

IN THE HIGH COURT OF DELHI AT NEW DELHI

WRIT PETITION No. 7455 OF 2001

NAZ FOUNDATION Petitioner

Vs

GOVERNMENT OF N.C.T. OF DELHI & ORS. Respondents

**OUTLINE OF COUNSEL'S ARGUMENTS ON BEHALF
OF RESPONDENT No. 8 ("VOICES AGAINST 377")****A. INTRODUCTION**

- 1.0 The purpose of this outline is to track the line of arguments advanced on behalf of Respondent No. 8 ("R-8").
- 1.1 R-8 supports the Petitioner. R-8 has filed a detailed counter affidavit. This counter affidavit is in two separate paper books and is at pages 1062 to 1563 of the Court record.
- 1.2 R-8 has also filed detailed written submissions in a separate volume entitled "Written Arguments on Behalf of Respondent No. 8, Voices Against 377". The written submissions cover 31 pages and are cross referenced to 51 primary documents. Each of these 51 documents is identified separately with a **Flag Number**. The documents bearing **Flag Nos. 1 to 51** are for convenience compiled in four spirally bound volumes. The flagged documents comprise judgments, extracts from scholastic material, affidavits of persons who have suffered the consequences of Section 377 and other material relied upon by R-8. Each of the affidavits is already on the record of this Court, but has been placed in these volumes for ease of reference.
- 1.3 The Written Arguments submitted on behalf of R-8 comprehensively cover the contentions advanced by this Respondent. In the course of counsel's arguments, R-8 will refer to its Written Submissions and Volumes I to IV containing the supporting documents (**Flags 1 – 51**). R-8 will propose "*Suggested Operative Directions*", which in its view, ought to be passed in the facts and circumstances of this case.

B. THE BACKGROUND OF RESPONDENT No. 8

- 2.0 R-8 is a coalition of 12 registered and unregistered associations that work in the field of Child Rights, Women's Rights, Human Rights and the Rights of Persons who identify themselves as Lesbian, Gay, Bisexual, Transgender, Hijra and Kothi ("LGBT persons").

- 2.1 Paragraphs 16-22 of the Written Submissions set out details of the constituent organizations of R-8. These organizations are engaged in a range of activities across the country and the work of many of them has been recognized by the government. Several of the organizations have acquired an expertise in their respective niches, published works, organized workshops, engaged in advocacy, conducted campaigns and have worked generally to promote and protect the rights of vulnerable sections of society.
- 2.2 Drawing on its counter affidavit, the Written Submissions also explain the context in which R-8 came to be formed and its deep concern for the issues that arise in this case.

C. THE IMPACT OF CRIMINALIZATION OF HOMOSEXUAL ACTIVITY

- 3.0 Section 377 as applied in the field, subjects members of the LGBT community to harsh treatment at the hands of the law enforcement agencies. This provision subjects male and female homosexuals as well as transgenders to repressive, cruel and disparaging treatment that destroys their sense of self esteem, inflicts grave physical and psychological harm on members of the LGBT community, inhibits the personal growth of these persons and prevents them from attaining fulfillment in personal, professional, economic and other spheres of life. Section 377 degrades such individuals into sub-human, second class citizens, vulnerable to continuous exploitation and harassment.
- 3.1 To illustrate the magnitude and range of exploitation and harsh and cruel treatment experienced as a direct consequence of Section 377, R-8 has placed on record material in the form of affidavits, FIRs, judgments and orders that objectively document instances of exploitation, violence, rape and torture suffered by LGBT persons.
- 3.2 The particulars of the incidents drawn from different parts of the country are set out at paras 32-47 of the Written Submissions. The supporting material in the form of affidavits, reports and orders, etc. are appended as **Flags Nos. 18-27 & 46 (Volume III & IV)**. The counter affidavit refers to several other instances of harassment and exploitation with supporting material.
- 3.3 The material on the record clearly establishes that the continuance of Section 377 on the statute book operate to brutalize a vulnerable, minority segment of the citizenry for no fault on its part. A segment of society is criminalized and stigmatized to a point where individuals are forced to deny the core of their identity and vital dimensions of their personality.

D. SEXUALITY AND IDENTITY

- 4.0 To understand and appreciate many of the profound issues that arise in this case, it is important to understand the notions of “sexual orientation” and “gender identity”.
- 4.1 The *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Flag 8) (Volume III)* define these expressions:
- “Sexual Orientation” is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.
 - “Gender Identity” is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. (Page 6)
- 4.3 Justice Edwin Cameron defines sexual orientation by reference to erotic attraction: in the case of heterosexuals to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can be any one who is erotically attracted to members of his or her own sex. (**Flag 2**, page 21-22)(Volume I).

E. DIGNITY, PRIVACY AND AUTONOMY

DIGNITY

- 5.0 Dignity is a difficult concept to capture in precise terms. At its least, the protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. (**Flag 2**, page-27), (Volume I).
- 5.1 Statutes that criminalize homosexuality have the effect of viewing all gay men as criminals. The harm imposed by the criminal law is far more than symbolic. Gay men are at risk of arrest, prosecution and conviction of the offence under Section 377 simply because they seek to engage in sexual conduct which is part of their experience of being human. The homosexuality offence builds insecurity and vulnerability in the daily life of gay men. Such a law degrades and devalues gay men in the eyes of society. Such a provision invades and erodes the dignity of homosexuals (**Flag 2**, page 27-28), (Volume II).

- 5.2 The assault on dignity takes various forms. Professor Ryan Goodman of the Harvard Law School categorizes how sodomy laws reinforce public abhorrence of lesbians and gays resulting in an erosion of self esteem and self-worth in numerous ways, including (a) self reflection, (b) reflection of self through family, (c) verbal harassment and dispute, (d) residential zones and migrations, (e) restricted public places, (f) restricted movement and gestures, (g) “safe places” and (h) conflicts with law enforcement agencies. (**Flag 17**, page 685-711) (Volume II).
- 5.3 Homosexuals suffer tremendous psychological harm. Fear of discrimination leads to a concealment of true identity, which is harmful to personal confidence and self-esteem. Compounding that effect is the message of criminalization that renders gays and lesbians unworthy of protection. (**Flag 2**, page 24) (Volume I).
- 5.4 In the case of gays, “it is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.” (**Flag 2**, page 98) (Volume I).

PRIVACY

- 5.5 The right to privacy is the right of an individual, to be free from unwarranted intrusion into matters so fundamentally affecting his or her person. Matters involving the most intimate and personal choices that a person may make are central to the personal dignity and autonomy of the individual and are protected from unwarranted intrusion. At the heart of personal liberty is the right to seek and develop personal relationships of an intimate character. Persons in a homosexual relationship are entitled to seek autonomy just as heterosexual persons do. (**Flag 1**, page 1,13, Justice Kennedy’s opinion) (Volume I).
- 5.6 Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy that allows us to establish and nurture human relationship without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of privacy (**Flag 2**, page 30) (Volume I).

AUTONOMY

- 5.7 Personal liberty presumes an autonomy of the individual that includes freedom of thought, belief, expression and certain intimate conduct (**Flag 1**, page 1, Justice Kennedy’s opinion) (Volume I). Individual adults have the freedom to determine their own actions and behaviour, particularly where such act or behaviour does

not harm a third party. The notion of autonomy extends beyond the spatial dimension. It projects beyond the home or the closet, since individuals to attain growth and fulfillment cannot be confined to such spaces. The freedom of conduct enjoyed by an individual arising from his or her sexual orientation is protected insofar as the intimate conduct is between consenting adults.

F. GLOBAL TRENDS IN RESPECT OF LAWS RELATING TO HOMOSEXUALITY

- 6.0 Since 1967 a process of change has informed legal attitudes towards sexual orientation. This process has culminated in many jurisdictions with the de-criminalization of sodomy in private between consenting adults (**Flag 2**, page 35-43) (Volume I).
- 6.1 In several jurisdictions the superior Courts and Tribunals have struck down anti-sodomy laws, where such laws remained on the statute book:
- US Supreme Court in 2003 (**Flag 1**);(Volume I)
 - Constitutional Court of South Africa in 1998 (**Flag 2**); (Volume I)
 - Fijian High Court in 2005 (**Flag 3**); (Volume I)
 - High Court of Hong Kong in 2005 and 2007 (separately tendered);
 - Nepalese Supreme Court in 2008 (separately tendered);
 - European Court of Human Rights in 1981 and 1988 (**Flags 4,5 and 6**); and (Volume II)
 - UN Human Rights Committee in 1994 (**Flag 7**) (Volume II)
- 6.2 The *Yogyakarta Principles* (**Flag 8**) (Volume II) embody the current status of human rights recognized globally with special reference to sexual orientation and gender identity. The *Yogyakarta Principles* are the work of acknowledged experts drawn from several countries. These *Principles* are designed to ensure that vulnerable minorities based on sexual orientation or gender identity enjoy human rights to the full extent. The necessity to articulate these principles arose since despite the universality of Human Rights in certain parts of the world individuals are being discriminated against on the grounds of sexual orientation or gender identity. The *Principles* recognize:
- Human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights; (page 10)
 - All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity; (page 14)
 - Every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without

discrimination on the basis of sexual orientation or gender identity (page 28).

G. OPINIONS IN INDIA

7.0 In paragraphs 10-15 of the Written Submissions (**Flag 9 - Flag 15**) (Volume II), R-8 has summarized the emerging recognition in India of the need to decriminalize homosexuality.

7.1 As regards, the prevalence of homosexuality in South Asia, the Written Submissions of R-8 summarize the position in paragraphs 48-56 (**Flag 28- Flag 34**). (Volume III).

H. CONSTRUCTION OF “CARNAL INTERCOURSE AGAINST THE ORDER OF NATURE”

8.0 The submissions of R-8 in this behalf are set out at paragraphs 58-70 of the Written Submissions (**Flag 35- Flag 38**), (Volume III).

8.1 Section 377 criminalizes ‘carnal intercourse against the order of nature.’ For a homosexual male or female, his or her sexual orientation is “natural”. The sexual orientation of an individual arises from the depth of his or her being and it is not an aspect of his or her conduct that can be termed as “unnatural” or “against the order of nature”. In most reported studies, persons have either no choice or very little choice in their attraction to members of their own sex.

8.2 The reports and studies placed on the record indicate that a sizeable portion of the population identifies itself as lesbian, gay or bisexual. In the counter affidavit of NACO (R4), the estimated number of male homosexuals has been put at about 25 lakhs (page 251, Court Record).

8.3 While it is difficult to ascertain the exact numbers of self-identifying LGBT persons in a given population, certain governments have generally adopted the position that about 5-7% of an adult population identifies itself as not heterosexual. The *Final Regulatory Impact Assessment: Civil Partnership Act 2004* conducted by the Department of Trade and Industry of the Government of the United Kingdom states that a “...wide range of research suggests that lesbian, gay and bisexual people constitute 5-7% of the total adult population.” (**Flag 37**) (Volume III).

8.4 R-8 draws attention to the near unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality. Homosexuality was *removed* from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) in 1973 after reviewing evidence that homosexuality is not a mental disorder. In 1987, ego-dystonic homosexuality was

not included in the revised third edition of the DSM after a similar review. The DSM is used worldwide as the standard benchmark of mental health practice and is also widely followed by the Indian Psychiatric Association.

8.5 In 1992, the World Health Organization removed homosexuality from its list of mental illnesses in the *International Classification of Diseases (ICD 10)*. Page 11 of the Clinical Descriptions and Diagnostic Guidelines of the ICD 10 reads: “Disorders of sexual preference are clearly differentiated from disorders of gender identity, and homosexuality in itself is no longer included as a category.” The Indian Medical fraternity also widely adopts this standard classification.

8.6 According to the *Amicus* brief filed in 2002 by the American Psychiatric Association before the United States Supreme Court in the case of *Lawrence v. Texas*:

“According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience.”

This *Amicus* brief is at **Flag 38**, (Volume III).

8.7 While individuals may undertake a range of sexual activity, homosexuality, like heterosexuality is not a disease or mental illness that needs to be, or can be ‘cured’ or ‘altered’.

8.8 Homosexuality, for the concerned individual, is as ‘natural’ as heterosexuality for a heterosexual. Same sex intimacy cannot fall within the term ‘carnal intercourse against the order of nature’ as used in Section 377. On a correct interpretation of Section 377, homosexual acts are not covered by that provision and a suitable declaration to that effect ought to be made by this Court.

I. ARTICLE 21, THE RIGHT TO LIFE AND THE PROTECTION OF A PERSON’S DIGNITY, AUTONOMY AND PRIVACY

9.0 The submissions of R – 8 in this behalf are set out at paragraphs 116 – 134 of the Written Submissions (Pages 22 – 26). It is submitted that the arguments relating to dignity, privacy and autonomy are based upon distinct legal principles and each of these grounds deserves separate consideration.

9.1 The expression “dignity of the individual” finds specific mention in the Preamble to the Constitution of India. The dignity of an individual is clearly covered by Article 21 of the Constitution of India. An individual’s dignity is very closely

linked to his identity. The sexual orientation of an individual lies at the core of his or her identity and arises from a deep well-spring. An individual's sense of "self", "being", "personhood" and "self-esteem" are all a part of the core notion of identity. The testimony of a gay man, Mr. Gautam Bhan articulates the tension between Section 377 and his sense of identity as a male homosexual. (**Flag 46**), (Volume IV). The voice of Mr. Bhan is mirrored in the experience of thousands of similarly placed individuals across the country.

- 9.2 Any law or statutory provision that denies a person's dignity and criminalizes his or her core identity violates Article 21 of the Constitution. Section 377 operates to criminalize, stigmatize, and treat as "unapprehended felons" homosexual males. The provision targets individuals whose orientation may have formed before they attained majority. It criminalizes individuals upon attaining majority, for no fault of the person and only because he is being himself.
- 9.3 Article 21 absolutely proscribes any law that denies an individual the core of his identity and it is submitted that no justification, not even an argument of "compelling State interest" can sanction a statute that destroys the dignity of an estimated 25 lakh individuals.
- 9.4 With respect to the sphere of privacy protected under Article 21 of the Constitution of India, this notion has been judicially construed to deal with "persons and not places" (*Canara Bank case*, (2005) 1 SCC 496, para 53). The distinction is very important. With respect to LGBT persons, these individuals cannot leave behind in their homes or closets their core identity. For every individual, be they LGBT or not, the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes. A person cannot leave behind his sense of gender or sexual orientation at home. R – 8 submits that the relief granted by this Court ought to be suitably moulded in a manner such that the privacy of LGBT persons is protected even in physical spaces beyond their home.
- 9.5 The issue of autonomy derives from the right to live with dignity and the right of privacy, both recognized dimensions under Article 21 of the Constitution of India. The right to autonomy deserves articulation and acceptance since it enables an individual to make choices regarding intimate relationships which cause no harm to third parties. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill all legitimate goals that he or she may set. The protected sphere of autonomy also extends beyond private spaces since it enables a homosexual or transgender to be himself or herself in public domains just like any other individual.

9.6 The moral justification argument, that may possibly be canvassed by the other Respondents, is no answer at all to the “Dignity” submission. In her concurring opinion in *Lawrence v Texas*, Justice O’Connor held: “Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause . . . Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law” . . . Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy”

9.7. The “majoritarian justification” was also discounted by Justice Kennedy who wrote the opinion of the Court in *Lawrence*. (Justice Thomas described the Texas law as “uncommonly silly”.)

9.8 Whose morality? The Constitutional Court of South Africa supplies an answer. Where the dictates of morality and nothing more is used to justify a law, that morality must be a *Constitutional* morality found in the text and spirit of the Constitution. (**Flag 2, page 104**) (Volume I). The South African Constitutional Court has also rejected the “public opinion” test when striking down the death penalty in *Makwanyane case* (**Flag 49**) (Volume IV). The moral justification advanced to uphold Section 377 deserves to be rejected.

J. ARTICLES 14-16, DISCRIMINATION AND THE RIGHT TO BE TREATED EQUALLY

10.0 The submissions with respect to the violation of Articles 14 and 15 of the Constitution of India are set out in paragraphs 71 – 114 of the Written Submissions filed by R-8.

10.1 While reiterating these submissions, R-8 would like to underscore the need for appropriate directions where persons of the LGBT community are alleged to have committed offences other than Section 377. It is a widespread experience that law enforcement officials policing against obscene acts in the public, etc. proceed against LGBT persons not as they would in respect to heterosexuals but under Section 377 as well. This amounts to a particularly invidious discrimination inasmuch as an offence under Section 377 is non bailable and is punishable with a sentence upto life imprisonment. In contrast, a heterosexual person is generally booked under Section 294 of the IPC which carries a relatively lighter sentence of three months imprisonment and is a bailable offence.

- 10.2 The Constitution of India in Articles 15 and 16 expressly prohibits discrimination against any citizen on the ground only of religion, race, caste, sex, place of birth or any of them. The Supreme Court in *Anuj Garg* (2008) 3 SCC 1 at 19, para 51 has construed Articles 14, 15 and 21 as prohibiting discrimination on the basis of sex, race, caste “or any like basis”. Sexual orientation is a “like basis” similar to the enumerated categories in these Constitutional provisions. Indeed, the expression “sex” has been construed by high judicial authority to take in the concept of sexual orientation. [(*Toonen*, Human Rights Committee, ICCPR, para 8.7, **Flag 7 Volume II**; *Vriend v. Alberta*, Canadian Supreme Court, see **Flag 2**, page 41, **Volume I**.)] If this submission is accepted, then Section 377 in so far as it targets male homosexuals because of their sexual orientation alone, violates Article 15.

K. INTERPRETATION OF SECTION 377

- 11.0 It is submitted that the constitutionality of a provision must be judged keeping in view the changed situation with the passage of time. A law that is constitutional at a certain point of time may with the passage of time be held to be unconstitutional. (*Anuj Garg* at page 9). In matters impacting human rights, a progressive interpretation of the law is necessary (*M. C. Mehta Vs. Union of India* (1987) 1 SCC 395 at para 17). In a distinct context the Supreme Court has observed “it is not necessary and indeed not permissible to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the code was enacted. The notions...have considerably changed then and now during nearly a century that has elapsed. It is legitimate to construe the code with reference to the modern needs, whenever this is permissible, unless there is anything in the code or in any particular section to indicate the contrary.” (*Mobarik Ali Vs. State of Bombay* (1958) 1 SCR 328 at para 44).
- 11.1 The court should avoid a construction that raises a serious constitutional question and should prefer an interpretation which saves a provision from being struck down as unconstitutional. The Supreme Court in *Shah & Co. Vs. State of Maharashtra* (1967) 3 SCR 466 (at para 33) held that “if certain provisions of law construed in one way would make them consistent with the Constitution, and not the interpretation that would render them unconstitutional, the Court would lean in favour of the former construction.”
- 11.2 To retain Section 377 as constitutional, it is necessary to construe the phrase ‘carnal intercourse against the order of nature’ to exclude consensual acts of sexual intercourse between consenting adults.

- 11.3 On the point of interpretation of a criminal sodomy statute, in the case of *Dhirendra Nandan v. State* (Crim App. Case Nos. HAA 85 and 86 of 2005) the High Court of Fiji declared that sections 175 (a) and 177 were “*inconsistent to the extent that this law criminalises acts constituting the private consensual sexual conduct against course of nature between adults.*” The Court further declared that “*Invalidity in this context does not mean that the offending sections in the Penal Code ceased to exist rather they are simply rendered inoperative to the extent of the inconsistency. Accordingly the sections dealing with carnal knowledge against the order of nature and acts of gross indecency will still apply to sexual conduct between adults and adult males where sexual activity occurs in public or without consent or involves parties under the age of 18 years.*” (**Flag 3**), (Volume I).
- 11.4 Similarly, the Supreme Judicial Court of Massachusetts in *Commonwealth v. Richard L. Balthazar*,(318 N.E.2d 478 (Mass. 1974) held that law which prohibited an ‘unnatural and lascivious’ act was to be construed to be inapplicable to private consensual conduct of adults. It was held “*In light of these changes and in light of our own awareness that community values on the subject of permissible sexual conduct no longer are as monolithic as the Jacquith case suggested they were in 1954, we conclude that s. 35 must be construed to be inapplicable to private consensual conduct of adults. We do so on the ground that the concept of general community disapproval of specific sexual conduct, which is inherent in s. 35, requires such an interpretation.*”
- 11.4 The interpretation with respect to Section 377 urged by R-8 is in keeping with contemporary understanding of sexual orientation and gender identity; it is consistent with Indian constitutional values; it is consistent with international human rights standards; it is consistent with the developments in this field of the law worldwide as reflected from legislative changes and decisions of the superior courts in countries across the world.

L. CONCLUSION

- 12.0 At its root, this case is about the Emancipation of a large segment of our people. All of them Indian, all of them citizens. The Constitution of India in one of the great emancipatory charters, lifting as it does from the status of wretchedness and subordination -- communities, castes, tribes and women -- to full Citizenship. This case is about an invisible minority of Indians that seek to unlock the assured liberties enshrined in the Constitution, but denied to them in an aspect of life that matters most to them: their own identity; their own sexuality; their own self.
- 12.1 As Justice Kirby puts it, ‘*The question is bluntly posed: can laws criminalising sexual minorities be any longer justified? Can violence and discrimination against this minority be tolerated or should the law adopt a leadership and educative role? In pluralistic societies, is it fair and realistic to demand that*

members of sexual minorities change their orientation or live completely celibate lives? Is it in society's interests to protect supportive mutual relationships, given that sexual minorities exist, have always existed and will continue to exist, whatever the law and society say?' (Michael Kirby, Discrimination on the ground of sexual orientation -a new initiative for the Commonwealth of nations? The Commonwealth Lawyer, December 2007 Vol.16, 1. at p. 12.)

- 12.2 LGBT persons are a permanent minority in society and have suffered in the past from severe disadvantages. Their dignity has been and continues to be degraded, severely undermining their sense of self-worth. The criminalization of homosexuality condemns in perpetuity this sizeable section of society and forces them to lead their lives in the shadow of harassment, exploitation, humiliation and cruel and degrading treatment at the hands of the law enforcement machinery. The Government of India estimates the MSM number at around 25 lacs. The number of lesbians and transgenders would run into several lacs of persons as well. This vast section of our society comprises honourable citizens who lead wholesome lives but, in the language of the South African Constitutional Court, are denied full *moral* citizenship. The “moral” dimension of their citizenship is denied to them, *not* because of any harm that they have inflicted on any other person, but *only* because they seek to live lives and build relationships -- so essential for the realization and fulfillment of life’s goals -- with others, based upon a inner aspect of their being.
- 12.3 To blot, to taint, to stigmatize and to criminalize an individual for no fault of his or hers, is manifestly unjust. To be condemned to life long criminality shreds the fabric of our Constitution. For the male homosexual in particular and by its expanded application to lesbians and transgenders as well, Section 377 has worked to silence the promise of the Preamble and Part III of the Constitution. It is the case of the Petitioner and those who support the petition that it is the liberating, emancipatory spirit underlying the Fundamental Rights invoked in this case that must prevail. The Constitution of India recognizes, protects and celebrates diversity. LGBT persons are entitled to full *moral* citizenship.
- 12.4 This case ranks with other great constitutional challenges that liberated people condemned by their race or gender to live lives as second class citizens, such as *Mabo v. Queensland* [(1992) 175 CLR 1 (3 June 1992)] (where the High Court of Australia declared that the aboriginal peoples of Australia had title to lands prior to colonization), *Brown v. Board of Education*, [344 U.S. 1 (1952)], (where the United States Supreme Court held that segregated schools in the several states are unconstitutional in violation of the 14th Amendment), *Loving v. Virginia*, [388 U.S. 1 (1967)], (where the United States Supreme Court held that laws that prohibit marriage between blacks and whites were unconstitutional) The debates

about de-criminalization of homosexuality belongs to another era circa –1957. The granting of basic rights to homosexuals did not lead to “opening up of floodgates of delinquent behaviour” or any “erosion of moral fabric” in those societies we look upon as models in terms of social and economic development.

- 12.5 With the permission of the Court, R-8 seeks to tender “*Suggested Operative Directions*” that would meet the end of justice.

SUGGESTED OPERATIVE DIRECTIONS

- I. It is declared that all persons, regardless of their sexual orientation or gender identity, are entitled to the full enjoyment of all Fundamental Rights guaranteed under Part III of the Constitution of India.
- II. It is declared that persons who identify themselves as lesbian, gay, bisexual, transgender, *hijra* or *kothi* are:
 - a) Entitled to equality before the law and equal protection of the laws within the territory of India as guaranteed under Article 14 of the Constitution of India;
 - b) Entitled to be treated without discrimination as guaranteed under Articles 14, 15 and 16 of the Constitution of India;
 - c) Entitled to the freedom of speech and expression in all its manifestations, the freedom to assemble peaceably and the freedom to form associations or unions, as guaranteed under Article 19 (1) (a), (b) and (c) of the Constitution of India;
 - d) Entitled to live with dignity and enjoy personal liberty to the fullest extent, as guaranteed under Article 21 of the Constitution of India; and
 - e) Entitled to privacy including autonomy with respect to decisions and choices concerning intimate personal relationships, as guaranteed under Article 21 of the Constitution of India.
- III. It is declared that Section 377 of the Indian Penal Code, 1860 is not applicable to and does not cover consensual, same-sex, sexual acts between adults. In particular, it is declared that intimate sexual acts between adult consenting males do not fall within the scope of Section 377 of the Indian Penal Code, 1860.
- IV. It is declared that inasmuch as homosexual activity between consenting adults has been held to fall outside the scope of Section 377 of the Indian Penal Code, 1860, offences arising from alleged intimate acts in public would be liable to be dealt with under other generally applicable provisions of law.
- V. It is declared that on the interpretation placed by this Court on Section 377 of the Indian Penal Code, 1860, the said provision is constitutional and will continue to be attracted, *inter alia*, in respect of sexual activity between adults and minors; child sexual abuse cases; and non-consensual sexual intercourse.
- VI. Having regard to the documented instances of the abuse of Section 377 and the special vulnerability of members of the LGBT community, the following directions are issued to Respondent Nos. 1, 2 and 5:

- a) Hijras, kothis and other transgender persons are not be detained over night in police stations and are not detained in all male cells in jails to prevent harassment, abuse and sexual assault.
- b) Allegations of illegal detention, custodial abuse and torture of LGBT persons are to be promptly investigated and suitable disciplinary proceedings, criminal and other legal action is taken..
- c) Police training at all levels shall include a module on sexual orientation and gender identity so that law enforcement officials are sensitized to the issues facing LGBT persons.