

TEAM CODE - ITMURLAW-1C0218XXXXV

1ST ITM NATIONAL MOOT COURT COMPETITION, 2018

IN THE HON'BLE SUPREME COURT OF LEXTON

AT LEXTON

SPECIAL LEAVE PETITION NO. _____ OF 2018

UNDER ARTICLE 136 OF THE CONSTITUTION OF LEXTON, 1950

IN THE MATTERS OF

ROB.....PETITIONER

v.

THE STATE.....RESPONDENT NO. 1

JOSEPH.....RESPONDENT NO. 2

MEMORANDUM ON BEHALF OF PETITIONER

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LIST OF ABBREVIATION

§	:	Section
AIR	:	All India Reporter
Anr.	:	Another
A.P	:	Andhra Pradesh
Art	:	Article
CrPC	:	Code of Criminal Procedure, 1973
Ch	:	Chapter
Const	:	Constitution of India
Govt.	:	Government
HIV/AIDS	:	Human Immuno Deficiency Virus / Acquired Immuno Deficiency Syndrome
HRGs	:	High-Risk Groups
ICCPR	:	International Covenant on Civil and Political Rights
IPC	:	Indian Penal Code, 1860
LGBT	:	Lesbian Gay Bisexual Transgender
Ltd.	:	Limited
Ors.	:	Others
RI	:	Rigorous Imprisonment
SCC	:	Supreme Court Cases
SC	:	Supreme Court
SLP	:	Special Leave Petition
UDHR	:	Universal Declaration On Human Rights
Vol.	:	Volume
v.	:	Versus
W.B.	:	West Bengal

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STATEMENT OF JURISDICTION

The Hon’ble Supreme Court of Lexton has jurisdiction to hear the instant matter under Article 136 of the Constitution of Lexton.

Article 136 of the Constitution reads as follows:

“136. Special leave to appeal by the Supreme Court-

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.”

STATEMENT OF FACTS

1. In the state of Lexton, whose socio-legal system is similar to that of India aims at protecting right of LGBT group and homosexuals. However, in Lexton LGBT and homosexual rights aren't recognized. The constitution of Lexton guarantees its citizens the right to privacy as their fundamental right.
2. Rob and Dillon works as a legal assistant and marketing manager respectively in V&K Pvt. Ltd. In respect of their designations they used to have constant interaction which attracted both of them towards each other and this resulted in carnal intercourse between them.
3. On communicating about his relation with Rob, Dillon faced severe opposition from his parents and because of their rebellious behaviour and regular heated arguments, he decided to move and start living with Rob and his family.
4. Rob used to reside with his parents and his Uncle Joseph. Rob's mother supported their relationship and respected their relation however; Joseph was against their relationship stating it to be a disgrace upon the society. Rob, being from legal profession was well aware about the LGBT rights and therefore, he denied the outrageous behaviour of his Uncle and continued to live with Dillon. Agitated by Rob's move, Joseph decided to emasculate Rob using dangerous weapon which led to grievous hurt.
5. Against which Rob approached the trial court for penalizing him for grievous hurt and for violating his LGBT rights while, Joseph defended his move of emasculation. The trial court awarded Joseph imprisonment for a term of 7 years and a fine of Rs. 50000 ignoring the unnatural relationship between Rob and Dillon.
6. Rob appealed in the High Court for awarding more stringent punishment to Joseph and for declaring Sec. 377 of Lexton Penal Court unconstitutional. The high court maintained the decision of lower court and rejected to grant the certificate of appeal.
7. Special Leave petition was filed by Rob before the Hon'ble Supreme Court for the same. Now, the case is pending before the court for final disposal.

STATEMENT OF ISSUES

**I. WHETHER § 377 VIOLATES FUNDAMENTAL RIGHTS GUARANTEED BY
THE CONSTITUTION OF THE STATE OF LEXTON?**

II. WHETHER THE LEGAL APPLICATION OF § 377 IS VALID & JUST?

**III. WHETHER AN APPROPRIATE PUNISHMENT HAS BEEN METED OUT TO
THE ACCUSED?**

SUMMARY OF ARGUMENTS**I. THAT § 377 IS UNCONSTITUTIONAL AS IT VIOLATES FUNDAMENTAL RIGHTS GUARANTEED BY THE CONSTITUTION**

Special leave petition filed in present case raises a serious question, whether state should penalize acts done in private places which intricately linked with expression of sexuality and the same has been appreciated by this court by granting appeal to special leave. Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the state is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the state should not be dominant presence. The object of § 377 militates against the basic notions of privacy that somehow sexual activities in private sphere are the interest of state to regulate. *Suresh Kaushal* does not present legal foundations of the state of Lexton. In state of Lexton right to privacy is a fundamental right and *Puttaswamy*' again reaffirmed the sanctity of privacy. Noticeably in same judgement court despised the *Suresh Kaushal*' that viewed LGBT community as *diminimus*. Art. 14 is violated on the grounds that there is no intelligible grounds to differentiate LGBT community neither any rationale to but to keep colonial era penal provision in place. Through § 377 sexual orientation by implicating a sexual orientation which is imputed to Sexual Minorities, thereby it violates Art. 15. Art 21 lays down the due process clause which protects citizens from unjust and unreasonable legal procedure. By penalising an act of sexual orientation many other penumbral rights are violated consequently, including right to dignity, health and comfort. § 377 is not congruous with the prevailing international changes and mores from UN declaration to Yogyakarta principles, decriminalization of homosexuality is demanded and adopted, many common law countries including Britain has decriminalized homosexuality. Lexton as a signatory to UN declaration cannot put its marginalised communities at bay by penalizing them. Therefore its high time that § 377 be held unconstitutional in lines of *NAZ foundation*.

II. THAT THE LEGAL APPLICATION OF § 377 IS INVALID & UNJUST

§ 377 is unjust as much unfair because on the grounds of void for vagueness doctrine, whereby a person must have a notice of a clear penal provision that either warrants or prohibits an act. It is the contention of the petitioner that with multiple judgements of High Court in the state of Lexton has broadened the scope of § 377 which in the colonial era

penalised sodomy, bestiality i.e *unnatural offences* to now it has encompassed oral sex, forcible masturbation in its penal realms. This doctrine has been adopted by Supreme Court in *Kartar Singh case* and later reaffirmed in *Shreya Singhal case*. It means when a penal offence is too vague to be comprehended through common sense it must fail the due process clause. Supreme Court of Florida dealt with one such penal and declared it invalid on this doctrine. Various law commission reports as recent as 172nd report found §377 redundant in light of recent criminal law amendments and new enactments. It is rather excessively punitive in nature and therefore is invalid and unjust.

III. THAT MORE STRINGENT PUNISHMENT MUST BE METED OUT TO JOSEPH (ACCUSED)

In present case Rob suffered the pain of emasculation by the hands of Joseph (accused), who used a dangerous weapon and thereby caused grievous hurt to Rob. It is no brainer that under which section the prosecution could have charged Joseph. It would invariably § 326 IPC, but in this case this fact and its conclusion has been overlooked by both Trial Court and High Court. Fine imposed on Joseph is wholly insufficient to meet the cost of medical treatment. There are ample authorities where court exceeded its relief power by granting a more generous compensation. It is pleaded on behalf of petitioner that there is an injustice that has caused to victim and this Court must correct the course.

BODY OF ARGUMENTS**FACTS OF THE PRESENT CASE CREATES EXIGENCY THAT HAS RIGHTLY BEEN ACCEPTED BY GRANTING APPEAL BY SPECIAL LEAVE**

1. Over and above the Constitutional provisions regulating the Supreme Court's appellate jurisdiction, Art. 136(1) empowers the Supreme Court to grant, in its discretion, special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.¹ Nature of power is defined as "plenary. limitless"² and "on the one hand, it is an exceptional power to be exercised sparingly ,with caution and care and to remedy extraordinary situation or situations occasioning gross failure of justice, on the hand, it is an overriding power where under the court may generously step into impart justice and remedy injustice."³ It is humbly submitted that powers under Article 136 can be exercised against any kind of judgement or order which is causing injustice to any party, and to serve the need, the power under Article 136 is unfettered.⁴

2. The penal provision contended in the case puts millions of Homosexual and other sexual minorities at whims of religious morality which for generations has denied dignity and freedom to them. Victim (Rob) suffered the pain because his sexual orientation is despised by society and backed by a colonial era penal provision, which implicates someone's sexual orientation despite the guaranteed fundamental right to privacy. It is thereby contended that present SLP involves a substantial question of constitutionality of sec 377 and re-examination of injustice occurred to victim.

1 Art. 136 INDIA CONST; *State Bank of India v. S.B.I. Employee' Union of India* AIR 1987 SC 2203.

2 *Esher Singh v. State of A.P* AIR 2004 SC 3030; *A.V. Papayya Sastry v. Govt of Andhra Pradesh* AIR 2007 SC 1546;

3 *Narpat Singh v. Jaipur Development Authority* (2002) 4 SCC 666; *N. Suriyakala v. A. Mohan Doss* (2007) 9 SCC 196; *Mohammad Khalil Chisti v. State of Rajasthan* 2013 Cr LJ 637 (649) (SC); *Sambhu Das v. State of Assam* (2010) 10 SCC 374

4 *Durga Shankar Mehta v. Thakur Raghuraj Singh and Ors.* AIR 1954 SC 520; *Associated;Cement Companies Ltd v. P.N. Sharma* (1965) 2 SCR 366; *Jose Da Costa and Anr. v. Bascora Sadasiva Sinai Narcornim and Ors.* (1976) 2 SCC 917; *Arunachalam v. P.S.R. Sadhanantham and Anr.* (1979) (2) SCC 297; *P.S.R. Sadhanantham v. Arunachalam and Anr.* (1980) 3 SCC 141; *Union Carbide Corporation and Ors. v. Union of India and Ors.* (1991) 4 SCC 584.

I. THAT SECTION 377 OF IPC IS UNCONSTITUTIONAL

1. Special leave petition filed by Rob before the Supreme Court for awarding more **stringent punishment** and declaring § 377 IPC **unconstitutional** under Art. 136. Though there is no presumption of constitutionality of a colonial law. It is contended by the petitioner that judgment of Delhi High Court⁵ be restored [*Suresh Kaushal*⁶ is not a correct precedent as it was not decided in light of *Puttaswamy*⁷ and guaranteed fundamental right to privacy in Lexton] on the following ground. In state of Lexton Right to Privacy is a fundamental right and Sec 377 violates it **[A]**; That Sec 377 violates Art. 14 as it is inherently arbitrary, based on no intelligible differential and reasonable object **[B]**; § 377 discriminates against particular sexual minorities by penalizing ‘only’ particular sexual act **[C]**; that application of § 377 is vague, due process under it not just, reasonable and equitable thus violates Art. 21 **[D]**; Spirit and Ethos of International Covenants & Mores are not congruous with Sec 377 **[E]**.

A. SECTION 377 VIOLATES RIGHT TO PRIVACY GUARANTEED UNDER THE CONSTITUTION OF LEXTON

2. In state of Lexton privacy is a fundamental right⁸ and also recently nine judge bench affirmed the same.⁹ Right to privacy is an integral part of life.¹⁰ “An individual’s right to control his or her personal activities or intimate personal decisions without outside interference, observation, or intrusion”.¹¹ Privacy, or the right to be let alone, is an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests.”¹² One’s right to privacy should not be seen as simply a negative right to occupy a private space free from government intrusion, but as a right to get on with one’s life, one’s personality and make fundamental decisions about intimate relations without penalisation.¹³ The concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole.¹⁴ Invasion of privacy by appropriation, false light, disclosure

5 *Naz Foundation v. Government of NCT of Delhi*, 2010 Cri LJ 94

6 *Suresh Kaushal v. Naz Foundation* (2014) 1 SCC 1

7 *Justice K.S.Puttaswamy (Retd.) & Anr. v Union of India & Ors.* (2017) 10 SCC 1

8 Fact Sheet, para 1

9 *Puttaswamy* (supra)

10 *Ram Jethmalani v. Union of India* (2011) 8 SCC 1; *Kharak Singh v. The State of U.P.*, (1964) 1 SCR 332; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

11 BLACK’S LAW DICTIONARY, (Bryan A. Garner ed., 9th, 2009); *Hill v. NCAA*, 865 P.2d 633, 653, 654 (Cal. 1994)

12 *Gobind v. State of M.P.*, 1975 AIR 1378.

13 *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, 1999 (1) SA 6.

14 *District Registrar and Collector, Hyderabad & Anr. v. Canara Bank & Anr.*, (2005) 1 SCC 496; *Thornburgh v. American College of O and G*, 476 US 747 (1986)

of private facts and intrusion are valid ground for torts claim.¹⁵ No one shall be subjected to arbitrary interference with his privacy, family home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.¹⁶ “That the individual shall have full protection in person and in property is a principle as old as the common law and now the right to life has come to mean the right to enjoy life,— the right to be let alone.”¹⁷

3. Section 377¹⁸ is broadly phrased (1) Carnal intercourse/anal sex 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) Consenting carnal intercourse between man and man; (5) Non consenting carnal intercourse between man and man; (6) Carnal intercourse with a child with or without consent.¹⁹ Although the laws involved here purport to do no more than prohibit a particular sexual act, their penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behaviour, and in the most private of places including the home.

B. SECTION 377 IS INHERENTLY ARBITRARY, BASED ON NO ‘INTELLIGIBLE DIFFERENTIA’ AND RATIONAL OBJECT.

4. § 377 IPC violates the Equal Protection clause enshrined under Article 14²⁰ [which ensures fairness²¹, and guarantees against arbitrariness,²² It provides that every action of the government must be informed by reasons and guided by public interest²³] of the Constitution. The concept of equal treatment presupposes the existence of legal of similar legal foothold and does not countenance of repetition of a wrong action to bring forth wrongs on a par.²⁴

15 BLACK’S LAW DICTIONARY, (Bryan A. Garner ed., 9th, 2009). .

16 UN DECLARATION INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS

17 *Samuel D. Warren and Louis D. Brandeis* [(4 Harv. L. Rev. 193)]. 1890

18 377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[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.

19 PSA PILLAI, CRIMINAL LAW (Dr. K I Vibhute, 12th Ed., 2016).

20 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.

21 *Delhi Transport Corporation v. DTC Mazdoor Congress*, AIR 1991 SC 101; *Mahesh Chandra v. Regional Manager, U.P. Financial Corpn*, AIR 1993 SC 935.

22 *Express Newspapers Pvt. Ltd. v. Union of India (UOI) and Ors.*, AIR 1986 SC 872; *Netai Bag v. State of West Bengal*, AIR 2000 SC 3313.

23 *MS Bhut Educational Trust v. State of Gujarat*, AIR 2000 Guj 160; *LIC v. Consumer Education and Research Centre*, AIR 1995 SC 1811

1. That Section 377 IPC is inherently arbitrary

5. The guarantee of equal protection includes absence of any *arbitrary* discrimination by the laws themselves or in the matter of their *administration*. Thus, even where a statute itself is not discriminatory, but the public official entrusted with the duty of carrying it into operation applies it against an individual,²⁵ not for the purpose of act but *intentionally for the purpose of injuring him*.²⁶ Reasonable and fairness is the heart and soul of Art 14.²⁷ In short Art. 14 hits ‘*arbitrariness*’ of state action in any forms.²⁸ On the other hand, it is the duty of state to allay the fears of citizens regarding discrimination and arbitrariness.²⁹ The prohibition under § 377 undermines respect for law by penalizing conduct many people engage in, activities penalised under aforesaid section regulate private conduct that is not harmful to others and the law is arbitrarily enforced³⁰ and thus invite the danger of blackmail because offence is cognizable.

2. That Section 377 is based on no ‘intelligible differentia’

6. “*Intelligible differentia*” means difference that is capable of being understood. § 377 classifies acts based on whether they are in consonance with or against the order of nature. It is contended that § 377 is based upon traditional Judo-Christian moral and ethical standards,³¹ which conceive of sex in purely functional terms i.e., for the purpose of procreation and thus creates a classification between procreative and non-procreative sex.³² Considering any non-procreative sexual activity as being “against the order of nature” is outdated, has no place in the modern society and most importantly, has no scientific basis.³³

24 *Union of India v. International Trading Co.*, (2003) 5 SCC 437; also *Sanjay Kumar Manjul v. Chairman, UPSC*, (2006) 8 SCC 42; *Ekta Shakti Foundation v. Govt. of NCT of Delhi* AIR 2006 SC 2609; *State of U.P. v. Neeraj Awasthi* (2006) 1 SCC 667; *Vishal Properties (P) Ltd. V. State of U.P.* (2007) 11 SCC 172

25 *Jayalaxmi v. State of Tamil Nadu* (2007) 4 MLJ 849

26 DR DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA (8th ed. 2014)

27 *Delhi Development Authority v. Joint Action Committee, Allottee of SFS Flats* (2008) 2 SCC 672

28 *Rayappa v. State of T.N.* AIR 1974 SC 555; *Ajay v. Khalid* AIR 1981 SC 487; *Nakara v. Union of India* AIR 1983 SC 130

29 *Style (Dress Land) v. Union Territory, Chandigarh* (1999) 7 SCC 89

30 *Naz Foundation v. Government of NCT of Delhi*, 2010 Cri LJ 94

31 Samuel H. Dresner, Homosexuality and the Order of Creation, *Judaism* 40 (1991): 309; also *Lawrence v Texas* 539 US 558 (2003)

32 Sholeh I. Miresghi & David Matsumoto; *Perceived Cultural Attitudes Toward Homosexuality and Their Effects on Iranian and American Sexual Minorities*, *Cultural Diversity and Ethnic Minority Psychology* (2008 Vol. 14, No.4) 372-376.

33 *Naz Foundation v. Government of NCT of Delhi*, 2010 Cri LJ 94

3. There is no 'rational nexus' between classification and objective sought

7. Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.³⁴ It is contended that § 377's legislative objective of penalizing "unnatural sexual offences" has no rational nexus to the classification created. It was based on a conception of sexual morality specific to Victorian era drawing on notions of carnality and sinfulness.³⁵

C. SECTION 377 DISCRIMINATES PARTICULAR SEXUAL MINORITIES AND THEIR ACT

3. Article 15(1)³⁶ specifically bars the state from discriminating against any citizen of India on grounds only of religion, race, caste, sex, place of birth or any of them. In the word of Justice Jackson: "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."³⁷ Thus, when a particular statute seeks to differentiate among individuals based on any one of these grounds; to adjudge the validity of a legislation, a distinction has to be drawn between the object underlying the impugned Act and the mode and manner adopted therein to achieve that object. The object underlying the Act may be good or laudable but its validity has to be judged by the method of its operation and its effect on the fundamental rights involved.³⁸

1. Section 377 Discrimination on the basis of Sexual Orientation

8. The reference to 'sex' under Article 2 is to be taken as including 'sexual orientation'.³⁹ Sexual orientation is a ground analogous to those listed in Art. 15(1) such as race, colour,

³⁴ *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 760, 763 (1966)

³⁵ Richard M. Davidson, *Flame of Yahweh: Sexuality in the Old Testament*, (Peabody, MA: Hendrickson Publishers, 2007), 91–105.

³⁶ 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

³⁷ *Railway Express Agency, Inc. v. New York*, 336 U.S. 106

³⁸ M P JAIN, INDIAN CONSTITUTIONAL LAW (LexisNexis 7th ed. 2014).

³⁹ *Toonen v. Australia*, CCPR/C/WG/44/D/488/1992.

religion, sex, etc,⁴⁰ and on the basis of historical, social, political and economic disadvantage suffered by homosexuals, sexual orientation must be seen as one of these grounds.⁴¹ Sexual minorities cannot be reduced to *de minimis* by stating their number in population not enough to seek protection of fundamental rights.

2. Section 377 Is Disproportionate and Discriminatory In Its Impact

9. In determining the constitutionality of the statute, the Court must take into consideration not the motives of the Legislature but the real effect of the statute.⁴² It is the effect of the impugned legislation that is to be considered and if its effect is to discriminate on any of the prohibited grounds, it is bad.⁴³ It is contended that in determining what the Legislature has really done, the Court should not look at the mere form or appearance of the legislation but must look at the substance or nature of the legislation.⁴⁴ It is contended that §377, by criminalising consensual same-sex acts between two males, is indirectly discriminatory against a particular section of the society i.e., ‘men who have sex with men’ (MSM). Although it might seem facially neutral and it apparently targets certain sexual acts instead of sexual identity of a person, but in its operation it does end up unfairly targeting a particular community since these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals.⁴⁵

3. Section 377 Does Not Satisfy the Compelling State Interest Test

10. It is opined that privacy claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior, or where a compelling state interest is shown. A law infringing a fundamental privacy right must satisfy the compelling state interest test i.e., whether the state interest is of such paramount interest as would justify an infringement of the right.⁴⁶ “As in all equal protection cases ... the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.”⁴⁷ Further, when the validity of a legislation is tested on the anvil of equality clauses contained in Art. 14 and 15, the burden therefore would be on the State.⁴⁸ A

40 *Corbiere v. Canada* (1999) 2 SCR 203 CAN

41 *Vriend v. Alberta*, [1998] 1 SCR 493

42 *Sakal Papers v. Union of India*, 1962 SC 305; *Bennett Coleman v. Union of India*, 1973 SC 106

43 M P JAIN, INDIAN CONSTITUTIONAL LAW (LexisNexis 7th ed. 2014).

44 *Smith v. Allwright*, (1944) 321 US 649.

45 *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, 1999 (1) SA 6.

46 *Gobind v. State of M.P.*, 1975 AIR 1378.

47 *Police Dep'r v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290 (1972); Polyvios G. Polyviou, *The Equal Protection of the Laws* 4 (1980).

48 *Anuj Garg v. Hotel Association of India*, AIR 2008 SC 663

measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.⁴⁹ Heightened level of scrutiny is the normative threshold for judicial review in cases where personal freedom is questioned. The test to review such a Protective Discrimination statute would entail a two-prolonged scrutiny:

- a) The legislative interference should be justified in principle,
- b) The same should be proportionate in measure

The state interest must be legitimate and relevant for a legislation to be non-arbitrary and must be proportionate to achieve the state's interest. A bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.⁵⁰ Various law commission reports found § 377 redundant in light of recent criminal law amendments and laws.⁵¹ Hence it can be summed up § 377 doesn't have any rationale to be kept in books.

D. SEC 377 VIOLATES RIGHT TO LIFE U/A 21 OF THE CONSTITUTION OF LEXTON

11. Part III of the Constitution incorporates the entire minutia on fundamental rights. These rights are the basic rights of the people that are premised on the Bill of Rights. They were incorporated in the text of the Constitution post the promulgation of the Universal Declaration of Human Rights by the UN General Assembly in 1948 that called on all member states to adopt them in their constitution. Section 377 of IPC violates Right to Life under Art.21 of the Constitution as - § 377 is void on vagueness doctrine [1]; It violates Right to dignity of an individual [2]; and, § 377 violates one's Right to Health [3].

1. Section 377 is void on vagueness doctrine

12. Penal (legislative provision) so unclear and indefinite as not to give a person of ordinary intelligence the opportunity to know what is prohibited, restricted, or required.⁵² Maxim *Optima est lex que minimum relinquit arbitrio judicis* [that best law is that which leaves the least to the discretion of the judge]⁵³ aptly describes this doctrine. The doctrine is based on the Due Process Clause requiring that a criminal statute state explicitly and definitely what acts are prohibited or restricted, so as to provide fair warning and preclude

49 *John Vallamattom v. Union of India*, AIR 2003 SC 2902

50 *Romer v. Evans* (1996) 517 U.S. 620

51 The Criminal Law (Amendment) Act, 2013 (13 of 2013); page 11 of Argument Advanced, para 21, Law Reports ; POCSO Act 2012 (32 of 2012)

52 BLACK'S LAW DICTIONARY, (Bryan A. Garner ed., 9th, 2009).

53 WHARTON'S CONCISE DICTIONARY OF LAW (16th ed 2013).

arbitrary enforcement.⁵⁴ “[T]he terms of a penal statute [...] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties... and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”⁵⁵ Same doctrine has been applicable in *State of Lexion*.⁵⁶ Sec 377 is much vague and must be declared void on this doctrine.

2. That § 377 IPC violates right to dignity of an individual

13. Art. 21⁵⁷ had penumbral rights defined under it one those right is to live with **dignity**,⁵⁸ the guarantee of human dignity forms part of our constitutional culture.⁵⁹ Dignity of a person is the intimate sense of himself and his being, entering into most private sphere by penalizing that act, pierce through the founding norms of civilised society. Homosexuality is an orientation and treating it like a ghastly act diminishes dignity of an individual who happens to find expression in that orientation.⁶⁰

3. § 377 IPC violates Right to Health

14. Supreme Court while interpreting Article 21 of the Constitution in light of Article 12 of the International Covenant on Economic, Social and Cultural Rights, held that the Right to Health was an integral component of one’s Right to life.⁶¹ The right to health contains both freedom and entitlements. The freedoms include the right to control one’s health and body, including sexual reproductive freedom.⁶²

54 *Coates, et al. v. City of Cincinnati* 214; 1971 U.S. LEXIS 38; 58; *Grayned v. City of Rockford*, 408 U.S. 104 108-109 (1972); *United States v. Williams*, 553 U. S. 285 304(2008);

55 *Connally v. General Construction Co.*, 269 U.S. 385 (1926) [Sutherland J.]

56 *Kartar Singh v. State of Punjab* (1994) 3 SCC 569; *State of Madhya Pradesh v. Baldeo Prasad* [1961] 1 S.C.R. 970; *Harakchand Ratanchand Banthia & Ors. v. Union of India & Ors*, 1969 (2) SCC 166; *Shreya Singhal v. U.O.I* AIR 2015 SC 1523

57 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

58 *Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi & Ors.* (AIR 1981 SC 746 para 3); *Olga Tellis v. Bombay Municipal Corporation* 1986 AIR 180; *Education and Research Centre vs. Union of India*[(1995) 3 SCC 42: 1995 (1) SCALE 354 at 375; *Bandhu Mukti Morcha vs. Union of India* (1984) 3 SCC 161]

59 *Prem Shankar Shukla v. Delhi Admn.* [(1980) 3 SCC 526]; also *Prinsloo v. Van Der Linde* 1997 (3) SA 1012 (CC), *Harksen v. Lane* 1998 (1) SA 300 (CC); *Corbiere v. Canada* [1999] 2 S.C.R. 203

60 Dr. Shekhar Seshadri; National Institute of Mental Health and Neuro Sciences IA No 9/2010 *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1

61 *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, AIR 1996 SC 2426.

62 General Comment No. 14 (2000) [E/C.12/2000/4; 11 August 2000].

(a) *It Affects the Psychological Well-Being of Homosexual Individuals in a Negative Manner*

15. It has been accorded recognition and the right of choice to attributes which are an inherent, integral and immutable part of an individual's personality and can on the strength of growing medical and psychiatric knowledge be rightly regarded as but a natural benign variant of the human experience.⁶³ It is contended that criminalisation of § 377 impacts homosexual men at a deep level and restricts their right to dignity, personhood and identity, privacy and equality by criminalising all forms of sexual intercourse homosexual men can indulge in.⁶⁴ While the privacy of heterosexual relations, especially marriage is clothed in legitimacy, homosexual relations are subjected to societal disapproval and scrutiny.⁶⁵

(b) *It acts as a serious impediment to successful public health interventions*

16. Stigma, discrimination and criminalisation faced by men who have sex with men are major barriers to the movement for universal access to HIV prevention, treatment, care and support.⁶⁶ With almost 2.39 million people affected by AIDS in Lexton.⁶⁷ The criminalisation of homosexual practices cannot be considered as a reasonable means or proportionate measure to achieve the spread of AIDS/HIV since no link has been shown between the continued criminalisation and the effective control of the spread of the HIV/AIDS virus."⁶⁸

E. SPIRITS AND ETHOS OF INTERNATIONAL COVENANTS & MORES ARE NOT CONGRUOUS WITH SEC 377.

17. Article 7 of the Universal Declaration of Human Rights⁶⁹ lays down the principle of equality and bars discrimination. Article 12 of the UDHR recognizes the right of a person to be free from arbitrary and unlawful interference vis-à-vis his privacy, home and reputation among others. Article 9 of the International Covenant on Civil & Political Rights⁷⁰ recognizes the right to liberty and security of every person. Article 17 of the ICCPR is in pari materia to Article 12 of the UDHR and recognizes the right of a person to be free from arbitrary and unlawful interference vis-à-vis his privacy, home and reputation among others. Article 19 of

63 *NALSA v. Union of India* [(2014) 5 SCC 438]

64 Sholeh I. Miresghi & David Matsumoto; Perceived Cultural Attitudes Toward Homosexuality and Their Effects on Iranian and American Sexual Minorities, *Cultural Diversity and Ethnic Minority Psychology* 2008 Vol. 14, No.4, 372-376.

65 *Govindrajulu, in Re*, (1886) 1 Weir

66 United Nations A/6-737 Assessment by UNAIDS, March 24, 2006; Delhi Declaration of Collaboration, 26th September 2006

67 Department of AIDS Control National AIDS Control Organisation Annual Report 2010-11

68 *Toonen v. State of Australia*, CCPR/C/WG/44/D/488/1992

69 Universal Declaration of Human Rights 1948.

70 International Covenant on Economic, Social and Cultural Rights, 1966

the ICCPR recognizes the right of every person to the freedom of expression. For that this Hon'ble Court has held that international conventions insofar as they are not inconsistent with the fundamental rights and are in harmony with its spirit, may be **relied** upon to promote the object of the **constitutional guarantee**.⁷¹

18. For that the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) were adopted in 2007 as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfil the human rights of all persons regardless of their **sexual orientation** or **gender identity**. The English Law has been reformed in Britain by the Sexual Offence Act, 1967 which decriminalized homosexuality and acts of sodomy between consenting adult [above age of 21] pursuant to the Report of Wolfenden Committee. Section 377 is diagonally opposite to these conventions, though LGBT/Homosexual rights are not recognised in Lexton, but it aims to protect them. Refutation of these convention would frustrate that aim.

II. THAT LEGAL APPLICATION OF SEC. 377 IS INVALID 7 UNJUST

19. Section 377 punishes unnatural carnal intercourse and corresponds to the offences of sodomy and bestiality under the English law. Under this section, consent is wholly irrelevant. The party consenting would be equally liable as an abettor. By virtue of explanation appended to it, penetration, as in the case of rape, however minimal it be, is required to constitute the 'carnal intercourse'. Voluntary 'carnal intercourse against the order of nature' with a man, woman or animal evinced by 'penetration' is essential to attract § 377.⁷² However, the key terms, 'carnal intercourse' and 'penetration', are not defined in the IPC.⁷³ Thus it is invalid as far the meaning of this section is vague **[A]**; § 377 is not needed and has excessive proportionality which destroys rational nexus between the objects and the means adopted to achieve them **[B]**.

A. THAT SEC 377 IS INVALID AS FAR THE MEANING OF THIS SECTION IS VAGUE.

20. 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.⁷⁴ But in *Khanu v. Emperor*⁷⁵ it was

71 India Const. Art 51; *A.D.M. Jabalpur v S. Shukla (Khanna J.)* AIR 1976 SC 1207

72 K.I. VIBHUTE, *PSA PILLAI'S CRIMINAL LAW*, LexisNexis (12th Edition, 2014)

73 INDIAN PENAL CODE 1860; RATANLAL AND DHIRAJLALS *THE INDIAN PENAL CODE* (33rd Edition 2016)

74 *R. v. Jacobs* : (1817) B&R 331 CCR

75 35 Cri LJ 1096 : (AIR 1934 Lah 261)

held that coitus per se is punishable under the Section.⁷⁶ The understating of acts which fall within the ambit of Section 377 has changed from non-procreative (*Khanu v. Emperor*)⁷⁷ to imitative of sexual intercourse,⁷⁸ to sexual perversity.⁷⁹ That extended to contact of organism 'in intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited.'⁸⁰ Even oral sex was meant to be under 'intercourse'⁸¹ Those who are versed in the law may understand the statute's meaning because of their knowledge of legal interpretations in court opinions, but it seems to us that if today's world is to have brought home to it what it is that the statute prohibits, it must be set forth in language which is relevant to today's society and is understandable to the average citizen of common intelligence which is the constitutional test of such language.⁸² "A defendant has right to have available, through a sufficiently precise statute, information revealing the standard of criminality before commission of the alleged offence."⁸³ A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning or what conduct might transgress them⁸⁴

B. THAT SECTION 377 IS NOT NEEDED AND EXCESSIVELY DISPROPORTIONATE

21. The 5th Law Commission, referring to the ongoing controversy about decriminalisation of homosexual acts and recalling the public opinion about it in India, recommended decriminalization of bestiality, as it a pathological manifestation of the perpetrator. It also felt the punishment provided for unnatural offences very harsh and unrealistic. It suggested leniency in punishment for buggery. However, it recommended a comparatively longer term of punishment for such an unnatural sexual assault on a minor girl or boy by an adult.

22. Clause 160 of the Indian Penal Code (Amendment) Bill 1978, drafted on lines suggested by the 5th Law Commission, sought to be substitute the existing Section 377 of IPC. The 14th Law Commission, endorsing the fifth law commission's proposal for the reform and consequential Clause 160 of the 1978 Bill and recalling the growing incidences of unnatural sexual assaults on minor children, however, recommended that a mandatory minimum sentence for a term not less than two years (which may extend to seven years)

76 *Govindarajulu in re* (1886) 1 Weir 382

77 *Khanu v. Emperor* (supra)

78 *Lohana Vasantlal v. State* AIR 1968 Guj 352

79 *Fazal Rab Choudhary v. State of Bihar* AIR 1983 SC 323, *Mihir v. Orissa* 1991 Cri LJ 488

80 *State of Kerala v. Kundumkara Govindan* (1969) Cr LJ 818 (ker)

81 *Brother John Antony v. State* (1992) Cr LJ 1532 (Mad)

82 *Franklin v. State*, 257 So. 2d 21 (Fla. 1971)

83 *Watkins v. United States*, 354 U.S. 178

84 *Raley v. Ohio*, 360 U.S. 423 (1959)

should be provided for unnatural sexual assault on a minor person. The Commission, however, proposed that a court, for adequate special reason to be recorded in the judgment, should be allowed to reduce the recommended mandatory minimum sentence.⁸⁵

23. However, the fifteenth law commission, in its 172nd Report on the review of rape laws, in the light of its proposal for reform in Section 375 and proposed Section 376-E, dealing with unlawful sexual conduct, recommended that Section 377 should be deleted from the IPC and the persons having voluntary carnal intercourse with any animal should be left to their just deserts.⁸⁶ This Court in the face of abuse of any penal provision can issue direction to correct its application.⁸⁷

III. THAT MORE STRINGENT PUNISHMENT MUST BE METED OUT TO JOSEPH (ACCUSED)

24. While sentencing is the discretion of the trial court judge, the sentence must be such as serves as deterrence to others. Punishment disproportionate to the crime committed or undue sympathy to an accused, in the long run will not only be detrimental to the social interests and the justice system but will also undermine the public confidence in the efficacy of criminal law and make a common man to lose his faith in the courts and justicing system.⁸⁸ Undue sympathy to impose inadequate sentence would do more harm to justice system to undermine the public confidence in the efficacy of the law and society could not long endure under serious threats. It is, therefore, duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was committed etc. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence.⁸⁹

25. It is not the actual nature of the injury caused namely, whether simple hurt or grievous hurt, but the manner in which it is caused, which is relevant. Though the end result or nature of injuries may be the same in these and previous Sections, the legislation has provided for enhanced punishment when hurt or grievous hurt is caused by dangerous weapon or by dangerous means. Under Section 325 the punishment prescribed for voluntarily causing grievous hurt is imprisonment of either description, which may extend to seven years and

85 PSA PILLAI, CRIMINAL LAW (Dr. K I Vibhute, 12th Ed., 2016) 744

86 Ibid. 744

87 Rajesh Sharma v, State of U.P. 2017 SC 821

88 PSA PILLAI, CRIMINAL LAW (Dr. K I Vibhute, 12th Ed., 2016). 280

89 Ibid.

fine. However, if the grievous hurt is caused by dangerous weapon or by dangerous means, then the maximum sentence that is prescribed under Section 326 is life imprisonment or imprisonment of either description for a term upto 10 years and fine. Expression any instrument which, used as a weapon of offence, is likely to cause death, when read in light of marginal note to Section 324⁹⁰ means dangerous weapon which if used by the offender is likely to cause death.⁹¹ Emasculation without proper immediate treatment may result in death. Therefore, Joseph's use of dangerous weapon cannot be overlooked, it is established the intent and resulted harm.

26. In present case Joseph (accused) emasculated Rob using **dangerous weapon** [which may include knife; blade; razor etc.]⁹² which led to grievous hurt. However trial court overlooked the direct evidence of case which undisputedly leads to the punishment under § 326, *grievous hurt using dangerous weapon [A]*; fine imposed on Joseph does not cover the cost of injury, thus is insufficient **[B]**.

A. TRIAL COURT AND HIGH COURT OVERLOOKED EVIDENCE OF THE CASE

27. The jurisdiction conferred under Art. 136 on the SC are corrective one and not a restrictive one.⁹³ A duty is enjoined upon the SC to exercise its power by setting right the illegality in the judgments is well-settled that illegality must not be allowed to be perpetrated and failure by the SC to interfere with the same would amount to allowing the illegality to be perpetuated.⁹⁴ Article 136 is the residuary power of SC to do justice where the court is satisfied that there is injustice.⁹⁵ The principle is that this court would never do injustice nor allow injustice being perpetrated for the sake of upholding technicalities.⁹⁶ Normally, in

90 324. Voluntarily causing hurt by dangerous weapons or means.—Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

91 Anwarul Haq v. State of U.P. AIR 2005 SC 2382

92 *Harmant v. State of Karnataka* AIR 1994 SC 1545; *Moti Lal v. State of Madhya Pradesh*, AIR 1994 SC 1544; *Bishwanath Singh v. State of Bihar* (1995) Cr.LJ 2626 (SC); *State of Karnataka v. Shivelingiah* AIR 1988 SC 115; *Jameel Hassan v. State of Uttar Pradesh* (1974) CrLJ 867 (ALL); *Jagat Singh v. State of NCT of Delhi* (1984) CrLJ 1551 (Del); *Mukati Prasad Rai @ Mukati Rai v. State of Bihar (New Jharkhand)*, AIR 2005 SC 1271

93 *Haryana State Industrial Corpn. v Cork Mfg. Co.* (2007) 8 SCC 359 (SC).

94 *Pawan Kumar v State of Haryana* (2003)11 SCC 241 (SC); see also H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4th edn. Vol 1 2010); see also HALSBURY'S LAWS OF INDIA (Vol. 35 2007).

95 *C.C.E v Standard Motor Products* (1989) AIR 1298 (SC), see also H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4th edn. Vol 2 2010).

96 *Janshed Hormusji Wadia v Board of Trustees, Port of Mumbai* (2004)3 SCC 214 (SC).

exercising its jurisdiction under Article 136, the Supreme Court does not interfere with the findings of the fact concurrently arrived at by the Trial and the High Court **unless** there is a clear error of law or unless some important piece of **evidence** has been omitted from consideration.⁹⁷ There is a **proved fact and direct evidence**⁹⁸ [*also inculpatory*] in the present case which fastens criminal liability upon Joseph (accused) **beyond reasonable doubt**. Because reasonable doubt does not mean some light, airy, insubstantial doubt that may fit through the minds of any of us about almost anything at some time or other; it does not mean doubt begotten by sympathy out of **reluctance to convict**.⁹⁹ Use of dangerous weapon is a direct evidence, which without the intervention of any other fact proves the existence of a **fact in issue**.¹⁰⁰ The point can be raised before the Supreme Court for the first time where it goes to the root of the matter and for consideration of this point no further investigation in the facts of the case is necessary.¹⁰¹

28. Joseph is accused of emasculating Rob by using dangerous weapon that stand proved hence punishable under Section 326¹⁰². Emasculation is a grave injury, it affected Rob's sense of manhood and comfort. Charging Joseph (accused) with lesser degree of offence when evidence point to contrary would be a defeat of fair proceeding and violate the rights of victim. Therefore this Hon'ble court must re-appreciate the evidence to meet the end of justice.

B. FINE IMPOSED ON JOSEPH DOES NOT COVER THE COST OF INJURY, THUS IS INSUFFICIENT.

29. In *Ravji alias Ram Chandra v state of Rajasthan*,¹⁰³ the apex court stated that

"It is the nature and gravity of the crime but not the criminal which is germane for the consideration of appropriate punishment in a criminal trial. This court will be failing in its duty if appropriate punishment is not awarded for a crime,

97 *Panchanan Misra v. Digambar Mishra*, AIR 2005 SC 129.

98 INDIAN EVIDENCE ACT 1872

99 *K. Gopal Reddy v. State of A.P.* AIR 1979 SC 387

100 DR AVATAR SINGH, PRINCIPLES OF THE LAW OF EVIDENCE (22nd ed. 2016)

101 *Sehla Burney v. Syed Alimosha Raza* (2011) 6 SCC 529 (534)

102 326. Voluntarily causing grievous hurt by dangerous weapons or means—Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with 1[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

103 AIR 1996 SC 787

which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal."¹⁰⁴

A court, thus, is expected to operate the sentencing system in such way that imposed sentence reflects the conscience of the society and responds to 'the society's cry for justice against the criminal'.¹⁰⁵

It may be noted that power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system.¹⁰⁶ It is because of this that it was recommended that all criminal courts should exercise this power liberally so as to meet the ends of justice, by cautioning that the amount of compensation to be awarded must be reasonable. In *Jacob George (Dr) v. State of Kerala*¹⁰⁷ this Court enhanced the punishment imposed by high court to compensate the injuries occurred to victim.

104 Ibid. The same point of view is also reiterated by the SC in *Union of India v. Kuldeep Singh* AIR 2004 SC 827; *State of U.P. v. Shri Krishan* (2005) Cr LJ 333 (SC), and *State of M.P. v Saleem @ Chamaru* (2005) Cr LJ 3433 (SC)

105 *State of M.P. v. Ghanshyam Singh* AIR 2003 SC 3191

106 *Manohar Singh v State of Rajasthan* AIR 2015 SC 1124; *Hari Singh v. Sukhbir Singh* (1988) 4 SCC 551

107 (1994) 3 SCC 430

PRAYER

Wherefore in the light of the facts stated, issues raised, authorities cited, and arguments advanced, it is most humbly prayed before this Honourable Court that it may be pleased to adjudge and declare:

1. That the judgement of Naz Foundation v. Government of NCT of Delhi be restored.
2. That Joseph be charged under § 326 and a more generous compensation be awarded to the petitioner.

And/Or,

Pass any other order that it deems fit.

And for this, the Petitioner as in duty bound, shall humbly pray.

COUNSEL ON BEHALF OF THE PETITIONER