IN THE HON'BLE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

W.P. (Crl.) No. 121 of 2018

In the matter of:

ANWESH POKKULURI & ORS. **…**

PETITIONERS

VERSUS

UNION OF INDIA **…**

RESPONDENT

Written Submissions submitted by Dr. Menaka Guruswamy,

Pritha Srikumar and Arundhati Katju

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I. The Petition

1.1 The 20 Petitioners are all Lesbian, Gay, Bi-sexual, Transgender students or alumni of the prestigious Indian Institutes of Technology ("**IIT**"), and are all members of 'Pravritti' – a 350 member strong pan-IIT support group for LGBT members of the IIT fraternity (students, alumni, interns, staff and anyone else who has lived on any of the IIT campuses). They come from diverse backgrounds – regional, social and economic. The petitioners come from Kakinada in Andhra Pradesh, Mandya in Karnataka, Sundergarh and Sambalpur in Odisha, Ranchi in Jharkhand and Korba in Chhattisgarh. They are scientists, entrepreneurs, teachers, researchers, and employees in companies. They are the children of farmers, teachers, home makers and government servants. The youngest petitioner is a 19-year old student from IIT Delhi and oldest is an academic who graduated in 1982.

1.2 The IITs are autonomous institutes of higher learning imparting education in the areas of science and technology. There are 23 IITs in India today, the first one being Kharagpur, set up in 1950. The IITs are regulated under the provisions of the Institutes of Technology Act, 1961. Under Section 2, the Act designates all IITs as institutes of national importance.

1.3 The first Prime Minister of India, Jawaharlal Nehru, is considered the architect of the IITs. Nehru envisioned that in due course, the IITs will "provide scientists and technologists of the highest calibre who would engage in research, design and development to help building the nation towards self-reliance in her technological needs." The graduates of the IITs would build a modern India. The IITs are the most competitive exams anywhere in the world with 1.2 million applying annually for 11,000

seats.[1] Therefore, these Petitioners are amongst the best and brightest in the country. Far from supporting these builders of contemporary India, Section 377 punishes them with the threat of criminal sanction simply for who they love.

1.4 The Petition documents in detail the horrific impact that Section 377 of the Indian Penal Code ("Section 377") has on the lives of these persons, who are amongst the best and brightest minds in the country. Their struggles include depression and mental health issues on account of the rejection of, and denial of their sexual identity, ridicule, bullying and blackmail stemming from homophobia, stigma arising from being treated as abnormal or deviant individuals, insecurity at the workplace etc. which has impelled many members of Pravritti to opt to move abroad, and reside in more accepting jurisdictions, where they may live their lives in peace. [Regard may be had to the averments at **para 16** of WP (Crl.) No. 121/2018, at **p.24-34.**]

1.5 Therefore, this writ petition *inter alia* seeks the following relief (**at p. 62**):

> A. Declare that the Petitioners are entitled to equality before the law and equal protection of law, without discrimination on the basis of their sexual orientation, under Articles 14, 15 and 16 of the Constitution of India;
> B. Declare that Section 377 of the Indian Penal Code, 1860 to the extent it penalizes consensual sexual relations between adults, is violative of Articles 14, 15, 16, 19 and 21 of the Constitution of India;
> C. Issue an appropriate writ, order or injunction prohibiting the Respondent arraigned herein by itself, or through its officers, agents and/or servants from in any manner enforcing the law under Section 377 of the Indian Penal Code, 1860 in relation to consensual, sexual conduct between adults;[…]

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[1] *IIT JEE Main 2018: 10.5 lakh students appeared for the examination*, THE TIMES OF INDIA (April 9, 2018), https://timesofindia.indiatimes.com/home/education/news/iit-jee-main-2018-10-5-lakh-students-appeared-for-the-examination/articleshow/63677318.cms; 11279 seats being offered in the IITs in 2018, an increase of 291 over last year, THE ECON. TIMES (June 6, 2018), https://economictimes.indiatimes.com/industry/services/education/11279-seats-being-offered-in-the-iits-in-2018-an-increase-of-291-over-last-year/articleshow/64483912.cms.

II. LGBTQ persons are entitled to equality before the law and equal protection of the law under Article 14

2.1 The Justice JS Verma Committee, consisting of the late Justices JS Verma and Leila Seth, and Sh. Gopal Subramaniam, Sr. Advocate noted that sexual orientation discrimination violates the right to equality:

> "Thus, if human rights of freedom mean anything, India cannot deny the citizens the right to be different. The state must not use oppressive and repressive labelling of despised sexuality. Thus the right to sexual orientation is a human right guaranteed by the fundamental principles of equality. We must also add that transgender communities are also entitled to an affirmation of gender autonomy. Our cultural prejudices must yield to constitutional principles of equality, empathy and respect...We need to remember that the founding fathers of our Constitution never thought that the Constitution is 'mirror of perverse social discrimination. On the contrary, it promised the mirror in which equality will be reflected brightly.'[2]

A. Section 377 is arbitrary and unconstitutional and violates Article 14 for the following reasons: (i) unlawfulness of legislative object (ii) lack of proportionality (iii) vagueness

2.2 Section 377 of the Indian Penal Code (45 of 1860) provides:

> 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.

2.3 Firstly, Section 377 is a hostile class legislation which furthers discrimination, and hence is contrary to Article 14. Section 377 discriminates between consensual sexual acts of adults on the basis of the sex of their chosen partner. The hostile legislative object of the Section is evident from its legislative history (see Prof. Douglas Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, November 2008, Sl. 2

[2] JS Verma Committee Report, page 55 para 75.

in Module 1 filed by Sh. Arvind Datar, Sr. Advocate), which establishes that the legislative object, in enacting Section 377, was to criminalise sexual activities between persons of the same sex. Thus, **the legislative object was itself discriminatory**.

2.4 While Article 14 permits classification on the basis of intelligible differentia having a rational nexus to the legislative object, this Hon'ble Court has repeatedly held that the object of the legislation itself must be a legitimate State object and not one that is designed merely to discriminate. It is submitted that where the object of a legislation is itself only to discriminate, as in the case of Section 377, such object would be manifestly arbitrary.

2.5 In *Nagpur Improvement Trust v. Vithal Rao,* (1973) 1 SCC 500, a seven-judge bench of this Hon'ble Court held as follows:

> "It is now well-settled that the State can make a reasonable classification for the purpose of legislation. It is equally well-settled that the classification in order to be reasonable must satisfy two tests: (i) the classification must be founded on intelligible differentia and (ii) the differentia must have a rational relation with the object sought to be achieved by the legislation in question. **In this connection it must be borne in mind that the object itself should be lawful. The object itself cannot be discriminatory, for otherwise, for instance, if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved."**

2.6 In *Subramaniam Swamy* v *Director, Central Bureau of Investigation & Anr.,* (2014) 8 SCC 682 **(pp. 1-59 of the Compilation)**, this Hon'ble Court held,

> "The Constitution permits the State to determine, by process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. There is bound to be some degree of inequality when there is segregation of one class from the other. However, such

> segregation must be rational and not artificial or evasive. In other words, the classification must not only be based on some qualities or characteristics, which are bound to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. Differentia which is the basis of classification must be found and must have reasonable relation to the object of the legislation. **If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial**." (para 58, p. 725) (*emphasis supplied*)

2.7 A constitution bench of this Hon'ble Court noted that arbitrariness is a facet of discrimination in *Union of India* v. *Tulsi Ram Patel,* (1985) 3 SCC 398:

> "90. Article 14 contains a guarantee of equality before the law to all persons and a protection to them against discrimination by any law…What Article 14 forbids is discrimination by law, that is, treating persons similarly circumstanced differently or treating those not similarly circumstanced in the same way or, as has been pithily put, treating equals as unequals and unequals as equals. **Article 14 prohibits hostile classification by law and is directed against discriminatory class legislation.** The propositions deducible from decisions of this Court on this point have been set out in the form of thirteen propositions in the judgment of Chandrachud, C.J., in *In re Special Courts Bill*, 1978 [(1979) 1 SCC 380 : (1979) 2 SCR 476] . The first of these propositions which describes the nature of the two parts of Article 14 has been extracted earlier…In early days, this Court was concerned with discriminatory and hostile class legislation and it was to this aspect of Article 14 that its attention was directed. As fresh thinking began to take place on the scope and ambit of Article 14, new dimensions to this guarantee of equality before the law and of the equal protection of the laws emerged and were recognized by this Court. **It was realized that to treat one person differently from another when there was no rational basis for doing so would be arbitrary and thus discriminatory**. **Arbitrariness can take many forms and shapes but whatever form or shape it takes, it is nonetheless discrimination. It also became apparent that to treat a person or a class of persons unfairly would be an arbitrary act amounting to discrimination forbidden by Article 14**…" (emphasis supplied)

2.8 "Manifest arbitrariness" was defined in *Shayara Bano* v *Union of India*, (2017) 9 SCC 1, as under:

> "**The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14**. Further, there is an apparent contradiction in the three-judge bench decision in *McDowell* when it is said that a constitutional challenge can succeed on the ground that a law is 'disproportionate, excessive or unreasonable', yet such challenge would fail on the very ground of the law being 'unreasonable, unnecessary or unwarranted'. **The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve the law being disproportionate, excessive or otherwise being manifestly unreasonable.** All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution." (Para 87, pp. 91-92) (*emphasis supplied*)

> "**Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally, and/or without adequate determinative principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary**." (Para 101, p. 99) (*emphasis supplied*)

2.9 Secondly, it is submitted that Section 377 is disproportionate and therefore arbitrary and contravenes Article 14. It is pertinent to note that while the same acts, done consensually, between persons of the opposite sex are not criminalised, Section 377 stipulates that such consensual sexual acts between persons of the same sex shall carry punishment of imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and also a fine. Thus, the disproportionate penalty or a savage sentence, on activity that is not criminalised as between persons of the opposite sex also establishes manifest arbitrariness.

2.10 Section 377 is also arbitrary because it imposes a life sentence or imprisonment for 10 years on persons merely for their exercise of choice.

In the words of *Mithu v. State of Punjab*, (1983) 2 SCC 277, "A savage sentence is anathema to the civilised jurisprudence of Article 21" (para 6).

2.11 Lastly, Section 377 is over-broad, vague and falls foul of Article 14 on this ground as well. In *Shreya Singhal* v. *UOI*, (2015) 5 SCC 1, this Hon'ble Court, after referring to American jurisprudence on the argument of vagueness of criminal statutes, quoted with emphasis the following observations in *K. A. Abbas* v. *UOI*, (1970) 2 SCC 780, to conclude that the doctrine of vagueness was established in Indian constitutional law also:

> "The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases." (emphasis supplied by the Court in *Shreya Singhal, a*t para 68)

2.12 In a constitutional democracy, a statute that protects and furthers the morality of colonial monarchs is per se arbitrary. The language of Section 377 is vague and leaves the persons to whom it is applied in a "boundless sea of uncertainty" for there is no precise definition nor understanding of "carnal intercourse against the order of nature". For the above reasons, Section 377 violates Article 14 and is liable to be struck down as unconstitutional.

B. Article 14 entitles LGBT persons to a declaration of their right to non-discrimination under any law, on grounds of sexual orientation

2.13 The present writ petition seeks a declaration that the Petitioners, as LGBT citizens, are entitled to equality before the law and equal protection of law, without discrimination on the basis of their sexual orientation, under Articles 14, 15 and 16 of the Constitution of India. The writ petition is not restricted to striking down Section 377 of the IPC.

2.14 It is submitted that merely striking down Section 377 does not ensure the fundamental right to equality of LGBT citizens. The declaration prayed for is imperative as LGBT citizens are denied a host of rights available to heterosexual persons, only on account of their identity. For instance, though protections are available to women in a relationship in the nature of marriage (a 'live-in' relationship) under the Protection of Women from Domestic Violence Act, 2005, this protection of the law is not extended to same-sex live-in partners, even though such relationships are also a social reality. In *Indra Sarma* v. *VKV Sarma*, (2013) 15 SCC 755, this Hon'ble Court observed:

> "**Domestic relationship between same sex partners (Gay and Lesbians): DV Act does not recognize such a relationship and that relationship cannot be termed as a relationship in the nature of marriage under the Act.** Legislatures in some countries, like the Interpretation Act, 1984 (Western Australia), the Interpretation Act, 1999 (New Zealand), the Domestic Violence Act, 1998 (South Africa), the Domestic Violence, Crime and Victims Act, 2004 (U.K.), have recognized the relationship between the same sex couples and have brought these relationships into the definition of Domestic relationship. (para 38.5, p. 780)
>
> 39. **Section 2(f) of the DV Act though uses the expression "two persons", the expression "aggrieved person" under Section 2(a) takes in only "woman", hence, the Act does not recognize the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or conduct of any of the parties, would not lead to domestic**

> **violence, entitling any relief under the DV Act.**" (para 39, p. 780)

2.15 In *Suresh Kumar Koushal* v *Naz Foundation*, (2014) 1 SCC 1, the Hon'ble Court noted:

> "… a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.

It is submitted that on the contrary, as noted by this Hon'ble Court while dealing with Article 25, in *Bijoe Emmanuel* v. *State of Kerala,* (1986) 3 SCC 615:

> "…the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's constitution." (para 18, at p.626)

In *Bijoe Emmanuel,* this Court also referenced the judgment of Justice Jackson of the US Supreme Court in *West Virginia State Board of Education* v. *Barnette,* 319 US 624, reversing a previous judgment of that Court in *Minersville School District* v. *Gobitis,* 310 US 586. Disagreeing with the prescriptions for judicial restraint in the matter of protection of rights as held in *Gobitis,* in *Barnette,* Justice Jackson observed as follows:

> "…The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

2.16 It is humbly submitted that it is in this context that a declaration of the right to equality of LGBT persons is prayed for in the present writ petition. A declaration of the right to equality before law and equal protection of the

law is necessary to ensure that social morality is shaped by constitutional morality. The recognition of rights conferred by the Constitution, cannot be conceded or acknowledged only in 'incremental' steps. The declaration prayed for is necessary in the context of the historical discrimination faced by the LGBT community, to secure them full and equal citizenship and to bridge the gap between decriminalisation and emancipation.

III. Section 377 violates Article 15's prohibition of sex discrimination

3.1 Articles 14, 15 and 16 are the composite equality code of the Indian Constitution. Article 15(1) prevents discrimination by the State on the prohibited grounds of religion, race, caste, sex, place of birth or any of them.

3.2 This Hon'ble Court has held that the State has a positive obligation to create a just and equal society under Articles 15 and 16 of the Constitution. Section 377 IPC interferes with this obligation, by creating a section of Indian citizens who have consistently faced discrimination and an inability to exercise constitutional rights. As held in *NALSA v Union of India*, (2014) 5 SCC 438 **(pp. 60-131 of the Compilation)**,

> "The basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community, and social status…There cannot be social reforms till it is ensured that each and every citizen of this country is able to exploit his/her potentials to the maximum." (para 98, p. 496)

3.3 Article 15 must be construed broadly to give meaningful content to the constitutional values enshrined, keeping in mind the settled principles of constitutional interpretation. As far back as *Sakal Papers v Union of India*,

(1962) 3 SCR 842 **(pp. 132-144 of the Compilation)**, this Hon'ble Court has held that the fundamental rights should be interpreted broadly:

> "It must be borne in mind that the Constitution must be interpreted in a broad and not in a narrow and pedantic sense. Certain rights have been enshrined in our constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a matter which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions. (para 28, pp. 138-139 of the Compilation)

3.4 The Constitution is built on a central set of enduring values including forging a just and equal society. The constitutional promise to uphold these values of justice, liberty, equality and fraternity is broken by discrimination on the basis of sexual orientation. The United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 **(pp. 145-186 of the Compilation)**, observed:

> "The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."
>
> (para 4, pg.8)

Therefore, the United States Supreme Court reasons that at the time of drafting constitutional texts, it may not always be obvious to generations past what is the extent of freedoms in all its dimensions that may be necessary for future generations to protect. The guiding principle when there may be a hypothetical discord is that constitutional values of liberty must guide interpretation of the text and when such a claim to liberty is made, it must be addressed by the Court.

A. Section 377 discriminates based on the sex of the partner

3.5 Section 377 discriminates based on the sex of a persons' sexual partner and hence violates Articles 15 and 16. Under Sections 376 to 376E IPC, a person can be prosecuted for certain acts with an opposite-sex partner only if the partner did not consent. However, the same acts with a same-sex partner are criminalized even if the partner consents. Hence, Section 377 IPC discriminates against persons based on the sex of their partners, which is a direct violation of Article 15 on a plain textual reading.

3.6 However, it is not simply sexual acts that the provision criminalises. What it actually criminalises is the loving relationships that LGBT Indians like these petitioners seek to enjoy. For instance, in *Navtej Singh Johar and Ors.* v *Union of India,* [W.P. (Crl.) no. 76 of 2016], the lead petitioner Navtej Singh Johar and his partner Petitioner no. 2 Sunil Mehra have been together 25 years. Petitioner Aman Nath and his partner Francis Wacziarg were together 23 years until the latter's death. How much must these petitioners (and other LGBT Indians) love each other to survive the cruelty of *Suresh Kumar Koushal* v *Naz Foundation*, (2014) 1 SCC 1 and Section 377?

3.7 By discriminating on the basis of the sex of the partner, Section 377 also forces the petitioners in this instant writ petition, the younger IIT students and alumni, to ask whether lives will be better than those of the older petitioners? Or must they also watch their lives go by? Does their love not warrant the protection of their court, their constitution and their country?

3.8 This Hon'ble Court has consistently recognised the autonomy of every Indian to pick a partner of their choice. In two recent decisions, this court affirmed the fundamental right to choose a partner. In *Shafin Jahan* v

Asokan K.M. and Ors., (2018) SCC Online SC 343, decided on 9th April 2018 **(pp. 330-353 of the Compilation)**, the Court observed:

> "The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. **Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness.** Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. **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.** The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. **Society has no role to play in determining our choice of partners**." (para 90, p. 350 of the Compilation) (*emphasis supplied*)

3.9 Additionally, in *Shakti Vahini* v *Union of India*, (2018) SCC Online SC 275, decided on 27th March 2018 **(pp. 312-329 of the Compilation)**, the court observed as follows:

> "**The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation**. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the

> ancestors of Caesar or, for that matter, Louis the XIV. **The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law**. (para 46, p. 324 of the Compilation) (*emphasis supplied*)

3.10 There is considerable authority from other jurisdictions that discrimination based on choice of partner is unlawful. In *El-Al Israel Airlines v. Danielowitz*, HCJ 721/94 **(pp. 461-500 of the Compilation)**, the Supreme Court of Israel held:

> Conferring a benefit on a permanent employee for his recognized companion and not conferring it on a permanent employee for a same-sex companion (who complies with all the requirements of a recognized companion apart from the requirement of sex) amounts to discrimination in conditions of employment because of sexual orientation. This discrimination is prohibited. Consider A, a permanent employee of El- Al, who shares his life for several years with a woman B. They cohabit and run a common household (as required by El-Al for complying with the conditions of a recognized companion). A is entitled to an aeroplane ticket for B. Now consider A who lives in the same way with a man C. They too cohabit and run a common household. A is not entitled to an aeroplane ticket for C. How can this difference be explained? Does the one carry out his job as an employee differently from the other? The only explanation lies in A's sexual orientation. This amounts to discrimination in conditions of employment because of sexual orientation. No explanation has been given that might justify this discriminatory treatment. There is nothing characterizing the nature of the job or the position that justifies this unequal treatment (see s. 2(c) of the Equal Employment Opportunities Law).
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> (pg.14-15)

3.11 In *Toonen v. Australia*, Communication No.488/1992, U.C. Doc CCPR/C/50/D/488/1992 (1994) **(pp. 501-510 of the Compilation)**, the Human Rights Committee held:

> Section 122 of the Tasmanian Criminal Code outlaws sexual intercourse between men and between women. While Section 123 also outlaws indecent sexual contacts between consenting men in open or in private, it does not outlaw similar contacts between consenting women. In paragraph 8.7, the Committee found that in its view, the reference to the term "sex" in article 2, paragraph 1, and in article 26 is to be taken as including sexual orientation. I concur with this view, as the common denominator

> for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating under Sections 122(a), (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant.
> Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time: the designated behaviour none the less remains a criminal offence.
> (pg.9)

3.12 In light of this Hon'ble Court's recent jurisprudence on the right to choice of partner, in addition to authority from other jurisdictions with similar constitutional values, it is submitted that Section 377 IPC places unconstitutional restrictions on this right by criminalizing the choice of an same-sex partner. It therefore violates Article 15 and ought to be struck down by this Hon'ble Court.

B. Section 377 is based on sex-based stereotypes

3.13 Section 377 discriminates against LGBT persons on the basis of gender stereotypes and assumptions about sexual preferences. Section 377 is based on a Victorian morality that assumes that people should have intercourse only with persons of the opposite sex and that sexual intercourse is of the "order of nature" only when it is for the purpose of procreation. By criminalizing certain acts based only on stereotypes of gender and sexual identity, Section 377 violates Article 15's prohibition against sex discrimination.

3.14 The protection against sex discrimination enshrined in Article 15 ought not to be narrowly interpreted, and it is submitted that stereotypes based on sexual role would also fall foul of Article 15. This proposition derives support from the observations of this Hon'ble Court in *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1 **(pp. 354-373 of the Compilation)**:

> "…This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the Court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy…."
>
> (para 41, p. 16)

> "…Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means."
>
> (para 46, p. 18)

3.15 In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) **(pp. 430-460 of the Compilation)** the US Supreme Court held that sex stereotyping cannot be used to discriminate against persons:

> "… As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for, "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[3] (p. 251)

3.16 Therefore the stereotyping in question that Section 377 that a man must be only with a woman and conversely, that women should only be in relationships with men. Such stereotyping draws on "incurable fixations of stereotype morality and conception of sexual role[s]" of men and women. And in the words of this Hon'ble Court in *Anuj Garg*, such

[3] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

stereotyping is "outmoded", and therefore, in our respectful submissions, impermissible and unconstitutional.

C. The prohibition against discrimination on the grounds of 'sex' in Article 15 includes 'sexual orientation'

3.17 It is submitted that the term 'sex' in Article 15 includes 'sexual orientation', keeping in mind the recent jurisprudence of this Hon'ble Court as well as guidance from other jurisdictions.

3.18 Significantly, the Justice JS Verma Committee on the Amendments to Criminal Law dated 23rd January 2013 **(pp. 187-221 of the Compilation)** expressly observed that "sex" in Article 15 includes "sexual orientation" as a prohibited ground of discrimination:

> "We must also recognize that our society has the need to recognize different sexual orientations a human reality. In addition to homosexuality, bisexuality, and lesbianism, there also exists the transgender community. In view of the lack of scientific understanding of the different variations of orientation, even advanced societies have had to first declassify 'homosexuality' from being a mental disorder and now it is understood as a triangular development occasioned by evolution, partial conditioning and neurological underpinnings owing to genetic reasons. Further, we are clear that Article 15(c) of the constitution of India uses the word "sex" as including sexual orientation. (para 65, p. 51)

3.19 In *Shakti Vahini* (supra), this Hon'ble Court has affirmed that the choice of partner and by implication, one's sexual orientation, are core facets of the right of every individual to live with dignity. Further, in *Shafin Jahan* (supra), this Hon'ble Court protected the right of a couple in an inter-religious relationship to choose their partner:

> "Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation

> of that freedom which is ingrained in choice on the plea of faith is impermissible." (para 54, p. 343 of the Compilation)

3.20 In *Common Cause* v. *Union of India*, (2018) 5 SCC 1, this Hon'ble Court held:

> "Our autonomy as persons is founded on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives." (para 346, p. 193-194)

3.21 Therefore, this Hon'ble Court has recognises that integral to one's sense of autonomy is the ability to decide choices of whom to love and whom to partner. Such a choice of whom to love and whom to partner must be necessarily protected from any possible discrimination on grounds of the sex of the partner as prohibited under Article 15. The citizen's sexual orientation in turn will decide the sex of the partner, whether the partner is of the opposite or the same sex. Hence, the prohibited ground of sex discrimination under Article 15 includes sexual orientation.

D. Sexual orientation is a ground analogous to those mentioned in Article 15

3.22 The Hon'ble Delhi High Court in *Naz Foundation* v. *Govt. of NCT of Delhi & Ors.*, (2009) 111 DRJ 1 (DB), as follows:

> "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. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15." (para 104, p. 47)

3.23 The Supreme Court of Canada in *Delwin Vriend and others* v *Her Majesty the Queen in Right of Alberta and others*, [1998] 1 SCR 493 **(pp. 222-264**

of the Compilation), when interpreting a breach of Section 15(1) of the Canadian Charter of Rights and Freedoms concluded that 'sex' includes sexual orientation. Section 15(1) of the Charter reads:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or physical disability."

3.24 In *Vriend,* the Supreme Court of Canada, relying on the reasoning adopted by it in *James Egan and John Norris Nesbit* v *Her Majesty the Queen in Right of Canada and Another* ([1995] 2 SCR 513), applied its now well-known test of grounds analogous to those specified textually. The *Egan* test was applied as follows:

> In Egan, it was said that there are two aspects which are relevant in determining whether the distinction created by the law constitutes discrimination. First, "whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) **or which is analogous to those enumerated**". Second "whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others" (para. 131). A discriminatory distinction was also described as one which is "capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration" (Egan, at para. 56, per L'Heureux-Dubé J.). It may as well be appropriate to consider whether the unequal treatment is based on "the stereotypical application of presumed group or personal characteristics" (Miron, at para. 128, per McLachlin J.)
>
> (para 89, pg.21)

> In Egan, it was held, on the basis of "historical social, political and economic disadvantage suffered by homosexuals" and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), **that sexual orientation is a ground analogous to those listed in s. 15(1). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (para. 5). It is analogous to the other personal**

> **characteristics enumerated in s. 15(1); and therefore this step of the test is satisfied.**
>
> (para 90, pg.21-22) (emphasis supplied)

3.25 In *National Coalition for Gay and Lesbian Equality & Another v. Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC) **(pp. 265-311 of the Compilation)**, the South African Constitutional Court was concerned with the challenge to South Africa's sodomy provision under Section 20A of Sexual Offences Act 23 of 1957. South Africa's top court looked to the Canadian Supreme Court's decision in *Egan*:

> Despite the fact that section 15(1) of the Canadian Charter 71 does not expressly include sexual orientation as a prohibited ground of discrimination, the Canadian Supreme Court has held that sexual orientation is a ground analogous to those listed in section 15(1):
> "In Egan, it was held, on the basis of 'historical social, political and economic disadvantage suffered by homosexuals' and the emerging consensus among legislatures (at para 176), as well as previous judicial decisions (at para 177), that sexual orientation is a ground analogous to those listed in s. 15(1)."
>
> (para 49, pg.19)

3.26 The South African Constitutional Court takes note of the symbolic as well as the real harm effected by the sodomy statute:

> "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 simply 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."**
>
> (para 28, pg.15)

3.27 Therefore, the South African Constitutional Court makes the powerful point that in the history of apartheid in South Africa, the lives of interracial couples were perpetually at risk and as a group they suffered vulnerability and degradation. Similarly, the sodomy offence in our jurisdiction creates

the same insecurity and vulnerability that was not just recognised in South Africa, but is familiar to us in India. We are familiar with this vulnerability due to inter-religious and inter-caste relationships, both of which this Hon'ble Court has recognized must be protected from discrimination and degradation of any kind, as set out above. If anything, sexual orientation is not just a ground analogous to the prohibited grounds listed in Articles 15 and 16 of the Indian Constitution, but LGBT relationships also warrant the same kind of constitutional protection and sensitivity that this Hon'ble Court has displayed to relationships that were not traditionally sanctioned.

IV. Section 377 denies LGBT citizens equal participation in professional life

4.1 Section 377 prevents LGBT persons from accessing their constitutional rights and state welfare measures, from pursuing their vocation – including state employment and constitutional office – and from seeking electoral office or even raising their demands through the electoral process. In *Jeeja Ghosh v. Union of India,* (2016) 7 SCC 761 (pp. 374-409 of the Compilation), this Hon'ble Court observed "(d)iscrimination occurs due to arbitrary denial of opportunities for equal participation." (para 40, p. 793)

4.2 This Hon'ble Court in *Supreme Court Advocates-on-Record Association* v *Union of India,* (2016) 5 SCC 1, observed as follows:

> *"*For example, in the recent past, there has been considerable debate and discussion, generally but not relating to the judiciary, with regard to issues of sexual orientation. It is possible that the executive might have an objection with regard to the sexual orientation of a person being considered for appointment as a judge but the Chief Justice of India may be of the opinion that that would have no impact on his/her ability to effectively discharge judicial function or the potential of that person to be a good judge." (para 927, p. 668)

4.3 This Hon'ble Court then noted in footnote 568 (p.668): "Australia and South Africa have had a gay judge on the bench. The present political executive in India would perhaps not permit the appointment of a gay person to the Bench." It is submitted that these observations of this Hon'ble Court clearly portray the extent to which discrimination based on sexual orientation is entrenched in our society and has its roots in Section 377.

4.4 In *Jamil Ahmad Qureshi* v. *Municipal Council Katangi,* 1991 Supp (1) SCC 302 (pp. 427-429 of the Compilation), the Appellant was found to be ineligible for appointment in service due to a prior conviction under Section 377 IPC, which was held to be an offence involving "moral turpitude".

4.5 Further, Rule 3 of the All India Services (Discipline and Appeal) Rules, 1969 **(pp. 410-414 of the Compilation)** and Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 **(pp. 415-426 of the Compilation)** provide for automatic suspension from service upon a public servant's being detained in official custody for more than 48 hours on a criminal charge or on conviction. Moreover, even where a public servant is not arrested and is being merely investigated, s/he may be suspended at the discretion of the Government if the offence involves "moral turpitude". In the current petition, out of the 350+ members of the pan-IIT LGBT support group, Pravritti, about a dozen members are bureaucrats at the topmost levels of government (Annexure P-1, pg.107 of the Petition) all of whom declined to be named for this petition fearing action or stigma on account of the abovementioned rules and Section 377.

V. Section 377 violates Article 19(1)(a) and Article 19(1)(c) of the Constitution

A. The freedom of speech and expression includes expression of sexual identity

5.1 It is submitted that pursuant to the decision of this Hon'ble Court in *NALSA* (supra), the expression of sexual and gender identity comes within the protection of Article 19(1)(a). In addition to observing that "each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom" (para 22, p. 465), the Court in *NALSA* went on to observe:

> "Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution." (para 69, p. 489)

5.2 The Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality & Anr. v. Minister of Justice and Ors* (supra), also recognized that "the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of Section 10 of the Constitution." (para 28, p. 15)

B. Section 377 has a chilling effect on LGBT persons' freedom of speech and expression

5.3 Section 377 impedes the exercise of the freedom of speech and expression by LGBT persons. It has a chilling effect on self-expression of sexual and gender identity. Laws that encourage self-censorship are liable to violate

Article 19(1)(a). In *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, this Hon'ble Court struck down Section 66-A of the Information Technology Act, 2000 because it had a chilling effect on free speech:

> "These two Constitution Bench decisions (*T. Rajagopal v. Tamil Nadu* and *Khushboo v. Kanniammal*) bind us and would apply directly on Section 66A. We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth." (para 94, pp. 169-170)

5.4 Section 377 has a chilling effect on the expression of sexual orientation and gender identity. LGBT people are afraid to be open about their sexual identity and their relationships for fear of coercive state action. By contrast, heterosexuals express their sexual identity constantly, whether explicitly or implicitly. Opposite sex couples receive public affirmation and approval when they appear together at social and professional gatherings. Social recognition and affirmation helps people nurture committed, long-term relationships.

5.5 The inability to express themselves, socially, romantically, and professionally leads to heightened rates of depression amongst LGBT persons. A 2016 report by the Astraea Lesbian Foundation of Justice titled "India LGBTI: Landscape Analysis of Political, Economic & Social Conditions" notes the limited data available regarding the healthcare of LGBT persons. The Report shows that there is a need to address social stigma and violence against LGBT persons that leads to mental harassment and depression. There are serious gaps in the area of mental health including suicide prevention.[4] For instance, Vikranth Prasanna, founder of

[4] Katie Zaman et al., India LGBTI: Landscape Analysis of Political, Economic & Social Conditions (Astraea Lesbian Foundation for Justice, 2016), page 10, https://globalphilanthropyproject.org/wp-content/uploads/2017/01/Astraea-landscape-analysis_India-04_11_16.pdf (last accessed on July 19, 2018).

Chennai Dost, an LGBT organization that provides counselling services to members, reported in 2015 that "suicides among the LGBT community has been increasing and this alarming trend is visible ever since the 2013 Supreme Court verdict on Section 377 of the Indian Penal Code (IPC) which has criminalised same gender sex."[5]

5.6 Dr. Lata Hemchand, a reputed psychologist recounts an instance where homosexuality was diagnosed as a psychotic disorder and the patient was given treatment for it:

> "A bright Computer Science student from Hassan, 22-year-old A came from an upper middle-class, conservative Marwari family. Since his adolescence he felt that his bone structure and distribution of hair on the body was more feminine than masculine. He felt that other males got attracted to him due to this. He came out about it to his parents. They tried physical punishment to change his ideas and finally when they were unsuccessful referred him to a psychiatrist. The psychiatrist diagnosed him as psychotic and put him on treatment. His sexual orientation was never addressed and he continued to be awkward and hesitant in social interaction."[6]

5.7 A study done by doctors at the National Institute of Mental Health and Neurosciences (NIMHANS), Bengaluru found that LGBT persons showed higher rates of depression and other mental health problems as compared to heterosexual persons:

> "… sexual minorities are at a higher risk to develop mental health problems due to the discrimination that they face. Compared to their heterosexual counterparts, gay men and lesbians suffer from more mental health problems including substance use disorders, affective disorders, and suicide."[7]
> …
> A national survey conducted by the advocacy organisation Gay, Lesbian, and Straight Education Network reported that those surveyed experienced verbal harassment (61%), sexual

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[5] 16 LGBT Suicides in 18 months, THE NEW INDIAN EXPRESS (26 October 2015), http://www.newindianexpress.com/cities/chennai/2015/oct/26/16-LGBT-Suicides-in-18-Months-834328.html.

[6] Dr. Lata Hemchand, *A Psychologist's Journey to Understanding Sexual Orientation* in NOTHING TO FIX: MEDICALISATION OF SEXUAL ORIENTATION AND GENDER IDENTITY (Arvind Narrain & Vinay Chandran eds., 2016), p.229

[7] Dr. Ami Sebastian Maroky et al., *Validity of 'Ego-dystonicity' in Homosexuality: An Indian perspective* in NOTHING TO FIX: MEDICALISATION OF SEXUAL ORIENTATION AND GENDER IDENTITY (Arvind Narrain & Vinay Chandran eds., 2016), p.206

> harassment (47%), physical harassment (28%), and physical assault (14%). A majority of them (90%) sometimes or frequently heard homophobic remarks at their schools, with many (37%) reporting hearing these remarks from faculty or school staff.
> Lesbian, Gay and Bisexual (LGB) people were twice as likely as heterosexual people to have experienced a life-event related to prejudice, such as being fired from a job. Gay and bisexual male workers were found to earn from 11 per cent to 27 per cent less than heterosexual male workers with the same experience, education, occupation, marital status, and region of residence."[8]

5.8 The Indian Psychiatric Society by their statement dated dated 02.07.2018 also does not consider homosexuality or bisexuality to be a mental illness. To the contrary, the IPS has recognized that LGBT persons suffer increased rates of suicide, depression and other mental illnesses because of the societal stigma that they suffer on account of their sexual orientation **(p. 511 of the Compilation)**.

5.9 Among the Petitioners, Petitioner No. 1, Anwesh Pokkuluri suffered from acute depression and mental stress which led him to attempt suicide (p.26 of the Petition). Several Petitioners including Petitioner No. 2, Akhilesh Godi, Petitioner No. 8, Udai Bharadwaj, Petitioner No. 13, Vardhaman Kumar and Petitioner No. 15, Viral Jesalpura have been subject to ridicule, bullying, and have faced express instances of homophobia leading to issues such as addiction to self-harm, suicidal thoughts and mental stress (p.25-26 of the Petition). In the case of Petitioner No. 18, Madhansai Marisetty, on account of her gender identity, she was asked to leave the hostel (p. 28 of the Petition).

C. Section 377 impoverishes political discourse

5.10 LGBT people cannot participate in the marketplace of ideas without the lurking fear that they may be prosecuted for self-expression. In *Secretary,*

[8] Dr. Ami Sebastian Maroky et al., *Validity of 'Ego-dystonicity' in Homosexuality: An Indian perspective* in NOTHING TO FIX: MEDICALISATION OF SEXUAL ORIENTATION AND GENDER IDENTITY (Arvind Narrain & Vinay Chandran eds., 2016), p.204

Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal (CAB) (1995) 2 SCC 161, this Court recognized that the freedom of speech and expression enables people to contribute to debates on social and moral issues (para 43, p. 213). However, LGBT persons cannot lobby their elected representatives to seek protection of their fundamental rights or the passage of legislation that would protect their interests. There are also no known cases of persons who openly identify as sexual minorities contesting elections.

5.11 By contrast, following this Court's judgment in *NALSA v. Union of India*, members of the transgender community have sought to participate the democratic process. There are prominent examples of transgender persons who have held elected office, such as C. Devi, who contested in the RK Nagar constituency of Tamil Nadu **(p. 512-514 of the Compilation)**. Mumtaz became the first transgender candidate to contest the Punjab Assembly polls last year **(p. 515-516 of the Compilation)**. In 2015, Madhu Kinnar became Raigarh, Chattisgarh's first transgender mayor **(p. 517-519 of the Compilation)**. Evidently, the continued criminalization of sexual minorities has had a chilling effect on their participation in the democratic process.

D. Section 377 is not a reasonable restriction under Article 19(2)

5.12 Section 377 is not a reasonable restriction in the interest of public order, decency, or morality. The State must discharge a high burden of proof to restrict the freedom under Article 19(1)(a), which it fails to meet in the present case.

5.13 The restrictions under Article 19 are narrowly defined, in contrast to the fundamental freedoms, which this Court interprets broadly. In *S.*

Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574 **(p. 530-556 of the Compilation)** this Hon'ble Court held:

> "our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest." (Para 45, p. 595)

5.14 Since "public order" is of narrower ambit than mere "law and order", the State must discharge a high burden of proof to restrict the freedom under Article 19(1)(a), as laid down by this Hon'ble Court in *The Superintendent, Central Prison Fatehgarh v. Ram Manohar Lohia*, A.I.R 1960 SC 633 **(p. 520-529 of the Compilation)** (para 12, pp. 525-526 of the Compilation). However, Section 377 has no direct or proximate connection to public order. Self-expression by sexual minorities is not "intrinsically dangerous to the public interest". It does not cause riots, turbulence, or acts of violence. It does not affect the security of the State or promote its overthrow. To the contrary, self-expression by minorities is essential to preserve the democratic fabric and to create a vibrant and diverse society.

5.15 Section 377 is also not a reasonable restriction in the interests of decency and morality. As held in *Khushboo v. Kanniammal*, (2010) 5 SCC 600 **(p. 557-578 of the Compilation):**

> "Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co-extensive...the law should not be used in a manner that has chilling effects on the 'freedom of speech and expression'." (Para 46-47, pp. 619-620)

5.16 Section 377 is not intended to preserve any notion of decency or morality that is consistent with the constitutional ethos. At best, it imposes notions

of Victorian morality sought to be imposed upon India by its erstwhile colonial rulers. Indian society has always accepted sexual diversity and gender expression as evidenced by our myths and traditions.

5.17 Hence, Section 377 is not a reasonable restriction in the interest of public order, decency or morality.

E. Section 377 violates the right of sexual minorities to form associations under Article 19(1)(c)

5.18 In its recent decision in *K.S. Puttuswamy v. Union of India*, (2017) 10 SCC 1 (para 374, p. 531), this Hon'ble Court has observed that association has different facets including political, social and personal association. LGBT persons are unable to form or join associations where they must identify as sexual minorities because they fear coercive state action and social stigma.

5.19 The inability to form a legally recognised association deprives LGBT persons of the very tangible benefits that the state extends to such associations, for example, tax exempt status offered to a registered society or charitable trust under Section 80G of the Income Tax Act, 1961. Although such tax exemption can be availed by corporations which promote interests of notified minority communities,[9] LGBT persons are unable to avail of such exemptions because of Section 377.

5.20 Similarly, LGBT persons are hesitant to register companies to provide services for the benefit of sexual minorities. In fact, conviction under Section 377 would render an LGBT person ineligible for appointment to

[9] Section 10(26BB) of the Income Tax Act, 1961. "10. Incomes not included in total income.— In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included— (26-BB) any income of a corporation established by the Central Government or any State Government for promoting the interests of the members of a minority community.
Explanation.—For the purposes of this clause, "minority community" means a community notified as such by the Central Government in the Official Gazette in this behalf;"

directorship of a company. Under Section 164 of the Companies Act, 2013, a person shall not be eligible for appointment if:

> "he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence. If a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company".

5.21 Sexual minorities are also unable to agitate for their rights through the democratic process unlike other historically disadvantaged groups. There is no known case of an elected representative in India who identified as sexual minority.

5.22 LGBT persons, like all citizens, have the right to form meaningful, intimate relationships with persons of their choice. This is an aspect of personal association which ought to be protected by Article 19(1*)(c).*

VI. Section 377 violates Article 21

6.1 We adopt the arguments in the written submissions in *Navtej Singh Johar & Ors. v. Union of India* [W.P. (Crl.) No. 76 of 2016].

VII. Section 377 violates the freedom of conscience under Article 25

7.1 Article 25 of the Constitution guarantees to all persons the freedom of conscience and the right to freely profess, practise, and propagate religion. As an aspect of liberty guaranteed under Article 21, the freedom of conscience is the foundation for the right to choice guaranteed under Article 21. Article 25 enables LGBT persons to acknowledge their own sexual identities both to themselves and to others, and to exercise the right to choice of partner.

7.2 Black's Law Dictionary defines conscience as:

> "1. The moral sense; esp., a moral sense applied to one's own judgment and actions. 2. In law, the moral rule that requires justice or honest dealings between people."[10]

7.3 In *Puttaswamy*, this Hon'ble Court held that the right to conscience, falling within the zone of private thought processes, is an aspect of liberty under Article 21:

> "Constitution of India protects the liberty of all subjects guaranteeing the freedom of conscience and right to freely profess, practise and propagate religion. While the right to freely "profess, practise and propagate religion" may be a facet of free speech guaranteed under Article 19(1)(a), the freedom of the belief or faith in any religion is a matter of conscience falling within the zone of purely private thought process and is an aspect of liberty."[11]

7.4 *Puttaswamy* explicitly noted that freedom of conscience goes beyond religious belief:

> "There are areas other than religious beliefs which form part of the individual's freedom of conscience such as political belief, etc., which form part of the liberty under Article 21".

7.5 As an aspect of liberty, the freedom of conscience embraces a human beings' ethical and moral positions, the choices we make based on these positions, and the outward expression of such choices. In *On Liberty*, John Stuart Mill recognized that the freedom of conscience enables people to make fundamental choices that affect all aspects of their lives:

> "This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.
> …
> Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without

[10] BLACK'S LAW DICTIONARY, (Bryan A Garner ed., 9th ed., 2009), p.345.
[11] Puttaswamy, para 372 (Chelameswar, J.).

> impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."[12]

7.6 The idea that we may enjoy liberty by exercising choice, so long as no harm comes to others, is the foundation of the social compact. The protection of liberty is therefore a fundamental state function. James Madison, the architect of the American Constitution traced the protection of conscience to the origins of the social compact and recognized the protection of liberty as a sacred duty of the State:

> "Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and inalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact."[13]

7.7 Section 377 constrains LGBT persons from enjoying the freedom of conscience and consequently from freely making choices about life's most fundamental decisions. LGBT people struggle to acknowledge their sexual identities to themselves and to others. By criminalizing their identities, Section 377 places additional constraints on the exercise of freedom of conscience.

7.8 The choice of partner guaranteed by the Constitution is also a facet of the freedom of conscience. A partner is one's companion on life's ethical and moral journey. Compatibility between partners is also a matter of conscience, as partners support each other socially, financially, professionally, spiritually and intellectually and guide one another should

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[12] John Stuart Mill, On Liberty and Other Essays (Stefan Collini Edition, 1989) (1859) as cited in *Puttaswamy*, para 408 (Bobde, J.) and para 523 (Nariman, J.).
[13] James Madison, "Essay on Property", in Gaillard Hunt (Ed.), The Writings of James Madison (1906), Vol. 6, at pp. 101-103 as cited in Puttaswamy, para 34 (Chandrachud, J.).

they falter. As John Stuart Mill recognized, the freedom of conscience is an aspect of the freedom of association:

> "Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived."[14]

VIII. Supreme Court's jurisprudence of constitutional morality has an impact on other constitutional courts

8.1 The Indian Supreme Court's judgments act as moral, legal and philosophical trailblazers for courts around the world. Constitutional courts do not arrive at constitutional law jurisprudence in isolation. In that sense, "comparative constitutional law" is a misnomer: all constitutional jurisprudence is inherently comparative. Even when Courts do not explicitly refer to judgments from other jurisdictions, they are participating in an ongoing, rich and sometimes sharply divided conversation about the nature of rights. Post-colonial courts, in particular, confront a large shared body of colonial law that they must continue to interpret. While doing so, they confront the challenges thrown up by their ever-changing post-colonial societies. For instance:

8.2 *Puttaswamy* has quickly become a landmark judgment in comparative constitutional law. In *Jason Jones v Attorney General of Trinidad & Tobago*, (Claim no. CV 2017-00720 decided on 12th April 2018), the High Court of Justice of the Republic of Trinidad and Tobago held that Section 13 of the Sexual Offences Act (which made the offence of buggery punishable with 25 years' imprisonment) and Section 16 (while the offence of serious indecency punishable with imprisonment for five years)

[14] John Stuart Mill, On Liberty and Other Essays (Stefan Collini Edition, 1989) (1859) as cited in *Puttaswamy*, para 408 (Bobde, J.) and para 523 (Nariman, J.).

unconstitutional under the Trinidad and Tobago Constitution. The Hon'ble Court held that:

> "A felicitous exposition of what the right to privacy entails, to this court's mind, is summarized in the Supreme Court of India decision in Puttaswamy v Union of India. In that matter, a nine judge bench of the Supreme Court of India handed down its decision in a 547 page judgment, containing six opinions, and ruled unanimously that privacy is a constitutionally protected right in India despite there being no explicit right to privacy as found in their Constitution. The right to privacy was held to exist based on the principle that the Indian Constitution is a living Instrument and the Court sought to give effect to the values of the Constitution by interpreting express fundamental rights protections as containing a wide range of other rights. As such, Article 21 of the Constitution which provides that 'No person shall be deprived of his life or liberty expect according to procedure established by law', was held to incorporate a right to privacy.'

8.3 Citing paras 297 and 298 of *Puttaswamy*, the Hon'ble Court noted that "the dicta coming out of *Puttaswamy* emphasized the fact that sexual orientation is an essential attribute of privacy, which is inextricably linked to human dignity." The Court also noted that *Puttaswamy* had cast doubt on *Suresh Kumar Koushal v Naz Foundation,* (2014) 1 SCC 1.

8.4 *Puttaswamy* has also been cited before the High Court of Kenya in *Eric Gitari v The Hon. Attorney General* (Petition no. 150 of 2016). Eric Gitari challenged the law criminalizing same sex conduct in Kenya when the registration of an NGO for LGBTIQ persons was rejected. The Attorney General and 9th Interested Party had relied upon *Suresh Kumar Koushal* to argue that these issues should be decided by the legislature. Here, the Petitioner relied upon Puttaswamy (para 144 to 146) as the nine-judge bench now sets out the correct approach in Indian law.

8.5 In *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu*, [2014] eKLR [Judicial Review 147 of 2013] **(p. 579-591 of the Compilation)**, the High Court of Kenya cited the

observations of the Supreme Court of India in *NALSA v Union of India*, (2014) 5 SCC 438 regarding sexual identity and sexual orientation.

8.6 The Supreme Court of Canada, in Reference re: Judicature Act, 1984 ABCA 354 cited *All India Bank Employees Association v. The National Industrial Tribunal* AIR 1962 SC 171 on the question of whether the imposition of compulsory interest arbitration in place of strikes and lockouts has interfered with the freedom of association of the workers involved.

8.7 The Sri Lankan Supreme Court in *Elmore Perera* v. *Major Montague Jayawickrema Minister of Public Administration and Plantation Industries and Others* [1985] 1SLR 285 decided the issue of fundamental rights under Articles 12 and 14(1)(g) of the Sri Lankan Constitution by applying the interpretation placed on Article 14 in *Maneka Gandhi's* case.

8.8 The Pakistan Supreme Court, in *Shehla Zia* v. *WAPDA*, PLD 1994 SC 693, quoted *Kharak Singh* v. *State of UP* (AIR 1963 SC 129), *Francis Coralie Mullin* v. *Union Territory of Delhi* (AIR 1981 SC 746), *Olga Tellis and others* v. *Bombay Municipal Corporation* (AIR 1986 SC 180) and *State of Himachal Pradesh and another* v. *Umed Ram Sharma and others* (AIR 1986 SC 847). The Pakistani Supreme Court observed that "Thus, apart from the wide meaning given by US Courts, the Indian Supreme Court seems to give a wider meaning which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence."

8.9 However, one exception to India being a trailblazer and crafter of global constitutional morality is in the area of colonial-era anti sodomy statutes. In this area, there have been a host of countries that have struck down their colonial era anti-sodomy statutes in the recent past.

8.10 In 2016, the Supreme Court of Belize in *Caleb Orozco* v. *Attorney General of Belize*[15] struck down Belize's colonial era anti-sodomy law. The Court relied on the constitutional protection and right of dignity, privacy, freedom of expression, and equality. The Court appreciated the concept of diversity and difference within the Belize Constitution to carve out private sexual acts between consenting adults from the purview of the law.

8.11 In *McCoskar* v *State*,[16] the High Court of Fiji decriminalised homosexuality as laws criminalising such conduct ran foul of the constitutional guarantees of privacy and equality. Justice Winter held that:

> "the way in which we give expression to our sexuality is the most basic way in which we establish and nurture relationships…the Court should adopt a broad and purposive construction of privacy that is consistent with the recognition in international law that the right to privacy extends beyond the negative conception of privacy as freedom from unwarranted State intrusion into one's private life to include the positive right to establish and nurture human relationships free of criminal or indeed community sanction."

The High Court of Fiji also held that the individual's right to privacy cannot be abrogated on the grounds of religious beliefs or public morality:

> "The judicial function in a case such as this is therefore to lay the impugned statutory provisions down beside the invoked constitutional provisions and if, in the light of the established facts a comparison between the two sets of provisions shows an invalidity, then the statutory provisions must be struck down either wholly or in part to cure that invalidity and make those statutory provisions consistent with the Constitution…while members of the public who regard homosexuality as amoral may be shocked, offended or disturbed by private homosexual acts, this cannot on its own validate unconstitutional law. The present

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[15] *Caleb Orozco v. Attorney General of Belize,* Claim No. 668 of 2010 (10.08.2016). Section 53 of the Belize Criminal Code, Chapter 101 :- "Every Person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years."

[16] [2005] FJHC 500. Section 175 and 177 of the Fijian Penal Code:- 175. Any person who- (a) has carnal knowledge of any person against the order of nature; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony, and is liable to imprisonment for fourteen years, with or without corporal punishment.

177. Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment. [2005] FJHC 500

> case concerns the most intimate aspect of private life. Accordingly there must exist particularly serious reasons before the State or community can interfere with an individual's right to privacy…I find this right to privacy so important in an open and democratic society that the morals argument cannot be allowed to trump the Constitutional invalidity…"

8.12 In Hong Kong, sodomy was decriminalised in 1991, and the age of consent between heterosexual and homosexual conduct was equalised in 2005. In the landmark case of *Leung TC William Roy* v *Secretary for Justice*,[17] the Court of Appeal held the law to be violative of the non-discrimination, privacy and equality guarantees in the Hong Kong Bill of Rights Ordinance:

> "Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way that is natural to them … It is disguised discrimination founded on a single base: sexual orientation."

8.13 In 2015, the Mexican Supreme Court held that the ban on same-sex marriage was unconstitutional as "because it undermined the self-determination of the people and against the right to free development of the personality of each individual."

8.14 Over a decade ago, the Nepal Supreme Court in *Sunil Babu Pant* v. *Nepal Government*, declared that the criminal provisions criminalising homosexual conduct were arbitrary, unreasonable and discriminatory:

> The right to privacy is a fundamental right of an individual. The issue of sexual activity falls under the definition of privacy. No one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural. In the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation. In such a situation, therefore, gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treating the sexual intercourse among them as unnatural.

[17] [2006] 4 HKLRD 211

> When an individual identifies her/his gender identity according to the self-feelings, other individuals, society, the state or law are not the appropriate ones to decide as to what type of genital s/he should have, what kind of sexual partner s/he needs to choose and with whom s/he should have marital relationship. Rather, it is a matter falling entirely within the ambit of the right to self-determination of such an individual. [18]

8.15 Section 9 of the South African Constitution explicitly prohibits discrimination by the State and private parties on grounds of gender, sex or sexual orientation.[19] In the landmark judgment of *National Coalition for Gay and Lesbian Equality* v *Minister of Justice*, the South African Constitutional Court declared the prohibition of sodomy unconstitutional on grounds of equality, privacy and dignity.

8.16 In *Judicial Yuan Interpretation No. 748*,[20] the Constitutional Court of Taiwan in 2017 held that the prohibition on same-sex marriage was violative of the constitutional guarantees of equality, non-discrimination and dignity under its Constitution.

8.17 These are but a few examples where such anti-sodomy laws and other restrictive laws have been struck down in light of the recognition of the rights of LGBT persons. It is respectfully submitted that this Hon'ble Court may consider not only setting aside its previous decision in *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, but also crafting constitutional principles that will protect the rights of LGBT Indians. By doing so, it would continue its jurisprudential trajectory of expanding freedoms and enhancing liberties of all people.

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[18] (2008) 2 NIA LJ 262, WP no. 917 of 2007. Nepal's Criminal Code, Chapter 16, part No. 4 "Whoever commits or cause to commit any other unnatural sexual intercourse save as provided for in other numbers of this chapter shall be punished with an imprisonment up to one year or five thousand rupees."

[19] Section 9(3) of the South African Constitution:- The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
Section 9(4) of the South African Constitution:- No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

[20] JY No. 748, 24 May 2017

IX. Conclusion: Constitutional Morality and the Supreme Court's Emancipatory Jurisprudence

9.1 Before the Constituent Assembly of independent India, the Chairman of the Drafting Committee, Dr. B.R Ambedkar, distinguished between constitutional morality from social morality by quoting Grote:

> "The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendency for themselves."
> "By constitutional morality Grote meant "a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own."
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> [Constituent Assembly Debates, Vol. VII, November 4, 1948]

9.2 It is this constitutional morality that we commit to as a nation state. This Hon'ble Court has consistently reinforced constitutional morality through its interpretation of the Constitution, never yielding to a majoritarian or social morality. In *Kesavananda Bharati* v *State of Kerala*, (1973) 4 SCC 225 and *Minerva Mills* v *Union of India*, (1980) 3 SC 625, it commenced crafting its renowned basic structure doctrine to protect constitutional democracy from a marauding executive.

9.3 Through its jurisprudence of the last many decades, this Hon'ble Court has emancipated fragile Indian citizens who would otherwise have been left out of the constitutional project. This Court has been the recognised

globally as the unparalleled trailblazer on creating and protecting socio-economic rights in a country of vast dispossession, poverty and inequality.

9.4 The IIT Petitioners are young adults entrusted with the weighty task of building modern India. They now approach their Court, with the Constitution in their hearts, asking not merely for the reading down of a penal provision that has for so long made them 'unconvicted felons' for who they choose to love. Instead, they pray for a declaration that the constitutional guarantees of equality, non-discrimination, life, liberty, dignity and conscience apply with equal force to LGBT Indians. They hope to be full citizens, warmly embraced by the promises of their Constitution.

9.5 In the lead petition, *Navtej Singh Johar* v *Union of India*, these much older petitioners learnt to protect and celebrate their love despite the darkness of section 377 and the indignities of *Suresh Kumar Koushal*. Navtej and Sunil have persevered in a relationship of 25 years. Aman's partner passed before this Writ could be filed. For Keshav Suri, even his family members were unable to accept his sexual orientation. Yet they all come to this Court with optimism and hope, praying that their love be constitutionally recognized. They simply ask that you emancipate them.

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NEW DELHI
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