

TEAM CODE - ITMURLAW-1C0218XXXXV

1<sup>ST</sup> ITM NATIONAL MOOT COURT COMPETITION, 2018

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IN THE HON'BLE SUPREME COURT OF LEXTON

AT LEXTON

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SPECIAL LEAVE PETITION NO. \_\_\_\_\_ OF 2018

UNDER ARTICLE 136 OF THE CONSTITUTION OF LEXTON, 1950

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IN THE MATTERS OF

ROB.....PETITIONER

v.

THE STATE.....RESPONDENT NO. 1

JOSEPH.....RESPONDENT NO. 2

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MEMORANDUM ON BEHALF OF RESPONDENTS

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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
Ed.	:	Edition
Govt.	:	Government
HIV/AIDS	:	Human Immuno Deficiency Virus / Acquired Immuno Deficiency Syndrome
HRGs	:	High-Risk Groups
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
U.P.	:	Uttar Pradesh
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 THE SPECIAL LEAVE PETITION FILED BY ROB BEFORE SUPREME COURT IS MAINTAINABLE?**

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

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

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

**SUMMARY OF ARGUMENTS****I. THAT THE SPECIAL LEAVE PETITION FILED WITH THE SUPREME COURT OF LEXTON IS NOT MAINTAINABLE**

Present set of facts do not show sufficient causes to allow appeal by special leave. This extraordinary power is to be used cautiously in exceptional circumstance where the occurred injustice jolted the conscience of the court. However, this case doesn't rise to level. No injustice has occurred upon the petitioner and both Trial court and High Court have scrutinized the claims of petitioner and rendered the due justice. Special Leave cannot be granted when substantial justice has been done and no exceptional or special circumstances exist for case to be maintainable. The practice of non-interference in the decisions of lower courts is followed by the Supreme Court when it is of the view that all relevant factors have been taken into consideration as in the instantaneous matter. Even once admitted petition might be rejected if the grounds to approach the Supreme Court are infirm. Hence, Hon'ble Supreme Court must reject the present petition.

**II. THAT § 377 OF THE INDIAN PENAL CODE IS CONSTITUTIONAL WITH RESPECT TO THE FUNDAMENTAL RIGHTS IN CH.3 OF THE CONSTITUTION**

In state of Lexton, there are fundamental rights guaranteed under the constitution but those rights are not absolute in nature. Each of these rights can be taken away with a procedure established by Law. Legislature with due regard to constitutional limits may impose reasonable restrictions on enjoyment of fundamental rights. Right to privacy like other fundamental rights is subject to restrictions on grounds of public morality, national security interest and others. Art. 14 does not bar state to create unequal categories if it has justified rationale in the larger interest of society. § 377 does not target sexual orientation but penalise only act of buggery, sodomy *i.e. unnatural offences*. Presumption of constitutionality favours legislation, and mere apprehension of misuse is not a sound ground for declaring an enactment unconstitutional. There are other enactments which are based on public morality like bar on termination of pregnancy, prohibition on child pornography, control on substance abuse and others. Therefore § 377 is an extension of curtailing abhorred acts. Therefore it would be erroneous to contend that § 377 is unconstitutional.

**III. THAT THE LEGAL APPLICATION OF § 377 IS PERFECTLY VALID & JUST**

To understand the penal offence under § 377 one must look at sections proceeding the section. Offence of rape § 375/376 of IPC is defined to include only male, thereby other types of sexual assaults which would not be included in above sections to be covered in § 377. National Crime Record Bureau Statistics do not match the level of contention of arbitrariness and abuse. Furthermore, application of doctrine of severability, which determines the legislative intent and cut down the unintended parts from the statute to make it compatible with the Constitution should be applied, courts have preferred reading down the law to make it consistent and reasonable with broader scheme of constitutional rights. It would be unimaginably reckless to whittle down § 377, even when the petitioner himself could have been brought under the net of § 377 but that did not occur. Therefore it is superficial to consider that § 377 is invalid or unjust.

**IV. THAT THE PUNISHMENT METED OUT TO JOSEPH (ACCUSED) IS DISPROPORTIONATE IN THE LIGHT OF MENTIONED AUTHORITIES.**

It is not the contention of that Joseph (accused) is innocent fact indeed prove his guilt but the punishment which has meted to him is fairly harsh. He has been punished to maximum extent of law which he was charged with. Now petitioner are asking for more stringent punishment the ground are only known to them. That is in violation of principles of § 300 and Art. 20(2), by subjecting him to more severe punishment than that which he has been awarded with. Seven years of imprisonment with Rs.50000 fine cannot be regarded inadequate rather on behalf of respondent 2 (Joseph) we seek to lessen the punishment given to Joseph. Punishment given by courts should not be just retributive, it must reform and rehabilitate the offender so he can repent his guilt and to again be a citizen of civilised society. Therefore it would be a wise call to lessen the imprisonment.

**ARGUMENTS ADVANCED****I. THAT THE SPECIAL LEAVE PETITION FILED WITH THE SUPREME COURT OF LEXTON IS NOT MAINTAINABLE**

1. Special leave petition Jurisdiction of the Supreme Court flows from Article 136 empowers the Supreme Court to grant in discretion 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.<sup>1</sup> The exercise of writ jurisdiction by the Supreme Court is discretionary in nature.<sup>2</sup> It is submitted that the writ petition is not maintainable on primarily three grounds: That there is no **miscarriage of justice** and the order of high court is not **misconceived** or **perverse [A]**; That there exist no **exceptional circumstances** that warrant special leave to this court **[B]**;

**A. THAT THERE IS NO MISCARRIAGE OF JUSTICE AND THE ORDER OF THE HIGH COURT IS NOT MISCONCEIVED OR PERVERSE**

2. When Supreme Court exercises its discretionary jurisdiction under Art 136<sup>3</sup> of the Constitution it is **in order to ensure that there is no miscarriage of justice**, if finding of acquittal by high court is found to be **misconceived** and **perverse**, this court can quash such order of acquittal under Art. 136 of the Constitution.<sup>4</sup> The facts of the present case don't lead to such conclusion, trial court convicted Joseph to full extent of law (u/s 325)<sup>5</sup>. "Where **findings of facts recorded** by the **trial court** are **affirmed** by the **high court** in appeal, the Supreme Court will be **reluctant** to interfere with such findings in exercise of jurisdiction under Art. 136 of the constitution unless there are very strong reasons to do so."<sup>6</sup> Those **reasons** are not stated by petitioner except asking for more stringent punishment **onus lies on the petitioner to prove such facts**.

1 INDIA CONST. Art. 136; Subedar v. State of U.P. AIR 1971 SC 125.

2 D.D BASU, A COMMENTARY ON THE CONSTITUTION OF INDIA, (8th Edn., 2010).

3 136. 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

4 *State of Rajasthan v. Islam* AIR 2011 SC 2317; *S.B. minerals v. MSLP Ltd.* AIR 2010 SC 1137

5 INDIAN PENAL CODE, 1860

6 *Saradamani Kandappan v. S. Rajalaxmi* AIR 2011 SC 3234; *Union of India v. Era Educational Trust*, AIR 2000 SC 1573.; *DCM v. Union of India*, AIR 1987 SC 2414



3. Facts of the case before us militate against the reasons of filing special leave petition. Joseph attempted to emasculate Rob that led to grievous hurt to Rob, against which Rob approached the trial court and trial court meted out punishment under Sec.325 of IPC extended up to the maximum punishment under said section by awarding imprisonment for a term of **seven** years and **Rs. 50000** in fine.

4. In *Dalip Singh v State of Punjab*<sup>7</sup> the SC clarified the context in which the court could interfere with the sentence imposed by the lower court. Thus, when discretion has been exercised along with the accepted judicial lines, an appellate court should not interfere to the detriment of an accused except for very strong reasons, which must be disclosed on the fact of the judgment. In *Bed Raj v State of Uttar Pradesh*,<sup>8</sup> this court stated that, in the matter of enhancement, there should not be interference when the sentence imposes substantial sentence. Interference will be warranted only when the sentence is manifestly inadequate.

5. Though Article 136 is conceived in widest terms, the practice of the Supreme Court is not to interfere on questions of fact except in exceptional cases when the finding is such that it shocks the conscience of the court.<sup>9</sup> A pure finding of facts based on appreciation of evidence does not call for interference in exercise of power under Art. 136 of the Constitution.<sup>10</sup> It is very important to notice this observation “there is no tangible justification to allow the appellants to raise new plea for the first time, the determination of which would require detailed investigation into facts”.<sup>11</sup> The Court would re-appreciate evidence only to find out whether there has been any **illegality, material irregularity** or **miscarriage of justice**.<sup>12</sup>

**B. THAT THERE EXIST NO EXCEPTIONAL CIRCUMSTANCES THAT WARRANT SPECIAL LEAVE TO THIS COURT**

6. In *criminal* cases the Supreme Court will not interfere in under Art. 136 unless it is shown that **exceptional** and **special circumstances** exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.<sup>13</sup> This wide power is not, however, to be exercised by the Supreme Court so as to entertain an appeal in *any* case where no appeal is otherwise provided by the law or the Constitution. It is a special power which is to be exercised under

7 AIR 1953 SC 364; *Narsingh v State of Uttar Pradesh* AIR 1954 SC 457

8 AIR 1955 SC 778

9 *Mehar Singh v. Shri Moni Gurudwara Prabandhak Committee*, AIR 2000 SC 492

10 *Pramod Buildings & Developers(p) Ltd. v. Shanta Chopra* AIR 2011 SC 1424

11 *Abdul Khader v. Tarabai* (2011) 6 SCC 529

12 *Amitava Banerjee v.State of W.B.* AIR 2011 SC 2913

13 *Pritam Singh v. State*, AIR 1950 SC 169S

**exceptional circumstances** and Supreme Court has already laid down the principles according to which this extraordinary power shall be used, *e.g.*, where there has been a violation of the principle of natural justice [the aim of natural justice to secure justice or to put negatively to prevent miscarriage of justice<sup>14</sup>: the principle implies a duty to act fairly *i.e.* fair play in action<sup>15</sup>; *justitia naturalisi*; what the courts are vigilant to watch is that the defendant has not been deprived of an opportunity to present his side of the case<sup>16</sup>]<sup>17</sup>. An appeal by special leave is not a **regular appeal**. Merely because a **different view** is possible on the evidence adduced at the trial is no ground for the court to upset the opinion of the courts below.<sup>18</sup> Special leave will not be granted when there is no failure of justice or when **substantial justice** is done, though the decision suffers from some legal errors<sup>19</sup>

7. After granting Special Leave to Appeal under Art. 136, the Court can revoke the leave granted by it, if the respondent brings to the notice of the Court facts which would justify such revocation. The court will do so in the interest of justice.<sup>20</sup> The main High Court decision does not merge with the order of the Apex Court. The aggrieved party may pursue any statutory remedy which may be open to him challenge the decision in question. For instance, he may move writ petition in High Court under Art. 226 to challenge the decision, or may move a petition in the High Court to review its own decision.<sup>21</sup>

8. The above observations can be summed up into following submissions (*supra*); **Firstly**: special leave petition lack justiciable reasons to be brought before supreme court; **Secondly**: Joseph (convict) has been tried and punished to the maximum extent under the existing laws of the land in other words substantial justice is done; **Thirdly**: the court can revoke the leave granted by it in the interest of justice.

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14 *A.K. Kraipak v. Union of India* (1970) 1 SCR 457

15 *Shahara India (firm) v Commissioner of Income Tax* (2008) 14 SCC 151

16 G.C. CHESHIRE, PRIVATE INTERNATIONAL LAW 675 (6th ed. 1961).

17 Wharton's Concise Dictionary of Law (16th ed 2013).

18 D.D BASU, A COMMENTARY ON THE CONSTITUTION OF INDIA, (6th Edn.)

19 *Council of Scientific and Industrial Research v. K. G. S. Bhatt*, AIR 1989 SC 1972 ; *State of H. P. V. Kailash Chand Mahajan*, AIR 1992 SC 1277; *Mathai Joby v. George*, (2010) 4 SCC 358.

20 *Penu Balakrishna M. Ariya v. Ramaswami Iyer*, AIR 1965 SC 195

21 *Indian Oil Corporation Ltd. v. State of Bihar*, AIR 1986 SC 1780; *M/s Rup Diamonds v. Union of India*, AIR 1989 SC 674; *Supreme Court Employees' Welfare Association v. Union of India*, AIR 1990 SC 334; *Yogendra Nayrayan Chowdhary v. Union of India*, AIR 1996 SC 751; *V.M. Salgaocar & Bros. v. I.T. Commr.*, AIR 2000 SC 1623; *Kunhayammed v. State of Kerala*, AIR 2000 SC 2587; *Govt. of West Bengal v. Tarun K. Roy*, (2004) 1 SCC 347.

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## II. THAT SECTION 377 OF IPC IS CONSTITUTIONAL WITH RESPECT TO THE FUNDAMENTAL RIGHTS IN CHAPTER-III OF THE CONSTITUTION

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9. The state of Lexton **aims** to protect right of homosexuals but there rights are not **recognized**, it guarantees privacy as a fundamental right. Petitioner Rob moved to this court to declare § 377 of IPC unconstitutional. It is submitted that these contentions do not rise to the level that is required to declare § 377 unconstitutional - that the right to privacy is not absolute **[A]**; that Art. 14 does not prohibit state to differentiate on intelligible differential and reasonable rationale **[B]**; § 377 is not arbitrary **[C]**; § 377 is gender neutral therefore does not violate Art.15 **[D]**; Art.21 empower state to take away liberty subject to procedure established by law **[E]**; presumption of constitutionality favours legislation **[F]**;

### A. THAT THE RIGHT TO PRIVACY GUARANTEED IN THE CONSTITUTION OF STATE OF LEXTON NOT ABSOLUTE

10. In 2016 nine judge constitution bench put this in conclusion “Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Art. 21<sup>22</sup>, **privacy** is not an **absolute right**. A law which encroaches upon privacy will have to withstand the touchstone of **permissible restrictions** on fundamental rights. In the context of Art. 21 an invasion of privacy must be justified on the basis of a law which stipulates a **procedure** which is **fair, just** and **reasonable**. The law must also be valid with reference to the encroachment on life and personal liberty under Art. 21. An invasion of life or personal liberty must meet the **three-fold requirement** of i) **legality**, which postulates the existence of law; (ii) need, defined in terms of a **legitimate state aim**; and (iii) **proportionality** which ensures a rational nexus between the objects and the means adopted to achieve them; and Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.”<sup>23</sup> As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.<sup>24</sup> How § 377 deals with these requirements are covered in argument

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22 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

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

24 *Mr. X v. Hospital Z* (1998) 8 SCC 296.

for Issue No. III.<sup>25</sup> Above observation is **ratio decendi** of the case hence is binding by application of **stare decisis**.

**B. THAT SECTION 377 DOES NOT VIOLATE THE EQUAL PROTECTION DOCTRINE ENshrined IN THE CONSTITUTION**

11. § 377 IPC does not violate the Equal Protection clause enshrined under Art. 14<sup>26</sup> [which ensures fairness<sup>27</sup>, and guarantees against arbitrariness,<sup>28</sup> It provides that every action of the government must be informed by reasons and guided by public interest<sup>29</sup>] of the Constitution and as such the aforementioned have been enacted to protect the interests of sexual minorities. Mere discrimination or inequality of treatment does not amount to discrimination within the ambit of Article 14.<sup>30</sup> For an act not to violate Art. 14, there must not be any substantive unreasonableness<sup>31</sup> in it, it should not be manifestly arbitrary<sup>32</sup> and it should fulfil the following two conditions:

- a) **Intelligible differentia** which distinguishes persons or things that are grouped together from other left out in the group<sup>33</sup> This is done by examining the purpose and policy of the act, which can be ascertained from its title, preamble<sup>34</sup> and provisions.<sup>35</sup>
- b) **Rational nexus**<sup>36</sup> that connects the object sought to be achieved by the act with the intelligible differentia ascertained in (a).<sup>37</sup>

**1. The Classification is founded on an Intelligible Differentia**

12. Art. 14 forbids class legislation; it does not forbid reasonable classification of persons by the Legislature for specific ends. Classification in such a case should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from others left out of it.<sup>38</sup>

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25 See page 10

26 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.

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

28 *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.

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

30 D.D. BASU, *SHORTER CONSTITUTION OF INDIA*, 62, (13 th ed., vol. 1, 2001).

31 *Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board and Ors.*, AIR 2007 SC 2276.

32 *Bombay Dyeing & Manufacturing Co. Ltd. v. Bombay Environmental Action Group*, AIR 2006 SC 1489.

33 *Pathumma v. State of Kerala*, AIR 1979 SC 771.

34 *Kausha ON v. Union of India*, AIR 1978 SC 1457.

35 *P. B. Roy v. Union of India*, AIR 1972 SC 908.

36 *Kedar Nath Bajoria v. State of W.B.*, AIR 1953 SC 404.

37 *Hanif v. State of Bihar*, AIR 1958 SC 731.

38 *Laxmi Khandsari v. State of Uttar Pradesh*, AIR 1981 SC 873

13. § 377<sup>39</sup> classifies acts based on whether they are in consonance with the ordinary course of nature or against it.<sup>40</sup> The section impugned includes the acts of carnal intercourse between man and man, man and woman and woman and woman and those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that § 377 suffers from the vice of arbitrariness and irrational classification.

14. It is contended that § 377 is gender neutral and covers voluntary acts of carnal intercourse against the order of nature irrespective of the gender of the person committing the act. It does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence and merely talks about a particular mode of sexual activity, independent of the sex of people or sexual orientation.<sup>41</sup>

15. Thus, § 377 distinguishes sexual acts from unnatural sexual offences or carnal intercourse against the order of nature. It does not distinguish between procreative and non-procreative sex and it is contended this classification is reasonable.

## **2. That there is a Rational Nexus between Classification and Objective Sought**

16. It is contended that the law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. Mere differentiation or inequality of treatment does not per se amount to discrimination and before considering inequality of treatment, the object of the legislation has to be considered.<sup>42</sup> If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation.<sup>43</sup>

17. The objective behind § 377 is to curb cases of allegation of child sexual abuse and for complementing lacunae in the rape laws. The state looks to uphold public morality and decency and it is a compelling state interest in this matter. If § 377 is struck down, there will be no way the State can prosecute any crime of non-consensual carnal intercourse against the

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39 377. 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.

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

41 *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1; *Mihir alias Bhikari Chauhan Sahu v. State*, 1992 Cri LJ 488; Re: *Special Courts Bill*, 1978 (1979) 1 SCC 380i.

42 *Thiru Muruga Finanace v. State of Tamil Nadu*, AIR 2000 Mad 137

43 MP JAIN, *INDIAN CONSTITUTIONAL LAW*, 917 (7th ed. 2015).

order of nature or gross male indecency done against any male adult. Thus, there is rational nexus between classification and objective sought in the case of § 377.

**C. THAT 377 IS NOT ARBITRARY WITH RESPECT TO ARTICLE 14**

18. Arbitrariness on the part of the legislature so as to make the legislation violative of Art. 14 of the Constitution should ordinarily be manifest arbitration.<sup>44</sup> To declare an act ultra vires under Art. 14, the Court must be satisfied in respect of substantive unreasonableness in the statute.<sup>45</sup> Classification is justified if it is not arbitrary.<sup>46</sup> If an enactment is challenged as violative of Art. 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein.<sup>47</sup> The legislature, as a body, cannot be accused of having passed a law for an extraneous purpose.<sup>48</sup> Transferred malice is unknown in the field of legislation.<sup>49</sup>

19. § 377 is not arbitrary, it lays out penal provisions in case of unnatural offence, which is reasonable to protect the victim of the offence. The possibility of abuse of power by executive officials who are responsible for § 377's implementation cannot be a valid ground to contest its constitutionality since the ill-treatment of homosexuals is neither mandated by the section nor condoned by it. Hence, it is contended that mere possibility of abuse of power by the responsible officials cannot be considered as a sufficient ground for holding § 377 arbitrary.

**D. THAT § 377 DOES NOT VIOLATE ARTICLE 15 OF THE CONSTITUTION**

20. It is contended that § 377 does not violate Article 15 [(1) The State shall not discriminate against any citizen on grounds **only** of religion, race, caste, sex, place of birth or any of them.]<sup>50</sup> of the Constitution of Lexton as - **[1]** it is not disproportionate and discriminatory in its impact and; **[2]** There is compelling state interest involved.

**1. That Section 377 is not Disproportionate and Discriminatory in its Impact**

21. Section 377 is applied on complaints by victims and there are no instances of arbitrary use or application in situations where the terms of the section do not naturally extend to § 377. In present case petitioner though himself well aware of LGBT rights in Lexton indulged in said activities and even those activities being cognizable in law the court or the police did

44 *Bombay Dyeing & Manufacturing Co. Ltd. v. Bombay Environmental Action Group*, AIR 2006 SC 1489.

45 *Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board and Ors.*, AIR 2007 SC 2276.

46 *State of Gujarat v. Shri Ambica Mills*, 1974 3 SCR 760

47 *State of Andhra Pradesh v. McDowell & Co.*, AIR 1996 SC 1627.

48 *K.Nagraj v. State of Andhra Pradesh*, AIR 1985 SC 551.

49 *State of Kerala v. PUCL, Kerala State Unit*, (2009) 8 SCC 46.

50 INDIA CONST.

not take notice of it. This in itself is evident enough to show that § 377 not misused by police officials and others. Therefore claims of disproportionate/discriminatory impact should be debunked.

**2. That there is Compelling State Interest Involve § 377**

22. The significance of word ‘only’ is that if there is any other ground or consideration for differential treatment besides those prohibited by this article, the **discrimination will not be unconstitutional**.<sup>51</sup> It is contended that homosexuality is considered against cultural norms of our society<sup>52</sup> and hence § 377 is crucial for maintaining public decency and morality.<sup>53</sup> It is further imperative to maintain public health in the general society since homosexual sexual activities constitute High-Risk Groups (HRGs) among population prone to HIV/AIDS. It is thus contended that since § 377 is based on legitimate and compelling state interest, its retention is justified and more importantly, crucial. ***Ubi eadem est ratio ibi idem jus*** [where there is same reason, there is same law]<sup>54</sup> Medical termination, child pornography, substance abuse, etc. are all based on general morality and sanction of society. It would not be wise to single out § 377 as a bad law.

**E. THAT SECTION 377 QUALIFIES THE TEST OF SUBSTANTIVE DUE PROCESS UNDER ARTICLE 21**

23. Art. 21<sup>55</sup> envisages a right to life and personal liberty of a person, which not merely guarantees the right to continuance of a person’s existence but a quality of life.<sup>56</sup> Art. 21 provides that the right to life and liberty is subject to procedure prescribed by law. The requirement of substantive due process has been read into the Constitution of Lexton through a combined reading of Articles 14, 21 and 19 and it has been held as a test required to be satisfied while judging the constitutionality of a statute.<sup>57</sup>

24. Section 4 of the CrPC provides “All offences under the IPC shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.” Thus, the CrPC prescribes a fair procedure before any person committing an offence § 377 IPC can be punished. Further, courts have come forward and held that “In order to attract culpability § 377, it has to be established that: The accused had carnal intercourse

51 *State of Kerala v. Arvind Ramakant Modawdakar* (1999) 7 SCC 400

52 42nd Report of the Law Commission of India, Indian Penal Code, 1860

53 INDIA CONST.

54 BLACK’S LAW DICTIONARY, (Bryan A. Garner ed., 9<sup>th</sup>, 2009).

55 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

56 *Francis Coralie v. Union Territory of Delhi*, AIR 1994 SC 1844; *Vellore Citizens’ Welfare Forum v. Union of India*, (1996) 5 SCC 647.

57 *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.* AIR 2014 SC 563.



with man, woman or animal, such intercourse was against the order of nature, the act of the accused was done voluntarily, and there was penetration.<sup>58</sup>

25. No uniform test can be culled out to classify acts as “carnal intercourse against the order of nature.”<sup>59</sup> Thus, it is contended that § 377 follows a substantive due process that is reasonable and non-arbitrary and is thus not violative of one’s Right to life and liberty.

**F. THAT THE PRESUMPTION OF CONSTITUTIONALITY FAVOURS LEGISLATION**

26. It is submitted that the presumption is always in the favour of constitutionality of an enactment<sup>60</sup> and it is for the petitioner to show how his fundamental right has been infringed, failing which, his petition will be dismissed.<sup>61</sup> It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

27. It is submitted that public disapproval or disgust for a certain class of persons can in no way serve to uphold the constitutionality of a statute.<sup>62</sup> It was opined that “the constitutionality of a law can be challenged only by the person directly affected.”<sup>63</sup> Keeping in view the fact that the Act is a pre-constitution enactment, the question as regards its constitutionality will, therefore, have to be judged as being law in force at the commencement of the Constitution of India.<sup>64</sup>

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58 *Calvin Francis v. Orissa* 1992 (2) Crimes 455.

59 *Mihir alias Bhikari Charan Sahu v. State*, Cri LJ 488.

60 *Mohan Choudhary v. Chief Commissioner, Tripura*, AIR 1964 SC 173; *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors*, AIR 1958 SC 538

61 *Ramcharitra v. High Court, Patna*, AIR 1976 SC 226

62 *Lawrence v. Texas*, 539 US 558 (2003)

63 *Chiranjil Lal v. Union of India*, AIR 1951 SC 41

64 *Keshavan Madhava Menon v. The State of Bombay*, 1951CriLJ 680.



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### III. THAT THE LEGAL APPLICATION OF § 377 IS PERFECTLY VALID & JUST

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28. The three fold test laid in *Puttuaswamy*<sup>65</sup> - legality, which postulates the existence of §377 is perfectly sound [A]; § 377 is needed, defined in terms of a legitimate state aim [B] and; § 377 has proportionality which ensures a rational nexus between the objects and the means adopted to achieve them [C].

#### A. THAT LEGALITY WHICH POSTULATES THE EXISTENCE OF LAW § 377 IPC IS PERFECTLY SOUND

##### 1. Application of Section 377 IPC

29. In order to attract culpability under § 377<sup>66</sup>, it has to be established that (i) the accused had carnal intercourse with man, woman or animal, (ii) such intercourse was against the order of nature, (iii) the act by the accused was done voluntarily; and (iv) there was penetration. Carnal intercourse against the order of nature is the gist of the offence in § 377. By virtue of the Explanation to the Section, it is necessary to prove penetration, however little, to constitute the carnal intercourse.<sup>67</sup> Under the English law, also in *Lexton* 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.<sup>68</sup>

30. But in *Khanu v. Emperor*<sup>69</sup> it was held that coitus per os is punishable under the Section.<sup>70</sup> The understating of acts which fall within the ambit of § 377 has changed from non-procreative (*Khanu v. Emperor*<sup>71</sup>) to imitative of sexual intercourse,<sup>72</sup> to sexual perversity.<sup>73</sup> Following actions may be penalized under § 377 (1) Carnal intercourse between husband and wife; (2) Carnal intercourse between man and woman for pleasure without the

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

66 377. 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.

67 *Kedar Nath S/o Bhagchand v. State of Rajasthan*, 1985 (2) WLN 560

68 *R. v. Jacobs* : (1817) B&R 331 CCR; *Raju v. State of Haryana* (1998) Cr LJ 2587 (P&H); *Kishan lal v. State of Rajasthan* (1998) Cr LJ 4508 (Raj); *Sukhdeo Singh v. State of Rajasthan* (2002) Cr LJ 1975 (Raj); *Mohan Ojha v. State of Bihar* (2002) Cr LJ 3344 (Pat); *Kailash @ Kala v. State* (2004) Cr LJ 310 (P&H); *Abdul Salam v. State* (2005) DLT 33; *Anil @ Arikhony Anikswamy Joseph v. State of Maharashtra* (2014) 2 SCALE 554

69 35 Cri LJ 1096 : (AIR 1934 Lah 261)

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

71 (Supra)

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

73 *Fazal Rab v. State of Bihar* AIR 1963; *Mihir v. Orissa* 1991 Cri LJ 488

possibility of conception of a human being; (3) Use of contraceptives between man and woman; (4) Anal sex between husband and wife; (5) Consenting carnal intercourse between man and man; (6) Non consenting carnal intercourse between man and man; (7) Carnal intercourse with a child with or without consent.

## **2. Argument on the broader contour of § 377**

**31.** Primary arguments against § 377 is that it invades privacy of certain sexual minorities and thereby diminishes their dignity this is wholly unfounded claim. An unlawful act cannot be rendered legitimate because the person to whose detriment it acts consents to it; there are no instances of arbitrary use or application in situations where the terms of the section do not naturally extend to § 377 IPC.

### **B. THAT § 377 IS NEEDED AND DEFINED IN TERMS OF LEGITIMATE STATE INTEREST**

**32.** It is not the argument of Respondent No. 1 that § 377 is well drafted section, but the original meaning of the section is not to invade privacy of individuals but prevent sexual assaults on adults or child or animals, whichever may constitute unnatural offences. Obviously when police authorities knock doors to prey on sexual minorities is unquestionably violation of privacy.<sup>74</sup> But that again is executory nature of penal offence not the **legislative intent**. We must apply the **doctrine of severability** to separate the grain from chaff [1] and; **reading down** of § 377 in order to make it legally sound to be applicable [2].

**33.** Legislative intention to put § 377 in books is largely based on section proceeding it in 1860, when IPC was enacted any other grave sexual assault other than rape in § 376 was covered through sec 377. Indeed a part of this section was to forbid buggery/sodomy but another part of the section rendered justice to the victims who could not seek recourse of § 376.

### **1. Applying the Doctrine of Severability**

**34.** The doctrine of severability rests, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute.<sup>75</sup> In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it.<sup>76</sup>

<sup>74</sup> *Lawrence v Texas* 539 US 558 (2003)

<sup>75</sup> *R.M.D. Chamarbaugwalla v. The Union of India* (UOI) AIR 1957 SC 628

<sup>76</sup> Sutherland on Statutory Construction, Vol. 2, p. 194

## **2. Reading down the law to make it compatible**

35. Thus, the Courts would accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the Courts. The Courts would preferably put into service the principle of 'reading down' or 'reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act.<sup>77</sup> It is clear and apparent that where any term has been used in the Act which per se seems to be without jurisdiction but can be read down in order to make it constitutionally valid by separating and excluding the part which is invalid or by interpreting the word in such a fashion in order to make it constitutionally valid and within jurisdiction of the legislature which passed the said enactment by reading down the provisions of the Act.<sup>78</sup>

### **C. THAT § 377 HAS PROPORTIONALITY WHICH ENSURES A RATIONAL NEXUS BETWEEN THE OBJECTS AND THE MEANS ADOPTED TO ACHIEVE THEM DEFINED IN TERMS OF LEGITIMATE STATE INTEREST**

36. In 2016, out of total 1996 incidents with 2003 victims at 0.2% rate; total arrest 2473, 2444 (male), 29 (female); out of these 1947 persons charge sheeted; out of that tally 216 persons convicted; 318 persons acquitted and 15 person stood discharged.<sup>79</sup> With population above 2.5mn LGBT/MSM<sup>80</sup> number of incidents does not justify the apprehension of these communities. Had police been abusing this section for intimidation that surely would have resulted in major arrests or incidents. In theory it could be a possibility that some private act that falls under § 377 would be taken notice by enforcement authorities but again in state of Lexton privacy is a fundamental right and therefore whatever happens at home would remain at home.

37. Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. Abuse of power given by law does occur; but the validity of the law cannot be contested because of such an apprehension. Discretionary power is not necessarily a discriminatory power.<sup>81</sup>

77 *Namit Sharma v. Union of India* (2013)1 SCC 745.

78 *Mazdoor Congress and Ors.* 1991 Supp (1) SCC 600.

79 Crime Record Bureau, 2016

80 *India has 2.5mn gays, government tells SC*, BBC 14.03.2012

81 *Re Special Courts Bill 1978*

38. In *Mafatlal Industries Ltd. and Ors. v. Union of India and Ors*<sup>82</sup>. a Bench of Nine Judges observed that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding a provision procedurally or substantively unreasonable "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity."<sup>83</sup> 'It must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief.'<sup>84</sup> While interpreting a provision, the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary.<sup>85</sup>

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**IV. THAT THE PUNISHMENT METED OUT TO JOSEPH (ACCUSED) IS DISPROPORTIONATE IN THE LIGHT OF MENTIONED AUTHORITIES**

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39. In view with the aforementioned facts, Joseph has been tried u/s 325 at the trial stage and affirmed by high court when appealed. It is clearly mentioned in the statute that the maximum punishment for voluntarily causing grievous hurt is 7 years, the same was awarded to the convict (Joseph) in the Trial Court. The Court cannot go beyond its competence and award more stringent punishment than prescribed in the statute.

40. It is humbly submitted that the punishment awarded to Respondent No. 2 under Section 325 IPC was excessively harsh [A]; and Had he been convicted under Section 326 the current sentence would be harsh enough [B].

**A. PUNISHMENT AWARDED TO JOSEPH WAS EXCESSIVE AND HARSH**

41. Before going into the question of quantum of punishment imposed on the Respondent No. 2 the Counsel would like to emphasize on the sentencing policy in India. It is also contended thereafter that the punishment meted out to Joseph under Section 325<sup>86</sup> was unduly harsh and excessive.

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82 1997(89)ELT247(SC) ,

83 *Collector of Customs v. Nathella Sampathu Chetty* : 1983 ECR 2198 D (SC)

84 *State of Rajasthan v. Union of India* : [1978]1SCR1; *Commissioner, H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Meth* : [1954]1SCR1005

85 *Maulavi Hussein Haji Abraham Umarji v. State of Gujarat*; MANU/SC/0567/2004 : 2004 CriLJ 3860; *Unique Butle Tube Industries (P) Ltd. v. U.P. Financial Corporation and Ors.* : [2002] SUPP 5 SCR 666; *Padma Sundara Rao (dead) and Ors. v. State of Tamil and Ors.* [2002] 255 ITR 147 (SC)

86 325. Punishment for voluntarily causing grievous hurt.—Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**1. Sentence -**

42. Any punishment imposed must be proportionate to the charge and the same is guaranteed under Art. 21.<sup>87</sup> For deciding just and appropriate sentence to be awarded for a offence, the aggravating and mitigating factors and circumstances in which a crime has been conducted are to be deliberately balanced in a dispassionate manner.<sup>88</sup>

43. It is observed by that the sentence to be awarded will have to be considered in the background of the each case and the court while doing so should bear in the mind the principle of proportionality. The sentence awarded should be neither excessively harsh nor ridiculously low.<sup>89</sup>

44. Indeed, the requirement that punishment not be disproportionately great, which is collory of just desert, is dictated by same principle that does not allow punishment of the innocent, for any punishment in the excess of what is deserved for the criminal conduct is punishment without guilt.<sup>90</sup>

**2. Fine-**

45. The terms ‘shall also be liable to fine’, was interpreted to mean that the court had perforce to impose penalty which has to be ‘commensurate with the gravity of the offence ad extent of evasion’, in addition to imposing punishment of imprisonment. The general principle running through the provision is that that amount of fine should not be harsh or excessive.<sup>91</sup>

46. A court has a wide discretion in quantifying fine to be imposed, particularly where no amount of fine is stipulated in a penal provision. However, a court is expected to see that the fine imposed should not be excessive.<sup>92</sup> The amount of fine considered to be excessive when it would be impossible or very difficult for the convict to pay it or is wholly disproportionate to the nature of offence committed by him.

47. While deciding the question of quantum of fine to be imposed, the courts should always bear in mind that there should be some sort of nexus between the amount of fine sought to be imposed and potentially of the accused to pay the same. There is no point in

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87 *Bachan Singh v. State of Punjab*, (1980) 2 SCC 84 –Opinion of Bhagavati J.; *Om Kumar v. Union of India*, AIR 2001 SC 3689

88 *Surja Ram v Sate of Rajasthan*, AIR 1997 SC 18

89 *Deo Narain Mandal v State of Uttar Pradesh*, AIR 2004 SC 5150

90 *Lehna v State of Haryana* (2002) 3 SCC 76, para 25.

91 *Shantilal v State of Madhya Pradesh* (2007) 11 SCC 243

92 *Jivan Trikan v Kutch Government*, AIR 1950 Kutch 73

imposing enormous amount as fine, which is beyond the paying capacity of the accused to pay.<sup>93</sup>

**B. SUBSTANTIAL PUNISHMENT WAS AWARDED, EVEN IF CONVICTED U/S 326 IPC**

48. The Petitioner may submit for want of the conviction of Joseph under Section 326 IPC for voluntarily causing grievous hurt by dangerous weapon in order to enhance the current punishment of 7 years imprisonment.

49. It is contended that even of the Respondent No. 2 was convicted, *ab initio*, under Sec. 326 IPC the sentence of 7 years imprisonment is harsh. The conviction under sec. 326 would not have affected the sentenced to be imposed by the Trial Court.

50. In *Modi Ram v State of M.P.*<sup>94</sup> the accused was convicted u/s. 325 for cutting of the nose of the victim and his male organ, and sentenced to one year RI by Trial Court. High Court enhanced the sentence to eight years RI. On appeal, this court, taking into consideration the young age of the accused, the humility and hurt he would have faced in having his wife live with another man in same vicinity, observed that there was grave provocation and hence reduced the sentence from eight years to three years.

51. It is submitted that in several cases of emasculation such as *C.B.I v. Kishore Singh & Ors*<sup>95</sup>, *Jatan Singh & Ors v. State of NCT Delhi*<sup>96</sup> the sentence imposed by Trial Court under Sec. 326 IPC was higher, which was later reduced by this court after considering mitigating factors and circumstances in which the crimes were committed.

52. It is respectfully submitted that grounds for seeking more stringent punishment would also be contrary in principle of Sec. 300(1) CrPC<sup>97</sup> and Art. 20(2)<sup>98</sup> of the Constitution.

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93 *Philip Bhimsent Aind v State of Maharashtra*, 1995 Cr LJ 1694 (Bom).

94 AIR 1972 SC 2438

95 (2011) 6 SCC 369

96 2012 CrLJ 1069

97 300. Person once convicted or acquitted not to be tried for same offence. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub- section (1) of section 221, or for which he might have been convicted under sub- section (2) thereof.

98 22. Protection against arrest and detention in certain cases - (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate

**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 present Special Leave Petition is dismissed; or
2. That the Leave granted is revoked; and
3. That Section 377 of IPC is constitutionally valid; and
4. That the plea of sentence reduction by Respondent No. 2, Joseph be kindly considered;

And/Or,

Pass any other order that it deems fit.

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

COUNSEL ON BEHALF OF THE RESPONDENT