IN THE SUPREME COURT OF INDIA
(CRIMINAL APPELLATE JURISDICTION)

WRIT PETITION (CRL) NO.100/2018

IN THE MATTER OF:

Arif Jafar …Petitioner

VERSUS

Union of India & Ors. …Respondents

AND

WRIT PETITION (CRL.) NO.101/2018

Ashok Row Kavi and Ors …Petitioners

VERSUS

Union of India & Ors. …Respondents

AND

IA NO. 10779 of 2018 in W.P. (Crl.) 76 of 2016

Naz Foundation (India) Trust …Intervenor

Navtej Singh Johar & Ors. …Petitioner

VERSUS

Union of India …Respondent

NOTE OF ARGUMENTS BY MR. ANAND GROVER, SENIOR COUNSEL, ON BEHALF OF THE PETITIONERS

I. ORIGIN AND INTERPRETATION OF SECTION 377, INDIAN PENAL CODE, 1860 ("IPC")

a. Origins of the anti-sodomy law in England:

1. The first records of sodomy as a crime can be found in *Fleta (1290);* the text categorically prescribed for the burning alive of the 'sodomite'. Records of sodomy as a crime also found in the *Britton (1300);* the text also prescribed for the burning of the 'sodomite'.
2. The Buggary Act of 1533 was passed during the reign of Henry VIII, which penalized acts of sodomy by hanging. The statute took over the offence of buggary from ecclesiastical law. The term '*abominable'* was borrowed from Book of Leviticus (18:22 and 20:13), therefore the rationale of the provision is unmistakably religious. The law prohibited the '*abominable vice of buggary'* (a term which was associated with sodomy by the 13th century) committed with mankind or beast.
3. The term 'buggary' traces back to 'bougre', or heretic in old French, and to the Latin Bulgarus for Bulgaria (depicted as a place of heretics). By the 13th century, the term was clarified to mean anal sexual intercourse.
4. In 1563, when Henry VIII's daughter Mary succeeded her brother and restored England's papal allegiance, all Protestant laws were repealed. But when Henry's daughter Elizabeth became queen, a new version of the Act was passed. The law was enacted one year after the Parliament ended the papal jurisdiction over English Church. Catholic Courts were unsympathetic to Henry VIII's divorce case. The buggary law was part of a widening campaign against Catholics, which lead to the expropriation of monasteries.
5. In 1644 the crime was described by the English jurist Sir Edward Coke as "*a detestable and abominable sin amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with brute beast, or by woman with brute beast".* This was clarified to mean anal sex

between two men, a man and a woman and beastiality. In 1767, The English jurist Sir William Blackstone in his commentaries on the Laws of England described the Buggary Act as prohibiting the "infamous crime against nature".

6. In 1835, English MP Henry Labourchere proposed amendment to the law to also punish '*any male person who in public or private commits or is party to the commission of or procures or attempts to procure the commission by any male person of any act of* ***gross indecency*** *with another male person"*, i.e., non-penetrative sex between men. This offence was so unrelated to and disproportionate to the debate on regulating sexuality in England at the time, the press quickly dubbed it as the 'blackmailer's charter'. Later penal codes in British colonies incorporated versions of this law. However, even though Labouchere's amendment only sought to criminalize male-male sex, some colonial governments extended the law to sex between women.

7. The Offences Against Persons Act, 1861 consolidated the law on physical and violent offences in Britain. It included the consensual and non-violent offence of buggary, however substituted the death penalty for a prison sentence of 10 years.

b. ***Origins of the anti-sodomy law in India***

8. The codification of sexual offences in British Colonies began in 1825, when the mandate to devise law for Indian colony was handed to politician and historian Thomas Babington Macaulay. Macaulay chaired the first Law Commission of India and was the main draftsperson of the Indian Penal Code, 1860 ('IPC') – the first codified criminal law developed in any part of the British Empire.

9. In 1837, first draft of Indian Penal Code contained the antisodomy law in Clauses 361 and 362, as follows:

"*Of Unnatural Offences:*

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

10. Macaulay, stated in the draft report that "*Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said…We are unwilling to insert, either in the next, 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 that would be done to the morals of the community by such discussion would far more than compensate for any benefit which may be deprived from legislative measures framed with the greatest precision."*

11. Section 377 (*Unnatural Offence*) was enacted in its present form by the British Colonial Government, which reads as:

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

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

12. The jurist Edward Coke in his treatise on English law phrases explained it as "*acts committed by carnal knowledge against the ordinance of the Creator, and order of Nature…"* He specified that

anal sex between two men or a man and a woman, along with beastiality were comprised in the expression.

13. The offence in Section 377, IPC was different than the 1837 draft, as it required 'penetration' as opposed to 'touching'. In comparison to the offence of buggary under ecclesiastical law in England, Section 377, IPC was overbroad depending on the interpretation Courts may give to "*carnal intercourse against the order of nature*".

c. Victorian morality of IPC exported to other British colonies:

14. Section 377 of the Indian Penal Code, 1860, became a model anti-sodomy law for the Commonwealth countries in Asia, Pacific Islands and Africa. (***See***: *This Alien Legacy: The Origins of Sodomy Laws in British Colonialism, Human Rights Watch, 2008*).

15. In Africa, countries that inherited versions of the anti-sodomy law from the British Empire are: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. Between 1897 and 1902, British administrators also broadly applied IPC-based codes to African colonies, in particular to Kenya and Uganda.

16. Colonial legislators brought the law because they felt 'native' cultures did not punish 'perverse' sex severely. The colonized needed compulsory re-education in sexual mores according to Judeo-Christian morality. Imperial rulers believed that as long as they lived and travelled through their settler colonies, 'native viciousness' and 'white virtue' had to be segregated: the former policed and the latter acclaimed.

17. It is well-documented that the personal views on morality of the colonial officials, rather than logic or respect for indigenous

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traditions, led to application of IPC-based penal codes uncritically across the Asian and African continent.

18. Almost none of these laws modelled on Section 377, Indian Penal Code, 1860 expressly mention ‘*homosexuality’* or ‘*homosexual acts’*, as the term ‘*homosexual’* was only coined in 1869.

19. The so-called anti-sodomy laws universally make no distinction based on age or consent of persons, thereby conflating and identifying homosexuality by association with violent sexual offences like paedophilia or rape, and intensifying socio-legal stigma.

20. An explanation to why criminalization of homosexuality was important to colonial governments and post-colonial states is to look at some other laws and practices the colonial governments imported along with the anti-sodomy laws. These laws seen together served ‘*civilizing mission’* of Europe over its ‘*barbaric’* colonial subjects. Vagrancy laws, public nuisance laws and anti-begging laws target people whom officials see as wandering or loitering in public with no purpose. Enforcement was always, and continues to this day in India and other former colonies, selectively targeting despised and vulnerable groups such as homeless, beggars, indigenous people, migrant labourers, transgender persons, sex workers, nomadic tribes or travellers. These laws in effect criminalize poverty and ‘despised’ identities, to keep the social and economic inequality out of public sight.

d. Scope of Section 377, IPC in India expanded by judicial interpretation

21. Initially oral sex was held not to be covered by Section 377 [***Govt.***

v. Bapoji Bhatt *1884 (7) Mysore* LR 280, Para nos. 281 and 282]. Later various other acts were read into Section 377 vide judicial pronouncements as follows:

i. Oral sex [***Khanu v. Emperor*** *1925 Sind* 286, para 2 at page 286].

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

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

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

v. Penetration into any orifice of anyone's body except the vaginal opening of a female [***State of Gujarat v. Bachmiya Musamiya*** 1998 (3) Guj L.R. 2456 at para 48]. vi. In later judgments, the orifice could be created artificially by the human body such as thighs joined together, the palm folded etc.

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

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

i. Initially a *procreative test* was used, whereby acts having no possibility of conception of human beings were covered.

[***Khanu v. Emperor*** at para 2; ***Lohana Vasanthlal v. State***, AIR 1968 Guj 352 at para 9].

ii. Subsequently, *imitative test* was formulated, i.e., acts of oral and anal sex become imitative of the desire of sexual intercourse. *[**Lohana Vasanthlal v. State*** at para 6-9]. iii. Later, a *test of sexual perversity/ immorality/ depravation of mind* was sought to be used. [***Fazal Rab Choudhary v. St. of Bihar***, AIR 1983 SC 323 at para 3; ***Mihir @ Bhikari Charan Sahu v. St. of Orissa**,* 1991 Cri LJ 488 at paras 6 and 9; ***Khandu v. Emperor*** at page 262].

e. Meaning of words 'carnal intercourse' and 'order of nature'

24. The Concise Oxford Dictionary (Ninth edition 1995), defines 'carnal' to mean, *of the body* or *flesh*; *worldly* and *sensual*, *sexual.*

25. The expression 'carnal intercourse' in Section 377, IPC is distinct from the expression 'sexual intercourse', which appears in Sections 375 (*Rape*) and 497 (*Adultery*), IPC. The expression, 'carnal intercourse' is broader than 'sexual intercourse'.

26. All the three sections presuppose that penetration is sufficient to constitute carnal intercourse. This is in contrast to the full act of sexual or carnal intercourse, which would mean the discharge of semen. This implies that the penetration contemplated in all the three sections is that of the penis and that even partial penetration would be sufficient. Non-penile penetration does not come within the purview of penetration in 375 (prior to 2013 amendment) or 377 or 497, IPC.

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

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Therefore, the expression ‘*sexual intercourse’* means ‘*penilevaginal sex*’.

28. The expression ‘carnal intercourse’ is therefore all sexual acts penile non-vaginal. The expression carnal intercourse against the order of nature may refer to ‘*penile non-vaginal sexual acts*’ that do not result in procreation.

f. Persons to whom the law applies [man, woman, animal, explanation

29. The text of Section 377, IPC makes clear that the ‘victim’ contemplated in the law can be male, female or animal. The ‘offender’ contemplated in the law is male, as according to the Explanation to the provision, (penile) penetration is sufficient to constitute the offence.

30. Judicial interpretation also covered minors in cases of child sexual abuse [***Calvin Francis v. State of Orissa, 1992 (2) Crimes 455***].

31. In recent times, Section 377, IPC is also used by married women to seek remedy for non-consensual anal or oral sexual acts.

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

g. Law Reforms

The Wolfenden Committee Report (1957):

33. The Wolfenden Committee Report particularly recognized how the English anti-sodomy law created at atmosphere for

blackmail, harassment and violence against homosexual men, as it noted "*English law has recognized the special danger of blackmail in relation to buggary and attempted buggary in Section 29 of The Larceny Act, 1926 …We know that blackmail takes places in connection with homosexual acts. Most victims of the blackmailer are naturally hesitant about reporting their misfortunes to the police, so that figures relating to prosecutions do not afford a reliable measure of the amount of blackmail that actually goes on…We have found it hard to decide whether the blackmailer's primary weapon is the threat of disclosure to the police, with attendant legal consequences, or the threat of disclosure to the victim's relatives, employers or friends, with attendant social consequences. It may well be that the latter is the more effective weapon, but it may yet be true that it would lose much of its edge if the social consequences were not associated with the present legal position*".

34. England and Wales themselves decriminalized sexual relations between consenting, adult males in 1967, on the recommendation of The Wolfenden Committee that urged "*homosexual conduct between consenting adults should no longer be a criminal offence…The law's function is to preserve public order and decency, and to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior…*".

35. However, this came too late for most of Britain's colonies who gained independence in 1950s and 1960s, who uncritically retained such laws.

36. Anti-sodomy laws, even when unenforced, express contempt, create inequality, increase vulnerability and reinforce secondclass citizen status in all areas of life for lesbian, gay,

bisexual and transgender persons. They relegate people to inferior status in law and society, by declaring their most intimate feelings as 'unnatural' and 'illegal'.

37. As England and Wales decriminalized sexual acts between consenting adults in private in 1967, Scotland followed in 1980 and Northern Ireland in 1982. However, these legal reforms set the age of consent for homosexual men at 21 years of age. This was lowered to 18 in 1990s.

38. At the same time, the age of consent for heterosexual couples was set of 16 years of age across Britain.

Law Commission Report (42nd):

39. In 1971, the 42nd Law Commission of India Report deferred to the public morality of the 'community' on homosexuality and recommended continued criminalization under Section 377, IPC, albeit less severely.

Law Commission Report (172nd):

40. In 2000, the 172th Law Commission of India Report raised questions on the rationale of the law in treating child sexual abuse as morally and legally equivalent to sexual acts between consenting adults in private under Section 377, IPC. The Report broadly looked at overhauling the sexual assault law in India, and in recommending amendments to existing laws to cover all forms of non-consensual, penetrative and non-penetrative sexual acts for male as well as female victims of sexual assault law, recommended deletion of Section 377, IPC.

41. The European Court of Human Rights ruled in 2001 that separate legal age of consent violated the right to equality and right to privacy for homosexual men. United Kingdom adopted

the ECHR's directive by legislative amendment in 2004 (*See Euan Sutherland v. United Kingdom, 2001 ECHR 234).*

42. In 2004, a law allowing civil partnerships for same sex couples was passed throughout UK.

43. On 2nd July 2009 the Hon'ble High Court of Delhi declared that Section 377 of IPC, in so far as it criminalizes consensual sexual acts of adults in private is violative of Articles 14, 15 and 21 of the Constitution of India (*Naz Foundation (India) Trust v. NCT of Delhi, 160 DLT 277*). Pertinently, the Union of India, did not file any appeal against the order of the Delhi High Court.

44. On 20th June, 2012, the Parliament passed the *Protection of Children against Sexual Offences Act* (hereinafter 'POCSO'), 2012 that sought to protect children, *inter alia*, from penetrative sexual assault and sexual harassment, and provides a comprehensive child-centric redressal mechanism to deal with such offences. It included acts also covered under Section 377, IPC and is gender neutral.

45. The Justice Verma Committee Report, 2013 recommended that the proposed Criminal Law Amendment Act, 2012 shall be modified to include sexual assault on male and transgender persons to effectively provide access to justice.

Parliamentary debates in 2013 – section 377 not amended as matter was 'sub-judice':

46. It is clear from the parliamentary debates on the Criminal Law Amendment Bill, 2013 that when the question of unnatural offences under Section 377 was raised in Lok Sabha, the Hon'ble Speaker of the House said "*this matter is currently subjudice. We do not need to deliberate on the same*", as evident from the Lok Sabha debates. In effect, Parliament did not amend the Section 377, during the 2013 Amendment process, precisely because this

Hon'ble Court was seized of the issue and the judgment was reserved. The fact of Parliament not amending the law cannot be interpreted as evidence of the legislative endorsement of the existing Section 377.

Supreme Court Judgment, 2013:

47. On 11th December 2013, this Hon'ble Court reversed the decision of the Hon'ble High Court of Delhi and held that Section 377 of IPC does not suffer from the vice of unconstitutionality and the declaration by the High Court is legally unsustainable. (***Suresh Kumar Koushal v. NAZ Foundation & Ors***., (2014) 1 SCC 1).

48. On 24th December 2013, NAZ Foundation (India) Trust filed Review Petition No. 41-55 of 2014 pointing out glaring errors on the face of the record and patent errors of law. Others also filed review petitions. On 28th January 2014, this Hon'ble Court dismissed the review petitions by circulation.

49. In the same year, The Marriage (Same Sex Couples) Act, 2013 legalized marriage of same sex couples in England and Wales.

50. On 31st March 2014, NAZ Foundation (India) Trust filed the curative petition (Civil) No. 88-102 of 2014 against the judgment dated 11.12.2013 along with the judgment and order in review petitions dated 28.01.2014. Several others filed curative petitions.

51. By an order dated 2 February 2016, this Hon'ble Court referred the Curative Petitions to the Curative Bench.

52. Writ Petitions came to be filed by various people challenging the validity of Section 377 IPC.

53. On 24 August 2017, this Hon'ble delivered the judgment in ***Justice KS Puttaswamy v Union of India***, holding that the privacy is a protected fundamental right in the Constitution and

that ***Suresh Kumar Koushal*** has been decided incorrectly on a number of issues including privacy.

54. On 8 January 2018, this Hon'ble Court in ***Navtej Singh Johar & Ors. v. Union of India****,* W.P (Crl.) No. 76 of 2016 decided to refer the examination of the constitutional validity of Section 377, IPC to a 5-judge constitutional bench.

55. On 1 May 2018, this Hon'ble Court ordered that the petition of the present Petitioner be tagged with Writ Petition (Crl.) No. 76/2016.

II. SECTION 377 VIOLATES ARTICLES 14, 15, 19 AND 21 OF THE CONSTITUTION

a. Fundamental Rights protected in Chapter III must be viewed in light of Constitutional goals and aspirations

56. The Constitution of India and its various chapters including the Preamble, Fundamental Rights (Part III) and Fundamental Duties (Part IV-A) is infused with humanism, i.e. the spirit to respect and cherish one another as human beings.

57. The Constitution is a living document. Constitutional provisions must be interpreted in a liberal and expansive manner, so as to anticipate and respond to changing circumstances, emerging challenges and evolving aspirations of the people.

58. Provisions under Part III must be interpreted so as to "*expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content.*"

59. The Preamble to the Constitution incorporates certain core and abiding values that pervade all other provisions in the document. The Preamble also lays down the vision and goal of the

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Constitution, which is, the *"realisation of a social order founded in* justice, *equality and the dignity of the individual."*

60. Respect for the dignity of all persons is a constitutional principle as well as a constitutional goal.

61. In the same vein, the Constitution enjoins the State and citizens to show respect for diversity, accepting and valuing people's differences rather than censuring or discriminating against them. In ***Subramanian Swamy v. Union of India*** (2016) 7 SCC 221 (hereinafter "*Subramanian Swamy*"), this Hon'ble Court proclaimed:- "*Respect for the dignity of another is a constitutional norm."* The reference to fraternity in the Preamble is nothing but the "*constitutional assurance of mutual respect and concern for each others's dignity.*"

62. The Preamble sets the humane tone and temper of the founding document. [***Prem Shankar Shukla v. Delhi Administration***, (1980) 3 SCC 526 at paras 1 and 21]. It aspires to secure:- "*Justice*", "*Liberty*", "*Equality*" and "*Fraternity assuring the dignity of the individual and the unity of the nation.*" In ***Justice KS Puttuswamy v Union of India*** (2017) 10 SCC 1, this Hon'ble Court observed that:-"*Fraternity is to be promoted to assure the dignity of the individual."* Fraternity under the Constitution is not built on conformity or sameness but is borne out of respect for and appreciation of differences in society.

63. Fundament Rights under Part III are infused with the humanistic spirit and democratic values enunciated in the Preamble. Fundamental rights not only derive meaning and content from such values but also serve as the means by which the constitutional vision laid down in the Preamble is realised. **[*Justice KS Puttuswamy v Union of India*** (2017) 10 SCC 1 at para 126**]**

64. Fundamental Rights do not operate in *silos* but are interlinked and intertwined in a manner that contributes to the blossoming of the individual and the human personality.

65. The Constitution of India envisions a society based on plurality, diversity and fraternity. The fundamental right to freedom of speech and expression must be understood in this context. Article 19 of the Constitution not only protects popular forms of speech and expression but also protects unpopular forms of speech and expression. Unpopular forms of speech and expression require a higher degree of protection as in the absence of unpopular forms of speech and expression, a diverse and plural society as envisaged by the Constitution, cannot be realised.

66. Articles 14, 15, 19 and 21 of the Constitution they must be read together.

67. International human rights law is to be read into Part III of the Constitution. This Hon'ble Court has long rejected judicial–insularity, in favour of accepting international law and comparative jurisprudence especially in adjudicating the nature and content of fundamental rights. "*In the view of this Court, international law has to be construed as part of domestic law in the absence of legislation to the contrary, and perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content of international conventions to which India is a party.*" [See ***Justice KS Puttuswamy v Union of India*** (2017) 10 SCC 1at para 103]

III. Section 377, IPC violates Article 14

a. *Section 377 is vague*

68. Section 377, IPC criminalises a person who 'voluntarily engages in '*carnal intercourse against the order of nature*' with any man,

woman or animal'. What constitutes '*carnal intercourse against the order of nature'* is neither defined in the section, nor in the IPC or any other law for that matter.

69. The language of section 377 is so vague that ordinary persons do not know what conduct would invite penal prosecution. Similarly, authorities who enforce the law remain uncertain as to what actions are lawful and what are prohibited by the law.

70. Laws should give persons of ordinary intelligence a reasonable opportunity to know what is prohibited. Similarly, those who administer the law must know whether and what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place. [***Kartar Singh v. State of Punjab*** (1994) 3 SCC 569 at para 130].

71. Vague law that does not offer clear construction and offers boundless sea of uncertainty taking away guaranteed freedom, violates the constitution [***K.A. Abbas v. The Union of India and Anr***. (1970) 2 SCC 760] at para 46].

72. Where the language of a provision is vague, the Court must construe it in a manner that accords with the legislative intent. The rationale behind the introduction of section 377, is however, equally vague. Debates at the time of adopting the IPC do not offer any guidance in this regard. In the context of section 377, which was originally numbered as clauses 361 and 362 in the Draft Penal Code, the only record available is Lord Macaulay's statement, which reads:-" *Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgement of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the*

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notes anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefit which be derived from legislative measures framed with the greatest precision."

73. No legislative intent is discernable except that the subject matter of section 377, i.e *'carnal intercourse against the order of nature'* was considered repugnant by the draftsmen of the Penal Code. Such an inexplicit and subjective reference hardly offers any aid to Judges to interpret the expression '*carnal intercourse against the order of nature'* with precision or certainty.

74. The expression "*order of nature*" in section 377 is open-ended, vague and undefined. 'Order of nature' implies something that is 'natural'. What is natural to one person, may not be to another. For gay persons, attraction towards a person of the same-sex is as 'natural' as it is for heterosexual persons to feel attracted towards someone of the opposite sex. There is no demarcating line to decide what is within or outside the 'order of nature'. (***Shreya Singhal, para 79***)

75. An individual's liberty cannot be restricted by a law which is nebulous and uncertain in its definition and application [See ***A.K. Roy v. Union of India*** (1982) 1 SCC 271 at para 58, 61].

76. Section 377 is unconstitutionally vague and must be struck down.

b. Section 377 is overbroad

77. Section 377 is cast very widely so as to take into its sweep private, intimate conduct of a consensual nature between adults as well as sexual acts that are non-consensual or involve a minor. This is

amplified by the expression:- "*Whoever, voluntarily has carnal intercourse against the order of nature with any man, woman.....*"

78. The former is an expression of one's intimate personality, privacy and autonomy, which is protected under the Constitution. On the contrary, actions of the latter kind i.e. non-consensual sex violate the dignity, privacy and autonomy of the victim. Section 377 is overbroad for it prohibits conduct, which is constitutionally protected. [***Shreya Singhal*** **paras 87, 94**]

79. The validity of a law that imposes a blanket ban on any act, innocent or otherwise, cannot be upheld. [See ***Kamlesh Prasad v State of Bihar*** AIR 1962 SC 1166].

c. Section 377 is manifestly arbitrary

80. Section 377, IPC contains no determination or guidance on what constitutes unlawful conduct and why. With punishment extending up to imprisonment for life, section 377 subjects lawabiding persons, who are simply exercising their constitutionally protected freedom and personal choice to punitive treatment at the hands of the State. This is arbitrary and violative of equality and equal protection of the law.

81. In ***Shayara Bano v. Union of India & Ors***., *(2017) 9 SCC 1,* this Hon'ble Court held: "*The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.".*

82. The proscription of consensual sexual expression under section 377, IPC is not founded on any known or rational principles.

    Reasonable implies intelligent care, and deliberation, i.e the choice of a course which is guided by reason. The only apparent reason

for section 377 is demanding conformity to 'the order of nature', a standard which itself is vague and incomprehensible.

83. An arbitrary act is unequal both according to political logic and constitutional law and is therefore violative of Article 14. [***E.P. Royappa v. State of T.N***., (1974) 4 SCC 3 at para 67].

84. Failure to protect from arbitrary state action violates right of equality under Article 14. [See ***KS Puttaswamy (retd.) v. Union of India*** at para 298].

d. Section 377 does not satisfy the test of classification under Article 14

85. Section 377 classifies '*carnal intercourse' on the basis of whether it is within the order of nature or against it.*

86. The marginal note, as well as title of the section, suggests that what is 'against the order of nature' is what is 'unnatural'. Conversely what is within the order of nature is natural.

87. There is no intelligible difference between 'natural' and 'unnatural' sex. What is natural to one may be unnatural to another. It is personal and subjective.

88. In ***Anuj Garg v Hotel Association of India*** **[(2008) 3 SCC 1 at para 26**], this Hon'ble Court had held that a criteria for classification which may have been valid at the time of its adoption, may not be on account of changing social norms. The distinction, if any, between sex within and against the order of nature under section 377 may have been palpable in the 19th century under colonial rule but not in the 21st century under a constitutional scheme.

89. Besides the classification under section 377 has no rational nexus with the object sought to be achieved. More so, when the object [of prohibiting sex against the order of nature] itself is illogical,

irrational and cannot be countenanced in a liberal, democratic and plural society.

90. It is settled law that if the object is illogical, unfair and unjust, necessarily the classification will have to be held unreasonable. [***Deepak Sibal v. Punjab University*** **(1989) 2 SCC 145, at para 20**)].

e. Section 377 treats unequals equally

91. While equals cannot be treated unequally under Article 14 of the Constitution, unequals cannot be treated equally. Treating unequals as equals offends the doctrine of equality enshrined in Article 14 [***Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and Anr***. (2008) 10 SCC 139 at para 40]

92. Sexual expression and intimacy of a consensual nature cannot be treated the same way as non-consensual sex. Similarly, intimate relations between adults cannot be equated to situations involving sexual acts with minors.

93. Section 377 blurs this difference and treats unequals equally, thereby violating Article 14.

f. Criminalisation under section 377 constitutes discrimination on the basis of sexual orientation

94. In ***Puttaswamy***, this Hon'ble Court held:- "*Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.*"(para 145)

95. In ***National Legal Services Authority v Union of India* 2014 (5) SCC 438 (hereinafter "NALSA")**, this Hon'ble Court held that: - "*discrimination on the ground of sexual orientation and gender identity, therefore impairs equality before law and equal protection of law and equal protection of law and violates Article 14 of the Constitution of India.*"

96. Section 377, IPC *per se* as well as when read with section 375 of the IPC (as amended by the Criminal Law (Amendment) Act, 2013 w.e.f. 3.2.2013) discriminates against similarly situated persons, on the basis of their sexual orientation, in contravention of Articles 14 and 15 of the Constitution.

97. On the face of it, section 377 prohibits sexual acts that are 'against the order of nature', which has been understood to mean 'penile-anal' and 'penile-oral' sex between a man and another man as also between 'a man and a woman', irrespective of consent. Yet, prosecution of consenting, heterosexual adults under section 377 is rare and the law has been associated with the prohibition of same-sex conduct, making it discriminatory in its effect and impact.

98. The expression: "W*hoever voluntarily engages in carnal intercourse against the order of nature..*" criminalises some forms of intimate sex among heterosexual persons, in the case of nonheterosexual persons, section 377 criminalises all forms of sexual expression.

99. Section 375 and 376 of the IPC, as amended by the Criminal Law (Amendment) Act, 2013 (w.e.f. 3.2.2013), expressly recognize 'consent' in relation to sexual acts enumerated under section 375. These include 'anal' and 'oral' sex between a man and a woman' [heterosexual persons]. Consequently, anal and oral sex between a 'man and a woman' are punishable only when if they are engaged in 'against woman's will or without her consent'. Consent itself is expressly defined in Explanation 2 to section 375. Therefore, there

is no prohibition on heterosexual persons, who are adults, from engaging in 'anal' or 'oral' sex consensually.

However, the same activities, when practiced by adult males [homosexual persons] invite punishment under section 377, IPC though there is consent. This is patently discriminatory, as it singles out homosexual persons as a class, upon whom penal law [under section 377] is imposed.

100. Being both 'later' and 'special' provisions in relation to sexual acts between 'a man and a woman' [heterosexual persons], the amended sections 375 and 376 will override section 377, if there is an inconsistency. [***Sharat Babu Digumarti v. Govt NCT of Delhi*** **(2017) 2 SCC- 18 at paras 32-38**].

101. Consequently, consensual sexual acts between 'a man and a woman' [heterosexual persons] which are exempt under section 375, cannot be criminalised under section 377. [***Sharat Babu Digumarti***]

102. After the adoption of the Criminal Law [Amendment] Act, 2013, section 377 is no longer neutral or blind to sexual orientation. It applies to sexual acts between 'a man and a man' on the basis of sexual orientation and identity. As it stands today, section 377, IPC is violative of Articles 14 and 15 of the Constitution.

IV. ARTICLE 15 PROHIBITS DISCRIMINATION ON THE GROUND OF 'SEX' WHICH INCLUDES 'SEXUAL ORIENTATION'

103. In ***IR Coelho v. State of Tamil Nadu*** **(2007) 2 SCC 1 @ para 42**, this Hon'ble Court held:-"*The Constitution is a living document. The constitutional provisions have to be construed having regard to the* <u>*march of time*</u> *and the* <u>*development of law*</u>*.*"

104. In ***M. Nagaraj v. Union of India,*** **(2006) 8 SCC 212 @ para 19,** this Hon'ble Court further held:-"*A constitutional provision must*

be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges".

105. In ***Puttaswamy,*** this Hon'ble Court made it clear that the meaning and scope of fundamental rights under Part III cannot be guided by the text or written words alone.

106. Further in ***Puttaswamy,*** this Hon'ble Court held that the interpretation of constitutional provisions cannot be limited by the views and perceptions of the founding fathers, which were expounded in a historical context. *"As society evolves, so must the constitutional doctrine." [***para 130, Puttaswamy**

107. Importantly, this Hon'ble Court held: - *"The interpretation of the Constitution cannot be frozen by its original understanding. The Constitution has evolved and must continuously evolve to meet the aspirations and challenges of the present and the future. Nor can judges foresee every challenge and contingency which may arise in the future. This is particularly of relevance in an age where technology reshapes our fundamental understanding of information, knowledge and human relationships that was unknown even in the recent past."*

108. Article 15(1) provides that the State shall not discriminate against any citizen on grounds only of "*religion, race, caste, sex, place of birth or any of them*". The general purport of Article 15(1) is to prohibit discrimination against citizens on the basis of the grounds enumerated therein.

109. It would be fair to say that while incorporating the grounds of 'sex' under Article 15(1), members of the Constituent Assembly did not imagine or conceive of discrimination on the basis of sexual orientation.

110. That however, does not preclude this Hon'ble Court from giving the expression 'sex' under Article 15(1) a purposive and expansive meaning in line with contemporary social and legal developments.

111. Article 15(1) uses the expression 'sex' but Article 15(3) uses the expression 'women'. The two cannot be collapsed into one.

112. Neither can Article 15(3) control or restrict the application of Article 15(1). The expression _'sex' in Article 15(1) cannot be reduced to binary norm of man and woman only.

113. In ***NALSA @ para 66***, this Hon'ble Court held: *"Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with 64 stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female."*

114. Under the ICCPR, the protection of equality is articulated in Articles 2 and 26, which together, prohibit any distinction of any kind and discrimination on any ground such as "*race, colour, sex,*

language, religion, political or other opinion, national or social origin, property, birth or other status."

115. In ***Toonen v. Australia***, at para 8.7, the Human Rights Committee held that the reference to 'sex' in Articles 2 (1), and 26 of the ICCPR is to be taken as including sexual orientation.

116. India has ratified the ICCPR and incorporated it domestically under the Protection of Human Rights Act, 1993. The decision in ***Toonen*** holds more than persuasive value and must inform the interpretation of Article 15(1) of the Constitution.

117. While interpreting Title VII of the Civil Rights Act.1964 (law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion), the U.S Court of Appeal for the Seventh Circuit held that:- "*Discriminating against an employee because they are homosexual constitutes discrimination because of: (i) such employee's sex and, (ii) such employee's sexual attraction to persons of the same sex. And "sex," under Title VII, is an enumerated trait.* [***Kimberly Hively v. Ivy Tech Cmty. Coll. of Ind.*****, 853 F.3d page-37]**

118. In a similar vein, the US Court of Appeals for the Second Circuit ruled that sexual orientation is a function of 'sex' and can also be understood as "*a subset of actions taken on the basis of sex*". [***Zarda v. Altitude Expres*****s, No. 15-3775 page- 22**].

119. Just as 'sex' and 'gender' are an immutable part of one's personality, so is 'sexual orientation'.

120. Discrimination against persons [whether men or women or transgender] because they are not heterosexual amounts to discrimination on the grounds of 'sexual orientation' which is embraced within the category of 'sex' under Article 15.

V. **SECTION 377 HAS A CHILLING EFFECT ON THE ENJOYMENT OF FUNDAMENTAL RIGHTS**

121. In ***K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1**, **para 146,** this Hon'ble Court noticed the chilling effect of section 377 in the following words:- "*The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place.... The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime.*"

122. Section 377 attaches criminality to the everyday lives of LGBT persons. The constant fear of police and getting into 'trouble with the law' perpetuates their vulnerability.

123. This Hon'ble Court in ***Shafin Jahan v. Asokan K.M. and Ors., 2018 SCC Online SCC 343*** @ **para 95** has emphasized:-,

"*Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms. Others are dissuaded to exercise their liberties for fear of the reprisals which may result upon the free exercise of choice. The chilling effect on others has a pernicious tendency to prevent them from asserting their liberty. Public spectacles involving a harsh exercise of State power prevent the exercise of freedom, by others in the same milieu. Nothing can be as destructive of freedom and liberty. Fear silences freedom.*"

124. In ***National Coalition for Gay and Lesbian Equality v. the Minister of Justice & Ors.*,1998 (12) BCLR 1517 (CC) at para 28],** the Constitutional Court of South Africa acknowledged how criminalization of sodomy impacted not only the sexual conduct of non-heterosexual persons, but all walks of life: " *... In so doing, it punishes a form of sexual conduct, which is identified by our*

broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy because they seek to engage in sexual conduct, which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men."

125. Section 377 creates an environment of hostility and revulsion towards LGBT persons, resulting in exclusion and marginalisation. This cannot be countenanced under the Constitutional order, which is founded on the values of liberty, dignity, equality and fraternity.

VI. SECTION 377 VIOLATES FREEDOMS UNDER ARTICLE 19(1)

1. Section 377 violates freedom of speech and expression under Article 19(1)(a)

126. Article 19(1)(a) does not specify what forms of speech and expression are protected. It will not be incorrect to say that Article 19(1)(a) not only protects words - written or spoken but also protects all forms of political, artistic, scientific and intimate expression which also includes sexual expression.

127. By condemning certain expressions of human intimacy as 'unnatural', section 377 imposes a singular and rigid heteronormativity in human relations, denying the existence and expression of any other sexual orientation or gender identity. This in contravention of an individual's right to be different and to

stand against the tide of conformity, which this Hon'ble Court recognized in **Puttaswamy.**

2. Section 377 violates freedom to form association under Article 19(1)(c)

128. The right to association under Article 19(1)(c) is not limited to form professional associations like societies, trade unions but also includes the freedom to form personal and intimate associations of one's choice.

129. The United States Supreme Court in ***Roberts v. United States Jaycees*** 468 U.S. 609 (1984) at page 468 U.S. 618 has held that freedom of association includes the freedom to enter into and maintain certain intimate human relationships.

130. In ***Shakti Vahini v. Union of India***, **2018 SCC Online SC-275 at para 44 & para 46,** this Hon'ble Court has held that two adults consensually choosing each other as life partners is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution.

131. Because of Section 377, LGBT persons cannot form intimate human relationships or romantic associations with a partner of their choice. Even peer-support groups attract suspicion and ridicule and are labelled 'gay sex rackets' under the stern eye of the law. Section 377 thus violates Article 19(1)(c) of the Constitution.

3. Section 377 is not protected by any of the exceptions under Article 19(2) and Article 19(4)

132. Under Article 19(2) and Article 19(4) reasonable restrictions can be imposed on the exercise of rights guaranteed under Article 19(1)(a) and Article 19(1)(c) respectively, in the interest of the sovereignty and integrity of India or public order or morality. A

failed attempt can be made to argue that Section 377 would be covered by the morality exception to the said Articles.

133. In ***Naz Foundation v. Government of India* and Ors., 2009 SCC Online Del 1762 at para 75-87 ("*Naz Foundation*"),** the Hon'ble High Court of Delhi has discussed and clarified the contours of morality as a ground of restriction to fundamental rights. The Court differentiated "public morality" from "constitutional morality" and held that if there is any type of morality that can pass the test of compelling state interest, it must be "constitutional morality" and not "public morality".

134. Constitutional morality is derived from Constitutional values such as liberty, dignity, autonomy, fraternity etc. as opposed to public morality which is based on shifting and subjective notions of right and wrong.

135. The learned ASG in ***Delhi High Court in Naz Foundation*** at para 86 made the argument that homosexual conduct might open floodgates of delinquent behaviour. The Hon'ble Delhi High Court found the argument without merit and held that moral indignation, howsoever strong, cannot be the basis to override an individual's fundamental right.

136. Section 377 violates the fundamental rights under Articles 19(1)(a) and (c), read with Article 21 and is not saved by the any of the exceptions in Articles 19(2) and (4) including morality.

VII. ARTICLE 377 VIOLATES ARTICLE 21

a. Section 377 violates the Right to Privacy, Dignity and Autonomy

129. In ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1, a nine-judge bench of this Hon'ble Court has held that privacy is an

intrinsic element of the right to life and personal liberty under Article 21. [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at paras 96, 313, 320, 322, 406, 407, 411, 535 and 536]

130. The right to personal liberty under Article 21 also includes the right to autonomy. [See ***NALSA v. Union of India and Ors.,*** (2014) 5 SCC 438 at para 73]

131. The right to privacy protects the autonomy of individuals and enables them to make choices on matters intimate to human life. It protects the right of the individual "*to be different and to stand against the tide of conformity in creating a zone of solitude*." [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at paras 271, 297, 298, 299, 521]

137. Dignity is the core principle which unites the fundamental rights of the Constitution. The right to dignity includes the right of the individual to develop to the full extent of their potential and the right to autonomy over fundamental personal choices. [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at paras 119, 525]

138. Privacy is an essential aspect of dignity and entails the freedom of self-determination including the right to choose one's sexual partner. This Hon'ble Court has held that, *"The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised."* [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at paras 119, 127, 146, 271, 298, 323]

139. Further, the Court has recognized that sexual orientation is an essential component of identity, and is deeply intertwined with the right to life, liberty and freedoms, privacy and dignity. [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at para

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145, 647]

140. Enumerating the relationship between sexual orientation and fundamental rights enshrined in Part III of the Constitution of India, Hon'ble Justice D.Y. Chandrachud has held that, *"Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual....The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."* [See ***K.S. Puttawswamy v. Union of India,*** (2017) 10 SCC 1 at para 144]

141. Section 377 criminalizes individuals' right to choose their sexual partners, which is one of the most personal and inviolable aspects of one's personality. It denies them respect and impacts their sense of self-worth.

142. Thus, Section 377 violates the right to privacy, dignity and autonomy under Article 21 of the Constitution of India.

b. Sec 377 violates the Right to Health

Right to Health in Domestic and International Law

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

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136. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

137. The ICESCR has been domesticated in India, via Section 2 of The Protection of Human Rights Act, 1993 that clearly provides that human rights that are enforceable in India include the rights contained in the ICESCR. Indian courts can, apart from incorporating human rights under the ICESR into Fundamental Rights while interpreting the fundamental rights, enforce human rights under the ICESR directly.

138. Further, any international convention not inconsistent with the fundamental rights and in harmony with the spirit of the Constitution must be read into Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. [See ***Vishaka and ors., v. State of Rajasthan and Ors.***, (1997) 6 SCC 241 at para 7; ***NALSA v. Union of India v. Ors***., (2014) 5 SCC 438 at paras 51-60; ***K.S. Puttaswamy and Anr. V. Union of India and Ors.***, (2017) 10 SCC 1 at para 154]

139. Article 12 of the ICESCR has been interpreted in General Comment No. 14. The Right to Health, as interpreted by General Comment No. 14, requires States to take measures to respect, protect and fulfil the health of all persons. States are obliged to ensure the availability and accessibility of health-related information, education, facilities, goods and services, without discrimination, especially for vulnerable and marginalized sections of the populations. [See: **General Comment No. 14 to Article 12 ICESCR**, at para 33]

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140. Thus, India is obligated to provide marginalized populations including gay men, other men who have sex with men, and transgender persons health facilities, goods and services which are Available (in sufficient quantity), Accessible (physically, geographically, economically, and in a non-discriminatory manner); Acceptable (respectful of culture and medical ethics); and of Quality (scientifically and medically appropriate and of good quality). [See: **General Comment No. 14 to Article 12 ICESCR,** at para 12].

Vulnerability of contracting HIV is higher among High Risk Groups

141. According to a 2012 report of the United Nations Development Programme titled "**Global Commission on HIV and the Law: Risks, Rights and Health**", Men who have Sex with Men (a term used by National AIDS Control Organization which includes gay and bisexual men) were found to be nineteen times more likely to be infected with HIV than other adult men. [See **Global Commission on HIV and the Law: Risks, Rights and Health**, United Nations Development Programme, July 2012, at page 45].

142. Criminalization of same sex relations leads to an increase in HIV prevalence amongst MSM. In 2008, UNAIDS had reported that in the Caribbean countries where homosexuality was criminalized, almost 1 in 4 MSM were infected with HIV. In the absence of such criminal law the prevalence was only 1 in 15 among MSM. [See **Global Commission on HIV and the Law: Risks, Rights and Health**, United Nations Development Programme, July 2012, at page 45].

143. According to the Annual Report of National AIDS Control Organization (NACO), 2016-2017, coverage for Men Who have Sex with Men was the highest at 65%. [See **National AIDS Control Organization (NACO) Annual Report of 2016-17**, p.

342].

144. Despite extensive coverage, HIV prevalence among MSM and transgender persons is disproportionately higher than the general adult prevalence. HIV prevalence among MSM is 4.3% and among transgender persons it is 7.5 % as opposed to the overall adult HIV prevalence of 0.26%. [See **National AIDS Control Organization (NACO) Annual Report of 2016-17**, p. 340, 341].

145. Section 377 criminalizes sexual relations among members of the same sex, and even those abetting such conduct are liable to criminal punishment. This would include health care workers and organizations working on HIV prevention and reduction by providing Men who have Sex with Men with access to condoms.

146. The Parliament of India has recognized the susceptibility of HIV prevention interventions for High Risk Groups (including Men who have Sex with Men) due to such undue criminalization and has sought to address the same by virtue of the **Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017**.

147. Section 22 of Act states that any strategy carried out for reduction of risk of HIV AIDS shall not amount to a criminal offence or attract civil liability. Such strategies include—

(i) the provisions of information, education and counselling services relating to prevention of HIV and safe practices;

(ii) the provisions and use of safer sex tools, including condoms;…

148. The Illustrations to Section 22 of the Act explicitly highlight the need to decriminalize measures aimed at improving the health of vulnerable groups, including Men who have Sex with Men.

149. Illustrations include:

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(a) A supplies condoms to B who is a sex worker or to C, who is a client of B. Neither A nor B nor C can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the strategy.

(b) M carries on an intervention project on HIV or AIDS and sexual health information, education and counselling for men, who have sex with men, provides safer sex information, material and condoms to N, who has sex with other men. Neither M nor N can be held criminally or civilly liable for such actions or be prohibited, impeded, restricted or prevented from implementing or using the intervention.

Impact of criminalization of the Right to Health

150. Criminalization of consensual sexual activity between persons of the same sex leaves them vulnerable to police harassment and renders them unable to access essential HIV/AIDS prevention material and treatment, thereby infringing their right to health under Article 21.

151. Section 377 creates a fear of law enforcement due to which there is under-reporting of male to male transmission of HIV. This lack of data results in the inability to provide sufficient health services.

152. The risk of criminalization leads to a fear of discrimination, breach of confidentiality and police-reporting which in turn may dissuade persons from seeking health services. Fear of arrest drives high risk groups underground, away from HIV and harm reduction programmes. [See **Global Commission on HIV and the Law: Risks, Rights and Health**, United Nations Development Programme, July 2012, at page 8]

153. Section 377 creates an atmosphere of stigma and prejudice. Studies conducted in India reveal that due to structural and societal factors, the vulnerable population of Men who have Sex with Men are at a higher risk for depression and other mental health problems, which may affect the degree to which they may benefit from HIV prevention interventions. [See **Factors Associated with Mental Depression among Men Who Have Sex with Men in Southern India**, Sangram Kishor Patel et al., Health, (7) 2015, at pages 1119- 1121; **Suicidality, clinical depression, and anxiety disorders are highly prevalent in men who have sex with men in Mumbai, India: Findings from a community-recruited sample**, Murugesan Sivasubramanian et al., Psychol Health Med., 16(4) 2011, at pages 6-7; **Depressive symptoms and human immunodeficiency virus risk behavior among men who have sex with men in Chennai, India**, Steven A. Safren et al., Psychol Health Med., 14(6) 2009, at pages 5-6]

154. The infringement of Right to Health by criminalization of sexual conduct between people of the same sex has been wellrecognized in international law.

155. In ***Toonen v. Australia***, the UN Human Rights Committee found that criminalization of same-sex activity runs counter to the implementation of effective educational programmes in respect of HIV prevention. [See ***Toonen v. Australia***, Communication No. 488/1992, decision dated 31/03/1994 at Para 8.5]

156. In ***R. v. Morgentaler***, the Supreme Court of Canada overturned Section 251 of the Criminal Code [abortion provisions] for violating the right to life, liberty and security under S. 7 of the Canadian Charter. In a concurring opinion, Beetz J. held that:- " *Security of person within the meaning of s. 7 of the Charter must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal*

sanction. If an act of parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate or no treatment at all, the right to security of the person has been violated." [See ***R. v. Morgentaler***, [1998] 1 S.C.R. 30 at p. 81]

157. The UN Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health has observed: *"Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights, including the right to health. These laws are generally inherently discriminatory and, as such, breach the requirements of a right-to-health approach, which requires equality in access for all people. The health-related impact of discrimination based on sexual conduct and orientation is farreaching, and prevents affected individuals from gaining access to other economic, social and cultural rights."* [See **Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health**, A/HRC/14/20, dated 27th April 2010 at Para 6]

c. Section 377 limits the right to choice of partner

158. Human beings are social beings; intermingling and exchange with others is an essential and natural part of life. The right to interact, engage and cohabit is a natural right, which is protected under the right to life and liberty under Article 21 of the Constitution.

160. Social connections include associations of an intimate nature such as friendships, peer groups and companionship. Forming and nurturing personal relationships is essential to the human experience.

161. In ***Shafin Jahan v Asokan KM & Ors*, (2018) SCC Online SC-343** (“***Shafin Jahan***”)*,* this Hon’ble Court held:-*“The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity.”*

162. Right to choice of partner is recognised as a fundamental right under Article 21 of the Constitution. This Hon’ble Court has found that the right to choice of partner is protected under the right to liberty, autonomy and dignity of an individual. (***Shafin Jahan* at para 54 & para 88, *Common Cause (A Regd. Society) v. Union of India*, 2018 SCC Online SC 208 at para 346, *Shakti Vahini v. Union of India,* 2018 SCC Online SC275 at para 44 & para 46).**

163. Section 377, IPC restricts individuality and expression in the most personal realm, i.e. a person’s sexuality and choice of partner, in contravention of Article 21 of the Constitution.

165. In ***Shafin Jahan****,* this Hon’ble Court held: - “*Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution.*” …. “*Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognizing them. Indeed, the Constitution protects personal liberty from disapproving audiences.*”

166. It is fairly common for disapproving parents and family members to use section 377 to threaten and coerce LGBT persons to marry a person of the opposite gender against their wishes. Where LGBT persons resist such pressure and assert their choice of a same-sex partner, it is not uncommon for parents to use the oppressive machinery of criminal law like filing false complaints of theft,

kidnapping and abduction to interfere and forcibly separate adult, consensual partners.

167. The choice of partner whether within or outside marriage lies within the exclusive domain of each individual. (***Shafin Jahan* at para 88**).

168. Yet, for LGBT persons section 377 hangs as a sword – irrespective of whether their personal and intimate choice of partners is known or hidden from others.

169. In a poignant observation, this Hon'ble Court in ***Puttaswamy @ para 118*** noted:- "*Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.*"

170. Section 377 enables the State and society to interfere and impose in the most important and personal decisions of a person's life, i.e the choice of partner. It is therefore violative of Article 21.

d. That in respect of Section 377 Substantive Due Process test is not met

171. This Hon'ble Court has held that test of substantive due process is to be applied to the fundamental right to life and liberty (***Mohd. Arif v. Registrar of Supreme Court of India-, (2014) 9 SCC 737, para. 28***).

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172. Article 14 has been held to animate the content of Article 21, interpreting 'procedure established by law' to mean fair, just and reasonable' procedure. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21, but to the content of the law itself. In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable *procedure* under the law, and a law which does so may yet be susceptible to challenge on the ground that its *content* does not accord with the requirements of a valid law. A law is open to substantive challenge on the ground the content of the law violates fundamental rights (***Justice KS Puttaswamy (retd.) v. Union of India, (2017) 10 SCC 1, para. 291***).

173. Challenges to validity of laws on substantive grounds as opposed to procedural grounds has been dealt with in varying contexts, such as:

a. Death penalty (***Bachan Singh v. State of Punjab, 1980 SCC (Cri) 580***),

b. Mandatory death sentence (***Mithu v. State of Punjab, (1983) 2 SCC 277; Indian Harm Reduction Network v. Union of India, (2011) 4 AIR Bom R 657***), c. Restrictions on speech (***Shreya Singhal v. Union of India, (2015) 5 SCC 1***), and

d. Non-consensual sex with minor wife (***Independent Thought v. Union of India, 2017 SCC Online SC 1222***).

174. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. An invasion of life or personal liberty must meet the threefold requirement of (***Puttaswamy, para. 325, 638***):

a. **Legality**, which postulates existence of valid law,

b. **Necessity**, defined in terms of legitimate State aims, and

c. **Proportionality**, which ensures there is a rational nexus between the objects and the means adopted to achieve them.

d. **Procedural safeguards,** to prevent abuse of State interference.

e. **Doctrine of Necessity & Proportionality**

175. The test of substantive due process as laid in India is analogous to the ***doctrine of necessity and proportionality*** as applied by the European Court of Human Rights. The expression '***necessary in a democratic State***' (Article 8, European Convention on Human Rights) - two hallmarks of which are tolerance and broadmindedness - implies the existence of a ***pressing social need,*** and every restriction imposed must be ***proportionate to the legitimate aim*** pursued ***(Handyside v. United Kingdom** at para 48**)**.*

176. A list of legitimate State aims may be national security, public safety, prevention of crime and protection of rights of other persons (***Uzun v. Germany, ECHR 2010 @ para. 76***).

177. In ascertaining the nature and scope of morality and its necessity as a legitimate State aim, the ECHR jurisprudence has held that the conception of morality changes from time to time and from place to place, and there is no 'uniform' morality in any particular region or culture (***Modinos v. Cyprus, ECHR 1993 @ para. 11***).

178. If State action destroys the essence of a right, it may be held as disproportionate interference. (***Uzun v. Germany, ECHR 2010 @ para. 26***).

179. The degree of State interference in view of the gravity of the offence complained of also indicates proportionality of the act (***Uzun v. Germany, ECHR 2010 @ para. 28***).

180. A measure of the necessity of criminalization of sexual acts of consenting adults in private can be arrived at by comparing its relevance in the era the law was enacted to the changes and developments that have occurred in society up to the present (***Dudgeon v. United Kingdom, para 60***).

181. On ***proportionality***, the test is to assess if the alleged benefits of criminalization outweigh the detrimental effects which the law has on the life of persons. Although members of public may regard homosexuality as immoral, but this cannot by itself warrant the application of penal law in context of consenting adults (***Dudgeon v. United Kingdom, para 60***).

Criminalization of sexual acts between consenting adults in private fails the test of substantive due process

182. Section 377, IPC fails the test of substantive due process.

183. In criminalizing sexual acts between persons regardless of age or consent, Section 377, IPC destroys the essence of Article 21 of the Constitution. The law violates the right to dignity and privacy of consenting adults and deprives persons of the fundamental right to personal autonomy in matters of choosing one's partner.

184. There is no stated aim of the law. If at all there is an aim, it has been articulated as public morality. The Constitution, however, envisages *constitutional morality* based on principles of dignity equality, non-discrimination, fraternity and pluralistic society based on values in the Constitution Public morality espoused in the law is antithetical to constitutional morality.

185. Section 377 also serves no *pressing social need* such as public safety, i.e., application of criminal law is not necessary in a democratic State like India.

186. Therefore the aim of Section 377 is not legitimate.

187. Section 377 not only results in the criminalization, stigmatization and impairing the dignity of homosexuals and transgender persons but it also impedes the access to HIVrelated healthcare services for them.

188. Therefore Section 377, IPC does not pass the test of proportionality.

f. Impact of Section 377 on Transgender Persons

189. ***Queen Empress v. Khairati***, *ILR (1884) 6 All 204* is the earliest recorded cases on Section 377, IPC in relation to the socio-legal harassment of transgender persons. Khairati was arrested and prosecuted under the anti-sodomy law on the suspicion of being a 'habitual sodomite', merely on basis of appearing in feminine clothing and singing in a public place, but later acquitted for lack of evidence. This is a case in point on the misconceptions and stigma of the colonial administrators on the plurality of gender and sexuality.

190. The Humsafar Trust has conducted a study in 2017 with the Transgender community in three cities (Mumbai, Delhi and Bangalore) assessing the needs and situation of the Transgender communities, particularly in the backdrop of the coming into force of Section 377, IPC in 2013. In this study, violence related question referred to all forms of violence like physical beating, sexual assault, teasing, bullying, threat, blackmail, extortion and financial abuse for creating public nuisance, soliciting and citing Section 377, IPC as a tool for harassment. In the study 59 percent of Transwomen experienced violence of which highest reporting

was from Bangalore. Across the three cities, most common perpetrators of violence were family and relative (22%), common public (21%), Panthi (18%), police (13%) Hijras from other (9%) and own (7%) Gharanas. Despite the favourable judgement of this Hon'ble Court in *NALSA* the transgender community recognize that they still continue to be covered under Section 377, IPC and that having consensual sex with their partners in private spaces continues to criminalize a fundamental aspect of their identity.

191. The anti-sodomy law (Section 377, IPC) hinders the ability of transgender persons to organize and participate meaningfully in the design and implementation of HIV/AIDS related healthcare programmes. The right to health cannot be realized without the active participation of vulnerable groups and communities.

192. Even as Section 377, IPC facially only criminalizes 'sexual acts', it effectively results in criminalization of 'identity' of transgender persons as penile non-vaginal is the only form of expression of sexuality available to transgender persons. Once actions that are closely associated with an identity or class of persons based on one or more characteristics (here, sexual orientation and gender identity), the threat of criminalization directly leaps to identity as well.

193. This Hon'ble Court has held that discrimination on basis of sexual orientation or gender identity is impairs equality before law and therefore violates Article 14 of the Constitution (*National Legal Services Authority v. Union of India, (2014) 5 SCC 438, para 62, 66*).

194. This Hon'ble Court has found the Yogyakarta Principles to be jurisprudentially consistent with the fundamental rights contained in the Constitution of India, and therefore they are applicable in India (*National Legal Services Authority v. Union of India, (2014) 5 SCC 438, para 60*). Principle 1 (Right to Universal

Enjoyment of Human Rights), Principle 2 (Right to Equality & Non-Discrimination), Principle 4(Right to Life), Principle 6 (Right to Privacy), Principle particularly require States to repeal or amend criminal and other legal provisions that prohibit, or are in effect employed to prohibit consensual sexual activity between people of same sex and transgender persons who are above the age of consent.

195. This Hon'ble Court has held that gender identity lies at the core of one's personal liberty. The Constitution states that all persons have the freedom of speech and expression, which includes the right to expression of self-identified gender. The self-identified gender can be expressed through dress, words, action or behaviour or any other form (*National Legal Services Authority v. Union of India, (2014) 5 SCC 438, para 69, 72*). 'Any other form' of expression of self-identified gender includes expression of sexuality, as it is an inseparable component of one's bodily integrity and personal autonomy.

196. This Hon'ble Court has held that Article 21 guarantees protection of personal autonomy of an individual, which includes both the negative right of not to be subject to interference by State and non-State actors and the positive right of individuals to make decisions about their life.

197. It is demonstrably clear that Section 377, IPC in so far as it criminalizes consensual, sexual acts of adult transgender persons in private is violative of the right to equality and nondiscrimination on basis of gender identity and sexual orientation, right to free speech and expression and the right to personal autonomy.

VIII. Criminalization of LGBT persons violates the fundamental right of Access to Justice

198. Rights cannot exist without a remedy.

199. '*Ubi jus ibi remedium,* i.e Every right when it is breached must be provided with a right to remedy.

200. The right to seek remedies for violation of fundamental rights is itself a fundamental right under Article 32 of the Constitution.

201. A constitution-bench of this Hon'ble Court has recognized access to justice as a fundamental right under Articles 14 and 21. [***Anita Kushwaha v Pushap Sudan*** **(2016) 8SCC 509 @ paras 9 -31**].

202. LGBT persons face a host of rights violations on account of their sexuality and sexual orientation.

203. Breach of privacy and unlawful intrusion into one's private life, extortion, blackmail, coercion, threats, harassment – physical, mental and sexual, domestic and partner violence, assault and rape are not uncommon experiences among LGBT persons, especially those belonging to poor and marginalized sections. These violations are almost always connected to their sexuality, identity and expression.

204. Most of aforesaid acts are identified as 'crimes' under the IPC or other criminal laws. Ordinarily, a person has been a victim of such crimes should be able to report to the Police and register a complaint. That is a remedy available in law to all.

205. However, where the victim is an LGBT person, the fear of recrimination under section 377 looms large. Criminalisation of one's sexual orientation and identity precludes persons from approaching legal authorities and seeking remedy.

206. A report by the ***International Commission of Jurists*** titled:- **"Unnatural Offences" Obstacles to Justice in India Based on Sexual Orientation and Gender Identity", published in February 2017**, documents many such experiences and finds:-

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"The fact that section 377 exists also operates as a threat that prevents people from accessing rights and protections that they are entitled to. For example, section 377 stops queer individuals from approaching the police when they are the victims of criminal acts. Two notable instances are that of blackmail and intimate partner violence. Queer individuals subjected to intimate partner violence or otherwise assaulted or harassed following same-sex encounters are unable to report it to the police because of fears of effectively exposing themselves to charges under section 377."

207. A case that demonstrates the impact of criminalization on access to justice is that of late Prof. Shrinivas Ramchandra Siras, Reader and Chair of the Department of Modern Indian Languages at Aligarh Muslim University (AMU), who identified as gay. On 08.02.2010, three persons claiming to be television reporters broke into the Professor's home and photographed him with a male partner. Prof. Siras was suspended on grounds of alleged immoral sexual conduct, which, according to the authorities in AMU, "undermined the pious image of the teacher community and tarnished the image of the University".

208. Prof. Siras was encouraged to seek judicial relief because at that time, the Delhi High Court's decision in ***Naz Foundation*** was in force and the right to be with one's partner [of the same sex] in the privacy of one's home was a protected fundamental right.

209. Consequently, Prof Siras approached the Allahabad High Court, which stayed the suspension. [***Dr. Shrinivas Ramchandra Siras & Ors. v. The Aligarh Muslim University & Ors,*** **Civil Misc. Writ Petition No.17549 of 2010, Order dated 01.04.2010].**

210. After the ***Koushal*** decision, LGBT persons have been hesitant and fearful of approaching State authorities and have continued to suffer injustice in silence.

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211. Section 377 violates the fundamental right to access justice under Articles 14 and 21.

IX. *Suresh Kumar Koushal* must be declared *per incuriam*

212. The 9 judge bench in ***KS Puttaswamy*** expressed disagreement with the manner in which the 2 judge bench in ***Koushal*** dealt with the right to privacy-dignity claims of lesbian, gay, bisexual and transgender persons (***KS Puttaswamy, paras. 144-147***).

213. ***Koushal*** held that Section 377, IPC does not criminalize a class of persons or identity or orientation, and merely identifies certain acts as an offence (***para. 60***). However, criminalization of the only form of expression of sexuality available to homosexual and transgender persons constitutes *de facto* criminalization of their personhood and identity, in light of ***KS Puttaswamy*** declaring that sexual orientation is an essential component of identity (**para 145**).

214. The principle that a facially neutral provision of law or State action which may disproportionately affect a class of persons constitutes indirect discrimination / disparate impact is now well accepted under Indian law (***Madhu and Ors. v. Northern Railways and Ors., 247 (2018) DLT 198, paras. 20-28***). The concept of indirect discrimination is evolved to deal with situations where discrimination lays disguised behind apparently neutral criteria, or where persons already adversely hit by patterns of historic subordination have their disadvantage intensified by impact of otherwise facially neutral laws such as Section 377, IPC.

215. This Hon'ble Court has on several occasions refused to defer to the Parliament for amending laws purportedly infringing on fundamental rights or violating the Constitution, and has readdown or struck-down provisions of laws found to be violative

of Constitutional principles in Articles 14, 15, 19 and 21, as described in paragraph 170 hereinabove.

216. ***Koushal*** fails to defend the validity of Section 377, IPC on ground of Article 14, as it only facially satisfies the first level of enquiry of the twin-test under Article 14, i.e., Section 377, IPC is ostensibly based on the intelligible differentia of *carnal intercourse in order of nature* in contrast to *carnal intercourse against the order of nature.* However, ***Koushal*** wholly ignores the second level of enquiry, i.e., the classification must have a rational nexus with the object sought to be achieved. Therefore, ***Koushal's*** analysis of Section 377, IPC in respect of Article 14 of the Constitution cannot be held to be valid (***para. 65***).