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DECRIMINALISING HOMOSEXUALITY – THE INDIAN JUDICIARY RESPONDS

LAW & SOCIETY TRUST

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Editor's Note ... ...

This issue of the *Review* deals with a recent development of interest in the Indian legal sphere regarding the criminal penalization of what is termed as 'unnatural offences', illustrating the robust working of public interest litigation in the context of effective judicial review in that country.

On 2 July 2009, the High Court of Delhi handed down a judgment decriminalizing homosexuality consequent to a group of non-governmental organizations filing a public interest petition before the Court on the basis that Section 377 of the Indian Penal Code which criminally penalized 'unnatural acts' was unconstitutional in that the said provision criminalized consensual sexual acts between adults in private.

The issue might have been thought to involve merely theoretical questions as to whether the said penal provision infringed the right to privacy as well as the right to equality and these were indeed grounds on which the petitioner's case was based. Thus, the right to privacy was contended to be violative of the broad reading of Article 21 of the Indian Constitution in as much as the right to privacy and dignity is subsumed within the right of life and liberty secured by Article 21.

Then again, it was contended that the Indian Penal Code's Section 377 violated the equality clause in that the legislative objective of that Section is based on 'stereotypes and misunderstanding that are outmoded and enjoys no historical or logical rationale which render it arbitrary and unreasonable'. Interestingly, it was further argued *inter alia* that the expression "sex" as used in Article 15 of the Indian Constitution (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth), cannot be read restrictive to "gender" but includes "sexual orientation". Consequently, equality on the basis of sexual orientation is implied in the said fundamental right against discrimination.

However, the petition went further than basing its case on questions of privacy and equality to contend that intervention and prevention efforts in regard to HIV/AIDS high risk communities were negatively affected by the impugned criminal provision in that by criminalising private, consensual same-sex conduct, it has served as a weapon for police abuse; detaining and questioning, extortion, harassment, forced sex, payment of hush money; and perpetuates negative and discriminatory beliefs towards same-sex relations and sexual minorities. As a result, this has driven sexual minorities underground thereby crippling HIV/AIDS prevention efforts. Exhaustive

documentation of specific such cases throughout the country was annexed to the petition.

Ironically, the government's response to these claims was far from uniform as the Court itself has observed. On the one hand, the Ministry of Home Affairs argued for the retention of the impugned section basing its argument largely on public morality, while the Ministry of Health and Family Welfare took the position that Section 377 has hampered HIV/AIDS prevention efforts.

In responding to these arguments, the Delhi High Court ruled that Section 377 of the Indian Penal Code is violative of Article 21, 14 and 15 of the Indian Constitution insofar as it criminalizes sexual acts of adults in private. This judgment is distinguished for the deliberate manner in which it uses gender neutral language and its detailed reasoning citing Indian as well as comparative and international legal precedents.

Its core however is contained not only in the Court's unequivocal affirmation of privacy rights (thus its reasoning that the impugned section denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality, thus violating Article 21 of the Indian Constitution) but also in its acknowledgement that criminalization of same-sex conduct has had a dangerously negative impact on the lives of sexual minorities, even when the relevant penal provisions are not enforced in a particular country. The judges' observation that 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' (see paragraph 67 of the judgment) is particularly notable.

Meanwhile, in dismissing the argument that there is 'moral disapproval' in respect of the decriminalizing of homosexuality, it was aptly observed by the Court as follows:

> '.....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' (see paragraph 79 of the judgment).

The Court went on to rule that the impugned section was also violative of the equality clause in Article 14 of the Indian Constitution in that it made no distinction between acts engaged in the public sphere and acts engaged in the private sphere or between consensual and non-consensual acts between adults. The section targeted homosexuals as a class and thereby was unconstitutional. In holding a further violation of Article 15 of the Indian Constitution, it was accepted that the term 'sex' in this constitutional article included 'sexual orientation' and therefore, discrimination on the basis of sexual orientation was not permitted by the constitutional structure. The Court's ruling striking down the applicability of Section 377 to consensual sexual acts of adults committed in private (but continuing to apply to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors) was determined to stand until Parliament chooses to amend the law.

The *Review* publishes the judgment of the Delhi High Court in full due to its immediate relevance in parallel developments in Sri Lanka, along with an edited reflection on this undoubtedly signal development in the Indian law relating to privacy rights.

Unlike the Indian judiciary, the Sri Lankan judiciary does not have the power of judicial review which may be exercised to strike down an existing unconstitutional legislative provision. This has been one of the most singularly unfortunate aspects of our present Constitution and efforts to bring about a constitutional scheme more in consonance with modern standards of constitutionalism have proved to be futile in the past.

As in the case of the now discredited Section 377 of the Indian Penal Code, Section 365A of the Sri Lankan Penal Code criminalizes acts of 'gross indecency' between males—and in a later legislative amendment between females as well—with a consequent stringent term of imprisonment. The extension of this section to females was brought about ironically enough, as a result of efforts made by activist groups in Sri Lanka more than a decade back to have this provision abolished on the basis of similar arguments as has now been held to be valid in the Indian context. However, instead of abolishing this section, its ambit was extended to include females despite fervent protests from sexual minority groups.

Efforts to reform the law, public attitudes and attitudes of policy makers in this respect in this country should receive some impetus from these undoubtedly admirable developments in India.

Kishali Pinto-Jayawardena

NAZ FOUNDATION v. *GOVERNMENT OF NCT OF DELHI AND OTHERS*

IN THE HIGH COURT OF DELHI AT NEW DELHI
WP(C) No.7455/2001
Date of decision: 2 July 2009

Naz Foundation
Petitioner

Through: Mr. Anand Grover, Sr. Advocate with Mr. Trideep Pais, Ms. Shivangi Rai and Ms. Mehak Sothi and Ms. Tripti Tandon, Advocates

versus

Government of NCT of Delhi and others
Respondents

Through: Mr. P.P. Malhotra, ASG with Mr. Chetan Chawla, Advocate for UOI.
Ms. Mukta Gupta, Standing Counsel (Crl.) with Mr. Gaurav Sharma and Mr. Shankar Chhabra, Advocates for GNCT of Delhi.

Mr. Ravi Shankar Kumar with Mr. Ashutosh Dubey, Advocates for respondent No.6/Joint Action Council Kannur.

Mr. H.P. Sharma, Advocate for respondent No.7/ Mr. B.P. Singhal.

Mr. S. Divan, Sr. Advocate with Mr. V. Khandelwal, Mr. Arvind Narain, Ms. S. Nandini, Mr. Mayur Suresh, Ms. Vrinda Grover and Mr. Jawahar Raja, Advocates for respondent No.8/Voices against 377.

CORAM:
HONOURABLE THE CHIEF JUSTICE
HONOURABLE DR. JUSTICE S. MURALIDHAR

1. Whether reporters of the local news papers be allowed to see the judgment? Y
2. To be referred to the Reporter or not ? Y
3. Whether the judgment should be reported in the Digest? Y

AJIT PRAKASH SHAH, CHIEF JUSTICE:

1. This writ petition has been preferred 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, 1860 (IPC), which 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, on account of it covering sexual acts between consenting adults in private infringes the fundamental rights guaranteed under Articles 14, 15, 19 & 21 of the Constitution of India. Limiting their plea, the petitioners submit that Section 377 IPC should apply only to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. The Union of India is impleaded as respondent No.5 through Ministry of Home Affairs and Ministry of Health & Family Welfare. 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. The writ petition was dismissed by this Court in 2004 on the ground that there is no cause of action in favour of the petitioner and that such a petition cannot be entertained to examine the academic challenge to the constitutionality of the legislation. The Supreme Court vide order dated 03.02.2006 in Civil Appeal No.952/2006 set aside the said order of this Court observing that the matter does require consideration and is not of a nature which could have been dismissed on the aforesaid ground. The matter was remitted to this Court for fresh decision.

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 the Fleta, 1290, and later in the Britton, 1300. Both texts 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, 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".

3. Indian Penal Code was drafted by Lord Macaulay and introduced in 1861 in British India. Section 377 IPC is contained in Chapter XVI of the IPC titled "Of Offences Affecting the Human Body". Within this Chapter 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. The marginal note refers to the acts proscribed as "unnatural offences". This expression, however, is not used in the text of Section 377 IPC. The expression "carnal intercourse" is used in Section 377 IPC as distinct from the expression "sexual intercourse", which appears in Sections 375 and 497 IPC. According to the Concise Oxford Dictionary (ninth edition, 1995), the term "carnal" means "of the body or flesh; worldly" and "sensual, sexual". Consent is no defence to an offence under Section 377 IPC and no distinction regarding age is made in the section. In *Khanu* v. *Emperor*, AIR 1925 Sind 286, Kennedy A.J.C. held that "section 377 IPC punishes certain persons who have carnal intercourse against the order of nature with *inter alia* human beings... [if the oral sex committed in this case is carnal intercourse], it is clearly against the order of nature, because the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of *coitus per os* is impossible" [page 286]. It appears that the courts had earlier held in *R.* v. *Jacobs* (1817) *Russ & Ry* 331 C.C.R., and *Govindarajula In re.*, (1886) 1 Weir 382, that inserting the penis in the mouth would not amount to an offence under Section 377 IPC. Later, Section 377 IPC has been interpreted to cover oral sex, anal sex and penetration of other orifices. In *Lohana Vasantlal Devchand* v. *State*, AIR 1968 Guj 252, the issue was whether oral sex amounted to an offence under Section 377 IPC. It was held that the "orifice of the mouth is not, according to nature, meant for sexual or carnal intercourse". In *Calvin Francis* v. *Orissa*, 1992 (2) Crimes 455, relying on *Lohana*, it was held that oral sex fell within the ambit of Section 377 IPC. The Court used the references to the Corpus Juris Secundum relating to sexual perversity and abnormal sexual satisfaction as the guiding criteria. In *Fazal Rab Choudhary* v. *State of Bihar*, AIR 1983 SC 323, it was observed that Section 377 IPC implied "sexual perversity". It is evident that the tests for attracting the penal provisions have changed from the non-procreative to imitative to 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) pursuant to the report of the Wolfenden Committee. The Committee advising the Parliament had recommended in 1957 repeal of laws punishing homosexual conduct.

The Challenge

6. The petitioner NGO has been working in the field of HIV/AIDS intervention 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, MSM or trans-gendered individuals, 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, 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 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, 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-dignity claim concerning private, consensual, sexual relations are also afforded protection within the ambit of the said fundamental right to life and liberty given under Article 21. 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 of privacy and dignity within the ambit of right to life and liberty under Article 21. The petitioner argues that fundamental right to privacy under Article 21 can be abridged only for a compelling state interest which, in its submission, is amiss here. 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 that Section 377 IPC's legislative objective of penalizing "unnatural sexual acts" has no rational nexus to the classification created between procreative and non-procreative sexual acts, and is thus violative of Article 14 of the Constitution of India. Section 377's legislative objective is based upon stereotypes and misunderstanding that are outmoded and enjoys no historical or

logical rationale which render it arbitrary and unreasonable. It is further the case of the petitioner that the expression "sex" as used in Article 15 cannot be read restrictive to "gender" but includes "sexual orientation" and, thus read, equality on the basis of sexual orientation is implied in the said fundamental right against discrimination. The petitioner argues that criminalization of predominantly homosexual activity through Section 377 IPC is discriminatory on the basis of sexual orientation and, therefore, violative of Article 15. It is further the case of the petitioner that the prohibition against homosexuality in Section 377 IPC curtails or infringes the basic freedoms guaranteed under Article 19(1)(a), (b), (c) & (d); in that, an individual's ability to make personal statement about one's sexual preferences, right of association/assembly and right to move freely so as to engage in homosexual conduct are restricted and curtailed.

10. Broadly on the above reasoning, it has been submitted that there is a case for consensual sexual intercourse (of the kind mentioned above; i.e., homosexual) between two willing adults in privacy to be saved and excepted from the penal provision contained in Section 377 IPC.

Reply by Union of India – Contradictory Stands of the 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 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, in his affidavit, 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 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. Terming the issues raised in the petition at hand as a subject relating to policy of law rather than that of its legality, 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 the 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 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 in the shape it stands at present, Union of India relies on the arguments of public morality, public health and healthy environment claiming that Section 377 IPC serves the purpose.

14. From the above summary of submissions of the Union of India through the MHA it is clear that the thrust of the resistance to the claim in the petition is founded on the argument of public morality. Though the MHA has referred to the issue of public health and healthy environment, the affidavit has not set out elaborately the said defence.

Affidavit of NACO / Ministry of Health & Family Welfare

15. 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. The submissions of NACO only confirm the case set out by the petitioner that the homosexual community (MSM etc.) 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. In the reply affidavit, NACO states that the groups identified to be at greater risk of acquiring and transmitting HIV infection due to a high level of risky behaviour and insufficient capacity or power for decision making to protect themselves from infection, generally described as 'High Risk Groups' (HRG), broadly include men who have sex with men (MSM) and female workers and injecting drug users.

16. NACO has adopted a strategy for preventing and further transmission of infection, which include the following efforts:

(a) The strategy for preventing and the further transmission of infection includes:

i. Making the General Population and High Risk Groups aware through strategic IEC (Information Education Communication) & BCC (Behaviour Change Communication) providing them with the necessary tools and information for protecting themselves from HIV infection.

ii. Motivating safer sexual practices by reducing sexual partners, being faithful to a single partner abstaining from casual sex and the correct and consistent use of condoms.

iii. Controlling Sexually Transmitted Infections (STIs) among High Risk Groups along with promoting use of condoms as preventive measure.

iv. Peer education and Community participation (being the essential component of Primary Health Care).

v. Ensuring availability of safe blood and blood products; and

vi. Reinforcing the traditional Indian moral values of abstinence, delayed sexual debut till marriage and fidelity among youth and other impressionable groups of population.

(b) To create an enabling socio-economic environment so that all sections of population can have access to proper information, health care & counseling services to protect themselves from the infection and at the same time empower families and communities to provide better care & support to people living with HIV/AIDS.

(c) Improving services for the care of people living with AIDS both in hospital and at homes through community care.

17. In the reply affidavit filed on behalf of NACO, it has been submitted that the report of the Expert Group on Size Estimation of Population with High Risk Behaviour for NACPIII Planning, January 2006 estimated that there are about 25 lakh MSM (Men having sex with men). The National Sentinel Surveillance Data 2005 shows that more than 8% of the population of MSM is infected by HIV while the HIV prevalence among the general population is estimated to be lesser than 1%. Given the high vulnerability of MSM to HIV infection, NACO has developed programmes for undertaking Targeted interventions among them. These projects are implemented by NGOs with financial support from NACO. Presently 1, 46,397 MSM (6%) are being covered through 30 targeted interventions. Under the targeted intervention projects, the objectives are to:

(a) Reduce number of partners and by bringing about a change in their behaviour;

(b) Reduce their level of risk by informing them about and providing access to condoms;

(c) Providing access to STD services.

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. It illustrates this point by referring to the data reflected in the National Baseline Behaviour Surveillance Survey (NBBSS of 2002) which indicates that while 68.6% MSM population is aware about the methods of preventing infection, only 36% of them actually use condoms. 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.

Responses of Other Respondents

19. 'Voices against Section 377 IPC' (hereinafter referred to as "respondent No.8") is a coalition of 12 organisations that represent child rights, women's rights, human rights, health concerns as well as the rights of same-sex desiring people including those who identify as Lesbian, Gay, Bisexual, Transgenders, *Hijra* and *Kothi* persons (which are referred to in the affidavit as "LGBT"). It has been submitted on its behalf that organisations that constitute respondent No.8 are involved in diverse areas of public and social importance and that in the course of their work they have repeatedly come across gross violation of basic human rights of "LGBT" persons, both as a direct and indirect consequence of the enforcement of Section 377 IPC. It relies upon its report tilted 'Rights for All : Ending Discrimination under Section 377' published in 2004 to create awareness about negative impact of this law on society in general and Lesbian, Gay, Bisexual and Transgenders people in particular.

20. Respondent No.8 supports the cause espoused by the petitioner in this PIL and avers that Section 377 IPC, which criminalises 'carnal intercourse against the order of the nature', is an unconstitutional and arbitrary law based on archaic moral and religious notions of sex only for procreation. It asserts that criminalisation of adult consensual sex under Section 377 IPC does not serve any beneficial public purpose or legitimate state interest. On the contrary, according to respondent No.8, Section 377 IPC by criminalising the aforementioned kinds of sexual acts has created an association of criminality towards people with same-sex desires. It pleads that the continued existence of this provision on the statute book creates and fosters a climate of fundamental rights violations of the gay community, to the extent of bolstering their extreme social ostracism.

21. To illustrate the magnitude and range of exploitation and harsh and cruel treatment experienced as a direct consequence of Section 377 IPC, respondent No.8 has placed on record material in the form of affidavits, FIRs, judgments and orders with objectively documented instances of exploitation, violence, rape and torture suffered by LGBT persons. The particulars of the incidents are drawn from different parts of the country. In an instance referred to as "Lucknow incident, 2002" in the report titled 'Epidemic of Abuse : Police Harassment of HIV/AIDS Outreach Workers in India' published by Human Rights Watch, the police during investigation of a complaint under Section 377 IPC picked up some information about a local NGO (Bharosa Trust) working in the area of HIV/AIDS prevention and sexual health amongst MSMs raided its office, seized safe sex advocacy and information material and arrested four health care workers. Even in absence of any prima facie proof linking them to the reported crime under Section 377 IPC, a prosecution was launched against the said health care workers on charges that included Section 292 IPC treating the educational literature as obscene material. The health workers remained in custody for 47 days only because Section 377 IPC is a non-bailable offence.

22. Then there is a reference to 'Bangalore incident, 2004' bringing out instances of custodial torture of LGBT persons. The victim of the torture was a *hijra* (eunuch) from Bangalore, who was at a public place dressed in female clothing. The person was subjected to gang rape, forced to have oral and anal sex by a group of hooligans. He was later taken to police station where he was stripped naked, handcuffed to the window, grossly abused and tortured merely because of his sexual identity. Reference was made to a judgment of the High Court of Madras reported as *Jayalakshmi* v. *The State of Tamil Nadu*, (2007) 4 MLJ 849, in which an eunuch had committed suicide due to the harassment and torture at the hands of the police officers after he had been picked up on the allegation of involvement in a case of theft. There was evidence indicating that during police custody he was subjected to torture by a wooden stick being inserted into his anus and some police personnel forcing him to have oral sex. The person in question immolated himself inside the police station on 12.6.2006 and later succumbed to burn injuries on 29.6.2006. The compensation of Rs.5,00,000/- was awarded to the family of the victim. Another instance cited is of a case where the Magistrate in his order observed that the case involved a hidden allegation of an offence under Section 377 IPC as well, thereby stretching the reach of Section 377 IPC to two lesbian adult women who were involved in a romantic relationship with each other while the initial accusation was only under Section 366 IPC. An affidavit of a gay person is also filed on record. The person was picked up from a bus stand at about 10PM by the police, who accused him of being a homosexual. He was physically assaulted with wooden sticks, taken to police post where he was subjected to sexual and degrading abusive language. During the incarceration in the police post over the night, four police men actually raped and sexually abused him including forcing him to have oral and anal sex. The respondent No.8 has relied upon several other instances of fundamental rights violation of homosexuals and gay persons. The material on record, according to the respondent No.8, clearly establishes that the continuance of Section 377 IPC on the statute book operate to brutalise a vulnerable, minority segment of the citizenry for no fault on its part. The respondent No.8 contends that a section of society has been thus criminalised and stigmatized to a point where individuals are forced to deny the core of their identity and vital dimensions of their personality.

23. Respondents No.1 (Govt. of NCT of Delhi), No.2 (Commissioner of Police, Delhi) and No.3 (Delhi State AIDS Control Society) did not file any counter affidavit/pleadings. Respondent No.6 (Joint Action Council Kannur) and respondent No.7 (Mr. B.K. Singhal), who were impleaded as intervenors, filed counter affidavits mainly adopting the views/stand of the Ministry of Home Affairs, Union of India on the issue.

Arguments

24. Learned counsel appearing for the parties have addressed the Court at length. During the course of submissions, extensive references were made to voluminous material which included various reports, publications, articles, Indian and foreign judgments including those of US Supreme Court, European Commission of Human Rights, Human Rights Committee, etc. Counsel also provided comprehensive written submissions supported by authorities but as we understand it, the prime arguments can be generally summarised in this way:

(i) The submission of Mr. Anand Grover, Sr. Advocate, appearing for the petitioner, and Mr. Shyam Divan, Sr. Advocate, appearing for respondent No.8, is that Section 377 IPC violates the constitutional protections embodied in Articles 14, 19 and 21. It suffers from the vice of unreasonable classification and is arbitrary in the way it unfairly targets the homosexuals or gay community. It also unreasonably and unjustly infringes upon the right of privacy, both zonal and decisional. It also conveys the message that homosexuals are of less value than other people demeans them and unconstitutionally infringes upon their right to live with dignity. Section 377 IPC also creates structural impediments to the exercise of freedom of speech and expression and other freedoms under Article 19 by homosexuals or gays and is not protected by any of the restrictions contained therein. Furthermore, morality by itself cannot be a valid ground for restricting the right under Articles 14 and 21. Public disapproval or disgust for a certain class of persons can in no way serve to uphold the constitutionality of a statute. In any event, abundant material has been placed on record which shows that the Indian society is vibrant, diverse and democratic and homosexuals have significant support in the population. It is submitted that courts in other jurisdictions have struck down similar laws that criminalise same-sex sexual conduct on the grounds of violation of right to privacy or dignity or equality or all of them. Keeping in mind that Section 377 IPC is the only law that punishes child sexual abuse and fills a lacuna in rape law, it is prayed that Section 377 IPC may be declared as constitutionally invalid insofar as it affects private sexual acts between consenting adults or in the alternative to read down Section 377 IPC to exclude consenting same-sex sexual acts between adults.

(ii) In reply, learned ASG submits that there is no fundamental right to engage in the same-sex activities. In our country, homosexuality is abhorrent and can be criminalised by imposing proportional limits on the citizens' right to privacy and equality. Learned ASG submits that right to privacy is not absolute and can be restricted for compelling state interest. Article 19(2) expressly permits imposition of restrictions in the interest of decency and morality. Social and sexual mores in

foreign countries cannot justify de-criminalisation of homosexuality in India. According to him, in the western societies the morality standards are not as high as in India. Learned ASG further submits that Section 377 IPC is not discriminatory as it is gender neutral. If Section 377 IPC is struck down there will be no way the State can prosecute any crime of non-consensual carnal intercourse against the order of nature or gross male indecency. He hastens to add that Section 377 IPC is not enforced against homosexuals and there is no need to "read down" the provisions of Section 377 IPC. Learned ASG further contends that spread of AIDS is curtailed by Section 377 IPC and de-criminalisation of consensual same-sex acts between adults would cause a decline in public health across society generally since it would foster the spread of AIDS. He submits that Section 377 IPC does not impact upon the freedom under Article 19(1) as what is criminalised is only a sexual act. People will have the freedom to canvass any opinion of their choice including the opinion that homosexuality must be decriminalised. He, therefore, submits that the Section 377 IPC is constitutionally valid.

(iii) Mr. Ravi Shankar Kumar, appearing for respondent No.6, and Mr. H.P. Sharma, appearing for respondent No.7, submitted that the petitioner's arguments with respect to the spread of HIV and AIDS are founded on propaganda and are not factually correct. Section 377 IPC prevents HIV by discouraging rampant homosexuality. According to them, Indian society considers homosexuality to be repugnant, immoral and contrary to the cultural norms of the country.

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. But in *Maneka Gandhi*, a seven-Judge Bench decision, P.N. Bhagwati J. (as his Lordship then was) 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 additional protection under Article 19. Any law interfering with personal liberty of a person must satisfy a triple test: **(i)** it must prescribe a procedure; **(ii)** the procedure must withstand a test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and **(iii)** it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with the personal liberty must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14, it would be no procedure at all within the meaning of Article 21. 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. This decision in *Maneka Gandhi* became the starting point for a very significant evolution of the law culminating in the decisions in *M.H. Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544, *Hussainara Khatoon and Ors.* v.

Home Secretary State of Bihar, (1980) 1 SCC 81, *Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494, *Prem Shankar Shukla* v. *Delhi Admn.*, (1980) 3 SCC 526, *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi and others*, (1981) 1 SCC 608.

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. V.R. Krishna Iyer J. observed that the guarantee of human dignity forms part of our constitutional culture [*Prem Shankar Shukla* v. *Delhi Admn.* (supra), page 529 of SCC].

27. In *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi and others* (supra), Justice P.N. Bhagwati explained the concept of right to dignity in the following terms:

> "...We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. ... Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights" [para 8 of SCC].

28. The Canadian Supreme Court in *Law* v. *Canada (Ministry of Employment and Immigration)*, [1999 1 S.C.R. 497] attempts to capture the concept of dignity in these words:

> "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society" [para 53].

Privacy

29. Article 12 of the Universal Declaration of Human Rights (1948) refers to privacy and it states:

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or 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), 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 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 wellbeing 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(1) (a) dealing with freedom of speech and expression, Article 19(1) (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 caselaw 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,* 277 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 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" (page 478). The dissent came to be accepted as the law after another four decades.

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.

33. After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In *Eisenstadt* v. *Baired*, 405 US 438 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights. It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it observed:

> "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship.....If the right of privacy means anything, it is the right of the individual married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" [para 453].

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 in the United States District Court for the Northern District of Texas, 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, the United States Supreme Court recognised that 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 First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights in the Ninth Amendment and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. In *Planned Parenthood of South-eastern 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" [page 851].

Development of Law of Privacy in India

35. in *Kharak Singh* v. *The State of U.P.*, (1964) 1 SCR 332, the U.P. Regulations regarding domiciliary visits were in question and the majority referred to *Munn* v. *Illinois*, 94

US 113 (1877), and held that though our Constitution did not refer to the right to privacy expressly, still it can be traced from the right to "life" in Article 21. According to the majority, clause 236 of the relevant Regulations in U.P. was bad in law; it offended Article 21 inasmuch as there was no law permitting interference by such visits. The majority did not go into the question whether these visits violated the "right to privacy". But, Subba Rao J. while concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1) (a), and also of the right of movement in Article 19(1) (d), held that the Regulations permitting surveillance violated the fundamental right to privacy. In effect, all the seven learned Judges held that the "right to privacy" was part of the right to "life" in Article 21.

36. We now come to the celebrated judgment in *Gobind* v. *State of M.P.*, (1975) 2 SCC 148, in which Mathew J. developed the law as to privacy from where it was left in *Kharak Singh*. The learned Judge referred to *Griswold* v. *Connecticut* and *Jane Roe* v. *Henry Wade* and observed:

> "There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis J. said in his dissent in *Olmstead* v. *United States, 277 US 438, 471* the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the Government a sphere where he should be let alone" [para 20 of SCC].

37. Mathew J. held that privacy – dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior, or where a compelling state interest was shown. If the court then finds that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether the state interest is of such paramount importance as would justify an infringement of the right. The learned Judge observed that the right to privacy will have to go through a process of case-by-case development. The learned Judge further observed that the right is not absolute. The issue whether enforcement of morality is a State interest sufficient to justify infringement of fundamental "privacy right" was held not necessary to be considered for purposes of the case. The Court refused "to enter into the controversial thicket whether enforcement of morality is a function of the State".

38. A two-Judge Bench in *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632, held the right to privacy to be implicit in the right to life and liberty guaranteed to the citizens of India by Article 21. "It is the right to be left alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among many other matters.

39. In *District Registrar and Collector, Hyderabad and another* v. *Canara Bank and another*, (2005) 1 SCC 496, another two-Judge Bench held that the right to privacy dealt with persons and not places. The right to privacy has been accepted as implied in our Constitution,

in other cases, namely, *People's Union for Civil Liberties* v. *Union of India*, (1997) 1 SCC 301 and *Sharda* v. *Dharampal*, (2003) 4 SCC 493.

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. Mathew J. in *Gobind* v. *State of M.P.* (supra) referring to the famous Article, "The Right to Privacy" by Charles Warren and Louis D. Brandeis, (4 HLR 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 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. (Ackermann J. in *The National Coalition for Gay and Lesbian Equality* v. *The Minister of Justice*, decided by Constitutional Court of South Africa on 9 October 1998).

41. In *Bowers* v. *Hardwick* (supra) 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 26 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. They included one former UN High Commissioner for Human Rights, 13 current or former UN Human Rights Special Mechanism Office Holders or Treaty Body Members, two serving Judges on domestic courts and a number of academics and activists. 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), 207-48].

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".

The Principles recognise:

- 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.

45. Prof Edwin Cameron in his Article "Sexual Orientation and the Constitution: A Test Case for Human Rights", (1993) 110 SALJ 450, defines sexual orientation:

"....sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same-sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex".

46. In *Bernstein and others* v. *Bester and others NNO*, 1996 (4) BCLR 449 (CC), Ackermann J. pointed out that the scope of privacy had been closely related to the concept of identity and that "rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's autonomous identity.... In the context of privacy this means that it is... the inner sanctum of the person such as his/her family life, sexual preference and home environment which is shielded from erosion by conflicting rights of the community" [para 117].

47. The Supreme Court has acknowledged that the sphere of privacy deals with persons and not places. Explaining this concept in *District Registrar & Collector, Hyderabad* v. *Canara Bank* (supra) Lahoti CJ. referred to observations of Stevens J. in *Thornburgh* v. *American College of O and G*, 476 US 747 (1986), that "the concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole". Lahoti CJ. Also referred to an observation of a commentator in (1976) 64 Cal. L. Rev. 1447, that privacy centres round values of repose, sanctuary and intimate decision. Repose refers to freedom from unwanted stimuli; sanctuary to protection against intrusive observation; and intimate decision, to autonomy with respect to the most personal of life choices. For every individual, whether homosexual or not, the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes. A person cannot leave behind his sense of gender or sexual orientation at home. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves. [Sachs J. in *The National Coalition for Gay and Lesbian Equality* v. *The Minister of Justice* (supra)].

48. The 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. 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. 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. We may quote another glaring example. During Colonial period in India, eunuchs (*hijras*) were criminalised by virtue of their identity. The Criminal Tribes Act, 1871 was enacted by the British in an effort to police those tribes and communities who 'were addicted to the systematic commission of non-bailable offences.' These communities and tribes were deemed criminal by their identity, and mere belonging to one of those communities rendered the individual criminal. In 1897, this Act was amended to include eunuchs. According to the amendment the local government was required to keep a register of the names and residences of all eunuchs who are "reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 IPC. Commenting on the Criminal Tribes Act in a speech made in 1936, Pt. Jawaharlal Nehru said:

> "I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty... an attempt should be made to have the Act removed from the statute book. No tribe can be classed as criminal as such and the whole principle as such is out of consonance with civilized principles of criminal justice and treatment of offenders" [Dalip D'Souza, *Branded by law: Looking at India's Denotified Tribes*, Penguin, New Delhi, 2001, page 57].

While this Act has been repealed, the attachment of criminality to the *hijra* community still continues.

51. In 2006, the State of Tamil Nadu vides G.O. (Ms.) No.199 dated 21.12.2006 recognising that "aravanis (*hijras*) are discriminated by the society and remain isolated" issued directions thus:

> I Counselling be given to children who may feel different from other individuals in terms of their gender identity.
>
> II Family counseling by the teachers with the help of NGOs sensitized in that area should be made mandatory so that such children are not disowned by their families. The C.E.O.s, D.E.O.s, District Social Welfare Officers and Officers of Social Defence are requested to arrange compulsory counseling with the help of teachers and NGOs in the Districts wherever it is required.
>
> III Admission in School and Colleges should not be denied based on their sex identity. If any report is received of denying admission of aravani's suitable disciplinary action should be taken by the authorities concerned".

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. The Government of India estimates the MSM number at around 25 lakhs. The number of lesbians and transgenders is said to be several lakhs as well. This vast majority (borrowing the language of the South African Constitutional Court) is denied "moral full citizenship". Section 377 IPC grossly violates their right to privacy and liberty embodied in Article 21 insofar as it criminalises consensual sexual acts between adults in private. These fundamental rights had their roots deep in the struggle for independence and, as pointed out by Granville Austin in *The Indian Constitution – Cornerstone of a Nation*, "they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India". In the words of Justice V.R. Krishna Iyer, these rights are cardinal to a decent human order and protected by constitutional armour. The spirit of Man is at the root of Article 21, absent liberty, other freedoms are frozen [*Maneka Gandhi* (supra), para 76 SCC].

Global Trends in Protection of Privacy, Dignity and Rights of Homosexuals

53. The first successful international human rights cases concerning the privacy on same-sex relations were taken under the ECHR. In *Dudgeon* v. *The United Kingdom*, 45 Eur.Ct.H.R. (ser.A) (1981), and *Norris* v. *Republic of Ireland*, 142 Eur.Ct.H.R. (ser.A) (1988), the criminalisation of such practices was deemed a violation of the privacy protection in Article 8 of the ECHR. In *Dudgeon* v. *The United Kingdom*, the European Court of Human Rights held that "maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 para 1 (art.8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affect his

private life. In *Norris* v. *Republic of Ireland*, the European Court of Human Rights ruled that Ireland's blanket prohibition on gay sex breached the ECHR. The Court quoted with approval the finding of an Irish Judge that:

> "[o]ne of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasion, to depression and the serious consequences which can follow..." [para.21].

54. In *Modinos* v. *Cyprus*, 259 Eur.Ct.H.R. (ser.A) (1993), the European Court of Human Rights again held that such a law violated the right to privacy, and maintained that even a "consistent policy" of not bringing prosecutions under the law was no substitute for full repeal.

55. In *Toonen* v. *Australia*, (No.488/1992 CCPR/C/50/D/488/1992, 31 March 1994), the Human Rights Committee held that the continuous existence of Tasmanian sodomy laws violates Article 17 of International Covenant of Civil and Political Rights. The Committee observed:

> "The Committee considers that sections 122(a) and (c) and 123 of the Tasmanian Criminal Code 'interfere' with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directiy 'interferes' with the author's privacy" [para.8.2].

56. In *The National Coalition for Gay and Lesbian Equality* v. *The Minister of Justice* (supra), the Constitutional Court of South Africa struck down the sodomy laws on the ground of violation of rights to privacy, dignity and equality. Ackermann J. narrated the palpable invasion of their rights:

> "The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy 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.

There can be no doubt 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].

57. In *Lawrence* v. *Texas*, 539 US 558 (2003), holding the Texas sodomy laws as unconstitutional, the US Supreme Court reversed its earlier decision in *Bowers* v. *Hardwick* (supra). Kennedy J. who delivered the opinion of the Court 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... [page 567].
>
> ...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" [page 571].
>
> ...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..." [page 575].

58. Since 1967 the process of change has informed legal attitude towards sexual orientation. This process has culminated in the de-criminalisation of sodomy in private between consenting adults, in several jurisdictions. The superior courts in some of these jurisdictions have struck down anti-sodomy laws, where such laws remain on the statute book. In 1967 in England and Wales and in 1980 in Scotland sodomy between consenting adult males in private was de-criminalised. However, in Northern Ireland the criminal law relating to sodomy remained unchanged. In 1982, in pursuance of the decision of the ECHR in *Dudgeon* v. *United Kingdom* (supra), sodomy between adult consenting males in private was de-criminalised in Northern Ireland. The same conclusion was reached in 1988 in *Norris* v. *Ireland* (supra) and Ireland repealed sodomy laws in 1993. 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 10 February 1995), nine had de-criminalised sodomy laws either before or shortly after their membership applications were granted. In Australia, all the States with the exception of Tasmania, had by 1982 de-criminalised sexual acts in private between consenting adults and had also passed antidiscrimination laws which prohibited discrimination on the ground, amongst others, of sexual orientation. Tasmania repealed offending sections in its Criminal Code in 1997 in view of the decision of United Nations Human Rights Committee in *Toonen* v. *Australia*. Consensual sexual relations between adult males have been de-criminalised in New Zealand. In Canada, consensual adult sodomy ("Buggery") and so-called "gross indecency" were decriminalised by statute in 1989 in respect of such acts committed in private between 21 years and older which was

subsequently brought down to age of 18 years or more. In United States of America though the challenge to sodomy laws was turned down in *Bowers* v. *Hardwick* (supra), but subsequently in *Lawrence* v. *Texas*, the sodomy laws insofar as between consenting adults in private were struck down. 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. The High Court of Hong Kong in its judgments in *Leung T.C. William Roy* v. *Secy. for Justice*, dated 24 August 2005 and 20 September 2006 struck down similar sodomy laws. To the same effect is the judgment of the High Court of Fiji in *Dhirendra Nandan & another* v. *State*, Criminal Appeal Case No. HAA 85 & 86 of 2005, decided on 26 August 2005. Nepalese Supreme Court has also struck down the laws criminalising homosexuality in 2008 [Supreme Court of Nepal, Division Bench, Initial Note of the Decision 21.12.2007].

59. On 18 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. 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. It builds on a previous joint statement supported by 54 countries, which Norway delivered at the UN Human Rights Council in 2006. UN High Commissioner for Human Rights, who addressed the General Assembly via a video taped message stated:

> "Ironically many of these laws, like Apartheid laws that criminalised sexual relations between consenting adults of different races, are relics of the colonial and are increasingly recognised as anachronistic and as inconsistent both with international law and with traditional values of dignity, inclusion and respect for all".

Compelling State Interest

60. The Union Ministry of Home Affairs has opposed the petition claiming, *inter alia*, that Section 377 IPC is a justified interference by "public authorities in the interest of public safety and protection of health and morals". On the other hand, Union Ministry of Health and Family Welfare has supported the petition and admitted that Section 377 IPC, by criminalising consensual sex between adults of the same-sex, hampers HIV intervention efforts aimed at sexual minorities. Indeed it is the plea of the petitioner that Section 377 IPC infringes right to health as embodied in Article 21 of the Constitution of India. We shall take up the issue of public safety and health first.

Section 377 IPC as an Impediment to Public Health

61. Article 12 of the International Covenant on Economic, Social and Cultural Rights 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 [*Paschim Banga Khet Mazdoor Samity* v. *State of W.B.*, (1996) 4 SCC 37].

62. It is submitted by NACO 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 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 include the right to a system of health, protection which provides equality of opportunity for people to enjoy the highest attainable level of health. It further states:

> "Non-discrimination and equal treatment 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..." [para.18].

64. The 2001 UN General Assembly Special Session (UNGASS) Declaration of Commitment on HIV/AIDS, held on 25-27 June 2001, adopted by all UN Member States

emphasised the importance of "addressing the needs of those at the greatest risk of, and most vulnerable to, new 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, 24 March 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].

65. A report of the National Conference on Human Rights and HIV/AIDS, held on 24-25 November 2000 in New Delhi and organised by the National Human Rights Commission, in collaboration with other organisations, concludes:

> "Therefore, to more successfully prevent and manage HIV/AIDS among these marginalized populations, (intravenous drug users and MSA), a revision of the existing laws and processes is strongly recommended.... In terms of preventing HIV/AIDS among men who have sex with men, it would be most useful to make section 377 IPC obsolete, and instead review the legislation and endeavour to define more clearly the age of sexual consent.
>
> ... ...
>
> In a nutshell, the protection of Human Rights and the empowerment of marginalized populations would, in the context of HIV/AIDS prevention, create an environment that would enable India to reach the most vulnerable with HIV/AIDS messages and supporting mechanisms".
>
> [Report of the National Conference on Human Rights and HIV/AIDS, www.nhrc.nic.in/Publications/report_hivaids.htm].

66. The "Delhi Declaration of Collaboration, 2006" issued pursuant to International Consultation on Male Sexual Health and HIV, co-hosted by the Government of India,

UNAIDS and Civil Society Organisations, recognised that: "...the stigma, discrimination and criminalisation faced by men who have sex with men, gay men and transgender people are major barriers to universal access to HIV prevention and treatment" [Delhi Declaration of Collaboration, 26 September, 2006]. On 30 June 2008, the Prime Minister Mr. Manmohan Singh in a speech delivered at the release of the Report of the Commission on AIDS in Asia stated "the fact that many of the vulnerable social groups, be they sex workers or homosexuals or drug users, face great social prejudice has made the task of identifying AIDS victims and treating them very difficult" [Prime Minister's address on the release of the Report of the Commission on AIDS in Asia, 30 June 2006]. On 8 August 2008, the Union Minister of Health and Family Welfare, Dr. Ambumani Ramadoss speaking at the 17th International Conference on Aids in Mexico City is reported to have stated: "...structural discrimination against those who are vulnerable to HIV such as sex workers and MSM must be removed if our prevention, care and treatment programmes are to succeed". He said, "Section 377 of the Indian Penal Code, which criminalises men who have sex with men, must go" [reported in *Indian Express*, 9 August 2006, www.indianexpress.com/story/346649.html]. Union Minister of Health is also reported to have stated at the International HIV/AIDS Conference in Toronto, 2006, that Section 377 IPC was to be amended as part of the government's measures to prevent HIV/AIDS [*The Hindu*, 16 August 2006].

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" [page 7 of Amicus brief].

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 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 indicated at pages 47-50 of the Report to

the effect that in Asia an estimated 5 million people were living with HIV in 2007 out of which 3,80,000 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 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, such as MSM [see *United Nations General Assembly Declaration of Commitment on HIV/AIDS*, 2001, at para.64; NACO, MoHFW, *National AIDS Control Programme Phase III (2007-2012) Strategy and Implementation Plan*, November 2006, at pages 18-32]. Thus, the submissions made orally on behalf of the Union of India 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 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" [para.8.5].

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-à-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 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" [page 578].

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" [page 582].

77. In *Dudgeon* v. *United Kingdom* (supra), the UK Government urged that there is 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 after referring to the Wolfenden report 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 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" [para.60].

78. In *Norris* v. *Republic of Ireland* (supra), the Court drew a comparison with the *Dudgeon* case and relied on the reasoning in the latter case to hold that:

> "It cannot be maintained that there is a "pressing social need" to make such acts criminal offences. On the specific issue of Proportionality, the Court is of the opinion that "such justifications as there are for retaining the law in force un-amended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved" [para.46].

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. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly. While moving the Draft Constitution in the Assembly [Constitutional Assembly Debates: Official Reports, Vol.VII, 4 November 1948, page 38], Dr. Ambedkar quoted Grote, the historian of Greece, who had said:

> "The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of 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 the ascendancy for themselves".

After quoting Grote, Dr. Ambedkar added:

> "While everybody recognised the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognised. One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution. ...The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic".

80. Granville Austin in his treatise *The Indian Constitution – Cornerstone of a Nation* had said that the Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement.

The core of the commitments to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution. The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately; liberty was no longer to be the privilege of the few. 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.

81. The question of the State in fact being a protector of constitutional morality was also canvassed by the Constitutional Court of South Africa in *The National Coalition for Gay and Lesbian Equality* v. *The Minister of Justice* (supra):

> "A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil.... The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself" [para.136].

82. The Wolfenden Committee 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 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" [para.54]. The Committee regarded the function of the criminal law in this field as:

> "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient 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, but not to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined" [para.13 and 14].

83. In the 172nd report, the Law Commission has recommended deletion of Section 377 IPC, though in its earlier reports it had recommended the retention of the provision. In the 172nd report, the Law Commission of India, focused on the need to review the sexual offences laws in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters, and *inter alia*, recommended deleting the section 377 IPC by effecting the recommended amendments in Sections 375 to 376E of IPC. The Commission discussed various provisions related to sexual offences and was of considered opinion to amend provisions in the Indian Penal Code, 1860; the Code of Criminal Procedure, 1973; and Indian Evidence Act, 1872. In the Indian penal Code, recasting of 375 IPC has been recommended by redefining it under the head of 'Sexual Assault' encompassing all ranges of non consensual sexual offences/assaults, which in particular penalize not only the sexual intercourse with a woman as in accordance with the current 'Rape Laws'; but any non-consensual or non-willing penetration with bodily part or object manipulated by the another person except carried out for proper hygienic or medicinal purposes.

The recommended provision to substitute the existing section 375 IPC reads thus:

> "375. Sexual Assault: Sexual assault means –
>
> (a) Penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with –
>
> i) Any part of the body of another person or
>
> ii) An object manipulated by another person except where such penetration is carried out for proper hygienic or medical purposes;
>
> (b) Manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus or the urethra of the offender by any part of the other person's body;
>
> (c) Introducing any part of the penis of a person into the mouth of another person;
>
> (d) Engaging in cunnilingus or fellatio; or
>
> (e) Continuing sexual assault as defined in clauses (a) to (d) above;
>
> in circumstances falling under any of the six following descriptions:
>
> First – Against the other person's will;
>
> Secondly – Without the other person's consent;
>
> Thirdly – With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt;
>
> Fourthly – Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her

consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married;

Fifthly – With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent;

Sixthly – With or without the other person's consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section.

Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault".

Pertinently, the major thrust of the recommendation is on the word 'Person' which makes the sexual offences gender neutral unlike gender specific as under the 'Rape Laws' which is the current position in statute book. Amendments in section 376A, 376B, 376C, 376D have been recommended on the same lines with enhanced punishments. An added explanation defining sexual intercourse is sought to be introduced governing section 376B, 376C, 376D. Insertion of new section 376E has been recommended to penalize non consensual, direct or indirect, intentional unlawful sexual contact with part of body or with an object, any part of body of another person. This section specifically penalizes the person committing unlawful sexual contact who is in a position of trust or authority towards a young person (below the age of sixteen years), thereby protecting children. Conclusively the Section 377 IPC in the opinion of the Commission deserves to be deleted in the light of recommended amendments. However persons, having carnal intercourse with any animal, were to be left to their just deserts. Though the Law Commission report would not expressly say so, it is implicit in the suggested amendments that elements of "will" and "consent" will become relevant to determine if the sexual contact (homosexual for the purpose at hand) constitute an offence or not.

84. Our attention was also drawn to a statement of the Solicitor General of India appearing on behalf of India at the Periodic Review before the United Nations Human Rights Council that Indian society was accepting of sexual differences. In response to a question from the delegate from Sweden on the state of homosexual rights in India, he stated:

> "Around the early 19th Century, you probably know that in England they frowned on homosexuality, and therefore there are historical reports that various people came to India to take advantage of its more liberal atmosphere with regard to different kinds of sexual conduct. ... As a result, in 1860 when we got the Indian Penal Code, which was drafted by Lord Macaulay, they inserted s.377 in the Indian Penal Code, which brought in the concept of "sexual offences against the order of nature". Now in India we didn't have this concept of something being "against the order of nature". It was essentially a Western concept which has remained over the years. Now

homosexuality as such is not defined in the Indian Penal Code, and it will be a matter of great argument whether it's "against the order of nature".

[The address of the Solicitor General of India before United Nations Human Rights Council: rtsp://webcast.un.org/ondemand/conferences/unhrc/upr/1st/hrc080410pm-ng.rm?start=02:18:32& end=02:37:42 at time index 16.30].

85. Justice Michael Kirby, a distinguished former Judge of Australian High Court, expressing in similar vein said that criminalisation of private, consensual homosexual acts is a legacy of one of three very similar criminal codes (of Macaulay, Stephen and Griffith), imposed on colonial people by the imperial rules of the British Crown. Such laws are wrong:

- 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, 8 April 2009].

86. The argument of the learned ASG that public morality of homosexual conduct might open floodgates of delinquent behaviour is not founded upon any substantive material, even from such jurisdictions where sodomy laws have been abolished. Insofar as basis of this argument is concerned, as pointed out by the Wolfenden Committee, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Moral indignation, howsoever strong, is not a valid basis for overriding individuals' 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. In Indian context, the latest report (172nd) of Law Commission on the subject instead shows heightened realisation about urgent need to follow global trends on the issue of sexual offences. In fact, the admitted case of Union of India that Section 377 IPC has generally been used in cases of sexual abuse or child abuse, and conversely that it has hardly ever been used in cases of consenting adults, shows that criminalisation of adult same- sex conduct does not serve any public interest. 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.

Whether Section 377 IPC Violates Constitutional Guarantees of Equality under Article 14 of The Constitution

88. The scope, content and meaning of Article 14 of the Constitution has been the subject matter of intensive examination by the Supreme Court in a catena of decisions. The decisions lay down that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that the differentia must have a rational relation to the objective sought to be achieved by the statute in question. The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be a nexus, i.e., causal connection between the basis of classification and object of the statute under consideration [*Budhan Choudhry* v. *State of Bihar*, AIR 1955 SC 191]. In considering reasonableness from the point of view of Article 14, the Court has also to consider the objective for such classification. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable [*Deepak Sibal* v. *Punjab University*, (1989) 2 SCC 145].

89. The other important facet of Article 14 which was stressed in *Maneka Gandhi* is that it eschews arbitrariness in any form. The Court reiterated what was pointed out by the majority in *E.P. Royappa* v. *State of Tamil Nadu*, (1974) 4 SCC 3, that "from a positivistic point of view, equality is antithetic to arbitrariness".

90. Affirming and explaining this view, the Constitution Bench in *Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722, held that it must, therefore, now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary must necessarily involve negation of equality. The Court made it explicit that where an Act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14.

The Classification Bears no Rational Nexus to the Objective Sought to Be Achieved

91. The petitioner's case is that public morality is not the province of criminal law and Section 377 IPC does not have any legitimate purpose. Section 377 IPC makes no distinction between acts engaged in the public sphere and acts engaged in the private sphere. It also makes no distinction between the consensual and non-consensual acts between adults. Consensual sex between adults in private does not cause any harm to anybody. Thus it is evident that the disparate grouping in Section 377 IPC does not take into account relevant factors such as consent, age and the nature of the act or the absence of harm caused to anybody. Public animus and disgust towards a particular social group or vulnerable minority

is not a valid ground for classification under Article 14. Section 377 IPC targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people.

92. According to Union of India, the stated object of Section 377 IPC is to protect women and children, prevent the spread of HIV/AIDS and enforce societal morality against homosexuality. It is clear that Section 377 IPC, whatever its present pragmatic application, was not enacted keeping in mind instances of child sexual abuse or to fill the lacuna in a rape law. It was based on a conception of sexual morality specific to Victorian era drawing on notions of carnality and sinfulness. In any way, the legislative object of protecting women and children has no bearing in regard to consensual sexual acts between adults in private. The second legislative purpose elucidated is that Section 377 IPC serves the cause of public health by criminalising the homosexual behaviour. As already held, this purported legislative purpose is in complete contrast to the averments in NACO's affidavit. NACO has specifically stated that enforcement of Section 377 IPC adversely contributes to pushing the infliction underground; make risky sexual practices go unnoticed and unaddressed. Section 377 IPC thus hampers HIV/AIDS prevention efforts. Lastly, as held earlier, it is not within the constitutional competence of the State to invade the privacy of citizen's lives or regulate conduct to which the citizen alone is concerned solely on the basis of public morals. The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The state interests "must be legitimate and relevant" for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society. The discrimination severely affects the rights and interests of homosexuals and deeply impairs their dignity.

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. This declaration was agreed upon by a group of experts at a conference entitled "Principles on Equality and the Development of Legal Standard on Equality" held on 3-5 April 2008 in London. Participants of different backgrounds, including academics, legal practitioners, human rights activists from all regions of the world took part in the Conference. The Declaration of Principles on Equality 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".

Part-II of the Declaration lays down the right to non-discrimination. The right to non-discrimination is stated to be a free-standing fundamental right, subsumed in the right to equality. Discrimination is defined as follows:

"Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds (emphasis supplied).

Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.

Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applied or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.

Discrimination may be direct or indirect.

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment (emphasis supplied).

[Declaration of Principles on Equality 2008 -- The Equal Rights Trust]

Section 377 IPC Targets Homosexuals as a Class

94. Section 377 IPC is facially neutral and it apparently targets not identities but acts, but 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 nonconformity, persecuted, marginalised and turned in on itself. [Sachs J. in *The National Coalition for Gay and Lesbian Equality* v. *The Minister of Justice,* para.108].

95. As Justice O'Connor succinctly stated in her concurring opinion in *Lawrence* v. *Texas* (supra):

> "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas's sodomy law is targeted at more than conduct. It is instead directed towards gay persons as a class" [page 583].

96. In *Romer* v. *Evans*, 517 U.S. 620 (1996), the challenge was to an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships" and deprived them of protection under the state anti-discrimination laws. The US Supreme Court concluded that the provision was "born of animosity towards the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. Justice Kennedy speaking for the majority observed:

> "It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities". *Sweatt* v. *Painter*, 339 U.S. 629, 635 (1950) (quoting *Shelley* v. *Kraemer*, 334, U.S. 1, 22 (1948). Respect for this principle explains why laws singling out a certain class of citizens for disfavoured legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of equal protection of the laws is a pledge of the protection of equal laws..." [page 633].
>
> "A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity towards the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean

that a bare... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest..." [page 634].

97. The Supreme Court of Canada in *Vriend* v. *Alberta*, (1998) 1 S.C.R. 493, held:

> "Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates [sic] the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination" [para.102].

These observations were made in the context of discrimination on grounds of sexual orientation in the employment field and would apply with even greater force to the criminalisation of consensual sex in private between adult males.

98. The inevitable conclusion is that the discrimination caused to MSM and gay community is unfair and unreasonable and, therefore, in breach of Article 14 of the Constitution of India.

Infringement of Article 15 – Whether 'Sexual Orientation' is a Ground Analogous to 'Sex'

99. Article 15 is an instance and particular application of the right of equality which is generally stated in Article 14. Article 14 is genus while Article 15 along with Article 16 are species although all of them occupy same field and the doctrine of "equality" embodied in these Articles has many facets. Article 15 prohibits discrimination on several enumerated grounds, which include 'sex'. The argument of the petitioner is that 'sex' in Article 15(1) must be read expansively to include a prohibition of discrimination on the ground of sexual orientation as the prohibited ground of sex-discrimination cannot be read as applying to gender *simpliciter*. The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning "normal" or "natural" gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex. This is stated to be the legal position in International Law and comparative jurisprudence. Reliance was placed on judgments of Human Rights Committee and also on the judgments of Canadian and South African courts.

100. 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'.

101. Despite the fact that Section 15(1) of the Canadian Charter 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 (para.176), as well as previous judicial decisions (para.177), that sexual orientation is a ground analogous to those listed in s.15(1)" [*Vriend* v. *Alberta* (supra) per Cory J., para.90].

102. Similarly, in *Corbiere* v. *Canada*, [1999] 2 S.C.R. 203, the Canadian Supreme Court identified the thread running through these analogous grounds – "what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity" [para.13].

103. The South African Constitutional Court recognised in *Prinsloo* v. *Van Der Linde*, 1997 (3) SA 1012 (CC), that discrimination on unspecified grounds is usually 'based on attributes and characteristics' attaching to people, thereby impairing their 'fundamental dignity as human beings'". In *Harksen* v. *Lane*, 1998 (1) SA 300 (CC), the Court further developed the idea to say that there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner. Elaborating on what it means by potential impairment of dignity, the Court resisted the temptation of laying down any such 'test' for discerning 'unspecified' grounds, but has this to say by way of guidelines, "In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features". It needs to be noted that on account of the prevalent wider knowledge of the discrimination on account of sexual orientation, the South African constitution, when it was drafted, specifically included that as a ground.

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. 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.

105. We may now examine in some detail the recent decision of the Supreme Court in *Anuj Garg* v. *Hotel Association of India*, (2008) 3 SCC 1, which has important bearing on the present case. In *Anuj Garg*, constitutional validity of Section 30 of the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drug is consumed by the public was challenged before the High Court of Delhi. The High Court declared Section 30 of the Act as *ultra vires* Articles 19(1) (g), 14 and 15 of the Constitution of India to the extent it prohibits employment of any woman in any part of such premises, in which liquor or intoxicating drugs are consumed by the public. National Capital Territory of Delhi accepted the said judgment but an appeal was filed by few citizens of Delhi. The appeal was ultimately dismissed by the Supreme Court, but the principles laid down by the Court relating to the scope of the right to equality enunciated in Articles 14 and 15 are material for the purpose of the present case. At the outset, the Court observed that the Act in question is a pre-constitutional legislation and although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. There is thus no presumption of constitutionality of a colonial legislation. Therefore, though the statute could have been held to be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid. In this connection, the Court referred to the following observations made in *John Vallamattom* v. *Union of India*, (2003) 6 SCC 611:

> "The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time... the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation" [para.28 & 33 of SCC].

106. The Court further held that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden there for would be on the State.

> "When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, *inter alia*, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefore would be on the State. While considering validity of a legislation of this nature, the court was to take notice of the other provisions of the Constitution including those contained in Part IV-A of the Constitution" [para.21of SCC].

107. The Court discussed two distinct concepts, "strict scrutiny" borrowed from the US jurisprudence, and "proportionality review" which has its origin in the jurisprudence of Canadian and European courts. The Court held that the interference prescribed by the State for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society. The Court further held that legislations with pronounced "protective discrimination" aims, such as Section 30, potentially serve as double edged swords. Strict scrutiny should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The Court then went on to state the principle of personal autonomy with a special judicial role when dealing with laws reflecting oppressive cultural norms that especially target minorities and vulnerable groups.

> "...the issue of *biological difference between sexes* gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over" [para.41 of SCC].

108. The Court held that Article 15's prohibition of sex discrimination implies the right to autonomy and self-determination, which places emphasis on individual choice. Therefore, a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.

> "46. ...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.
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> 47. No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a compelling state purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases.
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> 50. The test to review such a Protective Discrimination statute would entail a two-pronged scrutiny:
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> (a) the legislative interference (induced by sex discriminatory legislation in the instant case) should be justified in principle,
>
> (b) the same should be proportionate in measure.

> 51. The Court's task is to determine whether the measures furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al. The bottom line in this behalf would be a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis. In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued" (emphasis supplied).

109. In *Anuj Garg*, the Court, however, clarified that the heightened review standard does not make sex a proscribed classification, "*...sex classifications*" may be used to compensate women "for particular economic disabilities (they have) suffered", "to promote equal employment opportunity", to advance full development of the talent and capacities of our nation's people. Such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women".

110. In *Ashok Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1, the Supreme Court refused to apply strict scrutiny to an affirmative action measure. The Court held that the principles laid down by the United States Supreme Court such as 'suspect legislation', 'strict scrutiny' and 'compelling state necessity' are not applicable for challenging the validity of reservations or other affirmative action contemplated under Article 15(5) of the Constitution [per Balakrishnan CJ., Summary point 9, page 526 of SCC].

111. On a harmonious construction of the two judgments, the Supreme Court must be interpreted to have laid down that the principle of 'strict scrutiny' would not apply to affirmative action under Article 15(5) but a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.

112. Thus personal autonomy is inherent in the grounds mentioned in Article 15. The grounds that are not specified in Article 15 but are analogous to those specified there in, will be those which have the potential to impair the personal autonomy of an individual. This view was earlier indicated in *Indra Sawhney* v. *Union of India*, (1992) Supp. 3 SCC 217. In *Anuj Garg*, S.B. Sinha J. emphasised this aspect with great clarity:

> "...The bottom line in this behalf would be a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis..." (emphasis supplied) [para.51 of SCC].

113. As held in *Anuj Garg*, if a law discriminates on any of the prohibited grounds, it needs to be tested not merely against "reasonableness" under Article 14 but be subject to "strict scrutiny". The impugned provision in Section 377 IPC criminalises the acts of sexual minorities particularly men who have sex with men and gay men. It disproportionately impacts them solely on the basis of their sexual orientation. The provision runs counter to the

constitutional values and the notion of human dignity which is considered to be the cornerstone of our Constitution. Section 377 IPC in its application to sexual acts of consenting adults in privacy discriminates a section of people solely on the ground of their sexual orientation which is analogous to prohibited ground of sex. A provision of law branding one section of people as criminal based wholly on the State's moral disapproval of that class goes counter to the equality guaranteed under Articles 14 and 15 under any standard of review.

114. A constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems [*Francis Coralie Mullin* v. *Union Territory of Delhi* (supra), para.6 of SCC]. In *M. Nagraj* v. *Union of India,* (2006) 8 SCC 212, the Constitution Bench noted that:

> "Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges" [para.19 of SCC].

115. Similar is the sentiment expressed by Kennedy J. in *Lawrence* v. *Texas* (supra):

> "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They know times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom" [page 563].

Scope of the Court's Power to Declare a Statutory Provision Invalid

116. Learned ASG strenuously contended that the Judges must maintain judicial self-restraint while exercising the power of judicial review of legislation. There is a broad separation of powers under the Constitution, and the three organs of the State—the legislature, the executive and the judiciary—must respect each other and must not ordinarily encroach into each others' domain. The legislature is a democratically elected body which expresses the will of the people, and in a democracy, this will is not to be lightly frustrated or obstructed. The Court should, therefore, ordinarily defer to the decision of the legislature as it is the best judge of what is good for the community. He placed reliance on a recent judgment of the Supreme Court in the case of Government of *Andhra Pradesh* v. *P. Laxmi Devi*, (2008)

4 SCC 720, where the Court after referring to the classic essay of Professor James Bradley Thayer titled "The Origin and Scope of the American Doctrine of Constitutional Law" and certain observations of Justice Felix Frankfurter, held as follows:

> "46. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways, e.g. if a State legislature makes a law which only the Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the Court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the Court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope *vide Mark Netto* v. *State of Kerala and Ors.* (1979) 1 SCC 23, para.6 of SCC. Also, it is none of the concern of the Court whether the legislation in its opinion is wise or unwise.
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> 50. In our opinion judges must maintain judicial self-restraint while exercising the power of judicial review of legislation....
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> 51. In our opinion the legislature must be given freedom to do experimentations in exercising its powers, provided of course it does not clearly and flagrantly violate its constitutional limits.
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> ...
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> ...
>
> 57. In our opinion, the court should, therefore, ordinarily defer to the wisdom of the legislature unless it enacts a law about which there can be no manner of doubt about its unconstitutionality".

117. The learned ASG also referred to the *locus classicus* judgment of the Supreme Court in *State of Madras* v. *V.G. Row*, AIR 1952 SC 196, wherein para.15 dealing with test of reasonableness reads as follows:

> "15. ...It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors

and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable".

118. It is true that the courts should ordinarily defer to the wisdom of the legislature while exercising the power of judicial review of legislation. But it is equally well settled that the degree of deference to be given to the legislature is dependent on the subject matter under consideration. When matters of "high constitutional importance" such as constitutionally entrenched human rights are under consideration, the courts are obliged in discharging their own sovereign jurisdiction, to give considerably less deference to the legislature than would otherwise be the case. In *State of Madras* v. *V.G. Row* (supra), while impliedly explicating the scope of power under Article 13 it was held that if the legislation in question violated a fundamental right, it would have to be struck down "in discharge of a duty plainly laid upon the courts by the Constitution" [para.13 of AIR].

119. In *R. (Alconbury Ltd.)* v. *Environment Secretary*, [2001] 2 WLR 1389, Lord Hoffmann spoke of the approach in such cases:

> "There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation. The protection of these basic rights from majority decision requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and either (as in the United States) to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate" [*R. (Alconbury Ltd.)* v. *Environment Secretary* [2001] 2 WLR 1389, at 1411].

120. In this regard, the role of the judiciary can be described as one of protecting the counter majoritarian safeguards enumerated in the Constitution. It is apt to refer to the observations of Justice Robert Jackson in *West Virginia State Board of Education* v. *Barnette*, 319 US 624 (1943):

> "The very purpose of the 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" [page 638].

121. We may also refer to the two recent decisions of the Supreme Court involving the power of the courts to review Parliament's legislative and non-legislative functions—i.e., the judgments in *I.R. Coelho (Dead) by LRs* v. *State of Tamil Nadu & Ors.*, (2007) 2 SCC 1 and *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha & Ors.*, (2007) 3 SCC 1 In *Coelho*, the Supreme Court held that it could strike down any law inserted into the Ninth Schedule if it were contrary to Constitutional provisions. It was observed:

> "...the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power.... It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution" [para.56 & 102].

122. In *Raja Ram Pal* case, the Court disposed of the arguments regarding the unconstitutionality of the expulsion of Members of Parliament while simultaneously upholding the principles of judicial review. The Court began by stating that the Constitution was the "*supreme lex* in this country" and went on to say that:

> "Parliament indeed is a coordinate organ and its views do deserve deference even while its acts are amenable to judicial scrutiny... mere coordinate constitutional status... does not disentitle this Court from exercising its jurisdiction of judicial review..." [para.391 and 431 of SCC].

123. In the present case, the two constitutional rights relied upon, i.e., 'right to personal liberty' and 'right to equality' are fundamental human rights which belong to individuals simply by virtue of their humanity, independent of any utilitarian consideration. A Bill of Rights does not 'confer' fundamental human rights. It confirms their existence and accords them protection.

124. In *Peerless General Finance Investment Co. Ltd.* v. *Reserve Bank of India*, (1992) 2 SCC 343, the Court highlighted the role of the judiciary as protector of fundamental rights in following words:

> "Wherever a statute is challenged as violative of the fundamental rights, its real effect or operation on the fundamental rights is of primary importance. It is the duty of the court to be watchful to protect the constitutional rights of a citizen as against any encroachment gradually or stealthily thereon. When a law has imposed restrictions on the fundamental rights, what the court has to examine is the substance of the legislation without being beguiled by the mere appearance of the legislation. The Legislature cannot disobey the

constitutional mandate by employing an indirect method. The court must consider not merely the purpose of the law but also the means how it is sought to be secured or how it is to be administered. The object of the legislation is not conclusive as to the validity of the legislation.... The court must lift the veil of the form and appearance to discover the true character and the nature of the legislation, and every endeavour should be made to have the efficacy of fundamental right maintained and the legislature is not invested with unbounded power. The court has, therefore, always to guard against the gradual encroachments and strike down a restriction as soon as it reaches that magnitude of total annihilation of the right" [para.48 of SCC].

125. After the conclusion of oral hearing, learned ASG filed his written submissions in which he claimed that the courts have only to interpret the law as it is and have no power to declare the law invalid. According to him, therefore, if we were to agree with the petitioner, we could only make recommendation to Parliament and it is for Parliament to amend the law. We are constrained to observe that the submission of learned ASG reflects rather poorly on his understanding of the constitutional scheme. It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution derives its power or authority under the Constitution and has to act within the limits of powers. The judiciary is constituted as the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits. The role of the judiciary is to protect the fundamental rights. A modern democracy while based on the principle of majority rule implicitly recognizes the need to protect the fundamental rights of those who may dissent or deviate from the majoritarian view. It is the job of the judiciary to balance the principles ensuring that the government on the basis of number does not override fundamental rights. After the enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme. To quote the words of Krishna Iyer, J.: "...The compulsion of constitutional humanism and the assumption of full faith in life and liberty cannot be so futile or fragmentary that any transient legislative majority in tantrums against any minority by three quick readings of a Bill with the requisite quorum, can prescribe any unreasonable modality and thereby sterilise the grandiloquent mandate" [*Maneka Gandhi* v. *Union of India* (supra), para.81 of SCC].

Infringement of Article 19(1)(a) to (d)

126. In the light of our findings on the infringement of Articles 21, 14 and 15, we feel it unnecessary to deal with the issue of violation of Article 19(1)(a) to (d). This issue is left open.

Doctrine of Severability

127. The prayer of the petitioner is to declare Section 377 IPC as unconstitutional to the extent the said provision affects private sexual acts between consenting adults in private. The relief has been sought in this manner to ensure the continuance of applicability of Section 377 IPC to cases involving non-consensual sex. Our attention was drawn to a passage from

Constitutional Law of India (Fourth Edition, Vol.1) by H.M. Seervai, wherein the learned author has explained the Doctrine of Severability in the following words:

> "3.7 Severability we have seen that where two interpretations are possible, a Court will accept that interpretation which will uphold the validity of law. If, however, this is not possible, it becomes necessary to decide whether the law is bad as a whole, or whether the bad part can be severed from the good part. The question of construction and the question of severability are thus two distinct questions".
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> ...
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> 3.9 There are two kinds of severability: a statutory provision may contain distinct and separate words dealing with distinct and separate topics, as for example, one sub-section may apply it retrospectively. The first sub-section may be valid and the second void. In such a case, the Court may delete the second sub-section by treating it as severable.
>
> 3.10 There is however another kind of severability namely severability in application, or severability in enforcement. The question of this other kind of severability arises when an impugned provision is one indivisible whole, as for instance, the definition of a word. Here severability cannot be applied by deleting an offending provision and leaving the rest standing. It becomes necessary therefore to enquire whether the impugned definition embraces distinct classes and categories of subject matter in respect to some of which the Legislature has no power to legislate or is otherwise subject to a Constitutional limit. If it is found that the definition does cover distinct and separate classes and categories, the Court will restrain the enforcement of the law in respect of that class of subjects in respect of which the law is invalid. This might be done by granting perpetual injunction restraining the enforcement of law on the forbidden field, as held in *Chamarbaughwalla* case (1957) S.C.R. 930.
>
> 3.11 The principle of severability in application was first adopted by our Sup. Ct. when dealing with the contention that a tax law must be declared wholly void if it was bad in part as transgressing Constitutional limitations. Sastri CJ., delivering the majority judgment, observed: "It is a sound rule to extend severability to include separability in enforcement... and we are of the opinion that the principle should be applied in dealing with taxing statutes...". He referred to the decision in *Bowman* v. *Continental Oil Co.*, (1920) 256 US 642. In *Chamarbaughwalla* case, it was argued that this rule was exceptional and applied only to taxing statutes. But Venkatarama Aiyar J. rejected this contention".

128. In *R.M.D. Chamarbaugwalla* v. *Union of India,* AIR 1957 SC 628, the Constitution Bench laid down:

> "When a legislature whose authority, is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that account become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from

what is invalid, and that is a question which has to be decided by the Court on a consideration of the provisions of the Act. This is a principle well established in American Jurisprudence, *vide* Cooley's *Constitutional Limitations*, Vol.I, Chap.VII, Crawford on *Statutory Construction*, Chap.16 and Sutherland on *Statutory Construction*, 3rd Edn., Vol.2, Chap.24" [para.12 of AIR].

In that case, the Court accepted the contention of the respondent that the principle of severability is applicable when a statute is partially void for whatever reason that might be, and that the impugned provisions are severable and, therefore, enforceable as against competitions which are of a gambling character. The ratio in *Chamarbaugwalla* was followed in *Kedar Nath* v. *State of Bihar*, AIR 1962 SC 955, *Bhim Singhji* v. *Union of India*, (1981) 1 SCC 166 and *State of Andhra Pradesh* v. *National Thermal Power Corporation*, (2002) 5 SCC 203.

Conclusion

129. The notion of equality in the Indian Constitution flows from the 'Objective Resolution' moved by Pandit Jawaharlal Nehru on 13 December 1946. Nehru, in his speech, moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He said, "Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion.... (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future" [*Constituent Assembly Debates*, Lok Sabha Secretariat, New Delhi, 1999, Vol.I, pages 57-65].

130. If there is one constitutional tenet that can be said to be 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 excluded or ostracised.

131. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the 'spirit behind the Resolution' of which Nehru spoke so passionately. 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 Articles 21, 14 and 15 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 to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 IPC that have already attained finality.

We allow the writ petition in the above terms.

CHIEF JUSTICE

JULY 2, 2009
"nm/v/pk"

S. MURALIDHAR, J.

BLUSTERING SAHIBS AND SECTION 377*

Alexander Bubb

Many societies have claimed that homosexuality is an alien custom, brought to their shores by the merchants, missionaries or colonists of other nations. Arab writers have attributed its presence to Persian influence, while the Persians passed on the blame to Nestorian Christians. John Boswell has written of how the diehard Anglo-Saxon aristocracy used it to discredit their Norman invaders, initiating a long tradition of parochial English squinting at the Continent's vices (Vanita and Kidwai 2000). In India today it is pinned by turns on the Afghan dynasties which brought the Rubaiyat and the *naach* to the subcontinent, the ever-predatory British imperialist, or the glamorous lure of American capitalism. Will nobody own up to the "invention" of same-sex love, or are we to assume that the practice was kept alive by a few regenerates who crawled from the ashes of Sodom and Gomorrah?

There is a rather conspiratorial mindset which assumes that homosexuality is like a secret society, a sort of free-love freemasonry which surreptitiously evangelises its initiates through various odd practices and queer rites. Of course homosexuality was never invented. It is, for reasons mysterious, intrinsic to the makeup of a large section of the population worldwide, including many who do not consider themselves "gay". Anyone who grew up in a small Indian town, at least before the current debate on homosexual rights began, will know that the *masti* (horseplay) indulged in by young men, who will generally go on to get married, was something either winked at or not thought of at all. Rather, the individual's homosexual orientation comes first, he or she seeks out like-minded fellows, and culture develops around that.

The beginnings are the same, but different societies have found various means of incorporating alternative sexualities in their civil spectrum. For patriarchal reasons, methods of sexual-social mobility have mostly been devised for the benefit of men. In ancient Greece mature men were expected to marry, but within the culture of the gymnasia and the academy they were also permitted the society of youths. The monastic foundations of Tibet have traditionally found means for those in vows to contract alliances, when necessary, with laymen of their own sex. India cannot be logically excluded. It is true that the educated youth from which most gay activists are drawn tend to model themselves after their political forbears in the west, but the social niches occupied by *hijras* and *kothis* (homosexual men who dress as women) are indigenous to India. The legacy left by ancient Sanskrit literature is a fluid view of human sexuality (ibid). Aristophanes charmingly suggested that we humans, the paired fragments of once mightier beings, sought reunion with our more perfect selves through coupling either with another man, another woman, or one of a different sex. But easily pre-dating him, scholars have found that the concept of three sexes, man, woman or hermaphrodite, "has been a part of the Indian worldview for more than three thousand years". Same-sex love is discussed in texts as diverse as Patanjali's grammar, the

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Strinirvanaprakarana and the *Kamasutra*, although unlike the Greek sources, the Indians seem to allow for a more fluid interchange between *hetero* and *homo*sexuality.

Witch Burning Paranoia

What is an "alien legacy" however, as the report of Human Rights Watch amply demonstrates, is the entrenchment and dualisation of these two definitions originally devised by European sexologists of the 19th century. The report outlines how Section 377 was a British invention, criminalising homosexual behaviour in colonies which had not previously done so. The rather cold and often cruel rulings of Freudian psychoanalysis went iron hand in velvet glove with the more familiar categorisation, legislation and regulation of social behaviour through which British Utilitarianism's imperial enthusiasts sought to mould this country to their liking. The report traces the origin of the British criminalisation of homosexuality to the witch-burning paranoia of 16th century Puritanism, "sodomy" being one of many supposed moral corruptions associated with the departing order of the old church (p14).[1] The early to mid-19th century saw another kind of moral purge, as an aspiring middle class won reluctant concessions of democratic rights, before imposing the rigid behavioural standards which ensured that the impoverished workforce who underpinned their industrial wealth would not in turn demand a life, liberty and happiness of their own. This was a time which saw a great expansion of British power but an equivalent narrowing of national life: a regulation of her festivities, a uniform streetscape, a spying moral brigade which enforced both a cloying ideal of Christian virtue and a mandatory and arrogating Britishness. To cap it all off and keep it running smoothly: a faceless bureaucracy, the omnipresent constable, the workhouse, and an efficient criminal justice system. As Ashis Nandy (1988) has written, the whole regulatory attitude of this brave new country was so unimaginatively thorough, it could only have begun as a germ in the colonial mind. It was the British taste for despotic rule in India which moulded the hypocritical and class-ridden nanny society—and harsh laws—of Victorian Britain. The report shows how for British ideas of how to construct a society, and how to construct a person (p15). T B Macaulay's penal code was the moral tool of an invasive state which sought to define, categorise and legislate for everything within its remit, including people. The Indian Penal Code was the prototype code for the British Empire—both the code and its Section 377 were replicated not only throughout the colonies, but also provided the template for the reformed sexual laws of Great Britain itself (p15). Britain may have exported zealous Utilitarians and Evangelicals to India, but the moral codes they were allowed to enshrine there were exported back to Britain. The prosecution of citizens for their sexual preference, therefore is an unhappy legacy not only foisted by Britain on India, but also bequeathed to both countries by the tyrannic rationale of colonialism. The disapproving finger of Queen Victoria wags on throughout much of the former Empire, but thankfully she has been shown the door in Britain, South Africa, Fiji, Hong Kong and now Delhi.

Why did the British choose to criminalise homosexuality in a country with virtually no legal precedent for it? Indian precedents were of no concern to Macaulay. For him, universal moral arbitration emanated from absolute British sovereignty, and he had no truck with the

[1] The Report is available at www.hrw.org/en/report/2008/12/17/alien-legacy-0. All page number references to this report are given in parentheses in the main text.

"Anglo-Hindu" or "Anglo-Mohammadan" codes of customary law drafted by officers like William Jones which, incidentally, did not concern themselves with a crime named for a mythical city of the Christian Old Testament. Macaulay's dream was to bring India culturally in line with right thinking Britain. Sexually, this meant teaching a slovenly tropical country to stand up *straight*. Victorian racists such as the explorer Richard Burton associated sexual deviance with sultry climates (p16). In time-honoured fashion, Britain blamed its homosexuals on someone else—buggery was "the Greek vice". But then to quote another character from E M Forster's *Maurice*, "England has always been disinclined to accept human nature". As with Greece, the British saw in India a noble ancient fabric riddled with debaucheries. However, they were struck with admiration for much of the culture of their bewilderingly large dependency, and with the hypocrisy characteristic of their age they set about the sacred duty of "reform". They edited Sanskrit texts, covered or defaced "obscene" temple carvings, fantasised about rescuing scantily-clad women from funeral pyres and imprisoning their wicked relatives. They airbrushed out the corrupt accretions that had gathered like rust on an Ashokan pillar, helping Indian culture, so they thought, to realise its better self, and consigning all the verve and reality of history to a museum plinth. In short, they tried to make India "respectable".

An Alien Respectability

But there is another reason besides Victorian prudishness why the British chose to legislate sexuality in India and that was a fear of contagion. The reformers sought to maintain their own monopoly on respectability. The draconian prosecution of laws such as Section 377 was arguably less significant for civilising wayward Indians than punishing the peccadilloes. of sex-starved colonial personnel (p49). Many will be familiar with the comic portrait of the British sahib with his swagger stick and solar topi. But what really makes this figure ludicrous, and rather pathetic, is his helpless dependence on the strutting assertion of his own masculinity. Much of the paraphernalia of British rule—from cricket to Martial Race Theory —hinged on an ideal of manhood (and gentleman hood) embodied by the Englishman. Sexually speaking, he who could maintain a stiff upper lip was one who could restrain his stiffness elsewhere. Opportunistic sexual experimentation in an environment less beset by moral surveillance not only signified loss of manly resolve and consequent colonial prestige. To minds so warped as to think they were occupying their rightful position as the serene and pure master race at the summit of a dizzying caste hierarchy, copulation with any "native" implied defilement. Indeed, "loss of caste" was a term frequently used by the British in India to mean social disgrace. Worse, making love to an Indian man implied equality with that man, or perhaps even more than equality. "Sodomy" was unacceptable because it undermined the racist and masculinist pretext of colonial rule.

An important point made by the report is that whatever Macaulay's original intentions, the law as it has been applied in court and amended by government—not just in India—has been moulded to prosecute not so much an act as a person. It cites a series of depressing examples of convictions based on the most insidious brand of "character evidence". The colonial state victimised so-called "habitual catamites" on the grounds of effeminate behaviour or dress, or sought to prove their guilt of "unnatural" sex acts by subjecting them to medical examinations

as cruel and coerced as they were medically quackish and evidentially useless (p33). Such practices, ironically always more sadistic and perverse than anything of which the homosexuals themselves are accused, continue to serve the purpose of intimidating those who deviate from social norms.

Whatever one may make of Foucault (1978), he was astute in pointing out that while moralists might profess disgust for "unnatural" sex acts (they are in fact salaciously fascinated by them), it is the concept of the homosexual lifestyle that really disturbs them. By rejecting behavioural norms, homosexuals are presumed to threaten the social structure of family and marriage. They do this only inasmuch as they undermine gender roles, the ways in which men and women are expected to behave, which are of course prescribed by patriarchy. Homosexuals do not threaten the family. They threaten the power structure of the family. The colonial state's decision to legislate against them was analogous to its victimisation of the so-called "criminal tribes", who did not threaten, as supposed, the security of the highways but. the security of those who controlled or wished to control the land. The two legal drives came together to persecute the person of the *hijra*. Defined as both a criminal tribe and a sexual deviant, the *hijra* was everything the British loathed: a contradiction of official masculinity, a roving population hard to police, and a pagan oddity who had no place in the purified version of Indian culture. For the colonial courts, the very appearance of the *hijras* was enough to prove their guilt under Section 377 (pp28-29).

Of course, there was no single school of thought which determined the governance of India. The colonial camp housed many contending voices. But what really mattered in the long run was the way in which Indians shaped themselves and their society in response to the expectations of the imperialists. As in Victorian Britain, an educated middle class emerged to become the guardians and enforcers of official, colonial morality. Macaulay's children fulfilled all his wishes, up to and including their fostering of a national spirit and securing of independence. But even if in an effort to assert a modern Indian identity they have kicked against the colonial heritage, their assumption of three British characteristics—the belief that the state can author private morality, the reliance on prescribed gender roles, and the reinterpretation and "purification" of Indian culture—keeps them in the imperial shadow. If the British tried to remake India in their own Victorian image, then the measure of their success is the degree to which India is still infatuated with that outdated vision of itself.

A Minuscule Minority?

Queen Victoria is most certainly amused, because as a result of this "alien legacy" a queer thing has been happening recently. Whether they oppose the Delhi High Court's ruling prohibiting discrimination on the grounds of sexual orientation or support only the decriminalisation of homosexuality on the basis of right to health, homophobes are united by the trait of echoing the words of long-dead British colonialists.[2]

[2] *Naz Foundation* v. *Union of India*, writ petition no.7455/2001, Delhi High Court, decided on 2 July 2009.

A reading of the report might ruffle the smooth prose of Swapan Dasgupta (*Pioneer*, 5 July 2009). He makes a gesture towards an accommodation of gay Indians, who reassuringly constitute only a "minusculinity" of the population. Dasgupta's implication is that gay interest inhabits only the westernised urban elite, an inaccurate and patronising view which exposes the gay community to accusations of both irrelevance and un-Indianness. Dasgupta concedes the gays their freedom from prosecution, but dismisses the idea of a gay identity as a newfangled and chimerical import to which the state should reply by reasserting "family values". While not quite Victorian, his preoccupation with respectability leads him to a notion of polite homosexual life anchored somewhere in 1950s Cambridge. The nation's views of "ordinary decencies" have changed, he says, so that "decent individuals" such as Vikram Seth or Forster can indulge their perversion provided they do the decent thing and do not flaunt an "in-your-face gayness". What the columnist fails to realise is that just as Forster was only able to survive within the intellectual sanctuary of the college—while his fellow Kingsman Alan Turing, the inventor of the computer, was arrested and driven to suicide for daring to show that he kept a male lover in his private home—the real victims of Section 377 are usually not Vikram Seth, but the *hijras* and working-class *kothis* who are beaten and raped by the bigoted police. Those among them who vent a gay identity are not in-your-face. Rather, the state gets into their faces with its laws and *lathis*, and what choice have they but to respond with a united voice? Why should we make concessions to a "minuscule minority" like the Congress, asked the Viceroy Lord Curzon. They do not represent the "real India". But as with the freedom-fighters, Dasgupta's "minusculinity" are the few who speak out and give a voice to silent millions.

But Dasgupta could never countenance this analogy. Like Curzon, he believes in a "real" or "village India". He would never suggest that the denizens of this pure moral zone should be consulted on far-reaching legislation, but they make a useful hook on which to hang spurious generalisations of Indian culture. It must be said to his credit that he does not allow his cultural definitions to cloud his verdict on the injustice of the law, and so it is unfortunate that he insists on society's protection from moral pollution. Whose society does he mean? This position is taken to absurd heights in the appeal filed in the Supreme Court by the astrologer Kaushal. As patronising and paranoid as the most sun-addled British officer, this raving appeal first claims that the legalisation will lead to a venereal epidemic. Then it suggests that the Indian army will lose its glaciated resolve and turn pansy (always a worry for the lonely British frontiersman, who associated the local Pathans with boy-abducting as much as throat-cutting). Lastly, its bourgeois authors have the temerity to suggest that it speaks on the behalf of what it condescendingly refers to as "a conservative and primitive society" which "still remains in social and cultural age of early 1900s". I believe the citizen to whom the plaintiff refers is the "toiling *ryot*" beloved by Kipling, who does not know much but knows what is best for him.

It should not be presumed that a man of justice J.S. Verma's intelligence shares these undemocratic sentiments, but even he falls into the unfortunate trap of echoing the narrow views of parochial Victorians. Just like the blushing British archaeologists who attempted to censor the erotic temple carvings, justice Verma declares the "unnatural sex exhibited at Khajuraho" an "aberration" which is not representative of the culture of ancient India.

Consequently, he writes, let us not "ape the west" by incorporating it in our modern culture.[3] Ruth Vanita cites plenty of Sanskrit texts with which one could prove Verma mistaken, but let us instead consider whether he does have a point.

Both sides in the gay rights debate accuse the other of championing a foreign cause, but the greatest "alien legacy" afflicting India today is the relentless contest to define what is Indian and what is not. Any attempt of this sort is inevitably narrow and exclusionary, orthodox and ossifying. Even when undertaken by freedom fighters it was an obstacle to progress, for it remained rooted in a notion of "traditional India" that only ever existed in the imaginations of British *mai-baaps*. It was the reason Nehru toiled for almost a decade to enact the Hindu Code Bill. The only definition of India which even partially severed the Victorian fetters was that of Gandhi, for it stressed India's limitless diversity and "faculty for assimilation" in contrast to the stultified, parochial, houseproud and systematised climate of contemporary Britain. It was this faith that the guiding spirit of the country need only be inclusiveness and equality which informed the Constitutional statutes that formed the backbone of the Delhi High Court ruling, and it is all the India of today should rely on. Anything to the contrary would have shown that the Orient had absorbed and assimilated a generation of baffled and blustering sahibs only too completely.

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[3] Justice J.S. Verma's comments on the Naz Foundation judgment, 24 July 2009, posted on Law and Other Things. Available at: http://lawandotherthings.blogspot.com/2009/07/justice-jsvermas comment-on-naz.html.

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Law and Social Sciences Research Network (LASSnet)

The **Law and Social Sciences Research Network** (LASSnet), which is hosted at lassnet.blogspot.com, was constituted to map the field of Law and Social Sciences in South Asia. The network started with 14 people in conversation at the Centre for the Study of Law and Governance, Jawaharlal Nehru University (JNU) in December 2007. The network has grown to over 210 members in a year and a half. This was the first time this virtual community met. In many ways, the energy that each person brought to the conference signalled the consolidation of the academic and political interest in situating inter-disciplinarity at the heart of the study of law, society and politics.

The inaugural Law and Social Sciences Research Network (LASSnet) Conference held at the Jawaharlal Nehru University, New Delhi, from 8-11 January 2009 marked the coming of age of the law and social science research community in India. The conference was organised by the Centre for the Study of Law and Governance, JNU, with support from the Ford Foundation, New Delhi and the Max Planck Institute for Social Anthropology, Halle. The conference was held over four days where over a hundred papers were presented in 35 panels spread over seven sessions (see www.lassnet.org & lassnet.blogspot.com).

The next LASSnet conference will be hosted by the Alternative Law Forum and Centre for Study of Culture and Society in Bangalore. The network continues to be anchored at the Centre for the Study of Law and Governance. If you wish to be part of the LASSnet community, please write to: lassnet@gmail.com.