Naz Foundation v. Government of NCT of Delhi

HIGH COURT OF DELHI AT NEW DELHI
WP(C) No.7455/2001
July 2, 2009

Author's Note: Preparing this summary prompted a number of difficult decisions about striking an appropriate balance between *length* (105-page original version) and *essentials* (which are ubiquitous from historical, social, and legal perspectives).

Certain editorial enhancements have been added by the textbook author (without so indicating). The symbol "[¶]" indicates the textbook author's insertion of a new paragraph line—in the longer paragraphs of the original opinion. "British" English spellings have been retained. A number of case citations have been omitted. The textbook author's footnotes are numbered "a" through "e."

Court's Opinion: AJIT PRAKASH SHAH, CHIEF JUSTICE

1. This writ petition has been referred by Naz Foundation, a Non Governmental Organisation (NGO) as a Public Interest Litigation to challenge the constitutional validity of Section 377 of the Indian Penal Code, [of] 1860 (IPC)…. [It] criminally penalizes what is described as "unnatural offences," to the extent the said provision criminalises consensual sexual acts between adults in private. The challenge is founded on the plea that Section 377 IPC … infringes the fundamental rights guaranteed under … the Constitution of India. …

[¶] The Union of India [at this point referring to the *nation*, as opposed to the competing governmental entities below] is impleaded as respondent No.5 … Respondent No.4 is the National Aids Control Organisation (hereinafter referred to as "NACO") a body formed under the aegis of Ministry of Health & Family Welfare, Government of India. NACO is charged with formulating and implementing policies for the prevention of HIV/AIDS in India. Respondent No.3 is the Delhi State Aids Control Society. Respondent No.2 is the Commissioner of Police, Delhi. Respondents No.6 to 8 are individuals and NGOs, who were permitted to intervene on their request. …

HISTORY OF THE LEGISLATION

2. At the core of the controversy involved here is the penal provision Section 377 IPC which criminalizes sex other than heterosexual penile-vaginal. The legislative history of the subject indicates that the first records of sodomy as a crime at Common Law in England were chronicled in … 1290[A.D.] … [which prescribed that sodomites should be burnt alive. Acts of sodomy later became penalized by hanging under the Buggery Act of 1533 which was re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for the subsequent criminalisation of sodomy in the British Colonies. Oral-genital sexual acts were later removed from the definition of buggery in 1817. And in 1861 [one year after India enacted IPC §377], the death penalty for buggery was formally abolished in England and Wales. However, sodomy or buggery remained as a crime "not to be mentioned by Christians."

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3. [The] Indian Penal Code was drafted by Lord Macaulay[a] and introduced in 1861 in British India. … Section 377 IPC is categorised under the sub-chapter titled "Of Unnatural Offences" and reads as follows:

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

JUDICIAL INTERPRETATION

4. … Consent is no defence to an offence under Section 377 IPC and no distinction regarding age is made in the section. … In *Fazal Rab Choudhary v. State of Bihar*, AIR 1983 SC 323, it was observed that Section 377 IPC implied "sexual perversity." …

5. The English law was reformed in Britain by the Sexual Offences Act, 1967, which de-criminalised homosexuality and acts of sodomy between consenting adults (above age of 21)….

THE CHALLENGE

6. The petitioner NGO [Naz Foundation] has been working in the field of HIV/AIDS [i]ntervention and prevention. This necessarily involves interaction with such sections of society as are vulnerable to contracting HIV/AIDS and which include gay community or individuals described as "men who have sex with men" (MSM). For sake of convenient reference, they would hereinafter be referred to as "homosexuals" or "gay" persons or gay community. Homosexuals, according to the petitioner, represent a population segment that is extremely vulnerable to HIV/AIDS infection. The petitioner claims to have been impelled to bring this litigation in public interest on the ground that HIV/AIDS prevention efforts were found to be severely impaired by discriminatory attitudes exhibited by state agencies towards gay community … under the cover of enforcement of Section 377 IPC, as a result of which basic fundamental human rights of such individuals/groups (in minority) stood denied and they were subjected to abuse, harassment, [and] assault from public and public authorities.

7. According to the petitioner, Section 377 IPC is based upon traditional Judeo-Christian moral and ethical standards, which conceive of sex in purely functional terms, i.e., for the purpose of procreation only. Any non-procreative sexual activity is thus viewed as being "against the order of nature." The submission is that the legislation criminalising consensual oral and anal sex is outdated and has no place in modern society. In fact, studies of Section 377 IPC jurisprudence reveal that lately it has generally been employed [only] in cases of child sexual assault and abuse.

[¶] By criminalising private, consensual same-sex conduct, Section 377 IPC serves as the weapon for police abuse; detaining and questioning, extortion, harassment, forced sex,

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[a] The British government first sent this politician to India in the 1830's. In the aftermath of the Indian Rebellion of 1857, his proposed criminal law was enacted as the Indian Penal Code of 1860. See generally Thomas Babington Macaulay, BIOGRAPHIES OF LORD MACAULAY CONTRIBUTED TO THE ENCYCLOPÆDIA BRITANNICA: WITH NOTES OF HIS CONNECTION WITH EDINBURGH, AND EXTRACTS FROM HIS LETTERS AND SPEECHES (Chestnut Hill MA Adamant Media, 2001).

payment of hush money; and perpetuates negative and discriminatory beliefs towards same-sex relations and sexuality minorities; which consequently drive the activities of gay men and MSM, as well as sexuality minorities underground thereby crippling HIV/AIDS prevention efforts. Section 377 IPC thus creates a class of vulnerable people that is continually victimised and directly affected by the provision. It has been submitted that the fields of psychiatry and psychology no longer treat homosexuality as a disease and regard sexual orientation to be a deeply held, core part of the identities of individuals.

8. The petitioner submits that while right to privacy is implicit in the right to life and liberty and guaranteed to the citizens, *in order to be meaningful*, the pursuit of happiness encompassed within the concepts of privacy, human dignity, individual autonomy and the human need for an intimate personal sphere require that privacy … [be] afforded protection within the ambit of the said fundamental right to life and liberty given under [Indian Constitution] Article 21 [italics added].

[¶] It is averred that no aspect of one's life may be said to be more private or intimate than that of sexual relations, and since private, consensual, sexual relations or sexual preferences figure prominently within an individual's personality and lie easily at the core of the "private space," they are an inalienable component of the right of life. Based on this line of reasoning, a case has been made to the effect that the prohibition of certain private, consensual sexual relations (homosexual) provided by Section 377 IPC unreasonably abridges the right[s] of privacy and dignity within the ambit of right to life and liberty under Article 21.

[¶] The petitioner argues that [the] fundamental right to privacy under Article 21 can be abridged only for a *compelling* state interest [italics added]…. Also based on the fundamental right to life under Article 21 is the further submission that Section 377 IPC has a damaging impact upon the lives of homosexuals inasmuch as it not only perpetuates social stigma and police/public abuse but also drives homosexual activity underground thereby jeopardizing HIV/AIDS prevention efforts and, thus, rendering gay men and MSM increasingly vulnerable to contracting HIV/AIDS.

9. Further, it has been submitted on behalf of the petitioner [Naz Foundation] that Section 377 … is based upon stereotypes and misunderstanding[s] that are outmoded and enjoys no historical or logical rationale which render it arbitrary and unreasonable. … [T]he expression "sex" as used in [the Indian Constitution's "equality"] Article 15 cannot be read restrictive to [only] "gender" but [necessarily] includes "sexual orientation" and, [as] thus read, equality on the basis of sexual orientation is implied in the said fundamental right against discrimination.

…

REPLY BY UNION OF INDIA—CONTRADICTORY STANDS OF MINISTRY OF HOME AFFAIRS AND MINISTRY OF HEALTH & FAMILY WELFARE

11. A rather peculiar feature of this case is that completely contradictory affidavits have been filed by two wings of [the] Union of India. The Ministry of Home Affairs (MHA) sought to justify the retention of Section 377 IPC, whereas the Ministry of Health & Family Welfare insisted that continuance of Section 377 IPC has hampered the HIV/AIDS prevention efforts. We shall first deal with the affidavit of the Ministry of Home Affairs. The Director (Judicial) in the Ministry of Home Affairs, Government of India … seeks to justify the retention of Section 377 IPC on the statute book broadly on the reason that it has been generally invoked in cases of allegation of child sexual abuse and for complementing lacunae in the rape laws and not mere homosexuality.

[¶] This penal clause has been used particularly in cases of assault where bodily harm is intended and/or caused. It has been submitted that the impugned provision is necessary since the deletion thereof would well open flood gates of delinquent behaviour and can possibly be misconstrued as providing unfettered licence [*sic*] for homosexuality. Proceeding on the assumption that homosexuality is unlawful, it has been submitted in the affidavit that such acts cannot be rendered legitimate only because the person to whose detriment they are committed has given consent to it. Conceding ground in favour of right to respect for private and family life, in the submission of Union of India, interference by public authorities in the interest of public safety and protection of health as well as morals is equally permissible.

12. … Union of India relies upon the reports of Law Commission of India particularly on the issue whether to retain or not to retain Section 377 IPC. Reference has been made to 42nd report of the Commission wherein it was observed that Indian society by and large disapproved of homosexuality, which disapproval was strong enough to justify it being treated as a criminal offence even where the adults indulge in it in private. Union of India submits that law cannot run separately from the society since it only reflects the perception of the society. It claims that at the time of initial enactment, Section 377 IPC was responding to the values and morals of the time in the Indian society. It has been submitted that in fact in any parliamentary secular democracy, the legal conception of crime depends upon political as well as moral considerations notwithstanding considerable overlap existing between legal and safety conception of crime i.e. moral factors.

13. Acknowledging that there have been legal reforms in a large number of countries so as to de-criminalise homosexual conduct, Union of India [MHA] seeks to attribute this trend of change to increased tolerance shown by such societies to new sexual behaviour or sexual preference. Arguing that public tolerance of different activities undergoes change with the times in turn influencing changes in laws, it is sought to be pointed out that even the reforms in the nature of Sexual Offences Act, 1967 (whereby buggery between two consenting adults in private ceased to be an offence in the United Kingdom) had its own share of criticism on the ground that the legislation had negatived the right of the state to suppress 'social vices.' Union of India argues that Indian society is yet to demonstrate readiness or willingness to show greater tolerance to practices of homosexuality. Making out a case in favour of retention of Section 377 IPC …, Union of India relies on the arguments of public morality, public health and healthy environment claiming that Section 377 IPC serves the [public] purpose.

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AFFIDAVIT OF NACO / MINISTRY OF HEALTH & FAMILY WELFARE

15. [The] National Aids Control Organisation (NACO) has submitted its response in the shape of an affidavit affirmed by the Under Secretary of Ministry of Health and Family Welfare, which thus *also* represents the views of the said Ministry of the Government of India [italics added]. The submissions of NACO only confirm the case set out by the petitioner that homosexual community … is particularly susceptible to attracting HIV/AIDS in which view a number of initiatives have been taken by NACO to ensure that proper HIV intervention and prevention efforts are made available to the said section of the society by, amongst other things, protecting and promoting their rights. … NACO [further] states that the groups identified to be at greater risk of acquiring and transmitting HIV infection due to a high level of risky behaviour …, generally described as 'High Risk Groups' (HRG), broadly include men who have sex with men (MSM) and female sex workers and injecting drug users.

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18. According to the submissions of NACO, those in the High Risk Group are mostly

reluctant to reveal same sex behaviour due to the fear of law enforcement agencies, keeping a large section invisible and unreachable and thereby pushing the cases of infection underground making it very difficult for the public health workers to even access them. …

[¶] NACO has further submitted that enforcement of Section 377 IPC against homosexual groups renders risky sexual practices to go unnoticed and unaddressed inasmuch as the fear of harassment by law enforcement agencies leads to sex being hurried, particularly because these groups lack 'safe place,' utilise public places for their indulgence and do not have the option to consider or negotiate safer sex practices. It is stated that the very hidden nature of such groups constantly inhibits/impedes interventions under the National AIDS Control Programme aimed at prevention. Thus NACO reinforces the plea raised by the petitioner for the need to have an enabling environment where the people involved in risky behaviour are encouraged not to conceal information so that they can be provided total access to the services of such preventive efforts.

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ARTICLE 21, THE RIGHT TO LIFE AND PROTECTION OF A PERSON'S DIGNITY, AUTONOMY AND PRIVACY

25. Until the decision of the Supreme Court in *Maneka Gandhi v. Union of India,* (1978) 1 SCC 248, a rather narrow and constricted meaning was given to the guarantee embodied in Article 21 … [*Maneka*] held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and give[n] additional protection. … The Court thus expanded the scope and ambit of the right to life and personal liberty enshrined in Article 21 and sowed the seed for future development of the law enlarging this most fundamental of the fundamental rights. …

DIGNITY

26. Dignity as observed by L'Heureux-Dube, J is a difficult concept to capture in precise terms [*Egan v. Canada*, (1995) 29 CRR (2^{nd}) 79 at 106]. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others. The expression "dignity of the individual" finds specific mention in the Preamble to the Constitution of India. … [T]he guarantee of human dignity forms part of our constitutional culture.

[Here, the court traces the evolution of Indian and Canadian "dignity" judicial decisions.]

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PRIVACY

29. Article 12 of the Universal Declaration of Human Rights (1948) [textbook §10.2.B.1.] refers to privacy and it states:

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

Article 17 of the International Covenant of Civil and Political Rights (to which India is a party) [textbook §10.2.B.2.], refers to privacy and states that:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation.

30. The European Convention on Human Rights [textbook §10.4.A.2.] also states that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others.

31. In India, our Constitution does not contain a specific provision as to privacy but the right to privacy has, as we shall presently show, been spelt out by our Supreme Court from the provisions of Article 19(l)(a) dealing with freedom of speech and expression, Article 19(l)(d) dealing with right to freedom of movement and from Article 21, which deals with right to life and liberty.

[¶] We shall first refer to the case-law in US relating to the development of the right to privacy as these cases have been adverted to in the decisions of our Supreme Court. *Olmstead v. United States*, 111 US 438 (1928), was a case of wire-tapping or electronic surveillance and where there was no actual physical invasion, the majority held that the [wiretapping] action was not subject to Fourth Amendment restrictions. But, in his dissent, Justice Brandeis, stated that the amendment protected the right to privacy which meant "the right to be let alone," and its purpose was "to secure conditions favourable to the pursuit of happiness," while recognising "the significance of man's spiritual nature, of his feelings and intellect: the right sought "to protect Americans in their beliefs, their thoughts, their emotions and their sensations." The dissent came to be accepted as the law after another four decades [had elapsed].

32. In *Griswold v. State of Connecticut,* 381 US 479 (1965), the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.

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34. *Jane Roe v. Wade,* 410 US 113 (1973), was a case in which an unmarried pregnant woman, who wished to terminate her pregnancy by abortion instituted action…, seeking a declaratory judgment that the Texas Criminal Abortion Statutes, which prohibited abortions except with respect to those procured or attempted by medical advice for the purpose of saving the life of the mother, were unconstitutional. The Court said that although the Constitution of the USA does not explicitly mention any right of privacy, … a right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the … Bill of Rights … and in the concept of liberty guaran-

teed by the … Fourteenth Amendment [Due Process clause].

[¶] In *Planned Parenthood of Southeastern Pa v. Casey,* 505 US 833 (1992), the Court again confirmed the constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, the Court stated as follows:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.
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SECTION 377 IPC AS AN INFRINGEMENT OF THE RIGHTS TO DIGNITY AND PRIVACY

40. The right to privacy thus has been held to protect a "private space in which man may become and remain himself." The ability to do so is exercised in accordance with individual autonomy. [Indian judge] Mathew J. in *Gobind v. State of M.P.* referring to the famous Article, "The Right to Privacy" by Charles Warren and Louis D. Brandeis, (4 HLR [Harv. Law Rev.] 193), stressed that privacy—the right to be let alone—was an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests. Blackmun, J. in his dissent in *Bowers, Attorney General of Georgia v. Hardwick et al,* 478 US 186 (1986), made it clear that the much-quoted "right to be let alone" should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, your personality and make fundamental decisions about your intimate relations without penalisation. The privacy recognises that we all have a [positive] right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one's sexuality is at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.

41. In *Bowers v. Hardwick,* Blackmun, J. cited the following passage from Paris Adult Theatre I v. Slaton, [413 US 49 (1973), page 63]:

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

SEXUALITY AND IDENTITY

42. There is a growing jurisprudence and other law related practice that identifies a significant application of human rights law with regard to people of diverse sexual orientations

and gender identities. This development can be seen at the international level, principally in the form of practice related to the United Nations-sponsored human rights treaties, as well as under the European Convention on Human Rights. The sexual orientation and gender identity-related human rights legal doctrine can be categorised as follows: (a) non-discrimination; (b) protection of private rights; and (c) the ensuring of special general human rights protection to all, regardless of sexual orientation or gender identity.

43. On 26th March, 2007, a group of human rights experts launched the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles). The principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity. The experts came from 25 countries representative of all geographical regions. … Although relatively short period of time has elapsed since the launch of the Principles, a number of member and observer States have already cited them in Council proceedings. Within days of the Geneva launch, more than 30 States made positive interventions on sexual orientation and gender identity issues, with seven States specifically referring to the Yogyakarta Principles. [Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles"—Human Rights Law Review 8:2 (2008), 207–248].

44. The Yogyakarta Principles define the expression "sexual orientation" and "gender identity" as follows:

> "*Sexual Orientation"* is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;"
>
> "*Gender Identity"* is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.
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> The Principles [also] recognise:
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> • Human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights;
> • All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity;
> • Every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination on the basis of sexual orientation or gender identity.
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> 48. The [appropriate] sphere of privacy allows persons to develop human relations

without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill all legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person's dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.

IMPACT OF CRIMINALISATION ON HOMOSEXUALS

49. Prof. Ryan Goodman of the Harvard Law School, in his well researched study of the impact of the sodomy laws on homosexuals 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. He categorises how sodomy laws reinforce public abhorrence of lesbians and gays resulting in an erosion of self-esteem and self-worth in numerous ways, including (a) self-reflection, (b) reflection of self through family, (c) verbal assessment and disputes, (d) residential zones and migrations, (e) restricted public places, (f) restricted movement and gestures, (g) "safe places" and (h) conflicts with law enforcement agencies. (Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics", 89 Cal[if]. L. Rev. 643).

50. The studies conducted in different parts of world including India show that the criminalisation of same-sex conduct has a negative impact on the lives of these people [without a correlative impact on society at large]. Even when the penal provisions are not enforced, they reduce gay men or women to what one author has referred to as "unapprehended felons," thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion and discrimination. There is extensive material placed on the record in the form of affidavits, authoritative reports by well known agencies and judgments that testify to a widespread use of Section 377 IPC to brutalise MSM and gay community. Some of the incidents illustrating the impact of criminalisation on homosexuality are earlier noted by us.

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52. The criminalisation of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery.

GLOBAL TRENDS IN PROTECTION OF PRIVACY [AND] DIGNITY RIGHTS OF HOMOSEXUALS

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[Here, the court traces the judicial development of these related but distinct rights in the European Court of Human Rights, Australia, and South Africa.]

57. In *Lawrence v. Texas,* 539 US 558 (2003), holding the Texas sodomy laws as

unconstitutional, the US Supreme Court … Kennedy, J. … said:

> .... It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.
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> The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. ...

58. Since 1967 the process of change has informed [the] legal attitude towards sexual orientation. This process has culminated in the de-criminalisation of sodomy in private between consenting adults, in several [foreign] jurisdictions. The superior courts in some of these jurisdictions have struck down anti-sodomy laws, where such laws remain on the statute book. … Laws prohibiting homosexual activity between consenting adults in private having eradicated within 23 member-states that had joined the Council of Europe in 1989 and of the 10 European countries that had joined since (as at 10th February, 1995), nine had de-criminalised sodomy laws either before or shortly after their membership applications were granted. … A number of open democratic societies have turned their backs to criminalisation of sodomy laws in private between consenting adults despite the fact that sexual orientation is not expressly protected in the equality provisions of their constitutions. Homosexuality has been de-criminalised in several countries of Asia, Africa and South America. … Hongkong … Fiji … [and] Nepal.

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59. On 18th December, 2008, in New York, the UN General Assembly was presented with a statement endorsed by 66 States from around the world calling for an end to discrimination based on sexual orientation and gender identity. [This statement, and the counter declaration by a roughly *equal* number of countries, is available in textbook §10.3.I.—go to Course Web Page, at: <http://home.att.net/~slomansonb>, scroll to Chap. 10, click on GLBT UN Debate].[b]

[¶] The statement, read out by the UN Representative for Argentina Jorge Arguella, condemns violence, harassment, discrimination, exclusion, stigmatisation, and prejudice based on sexual orientation and gender identity. It also condemns killings and executions, torture, arbitrary arrest, and deprivation of economic, social, and cultural rights on those grounds. The statement read at the General Assembly reaffirms existing protections for human rights in international law.

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[b] The textbook author's reference to the opposing Syrian position—and to the location of his op-ed on these respective statements (which were read in the General Assembly in December 2008)—are offered to ensure that readers have *both* positions at hand—rather than acquiescing in the court's apparent oversight in not making *both* statements available to academic analysts.

SECTION 377 IPC AS AN IMPEDIMENT TO PUBLIC HEALTH

61. Article 12 of the International Covenant on Economic, Social and Cultural Rights [textbook §10.3.I.4.] makes it obligatory on the "State to fulfill everyone's right to the highest attainable standard of health." The Supreme Court of India interpreting Article 21 of the Indian Constitution in the light of Article 12 of the Covenant held that the right to health inhered in the fundamental right to life under Article 21.

62. It is submitted by NACO [National Aids Control Organisation] that Section 377 acts as a serious impediment to successful public health interventions. According to NACO, those in the High Risk Group are mostly reluctant to reveal same-sex behaviour due to fear of law enforcement agencies, keeping a large section invisible and unreachable and thereby pushing the cases of infection underground making it very difficult for the public health workers to even access them. The situation is aggravated by the strong tendencies created within the community who deny MSM behaviour itself. Since many MSM are married or have sex with women, their female sexual partners are consequently also at risk for HIV/infection. The NACO views it imperative that the MSM and gay community have the ability to be safely visible through which HIV/AIDS prevention may be successfully conducted. Clearly, the main impediment is that the sexual practices of the MSM and gay community are hidden because they are subject to criminal sanction.

63. General Comment No.14 (2000) [E/C.12/2000/4; 11 August 2000] on Article 12 of the International Covenant on Economic, Social and Cultural Rights states that right to health is not to be understood as [merely] a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements [also] include the right to a system of health, [and] protection which provides equality of opportunity for people to enjoy the highest attainable level of health. It further states:

> Non-discrimination and Equal Treatment [¶18]
>
> By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), *sexual orientation* and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. The Committee stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information [italics added]….[c]

64. The 2001 UN General Assembly Special Session (UNGASS) Declaration of Commitment on HIV/AIDS, … adopted by all UN Member States emphasised [*sic*] the importance of "addressing the needs of those at the greatest risk of, and most vulnerable to, new

[c] As you learned earlier in Chapter 7, a treaty's subsequent protocols and related instruments are not necessarily binding on all parties. Syria, for example, would not consider itself bound by this 2000 General Comment to the 1966 Covenant (which did not enter into force for any signatory until 1976).

infection as indicated by such factors as ... sexual practices." In 2005, 22 governments from different regions along with representatives of non-governmental organisations and people living with HIV as members of the UNAIDS governing board, called for the development of programmes targeted at key affected groups and populations, including men who have sex with men, describing this as "one of the essential policy actions for HIV prevention." [UNAIDS (2005) Intensifying HIV Prevention, Geneva, Joint United Nations Programme on HIV/AIDS]. Since then, country and regional consultations have confirmed that the stigma, discrimination and criminalisation faced by men who have sex with men are major barriers to the movement for universal access to HIV prevention, treatment, care and support. [United Nations A/60/737 Assessment by UNAIDS to the General Assembly on Scaling up HIV Prevention, Treatment, Care and Support, March 24, 2006].

[¶] At the 2006 High Level Meeting on AIDS, the Member States and civil society members reiterated the commitment underlining the need for "full and active participation of vulnerable groups ... and to eliminate all forms of discrimination against them ... while respecting their privacy and confidentiality." [Paragraph 64 of 2001 Declaration of Commitment on HIV/AIDS and Paragraphs 20 and 29 of the 2006 Political Declaration on HIV/AIDS]. In this context UNAIDS, inter alia, recommended the following:

> Respect, protect and fulfill the rights of men who have sex with men and address stigma and discrimination in society and in the workplace by amending laws prohibiting sexual acts between consenting adults in private; enforcing anti-discrimination; providing legal aid services, and promoting campaigns that address homophobia. [HIV and Sex between Men: UNAIDS]

. . .

67. There is almost 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. In 1987, ego-dystonic homosexuality was not included in the revised third edition of the DSM after a similar review. In 1992, the World Health Organisation removed homosexuality from its list of mental illnesses in the International Classification of Diseases (ICD 10). 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."

68. 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. Thus, homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered,' it is just another expression of human sexuality.

69. Learned Additional Solicitor General [ASG] made an attempt at canvassing the interest of public health to justify retention of Section 377 IPC on the statute book. He referred to the UN

Report on Global AIDS Epidemic, 2008, particularly the section dealing with Asia to highlight that HIV/AIDS is transmitted through the route of sex and specifically that of sex by men-with-men. Reliance was placed on the findings … to the effect that in Asia an estimated 5.0 million people were living with HIV in 2007 out of which 3,80[0],000 people were those who had been newly infected in that year alone. The UN Report attributes this alarming increase in the HIV infection, amongst others, to "unprotected sex" in which unprotected anal sex between men is stated to be a potential significant factor. Learned ASG placed reliance on a number of articles, papers and reports, including publications of Centre for Disease Control and Prevention (CDC). The objective of ASG, in relying upon this material, is to show that HIV/AIDS is spread through sex and that men-to-men sex carries higher risk of exposure as compared to female-to-male or male-to-female. In his submission, de-criminalisation of Section 377 IPC cannot be the cure as homosexuals instead need medical treatment and further that AIDS can be prevented by appropriate education, use of condoms and advocacy of other safe sex practices.

70. We are unable to accede to the submissions of [the] learned ASG. The understanding of homosexuality, as projected by him, is at odds with the current scientific and professional understanding. As already noticed with reference to Diagnostic and Statistical Manual of Mental Disorders (DSM), as revised in 1987 (3rd edition), "homosexuality" is no longer treated as a disease or disorder and now near unanimous medical and psychiatric expert opinion treats it as just another expression of human sexuality.

71. The submission of ASG that Section 377 IPC does not in any manner come in the way of MSM accessing HIV/AIDS prevention material or health care intervention is in contrast to that of NACO, a specialized agency of the government entrusted with the duty to formulate and implement policies for prevention of spread of HIV/AIDS. As mentioned earlier, NACO confirms the case of the petitioner that enforcement of Section 377 IPC contributes adversely; in that, it leads to constantly inhibiting interventions through the National AIDS Control Programme undertaken by the said agency.

[¶] It needs to be noted here that Government of India is a party to the declared commitment to address the needs of those at greater risk of HIV including amongst High Risk Groups…. Thus, the submissions made orally on behalf of the Union of India [by its Ministry of Home Affairs] are not borne out by the records. On one hand, the affidavit of NACO categorically states that Section 377 IPC pushes gays and MSM underground, leaves them vulnerable to police harassment and renders them unable to access HIV/AIDS prevention material and treatment. On the other, the extensively documented instances of NGOs working in the field of HIV/AIDS prevention and health care being targeted and their staff arrested under Section 377 IPC amply demonstrate the impact of criminalization of homosexual conduct.

72. The submission of ASG that Section 377 IPC helps in putting a brake in the spread of AIDS and if consensual same-sex acts between adults were to be de-criminalised, it would erode the effect of public health services by fostering the spread of AIDS is completely unfounded since it is based on incorrect and wrong notions. Sexual transmission is only one of the several factors for the spread of HIV and the disease spreads through both homosexual as well as heterosexual conduct. There is no scientific study or research work by any recognised scientific or medical body, or for that matter any other material, to show any causal connection existing between decriminalisation of homosexuality and the spread of HIV/AIDS. The argument, in fact, runs counter to the policy followed by the Ministry of Health and Family Welfare in combating the spread of this disease.

73. A similar line of argument advanced in the case of *Toonen v. State of Australia*

(supra) before [the UN] Human Rights Committee was rejected with the following observations:

> As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Government of Australia observes that statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection." Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

74. Learned ASG was at pains to argue that Section 377 IPC is not prone to misuse as it is not enforced against homosexuals but generally used in cases involving child abuse or sexual abuse. Again, the submission is against the facts. A number of documents, affidavits and authoritative reports of independent agencies and even judgments of various courts have been brought on record to demonstrate the widespread abuse of Section 377 IPC for brutalising MSM and gay community persons, some of them of very recent vintage. If the penal clause is not being enforced against homosexuals engaged in consensual acts within privacy, it only implies that this provision is not deemed essential for the protection of morals or public health vis-a-vis said section of society. The provision, from this perspective, should fail the "reasonableness" test.

MORALITY AS A GROUND OF A RESTRICTION TO FUNDAMENTAL RIGHTS

75. As held in *Gobind* (supra), if the court does find that a claimed right is entitled to protection as a fundamental privacy right, the law infringing it must satisfy the compelling state interest test. While it could be "a compelling state interest" to regulate by law, the area for the protection of children and others incapable of giving a valid consent or the area of non-consensual sex, enforcement of public morality does not amount to a "compelling state interest" to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others. In *Lawrence v. Texas* (supra), the [US Supreme] Court held that moral disapproval is not by itself a legitimate state interest to justify a statute that bans homosexual sodomy. Justice Kennedy observed:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a

realm of personal liberty which the government may not enter." .... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

76. Further, Justice O'Connor while concurring in the majority judgment added that:

Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

[Here, the Indian court missed yet another opportunity to present and respond to the opposing view. As Justice Antoin Scalia, speaking for one-third of the court's members via his *Lawrence v. Texas* dissent, opined:

> Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. …
>
> It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter.[d]

As stated above (textbook author's footnote b), information not included in the Indian court's decision deprives the reader of access to both sides of the argument, as is required for academic objectivity. The counter-arguments available to the Indian court might have included the following:

• As Justice Scalia acknowledged: "the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct." Justice Scalia thereby responsibly identified the degree to which a prominent group disagreed with his position. The Indian court's *Naz Foundation* decision could have done more to objectively reveal both sides of the issue presented—by not *selectively* drawing upon just the preferred portion of the above UN General Assembly gay rights declarations, and the US Supreme Court's *Lawrence* decision.

• As the Indian court asserted earlier in this opinion, there is an extraordinarily significant difference between constitutional and political morality. This distinction could have been squarely parsed, rather than leading the reader to assume that the *Lawrence v.*

[d] *Lawrence*, at 602.

Texas court was undivided in its decision to ban the criminalization of homosexuality among consenting adults.

• Justice Scalia's reference to "the agenda promoted by some homosexual activists" appears to presume that heterosexual activists do not advocate the same goals as homosexual activists—that is, to promote *constitutional* democracy (as opposed to mere majority rule), by preserving the rights of cognizable minorities.]

77. In *Dudgeon v. United Kingdom* (supra), the UK Government urged that there is [a contemporary] feeling in Northern Ireland against the proposed change, as it would be seriously damaging to the moral fabric of Northern Irish society. The issue before the Court was to what extent, if at all, the maintenance in force of the legislation is "necessary in a democratic society" for these aims. The Court … observed that overall function served by the criminal law in this field is to preserve public order and decency and to protect the citizen from what is offensive or injurious. Furthermore, the necessity for some degree of control may even extend to consensual acts committed in private, where there is call to provide social safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence. The Court concluded as follows:

> As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States. In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years [18 in India] capable of valid consent. No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.
>
> It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.

. . .

79. Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. 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.

. . .

80. … The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.

. . .

82. The [British] Wolfenden Committee[e] [—] in considering whether homosexual acts between consenting adults in private should cease to be criminal offences [—] examined a similar argument of morality in favour of retaining them as such. It was urged [by IPC 377 supporters] that conduct of this kind is a cause of the demoralisation and decay of civilisations, and that, therefore, unless the Committee wished to see the nation degenerate and decay, such conduct must be stopped, by every possible means. Rejecting this argument, the Committee observed: "We have found no evidence to support this view, and we cannot feel it right to frame the laws which should govern this country in the present age by reference to hypothetical explanations of the history of other peoples in ages distant in time and different in circumstances from our own. In so far as the basis of this argument can be precisely formulated, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Many people feel this revulsion, for one or more of these reasons. But 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."

. . .

85. Justice Michael Kirby, a distinguished former Judge of Australian High Court …, said that criminalisation of private, consensual homosexual acts is a legacy of one of three very similar criminal codes (of [British officials] Macaulay, Stephen and Grifith), imposed on colonial people by the imperial rules of the British Crown. [Kirby urged that] [s]uch laws are …:

> • Wrong in legal principle because they exceed the proper ambit and function of the criminal law in a modern society;
> • Wrong because they oppress a minority in the community and target them for an attribute of their nature that they do not choose and cannot change. In this respect they are like other laws of colonial times that disadvantages people on the ground of their race or sex;
> • Wrong because they fly in the face of modern scientific knowledge about the incidence and variety of human sexuality; and
> • Wrong because they put a cohort of citizens into a position of stigma and shame that makes it hard to reach them with vital messages about safe sexual conduct, essential in the age of HIV/AIDS.

[Homosexual Law Reform: An Ongoing Blind Spot of the Commonwealth of Nations by the Hon'ble Michael Kirby AC CMG, 16th National Commonwealth Law Conference, Hong Kong, 8th April, 2009].

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[e] The Wolfenden Report (whose Chair was Sir John Wolfenden) responded to a mid-1950's Royal Commission request to investigate British laws on homosexuality. There had been a series of highly publicized prosecutions of individuals for homosexual acts. The report did not condone homosexuality. It did observe that laws against gays constituted violations of civil liberties. This Report also concluded that homosexuality was not a disease. Psychiatric care for gays was not needed. See Great Britain Committee on Homosexual Offences and Prostitution, THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (New York, NY: Stein and Day, 1963).

86. … Moral indignation, howsoever strong, is not a valid basis for overriding [the] individual's fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view. … The compelling state interest rather demands that public health measures are strengthened by de-criminalisation of such activity, so that they can be identified and better focused upon.

87. For the above reasons we are unable to accept the stand of the Union of India that there is a need for retention of Section 377 IPC to cover consensual sexual acts between adults in private on the ground of public morality.

. . .

THE CLASSIFICATION BEARS NO RATIONAL NEXUS TO THE OBJECTIVE SOUGHT TO BE ACHIEVED

. . .

93. We may also refer to Declaration of Principles of Equality issued by the Equal Rights Trust in April, 2008, which can be described as current international understanding of Principles on Equality … [which] reflects a moral and professional consensus among human rights and equality experts. The declaration defines the terms 'equality' and 'equal treatment' as follows:

> THE RIGHT TO EQUALITY
>
> The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.
>
> EQUAL TREATMENT
>
> Equal treatment, as an aspect of equality, is not equivalent to identical treatment. To realise full and effective equality, it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals.

. . .

SECTION 377 IPC TARGETS HOMOSEXUALS AS A CLASS

94. Section 377 IPC is facially neutral and it apparently targets not identities but acts[.] [B]ut in its operation it does end up unfairly targeting a particular community. The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class. Section 377 IPC has the effect of viewing all gay men as criminals. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself.

INFRINGEMENT OF ARTICLE 15—WHETHER 'SEXUAL ORIENTATION' IS A GROUND ANALOGOUS TO 'SEX'

99. … Article 15 prohibits discrimination on several enumerated grounds, which include 'sex.'

. . .

100. [The] International Covenant on Civil and Political Rights (ICCPR) recognises the right to equality and states that, "the law shall prohibit any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social region, property, birth or other status". In *Toonen v. Australia* (supra), the Human Rights Committee, while holding that certain provisions of the Tasmanian Criminal Code which criminalise various forms of sexual conduct between men violated the ICCPR, observed that the reference to 'sex' in Article 2, paragraphs 1 and 26 (of the ICCPR) is to be taken as *including* 'sexual orientation' [italics added].

. . .

104. We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15.

. . .

CONCLUSION

. . .

130. If there is one constitutional tenet that can be said to be [the] underlying theme of the Indian Constitution, it is that of 'inclusiveness.' This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as "deviants' or 'different' are not on that score [thereby legally] excluded or ostracised.

131. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non discrimination. … In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.

132. We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of … the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law….

We allow the writ petition in the above terms.