equality under Article 14?

32 Annexure R 26 to the Counter Affidavit of Respondent No. 8 at page 1504 of Volume 5 (Internal Page No. 473).

33 *Id.*

- III. Whether Sec 377 discriminates against persons on the basis of one of the prohibited grounds under Article 15(1)?
- IV. Whether Sec 377 of the IPC violates Article 21, and more particularly the Right to Privacy and the Right to life with Dignity ?
- V. Whether section 377 of the IPC is in violation of Article 19(1)(a), (b), (c) and (d) and not saved by the reasonable restrictions under Art 19(2), (3), (4) and (5) ?
- VI. To what extent is morality a valid basis to place restrictions on fundamental rights

I. Homosexual acts are not covered by 'carnal acts against the order of nature' as used in Section 377

58. 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'. Respondent No. 8 argues that homosexuality widely prevalent in any given population and is as 'natural' as heterosexual acts. Homosexual sexual acts are undertaken so widely that they cannot be termed as unnatural and therefore homosexuality and homosexual acts cannot fall within the ambit of section 377

59. According to a survey conducted by Social Scientist Shiv Vishwanathan commissioned by India Today-AC Nielsen-ORG-MARG in 2006, 37% of males between the ages of 16 to 25 in India have had a homosexual sexual experience.³⁴ A true copy of this report is annexed at **Flag 35**.

60. According to a survey report titled *Sexual Behaviour and Selected Health Measures: Men and Women 15-44 years of age, United States, 2002*, published by the United States Department of Health and Human Services in 2002:

- I. Among males 15–44 years of age, 5.7 percent have had oral sex with another male at some time in their lives, and 3.7 percent have had anal sex with another male; overall, 6.0 percent have had oral or anal sex with another male.
- II. Among women 15–44 years of age in 2002, 11 percent answered yes when asked, "Have you ever had any sexual experience of any kind with another female?"
- III. In response to a question that asked, "Do you think of yourself as heterosexual, homosexual, bisexual, or something else?" 90 percent of men 18-44 years of age responded that they think of themselves as heterosexual, 2.3 percent of men answered homosexual, 1.8 percent bisexual, 3.9 percent "something else," and 1.8 percent did not answer the question. Percents for women were similar.
- IV. Survey participants were asked if they were sexually attracted to males, to females, or to both. Among men 18-44 years of age, 92 percent said they were attracted "only to females," and 3.9 percent, "mostly" to females. Among women, 86 percent said they were attracted only to males, and 10 percent, "mostly" to males.

Relevant excerpts from this report are annexed herewith at **Flag 36**.³⁵

61. This survey indicates that a sizeable portion of the population identifies itself as lesbian, gay or bisexual. Importantly, the survey further indicates that while persons may not necessarily identify themselves as 'gay' or 'lesbian' or 'bisexual', that individuals undertake sexual activities irrespective of their professed sexual orientation

62. 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

34 India Today-AC Nielsen-ORG-MARG Sex Survey 2006 available at <http://www.indiatoday.com/itoday/20061113/cover.shtml>

35 William D. Mosher, Ph.D.; Anjani Chandra, Ph.D et al. *Sexual Behaviour and Selected Health Measures: Men and Women 15-44 years of age, United States, 2002* (US Department of Health and Human Services, 2002). Full report available at www.cdc.gov/nchs/products/pubs/pubd/ad/361-370/ad362.htm.

constitute 5-7% of the total adult population.” Relevant excerpts of the report are at **Flag 37**.

63. The Respondent No. 8, also wishes to draw attention to the near unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality. Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973 after reviewing evidence that homosexuality is not a mental disorder.³⁶ In 1987, ego-dystonic homosexuality was not included in the revised third edition of the DSM after a similar review. The DSM is used worldwide as the standard benchmark of mental health practice and is also widely followed by the Indian Psychiatric Association.
64. 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.”³⁷ The Indian Medical fraternity also widely adopts this standard classification.
65. According to the *amicus* brief filed in 2002 by the American Psychiatric Association before the United States Supreme Court in the case of *Lawrence v. Texas*:
- “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.”*

This *amicus* brief is annexed to these written submissions at **Flag 38**.

66. They further argue that
- “More recent studies have reported that most gay men and most or many lesbians experience either no choice or very little choice in their sexual attraction to members of their own sex. In a study that included a community-based sample of 125 gay men and lesbians, 80% of the gay men and 62% of the lesbians said they had “no choice at all” about being gay, lesbian, or bisexual. See G.M. Herek et al., Correlates of Internalized Homophobia In a Community Sample of Lesbians and Gay Men, 2 J. Gay & Lesbian Med. Ass’n 23 (1998). The same researchers subsequently conducted a larger study that included 898 gay men and 980 lesbians. In that larger study, 85% of the gay men and 68% of the lesbians reported having either “no choice” or “very little choice” about their sexual orientation.”*
67. It further argues that since all sexual orientation cannot be changed.
- all major national mental health organizations have officially expressed concerns about therapies promoted to change sexual orientation. Given the strong stigma against homosexuality that remains in place in our society, however, it is perhaps not surprising that some persons who experience sexual attractions towards members of their own sex nonetheless feel that they should attempt to change their sexual orientation and seek treatment to that end...To date, however, there has been no scientifically adequate research to show that interventions aimed at changing sexual orientation are effective or safe. Moreover, critical examinations of reports of the effectiveness of these therapies have highlighted numerous problems with such claims.*
68. Therefore, while individuals may undertake a range of sexual activity, homosexuality, like heterosexuality is not a disease or mental illness that need to be, or can be ‘cured’ or altered.
69. Modern understandings of human sexuality have moved away from a purely biological and natural understanding of sexual behaviour to one which locates sex and gender within social and cultural contexts. Political theorist, Dr. Nivedita Menon of Jawaharlal Nehru University, argues that institutional structures such as the law and medical establishment use violent and coercive means to in order to sustain what is perceived to be a ‘natural’ state of heterosexuality. She however poses the

36 Annexure R2 (Colly) to Counter Affidavit of Respondent No. 8 at page 1163 of Volume 5 (Internal Page no. 109)

37 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.

question 'Why would we need laws to maintain something that is natural? Are there laws forcing people to eat or sleep? But there is a law forcing people to have sex in a particular way.'³⁸

70. 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 that an individual has no control over. Since homosexuality is as 'natural' as heterosexuality neither of which are based on intention or knowledge, they cannot fall within the ambit of section 377. Homosexuality, like heterosexuality are not 'against the order of nature' and cannot fall within the term 'carnal intercourse against the order of nature' as used in Section 377.

II. Whether Sec 377 is violative of the Constitutional guarantee of equality under Article 14

71. The judiciary in its interpretation of Art 14 has laid down two tests. To satisfy Article 14, a law must satisfy the test of permissible classification based on intelligible differentia bearing a rational nexus to a legitimate state interest, as well as the test of non-arbitrariness.

i. Section 377 fails the test of permissible classification, and the classification bears no nexus to a legitimate state objective.

72. The first test propounded by the judiciary in numerous cases is based on the premise that Art 14 does not prohibit reasonable classification for the purpose of legislation. In order for classification made by the legislature to be held permissible or legitimate two tests need to be satisfied. First, the classification must be based upon an intelligible differentia which distinguishes persons or things grouped together in one class from others left out of it, and the differentia must have a reasonable or rational nexus with the object sought to be achieved by the said impugned provision.³⁹

ii. Section 377 does not create a classification based on intelligible differentia

73. Sec 377, on a bare reading does not distinguish between two sets of persons or objects on an intelligible differentia and it is not apparent what is 'carnal intercourse against the order of nature'. Hence one does not know what acts are prohibited by the provision and which acts are permitted.
74. The Hon'ble Supreme Court in *Javed v. State*⁴⁰ made a strong case for the fact that classification should be 'well defined and well perceptible'. It is patently clear that the category of 'carnal intercourse against the order of nature' is neither well defined nor perceptible and hence the classification lacks any intelligible differentia. Hence the classification created by Sec. 377 is vague and arbitrary. This case is annexed here at **Flag 39**.

iii. Section 377, through judicial interpretation, distinguishes between procreative and non-procreative sexual acts

75. Despite the vagueness of the provision, the question of what is meant by 'carnal intercourse against the order of nature' has been sought to be clarified by the judiciary in numerous case law. The reported judicial decisions under Section 377 are by and large prosecutions of non consensual sex between men on one hand and children, women and other adult men on the other hand.⁴¹
76. In 1884 a Mysore Court was confronted with a case of a man who '*forced open a child's mouth and put his private parts and completed his lust*'. The Court held that '*to constitute the offence of sodomy, the act must be in that part where sodomy is usually committed*' and on the basis of this reasoning held that the act of oral intercourse is not an act which is criminalized under Section 377.⁴² This judgment is annexed here at **Flag 30**.

38 Nivedita Menon "How Natural is Normal? Feminism and Compulsory Heterosexuality" *Because I have a Voice: Queer Politics in India* 33 (Arvind Narrain and Gautam Bhan eds., New Delhi: Yoda Press, 2005).

39 *Javed v. State of Haryana* AIR 2003 SC 3057, *Gopi Chand v. Delhi Administration*, AIR 1959 SC 609. See also *Laxmi Khandhari v. State of UP*, AIR 1981 SC 873, *Babulal v. Collector Of Customs* AIR 1957 SC 877, *Budhan Choudhry v. State of Bihar*, AIR 1955 SC 191, *State of West Bengal v. Anwar Ali*, AIR 1952 SC 75, *R.K Garg V. Union of India* AIR 1981 SC 2138.

40 AIR 2003 SC 3057

41 See Alok Gupta, "The History and Trends in the Application of the Anti –Sodomy Law in the Indian Courts", *The Lawyers Collective*, Vol 16, No.7, p.9.

42 *Government v Bapoji Bhatt*, 1884 Mys. L. R. 280.

77. However by 1914, the Hon'ble High Court of Sindh in *Khanu v. Emperor* noted, "the natural object of sexual intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os [oral intercourse] is impossible". It then went on to state that "it would seem that [the] sin of Gomorrah is no less carnal intercourse than the sin of Sodom."⁴³ This judgment is annexed here at **Flag 41**.
78. The significance of the *Khanu* principle that the object of Section 377 was to criminalize forms of sex which were penetrative and which did not result in procreation formed the basis for all future judicial decisions.⁴⁴
79. 'Carnal intercourse against the order of nature' has therefore been interpreted to include all forms of sexual intercourse that involve penetration and are non-procreative. Section 377, through judicial interpretation, has created a differentia based on procreative acts and non-procreative acts. The axis of 'possibility of conception' has thus been judicially used to define the class criminalised by section 377.
80. The differentia based on procreation/non-procreation is illogical and unreasonable. While on the one hand the state criminalises certain forms of non-procreative sexual acts through section 377, at the same time, however, other forms of non-procreative sexual acts, such as family planning methods are actively promoted and supported by the Government and have been held to be constitutionally protected as a legitimate state object.⁴⁵

iv. Section 377 fails to create a classification based on consent, hence creates an overinclusive classification.

81. The reported judicial decisions under Section 377 involve prosecutions of non-consensual sex between men on one hand and children, women and other adult men on the other hand.⁴⁶ However while the facts of the case are specific to non-consensual sex between adults and those who are under the age of eighteen, the observations of the judges conflate coerced sexual intercourse or child sexual abuse with homosexuality itself. This is because on the bare reading of the provision no differentia is created between consensual and non-consensual sexual acts. Section 377 thus enacts an over-inclusive penalisation, with both voluntary and coerced falling within the ambit of 'carnal intercourse against the order of nature.'
82. In *Fazal Rab Choudary v. State of Bihar*⁴⁷, for example which was a case involving a young boy, the court noted,
- 'The offence is one under Section 377 IPC, which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking.'*
83. From the above discussion it is clear that consensual sexual acts between adults comes to be conflated with sexual acts which are coerced or are with minors. Section 377 is over inclusive as it fails to make a distinction between sexual acts which are consensual and those which are not. The classification into procreative and non-procreative sexual acts results in a situation where dissimilar acts (such as forced

43 *Khanu v Emperor*, AIR 1925 Sind 286

44 *Lohana Vasantlal Devchand v State*, AIR 1968 Guj 252. It was held that 'what is important is whether there was an act of imitating the actual act of sexual intercourse or carnal intercourse. If it was an imitative act of sexual intercourse to appease his sex urge or the sexual appetite it would be an unnatural offence punishable under Section 377 of the Indian Penal Code.' See also *Brother John Anthony v State*, 1992 Cri.L. J 1352. wherein the court had to decide the question whether 'the act of committing intercourse between the thighs is carnal intercourse against the order of nature.' The court decided that 'in intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs, the thighs are kept together and tight. ... The word 'insert' means 'place, fit, thrust'. Therefore, if the male organ is 'inserted' or thrust between the thighs there is 'penetration' to constitute unnatural offence' This decision followed the *State of Kerala vs Govindan* 1969 Cri L J 818 where the Court decided that 'thigh sex also amounted to an offence under Section 377.

45 *B.K. Parthasarthy v. Government of Andhra Pradesh* AIR 2000 AP 156, *Javed v. State of Haryana*, AIR 2003 SC 3057.

46 See Alok Gupta, "The History and Trends in the Application of the Anti –Sodomy Law in the Indian Courts", The Lawyers Collective, Vol 16, No.7, p.9.

47 (1982) 3 SCC 9. See also *Mihir v. State* Cr.L.J. 1992 488 where it was stated

'Unnatural carnal intercourse is abhorred by civilized society, which is reckoned as a crime and therefore is punishable with strict sentence. Unlike an offence of rape under Sec 376, consent of the victim is immaterial.'

sexual assault and consensual adult sexual intercourse) are treated as similar, while similar acts (consensual non-procrative sexual acts such as sex with contraceptives and anal or oral sex) are disparately criminalized.⁴⁸

84. Respondent No. 7 has argued that one cannot consent to the commission of a crime, and that consent cannot be a defence against heinous criminal acts. It must be noted that the Indian Penal Code formulates a scheme of compoundable and non-compoundable criminal offences indicating that certain criminal acts cease to be treated as crimes at the option of the complainant. Further, it is only in situations of extreme harm endangering the life of the victim that the State resorts to criminalization of acts in the private sphere. The harm principle provides the basis for rendering certain acts criminal. There is no harm caused by consensual homosexual acts.

v. The classification bears no rational nexus to the objective sought to be achieved.

85. Respondents No. 5, 6 and 7 argue that Sec 377 protects women and children, prevents the spread of HIV/AIDS and expresses a societal morality against homosexuality.

86. While section 377 was never intended to protect women and children, the Respondent No. 5 seeks to graft a new beneficial interpretation onto the purpose underlying Sec 377. However, in the absence of any law on child sexual abuse or other forms of penetrative sexual assault on women, Section 377 is serving the role, however inadequately and poorly, of filling this legislative vacuum.⁴⁹ Mindful of this, it is prayed that Sec 377 be read down to exclude consensual adult homosexual sexual activity. The legislative object of protecting women and children would in no way be hampered if the Hon'ble Court were to grant the prayer of the Respondent No. 8, i.e. remove acts of consenting sex between adults from the criminalizing ambit of Sec 377.

87. The second legislative purpose elucidated is that Sec 377 serves the cause of public health by criminalizing homosexual behavior. However this purported legislative purpose is contradictory to the averments of Respondents 4 and 5. As NACO has stated, 'It is submitted that the enforcement of section 377 of IPC can adversely contribute to pushing the infection underground, make risky sexual practices go unnoticed and unaddressed.' Section 377 thus hampers HIV/AIDS prevention efforts.

88. The question which parties defending the vires of Section 377 must address is whether the intelligible differentia has any rational nexus with the objective sought to be achieved. If the objective is to protect women and children, criminalizing consensual sexual acts between adults has no nexus to this objective. Therefore consensual sexual acts may be excluded from the purview of section 377, without prejudice to the object of protecting women and children.

vi. Section 377 is unreasonable and arbitrary.

89. It is well established that the test of arbitrariness is also intrinsic to testing the validity of a statute against Article 14.⁵⁰ Sec 377 confers unguided and unfettered discretion on state authorities and officials which allows them to arbitrarily target a class of people. As noted above in *Bachan Singh v. Union of India*,

*'Where such unguided and unstructured discretion is conferred on an authority, the law would be violative of Article 14 because it would enable the authority to exercise such discretion arbitrarily and thus discriminate without reason.'*⁵¹

48 *D.P. Minawalla vs Emperor*, AIR 1935 Sind 78, *Nowshirwan vs Emperor*, AIR 1934 Sind 206, *Queen-Empress vs Khairati*, I.L.R. 6 All 205

49 The legislative scheme of section 377, 354, and 376 are grossly inadequate to cover the range of sexual violence that children and women are subject to. The present use of section 377 to prosecute cases of penetrative non-peno-vaginal sexual assaults on women on children, is a matter of executive pragmatism and not legislative objective or intent. Recognising the lacunae in the present framework, the 172nd Law Commission Report and the Report of the National Commission for Women on amendments to the laws relating to rape and related provisions, recommended the deletion of section 377

50 *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555 at 583. See also *Menaka Gandhi v. Union of India*, AIR 1978 SC 597, *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487, *Ramana v. I.A. Authority of India* AIR 1979 SC 1628, *Bachan Singh v. Union of India*, AIR 1982 SC 1325

51 *Bachan Singh v. Union of India*, AIR 1982 SC 1325. See also *R. v. Bain* [1992] ISCR 91 cited by J. Iacobucci in *Little Sister Book and Art Emporium and others v. The Minister of Justice*, [2000] 2 S.C.R. at para 210: "Unfortunately, it would seem that whenever the Crown is granted statutory power that can be used

90. The provision is vague and unclear, and also fails to create a distinction between consensual and non-consensual adult sexual intercourse. It is unclear as to what sexual acts are covered by the provision and which are excluded and it therefore confers unguided discretion upon police officials to harass, detain, extort, blackmail and torture at their whim.
91. The Respondent No. 8 apart from placing before the Hon'ble Court the abovementioned instances of what can be characterized as the wrongful use of Sec 377 strongly asserts that even when Sec 377 is not expressly used, it allows both the police to commit acts of rape, extortion, sexual abuse and torture against LGBT persons.⁵²
92. Section 377 thus creates a climate where fundamental rights of LGBT persons can be violated with impunity due to the association of criminality with their very existence. Even where it is apparent that no actual offence has occurred or where the accused are persons to whom the provision prima facie does not apply, the section is invoked by police against LGBT persons.

vii. Section 377 unreasonably targets LGBT persons as a class and is solely based on animus towards this class

93. Though a bare reading of Sec 377 makes it clear that, it is facially neutral and that it targets not identities but acts, in its operation it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalized by Sec 377 are associated more closely with 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.
94. 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."*⁵³
95. 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.'*⁵⁴

abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuing exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provisions should be removed"

⁵²See People's Union of Civil Liberties-Karnataka, *Human Rights Violations against Sexuality Minorities in India: A PUCL-K Fact-Finding Report About Bangalore*, 2001, People's Union of Civil Liberties-Karnataka, *Human Rights Violations against Transgender People: a Case Study of Hijras and Kothis in Bangalore*, 2003, Also see the Memorandum entitled 'Sexual minorities and the Police in India: Towards a regime of accountability' submitted by thirty nine organizations working on sexuality issues to the Committee headed by Soli Sorabjee set up to Reform the Police Act.

⁵³ 539 U.S. 558 (2003)

⁵⁴ *NCGL 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 orientation.'

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 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.'

96. In the Indian context, academic opinion has also noted that, 'Sec 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.'⁵⁵ Therefore, if certain acts are associated with 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. A copy of this article is annexed at **Flag 42**.
97. Sec 377 therefore unfairly targets the LGBT community. There is a correlation between the acts criminalized under Sec 377 and the identities of that group of people who are most closely associated with these sexual acts, namely LGBT persons.
98. The question before this Hon'ble Court, is whether the majority's revulsion for a certain portion of the population can constitutionally justify a law that targets that community or renders activities that define that community, as criminal.
99. The United States' Supreme Court in *Romer v. Evans*⁵⁶, relying upon *Department of Agriculture v. Moreno*⁵⁷, 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' 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."
- A copy of this judgment is annexed at **Flag 43**.
100. 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. Sec 377 targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people. Sec 377 is sought to be justified by those opposed to the petition 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 reasonable classification under Article 14.

viii. Heterosexual and Homosexual sexual acts are to be treated alike in law.

101. Respondent No. 8 prays that all sexual acts, whether homosexual or heterosexual which cause public nuisance, be treated en par and face the same consequences in law.
102. The High Court of Hong Kong in when faced with adjudicating the constitutional validity of a provision of the law which specifically targeted homosexual sex in public, held the provision to be discriminatory and hence unconstitutional. The court noted that there was an absence of an equivalent statutory offence criminalizing forms of heterosexual sex. It went on to hold that the law, '*singles out male homosexuals as a class of persons and imposes a social and moral stigma which does not apply to anyone else*'. J. Hong Tang went on to note, '*I can see no justification for Section 118 F ... It stigmatizes homosexuality and distinguishes it from other acts of indecency in public*'.⁵⁸
103. If Sec 377 is permitted to operate in the public sphere it would lead to an unreasonable classification. Comparable homosexual and heterosexual acts would both be subject to obscenity and nuisance provisions of the Indian Penal Code, 1860 and other criminal statutes, but homosexual conduct in public would be singled out and doubly punished under section 377 as well.⁵⁹ Hence the Respondent No. 8 prays

55 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 I Rev 1431 (1992) at 1461.

56 517 U.S. 620 (1996)

57 413 U.S. 528, 534 (1973)

58 Secretary for Justice v. Yau Yuk Lung Zigo and another, FACC 12/2006

59 Public Heterosexual intimate and sexual conduct is punishable under section 294 of the IPC which

all sexual acts committed in public that may cause public nuisance be treated equally in law, and that section 377 be read down to exclude all consensual homosexual acts, whether they occur in public or in private.

viii. No presumption of constitutionality of colonial legislations

104. In *Anuj Garg v. Hotel Association of India*,⁶⁰ the Supreme Court laid down the following precedent

When the original Act was enacted, the concept of equality between two sexes was unknown... Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefore would be on the State. (Emphasis added)

A copy of this judgment is annexed here at **Flag 44**.

105. In *Anuj Garg*, a pre-constitutional law was challenged for violating the equality clause of the Constitution. It was held that there can be no presumption of constitutionality for pre-constitutional laws that were framed at a time when there was no concept of equality. Hence, the initial burden of proof is on the state to establish that the impugned pre-constitutional colonial law does not violate the right to equality.

III. Section 377 discriminates against persons on the basis of one of the prohibited grounds under Article 15(1)

i. Sexual Orientation is a protected class under Article 15(1)

106. "Sex" in 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.⁶¹

107. 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 14.⁶² The grounds that are not specified in 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 any other like basis.'*⁶³

108. Thus any autonomy impinging personal characteristics that denies 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.

ii. Discrimination on grounds of sexual orientation should be subject to strict scrutiny

109. In *Anuj Garg*,⁶⁴ the Hon'ble Supreme Court established that if a law discriminates on any of the Article 15 grounds, it needs to be tested not merely against 'reasonableness' under Article 14 but be subjected to 'strict scrutiny'. The Supreme Court held:

imposes a maximum term of three months, or with fine, or with both. By contrast section 377 imposes a punishment of '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.' If section 377 were retained in the public sphere it would be grossly discriminatory against the LGBT community and the punishment wholly disproportionate to the acts

60 AIR 2008 SC 663 at para 20.

61 *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.

Sec 9 (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."

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

63 AIR 2008 SC 663 at para 49.

64 AIR 2008 SC 663 at para 44.

Strict scrutiny test should be employed while assessing the implications of this variety of legislations... The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means

110. Further, the Hon'ble Supreme Court 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 **which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis**. In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued...*⁶⁵ (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."⁶⁶

111. The judgment establishes the following propositions:

- I. The political 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.
- II. 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.
- III. 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

iii. Section 377 fails the strict scrutiny review as mandated by Article 15

112. Section 377 serves no compelling state interest. Three state interests have been proffered as underlying section 377 – protection of women and children, protection of public health, and protection of popular morality.

113. It must be conceded that protection of women and children, as well as protection of public health, are compelling state interests that every government must pursue with vigour. However, protection of shifting popular morality does not pass the muster of a 'compelling' state interest. Detailed arguments on morality are dealt with below at section E.VII of these written arguments.

114. Furthermore, 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. Section 377, insofar as it criminalizes adult consensual sex, is definitely not necessary to protect women and children, or public health. There is no harm done to children, women, or to public health by decriminalizing consenting sex between adults.

115. Sec. 377 is immensely disproportionate to the aims sought to be achieved. The interest harmed by Sec. 377, that is the freedom to choose ones sexual 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.

65 Ibid. para 49.

66 Ibid. para 39.

IV Section 377 as it applies to consensual same-sex sexual acts is in violation of Article 21

i. Section 377 as it applies to consensual same-sex sexual acts unreasonably infringes upon the Right to Privacy

116. The Right to Privacy has been recognized as intrinsic to Article 21 through a number of judgments. In *Kharak Singh v. State of Uttar Pradesh*⁶⁷, 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."*⁶⁸

117. The question before this Hon'ble Court is now the scope of the Right to Privacy. The Hon'ble Supreme 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*⁶⁹, 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."*⁷⁰

118. In the case of *Dudgeon v. United Kingdom*⁷¹, the European Court of Human Rights held that Northern Ireland's law that criminalized consensual homosexual acts committed in private ran afoul of Article 8 of the European Convention of Human Rights⁷². The Court held that "the very existence of this legislation continuously and directly affects his private life: either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution."⁷³

ii. Section 377 as it applies to consensual same-sex sexual activity unreasonably violates the Right to Privacy of the Home

119. The Hon'ble Supreme Court has held therefore 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, should feel most at ease with himself and should be free from all societal constraints on his personality.

120. Sec 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. Sec 377 does not draw any distinction between acts committed in public or in the privacy of the home. Sec 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. Sec 377 directly, unjustly and unfairly restricts the right of an individual to satisfy his emotional needs within the privacy of his home.

iii. Section 377 as it applies to consensual sexual activity unreasonably violates the Right to Privacy of Decisions and Conduct

121. In the case of *District Registrar and Collector, Hyderabad v. Canara Bank*⁷⁴ the

67 AIR 1963 SC 1295 at para 18

68 Ibid. at para 31

69 AIR 1975 SC 1379 at para 24

70 Ibid. at para 27.

71 45 Eur. Ct. H.R. (ser.A) (1981) p. 149

72 Article 8 reads "Everyone has the right to respect for his private and family life, his home and his correspondence".

73 This case was upheld and applied in the case of *Norris v. Ireland* and *Modinos v. Cyprus* and the laws in both these cases, which criminalized same-sex private sexual acts, were negated as being violative of the Right to Privacy.

74 AIR 2005 SC 186,

Hon'ble 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 Hon'ble Supreme Court made this determination on the basis of several decisions of the United States Supreme Court, in particular *Griswold v. State of Connecticut*⁷⁵ⁿ, 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. A copy of this judgment is annexed at **Flag 45**.

122. The majority of the Court in *Lawrence*, in overruling *Bowers v. Hardwick*⁷⁶ 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."
123. 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."
124. Sec 377 is clearly violative of the Right to privacy. Sec 377 allows state officials cavalierly, and if necessary by force, to make deep and searching inquiries and scrutiny into the most intimate parts of the individual's life. The provision under challenge, denies individuals the right to decide for themselves whether to engage in particular forms of consensual sexual activity. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a society as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. Sec 377 seeks to control a personal relationship that is within the liberty of persons to choose without being punished as criminals.⁷⁷
125. Most of the instances of harassment and abuse of LGBT persons that the Respondent No 8 has drawn attention to, are not because the individuals concerned has committed the act under sec 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 sec 377 but that one can be rendered criminal merely for acting 'gay' or looking like a hijra. Sec 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 sec 377.
126. Sec 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 sec 377

75 (1965) 381 US 278

76 478 U.S. 186 (1986)

77 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."

criminalises this love and one's right to pursue happiness is thwarted.

iv. Section 377 as it applies to LGBT persons unreasonably infringes upon the Right to Life with Dignity

127. The Respondent No. 8 also assails the provision on the ground that it offends the basic dignity of LGBT persons. In its counter, the said Respondent No. 8 produces the affidavit of one Mr. Gautam Bhan, a gay man, who attests that "Sec 377 offends me personally because I feel like a second class citizen in my own country, 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 annexed at **Flag 46**.

128. The Constitution of India, in the preambles assures 'the dignity of the individual'. In the case of *Prem Shankar Shukla v. Delhi Administration*,⁷⁸ Justice Krishna Iyer held that "*The guarantee of human dignity forms part of an Constitutional culture.*" The Right to Dignity thus protects against the defiling of the personhood of the individual. This point was reiterated in *Francis Coralie Mullins v. Administrator, Union Territory of Delhi*⁷⁹

129. In the *National Coalition for Gay and Lesbian Equality and others v. Minister of Home Affairs*⁸⁰ 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 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"

A copy of this judgment is annexed at **Flag 47**.

130. Similarly Section 377 creates and fosters 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.

v. Section 377 insofar as it applies to consensual sexual acts is an unjust, unfair and unreasonable restriction on Article 21 and is hence unconstitutional.

131. The Respondent No. 8 argues that sec 377 insofar as it applies to consensual imposes unjust, unfair and unreasonable restrictions on the right to life and liberty and is hence unconstitutional.

78 AIR 1980 SC 1535

79 AIR 1981 SC 746.

80 **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."

132. The Respondent Nos. 5, 6, and 7 point out that the Right to Privacy is not absolute. Respondent No. 7 relies upon the judgment of the Hon'ble Supreme Court in *Mr. X v. Hospital Z*⁸¹ In that case, however, what was at issue was a balancing of the right to privacy of the petitioner, who was infected with AIDS, and the right to life of his fiancée. In this instance there was a clear and direct harm that would have resulted, had the petitioner's right to privacy not been infringed. In order to satisfy the test in *Mr. X v. Hospital Z*, it must be shown that there is harm that may be caused to another person or the general public that would warrant the restriction on the right to privacy of LGBT persons.
133. While it has been stated by the Respondent No. 5, that a repeal of sec 377 would 'open the floodgates of delinquent behaviour' it is not clear how this is so, and is merely asserted without any factual basis. Similarly Respondent No. 7, in his counter further avers that should consensual sexual acts between adults be legalised, it would lead to "a) consensual sati system in India, b) consensual child labour, etc etc." However, the Respondent No. 7 fails to demonstrate a causal link between permitting same-sex consensual sexual activity and his list of repercussions that legalised homosexuality would bring.⁸²
134. The Respondents 5, 6 and 7 all oppose the petition on the grounds of public morality. It was argued by all these parties that homosexuality stands at odds against public morality and the mores of Indian society. The role of morality as a justification for restriction on the right under Article 21 has been discussed below.

V. Section 377 is violative of Articles 19(1)(a), (b), (c) and not saved by reasonable restrictions under Article 19(2), (3), and (4)

135. It has been contended by the Respondent No. 8, that Section 377 imposes structural limits to 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.
136. In *Bennett Coleman and Co. v. Union of India*⁸³, the 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*⁸⁴.
137. 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. 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.*"⁸⁵
138. 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*

81 AIR 1999 SC 495

82 The Wolfenden Committee had to consider similar arguments to those put forward by the Respondents 5 and 7. As the Committee observed, "It is contended that Conduct of this kind is a cause of the demoralization and decay of civilizations. ... We have found no evidence to support this view, and we cannot feel it right to frame the laws that should govern this country...In so far as the basis of this argument can be precisely formulated, it is often no more that the expression of revulsion against what is regarded as unnatural, sinful and disgusting... but moral conviction or instinctive feeling, however strong, is not a valid basis for over riding the individuals privacy and for bringing within the ambit of criminal law private sexual behaviour of this kind.' Wolfenden committee report 1957 para 54.

83 (1972) 2 SCC 788.

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

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

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."

A copy of this article is annexed at **Flag 47**.

139. 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 plays in facilitating artistic and scholarly endeavours of any sorts."*⁸⁶

This judgment is annexed at **Flag 48**.

140. Sec 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.

141. 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.⁸⁷

142. The Right to Freedom of Speech and Expression includes the right to know, the right to information, and the right to impart and receive ideas and opinions. The freedom to receive and to communicate information and ideas without interference is thus an integral aspect of the freedom of speech and expression.⁸⁸

143. Section 377 infringes the rights of LGBT persons to receive information with regard to safe sexual practices, HIV/AIDS etc. A very real harm is caused to LGBT persons because of this infringement of the right to receive vital and often life saving information.

144. The Respondent No. 8 has also contended that the fundamental freedoms under Article 19(1)(b), and (c) of the LGBT community are infringed by Section 377. The continued existence of the Section ensures that the sexuality of LGBT persons cannot be publicly expressed, nor can they meet without fear of police harassment in public places. The Right to association is curtailed due to the constant threat that Section 377 will be used to proscribe organisations and associations of LGBT persons. Subsequent to the arrests of the four health workers in Lucknow in July 2001, on the basis of materials seized from the NGO office other groups and NGO's around the country working on issues of sexual health and rights of LGBT persons were targeted and harassed by police.

86 AIR 1995 SC 1237 at 1259.

87 *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.

88 *State of Uttar Pradesh v. Raj Narain* AIR 1975 SC 865 at 884, *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* AIR 1995 SC 1236, *Hamdard Dawakhana v. Union of India* AIR 1960 SC 554.

145. The freedoms guaranteed under Article 19(1) must be interpreted broadly. The question to be then considered is whether Sec 377 is saved under the 'reasonable restrictions' clause. Section 377 is sought to be justified on the ground that it protects public decency and morality. These arguments are addressed below.

VI. Morality as a ground for the restriction of Fundamental Rights

146. Public Morality has been cited as a justification for the continuance of section 377 by Respondents, 5, 6 and 7. It has been asserted by these Respondents that Indian public opinion is squarely against homosexuality. The question is therefore, whether public morality is a valid basis for restriction of a fundamental right.

147. Respondent No. 8 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 'constitutional' morality, not popular morality.

148. As the South African Constitutional Court noted in a decision which struck down the death penalty as unconstitutional,

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.⁸⁹

A copy of this judgment is annexed here at **Flag 49**.

149. The question of the State in fact being a protector of constitutional morality was also made in another decision of the South African Supreme 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.⁹⁰

150. Thus popular morality, or public disapproval of certain acts is not a valid justification for restriction of the rights under Articles 14 and 21. Instead, it is the moral values of the Constitutional framework, deeply rooted in a commitment to preserving 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.

151. 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."

This judgment is annexed at **Flag 50**.

152. Thus the United States Supreme Court decisions lay down the clear propositions

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

90 National Coalition for Gay and Lesbian Equality v Minister of Justice, n

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 the due process clause.⁹¹

153. 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*"⁹²

A copy of this report is annexed at **Flag 51**.

154. In the case of *Dudgeon v. United Kingdom*⁹³, the European Court of Human Rights held that "*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.*"⁹⁴

i. Public Decency and Morality as a ground for restricting the Right under Article 19

155. Respondent No. 8 asserts that the freedoms granted by Article 19(1) must be interpreted broadly and the reasonable restriction of 'public decency and morality' upon fundamental must be construed narrowly.

156. The Wolfenden Committee reached a similar conclusion. It observed, '*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 in crude terms, not the law's business*'⁹⁵

157. In the Communication by Nicholas Toonen to the Human Rights Committee, it was observed, 'that the very fact that the laws are not enforced against individuals engaged in private, consensual sexual activity indicates that the laws are not essential to the protection of that society's moral standards.'⁹⁶

158. Respondents 5, 6 nor 7 fail to demonstrate how consensual sexual acts, done in the privacy of one's home, can or does offend public morals. None of these parties have contended that prosecution of same sex acts in private is essential for the purpose of preserving public 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.

ii. No uniform public opinion against homosexuality

159. The Union of India and Respondent no 7 oppose the petition on the grounds of public morality. It has been asserted by all these parties that homosexuality stands at odds against public morality and the mores of Indian society.⁹⁷

160. It is unfortunate that these Respondents seek to portray public opinion and Indian

91 See *Planned Parenthood v. Casey*,¹ 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."

92 Wolfenden Committee report, 1957 at para 24.

93 45 Eur. Ct. H.R. (ser.A) (1981) p. 149

94 Ibid.

95 Wolfenden Committee report, op. cit. para 52.

96 *Toonen v. Australia Communication No. 488/1992*, Decision by the Human Rights Committee, under the International Covenant on Civil and Political Rights at para 6.8

97 Ratna Kapur, "Erotic Disruptions: Legal Narratives of Culture, Sex and Nation in India" 10 *Columbia Journal of Gender and the Law* 333 (2000). Where her key concern is to look at the multiple ways in which culture is deployed in contemporary legal controversies about sex and sexuality in India. She discusses law's role in simultaneously reinforcing and essentialist story about culture as well as providing space for resisting this construction. She examines how culture is used to delegitimize sexual practices and activities by casting them as foreign and contaminating.

morality and uniform, conservative and intolerant of difference. The Petitioner and Respondent 8, relying on academic treatises, newspaper reports and public statements by eminent public figures and intellectuals have demonstrated Indian society and public morality has historically been and continues to be is diverse, evolving and open in its attitude to different sexualities.

161. Public opinion too does not uniformly favour the criminalization of homosexuality. Enumerated below are some instances of positive public opinion on LGBT concerns, as reflected in literature, dramatic performances, popular culture, political mobilisations and academic conferences.

- August 15 1981, eminent playwright Vijay Tendulkar's Marathi play *Mitrachi Gosht*, about lesbians, performed to critical acclaim in Mumbai and Thane.
- 1990, *Bombay Dost*, India's first gay and lesbian magazine made its debut in Mumbai.
- 1993, the AIDS Bedhbhav Virodhi Andolan organized the first public demonstration for gay rights and against police harassment.
- 1997, Humjinsi Conference in Bombay on the Rights of LGBT Persons, and the subsequent publication of *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*.
- 1997, First academic conference on Gay Rights held at the National Law School of India University, at Bangalore.
- 1999, Penguin India published *Yaarana*, an anthology of Indian gay male writing, and *Facing the Mirror*, a corresponding volume on lesbian writing.
- 2001, publication of *Same-sex Love in India* edited by prominent historians Saleem Kidwai and Ruth Vanita (MacMillan Press), an anthology of extracts on same-sex love in ancient and historical Indian texts.
- 2003, First Calcutta Rainbow Pride March. The annual Kolkata March has given a new visibility to the existence of LGBT persons. **Annexure R27** is a newspaper report describing this incident. ('The Telegraph', dated 21st June 2005)
- 2003, *Hijra Habba*, a public cultural festival for hijras and kothis at Bangalore's Town Hall. **Annexure R 28** is a news report of the festival ('The Hindu' dated September 8th, 2003)
- 2003, Penguin India released Raj Rao's novel *The Boyfriend* to popular and critical acclaim
- 2005, Resolution passed at the Indian Association of Women's Studies seeking a repeal of Section 377IPC as it "clearly violates every principle of equity, justice and citizenship."
- 2006, renowned filmmaker Amol Palekar makes *Quest*, a film about same-sex relationship between two men that is commercially released.
- 2006, *Loving Women: Being Lesbian in Unprivileged India* by Maya Sharma, which documents the stories of working-class lesbian women living in North India, published by Yoda Press
- 2006, Panel discussions on Law, Rights and Sexuality, at the Critical Legal Studies Conference organised by National Academy of Legal Studies and Research University of Law (NALSAR, Hyderabad) **Annexure R29** is an extract from the Conference Report dated 1st to 3rd September 2006
- 2006, the National Shadow Report to United Nations Committee for the Elimination of All forms of Discrimination Against Women (CEDAW), prepared by Indian women's groups highlights violations faced by women on the basis of their sexual orientation as well as by Hijras, including the implications that Section 377 has on their lives. **Annexure R30** is a True copy of the National Shadow Report dated November 2006.
- November 2006, India Social Forum, Delhi. LGBT persons publicly testified to the violence and harassment faced by them on account of Section 377 IPC. **Annexure R31** is a News report titled 'Repeal laws against those with different preferences' ('The Hindu', dated Saturday, November 11th, 2006)
- LGBT Pride Marches on June 29, 2008 in Delhi, Bangalore and Kolkatta each of which attracted large crowds.

162. The voluminous documentation from the Counter Affidavit of the Respondent No. 8, does show that public morality is not uniformly opposed to homosexuality and that there is significant support for the rights of LGBT persons in Indian society and culture.

F. Conclusion

163. Therefore Sec 377 violates the constitutional protections embodied in Articles 14, 19 and 21. It suffers from the vice of unreasonable classification, is arbitrary in the way it unfairly targets the LGBT community. It also unreasonably and unjustly infringes upon the Rights of Privacy both zonal and decisional. It also conveys the message that LGBT persons are of less value than other people, demeans them and unconstitutionally infringes upon the Right to Live with Dignity of LGBT persons. Section 377 also creates structural impediments to the exercise of freedom of speech

and expression and other freedoms under Art 19 by LGBT persons and is not protected by any of the restrictions contained therein.

164. Furthermore, morality by itself cannot be a valid ground for restricting the right under Articles 14 and 21. Public disapproval or disgust for a certain class of persons can in no way serve to uphold the constitutionality of a statute. In any event the Respondent No. 8 has provided many instances in culture and public and government opinion which shows that Indian society is vibrant, diverse and democratic and LGBT persons have significant support in the population.
165. Keeping in mind that section 377 is the only law that punishes child sexual abuse and fills a lacuna in rape law, it is prayed before this Hon'ble Court to read down Sec 377 to exclude acts of consenting same-sex sexual acts between adults.
166. If it is not read down, Sec 377 would clearly be in breach of the fundamental constitutional values embodied in Art 14, 19 and 21. It is an established principle of interpretation that if there are two ways of reading a statute, one of which is constitutional and the other would render the provision unconstitutional, then the former reading should be adopted. In the interests of justice and to preserve the constitutionality of the provision, it is prayed before this Hon'ble Court declare that section 377 is read narrowly so as to exclude consensual same-sex sexual acts between adults from its ambit.