

**IN THE SUPREME COURT OF INDIA**

**(CRIMINAL ORIGINAL JURISDICTION)**

**WRIT PETITION (CRIMINAL) NO. \_\_\_\_ OF 2018**

**(Under Article 32 of Constitution of India)**

**IN THE MATTER OF:**

Arif Jafar,

Of Lucknow Indian Resident

Age: 47 years,

...Petitioner

Versus

1. Union of India,

Through the Secretary,

Ministry of Law & Justice,

Shastri Bhawan,

New Delhi 110001

2. Union of India

Through the Secretary.

Ministry of Home Affairs,

North Block,

New Delhi 110001

3. Union of India

Through the Secretary

Ministry of Health

Nirman Bhawan

New Delhi 110001

...Respondents

**IN THE MATTER OF:**

**INFRINGEMENT OF FUNDAMENTAL RIGHTS  
GUARANTEED UNDER ARTICLES 14, 15, 19 AND 21 OF  
THE CONSTITUTION OF INDIA**

**AND**

**IN THE MATTER OF:**

**SECTION 377 (UNNATURAL OFFENCE) OF THE INDIAN PENAL  
CODE, 1860**

**AND**

**IN THE MATTER OF:**

**PETITION UNDER ARTICLE 32 OF THE CONSTITUTION**

**OF INDIA SEEKING A DECLARATION THAT SECTION 377**

**(UNNATURAL OFFENCE) OF THE INDIAN PENAL**

**CODE, 1860 IS UNCONSTITUTIONAL IN AS MUCH AS IT  
CRIMINALISES ADULT CONSENSEUAL SEXUAL RELATIONS  
AMONGST NON-HETEROSEXUAL PERSONS**

**TO,**

**THE HONOURABLE CHIEF JUSTICE OF INDIA,**

**AND HIS OTHER COMPANION JUDGES,**

**OF THE HON'BLE SUPREME COURT OF INDIA.**

**THE HUMBLE PETITION OF**

**THE PETITIONERS ABOVENAMED**

**MOST RESPECTFULLY SHOWETH:**

1. That the Petitioner before this Hon'ble Court is a gay man and a citizen of India. He has suffered arrest, detention and prosecution on account of his sexual orientation and has experienced first-hand the violation of his fundamental rights and freedoms guaranteed under Part III of the Constitution of India on account of section 377 of the Indian Penal Code, 1860 (hereinafter "IPC"). Vide its order dated 08.01.2018 in W.P (CRL.) No. 76 of 2016, this Hon'ble Court has directed that the constitutional validity of section 377 be examined by a constitution-bench of this Hon'ble Court. That vide the said order, this Hon'ble Court has also agreed to test the correctness of its decision in *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors* (2014) 1 SCC 1, wherein section 377 was held to be constitutional. Being personally and directly aggrieved by section 377, IPC, the Petitioner has no other efficacious remedy but to approach this Hon'ble Court by way of the present petition under Article 32 of the Constitution to challenge the Constitutional validity of Section 377 IPC.
2. That the present Writ Petition, raises the following important questions of law of public interest for the consideration of this Hon'ble Court:-
  - a. Whether section 377 that criminalizes 'voluntary carnal intercourse against the order of nature', does not violate the fundamental right to privacy?
  - b. Whether section 377 that criminalizes intimate expression between consenting adults does not violate the fundamental right to privacy, dignity and autonomy under the Constitution of India?
  - c. Whether section 377 that criminalizes persons on the basis of their sexual orientation and identity, does not violate fundamental right to equality and non-discrimination under Articles 14, 15, read with Articles 19 and 21 of the Constitution?
  - d. Whether section 377, which neither defines nor explains what constitutes 'carnal intercourse against the order of nature' is not arbitrary and violative of Articles 14 and 21 of the Constitution?
  - e. Whether section 377 that impairs autonomy and expression in one of the most personal decisions of an individual's life, i.e. the choice of one's partner and intimate association is not violative of Articles 19 and 21 of the Constitution?

**ARRAY OF PARTIES:**

3. The Petitioner is an ordinary Indian citizen, born and brought up in Lucknow, Uttar Pradesh. The Petitioner has an academic background in Science and in Sociology. He holds M.A, M.Sc. M.Ed. and M.Phil. degrees. The Petitioner has been aware of his sexual orientation, i.e. that he is gay and attracted to persons of the same sex since his teenage years. Initially reluctant, the Petitioner's family, especially his mother and father, came to accept and embrace him just the way he is. The Petitioner has always been self-assured and confident and never thought of himself as being 'abnormal' or 'lesser' than anyone else.
4. The Respondent is the Union of India and is sued through the Ministry of Home, Law and Justice and Health.

#### **Brief Facts of the Petitioner**

5. That in 1992 - at the age of 17, the Petitioner started an informal support group by the name - 'Friends India' for Lesbian, Gay, Bisexual and Transgender ("LGBT") persons in Lucknow. In 1997, the Petitioner set up 'Bharosa' Trust - a community based organization providing information, counseling, outreach and peer support for homosexual and transgender persons, of which sexual health services became a substantial part, after an increasing number of visitors to the Bharosa Trust, i.e. persons who were gay or transgender started reporting symptoms of sexually transmitted infections including HIV.
6. That on 6<sup>th</sup> July 2001, the office premises of Bharosa Trust in Lucknow were raided by the Police, who seized literature on gender, sexuality and safe-sex and condoms as "*evidence*" of running a "*gay sex racket*".
7. That on 8<sup>th</sup> July 2001, the Petitioner and his four colleagues, who were involved in outreach and distribution of condoms among men having sex with men were humiliated and beaten up in public before being arrested by the police under section 109 (punishment of abetment), section 120B (criminal conspiracy), section 292 (sale etc. of obscene books etc.) and section 377 (unnatural offence) of the IPC.
8. That the Petitioner and his colleagues were denied bail by the Sessions Court. Scandalous media-reports and hysteria surrounding the allegations of "*conspiracy to promote homosexuality*" and "*a group of men indulging in these activities...(is) polluting the entire society by encouraging young persons and abetting them to committing the offence of sodomy*" ensured that the Petitioner remained in custody for over a month.
9. That the Petitioner was detained in the jail in inhuman conditions, which nearly broke him down as human being. The Petitioner and his colleagues were granted bail by the Lucknow bench of the High Court of Allahabad after spending 47 days in judicial custody.

10. That though the Petitioner was released from jail on the order of the Hon'ble High Court granting bail. Eighteen years after the incident, he is still chained by the memories of his arrest, detention and treatment in prison, which dehumanized him, violating the integrity of his mind, body and soul.
11. That the Petitioner's experience is best described in his own words, which appeared as an article in the Hindustan Times (online edition) dated 07 February, 2018: -

***“Let's talk about 377 | Police revulsion for a gay man put me in 'hellhole' jail: Arif Jafar***

*“Saala angrezi cho\*\*\* hai” (Bloody \*\*\* is sleeping with the British).”*

*“The inspector screamed at me as he slapped me again and again inside the lock up. The date and time is still etched in my mind — 2am on July 8, 2001. I was abused, tortured and humiliated for 24 hours — and made to feel less than human — only because of an archaic law that decided I was a criminal in my own country.*

*The horror had begun a day earlier. Around 5am, a panic call from my mother had jolted me awake. Shahid, a worker from my organisation, had been arrested while doing his job — distributing condoms among MSM (men who have sex with men) population in Lucknow's Charbagh area. He had been dragged to the police station and hadn't been heard of since.*

*I was confident it was a mix-up. After all, I had been working with the Lesbian, Gay, Bisexual and Transgender (LGBT) population for a decade and knew state and national-level authorities. I called up senior bureaucrats and police officials and was promptly assured it would be sorted. I rushed to the police station to get Shahid back.*

*Unknown to us, a plan to arrest and humiliate us was already afoot. As I waited in the station, the police raided our offices, ransacked the premises and seized what they thought was damning evidence of our 'perversion' — literature on gender, sexuality and safe sex, stacks of condoms and a couple of dildos we used for demonstration.*

*We were raided around 4pm on a Saturday. By evening, the channels were splashing bulletins of a “Gay Sex Racket” and discussing theories of how I had taken funding from Pakistan to make all Indian men homosexual.*

*But that was just the beginning of the nightmare. Within hours, three of my colleagues and I were arrested and beaten up in public at the Hazratganj traffic circle. I think the revulsion for a gay man was so acute that they wanted to hurt our reputation and ensure we could never show our faces in public again.*

*When we were produced in court the next day, we learnt that we had been charged under section 110 (abetment to a crime), 120B (criminal conspiracy), and section 377 (unnatural offences) of the Indian Penal Code. The police told the court that they had found us guilty of a conspiracy to promote homosexuality, as if perfectly normal sexual behaviour could ever be ‘promoted’.*

*But the pervasive homophobia and stigma surrounding gay sex ensured no one questioned the police, and instead looked at us as if we were animals, undeserving of even the most basic human rights accorded to every Indian citizen. We were thrown in jail with the then police chief declaring, “Even if I have no proof against them, I will ensure they rot in jail.”*

*Our horrors were just beginning.*

*Many prisoners had already heard of us. We were beaten up almost every day, and abused — Saaley Gandu aaye hain, mazey se \*\*\*. (“Bloody homosexuals have come, we can take advantage of them.”). We were beaten up and the jailor would often menacingly threaten to “take remand” of all of us with a wicked smile. What that meant anyone can imagine.*

*The media reported that we took Rs 70 lakh for supplying boys to ministers and bureaucrats, and many of the burlier prisoners beat us up when we couldn’t show the stash. My colleague still has a damaged tailbone because of the torture.*

*The psychological violence also broke me. We were forced to use putrid drain water for cleaning our utensils. Our dirty food bowls were mossy, which could only be cleaned with the drain water. It was clear that they wanted to hit us where it hurt the most — our sanity and self-respect.*

*But even in hell, there was a sliver of light. Some prisoners saw that we were crumbling and offered support. We were moved to another barrack, where two prisoners gave me fresh clothes of their own, arranged for some warm water and a haircut. I used to offer Namaz five times a day, and this forged a bond with some of the other inmates, who were convinced that we were innocent.*

*On day eleven, when the constables came to beat us up, these prisoners and their friends ring-fenced us and threatened the policemen, who backed off. I can never forget their magnanimity.*

*Still, our fortunes were far from turning around. I used to have severe kidney pain, but the officials offered no help or treatment. The poor hygiene of the jail made me lose most of my teeth — now I make do with artificial ones. We were frequently ill and infected with diseases. Our bail request was turned down repeatedly on the grounds that we were a curse to society.*

*Finally, on Day 47, we stepped out of that hellhole.*

*But the nightmare hasn't ended for me. I am 47 years old now and for the last 18 years, the case has dragged on and poisoned my life. I have to go to court every couple of months. I live in fear and consternation. Only because, as a gay man, I cannot seem to enjoy the same rights my fellow Indians take for granted.*

*It took me almost a decade to come out of the trauma the jail inflicted. An archaic law that is the remnant of a regressive colonial practice was used to strip me of dignity and abuse me, only to serve the homophobic hatred of some people in positions of power.*

*Thankfully, my mother and family were supportive of my case, my sexuality. They understood that there is nothing wrong in falling in love with a man and wanting to live with him. They understood that there is nothing unnatural in being gay. That section 377 is a retrograde law that is designed to make us second-class citizens and criminals for no fault of ours. That I committed no crime in being gay.*

*I am now in a loving relationship with a man I deeply care for. We have been together for almost a decade. But the trauma of Section 377 continues to hang over my head. The humiliation never leaves you — I have to keep explaining to people that I did nothing wrong, that I am just as “normal” as everyone else.*

*But that jail stint left me stronger and more determined to carry out our work against Section 377 and build it into a nationwide movement. I now know that we have to stand up for our own rights as Lesbian, Gay, Bisexual and Transgender people. I know that section 377 has no right to impose social morality on our community, force it into the shadows — into shameful marriages, extortion, humiliation and even suicide.*

*With the Supreme Court deciding to hear the petition against the abominable law afresh, I am hopeful that a new generation of LGBT people will never face the trauma and shame I faced. It is time we start talking about a law that criminalizes our lives and makes us less than human. It is time to talk about Section 377.”*

*(Arif Jafar is an LGBT activist and has worked for the community for 30 years)”*

12. That aforesaid incident constituted a serious invasion of the Petitioner’s privacy, dignity and liberty solely on account of his sexual orientation and how it is viewed under the law of the land, namely, section 377, IPC.
13. That for the first time in his life, the Petitioner was made to feel ashamed of himself and his identity as a gay man. Though he had done no wrong, the Petitioner was treated as the most contemptible criminal, whose very existence was a ‘threat’ and ‘curse’ to society.
14. That though previously the Petitioner’s extended family did not raise any issue about his sexual orientation, after the Petitioner’s arrest and detention, they frowned upon his sexuality and reproached his parents for failing to correct his ‘deviant’ ways, which are also disapproved in law.
15. That the derision and humiliation that the Petitioner was subjected to would not have happened but for the existence of section 377 of the IPC, which criminalizes LGBT persons. It was the unconditional love of his family and friends that enabled the Petitioner to fight back feelings of guilt and fear and hold his head high once again. But for this support, the Petitioner could well have been a shattered man throughout his life, with the law condemning his very being and personhood.
16. That the Petitioner has always felt the need to reach out to peers, who find themselves isolated, without any understanding, acceptance or social support. That is why he set up support groups like ‘Friends India’ and the ‘Bharosa Trust’ in Lucknow. But in light of the criminality attached to LGBT persons, peer-support was seen in the public eye as a ‘gay sex racket’ or ‘attempt to promote homosexuality’ and in law as a ‘conspiracy’ to commit ‘unnatural offences’ [“gay sex”] under section 377, IPC.

17. That the incident of the Petitioner's arrest and detention in July 2001 sent shock waves among the LGBT community, instilling fear and deep anxiety. The use of section 377 and other ancillary provisions of the IPC to raid a peer-support programme and arrest volunteers also had a chilling effect on similar interventions including those run with the support of the government to prevent and control HIV among men having sex with men.
18. That the Petitioner's case has been widely written and talked about in India and abroad in the context of health, human rights and anti-sodomy laws. It would not be an exaggeration to say that no conversation around section 377, IPC and its impact on the lives of LGBT persons is complete without a reference to the Petitioner's case and the ineffable suffering that he and his colleagues endured on account of this dehumanizing law.
19. That the Petitioner presently lives with his partner in Lucknow, with who he has been in a committed relationship. While his family and friends are supportive of his decision, the State shows utter contempt and disregard towards his choice of partner in the guise of section 377, IPC, even though it is not the State's concern. Relying on the legal disapproval of same-sex love and relationships, society compels gay men and women to marry persons of the opposite sex, against their will.
20. In an order dated 30.6.2015 in Tr.C.M.P.Nos. 299 & 26 of 2015, which was passed in relation to divorce proceedings, where one of the parties to the marriage was gay, the Hon'ble High Court of Madras questioned whether the criminalization of same-sex relations under section 377 and the non-recognition of sexual orientation of LGBT persons does not constitute a violation of the right to privacy and a dignified life under Article 21 of the Constitution. This gave the Petitioner a glimmer of hope.
21. That the perception that section 377, IPC covers acts and not a class of persons based on identity, heterosexual or homosexual, is not correct. After the enactment of the Criminal Law (Amendment) Act, 2013, section 375 of the IPC makes non penile-vaginal sex between a man and woman punishable only if the sexual act, which *inter-alia* includes '*penetration by the penis, to any extent, into the vagina, mouth, urethra or anus of a woman*' is carried out against the woman's will or her consent, which is defined as: - "*an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:*" Consequently, a 'man' and a 'woman' can engage in penile-oral and penile-anal sex consensually, without attracting punitive consequences under the IPC. However, if the same sexual acts are engaged in by a 'man' with another 'man' or for that

matter, a transgender persons, consensually, they will attract penal consequences under section 377, IPC. Thus, section 377 is palpably discriminatory towards homosexual persons like the Petitioner, as also transgender persons.

22. That the hostility and animus that the Petitioner faced on account of his sexual orientation cannot be countenanced under the Constitution of India, which is founded on the values of liberty, dignity, equality and fraternity and protects fundamental rights of all citizens - whether gay or heterosexual.
23. That the Petitioner further found the confidence to approach this Hon'ble Court from a nine-judge bench decision in *Justice K.S Puttuswamy (Retd.) and anr v Union of India and ors* (2017) 10 SCC 1, wherein this Hon'ble Court accorded constitutional protection to one's sexual orientation and intimacy under the fundamental right to privacy and virtually declared its decision in *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors* (2014) 1 SCC 1, wherein a 2-judge bench had upheld section 377 IPC, incorrect.
24. That the Petitioner's sole motivation in approaching this Hon'ble Court is his wish that no other person should suffer what he had to suffer on account of a discriminatory law i.e. section 377, IPC and that fellow LGBT citizens can live with the freedom, dignity and respect that they are entitled to, under the Constitution of India.
25. The Petitioners have not filed any other petition either before this Hon'ble Court or any other High Court challenging the constitutional validity of Section 377 IPC.
26. The present Petition is filed *bona fide* and in the interests of justice.
27. That in view of the above, the Petitioner approaches this Honb'le Court on the following, amongst other grounds, which are not prejudice to one another: -

### **GROUND**

- A. Because section 377 of the Indian Penal Code, 1860 (hereinafter "IPC") is in violation of Articles 14, 15, 19 and 21 of the Constitution of India.
- B. Because a person's sexual orientation is their private concern and not the concern of the State or the police. Section 377, IPC and its use by law enforcement agencies constitutes a gross violation of the Petitioner's right to equality, non-discrimination, freedom of expression and association, privacy, dignity and liberty enshrined in Articles 14, 15, 19 and 21 of the Constitution of India.

### **Right to privacy**

- C. Because section 377, IPC is *ultra vires* the Constitution in light of the 9-judge bench decision of this Hon'ble Court in *Justice K.S Puttuswamy (Retd.) and anr v Union of India and ors*, (2017) 10 SCC 1, (hereinafter "Puttuswamy"), wherein

this Hon'ble Court unequivocally held that: -*“The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.”*

- D. Because section 377 IPC criminalizes one of the most innate, personal and inviolable aspects of one's personality, i.e. their sexual orientation, which according to this Hon'ble Court in *Puttuswamy* is “...an essential attribute of privacy”
- E Because in *Puttuswamy*, this Hon'ble Court unequivocally held that: - *“Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.”*
- F. Because protection of one's personal relations and sexual intimacies lies at the heart of the right to privacy. The way in which one gives expression to one's sexuality is at the core of 'personal privacy' and is protected from arbitrary interference under the Constitution.
- G. Because by intruding in the most private aspects of a person's life, section 377, IPC constitutes an unwarranted invasion of personal privacy, which the Constitution does not permit.

#### **No legitimate aim**

- H. Because section 377 IPC violates the fundamental right to privacy and does not meet the three-fold requirements laid down by this Hon'ble Court in *Puttuswamy*, which may justify restraints on privacy. In particular, section 377 IPC fails to meet the second requirement, which is that of a valid law that serves a 'legitimate aim', or, in other words, a law that is not manifestly arbitrary. The only avowed objective of section 377 IPC is to prohibit sexual activity that is *“against the order of nature”* – which, is *ex facie* arbitrary. In delineating an offence, section 377, IPC does not distinguish between consensual and non-consensual sex as is evident from the expression: *“whoever, voluntarily has carnal intercourse....”* or whether the parties are adults or minor. It lays down a blanket prohibition on all sexual expression (other than penile-vaginal intercourse) - which cannot be a legitimate object for the State and its criminal justice machinery to pursue.
- I. Because arresting and prosecuting consenting adults for their intimate actions, when no one is harmed or aggrieved, or even affected, cannot be considered a legitimate state action or fair, just and reasonable law within the meaning of Article 21 of the Constitution. [See *Dudgeon v. United Kingdom*, [1981] ECHR 5 (22 October 1981); *Norris v. Ireland*, [1988] ECHR 22 (26 October 1988)]

- J. Because the legitimacy, if any, attached to section 377 has substantially diminished after the enactment of the Protection of Children against Sexual offences Act, 2012 (“POCSO”) and the amended section 375 and 376 of the IPC, which proscribe non-consensual penile-non vaginal sex between an adult and a child as well as between a man and a woman, respectively. The only legitimate purpose that section 377 currently serves is to criminalize non-consensual sex between a man and another man and a transgender person, which too, must be addressed through substantive law(s) on rape/sexual assault and not in vague and arbitrary terms contained in section 377, IPC. As is evident from the language/text of the law and its interpretation, the inquiry under section 377 is not on whether the sexual act was consensual, but on whether it was [within] or “*against the order of nature*”. This can hardly be set to accord protection to a victim of rape/sexual assault.
- K. Because enforcing social morality or public opinion cannot be the province of law in a constitutional democracy, where the protection of fundamental rights and constitutional morality are paramount.

#### **Right to dignity and autonomy**

- L. Because every person has the fundamental right to be treated with dignity, with full respect for the humanity and potential that inheres in them. Sexual orientation and identity cannot be the basis of denying a person their inherent dignity, which the Constitution of India resolutely protects.
- M. Because section 377, IPC violates the right to dignity, which is inalienable and lies at the heart of fundamental rights guaranteed to the individual under Part III of the Constitution. By treating their intimate expression as a criminal offence, section 377 conveys that homosexual persons are unworthy and undeserving of respect and ‘lesser’ than other members of society, which cannot be countenanced under the Constitution.
- N. Because the persistent fear of prosecution under section 377, IPC, forbids LGBT persons from living their lives in a way that is true to themselves. By condemning certain expressions of human intimacy as ‘unnatural’, section 377 imposes a singular and rigid hetero-normativity in human relations, denying the existence and realization of any other sexual orientation or gender identity. This in contravention of an individual’s *right to be different and to stand against the tide of conformity*, which this Hon’ble Court recognized in *Puttuswamy*.
- O. Because section 377 takes away autonomy and censures personal decisions and life choices of LGBT persons, in contravention of the right to life and liberty guaranteed under Article 21. In *Puttuswamy*, this Hon’ble Court held that: - “*The*

*duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. ‘Life’ within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one’s being in its fullest sense. That which facilitates the fulfillment of life is as much within the protection of the guarantee of life.”*

**Right to personal decisions including the determination of choice of one’s partner**

- P. Because section 377, IPC restricts individuality and expression in the most personal realm, i.e. a person’s sexuality and choice of partner, in contravention of Article 21 of the Constitution.
- Q. Because section 377 IPC is contrary to this Hon’ble Court’s recent decision in *Shafin Jahan v Asokan K.M & ors*, Criminal Appeal No. 366 of 2018, dt. 9<sup>th</sup> April 2018 (hereinafter “*Shafin Jahan*”) wherein this Hon’ble Court held:- “*The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity.*”
- R. Because section 377, IPC prevents LGBT persons from exercising their autonomy and choice in one of the most important areas of life, i.e. determining one’s intimate partner, even though such decisions are constitutionally protected under Article 21. In *Shafin Jahan*, this Hon’ble Court held: - “*Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution.*” .... “*Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognizing them. Indeed, the Constitution protects personal liberty from disapproving audiences.*”
- S. Because in *Shafin Jahan*, this Hon’ble Court upheld the fundamental right to determine the “*choice of one’s intimate partner, within or outside marriage*”, which section 377 specifically and directly violates.
- T. Because section 377, IPC forbids LGBT persons from forming intimate relationships or romantic associations with a partner of their choice, in contravention of the freedoms guaranteed under Articles 19(1)(a) and (c) of the Constitution.
- U. Because the criminality attached to homosexuality on account of section 377, IPC prevents LGBT persons from organizing and forming community/peer groups for the empowerment of their members, in violation of Articles 19(1)(a) and (c) of the Constitution.

### **Right to health**

- V. Because section 377, IPC frustrates the realization of the right to health, which is guaranteed under Article 21 of the Constitution read with Article 12 of the International Covenant on Economic, Social and Cultural Rights.
- W. Because the right to health guarantees certain: - i) freedoms, i.e. the right to control one's own health and body including sexual and reproductive and, ii) entitlements, in particular, the entitlement to a system of health protection, to goods, services and health facilities, which must be available and accessible to all, especially the most vulnerable and marginalized sections, without discrimination, including condoms for safe sex.
- X. Because the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, who, while examining the impact of criminal laws against adult sexual conduct and sexual orientation on the right to health, observed that:- "*Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights, including the right to health. These laws are generally inherently discriminatory and, as such, breach the requirements of a right-to-health approach, which requires equality in access for all people. The health related impact of discrimination based on sexual conduct and orientation is far-reaching, and prevents affected individuals from gaining access to other economic, social and cultural rights.*" [See Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, A/HRC/14/20, dated 27th April 2010 at para 6.]

### **Discrimination on the basis of sexual orientation**

- Y. Because in *National Legal Services Authority v Union of India* 2014 (5) SCC 438 (hereinafter "*NALSA*"), this Hon'ble Court held that: - "*discrimination on the ground of sexual orientation and gender identity, therefore impairs equality before law and equal protection of law and equal protection of law and violates Article 14 of the Constitution of India.*"
- Z. Because by criminalizing sexual intimacy between gay men, section 377 denies them the opportunity to participate in a profound and fundamental aspect of human experience. The effect is that homosexual persons either deny themselves a basic human experience to avoid committing a "crime" or otherwise risk prosecution under section 377. Adult, consenting heterosexual persons do not face such constraints under the law, which is discriminatory towards LGBT persons.

- AA. Because section 377, IPC *per se* as well as read with section 375 of the IPC (as amended by the Criminal Law (Amendment) Act, 2013 w.e.f. 3.2.2013) discriminates against similarly situated persons, on the basis of their sexual orientation, in contravention of Articles 14 and 15 of the Constitution.
- AB. On the face of it, section 377 prohibits sexual acts that are ‘*against the order of nature*’, which has been understood to mean ‘penile-anal’ and ‘penile-oral’ sex between a man and another man as also between a man and a woman, irrespective of consent. Yet, prosecution of consenting, heterosexual adults under section 377 is rare and the law has been associated with the prohibition of same-sex conduct, making it discriminatory in its effect and impact.
- AC. Because section 375 and 376 of the IPC, as amended by the Criminal Law (Amendment) Act, 2013, expressly recognize ‘consent’ or rather the lack of it, as the basis of outlawing sexual acts between a man and a woman [heterosexual persons]. In other words, penile-oral, penile-anal and a host of other sexual acts between heterosexual persons are unlawful *only* if they are engaged in against woman’s will or without her consent, which is expressly defined in the law. In contrast, the same activities, when practiced by adult males invite punishment under section 377, IPC even when there is consent. This is patently discriminatory and violative of Articles 14 and 15 of the Constitution.
- AD. Because the amended section 375 and 376, IPC was in force when the judgment in *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors* (2014) 1 SCC 1 (hereinafter “*Koushal*”) was pronounced by this Hon’ble Court i.e. 11.12.2013. Its effect however, was not noticed by this Hon’ble Court when it held that section 377; IPC does not criminalize any particular identity or sexual orientation and therefore, does not discriminate against homosexual persons as a class. Having been given in ignorance of the terms of a statute in force, the decision in *Koushal* is *per incuriam*.
- AE. That without prejudice to the above, the decision in *Koushal* has been held to be in error by this Hon’ble Court in *Puttuswamy* in terms of the manner in which it treated claims of violation of fundamental rights of LGBT persons by the Respondents in the case.

### **Vague and arbitrary**

- AF. Because section 377 IPC does not define or explain what constitutes “*carnal intercourse against the order of nature*”, for which a person may suffer imprisonment upto 10 years or life. Therefore, for consenting non-heterosexual adults, it is unclear which sexual acts or intimate expression could be construed as an offence under the impugned provision. And despite being in existence for over

155 years, legal authorities remain unsure about whether and what offence has been committed under section 377, IPC.

AG. Because it is settled law that what constitutes an offence must be clear and not vague. Ordinary people must know with certainty what conduct is prohibited and what is permitted. Those who administer the law must also know what offence has been committed so that arbitrary and discriminatory enforcement of the law, which is contrary to Article 14, is avoided. (See *Kartar Singh v. State of Punjab* (1994) 3 SCC 569)

AH. Because in its judgment in *Shreya Singhal v Union of India* (2015) 5 SCC 1 (hereinafter “*Shreya Singhal*”), this Hon’ble Court categorically stated that:

*–“where no reasonable standards are laid down to define guilt in a section which creates an offence and where no clear guidance is given to either law-abiding citizens or to authorities and courts, a section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable.”*

AI. Because section 377, IPC is void for vagueness under Article 14 as it fails to define the criminal offence with sufficient definiteness. The expression “*order of nature*” is nebulous; what is natural to one person, may not be to another. A law, which rests on subjective and arbitrary notions of what, is within the order of nature and what is against, must, in light of *Shreya Singhal* be *unconstitutionally vague*.

AJ. Because in *Shayara Bano v Union of India* (2017) 9 SCC 1, a decision of the Constitution–bench of this Hon’ble Court, the majority held that laws that are manifestly arbitrary and patently unjust and unreasonable can be struck down.

### **Chilling effect on exercise of other fundamental rights**

AK. Because section 377, IPC has a chilling effect on the exercise of various fundamental rights and freedoms by LGBT persons and thereby constitutes hostile discrimination against a class of citizens, on the basis of their sexual orientation. In *Puttuswamy*, this Hon’ble Court noticed the deleterious effect of the law in terms of how it: “...poses a grave danger to the unhindered fulfillment of one’s sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime.” Similarly, in *Shafin Jahan*, this Hon’ble Court further observed that: - “*Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms. Others are dissuaded to exercise their liberties for fear of the reprisals, which may result upon the free exercise of choice. The chilling effect on others has a pernicious tendency to prevent them from asserting their liberty. Public spectacles involving a harsh exercise of State power prevent the exercise of freedom, by others in the same*

*milieu. Nothing can be as destructive of freedom and liberty. Fear silences freedom.”*

### **Constitution envisions fraternity, not animus or hostility**

AL. Because the Constitution of India and its various chapters including the Preamble, Fundamental Rights (Part III) and Fundamental Duties (Part IV-A) is infused with humanism, i.e. the spirit to respect and cherish one another as human beings. In the same vein, the Constitution enjoins the State and citizens to show respect for diversity, accepting and valuing people’s differences rather than discriminating against them. In *Subramanian Swamy v. Union of India* (2016) 7 SCC 221 (hereinafter “*Subramanian Swamy*”), this Hon’ble Court proclaimed:- “*Respect for the dignity of another is a constitutional norm. It would not amount to an overstatement if it is said that constitutional fraternity and the intrinsic value inhered in fundamental duty proclaim the constitutional assurance of mutual respect and concern for each others’ dignity.*”

AM. By criminalizing persons on the basis of their sexual orientation, section 377, IPC breeds contempt against LGBT persons and fuels discrimination, contrary to the principles of equality and fraternity enshrined in the Constitution.

### **Incompatible with India’s obligations under international human rights law**

AN. Because section 377, IPC is incompatible with international human rights law, which form a part and parcel of our domestic, constitutional jurisprudence. This Hon’ble Court has long rejected judicial–insularity, in favour of accepting international law comparative jurisprudence especially in adjudicating the nature and content of fundamental rights.

AO. Because Articles 51 (Promotion of International Peace and Security) and Article 253 (Legislation for giving effect to International Agreements) of the Constitution of India require that the development and interpretation of domestic law must be in accordance with changes in international law.

AP. Because in *NALSA*, this Hon’ble Court adverted to international conventions acceded to by India, in particular the UDHR and the ICCPR to fortify the meaning and content of fundamental rights protected by the Constitution.

AQ. Because in *Puttuswamy*, this Hon’ble Court held that: “*In the view of this Court, international law has to be construed as a part of domestic law in the absence of legislation to the contrary, and perhaps more significantly, the meaning of constitutional guarantees must be illuminated by the content to the international conventions, to which India has become a party.*”

- AR. Because the Universal Declaration of Human Rights (“UDHR”) declares that:-  
*“All human beings are born free and equal in dignity and rights”.*
- AS. Because the Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR) 1976 (which India ratified on December 11th, 1977) provides:-  
*“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”*
- AT. Because in *Toonen v. Australia*, the UN Human Rights Committee categorically rejected the contention that the prohibition on homosexuality prevents the spread of HIV/AIDS. Instead, the Committee found that criminalization of homosexuality runs counter to the implementation of effective educational programmes in respect of HIV prevention [See *Toonen v. Australia* [Communication No. 488/1992, decision dated 31/03/1994 at Para 8.5].
- AU. Because in applying international human rights law to the context of LGBT persons, the United Nations High Commissioner on Human Rights observed that: -  
*“All people, including LGBT persons, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly.”* (See Report of the United Nations High Commissioner for Human Rights, A/HRC/19/41, dated 17th November 2011 at Para 5). In a subsequent report submitted to the Human Rights Council, the UN High Commissioner for Human Rights stated: - *“States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination.”* (See Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23, dated 4th May 2015 at Para 43)
- AV. Because in *NALSA*, this Hon’ble Court also alluded to the ‘Yogyakarta Principles’ i.e. a set of principles of international human rights law in relation to sexual orientation and gender identity and did not find them inconsistent with the various fundamental rights guaranteed under the Indian Constitution.
- AW. Because the Yogyakarta Principles require Member States to respect human rights in relation to sexual orientation and gender identity by *inter alia*, removing punitive sanctions for same sex sexual activity and relations.
- AX. THAT the Principle 1(Right to Universal Enjoyment of Human Rights) of Yogyakarta Principles states that *“All human beings are born free and equal in dignity and rights. Human beings of all sexual orientation and gender identities are entitled to the full enjoyment of human rights”*. States are required to embody

principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions and appropriate legislations.

- AY. Because laws criminalizing homosexuality have long been repealed in the United Kingdom, the country from which they were imported into India. Because England and Wales themselves decriminalized sexual relations between consenting, adult males in 1967, on the recommendation of The Wolfenden Committee in 1957 that urged “*homosexual conduct between consenting adults should no longer be a criminal offence...The law’s function is to preserve public order and decency, and to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior...*”.
- AZ. Because Courts in several countries including South Africa, United States of America, Fiji and most recently, Belize have struck down laws similar to section 377 on similar constitutional grounds [See: *National Coalition of Gay and Lesbian Equality and Another v. Minister of Justice and Others*, [1998] ZACC 15; *John Geddes Lawrence and Tyron Garner v. Texas*, 539 US 558 (2003); *Caleb Orozco v. Attorney General of Belize*, Claim No. 668/2010].
- BA. Because in *John Vallamattom v Union of India* (2003) 6 SCC 61,1 this Hon’ble Court held that in determining the constitutional validity of a statute, the Court may consider not only the past history of the legislation concerned but the manner in which the same has been dealt with by the legislature of its origin.
- BB. Because in *Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1, this Hon’ble Court held that: “*A statute could have been held to be a valid piece of legislation keeping in view the social condition of the times it was enacted it, but with changes occurring therein both domestically as also internationally, such a law can also be declared invalid.*”

### PRAYER

In light of the above mentioned facts and circumstances, it is prayed that that this Hon’ble Court may be pleased to:

- ea) Declare that Section 377 of the Indian Penal Code, 1860 to the extent it criminalizes practices between consenting adult non-hetero sexual persons engaging in acts in private is in violation of Articles 14, 15, 19 and 21 of the Constitution;
- eb) For an appropriate writ order or direction prohibiting the Respondents from in manner enforcing the provisions of

Section 377 IPC to consenting adult non-hetero sexual persons  
engaging acts in private;

ec) for costs of this Petition;

ed) For such further and other orders as the circumstances of the  
case may deem fit and necessary in the interests of justice.

Petition drawn by

Ms. Tripti Tandon

Advocate

Petition settled by

Mr. Anand Grover

Senior Advocate

Petition filed by

Advocate