REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.10972 OF 2013
(Arising out of SLP (C) No.15436 of 2009)

Suresh Kumar Koushal and another ... Appellants

versus

NAZ Foundation and others ... Respondents

with

CIVIL APPEAL NO.10974 OF 2013
(Arising out of SLP(C) No.37703 of 2013 @ CC NO.13105 of 2009)

CIVIL APPEAL NO.10986 OF 2013
(Arising out of SLP(C) No.37708 of 2013 @ CC NO.14042 of 2009)

CIVIL APPEAL NO.10981 OF 2013
(Arising out of SLP(C) No.37705 of 2013 @ CC NO.19478 of 2009)

CIVIL APPEAL NO.10983 OF 2013
(Arising out of SLP(C) NO.20913 of 2009)

CIVIL APPEAL NO.10984 OF 2013
(Arising out of SLP(C) NO.20914 of 2009)

CIVIL APPEAL NO.10975 OF 2013
(Arising out of SLP(C) NO.22267 of 2009)

CIVIL APPEAL NO.10973 OF 2013
(Arising out of SLP(C) NO.24334 of 2009)

CIVIL APPEAL NO.10985 OF 2013
(Arising out of SLP(C) NO.25346 of 2009)

CIVIL APPEAL NO.10976 OF 2013
(Arising out of SLP(C) NO.34187 of 2009)

CIVIL APPEAL NO.10980 OF 2013
(Arising out of SLP(C) NO.36216 of 2009)

CIVIL APPEAL NO.10982 OF 2013
(Arising out of S.L.P.(C) No.37706 of 2013 @ CC NO.425 of 2010)

CIVIL APPEAL NO.10977 OF 2013
(Arising out of SLP(C) NO.286 of 2010)

CIVIL APPEAL NO.10978 OF 2013
(Arising out of SLP(C) NO.872 of 2010)

CIVIL APPEAL NO.10979 OF 2013
(Arising out of SLP(C) NO.873 of 2010)

JUDGMENT

G.S. SINGHVI, J.

1. Leave granted.

2. These appeals are directed against order dated 2.7.2009 by which the Division Bench of the Delhi High Court allowed the writ petition filed by NAZ Foundation – respondent No.1 herein, by way of Public Interest Litigation (PIL) challenging the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC) in the following terms:

> "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."

3. <u>The Background facts:</u>

(i) Respondent No.1 is a Non-Governmental Organisation (NGO) registered under the Societies Registration Act, 1860 which works in the field of HIV/AIDS intervention and prevention. Its work has focussed on targeting 'men who have sex with men' (MSM) or homosexuals or gays in consonance with the integrationist policy. Alleging that its efforts have been severely impaired by the discriminatory attitudes exhibited by State authorities towards sexual minorities, MSM, lesbians and transgender individuals and that unless self respect and dignity is restored to these sexual minorities by doing away with discriminatory laws such as Section 377 IPC it will not be possible to prevent HIV/AIDS, NAZ Foundation filed WP(C) No. 7455/2001 before the Delhi High Court impleading the Government of NCT of Delhi; Commissioner of Police, Delhi; Delhi State Aids Control Society; National Aids Control Organisation (NACO) and Union of India through Ministry of Home Affairs and Ministry of Health & Family Welfare and prayed for grant of a declaration that Section 377 IPC to the extent it is applicable to and penalises sexual acts in private between consenting adults is violative of Articles 14, 15, 19(1)(a)-(d) and 21 of the Constitution. Respondent No.1 further prayed for grant of a permanent injunction restraining Government of

NCT of Delhi and Commissioner of Police, Delhi from enforcing the provisions of Section 377 IPC in respect of sexual acts in private between consenting adults.

(ii) Respondent No.1 pleaded that the thrust of Section 377 IPC is to penalise sexual acts which are "against the order of nature"; that the provision is based on traditional Judeo-Christian moral and ethical standards and is being used to legitimise discrimination against sexual minorities; that Section 377 IPC does not enjoy justification in contemporary Indian society and that the section's historic and moral underpinning do not resonate with the historically held values in Indian society concerning sexual relations. Respondent No.1 relied upon 172nd Report of the Law Commission which had recommended deletion of Section 377 and pleaded that notwithstanding the recent prosecutorial use of Section 377 IPC, the same is detrimental to people's lives and an impediment to public health due to its direct impact on the lives of homosexuals; that the section serves as a weapon for police abuse in the form of detention, questioning, extortion, harassment, forced sex, payment of hush money; that the section perpetuates negative and discriminatory beliefs towards same sex relations and sexual minorities in general; and that as a result of that it drives gay men and MSM and sexual minorities generally underground which cripples HIV/AIDS prevention methods. According to respondent No.1, Section 377 is used predominantly against homosexual conduct as it criminalises activity practiced more often by men or women who are homosexually active. The evidence that refutes the assumption that non-

procreative sexual acts are unnatural includes socio-scientific and anthropological evidence and also the natural presence of homosexuality in society at large.

(iii) That private, consensual sexual relations are protected under the right to liberty under Article 21 under the privacy and dignity claim. It was further pleaded that Section 377 IPC is not a valid law because there exists no compelling State interest to justify the curtailment of an important fundamental freedom; that Section 377 IPC insofar as it criminalises consensual, non-procreative sexual relations is unreasonable and arbitrary and therefore violative of Article 14.

(iv) Another plea taken by respondent No.1 was that Section 377 creates a classification between "natural" (penile-vaginal) and "unnatural" (penile-non-vaginal) penetrative sexual acts. The legislative objective of penalising unnatural acts has no rational nexus with the classification between natural (procreative) and unnatural (non-procreative) sexual acts and is thus violative of Article 14.

4. By an order dated 2.9.2004, the Division Bench of the High Court dismissed the writ petition by observing that no cause of action has accrued to respondent No.1 and purely academic issues cannot be examined by the Court. The review petition filed by respondent No.1 was also dismissed by the High Court vide order dated 3.11.2004.

5. Respondent No.1 challenged both the orders in SLP (C) Nos. 7217-7218/2005, which were converted to Civil Appeal No. 952/2006. This Court

allowed the appeal vide order dated 3.2.2006 and remitted the writ petition for fresh decision by the High Court. The relevant portions of that order are reproduced below:

> "The challenge in the writ petition before the High Court was to the constitutional validity of Section 377 of the Indian Penal Code, 1860. The High Court, without examining that issue, dismissed the writ petition by the impugned order observing that there is no case of action in favour of the appellant as the petition cannot be filed to test the validity of the Legislation and, therefore, it cannot be entertained to examine the academic challenge to the constitutionality of the provision.
>
> The learned Additional Solicitor General, if we may say so, rightly submits that the matter requires examination and is not of a nature which ought to have been dismissed on the ground afore-stated. We may, however, note that the appeal is being strenuously opposed by Respondent No.6. We are, however, not examining the issue on merits but are of the view that the matter does require consideration and is not of a nature which could have been dismissed on the ground afore-stated. In this view, we set aside the impugned judgment and order of the High Court and remit Writ Petition (C) No.7455 of 2001 for its fresh decision by the High Court."

6. NACO and the Health Ministry had filed counter in the form of an affidavit of Shri M.L. Soni, Under Secretary to the Government of India, Ministry of Health & Family Welfare, National AIDS Control Organisation. He outlined the strategy adopted by NACO for prevention and control of HIV/AIDS in India which includes identification of high risk groups and the provision of necessary tools and information for protection and medical care. The deponent averred that National Sentinel Surveillance Data 2005 estimated that HIV prevalence in "men

who have sex with men" (MSM) is 8% while in general population it is lesser than 1%. The MSM population is estimated at 25 lacs as of January 2006. Shri Soni also stated that NACO has developed programmes for undertaking targeted interventions among MSM population and that for prevention of HIV/AIDS there is a need for an enabling environment where people indulging in risky behaviour may be encouraged not to conceal information so that they are provided with access to NACO services.

7. On behalf of the Ministry of Home Affairs, Government of India, Shri Venu Gopal, Director (Judicial) filed an affidavit and pleaded that Section 377 does not suffer from any constitutional infirmity. Shri Venu Gopal further pleaded that an unlawful act cannot be rendered legitimate because the person to whose detriment it acts consents to it; that Section 377 has been applied only on complaint of a victim and there are no instances of arbitrary use or application in situations where the terms of the section do not naturally extend to Section 377 IPC; that Section 377 IPC is not violative of Articles 14 and 21 of the Constitution. According to Shri Venu Gopal, Section 377 IPC provides a punishment for unnatural sexual offences, carnal intercourse against the order of nature and does not make any distinction between procreative and non-procreative sex.

8. Joint Action Council Kannur and Shri B.P. Singhal, who were allowed to act as interveners, opposed the prayer made in the writ petition and supported the stand taken by the Government. Another intervener, i.e., Voices Against 377,

supported the prayer of respondent No.1 that Section 377 should be struck down on the ground of unconstitutionality.

9. The Division Bench of the High Court extensively considered the contentions of the parties and declared that Section 377, insofar as it criminalises consensual sexual acts of adults in private is violative of Articles 21, 14 and 15 of the Constitution. While dealing with the question relating to violation of Article 21, the High Court outlined the enlarged scope of the right to life and liberty which also includes right to protection of one's dignity, autonomy and privacy, the Division Bench referred to Indian and foreign judgements, the literature and international understanding (Yogyakarta Principles) relating to sexuality as a form of identity and the global trends in the protection of privacy and dignity rights of homosexuals and held:

> "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 fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil 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.
>
> 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 lacs.

> The number of lesbians and transgender is said to be several lacs 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.
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> 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 brutalizing MSM and gay community persons, some of them of very recent vintage. If the penal clause is not being enforced against homosexuals engaged in consensual acts within privacy, it only implies that this provision is not deemed essential for the protection of morals or public health vis-a-vis said section of society. The provision, from this perspective, should fail the "reasonableness" test."

10. The High Court discussed the question whether morality can be a ground for imposing restriction on fundamental rights, referred to the judgments in Gobind v. State of Madhya Pradesh and another (1975) 2 SCC 148, Lawrence v. Texas 539 U.S. 558 (2003), Dudgeon v. UK, European Court of Human Rights Application No.7525/1976, Norris v. Republic of Ireland, European Court of Human Rights Application No. 10581/1983, The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, South African Constitutional Court 1999 (1) SA 6, the words of Dr. Ambedkar quoting Grotius while moving the Draft Constitution, Granville Austin in his treatise "The Indian Constitution –

Cornerstone of A Nation", the Wolfenden Committee Report, 172nd Law Commission of India Report, the address of the Solicitor General of India before United Nations Human Rights Council, the opinion of Justice Michael Kirby, former Judge of the Australian High Court and observed:

> "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.
>
> 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 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 realization 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 criminalization 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-criminalization of such activity, so that they can be identified and better focused upon.
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> 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."

11. The High Court then considered the plea of respondent No.1 that Section 377 is violative of Article 14 of the Constitution, referred to the tests of permissible classification as also the requirements of reasonableness and non-arbitrariness as laid down by this Court and held that the classification created by Section 377 IPC does not bear any rational nexus to the objective sought to be achieved. The observations made by the High Court on this issue are extracted below:

> "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 criminalizing 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 criminalization of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The state interest "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."

12. The High Court took note of the Declaration of Principles of Equality issued by the Equal Rights Trust in April, 2008. It referred to the judgments in The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, Lawrence v. Texas, Romer v Evans, Vriend v. Alberta and held:

> "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].

13. The High Court also discussed the case of Anuj Garg v. Hotel Association of India in detail and made reference to the principles of strict scrutiny and proportionality review as borrowed from the jurisprudence of the US Supreme Court, the Canadian and European Courts and proceeded to observe:

> "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.

> 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 therein, 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….
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> 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.
>
> 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*** (1981) 1 SCC 608, Para 6 of SCC]."

14. Finally, the High Court elaborated upon the scope of the Court's power to declare a statutory provision invalid, referred to the judgments in State of Madras v. V.G. Row, R. (Alconbury Ltd.) v. Environment Secretary, [2001] 2 WLR 1389, West Virginia State Board of Education v. Barnette, 319 US 624 (1943), 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 184, Peerless

General Finance Investment Co. Ltd. v. Reserve Bank of India, (1992) 2 SCC 343

and held:

> "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 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.
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> 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."

15. The order of the High Court has been challenged by large number of organizations and individuals including Joint Action Council Kannur and Shri B.P. Singhal, who were interveners before the High Court. During the pendency of the special leave petitions several individuals and organisations filed IAs for permission to intervene. All the IAs were allowed vide order dated 7.2.2011 and the applicants were permitted to act as interveners. The details of the parties and interveners before this Court are as under:

Case Number	Name	Description before the Court	Details
SLP (C) No. 15436/2009 (CC No. 9255/2009)	Suresh Kumar Koushal & Anr.	Petitioners (Not parties before the High Court)	Petitioners are citizens of India who believe they have the moral responsibility and duty in protecting cultural values of Indian society.
	Samajik Ekta Party	Intervener – IA No. 4/2009	The applicant is a political party registered by the Election Commission of India under Sec 29A, Representation of People Act, 1951 vide order dt. 20.4.1995. It is interested in the welfare of the citizens, their rights, functioning of the State and interest of public at large.

	Mr. Shyam Benegal	Intervener – IA No. 6/2009	The applicant is a film maker and a citizen. He seeks impleadment in the SLP in light of the fact that due to the misunderstanding and confusion of thought with regard to homosexuality, all points of view must be projected before this Hon'ble Court.
	Trust God Missionaries	Interveners – IA No. 7/2010	The applicant is a registered charitable trust having the main aim to preserve and protect life for humanity and earth and takes support from human rights, social and religious organisations, such as CBCI, NCCI and KCBC, etc. The applicant claims to be vitally interested in the outcome of the appeal and is an affected party.
	Minna Saran & Others (Parents of LGBT Children)	Interveners – IA No. 8/2010	The applicants are parents of lesbian, gay, bisexual and transgender persons from different professional, socio-cultural backgrounds and different regions of India. They have a direct and immediate stake in the proceedings and are necessary and proper parties. No prejudice will be caused to the petitioners if the applicants are impleaded but the applicants will sufferer irreparable harm and damage as criminalisation not only affects the LGBT persons but also their families. Their struggles of having to understand sexuality at odds with Section 377 IPC have resulted in accepting their children's sexuality and they are acutely aware of the social stigma prejudice, myths and stereotypes that surround the subject of homosexuality in India.
	Dr. Shekhar Seshadri & Others (Professor of Psychiatry at the National Institute of	Interveners - IA No. 9/2010	The Applicants are mental health professionals who have been practising as psychiatrists, clinical psychologists and behavioral psychologists in the field of mental health in reputed medical institutions throughout India. They

	Mental Health and Neuro Sciences, Bangalore)		claim to have had considerable expertise in addressing the mental health concerns of Lesbian, Gay, Bisexual and Transgender persons. The Applicants submit that sexual orientation is an immutable characteristic and is present at birth.
	Nivedita Menon & Others (Professor in Political Thought, Jawaharlal Nehru University)	Interveners - I.A. No. 10/2010	The Applicants are academicians who wish to contribute to the debate on the issues raised by the judgment and to draw attention to the mental distress caused to the LGBT community.
	Ratna Kapur & Ors.	Interveners – IA No. 13/2011	The applicants are law professors, teachers and research associates with Jindal Global Law School working in different fields of law such as jurisprudence, human rights, sexuality studies and law, criminal justice, and cultural studies and law, and feminist legal theory. They are concerned with the correct interpretation of statutes and the constitutional validity of Section 377 IPC.
SLP (C) No. 24334/2009	Delhi Commission for Protection of Child Rights	Petitioner (Not parties before the High Court)	The petitioner has been constituted under the Commissions for Protection of Child Rights Act, 2005 read with GoI MHA notification dt. 15.1.2008. Under Sec 13(1j) the Commission is empowered to take suo moto notice of deprivation and violation of child rights, non implementation of laws providing for protection and development of children, and non compliance of policy decisions, guidelines or instructions aimed at mitigating hardship and ensuring welfare of children and providing relief. Its functions include: study and monitor matters relating to constitutional and legal rights of children; examine and review safeguards for protection of child rights and effective implementation

			of the same; review existing law and recommend amendments; look into complaints of taking suo moto action in cases involving violation of child rights; monitor implementation of laws; present reports to the Central Government. It is the moral duty of the Commission to protect the best interest of children and provide them with an atmosphere where the freedom and dignity of all children is safe and a child may bloom without any fear of abuse, exploitation and deprivation.
CC No. 13105/2009	Ram Murti	Petitioner (not party before the High Court	He is a citizen of India and has a duty to report if something illegal is happening.
SLP (C) No. 22267/2009	B.P. Singhal	Petitioner (Respondent 7 – Intervener before the High Court)	
SLP (C) No. 34187/2009	B. Krishna Bhat	Petitioner (not a party before the High Court)	The petitioner is a citizen of India and a public spirited individual, social worker and environmentalist who believes in the Rule of Law and has successfully prosecuted a number of PILs in Karnataka High Court, other High Courts and the Supreme Court on issues of protection of green belt, illegal extraction of monies from citizens of Bangalore, property taxes, illegal mining, stray dog menace, development of tanks, shifting of slaughter house, caste based reservation, etc.
SLP (C) No. 286/2010	Joint Action Council, Kannur	Petitioner (respondent 6 – Intervener before the High Court)	
SLP (C) No. 872/2010	The Tamil Nadu Muslim Munnetra Kazhagam	Petitioner (not a party before the High Court)	The petitioner is a registered trust working for the betterment of the poor and downtrodden in general and for those belonging to the minority Muslim community in particular. It is a mass based

			voluntary organisation of Muslims of Tamil Nadu functioning since 1955 in Tamil Nadu. The president appeared before the UN Minority Rights Working Group and the organisation has set up a Tsunami Relief Fund of Rs 7 million. It has worked against spread of AIDS and has worked in blood donation and has been given two awards by the Tamil Nadu State AIDS Control Board.
SLP (C) No. 873/2010	Raza Academy	Petitioner (not a party before the High Court)	The petitioner is an organisation working for welfare of the general public and it has done tremendous work in public interest.
SLP (C) No. 36216/200	Krantikati Manuvadi Morcha Party & Anr.	Petitioner (not a party before the High Court)	Krantikari Manuwadi Morcha (Revolutionary Manuist Front), is a Hindutva political organisation in India. It is one of the registered unrecognized political parties in India. The president of KMM is Ram Kumar Bhardwaj, grandson of freedom fighter Rudra Dutt Bhardwaj.
CC No. 19478/2009	Utkal Christian Council rep. by Secretary Miss Jyotsna Rani Patro	Petitioner (not a party before the High Court)	Note: There is no information on the petitioner in the SLP.
CC No. 425/2010	All India Muslim Personal Law Board	Petitioner (not a party before the High Court)	The petitioner is a registered society established to protect and preserve Muslim Personal Laws. It strives to uphold the traditional values and ethos of the Muslim community and promotes essential values of Islam and also a national ethos among Muslims. The members of the society are religious scholars (ulemas), Muslim intellectuals and professionals from different disciplines.
SLP (C) No. 20913/2009	Sh. S.K. Tijarawala	Petitioner (not a party before the High Court)	Petitioner is spokesperson of Yoga Guru Swami Ramdev Ji is running a social welfare trust in the name of "Bharat Swabhiman" Patanjali Yogpeeth Trust. Petitioner is an eminent social worker and writer

			interested in protecting cultural values of the Indian society.
SLP (C) No. 20914/2009	Apostolic Churches Alliance rep. by its bishop Sam T. Varghese	Petitioner (not a party before the High Court)	With a desire to promote unity, build relationships, and see increased cooperation amongst Churches, a few pastors from growing independent churches in Kerala have come together and formed a body called the "Apostolic Churches Alliance" (ACA). The Alliance has been formed with the primary purpose of addressing spiritual, legal or any other kind of issue which may be relevant to the Churches at any given time or place. The ACA is a registered body with nine Pastors as members of the Core Group and is in its early stages of growth. Pastor Sam T. Varghese of Life Fellowship, Trivandrum, serves as its General Overseer.
SLP (C) No. 25364/2009	Prof. Bhim Singh	Petitioner (not a party before the High Court)	
CC No. 14042/2009	Sanatan Dharam Pritinidhi Sabha Delhi (Registered)	Petitioner (not a party before the High Court)	

16. ARGUMENTS

16.1 Shri Amrendra Sharan, Senior Advocate appearing for the appellant in Civil Appeal arising out of SLP(C) No.24334/2009 – Delhi Commission for Protection of Child Rights led arguments on behalf of those who have prayed for setting aside the impugned order. He was supported by Shri V. Giri, Senior Advocate appearing for Apostolic Churches Alliance [SLP(C) No. 20914/2009] and Utkal Christian Council [SLP(C) No.19478/2009], Shri K. Radhakrishnan, Senior

Advocate appearing for intervener – Trust God Missionaries, and S/Shri Sushil Kumar Jain, counsel for the appellant - Kranthikari Manuvadi Morcha Party (SLP(C) No.36216/2009), Huzefa Ahmadi appearing for All India Muslim Personal Law Board (SLP(C) No. CC425/2010), Purshottaman Mulloli appearing in person for Joint Action Council, Kannur (SLP (C) No.286/2010), Ajay Kumar for the appellant – S.K. Tijarawala (SLP(C) No.20913/2009), Praveen Agrawal, counsel for the appellant –Suresh Kumar Koushal (SLP(C) No.15436/2009, H.P. Sharma, counsel for the appellant – B.P. Singhal (SLP(C) No.22267/2009), K.C. Dua, counsel for appellant – S.D. Pritinidhi Sabha Delhi (SLP(C) No.CC 14042/2009), P.V. Yogeswaran for appellant – Bhim Singh (SLP(C) No.25346/2009), Lakshmi Raman Singh, counsel for appellant – Tamil Nadu Muslim Munn. Kazhgam and Mushtaq Ahmad, counsel for appellant - Raza Academy (SLP(C) No.873/2010). Shri Amarendra Sharan made the following arguments:

16.2 That the High Court committed serious error by declaring Section 377 IPC as violative of Articles 21, 14 and 15 of the Constitution insofar as it criminalises consensual sexual acts of adults in private completely ignoring that the writ petition filed by respondent no.1 did not contain foundational facts necessary for pronouncing upon constitutionality of a statutory provision. Learned counsel extensively referred to the averments contained in the writ petition to show that respondent no.1 had not placed any tangible material before the High Court to show that Section 377 had been used for prosecution of homosexuals as a class and that few affidavits and unverified reports of some NGOs relied upon by

respondent no.1 could not supply basis for recording a finding that homosexuals were being singled out for a discriminatory treatment.

16.3 The statistics incorporated in the affidavit filed on behalf of NACO were wholly insufficient for recording a finding that Section 377 IPC adversely affected control of HIV/AIDS amongst the homosexual community and that decriminalization will reduce the number of such cases.

16.4 The High Court is not at all right in observing that Section 377 IPC obstructs personality development of homosexuals or affects their self-esteem because that observation is solely based on the reports prepared by the academicians and such reports could not be relied upon for grant of a declaration that the section impugned in the writ petition was violative of Articles 14 and 15 of the Constitution. In support of these arguments, learned counsel relied upon the judgments in Southern Petrochemical Industries v. Electricity Inspector (2007) 5 SCC 447, Tamil Nadu Electricity Board v. Status Spinning Mills (2008) 7 SCC 353 and Seema Silk and Sarees v. Directorate of Enforcement (2008) 5 SCC 580.

16.5 That Section 377 IPC is gender neutral and covers voluntary acts of carnal intercourse against the order of nature irrespective of the gender of the persons committing the act. They pointed out that the section impugned in the writ petition includes the acts of carnal intercourse between man and man, man and woman and woman and woman and submitted that no Constitutional right vests in a person to indulge in an activity which has the propensity to cause harm and any act which has the capacity to cause harm to others cannot be validated. They

emphasized that anal intercourse between two homosexuals is a high risk activity, which exposes both the participating homosexuals to the risk of HIV/AIDS and this becomes even grave in case of a male bisexual having intercourse with female partner who may not even be aware of the activity of her partner and is yet exposed to high risk of HIV/AIDS. They argued that Section 377 IPC does not violate the right to privacy and dignity guaranteed under Article 21 of the Constitution.

16.6 That the impugned order does not discuss the concept of "carnal intercourse against the order of nature" and does not adequately show how the section violates the right to privacy and that also the right to privacy can be curtailed by following due process of law and the Code of Criminal Procedure prescribes a fair procedure, which is required to be followed before any person charged of committing an offence under Section 377 IPC can be punished. The right to privacy does not include the right to commit any offence as defined under Section 377 IPC or any other section.

16.7 That the legislature has treated carnal intercourse against the order of nature as an offence and the High Court has not given reasons for reading down the section. The presumption of constitutionality is strong and the right claimed should have been directly violated by the statute. Indirect violation is not sufficient for declaring Section 377 IPC violative of Articles 14, 15 and 21 of the Constitution.

16.8 That Article 21 provides that the right to life and liberty is subject to procedure prescribed by law. He referred to the judgments of this Court in A.K. Gopalan v. State of Madras 1950 SCR 88, R.C. Cooper v. Union of India (1970) 1 SCC 248, Maneka Gandhi v. Union of India (1978) 1 SCC 248 and submitted that Gopalan's case has not been overruled by Maneka Gandhi's case.

16.9 That the term used in Section 375 IPC, which defines rape is 'sexual intercourse', whereas in Section 377 IPC the expression is 'carnal intercourse'. In Khanu v. Emperor AIR 1925 (Sind), it was held that the metaphor 'intercourse' refers to sexual relations between persons of different sexes where the 'visiting member' has to be enveloped by the recipient organization and submitted that carnal intercourse was criminalized because such acts have the tendency to lead to unmanliness and lead to persons not being useful in society.

16.10 Relying upon the dictionary meanings of the words 'penetration' and 'carnal', Shri Sharan submitted that any insertion into the body with the aim of satisfying unnatural lust would constitute carnal intercourse.

16.11 Assailing the finding of the High Court that Section 377 IPC violates Article 14, Shri Sharan submitted that the section does not create a clause and applies to both man and woman if they indulge in carnal intercourse against the order of nature. Learned senior counsel argued that if the view expressed by the High Court is taken to its logical conclusion, any provision could be declared to be violative of Article 14. Shri Sharan further argued that no class was targeted by Section 377 IPC and no classification had been made and, therefore, the

finding of the High Court that this law offended Article 14 as it targets a particular community known as homosexuals or gays is without any basis.

16.12 Shri K. Radhakrishnan, learned senior counsel appearing for intervener in I.A. No.7 – Trust God Missionaries argued that Section 377 IPC was enacted by the legislature to protect social values and morals. He referred to Black's Law Dictionary to show that 'order of nature' has been defined as something pure, as distinguished from artificial and contrived. He argued that the basic feature of nature involved organs, each of which had an appropriate place. Every organ in the human body has a designated function assigned by nature. The organs work in tandem and are not expected to be abused. If it is abused, it goes against nature. The code of nature is inviolable. Sex and food are regulated in society. What is pre-ordained by nature has to be protected, and man has an obligation to nature. He quoted a Sanskrit phrase which translated to "you are dust and go back to dust". Learned senior counsel concluded by emphasising that if the declaration made by the High Court is approved, then India's social structure and the institution of marriage will be detrimentally affected and young persons will be tempted towards homosexual activities.

16.13 Shri V. Giri, learned senior counsel argued that Section 377 IPC does not classify people into groups but it only describes an offence. He submitted that the High Court made two wrong assumptions: one, that sexual orientation is immutable and two, that sexual orientation can be naturally demonstrated only in a way as contemplated in Section 377 IPC. Learned senior

counsel submitted that what has been criminalized by Section 377 IPC is just the act, independent of the sex of people or sexual orientation. Shri Giri further submitted that sufficient evidence is not available to support the statement that Section 377 IPC helps with HIV/AIDS prevention. He referred to the scientific study conducted by the National Institute of Health on behavioral patterns and AIDS which shows that HIV/AIDS is higher among MSM. Learned counsel submitted that same sex is more harmful to public health than opposite sex.

16.14 Shri Huzefa Ahmadi submitted that the right to sexual orientation can always be restricted on the principles of morality and health. He referred to the constitutional assembly debates on Article 15 to show that the inclusion of sexual orientation in the term 'sex' was not contemplated by the founding fathers. Shri Ahmadi also referred to the dissenting opinion given by Justice Scalia and Justice Thomas in Lawrence v. Texas wherein it was stated that promotion of majoritarian sexual morality was a legitimate state interest. Shri Ahmadi stressed that Courts, by their very nature, should not undertake the task of legislating. He submitted that the Delhi High Court was not clear if it was severing the law, or reading it down. He argued that if the language of the section was plain, there was no possibility of severing or reading it down. He further argued that, irrespective of the Union Government's stand, so long as the law stands on the statute book, there was a constitutional presumption in its favour.

16.15 Shri Purshottaman Mulloli submitted that the data presented by NACO was fraudulent and manufactured and the disparities and contradictions

were apparent.

16.16 Shri Sushil Kumar Jain argued that the High Court was not at all justified in striking down Section 377 IPC on the specious grounds of violation of Articles 14, 15 and 21 of the Constitution and submitted that the matter should have been left to Parliament to decide as to what is moral and what is immoral and whether the section in question should be retained in the statute book. Shri Jain emphasized that mere possibility of abuse of any particular provision cannot be a ground for declaring it unconstitutional.

16.17 Shri Praveen Aggarwal argued that all fundamental rights operate in a square of reasonable restrictions. There is censorship in case of Freedom of Speech and Expression. High percentage of AIDS amongst homosexuals shows that the act in dispute covered under Section 377 IPC is a social evil and, therefore, the restriction on it is reasonable.

17. Shri F.S. Nariman, Senior Advocate appearing for Minna Saran and others (parents of Lesbian Gay Bisexual and Transgender (LGBT) children), led arguments on behalf of the learned counsel who supported the order of the High Court. Shri Nariman referred to the legislative history of the statutes enacted in Britain including Clauses 361 and 362 of the Draft Penal Code, 1837 which preceded the enactment of Section 377 IPC in its present form and made the following arguments:

17.1 Interpretation of Section 377 is not in consonance with the scheme of the IPC, with established principles of interpretation and with the changing nature of society.

17.2 That Section 377 punishes whoever voluntarily has carnal intercourse against the order of nature. This would render liable to punishment- (a) Any person who has intercourse with his wife other than penile - vaginal intercourse; (b) Any person who has intercourse with a woman without using a contraceptive.

17.3 When the same act is committed by 2 consenting males, and not one, it cannot be regarded as an offence when- (i) The act is done in private; (ii) The act is not in the nature of sexual assault, causing harm to one of the two individuals indulging in it; and (iii) No force or coercion is used since there is mutual consent.

17.4 Section 377 must be read in light of constitutional provisions which include the "right to be let alone". The difference between obscene acts in private and public is statutorily recognized in Section 294 IPC.

17.5 The phraseology of Section 377 ('Carnal intercourse against the order of nature') is quaint and archaic, it should be given a meaning which reflects the era when it was enacted. (1860**)**

17.6 Section 377 should be interpreted in the context of its placement in the IPC as criminalizing an act in some way adversely affecting the human body and not an act which is an offence against morals as dealt with in Chapter XIV.

The language of Section 377 is qua harm of adverse affection to the body which is the context in which the section appears. It would have to be associated with sexual assault. It is placed at the end of the Chapter XVI (Of Offences affecting the human body) and not in Chapter XIV (Of Offences affecting the Public Health, Safety, Convenience, Decency and Morals).

17.7 Chapter Headings and sub headings provide a guide to interpreting the scope and ambit of Section 377. The Petitioners rely on G.P. Singh, Principles of Statutory Interpretation,13th Ed. 2012, pp 167 – 170, Raichuramatham Prabhakar v. Rawatmal Dugar, (2004) 4 SCC 766 at para 14 and DPP v. Schildkamp, 1971 A.C. 1 at page 23. Headings or Titles may be taken as a condensed name assigned to indicate collectively the characteristics of the subject matter dealt with by the enactment underneath.

17.8 Section 377 is impermissibly vague, delegates policy making powers to the police and results in harassment and abuse of the rights of LGBT persons. The Petitioners rely on *State of MP v. Baldeo Prasad,* (1961) 1 SCR 970 at 989 which held that, 'Where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent, it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Article 19 (5).'

17.9 Widespread abuse and harassment of LGBT persons u/s 377 has been incontrovertibly established. The appellants rely on paras 21, 22, 50, 74 and 94 of the judgment of the Division Bench of the Delhi High Court in *Suresh Kumar Koushal v. Naz Foundation* which records evidence of various instances of the use of Section 377 to harass members of the LGBT community. These were based on paras 33 and 35 of the Writ Petition filed by the Naz Foundation challenging the vires of Section 377. It was supported by various documents brought on record, such as Human Rights Watch Report, July 2002 titled, "Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India"; Affidavits giving instances of torture and sexual abuse; *Jayalakshmi v. State*, (2007) 4 MLJ 849 dealing with sexual abuse and torture of a eunuch by police; An Order of a Metropolitan Magistrate alleging an offence u/s 377 against two women even though there is an express requirement of penetration under the Explanation to Section 377.

17.10 Section 377 is ultra vires of Article 14 as there is no classification apparent on the face of it.

17.11 The appellants contend that Section 377 is too broadly phrased as it may include: (1) Carnal intercourse between husband and wife; (2) Carnal intercourse between man and woman for pleasure without the possibility of conception of a human being; (3) Use of contraceptives between man and woman; (4) Anal sex between husband and wife; (5) Consenting carnal intercourse

between man and man; (6) Non consenting carnal intercourse between man and man; (7) Carnal intercourse with a child with or without consent.

17.12 The Section does not lay down any principle or policy for exercise of discretion as to which of all these cases he may investigate. It is silent on whether the offence can be committed taking within its ambit, the most private of places, the home.

17.13 Section 377 targets the LGBT community by criminalizing a closely held personal characteristic such as sexual orientation. By covering within its ambit, consensual sexual acts by persons within the privacy of their homes, it is repugnant to the right to equality.

18. Shri Shyam Divan, learned senior counsel representing respondent No.11-Voices Against 377, made the following arguments:

18.1 Section 377 is ultra vires Articles 14, 15, 19(1)(a) and 21 of the Constitution inasmuch as it violates the dignity and personhood of the LGBT community. Sexual rights and sexuality are a part of human rights and are guaranteed under Article 21. It is scientifically established that consensual same sex conduct is not "against the order of nature". LGBT persons do not seek any special rights. They merely seek their right to equality of not to be criminalized for being who they are. Our Constitution does not deny any citizen the right to fully develop relationships with other persons of the same gender by casting a shadow of criminality on such sexual relationships. Justice Vivian Bose in *Krishna v. State of Madras*, 1951 SCR 621 stated: 'When there is ambiguity or doubt the

construction of any clause in the chapter on Fundamental Rights, it is our duty to resolve it in favour of the freedoms so solemnly stressed.' Section 377 in its interpretation and operation targets LGBT persons and deprives them of their full moral citizenship. This Court has developed great human rights jurisprudence in cases concerning under trials, scavengers and bonded labourers to interpret the notion of 'dignity'. The Delhi High Court has exercised its jurisdiction to separate out the offending portion of Section 377 IPC. Shri Divan also referred to the legislative history of Section 377 IPC and argued that this provision perpetuates violation of fundamental rights of LGBT persons. Shri Divan referred to the incidents, which took place at Lucknow (2002 and 2006), Bangalore (2004 and 2006), Delhi (2006), Chennai (2006), Goa (2007), and Aligarh (2011) to bring home the point that LGBT persons have been targeted by the police with impunity and the judiciary at the grass route level has been extremely slow to recognize harassment suffered by the victims. He also relied upon 'Homosexuality: A Dilemma in Discourse, Corsini Concise Encyclopaedia of Psychology and Behavioural Science', articles written by Prof. Upendra Baxi and Prof. S.P. Sathe, 172nd Report of the Law Commission which contained recommendation for deleting Section 377 IPC and argued that Section 377 has been rightly declared unconstitutional because it infringes right to privacy and right to dignity. He relied upon the statement made by the Attorney General on 22.3.2012 that the Government of India does not find any legal error in the order of the High Court and accepts the same. Shri Divan further argued that Section 377 IPC targets

LGBT persons as a class and is, therefore, violative of Articles 14 and 15 of the Constitution.

19. Shri Anand Grover, learned senior counsel for respondent No.1 made the following submissions:

19.1 Section 377 criminalises certain sexual acts covered by the expressions "carnal intercourse against the order of nature" between consenting adults in private. The expression has been interpreted to imply penile non vaginal sex. Though facially neutral, these acts are identified and perceived by the broader society to be indulged in by homosexual men.

19.2 By criminalising these acts which are an expression of the core sexual personality of homosexual men, Section 377 makes them out to be criminals with deleterious consequences thus impairing their human dignity.

19.3 Article 21 protects intrusion into the zone of intimate relations entered into in the privacy of the home and this right is violated by Section 377, particularly of homosexual men. The issue is therefore whether protection of the privacy is available to consenting adults who may indulge in "carnal intercourse against the order of nature".

19.4 Section 377 does not fulfil the just fair and reasonable criteria of substantive due process now read into Article 21.

19.5 Criminalisation impairs health services for gay men and thus violates their right to health under Article 21.

19.6 Section 377 is vague and seeks to introduce a classification which is not based on rational criteria and the object it seeks to advance is not a legitimate state object.

19.7 The history of unnatural offences against the order of nature and their enforcement in India during the Mogul time, British time and post independence, shows that the concept was introduced by the British and there was no law criminalising such acts in India. It is based on Judeo-Christian moral and ethical standards which conceive of sex on purely functional terms, that is, for procreation. Post independence the section remained on the statute books and is now seen as part of Indian values and morals.

19.8 Though facially neutral, an analysis of the judgments shows that heterosexual couples have been practically excluded from the ambit of the section and homosexual men are targeted by virtue of their association with the proscribed acts.

19.9 The criminalisation of Section 377 impacts homosexual men at a deep level and restricts their right to dignity, personhood and identity, privacy, equality and right to health by criminalising all forms of sexual intercourse that homosexual men can indulge in as the penetrative sexual acts they indulge in are essentially penile non vaginal. It impacts them disproportionately as a class especially because it restricts only certain forms of sexual intercourse that heterosexual persons can indulge in. The expression of homosexual orientation which is an innate and immutable characteristic of homosexual persons is

criminalised by Section 377. The section ends up criminalising identity and not mere acts as it is usually homosexual or transgender persons who are associated with the sexual practices proscribed under Section 377 (relied on National Coalition for Gay and Lesbian Equality v. Minster of Justice & Ors. 1998 (12) BCLR 1517 (CC), Queen Empress v. Khairati 1884 ILR 6 ALL 204, Noshirwan v. Emperor). While the privacy of heterosexual relations, especially marriage are clothed in legitimacy, homosexual relations are subjected to societal disapproval and scrutiny. The section has been interpreted to limit its application to same sex sexual acts (Govindrajulu, in re, (1886) 1 Weir 382. Grace Jayamani v. E Peter AIR 1982 Kar 46, Lohana Vasantlal Devchand v. State). Sexual intimacy is a core aspect of human experience and is important to mental health, psychological well being and social adjustment. By criminalising sexual acts engaged in by homosexual men, they are denied this fundamental human experience while the same is allowed to heterosexuals. The section exposed homosexual persons to disproportionate risk of prosecution and harassment. There have been documented instances of harassment and abuse, for example, Lucknow 2001 and Lucknow 2006.

19.10 Criminalisation creates a culture of silence and intolerance in society and perpetuates stigma and discrimination against homosexuals. Homosexual persons are reluctant to reveal their orientation to their family. Those who have revealed their orientation are faced with shock, denial and rejection and some are even pressurised through abuse and marriage to cure themselves. They are subjected to conversion therapies such as electro-convulsive therapy although

homosexuality is no longer considered a disease or a mental disorder but an alternate variant of human sexuality and an immutable characteristic which cannot be changed. Infact the American Psychiatry Association and American Psychological Association filed an amicus brief in Lawrence v. Texas demonstrating the harm from and the groundlessness of the criminalisation of same sex sexual acts.

19.11 Fundamental rights must be interpreted in an expansive and purposive manner so as to enhance the dignity of the individual and worth of the human person. The Constitution is a living document and it should remain flexible to meet newly emerging problems and challenges. The rights under Articles 14, 19 and 21 must be read together. The right to equality under Article 14 and the right to dignity and privacy under Article 21 are interlinked and must be fulfilled for other rights to be truly effectuated. International law can be used to expand and give effect to fundamental rights guaranteed under our Constitution. This includes UDHR, ICCPR and ICESCR which have been ratified by India. In particular the ICCPR and ICESCR have been domesticated through enactment of Section 2 of the Protection of Human Rights Act 1993 (Francis Coralie Mullin v. Administrator, UT of Delhi (1981) 1 SCC 608, M. Nagaraj v. UoI (2006) 8 SCC 212, Maneka Gandhi v. UoI (1978) 1 SCC 248, Tractor Export v. Tarapore & Co., (1969) 3 SCC 562, Jolly George v. Bank of Cochin (1980) 2 SCC 360, Gramaphone Company of India Ltd. v. Birendra Bahadur Pandey (1984) 2 SCC 534, Vellore Citizens Welfare Forum v. UoI (1996) 5 SCC 647, Vishaka & Ors. v. State of Rajasthn & Ors (1997) 6 SCC 241, PUCL v. UoI & Anr (1997) 1 SCC

301, PUCL v. UoI & Anr (1997) 3 SCC 433, Apparel Export Promotion Council v. A.K. Chopra (1999) 1 SCC 759, Pratap Singh v. State of Jharkhand (2005) 3 SCC 551, PUCL v. UoI & Anr. (2005) 2 SCC 436, Entertainment Network (India) Ltd. v. Super Cassette Industries (2008) 12 SCC 10, Smt. Selvi v. State of Karnataka (2010) 7 SCC 263).

19.12 Section 377 violates the right to privacy, dignity and health guaranteed under Article 21 of all persons especially homosexual men.

19.13 Section 377 fails the criteria of substantive due process under Article 21 as it infringes upon the private sphere of individuals without justification which is not permissible. The principle has been incorporated into Indian jurisprudence in the last few years after the Maneka Gandhi case. The test of whether a law is just fair and reasonable has been applied in examining the validity of state action which infringes upon the realm of personal liberty (Mithu v. State of Punjab (1983) 2 SCC 277, Selvi v. State of Karnataka (2010) 7 SCC 263, State of Punjab v. Dalbir Singh (2012) 2 SCALE 126, Rajesh Kumar v. State through Govt of NCT of Delhi (2011) 11 SCALE 182).

19.14 The guarantee of human dignity forms a part of Article 21 and our constitutional culture. It seeks to ensure full development and evolution of persons. It includes right to carry on functions and activities which constitute the bare minimum of expression of the human self. The right is intimately related to the right to privacy. Dignity is linked to personal self realisation and autonomy. Personal intimacies and sexual relations are an important part of the expression of

oneself. In light of the right to privacy, dignity and bodily integrity, there should be no restriction on a person's decision to participate or not participate in a sexual activity. By making certain sexual relations between consenting adults a crime, Section 377 by its existence demeans and degrades people and imposes an examination on sexual intercourse. This is regardless of whether it is enforced. By denying sexual expression which is an essential experience of a human being, Section 377 violates the dignity of homosexual men in particular. Sex between two men can never be penile vaginal and hence virtually all penile penetrative acts between homosexual men are offences. As the society associates these acts with homosexual men they become suspect of committing an offence thus creating fear and vulnerability and reinforcing stigma of being a criminal (refer to Francis Coralie Mullin, Prem Shankar Shukla v. Delhi Administration (1980) 3 SCC 526, Maharashtra University of Health Science and Ors. v. Satchikitsa Prasarak Mandal and Ors. (2010) 3 SCC 786, Kharak Singh, Noise Pollution (V), In re (2005) 5 SCC 733, DK Basu v. State of WB (1997) 1 SCC 416, Gobind, Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1, Egan v. Canada [1995] 2 SCR 513, Law v. Canada (Minister of Employment and Immigration [1999] 1 SCR 497, Lawrence v. Texas, National Coalition of Gay and Lesbian Equality & Ors.).

19.15 Right to health is an inherent part of the right to life under Article 21, it is recognised by the ICESC which has been domesticated through Section 2 of the Protection of Human Rights Act 1993. Article 12 of the ICESCR requires states to take measures to protect and fulfil the health of all persons. States are

obliged to ensure the availability and accessibility of health services, information, education facilitates and goods without discrimination especially to vulnerable and marginalised sections of the population. The Govt. has committed to addressing the needs of those at the greatest risk of HIV including MSM and transgendered persons. The risk of contracting HIV through unprotected penile anal sex is higher than through penile vaginal sex. The HIV prevalence in MSM is 7.3% which is disproportionately higher than in that of the general population which is less than 0.5%. The prevalence continues to rise in many States and this is because of the stigmatisation of the MSM population due to which they are not provided with sexual health services including prevention services such as condoms. Due to pressure, some MSM also marry women thus acting as a bridge population. Criminalisation increases stigma and discrimination and acts as a barrier to HIV prevention programmes. Section 377 thwarts health services by preventing collection of HIV data, impeding dissemination of information, forcing harassment, threats and closure upon organisations who work with MSM, preventing supply of condoms as it is seen as aiding an offence; limits access to health services, driving the community underground; prevents disclosure of symptoms; increases sexual violence and harassment against the community; and creates an absence of safe spaces leading to risky sex. There are little if any negative consequences of decriminalisation and studies have shown a reduction in STDs (sexually transmitted diseases) and increased psychological adjustment.

19.16 Section 377 is vague and arbitrary. It is incapable of clear construction such that those affected by it do not know the true intention as it does

not clearly indicate the prohibition. The expression "carnal intercourse against the order of nature" has not been defined in the statute. In the absence of legislative guidance, courts are left to decide what acts constitute the same. A study of the cases shows that application has become inconsistent and highly varied. From excluding oral sex to now including oral sex, anal sex and penetration into artificial orifices such as folded palms or between thighs by terming them as imitative actors or acts of sexual perversity, the scope has been so broadened that there is no reasonable idea of what acts are prohibited. It is only clear that penile vaginal acts are not covered. This results in arbitrary application of a penal law which is violative of Article 14 (refer to AK Roy v. UoI (1982) 1 SCC 271, KA Abbas v. UoI and Anr. (1970) 2 SCC 760, Harish Chandra Gupta v. State of UP AIR 1960 All 650, Subhash Chandra and Anr. v. Delhi Subordinate Services Selection Board (2009) 15 SCC 458).

19.17 Section 377 distinguishes between carnal intercourse which is against the order of nature and not against the order of nature. This classification is unintelligible. It is arbitrary and not scientific. Due to an absence of legislative guidance it is left to the Court to decide what constitutes against the order of nature. The test in this regard has shifted from acts without possibility of procreation to imitative acts to acts amounting to sexual perversity. These parameters cannot be discerned on an objective basis. The object of the classification which seeks to enforce Victorian notion of sexual morality which included only procreative sex is unreasonable as condemnation of non procreative sex is no longer a legitimate state object. Furthermore advancing public morality

is subjective and cannot inform intrusions in personal autonomy especially since it is majoritarian. Even assuming that the section was valid when it was enacted in 1861, the unreasonableness is pronounced with time and the justification does not hold valid today. (refer to DS Nakara v. UoI (1983) 1 SCC 305, Kartar Singh v. State of Punjab (1994) 3 SCC 569, M Nagaraj v. UoI (2006) 8 SCC 212, Anuj Garg v. Hotel Association of India (2008) 3 SCC 1, Deepak Sibal v. Punjab University (1989) 2 SCC 145, Suchita Srivastava v. Chandigarh Administration).

19.18 Section 377 is disproportionate and discriminatory in its impact on homosexuals. The law must not only be assessed on its proposed aims but also on its implications and effects. Though facially neutral, the section predominantly outlaws sexual activity between men which is by its very nature penile non vaginal. While heterosexual persons indulge in oral and anal sex, their conduct does not attract scrutiny except when the woman is underage or unwilling. In fact, Courts have even excluded married heterosexual couples from the ambit of Section 377. When homosexual conduct is made criminal, this declaration itself is an invitation to perpetrate discrimination. It also reinforces societal prejudices. (Anuj Garg v. Hotel Association of India, Peerless General Finance Investment Co. Ltd. v. Reserve Bank of India (1992) 2 SCC 343, Grace Jayamani v. EP Peter AIR 1982 Kant. 46, Lawrence v. Texas, National Coalition for Gay and Lesbian Equality, Dhirendra Nadan v. State–Criminal Case Nos.HAA0085 & 86 of 2005 (Fiji High Court).

19.19 Section 377 violates Article 15 by discriminating on the ground of sexual orientation as although facially neutral it treats homosexual men unequally

compared to heterosexuals and imposes an unequal burden on them. The general purport of Article 15 is to prohibit discrimination on the grounds enumerated therein. It is contended that as Article 15(3) uses the expression "women" the word sex in Article 15(1) must partake the same character. However it is submitted that Article 15(3) must not be allowed to limit the understanding of Article 15(1) and reduce it to a binary norm of man and woman only. This becomes clear when Article 15(2) is applied to transgendered persons who identify as a third gender. For example, Government of India has introduced an option for "others" in the sex column of the passport application form. This can be achieved only if the expression "sex" is read to be broader than the binary norm of biological sex as man or woman. The Constitution is a living document and the Court can breathe content into rights. The underlying purpose against sex discrimination is to prevent differential treatment for the reasons of non conformity with normal or natural sexual or gender roles. Sex relations are intricately tied to gender stereotypes. Accordingly discrimination on the ground of sex necessarily includes discrimination on the basis of sexual orientation. Like gender discrimination, discrimination on the basis of sexual orientation is directed against an immutable and core characteristic of human personality. Even international law recognises sexual orientation as being included in the ground "sex". The determination of impact of a legislation must be taken in a contextual manner taking into account the content, purpose, characteristics and circumstances of the law. Section 377 does not take into account the differences in individuals in terms of their sexual orientation and makes sexual practices relevant to and associated with a class of homosexual persons criminal. It criminalises acts which are normal sexual expressions for homosexual men

because they can only indulge in penetrative acts which are penile non vaginal. Distinction based on a prohibited ground cannot be allowed regardless of how laudable the object is. If a law operates to discriminate against some persons only on the basis of a prohibited ground, it must be struck down. (M Nagaraj v. UoI, Anuj Garg v. Hotel Association of India, Toonen v. Australia, Egan v. Canada, Vriend v. Alberta, Punjab Province v. Daulat Singh AIR 1946 PC 66, State of Bombay v. Bombay Education Society [1955] SCR 568). Shri Grover also submitted that the Courts in other countries have struck down similar laws that criminalise same-sex sexual conduct on the ground that they violate the right to privacy, dignity and equality.

20. Shri Ashok Desai, learned senior counsel, who appeared for Shri Shyam Benegal argued that Section 377 IPC, which is a pre-Constitution statute, should be interpreted in a manner which may ensure protection of freedom and dignity of the individuals. He submitted that the Court should also take cognizance of changing values and temporal reasonableness of a statute. Shri Desai emphasized that the attitude of the society is fast changing and the acts which were treated as offence should no longer be made punitive. He referred to medical literature to show that sexuality is a human condition and argued that it should not be regarded as a depravity or a sin or a crime. Learned senior counsel submitted that in view of Section 377 IPC which stigmatized homosexuality, not only homosexuals but their families face stigma and discrimination. He referred to the recommendations made by 172nd Law Commission Report for deleting Section 377 IPC, the survey conducted by Outlook Magazine giving the statistics

of the persons who indulged in different sexual practices, the support extended by the eminent persons including Swami Agnivesh, Soli J. Sorabjee (Senior Advocate), Capt. Laxmi Sehgal, Aruna Roy, Prof. Amartya Sen and Prof. Upendra Baxi for deleting Section 377 IPC and submitted that the impugned order should be upheld. Learned senior counsel further argued that Section 377 IPC, which applies to same sex relations between consenting adults violates the constitutional guarantee of equality under Articles 14 and 15 and the High Court rightly applied Yogyakarta principles for de-criminalisation of the section challenged in the writ petition filed by respondent No.1. He supported the High Court's decision to invoke the principle of severability. Shri Ram Jethmalani, Senior Advocate, who did not argue the case, but filed written submissions also supported the impugned order and argued that the High Court did not commit any error by declaring Section 377 IPC as violative of Articles 14, 15 and 21 of the Constitution.

21. The learned Attorney General, who argued the case as Amicus, invited our attention to affidavit dated 1.3.2012 filed on behalf of the Home Ministry to show that the Group of Ministers constituted for looking into the issue relating to constitutionality of Section 377 IPC recommended that there is no error in the impugned order, but the Supreme Court may take final view in the matter. The learned Attorney General submitted that the declaration granted by the High Court may not result in deletion of Section 377 IPC from the statute book, but a proviso would have to be added to clarify that nothing contained therein shall apply to any sexual activity between the two consenting adults in private. Learned Attorney

General also emphasised that the Court must take cognizance of the changing social values and reject the moral views prevalent in Britain in the 18th century.

22. Shri P.P. Malhotra, learned Additional Solicitor General, who appeared on behalf of the Ministry of Home Affairs, referred to the affidavit filed before the Delhi High Court wherein the Ministry of Home Affairs had opposed de-criminalisation of homosexuality and argued that in its 42nd Report, the Law Commission had recommended retention of Section 377 IPC because the societal disapproval thereof was very strong. Learned Additional Solicitor General submitted that the legislature, which represents the will of the people has decided not to delete and it is not for the Court to import the extra-ordinary moral values and thrust the same upon the society. He emphasized that even after 60 years of independence, Parliament has not thought it proper to delete or amend Section 377 IPC and there is no warrant for the High Court to have declared the provision as ultra vires Articles 14,15 and 21 of the Constitution.

23. Shri Mohan Jain, learned Additional Solicitor General who appeared on behalf of the Ministry of Health, submitted that because of their risky sexual behaviour, MSM and female sex workers are at a high risk of getting HIV/AIDS as compared to normal human beings. He pointed out that as in 2009, the estimated number of MSM was 12.4 lakhs.

24. We have considered the arguments/submissions of the learned counsel and perused the detailed written submissions filed by them. We have also gone through the voluminous literature placed on record and the judgments of other

jurisdictions to which reference has been made in the impugned order and on which reliance has been placed by the learned counsel who have supported the order under challenge.

25. We shall first deal with the issue relating to the scope of judicial review of legislations. Since Section 377 IPC is a pre-Constitutional legislation, it has been adopted after enactment of the Constitution, it will be useful to analyse the ambit and scope of the powers of the superior Courts to declare such a provision as unconstitutional. Articles 13, 14, 15, 19, 21, 32, 226 and 372 of the Constitution, which have bearing on the issue mentioned herein above read as under:

> **"13. Laws inconsistent with or in derogation of the fundamental rights.—**(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
>
> (3) In this Article, unless the context otherwise requires,—
> (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
> (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
> (4) Nothing in this Article shall apply to any amendment of this Constitution made under Article 368.

14. Equality before law.— The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -
(a) access to shops, public restaurants, hotels and places of public entertainment; or
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.
(3) Nothing in this article shall prevent the State from making any special provision for women and children.
(4) Nothing in this article or in clause (2) or article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
(5) Nothing I this article or in sub-clause (g) of clause () of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizen or for the Scheduled Castes or Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in Clause (1) of article 30.

19. Protection of certain rights regarding freedom of speech etc.- (1) All citizens shall have the right-
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) omitted
(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or

controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

21. Protection of life and personal liberty. — No person shall be deprived of his life or personal liberty except according to procedure established by law.

32. Remedies for enforcement of rights conferred by this Part.—
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

226. Power of High Courts to issue certain writs.—
(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—
(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this Article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

372. Continuance in force of existing laws and their adaptation.—
(1) Notwithstanding the repeal by this Constitution of the enactments referred to in
Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.
(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.
(3) Nothing in clause (2) shall be deemed—
(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I.—The expression "law in force" in this Article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II.—Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

Explanation III.—Nothing in this Article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV.—An Ordinance promulgated by the Governor of a Province under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382, and nothing in this Article shall be construed as continuing any such Ordinance in force beyond the said period."

26. A plain reading of these Articles suggests that the High Court and this Court are empowered to declare as void any pre-Constitutional law to the extent of its inconsistency with the Constitution and any law enacted post the enactment of the Constitution to the extent that it takes away or abridges the rights conferred by Part III of the Constitution. In fact a constitutional duty has been cast upon this Court to test the laws of the land on the touchstone of the Constitution and provide appropriate remedy if and when called upon to do so. Seen in this light the power of judicial review over legislations is plenary. However, keeping in

mind the importance of separation of powers and out of a sense of deference to the value of democracy that parliamentary acts embody, self restraint has been exercised by the judiciary when dealing with challenges to the constitutionality of laws. This form of restraint has manifested itself in the principle of presumption of constitutionality.

27. The principle was succinctly enunciated by a Constitutional Bench in Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors. AIR 1958 SC 538 in the following words:

> "… (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
>
> (c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
>
> (d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
>
> (e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
>
> (f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

The application of the above noted principles to pre-Constitutional statutes was elucidated in the following words:

> "18. It is neither in doubt nor in dispute that Clause 1 of Article 13 of the Constitution of India in no uncertain terms states that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III there, shall, to the extent of such inconsistency, be void. Keeping in view the fact that the Act is a pre-constitution enactment, the question as regards its constitutionality will, therefore, have to be judged as being law in force at the commencement of the Constitution of India [See *Keshavan Madhava Menon v. The State of Bombay* - 1951CriLJ 680 . By reason of Clause 1 of Article 13 of the Constitution of India, in the event, it be held that the provision is unconstitutional the same having regard to the prospective nature would be void only with effect from the commencement of the Constitution. Article 372 of the Constitution of India per force does not make a pre-constitution statutory provision to be constitutional. It merely makes a provision for the applicability and enforceability of pre-constitution laws subject of course to the provisions of the Constitution and until they are altered, repealed or amended by a competent legislature or other competent authorities."

Referring to that case, the Court in Anuj Garg v. Hotel Association of India and Ors. (2008) 3 SCC 1, while dealing with the constitutionality of Section 30 of Punjab Excise Act, 1914, this Court observed:

> "7. The Act is a pre-constitutional legislation. 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. While embarking on the questions raised, it may be pertinent to know that a statute although 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 John Vallamattom and Anr. v. Union of India AIR 2003 SC 2902, this Court, while referring to an amendment made in UK in relation to a provision which was in pari materia with Section 118 of Indian Succession Act, observed:

> "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."

Referring to the changing legal scenario and having regard to the Declaration on the Right to Development adopted by the World Conference on Human Rights as also Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, this Court observed:

> "It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26-1-1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that 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."

Presumption of constitutionality:

28. Every legislation enacted by Parliament or State Legislature carries with it a presumption of constitutionality. This is founded on the premise that the legislature, being a representative body of the people and accountable to them is aware of their needs and acts in their best interest within the confines of the Constitution. There is nothing to suggest that this principle would not apply to pre-Constitutional laws which have been adopted by the Parliament and used with or without amendment. If no amendment is made to a particular law it may

represent a decision that the Legislature has taken to leave the law as it is and this decision is no different from a decision to amend and change the law or enact a new law. In light of this, both pre and post Constitutional laws are manifestations of the will of the people of India through the Parliament and are presumed to be constitutional.

29. The doctrine of severability and the practice of reading down a statute both arise out of the principle of presumption of constitutionality and are specifically recognized in Article 13 which renders the law, which is pre-Constitutional to be void only to the extent of inconsistency with the Constitution. In R.M.D. Chamarbaugwalla v. The Union of India (UOI*)* AIR 1957 SC 628, a Constitution Bench of this Court noted several earlier judgments on the issue of severability and observed as follows:

> "The doctrine of severability rests, as will presently be shown, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute. It is the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it.
>
> When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provisions contravening constitutional prohibitions.
>
> 26. That being the position in law, it is now necessary to consider whether the impugned provisions are severable in their application to competitions of a gambling character, assuming of

course that the definition of 'prize competition' in s. 2(d) is wide enough to include also competitions involving skill to a substantial degree. It will be useful for the determination of this question to refer to certain rules of construction laid down by the American Courts, where the question of severability has been the subject of consideration in numerous authorities. They may be summarised as follows:

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide Corpus Juris Secundum, Vol. 82, p. 156; Sutherland on Statutory Construction, Vol. 2, pp. 176-177.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol. 1 at pp. 360-361; Crawford on Statutory Construction, pp. 217-218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Vide Crawford on Statutory Construction, pp. 218-219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; (Vide Cooley's Constitutional Limitations, Vol. 1, pp. 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

> 6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol. 2, p. 194.
>
> 7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on Statutory Construction, Vol. 2, pp. 177-178."

30. Another significant canon of determination of constitutionality is that the Courts would be reluctant to declare a law invalid or *ultra vires* on account of unconstitutionality. The Courts would accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the Courts. The Courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act. These are the principles which clearly emerge from the consistent view taken by this Court in its various pronouncements including the recent judgment in Namit Sharma v. Union of India (2013)1 SCC 745.

In D.S. Nakara and Ors. v. Union of India *(UOI)* (1983) 1 SCC 305 a Constitution Bench of this Court elucidated upon the practice of reading down statutes as an application of the doctrine of severability while answering in affirmative the question whether differential treatment to pensioners related to the date of retirement qua the revised formula for computation of pension attracts

Article 14 of the Constitution. Some of the observations made in that judgment are extracted below:

> "66. If from the impugned memoranda the event of being in service and retiring subsequent to specified date is severed, all pensioners would be governed by the liberalised pension scheme. The pension will have to be recomputed in accordance with the provisions of the liberalised pension scheme as salaries were required to be recomputed in accordance with the recommendation of the Third Pay Commission but becoming operative from the specified date. It does therefore appear that the reading down of impugned memoranda by severing the objectionable portion would not render the liberalised pension scheme vague, unenforceable or unworkable.
>
> 67. In reading down the memoranda, is this Court legislating? Of course 'not' When we delete basis of classification as violative of Article 14, we merely set at naught the unconstitutional portion retaining the constitutional portion.
>
> 68. We may now deal with the last submission of the learned Attorney General on the point. Said the learned Attorney-General that principle of severability cannot be applied to augment the class and to adopt his words 'severance always cuts down the scope, never enlarges it'. We are not sure whether there is any principle which inhibits the Court from striking down an unconstitutional part of a legislative action which may have the tendency to enlarge the width and coverage of the measure. Whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be of enlarging the class. In such a situation, the Court can strike down the words of limitation in an enactment. That is what is called reading down the measure. We know of no principle that 'severance' limits the scope of legislation and can never enlarge it."

The basis of the practice of reading down was succinctly laid down in Commissioner of Sales Tax, Madhya Pradesh, Indore and Ors. v. Radhakrishan and Ors. (1979) 2 SCC 249 in the following words:

> "In considering the validity of a statute the presumption is in favour of its constitutionality and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles. For sustaining the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived it must always be presumed that the Legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is based on adequate grounds. It is well settled that courts will be justified in giving a liberal interpretation to the section in order to avoid constitutional invalidity. These principles have given rise to rule of reading down the section if it becomes necessary to uphold the validity of the sections."

In Minerva Mills Ltd. and Ors. v. Union of India (UOI) and Ors. (1980) 3 SCC 625, the Court identified the limitations upon the practice of reading down:

> "69. The learned Attorney General and the learned Solicitor General strongly impressed upon us that Article 31C should be read down so as to save it from the challenge of unconstitutionality. It was urged that it would be legitimate to read into that Article the intendment that only such laws would be immunised from the challenge under Articles 14 and 19 as do not damage or destroy the basic structure of the Constitution. The principle of reading down the provisions of a law for the purpose of saving it from a constitutional challenge is well-known. But we find it impossible to accept the contention of the learned Counsel in this behalf because, to do so will involve a gross distortion of the principle of reading down, depriving that doctrine of its only or true rationale when words of width are used inadvertently. The device of reading down is not to be resorted to in order to save the susceptibilities of the law makers, nor indeed to imagine a law of one's liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment."

This was further clarified in Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Ors. 1991 Supp (1) SCC 600. In his concurring opinion, Ray, J. observed:

"On a proper consideration of the cases cited hereinbefore as well as the observations of Seervai in his book 'Constitutional Law of India' and also the meaning that has been given in the Australian Federal Constitutional Law by Coin Howard, it is clear and apparent that where any term has been used in the Act which per se seems to be without jurisdiction but can be read down in order to make it constitutionally valid by separating and excluding the part which is invalid or by interpreting the word in such a fashion in order to make it constitutionally valid and within jurisdiction of the legislature which passed the said enactment by reading down the provisions of the Act. This, however, does not under any circumstances mean that where the plain and literal meaning that follows from a bare reading of the provisions of the Act, Rule or Regulation that it confers arbitrary, uncancalised, unbridled, unrestricted power to terminate the services of a permanent employee without recording any reasons for the same and without adhering to the principles of natural justice and equality before the law as envisaged in Article 14 of the Constitution, cannot be read down to save the said provision from constitutional invalidity by bringing or adding words in the said legislation such as saying that it implies that reasons for the order of termination have to be recorded. In interpreting the provisions of an Act, it is not permissible where the plain language of the provision gives a clear and unambiguous meaning can be interpreted by reading down and presuming certain expressions in order to save it from constitutional invalidity."

31. From the above noted judgments, the following principles can be culled out:

(i) The High Court and Supreme Court of India are empowered to declare as void any law, whether enacted prior to the enactment of the Constitution or after. Such power can be exercised to the extent of inconsistency with the Constitution/contravention of Part III.

(ii) There is a presumption of constitutionality in favour of all laws, including pre-Constitutional laws as the Parliament, in its capacity as the

representative of the people, is deemed to act for the benefit of the people in light of their needs and the constraints of the Constitution.

(iii) The doctrine of severability seeks to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. This doctrine should be applied keeping in mind the scheme and purpose of the law and the intention of the Legislature and should be avoided where the two portions are inextricably mixed with one another.

(iv) The court can resort to reading down a law in order to save it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable.

32. Applying the afore-stated principles to the case in hand, we deem it proper to observe that while the High Court and this Court are empowered to review the constitutionality of Section 377 IPC and strike it down to the extent of its inconsistency with the Constitution, self restraint must be exercised and the analysis must be guided by the presumption of constitutionality. After the adoption of the IPC in 1950, around 30 amendments have been made to the statute, the most recent being in 2013 which specifically deals with sexual offences, a category to which Section 377 IPC belongs. The 172nd Law Commission Report specifically recommended deletion of that section and the issue has repeatedly come up for debate. However, the Legislature has chosen not to amend the law or revisit it. This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it

proper to delete the provision. Such a conclusion is further strengthened by the fact that despite the decision of the Union of India to not challenge in appeal the order of the Delhi High Court, the Parliament has not made any amendment in the law. While this does not make the law immune from constitutional challenge, it must nonetheless guide our understanding of character, scope, ambit and import.

33. It is, therefore, apposite to say that unless a clear constitutional violation is proved, this Court is not empowered to strike down a law merely by virtue of its falling into disuse or the perception of the society having changed as regards the legitimacy of its purpose and its need.

34. We may now notice the relevant provisions of the IPC.

> "**Section 375. Rape.-**A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-
>
> First.-Against her will.
>
> Secondly.-Without her consent.
>
> Thirdly.-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
>
> Fourthly.-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> Fifthly.-With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.-With or without her consent, when she is under sixteen years of age.

Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.-Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

376. Punishment for rape.--(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,-
(a) being a police officer commits rape-
(i) within the limits of the police station to which he is appointed; or
(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or
(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or
(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or
(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or
(e) commits rape on a woman knowing her to be pregnant; or
(f) commits rape on a woman when she is under twelve years of age; or
(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:
Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.-Where a women's is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.-"women's or children's institution" means an institution, whether called and orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.-"hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

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."

35. Before proceeding further, we may also notice dictionary meanings of some words and expressions, which have bearing on this case.

Buggery – a carnal copulation against nature; a man or a woman with a brute beast, a man with a man, or man unnaturally with a woman. This term is often used interchangeably with "sodomy". (Black's Law Dictionary 6th Edn. 1990)

Carnal – Pertaining to the body, its passions and its appetites animal; fleshy; sensual; impure; sexual. People v. Battilana, 52 Cal.

App.2d 685, 126 P.2d 923, 928 (Black's Law Dictionary 6th edn. 1990)

Carnal knowledge – Coitus; copulation; the act of a man having sexual bodily connections with a woman; sexual intercourse. Carnal knowledge of a child is unlawful sexual intercourse with a female child under the age of consent. It is a statutory crime, usually a felony. Such offense is popularly known as "statutory rape". While penetration is an essential element, there is "carnal knowledge" if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. State v. Cross, 2000 S.E.2d 27, 29. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. De Armond v. State, Okl. Cr., 285 P.2d 236. (Black's Law Dictionary 6th edn. 1990)

Nature – (1) A fundamental quality that distinguishes one thing from another; the essence of something. (2) Something pure or true as distinguished from something artificial or contrived. (3) The basic instincts or impulses of someone or something (Black's Law Dictionary 9th edn).

LEGISLATIVE HISTORY OF SECTION 377

ENGLAND

36. 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. Such offences were dealt with by the ecclesiastical Courts.

The Buggery Act 1533, formally an Act for the punishment of the vice of Buggerie (25 Hen. 8 c. 6), was an Act of the Parliament of England that was passed during the reign of Henry VIII. It was the country's first civil sodomy law. The Act defined buggery as an unnatural sexual act against the will of God and man and prescribed capital punishment for commission of the offence. This Act

was later defined by the Courts to include only anal penetration and bestiality. The Act remained in force until its repeal in 1828.

The Buggery Act of 1533 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 removed from the definition of buggery in 1817.

The Act was repealed by Section 1 of the Offences against the Person Act 1828 (9 Geo.4 c.31) and by Section 125 of the Criminal Law (India) Act 1828 (c.74). It was replaced by Section 15 of the Offences against the Person Act 1828, and ection 63 of the Criminal Law (India) Act 1828, which provided that buggery would continue to be a capital offence.

With the enactment of the Offences against the Person Act 1861 buggery was no longer a capital offence in England and Wales. It was punished with imprisonment from 10 years to life.

INDIA

37. The offence of sodomy was introduced in India on 25.7.1828 through the Act for Improving the Administration of Criminal Justice in the East Indies (9.George.IV).

Chapter LXXIV Clause LXIII "Sodomy" – "And it be enacted, that every person convicted of the abominable crime of buggery committed with either mankind or with any animal, shall suffer death as a felon".

In 1837, a Draft Penal Code was prepared which included: Clauses 361 – "Whoever intending to gratify unnatural lust, touches for that purpose any person or any animal or is by his own consent touched by any person for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and must not be less than two years"; and Clause 362 - "Whoever intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine."

In Note M of the Introductory Report of Lord Macaulay to the Draft Code these clauses were left to his Lordship in Council without comment observing that:

> "Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could have given rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision."
>
> [Note M on Offences Against the Body in Penal Code of 1837 – Report of the Indian Law Commission on the Penal Code, October 14, 1837.]

However, in Report of the Commissioner's Vol XXVIII it was observed that the clauses and the absence of comments had created "a most improper ambiguity". Some members noted that the existing law on the subject is dead letter and also that the said offence had been omitted in revised statutes of

Massachusetts and does not appear in the French Penal Code unless the sufferer is below 10 years of age.

> "451. The Law Commissioners observe that Clauses 361 and 362 relate to an odious class of offences, respecting which it is desirable that as little as possible should said. They therefore leave the provisions proposed therein without comment to the judgment of the governor-General in Council. Mr A.D. Campbell in concurrence with Mr. Blane, censures the false delicacy which has in their opinion caused a most improper ambiguity in these clauses, leaving it uncertain whether they apply to the mere indecent liberties, or extend to the actual commission of an offence of the nature indicated.
>
> 452. It appears to us clear enough, that it was meant to strike at the root of the offence by making the first act tending to it liable to the same punishment, if the Judge shall deem it proper, as the offence actually accomplished. This is a new principle, and it would have been better if the Commissioners had explained for what reason they adopted it, in respect to the offences here contemplated in particular. We conceive that there is a very weighty objection to the clauses in question, in the opening which they will afford to calumny, if for an act so slight as may come within the meaning of the word, "touches", a man may be exposed to such a revolting charge and suffer the ignominy of a public trial upon it.
>
> 453. Colonel Sleeman advises the omission of both these clauses, deeming it most expedient to leave offences against nature silently to the odium of society. It may give weight to this suggestion to remark that the existing law on the subject is almost a dead letter, as appears from the fact that in three years only six cases came before the Nizamut Adawlut at Calcutta, although it is but true, we fear that the frequency of the abominable offence in question "remains" as Mr AD Campbell expresses it, "a horrid stain upon the land.
>
> 454. Mr. Livingstone, we observe, makes no mention of offences of this nature in his code for Louisiana, and they are omitted in the revised statutes of Massachusetts, of which the Chapter "of offences against the Lives and Persons of Individuals" is appended to the 2d Report of the English Criminal Law Commissioners. By the French Penal Code, offences of this description do not come within the scope of the law, unless they are effected or attempted by violence, except the sufferer be under the age of ten years."

> [Comment of the Law Commissioners on clauses 361 and 362 in Report on the Indian Penal Code,1848.]

38. The IPC along with Section 377 as it exists today was passed by the Legislative Council and the Governor General assented to it on 6.10.1860. The understating of acts which fall within the ambit of Section 377 has changed from non-procreative (Khanu v. Emperor) to imitative of sexual intercourse (Lohana Vasantlal v. State AIR 1968 Guj 352) to sexual perversity (Fazal Rab v. State of Bihar AIR 1963, Mihir v. Orissa 1991 Cri LJ 488). This would be illustrated by the following judgments:

R. V. Jacobs (1817), Russ. & Ry. 331, C. C. R. -The offence of Sodomy can only be committed per anum.

Govindarajula In re. (1886) 1 Weir 382-Inserting the penis in the mouth would not amount to an offence under Section 377 IPC.

Khanu v. Emperor AIR 1925 Sind 286.

> "The principal point in this case is whether the accused (who is clearly guilty of having committed the sin of Gomorrah coitus per os) with a certain little child, the innocent accomplice of his abomination, has thereby committed an offence under Section 377, Indian Penal Code.
>
> Section 377 punishes certain persons who have carnal intercourse against the order of nature with inter alia human beings. Is the act here committed one of carnal intercourse? If so, 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".
>
> "Intercourse may be defined as mutual frequent action by members of independent organisation. Commercial intercourse is thereafter referred to; emphasis is made on the reciprocity".

"By metaphor the word 'intercourse' like the word 'commerce' is applied to the relations of the sexes. Here also 'there is the temporary visitation of one organism by a member of other organisation, for certain' clearly defined and limited objects. The primary object of the visiting organization is 'to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis'."
"But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Looking at the question in this way it would seem that sin of Gomorrah is no less carnal intercourse than the sin of sodomy".

"it is to be remembered that the Penal Code does not, except in Section 377, render abnormal sexual vice punishable at all. In England indecent assaults are punishable very severely. It is possible that under the Penal Code, some cases might be met by prosecuting the offender for simple assault, but that is a compoundable offence and in any case the patient could in no way be punished. It is to be supposed that the Legislature intended that a Tegellinus should carry on his nefarious profession perhaps vitiating and depraving hundreds of children with perfect immunity?

I doubt not therefore, that cotius per os is punishable under Section 377, Indian Penal Code."

Khandu v. Emperor 35 Cri LJ 1096 : (AIR 1934 Lah 261)-"Carnal intercourse with a bullock through nose is an unnatural offence punishable under Section 377, Penal Code."

Lohana Vasantlal Devchand v. The State AIR 1968 Guj 252.

In this case, there were three accused. Accused 1 and 2 had already committed the offence, in question, which was carnal intercourse per anus, of the victim boy. The boy began to get a lot of pain and consequently, accused 2 could not succeed having that act. He therefore voluntarily did the act in question by putting his male organ in the mouth of the boy and there was also seminal

discharge and the boy had to vomit it out. The question that arose for consideration therein was as to whether the insertion of the male organ by the second accused into the orifice of the mouth of the boy amounted to an offence under Section 377 IPC.

The act was the actual replacement of desire of coitus and would amount to an offence punishable under Section 377. There was an entry of male penis in the orifice of the mouth of the victim. There was the enveloping of a visiting member by the visited organism. There was thus reciprocity; intercourse connotes reciprocity. It could, therefore, be said that the act in question amounted to an offence punishable under Section 377.

What was sought to be conveyed by the explanation was that even mere penetration would be sufficient to constitute carnal intercourse, necessary to the offence referred to in Section 377. Seminal discharge, i.e., the full act of intercourse was not the essential ingredient to constitute an offence in question.

It is true that the theory that the sexual intercourse is only meant for the purpose of conception is an out-dated theory. But, at the same time it could be said without any hesitation of contradiction that the orifice of mouth is not, according to nature, meant for sexual or carnal intercourse. Viewing from that aspect, it could be said that this act of putting a male-organ in the mouth of a victim for the purposes of satisfying sexual appetite would be an act of carnal intercourse against the order of nature.

In **State of Kerala** v. **Kundumkara Govindan and Anr.**, 1969 Cri LJ 818, the Kerala High Court observed:

> "18. Even if I am to hold that there was no penetration into the vagina and the sexual acts were committed only between the thighs, I do not think that the respondents can escape conviction under Section 377 of the Penal Code. The counsel of the respondents contends (in this argument the Public Prosecutor also supports him) that sexual act between the thighs is not intercourse. The argument is that for intercourse there must be encirclement of the male organ by the organ visited; and that in the case of sexual act between the thighs, there is no possibility of penetration.
>
> 19. The word 'intercourse' means 'sexual connection' (Concise Oxford Dictionary). In Khanu v. Emperor AIR 1925 Sind 286 the meaning of the word 'intercourse' has been considered:
>
> Intercourse may be defined as mutual frequent action by members of independent organization.
>
> Then commercial intercourse, social intercourse, etc. have been considered; and then appears:
>
> By a metaphor the word intercourse, like the word commerce, is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organization, for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity.
>
> Therefore, to decide whether there is intercourse or not, what is to be considered is whether the visiting organ is enveloped at least partially by the visited organism. In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs: the thighs are kept together and tight.
>
> 20. Then about penetration. The word 'penetrate' means in the concise Oxford Dictionary 'find access into or through, pass through.' When the male organ is inserted between the thighs kept together and tight, is there no penetration? The word 'insert' means place, fit, thrust.' Therefore, if the male organ is 'inserted' or 'thrust' between the thighs, there is 'penetration' to constitute unnatural offence.

21. Unnatural offence is defined in Section 377 of the Penal Code; whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal commits unnatural offence. The act of committing intercourse between the thighs is carnal intercourse against the order of nature. Therefore committing intercourse by inserting the male organ between the thighs of another is an unnatural offence. In this connection, it may be noted that the act in Section 376 is "sexual intercourse" and the act in Section 377 is carnal intercourse against the order of nature."

22. The position in English law on this question has been brought to my notice. The old decision of Rex v. Samuel Jacobs (1817) Russ & Ry 381 CCE lays down that penetration through the mouth does not amount to the offence of sodomy under English law. The counsel therefore argues that sexual intercourse between the thighs cannot also be an offence under Section 377 of the Penal Code. In Sirkar v. Gula Mythien Pillai Chaithu Maho. mathu 1908 TLR Vol XIV Appendix 43 a Full Bench of the Travancore High Court held that having connection with a person in the mouth was an offence under Section 377 of the Penal Code. In a short judgment, the learned Judges held that it was unnecessary to refer to English Statute Law and English text books which proceeded upon an interpretation of the words sodomy, buggery and bestiality; and that the words used in the Penal Code were very aim pie and died enough to include all acts against the order of nature. My view on the question is also that the words of Section 377 are simple and wide enough to include any carnal intercourse again tithe order of nature within its ambit. Committing intercourse between the thighs of another is carnal intercourse against the order of nature."

In **Fazal Rab Choudhary v. State of Bihar (1982) 3 SCC 9 -** While reducing the sentence of the appellant who was convicted for having committed an offence under Section 377 IPC upon a young boy who had come to his house to take a syringe, the Court observed:

"3. The offence is one under Section 377 I.P.C., which implies sexual perversity. No force appears to have been used. Neither the notions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence has influenced our thinking. However in judging the Depravity of the action for determining quantum of sentence, all aspects of the matter must be

kept in view. We feel there is some scope for modification of sentence. Having examined all the relevant aspects bearing on the question of nature of offence and quantum of sentence, we reduce the substantive sentence to R.I. for 6 months. To the extent of this modification in the sentence, the appeal is allowed."

In **Kedar Nath S/o Bhagchand v. State of Rajasthan, 1985 (2) WLN 560**, the Rajasthan High Court observed:

"19. The report (Ex. P. 24) shows that the rectal swear was positive for spermatozoa, which resembled with human-spermatozoa. The presence of the human-spermatozoa in the rectum of the deceased has been held to be a definite proof of fact that the boy has been subjected to the carnal intercourse against the course of nature. We are in agreement with the above conclusion arrived at by the learned trial Court as, in the facts and circumstances of the case, the presence of human spermatozoa in the rectum of the deceased who was a young boy, leads to only one conclusion that he was subjected to the carnal intercourse against the course of nature."

In **Calvin Francis v. Orissa 1992 (2) Crimes 455,** the Orissa High Court outlined a case in which a man inserted his genital organ into the mouth of a 6 year old girl and observed:

"8. In order to attract culpability under Section 377, IPC, it has to be established that (i) the accused had carnal intercourse with man, woman or animal, (ii) such intercourse was against the order of nature, (iii) the act by the accused was done voluntarily; and (iv) there was penetration. Carnal intercourse against the order of nature is the gist of the offence in Section 377. By virtue of the Explanation to the Section, it is necessary to prove penetration, however little, to constitute the carnal intercourse. Under the English law, to constitute a similar offence the act must be in that part where sodomy is usually committed. According to that law, the unnatural carnal intercourse with a human being generally consists in penetration per anus. In R. v. Jacobs : (1817) B&R 331 CCR and in Govindarajulu in re (1886) 1 Weir 382, it was held that the act in a child's mouth does not constitute the offence. But in Khanu v. Emperor : AIR 1925 sind 286 it was held that coitus per os is punishable under the Section.

9. In terms of Section 377, IPC, whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, commits the offence. Words used are quite comprehensive and an act like putting male organ into victim's mouth which was an initiative act of sexual intercourse for the purpose of his satisfying the sexual appetite, would be an act punishable under Section 377, IPC.

10. In Corpus Juris Secundum, Volume 81, op. 368-370, the following comments have been made.

"Words used in statutory definitions of the crime of Sodomy have been frequently construed as more comprehensive and as not depending on, or limited by the common law definition of the crime, at least as not dependent on the narrower definition of sodomy afforded by some of the common law authorities and are generally interpreted to include within their provisions all acts of unnatural copulation, whether with mankind or beast. Other authorities, however, have taken a contrary view, holding that the words used in the statute are limited by the common law definition of the crime where the words of the statute themselves are not explicit as to what shall be included.

It is competent for the legislature to declare that the doing of certain acts shall constitute the crime against nature even-though they would not have constituted that crime at common law, and the statutory crime against nature is not necessarily limited to the common law crime of sodomy, but in imposing a punishment for the common law crime it is not necessary for the legislature to specify in the statute the particular acts which shall constitute the crime.

Under statutes providing that whoever has carnal copulation with a beast, or in any opening of the body, except sexual parts, with another being, shall be guilty of sodomy, it has been held that the act of cunnilingus is not a crime, but that taking the male sex organ into the mouth is sodomy. On the other hand, under such a statute it has been held that the crime of sodomy cannot be committed unless the sexual organ of accused is involved, but there is also authority to the contrary. Under a statute defining sodomy as the carnal knowledge and connection against the order of nature by man with man, or in the same unnatural manner with woman, it has been held that the crime cannot be committed by woman with woman.

A statute providing that any person who shall commit any act or practice of sexual perversity, either with mankind or beast on conviction shall be punished, is not limited to instances involving carnal copulation, but is restricted to cases involving the sex organ of at least one of the parties. The term 'sexual perversity' does not refer to every physical contact by a male with the body of the female with intent to cause sexual satisfaction to the actor, but the condemnation of the statute is limited to unnatural conduct performed for the purpose of accomplish; abnormal sexual satisfaction for the actor. Under a statute providing that any person participating in the act or copulating the mouth of one person with the sexual organ of another is guilty of the offence a person is guilty of violating the statute when he has placed his mouth on the genital organ of another, and the offence may be committed by two persons of opposite sex.

11. Though there is no statutory definition of 'sodomy', Section 377 is comprehensive to engulf any act like the alleged act. View similar to mine was expressed in Lohana Vasantlal Devchand and Ors. v. The State : AIR 1963 Guj 252 and in Khanu's case (supra). The orifice of the mouth is not, according to nature, meant for sexual or carnal intercourse. 'Intercourse' may be defined as mutual frequent action by members of independent organisation. Commercial intercourse is therefore referred to; emphasis is made on the reciprocity. By metaphor the word 'intercourse' like the word 'commerce' is applied to the relations of the sexes. Here also there is the temporary visitation of one organism by a member of the other organisation, for certain clearly defined and limited objects. The primary object of the visiting organisation is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. But there is no intercourse unless the visiting member is enveloped at least partially by the visited organism, for intercourse connotes reciprocity, and in this view it would seem that sin of Gomorrah is no less carnal intercourse than the sin of sodomy. These aspects have been illuminatingly highlighted in Khanu's case (supra).

12. In Stroud's Judicial Dictionary, the word 'buggery' is said to be synonymous with sodomy. In K. J. Ayer's Manual of Law Terms and Phrases (as Judicially Expounded), the meaning of the word 'sodomy' is stated to be a carnal knowledge committed against the order of Nature by a man with a man or in the same unnatural manner with a woman, or by a man or woman in any manner with a beast. This is called buggery. As observed in Lohan Vasantlal Devchand's case (supra), sodomy will be a species and unnatural offence will be a generis. In that view of the matter, there can be no

scope for any doubt that the act complained of in punishable under Sec. 377, IPC."

Similar views were expressed in State v. Bachmiya Musamiya, 1999 (3) Guj LR 2456 and Orissa High Court in Mihir alias Bhikari Charan Sahu v. State 1992 Cri LJ 488. However, from these cases no uniform test can be culled out to classify acts as "carnal intercourse against the order of nature". In our opinion the acts which fall within the ambit of the section can only be determined with reference to the act itself and the circumstances in which it is executed. All the aforementioned cases refer to non consensual and markedly coercive situations and the keenness of the court in bringing justice to the victims who were either women or children cannot be discounted while analyzing the manner in which the section has been interpreted. We are apprehensive of whether the Court would rule similarly in a case of proved consensual intercourse between adults. Hence it is difficult to prepare a list of acts which would be covered by the section. Nonetheless in light of the plain meaning and legislative history of the section, we hold that Section 377 IPC would apply irrespective of age and consent. It is relevant to mention here that the Section 377 IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.

39. We shall now consider the question whether the High Court was justified in entertaining challenge to Section 377 IPC despite the fact that respondent No.1 had not laid factual foundation to support its challenge. This issue deserves to be

prefaced by consideration of some precedents. In Southern Petrochemical Industries v. Electricity Inspector (2007) 5 SCC 447, this Court considered challenge to the T.N. Tax Consumption or Sale of Electricity Act, 2003. While dealing with the question whether the 2003 Act was violative of the equality clause enshrined in Article 14 of the Constitution, this Court made the following observations:

> "In absence of necessary pleadings and grounds taken before the High Court, we are not in a position to agree with the learned counsel appearing on behalf of the appellants that only because Section 13 of the repealed Act is inconsistent with Section 14 of the 2003 Act, the same would be arbitrary by reason of being discriminatory in nature and ultra vires Article 14 of the Constitution of India on the premise that charging section provides for levy of tax on sale and consumption of electrical energy, while the exemption provision purports to give power to exempt tax on "electricity sold for consumption" and makes no corresponding provision for exemption of tax on electrical energy self-generated and consumed."

In Seema Silk and Sarees v. Directorate of Enforcement (2008) 5 SCC 580, this Court considered challenge to Sections 18(2) and (3) of the Foreign Exchange Regulation Act, 1973, referred to paragraphs 69, 70 and 74 of the Southern Petrochemical Industries v. Electricity Inspector (supra) and observed:

> "In absence of such factual foundation having been pleaded, we are of the opinion that no case has been made out for declaring the said provision ultra vires the Constitution of India."

40. The writ petition filed by respondent No.1 was singularly laconic inasmuch as except giving brief detail of the work being done by it for HIV prevention

targeting MSM community, it miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic human rights to them. Respondent No.1 has also not furnished the particulars of the cases involving harassment and assault from public and public authorities to sexual minorities. Only in the affidavit filed before this Court on behalf of the Ministry of Health and Family Welfare, Department of AIDS Control it has been averred that estimated HIV prevalence among FSW (female sex workers) is 4.60% to 4.94%, among MSM (men who have sex with men) is 6.54% to 7.23% and IDU (injecting drug users) is 9.42% to 10.30%. The total population of MSM as in 2006 was estimated to be 25,00,000 and 10% of them are at risk of HIV. The State-wise break up of estimated size of high risk men who have sex with men has been given in paragraphs 13 and 14 of the affidavit. In paragraph 19, the State-wise details of total adult population, estimated adult HIV prevalence and estimated number of HIV infections as in 2009 has been given. These details are wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by State or its agencies or the society.

41. The question whether a particular classification is unconstitutional was considered in Re: Special Courts Bill, 1978 (1979) 1 SCC 380. Speaking for majority of the Constitution Bench, Chandrachud, CJ, referred to large number of precedents relating to the scope of Article 14 and concluded several propositions including the following:

"1. The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The second part, which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favourtism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

2. The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

3. The Constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

4. The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian Territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

5. By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and

characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

6. The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

7. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

8. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned.

9. If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the legislature, its action can be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory, irrespective of the way in which it is applied.

10. Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. Abuse of power given by law does occur; but the validity of the law cannot be contested because of such an apprehension. Discretionary power is not necessarily a discriminatory power.

11. Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.

12. Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

13. A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination."

42. Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same

family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution.

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

44. The vagueness and arbitrariness go to the root of a provision and may render it unconstitutional, making its implementation a matter of unfettered discretion. This is especially so in case of penal statues. However while analyzing a provision the vagaries of language must be borne in mind and prior application of the law must be considered. In A.K. Roy and Ors. v. Union of India and Ors. (1982) 1 SCC 271, a Constitution Bench observed as follows:

> "67. The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in Maneka Gandhi [1978] 2 SCR 621 . The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the prescribed area, when measured by common understanding. In criminal law, the legislature frequently uses vague expressions like 'bring into hatred or contempt', 'maintenance of

harmony between different religious groups' or 'likely to cause disharmony or hatred or ill-will', or 'annoyance to the public', (see Sections 124A, 153A(1)(b), 153B(1)(c), and 268 of the Penal Code). These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language carries with it the inconvenience of the imperfections of language."

In K.A. Abbas v. The Union of India (UOI) and Anr**.** (1970) 2 SCC 780 the Court observed:

"46. These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the nineteenth Article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered. A very pertinent example is to be found in State of Madhya Pradesh and Anr. v. Baldeo Prasad where the Central Provinces and Berar Goondas Act 1946 was declared void for uncertainty. The condition for the application of Sections 4 and 4A was that the person sought to be proceeded against must be a goonda but the definition of goonda in the Act indicated no tests for deciding which person fell within the definition. The provisions were therefore held to be uncertain and vague.

47. The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible,

> the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases."

45. We may now deal with the issue of violation of Article 21 of the Constitution. The requirement of substantive due process has been read into the Indian Constitution through a combined reading of Articles 14, 21 and 19 and it has been held as a test which is required to be satisfied while judging the constitutionality of a provision which purports to restrict or limit the right to life and liberty, including the rights of privacy, dignity and autonomy, as envisaged under Article 21. In order to fulfill this test, the law must not only be competently legislated but it must also be just, fair and reasonable. Arising from this are the notions of legitimate state interest and the principle of proportionality. In Maneka Gandhi v. Union of India (supra), this Court laid down the due process requirement in the following words:

> "13. Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political), Freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), of Equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of Fraternity (assuring dignity of the individual and the unity of the nation), which our Constitution visualises. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection….

> … But the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by a law which curtails or takes away the personal liberty guaranteed by Article 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the provision for a full-dressed hearing as in a Courtroom trial, but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with. Secondly, even the fullest compliance with the requirements of Article 21 is not the journey's end because, a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty guaranteed by Article 21 has still to meet a possible challenge under other provisions of the Constitution like, for example, Articles 14 and 19."

46. The right to privacy has been guaranteed by Article 12 of the Universal Declaration of Human Rights (1948), Article 17 of the International Covenant of Civil and Political Rights and European Convention on Human Rights. It has been read into Article 21 through an expansive reading of the right to life and liberty. The scope of the right as also the permissible limits upon its exercise have been laid down in the cases of Kharak Singh v. State of UP & Ors. (1964) 1 SCR 332 and Gobind v. State of MP (1975) 2 SCC 148 which have been followed in a number of other cases. In Kharak Singh v. The State of U.P. and Ors. (supra) the majority said that 'personal liberty' in Article 21 is comprehensive to include all varieties of rights which make up personal liberty of a man other than those dealt with in Article 19(1) (d). According to the Court, while Article 19(1) (d) deals with the particular types of personal freedom, Article 21 takes in and deals with the residue. The Court said:

"We have already extracted a passage from the judgment of Field J. in Munn v. Illinois (1877) 94 U.S. 113, where the learned Judge pointed out that 'life' in the 5th and 14th Amendments of the U.S. Constitution corresponding to Article 21 means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs-his arms and legs etc. We do not entertain any doubt that the word 'life' in Article 21 bears the same signification. Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal ? It might not be in appropriate to refer here to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human value as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire Constitutional theories."

47. In Gobind v. State of M.P. (supra) the Court observed:

"22. There can be no doubt 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. If the Court does find 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 a state interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible state interest, the characterization of ft claimed rights as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a state interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of state.

23. Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit Constitutional guarantees. "In the application of the

Constitution our contemplation cannot only be of what has been but what may be." Time works changes and brings into existence new conditions. Subtler and far reaching means of invadings privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individuals. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

24. Any right to privacy must encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of that distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

25. Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against government" a phrase coined by Professor Corwin express this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.

26. As Ely says: "There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case" see "The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920.

27. There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might he engaging in such activities and that such 'harm' is not Constitutionally protective by the state. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on

the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures see 26 Standford Law Rev. 1161 at 1187.

28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

48. The issues of bodily integrity and the right to sexual choices have been dealt with by this Court in Suchita Srivastava and Anr. v. Chandigarh Administration (2009) 9 SCC 1, in context of Section 3 of the Medical Termination of Pregnancy Act, 1971, observed:

"11. A plain reading of the above-quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions

specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."

49. In Mr. X v. Hospital Z (1998) 8 SCC 296, this court observed:

"25. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

26. Right of Privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. As already discussed above, Doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore. Doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the Right of Privacy which may sometimes lead to the clash of person's "right to be let alone" with another person's right to be informed.

27. Disclosure of even true private facts has the tendency to disturb a person's tranquility. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the Right of Privacy is an essential component of right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

28. Having regard to the fact that the appellant was found to be HIV(+), its disclosure would not be violative of either the rule of confidentiality or the appellant's Right of Privacy as Ms. Akali with whom the appellant was likely to be married was saved in time by such disclosure, or else, she too would have been infected with the dreadful disease if marriage had taken place and consummated."

50. The right to live with dignity has been recognized as a part of Article 21 and the matter has been dealt with in Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors. (1981) 1 SCC 608 wherein the Court observed:

> "8. But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. 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 one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. 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. Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21."

51. Respondent No.1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section. It might be a relevant factor for the Legislature to consider while

judging the desirability of amending Section 377 IPC. The law in this regard has been discussed and clarified succinctly in Sushil Kumar Sharma v. Union of India and Ors. (2005) 6 SCC 281 as follows:

> "11. It is well settled that mere possibility of abuse of a provision of law does not per se invalidate a legislation. It must be presumed, unless contrary is proved, that administration and application of a particular law would be done "not with an evil eye and unequal hand" (see: A. Thangal Kunju Musaliar v. M. Venkatachalam Potti, Authorised Official and Income-Tax Officer and Anr.) : [1956]29ITR349(SC) .
>
> 12. In Budhan Choudhry and Ors. v. State of Bihar : 1955CriLJ374 a contention was raised that a provision of law may not be discriminatory but it may land itself to abuse bringing about discrimination between the persons similarly situated. This court repelled the contention holding that on the possibility of abuse of a provision by the authority, the legislation may not be held arbitrary or discriminatory and violative of Article 14 of the Constitution.
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> 13. From the decided cases in India as well as in United States of America, the principle appears to be well settled that if a statutory provision is otherwise intra-vires, constitutional and valid, mere possibility of abuse of power in a given case would not make it objectionable, ultra-vires or unconstitutional. In such cases, "action" and not the "section" may be vulnerable. If it is so, the court by upholding the provision of law, may still set aside the action, order or decision and grant appropriate relief to the person aggrieved.
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> 14. In Mafatlal Industries Ltd. and Ors. v. Union of India and Ors. : 1997(89)ELT247(SC) , a Bench of 9 Judges observed that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding a provision procedurally or substantively unreasonable. In Collector of Customs v. Nathella Sampathu Chetty : 1983ECR2198D(SC) this Court observed:
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> "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity." It was said in State of Rajasthan v. Union of India : [1978]1SCR1 "it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time

> incapable of mischief." (Also see: Commissioner, H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Meth : [1954]1SCR1005 .
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> 15. As observed in Maulavi Hussein Haji Abraham Umarji v. State of Gujarat MANU/SC/0567/2004 : 2004CriLJ3860 . Unique Butle Tube Industries (P) Ltd. v. U.P. Financial Corporation and Ors. : [2002]SUPP5SCR666 and Padma Sundara Rao (dead) and Ors. v. State of Tamil and Ors. [2002]255ITR147(SC) , while interpreting a provision, the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary."

52. In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature. This view was expressed as early as in 1973 in Jagmohan Singh v. State of U.P. (1973) 1 SCC 20. In that case, a Constitutional Bench considered the legality of the death sentence imposed by the Sessions Judge, Shahjahanpur, which was confirmed by the Allahabad High Court. One of the arguments raised by the counsel for the appellant was that capital punishment has been abolished in U.S. on the ground of violation of the 8th Amendment. While considering that argument, this Court observed:

> "13. Reference was made by Mr Garg to several studies made by Western scholars to show the ineffectiveness of capital punishment either as a detterent or as appropriate retribution. There is large volume of evidence compiled in the West by kindly social reformers

and research workers to confound those who want to retain the capital punishment. The controversy is not yet ended and experiments are made by suspending the death sentence where possible in order to see its effect. On the other hand most of these studies suffer from one grave defect namely that they consider all murders as stereotypes, the result of sudden passion or the like, disregarding motivation in each individual case. A large number of murders is undoubtedly of the common type. But some at least are diabolical in conception and cruel in execution. In some others where the victim is a person of high standing in the country society is liable to be rocked to its very foundation. Such murders cannot be simply wished away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval by the society.

14. We have grave doubts about the expediency of transplanting Western experience in our country. Social conditions are different and so also the general intellectual level. In the context of our Criminal Law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty. We have not been referred to any large-scale studies of crime statistics compiled in this country with the object of estimating the need of protection of the society against murders. The only authoritative study is that of the Law Commission of India published in 1967. It is its Thirty-fifth Report. After collecting as much available material as possible and assessing the views expressed in the West both by abolitionists and the retentionists the Law Commission has come to its conclusion at paras 262 to 264. These paragraphs are summarized by the Commission as follows at p. 354 of the Report:

"The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind.

It is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition. Nor does the Commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment, and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

Arguments which would be valid in respect of one area of the world may not hold good in respect of another area, in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts.

On a consideration of all the issues involved, the Commission is of the opinion, that capital punishment should be retained in the present state of the country."

The Court also referred to an earlier judgment in State of Madras v. V.G. Row 1952 SCR 597. In that case, Patanjali Sastri, CJ. observed:

"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 to 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". The responsibility of Judges in that respect is the greater, since the question as to whether capital sentence for murder is appropriate in modern times has raised serious controversy the world over, sometimes, with emotional overtones. It is, therefore, essential that we approach this constitutional question with objectivity and proper measure of self-restraint."

53. The afore-stated judgment was relied upon in Surendra Pal v. Saraswati Arora (1974) 2 SCC 600. Learned counsel who appeared for the appellant in that case relied upon a passage from Halsbury's Laws of England on the issue of presumption of undue influence in the case of parties engaged to be married. While refusing to rely upon the proposition laid down in Halsbury's laws of England, this Court observed:

> "The family law in England has undergone a drastic change, recognised new social relationship between man and woman. In our country, however, even today a marriage is an arranged affair. We do not say that there are no exceptions to this practice or that there is no tendency, however imperceptible, for young persons to choose their own spouses, but even in such cases the consent of their parents is one of the desiderata which is sought for. Whether it is obtained in any given set of circumstances is another matter. In such arranged marriages in this country the question of two persons being engaged for any appreciable time to enable each other to meet and be in a position to exercise undue influence on one another very rarely arises. Even in the case of the marriage in the instant case, an advertisement was resorted to by Bhim Sain. The person who purports to reply is Saraswati's mother and the person who replied to her was Bhim Sain's Personal Assistant. But the social considerations prevailing in this country and ethos even in such cases persist in determining the respective attitudes. That apart, as we said earlier, the negotiations for marriage held in Saraswati's sister's house have all the appearance of a business transaction. In these circumstances that portion of the statement of the law in Halsbury which refers to the presumption of the exercise of undue influence in the case of a man to a woman to whom he is engaged to be married would hardly be applicable to conditions in this country. We have had occasion to point out the danger of such statements of law enunciated and propounded for meeting the conditions existing in the countries in which they are applicable from being blindly followed in this country without a critical examination of those principles and their applicability to the conditions, social norms and attitudes existing in this country. Often statements of law applicable to foreign countries as stated in compilations and learned treatises are cited without making a critical examination of those principles

> in the background of the conditions that existed or exist in those countries. If we are not wakeful and circumspect, there is every likelihood of their being simply applied to cases requiring our adjudication without consideration of the background and various other conditions to which we have referred. On several occasions merely because courts in foreign countries have taken a different view than that taken by our courts or in adjudicating on any particular matter we were asked to reconsider those decisions or to consider them for the first time and to adopt them as the law of this country.
>
> No doubt an objective and rational deduction of a principle, if it emerges from a decision of foreign country, rendered on pari materia legislative provisions and which can be applicable to the conditions prevailing in this country will assist the Court in arriving at a proper conclusion. While we should seek light from whatever source we can get, we should however guard against being blinded by it."

54. In view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable.

55. The appeals are accordingly allowed, the impugned order is set aside and the writ petition filed by respondent No.1 is dismissed.

56. While parting with the case, we would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of

deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.

.....J.
(G.S. SINGHVI)

.....J.
(SUDHANSU JYOTI MUKHOPADHAYA)

New Delhi
December 11, 2013