

ICJ: Briefing Paper on *Navtej Singh Johar et al v. Union of India and Others*

Introduction

On 17 July 2018, India’s Supreme Court completed hearings on the validity of Section 377 of the Indian Penal Code (hereinafter Section 377), which criminalizes voluntary “carnal intercourse against the order of nature”.¹ The effect of Section 377 is to criminalize not just consensual same-sex sexual acts, but an entire section of the population, by branding them outlaws because of their real or imputed sexuality. Hence, the impact of this case could be a real watershed: based on international human rights law and India’s own constitutional law, the Supreme Court could finally be about to uphold the right of every human being to be free and equal, regardless of sexual orientation or gender identity.

This briefing paper sets out: a) the substantive and procedural history of the recently concluded hearings; b) the main arguments that were put forth in the hearings; and c) relevant Indian and international jurisprudence, laws and regulations, so as to understand how to continue to take forward the struggle against discrimination even if the Supreme Court decides that Section 377 is unconstitutional.²

Though the exact contours of the acts prohibited by Section 377 have been uncertain since it was enshrined in the Indian Penal Code in 1860,³ this provision has given rise to the persecution of people based on discrimination

¹ Section 377, Indian Penal Code: 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.

² See ICJ Press Release and Background Document, ‘India’s Supreme Court gets another chance to decriminalize same-sex relationships’, July 10, 2018 available at <https://www.icj.org/wp-content/uploads/2018/07/India-Supreme-Court-and-Section377-News-press-release-2018-ENG.pdf>

³ In 1837, in British India, Lord Macaulay presented a Draft Penal Code, which contained a clause on ‘unnatural offences’ and ‘unnatural lust’. While Lord Macaulay described other clauses in detail, for this clause he said that he was “unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of the opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.” Subsequently, Section 377 was added to the Indian Penal Code in 1860.

and hatred against their real or imputed sexual orientation, gender identity, gender expression, and/or sex characteristics (SOGIESC), through its direct enforcement in courts, but also, primarily, through its facilitation of violence, discrimination, and other human rights abuses at the hands of non-state actors, including families and communities, against people's real or imputed SOGIESC. The existence of Section 377 has fostered an atmosphere conducive to numerous human rights violations, such as of the right to equality before the law and equal protection of the law without discrimination; the non-discrimination principle; and of the rights to dignity, liberty, security of the person, freedom of expression, health and privacy.⁴

This paper uses the term "LGBT" to refer to any individual who identifies with a non-normative sexuality, gender identity and/or expression. It includes individuals who identify as lesbian, gay, bisexual, transgender and gender-queer, and also encompasses persons who may not identify with any of these identities. For the purposes of this paper, "LGBT" should be read to include other people who face human rights violations on the basis of their real or imputed sexual orientation, gender identity and/or expression, including those who may identify with terms other than those encompassed by "LGBT".

Brief History of the Current Hearings on Section 377

The recently concluded hearings on Section 377 are part of a long process of litigation going back more than a decade.

In a 2009 landmark judgment, the Delhi High Court in the case of *Naz Foundation v. Government of NCT of Delhi* ruled that Section 377 violated the Indian Constitution in so far as it criminalized consensual sexual acts between adults, as the provision discriminated on the basis of sexual orientation, which the Court saw as analogous to sex, and violated equality, privacy, liberty and dignity, and relevant international law standards.

However, Suresh Kumar Koushal, who, while not an original party to the original proceedings before the Delhi High Court, was nonetheless permitted to bring proceedings against the *Naz* judgment, which, in December 2013, resulted in the India's Supreme Court reversing the Delhi High Court decision and ruling that it was ultimately for the legislature to decide whether to repeal Section 377. The Supreme Court held, " the High Court overlooked that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and ... this cannot be made sound basis for declaring that section *ultra vires* the provisions of Articles 14, 15 and 21 of the Constitution".

⁴ See International Commission of Jurists, "'Unnatural Offences' Obstacles to Justice in India Based on Sexual Orientation and Gender Identity', 2017 available at <https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf>

This led the original petitioners in the *Naz* case, as well as the Central Government, to file review petitions⁵ against the December 2013 Supreme Court decision. However, these review petitions were dismissed on 28 January 2014, with the Supreme Court holding that it saw no reason to interfere with the December 2013 judgment.⁶

The petitioners then filed curative petitions,⁷ which are rarely granted. However, in this case, the Supreme Court granted the curative petition on 2 February, 2016,⁸ and passed an order to constitute a Constitution Bench,⁹ to hear the curative petitions. However, as of today, the curative petitions have not been listed for hearing.

Instead, a series of fresh petitions contesting the constitutional validity of Section 377 were filed, with the first petition being *Navtej Singh Johar v. Union of India*, which was admitted on 8 January, 2018, along with five other petitions, which were also admitted and joined with *Navtej Singh Johar's* petition (*Navtej Singh Johar et al*).¹⁰ Some of the petitioners to the original

⁵ As per Article 137 of the Indian Constitution, a review petition is filed by the petitioners who are aggrieved by a Supreme Court order, where the Supreme Court has the power to review any judgment pronounced by it. A criminal review petition can only be moved on the ground of an error apparent on the face of the record. The same judges who had deliberated on and adopted the decision, assess whether their decision disclosed any "errors apparent on the face of the record".

⁶ <http://orinam.net/377/wp-content/uploads/2014/01/Review-Naz.pdf>

⁷ A curative petition is a petition through which a Supreme Court decision may be challenged, after the review petition has been dismissed. This judicial remedy was made available in *Rupa Ashok Hurra v. Ashok Kumar Hurra*. Through the Curative Petition, the Supreme Court upheld the principle that no technicality should hamper the interests of justice. It further stated: "rendering justice in a cause is not less important than the principle of finality of its judgment." The curative petition is presided over and decided by a bench comprising the three most senior judges of the Supreme Court along with the two judges who originally deliberated on the decision under challenge. See International Commission of Jurists, "Briefing Paper: The Section 377 Curative Petition" (2016) available at <https://www.icj.org/wp-content/uploads/2016/03/India-QA-art-377-Advocacy-Analysis-brief-2016-ENG.pdf>

⁸ *Naz Foundation Trust v. Suresh Kumar Koushal and Others*, Curative Petition Nos. 88-102 of 2014, Supreme Court of India, 2 February, 2016. Available at http://orinam.net/377/wp-content/uploads/2013/12/SUPREME_COURT_Curative_Order_Feb2_2016.pdf

⁹ Article 145 (3) of the Indian Constitution states that for cases involving a substantial question of law as to the interpretation of the Constitution, the minimum number of judges required to sit on the bench is five. See International Commission of Jurists, "Briefing Paper: The Section 377 Curative Petition" (2016) available at <https://www.icj.org/wp-content/uploads/2016/03/India-QA-art-377-Advocacy-Analysis-brief-2016-ENG.pdf>

¹⁰ *Navtej Singh Johar & Others. v. Union of India Ministry of Law and Justice*, Writ Petition (Criminal) No.76/2016, *Akkai Padmasali & Ors. v. Union of India and Ors.*, Writ Petition (Civil) No.572/2016, *Keshav Suri v. Union of India* Writ Petition (Criminal) No. 88/2018, *Arif Jafar v. Union of India* Writ Petition (Criminal) No.

curative petitions as well as new petitioners, including Voices Against 377, Naz Foundation, parents of LGBT persons (Minna Saran), mental health professionals (Dr. Alok Sarin) and teachers (Prof. Nivedita Menon) filed impleadment applications, which too were connected with the *Navtej Singh Johar et al* writ petitions. The hearings for *Navtej Singh Johar et al* began on 10 July 2018 and concluded on 17 July 2018. The judgment has been reserved.

The *Navtej Singh Johar v. Union of India et al* petitions, and the impleadment applications¹¹ were heard jointly by the Constitution Bench¹² of the Supreme Court, which will rule on the constitutional validity of Section 377.

1. What has been the history of the judicial developments on Section 377, Indian Penal Code, 1860, up until the fresh petitions were filed?

1994 – 2009: Several legal challenges were brought concerning the constitutionality of Section 377, starting in 1994. In December 2001, the Naz Foundation filed a writ petition contesting the constitutional validity of Section 377 in the Delhi High Court. In 2004, the Delhi High Court dismissed the petition, as well as a subsequent review petition. However, the Naz Foundation challenged this dismissal before the Supreme Court. Eventually, the Supreme Court directed that the High Court should hear the case.¹³

This resulted in the landmark case *Naz Foundation v. Union Of India*, in which the petitioner, Naz Foundation and intervenor, Voices Against 377, challenged the constitutionality of Section 377, stating that HIV/AIDS prevention efforts were being obstructed by the existence of Section 377; that the LGBT community was being denied their rights to privacy and dignity through the criminalization of consensual private sexual relations, which, the petitioners argued, were activities protected by the right to life and liberty

100/2018, *Ashok Row Kavi and Ors. v. Union of India* Writ Petition (Criminal) Diary No. 16238/2018, *Anwesh Pokkuluri and Others v. Union of India* Writ Petition (Criminal) No. 121/2018. See Daily Cause List for 10 July 2018, Supreme Court of India, at https://supremecourtindia.nic.in/jonew/cl/2018-07-10/F_J_1.pdf

¹¹ A third party that is likely to be impacted by the outcome of the decision, is entitled to get itself impleaded to the suit.

¹² Article 145 (3) of the Indian Constitution states that for cases involving a substantial question of law as to the interpretation of the Constitution, the minimum number of judges required to sit on the bench is five. In practice, the Court has often failed to comply with this provision when deciding on cases that raised questions of interpretation of the Constitution - the *Suresh Kumar Koushal* case, for instance, would have been a prime candidate for being heard by a Constitution Bench. See International Commission of Jurists, "Briefing Paper: The Section 377 Curative Petition" (2016) available at <https://www.icj.org/wp-content/uploads/2016/03/India-QA-art-377-Advocacy-Analysis-brief-2016-ENG.pdf>

¹³ Orinam, "Notes of Proceedings in *Suresh Kumar Kaushal v. Naz Foundation*: February 23 to March 27, 2012 Supreme Court of India", available at http://orinam.net/content/wp-content/uploads/2012/04/Naz_SC_Transcript_2012_final.pdf

under Article 21 of the Indian Constitution. They also argued that the LGBT community was being denied the right to non-discrimination on the grounds of 'sex' as per Article 15 of the Indian Constitution, which included sexual orientation, and that non-discrimination on the basis of sexual orientation is implied in their exercise of fundamental rights. The Delhi High Court accepted the arguments and read down Section 377, holding that, "Section 377 IPC, insofar as it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14, and 15 of the Constitution".¹⁴ However, the Delhi High Court also ruled that Section 377 would continue to criminalize non-consensual penile non-vaginal intercourse and sex with minors.

2009 – 2013: Effectively, the Delhi High Court judgment decriminalized homosexuality, and consensual same-sex relations between adults remained decriminalized between 2009 and 2013. However, several groups, including religious groups, who were not party to the original *Naz Foundation* case before the Delhi High Court, successfully challenged the *Naz* judgment. In *Suresh Kumar Koushal v. Naz Foundation*, in 2013, a two-judge bench of the Supreme Court overruled the 2009 Delhi High Court judgment. In its decision, the Supreme Court stated that Section 377 impacted a "minuscule fraction of the country's population", and that less than 200 cases had been brought under Section 377 in the past 200 years. Further, the Court stated that the misuse of the provision by state or non-state actors was not condoned by the provision itself, and the occurrence of such misuse would not make the provision unconstitutional. Finally, the Supreme Court held that the Delhi High Court decision in *Naz Foundation* was not legally sustainable; Section 377 "did not suffer from the vice of unconstitutionality"; and it was the legislature that should decide regarding the repeal of Section 377.¹⁵

In the aftermath of the December 2013 Supreme Court's decision in *Suresh Kumar Koushal*, the Naz Foundation and other parties filed review petitions with the Supreme Court, which, however, were all dismissed in 2014. But on 2 February 2016, the Supreme Court admitted the curative petition filed by the petitioners, and referred it to a Constitution Bench. However, the curative petition is still pending, and has not been listed for hearing.¹⁶

2. What is the impact of the landmark Supreme Court judgment on privacy on LGBTI rights?

On 24 August 2017, in *Justice K. S. Puttaswamy v. Union of India*,¹⁷ the Supreme Court handed down a nine-judge bench decision guaranteeing the

¹⁴ *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277.

¹⁵ *Suresh Kumar Koushal and another v. Naz Foundation and others*, [(2014)1 SCC 1].

¹⁶ For more information about curative petitions, and the specific curative petition in the section 377 matter, please see: ICJ "Briefing Paper: The Section 377 Curative Petition" available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2016/03/India-QA-art377-Advocacy-Analysis-brief-2016-ENG.pdf>.

¹⁷ Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India and Ors., Writ Petition (Civil) No. 494/2012 available at

constitutional right to privacy, and referring to sexual orientation as core to privacy. The decision held that, “[p]rivacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation...”¹⁸ The *Puttaswamy* judgment recognized the rights to privacy and dignity as the core of one’s notion of sexual orientation, and criticized the *Koushal* judgment for disregarding the rights of minority populations, stating that fundamental rights inhere in each and every individual. This judgment was the primary impetus for the Supreme Court to reconsider their decision in the *Koushal* judgment, which upheld the constitutional validity of Section 377.

3. Which writ petitions did the Supreme Court hear and what were the arguments advanced in the different petitions?

In 2018, a series of six fresh writ petitions, and several impleadment applications, challenging the constitutional validity of Section 377, were accepted by the Supreme Court. The first petition, *Navtej Singh Johar v. Union of India* was accepted on January 8, 2018, where the Supreme Court agreed to reconsider the two-judge bench decision in *Suresh Kumar Koushal v. Naz Foundation*, and referred the matter to a Constitution Bench. The remaining five petitions and impleadment applications were then joined to *Navtej Singh Johar* petition. This was a crucial development as the Supreme Court agreed to reconsider the constitutional validity of Section 377.

A. *Navtej Singh Johar v. Union of India*: In 2016, a fresh writ petition, was filed by five renowned members of the LGBT community - Sunil Mehra, Navtej Singh Johar, Ritu Dalmia, Aman Nath and Ayesha Kapur - who challenged the constitutional validity of Section 377, arguing that the issues raised in their petition were “varied and diverse from those raised in the Curative Petition”. They claimed that the existence of Section 377 “rendered them criminals in their own country... as it criminalized the very existence of LGBT persons by criminalizing their sexuality”. They argued that in addition to their right to sexuality, their fundamental rights that flow from their constitutional right to dignity (Art. 21) were violated by Section 377, such as their right to be open about their sexuality in their personal and professional lives, which is integral to living a life with dignity. Further, the petitioners argued that Section 377 perpetuates the fear of criminalization and abuse by state and non-state actors to the detriment of their economic, social, and political lives. Based on these and other arguments, the petitioners said that the existence of Section 377 deprived them of a number of fundamental rights, such as their right to life with dignity, right to equality, right to non-discrimination, right to personal autonomy, right to choice of partner, right to privacy, right to health, right to freedom of speech and expression, right to equality in matters of employment, and further, that the Section 377 was vague, excessive, inherently arbitrary and unreasonable, and a hostile class

http://supremecourtsofindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf

¹⁸ *Ibid* Para 2(f).

legislation.¹⁹

B. *Dr. Akkai Padmasali & Ors. v. Union of India* - In 2016, Dr. Akkai Padmasali, a transgender person, filed a writ petition, which was accepted by the Court in 2018, challenging the constitutional validity of Section 377 on the basis that it violated the transgender community's fundamental rights to life, autonomy and dignity guaranteed under Article 21 of the Indian Constitution, their right to equality guaranteed under Article 14 of the Indian Constitution and their right to freedom of expression provided under Article 19 of the Indian Constitution, and that each of these rights had been recognized in *National Legal Services Authority v. Union of India*.²⁰ In that case, which effectively reflected an expansive jurisprudential approach, the Supreme Court in its judgment had affirmed transgender individuals' right to decide their self-identified gender, and directed the Centre and State governments to grant legal recognition of this gender identity such as male, female or as third gender, and take specific steps to address the discrimination faced by transgender persons in India.²¹ Relying on the Supreme Court's judgment in *NALSA*, Dr. Akkai Padmasali's petition has expanded the ambit of the adjudication on the constitutionality of Section 377 to include transgender persons who engage in same-sex adult consensual sexual relationships.

C. *Keshav Suri v. Union of India* - In 2018, Keshav Suri, a hotelier and an LGBT community member, filed a writ petition, asking the Court to declare that the right to choose one's sexual orientation is inherent to one's right to life with dignity and to one's right to privacy, (Art. 21, Indian Constitution), and that discrimination on the basis of a person's sexual orientation or gender identity was a violation of their right to equality (Art. 14, Indian Constitution). This petition emphasized the economic costs of discrimination, both due to criminalization and due to social stigma, stating that discrimination prevents the LGBT community from contributing to the growth of the economy, using a World Bank study of India which has estimated a cost between 0.1% - 1.7% to GDP due to homophobia, to underscore its argument. The petition asked for striking down or in the alternative the reading down of Section 377 in as much as it applied to same-sex consensual

¹⁹ *Navtej Singh Johar & Ors. v. Union of India Ministry of Law and Justice Writ Petition (Criminal) No.76/2016* available at <http://orinam.net/377/wp-content/uploads/2016/06/Johar-UoI-2016.pdf>

²⁰ *Akkai Padmasali & Ors. v. Union of India and Ors.*, Writ Petition (Civil) No.572/2016 available at http://orinam.net/377/wp-content/uploads/2016/07/Akkai_vs_UOI_2016.pdf

²¹ *NALSA v. Union of India*, 2014, for more information about the *NALSA* decision, refer to ICJ Briefing Paper: "Implementation of the *NALSA* Decision", 2016, available at <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf>

adult intercourse. The petition was heard by the Court and tagged with the *Navtej Singh Johar* petition.²²

D. *Arif Jafar v. Union of India*- The petitioner, a homosexual man, faced arrest and detention of 47 days, for distribution of condoms among men who have sex with men, under Section 377 and other offences. In his petition he highlighted his experience and the impact of Section 377, and argued that a person's sexual orientation is covered by their right to privacy, and criminalization under Section 377 was a violation of an individual's constitutionally guaranteed rights to equality, non-discrimination, freedom of expression and association, privacy, dignity and liberty. The petition also argued that Section 377 denied personal autonomy, which would include the right to choose one's partner; was vague and arbitrary; and resulted in denial of other fundamental rights and in discrimination against a class of citizens. The petition asked that Section 377 be recognized as violating the Indian Constitution, as it denied people's constitutionally guaranteed fundamental rights to life with dignity, privacy, autonomy, (Art. 21) equality, (Art. 14) non-discrimination, (Art. 15), liberty, (Art. 21), and freedom of expression and association (Art. 19).²³ On May 1st, this petition too was tagged with the *Navtej Singh Johar* petition.²⁴

E. *Ashok Row Kavi and Ors. v. Union of India* – Ashok Row Kavi is a member of the LGBT community, and works on promoting the rights of LGBT persons, as part of a community-based organization in India. The petition argued that Section 377 in criminalizing consensual, sexual acts between adults violated the right to dignity, personal autonomy, privacy, and health under Article 21; was arbitrary and violated the right to equality under article 14; as well as the right to non-discrimination under article 15; and the right to freedom of speech and expression in art 19(1); and undermined the constitutional value of fraternity, which, in turn, required respect for diversity.²⁵ This petition too was heard and tagged with *Navtej Singh Johar*.²⁶

F. *Anwesh Pokkuluri and Others v. Union of India* - This petition was filed by 20 students and alumni of the Indian Institutes of Technology, who identified as members of the LGBT community. The petition stated that Section 377 violated the Indian Constitution, as it violated the right to

²² *Keshav Suri v. Union of India* Writ Petition (Criminal) No. 88/2018, available at <https://indiankanoon.org/doc/13102222/>

²³ *Arif Jafar v. Union of India* Writ Petition (Criminal) No. 100/2018 available at http://www.lawyerscollective.org/wp-content/uploads/2018/04/watermarked_Final-Arif-Jafar-writ-petition-25.04.2018-as-filed.pdf

²⁴ *Arif Jafar v. Union of India* Writ Petition (Criminal) No. 100/2018 available at <https://indiankanoon.org/doc/79641809/>

²⁵ *Ashok Row Kavi v. UOI*, Writ Petition available at http://www.lawyerscollective.org/wp-content/uploads/2018/04/watermarked_FINAL-Ashok-Rao-Kavi-ors-v-UOI-26.04.2018-as-filed.pdf

²⁶ *Ashok Row Kavi and Ors. v. Union of India* Writ Petition (Criminal) Diary No. 16238/2018, available at <https://indiankanoon.org/doc/21050916/>

equality before the law and to non-discrimination. The petition highlighted the impact of Section 377 on the petitioners stating that criminalization of sexual orientation resulted for some petitioners in shame, low self-esteem, and depression, among other mental health issues; Section 377 denied some petitioners' equal access to justice; denied equal access to information about sexual identities; forced some petitioners to forego better employment prospects, including public sector employment; and pushed some petitioners to leave India due to their LGBT status.²⁷ The petition was tagged with Navtej Singh Johar.²⁸

In addition to these writ petitions, parents of LGBT individuals, mental health professionals, activists and teachers, Voices Against 377, Naz Foundation among others, filed impleadment applications.

Each of the above-mentioned petitions and impleadment applications asked for a reading down of Section 377 in as much as it concerns adult consensual same sex intercourse. Further, each petition asked the Supreme Court to read down the provision as a remedy on the basis of a comprehensive finding by the Supreme Court that Section 377 violates fundamental rights, guaranteed by the Indian Constitution, including the petitioners' rights to equality before the law and equal protection of the law without discrimination, dignity, liberty, health, freedom of expression, equality in employment, and privacy.

It is hoped that in its eventual decision in these joint cases the Supreme Court will recognize the full breadth of the fundamental rights of LGBT individuals, as guaranteed by the Indian Constitution, and the impact of Section 377, in turn, on their enjoyment and exercise.

4. What are the main arguments that have been put forth by the petitioners in the 10 July – 17 July hearings?

A. Right to Equality (Article 14) - Section 377 violates LGBT persons' "right to equality before the law" and "equal protection of the laws"²⁹. There are two tests for Article 14 that have to be satisfied to demonstrate that a law is valid. The first test is to show that the classification in the legislation - being "against the order of nature" - is based upon intelligible differentia,³⁰ has a legitimate purpose and there exists a rational nexus between the purpose of the legislation and the classification. With respect to Section 377, it was argued that there is

²⁷ <http://orinam.net/377/wrongness-of-koushal-iit-petition-may-2018/>.

²⁸ *Anwesh Pokkuluri and Others v. Union of India* Writ Petition (Criminal) No. 121/2018, available at <https://indiankanoon.org/doc/39558252/>.

²⁹ Article 14, Constitution of India, 1949: 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.

³⁰ The classes "against the order of nature" and "within the order of nature" should be distinct, well-defined, and distinguishable from each other.

no intelligible differentia between 'carnal intercourse against the order of nature' and 'carnal intercourse within the order of nature'; there is no legitimate purpose for the above classification; and there is no 'rational nexus' between the purpose of the legislation and the classification. Hence the three limbs of the test under Article 14 stand violated.

As per the second test for Article 14, when the provision is manifestly arbitrary it is liable to be struck down. The terms used in the provision, "carnal intercourse" and "order of nature" are undefined and vague, which prevent State and non-State actors from knowing when their conduct is in violation of the provision. As such it was argued that the provision was arbitrary and liable to be struck down.

Finally, while the language of Section 377 may be facially neutral, in effect, it impacts the LGBT community disproportionately and to that extent is unconstitutional. It was argued that any classification, which seeks to discriminate on the basis of personal characteristics that are intimately connected with individuality, choice and personhood, violates Article 14.

B. Prohibition on discrimination based on sex (Article 15)³¹ - Since sex includes sexual orientation and gender identity, any discrimination against an LGBT person by State or non-State actors, based on sexual orientation, is a violation of Article 15. As Section 377 effectively criminalizes the daily lives of LGBT persons, it has a chilling effect on their ability to exercise their rights, as they are always fearful of societal or State punishment. Section 377 assumes that people should only have sexual intercourse with persons from the opposite sex and sexual intercourse is acceptable only when it is procreative, and, thus, discriminates against people based on gender stereotypes. Section 377 denies an individual the fundamental right to choose a partner. The petitioners have instead asked the Court to accord the same protections to LGBT relationships that is given to other vulnerable relationships based on caste or religion.³²

C. Right to Freedom of Speech and Expression (Article 19(1)(a))³³
- Section 377 by criminalizing one's sexual orientation and gender

³¹ Article 15(1), Constitution of India, 1949: 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.

³² *Shafin Jahan v. Asokan K.M. and Others* Criminal Appeal No. 366/2018 (Arising out of S.L.P. (Crl.) No. 5777 of 2017), April 9, 2018 upheld the right of an individual to decide their choice of partner as integral to their identity under Article 21, and reiterated that societal opprobrium does not bear on the choice of partners and that these decisions are outside the control of the state. Moreover it stated that Courts must safeguard these freedoms as state interference on these issues can have a chilling effect on other fundamental rights, including the exercise of liberty.

³³ Article 19(1)(a), Constitution of India, 1949: Protection of certain rights regarding freedom of speech etc. - (1) All citizens shall have the right (a) to freedom of speech and expression.

identity has a chilling effect on the individuals' freedom of speech and expression as expression includes expression of sexual orientation. While heterosexual couples are able to express their sexual orientation publicly, same-sex couples are denied this right. Further, the right to freedom of speech and expression enables people to contribute fully to relevant social debates, but the LGBT community is unable to express their ideas openly because they fear persecution due to their sexual orientation. Thus, Section 377 stigmatizes the lives of LGBT persons and prevents them from being a part of society.

- D. Right to Form Associations or Unions (Article 19(1)(c))³⁴** - Section 377 violates the rights of LGBT persons to form personal and professional associations. For instance, corporations that promote the interests of minority communities can avail of tax exemptions, but this tax benefit is not available to organizations that promote the interests of sexual minorities. Rather, even LGBT peer support groups risk being criminalized due to Section 377.
- E. Right to practice any profession or to carry on any occupation, trade, or business (Article 19(1)(g))³⁵** - Section 377 forces LGBT individuals to hide their identities in workplaces, however, this has a deep psychological impact, which has a direct effect on their exercise of fundamental rights and is tantamount to persecution in the workplace.
- F. Right to Protection of Life and Personal Liberty (Article 21)³⁶** - Sexual orientation is an essential component of identity and is embedded in the rights to life, liberty, dignity, privacy, as upheld by the Supreme Court in its decision in *Puttaswamy* (See Question No. 5 below). Section 377 criminalizes an LGBT individual's identity, which, in turn, is protected under Article 21. Further, one's right to choose one's partner, to engage and to cohabit with one's partner is also an essential part of one's personality and is intrinsic to the exercise of the rights to liberty, autonomy and dignity. However, Section 377, by criminalizing some individuals' sexual orientation, violates the right of those individuals to choose their partner.
- G. Right to Health (Article 21)** - Right to health is a fundamental part of the right to life under Article 21. Though India is obliged to provide to marginalized populations, including the LGBT population, health services, HIV prevalence among men who have sex with men (MSM) and transgender persons is higher than among the general population. Currently, Section 377 criminalizes even health workers who assist HIV

³⁴ Article 19(1)(c), Constitution of India, 1949: Protection of certain rights regarding freedom of speech etc. - (1) All citizens shall have the right (c) to form associations or unions.

³⁵ Article 19(1)(g), Constitution of India, 1949: Protection of certain rights regarding freedom of speech etc. - (1) All citizens shall have the right to (g) practise any profession, or to carry on any occupation, trade or business.

³⁶ Article 21, Constitution of India, 1949: Protection of Life and Personal Liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.

prevention by providing condoms to MSM. Further, Section 377 facilitates underreporting of male-to-male HIV transmission, and increases the risk of depression and other mental health issues among the LGBT community by criminalizing their identity.

H. Right to Access Justice (Articles 14 and 21) – Each person has a right to access justice and this right cannot exist without a remedy. However, when LGBT persons are victims of crimes such as blackmail, extortion, rape, harassment, which are perpetrated against them partly or wholly because of their real or imputed sexual orientation or gender identity, they are unable to access remedies for these crimes unlike the rest of the population because of the risk of prosecution under Section 377.³⁷

I. Fraternity³⁸ - Fraternity is the constitutional principle of respect for the other person's dignity, in light of their differences. Section 377 violates the principle of fraternity and it criminalizes LGBT persons for their differences.

5. What are the petitioners asking for?

The petitioners are asking for the following:-

- a) Section 377 to be read down in as much as it applies to adult consensual same sex intercourse;
- b) The Supreme Court judgment of December 2013 in *Koushal* to be held invalid, in light of the *Puttaswamy* decision. While *Koushal* argued that Section 377 criminalizes certain acts and not the identity of any community, in its judgment in *Puttaswamy* the Supreme Court clearly disagreed with this and held that sexual orientation is essential to one's identity;
- c) Article 21 includes a right to intimacy;
- d) Article 15 includes the right to be free from discrimination on the basis of sexual orientation and gender identity;

³⁷ See ICJ, "'India: Unnatural Offences': Obstacles to Justice in India Based on Sexual Orientation and Gender Identity', 2017, which analyzes the challenges faced by LGBT persons in accessing justice in India. Available at <https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf>. Lawyers Anand Grover and Shyam Divan, who appeared on behalf of petitioners and impleaders, Arif Jafar, Ashok Row Kavi and Others, Naz Foundation(India) Trust, and Voices Against 377, referenced this report in their written submissions.

³⁸ Preamble, Constitution of India, 1949: "WE, THE PEOPLE OF INDIA, having solemnly resolved into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity; and to promote among them all
FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
IN OUR CONSTITUENT ASSEMBLY this 26th day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

- e) Article 15(2) includes the right to non-discrimination in relation to housing, healthcare, education, employment, and other facilities for the LGBT community.

6. What is the equivalent international law position on each constitutional argument made in the hearings?

The Indian Supreme Court has read relevant international law into the Indian domestic framework, when there has been no conflict between the international legal obligation and the Indian Constitution. In particular, the Yogyakarta Principles on the application of relevant international law to sexual orientation and gender identity were referenced in *Naz Foundation v. Govt. of NCT of Delhi* and read as part of the Indian Constitutional framework in *NALSA v. Union of India*. The same was reiterated in *K. S. Puttaswamy v Union of India*.

The existence of Section 377 violates several of India's international human rights law obligations, including the obligation to respect, protect, and fulfill the right to life, liberty and security of person, non-discrimination, equality before the law, equal protection of the law, free expression, health, and privacy. Those rights are guaranteed in a number of international treaties by which India is bound, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

A. Right to Equality - In the context of international law, right to equality is captured in Article 1 of Universal Declaration of Human Rights, which says, "all human beings are born free and equal in dignity and rights" as well as in Article 3 of International Covenant of Civil and Political Rights. This applies to all persons including those who identify as LGBT. The Human Rights Committee has urged State parties to "guarantee equal rights to all individuals, as established in the Covenant, regardless of their sexual orientation".³⁹

B. Right to Non-Discrimination - Prohibition on non-discrimination is a core human rights principle, which is in the United Nations Charter, Universal Declaration of Human Rights, and other human rights treaties. In *Toonen v. Australia*, the Human Rights Committee stated, "the reference to 'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."⁴⁰ The Committee on Economic, Social and Cultural Rights has affirmed that the non-discrimination guarantee in the International Covenant on Economic, Social and Cultural Rights includes sexual orientation. Further, gender identity has also been accepted as a prohibited ground for discrimination.

C. Right to Work - The right to work is enshrined in Article 6 of the

³⁹ See concluding observations on Chile (CCPR/C/CHL/CO/5), para. 16. See also concluding observations on San Marino (CCPR/C/SMR/CO/2), para. 7 and Austria (CCPR/C/AUT/CO/4), para. 8.

⁴⁰ CCPR/C/50/d/499/1992, at para. 8.7.

International Covenant on Economic Social and Cultural Rights, providing that, “everyone has the opportunity to gain his living by work which he freely chooses or accepts” and requiring States to “take appropriate steps to safeguard this right.” The United Nations Committee on Economic, Social, and Cultural Rights has clarified that the Covenant, “prohibits discrimination in access to and maintenance of employment on grounds of... sexual orientation”,⁴¹ and that States have an obligation to ensure that the principle of non-discrimination applies to the right to work for everyone, especially for disadvantaged groups and individuals.

D. Right to Freedom of Speech, Expression, and Assembly - Limitations on the right to freedom of expression, association and peaceful assembly that are based on the sexual orientation or gender identity of an individual violate rights guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the International Covenant on Civil and Political Rights. Limitations on these rights must be compatible with the non-discrimination provisions of international law.

E. Rights to life and to liberty and security of person – The rights to life and to liberty and security of person are core human rights found in the Universal Declaration of Human Rights (Article 3) and the International Covenant on Civil and Political Rights (Articles 6 and 9), among others.⁴² In order to guarantee those rights, States are required to exercise due diligence, including in preventing, punishing and providing redress for acts that result in arbitrary deprivations of life or in abuses of the right to liberty and security of person perpetrated by private parties, including in instances where victims have been targeted on the grounds of their real or imputed SOGIESC.⁴³

F. Right to Health - Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights provides that States parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The Committee on Economic, Social and Cultural Rights has indicated that

⁴¹ Committee on Economic, Social and Cultural Rights, General Comment No. 18 (right to work), at para. 12(b)(1). See United Nations Office of the High Commissioner ‘Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law’, 2012, New York and Geneva at pg. 46.

⁴² The Working Group on Arbitrary Detention has stated that detaining someone for offences relating to sexual orientation or gender identity, including offences not directly related to sexual conduct, such as those pertaining to physical appearance or so-called “public scandal”, breaches international law. See Annual Report of the United Nations High Commissioner for Human Rights, “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity”, 17 November 2011, at A/HRC/19/41, at page 15.

⁴³ Human Rights Committee, General Comments No. 6 (on the right to life), and No. 31 (on the nature of the general legal obligation imposed on States parties to the Covenant), at para. 8.

the Covenant proscribes any discrimination in access to health care and the underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of sexual orientation and gender identity. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health observed: "Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights, including the right to health."⁴⁴ States have an obligation to provide unhindered access to health services and facilities to people on a non-discriminatory basis, including in respect of their real or imputed SOGI.

G. Right to Privacy- Right to privacy is enshrined in Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, which states that no one should be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence".⁴⁵ In its General Comment no. 16, the Human Rights Committee confirmed that any interference with privacy, even if provided for by law, "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."⁴⁶ Since *Toonen* in 1994, the Human Rights Committee has held that laws used to criminalize private, adult, consensual same-sex sexual relations violate rights to privacy and to non-discrimination.

In its second Universal Periodic Review, the Government of India agreed to "[s]tudy the possibility of eliminating any criminalization of same sex relations".⁴⁷ Since then, however, the Government of India has not taken any notable measures on this issue. Further, the Government of India abstained during the vote on Human Rights Council Resolution 32/2 of 30 June 2016 on Protection against violence and discrimination based on sexual orientation and gender identity, which established mandate of the Independent Expert of the Human Rights Council on protection against violence and discrimination based on sexual orientation and gender identity.⁴⁸ In the third Universal

⁴⁴ Grover Anand. UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. A/HRC/14/20. 2010 Available at

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>

⁴⁵ Article 17, International Covenant on Civil and Political Rights.

⁴⁶ Para 4, General Comment 16, Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation), UN Human Rights Committee, HRI/GEN/1/Rev.9 (Vol. I),1988.

⁴⁷ A/HRC/21/10, India, 'Report of the Working Group on the Universal Periodic Review', available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/151/08/PDF/G1215108.pdf?OpenElement>

⁴⁸ For more information about UN Independent Experts on sexual orientation and gender identity, please refer to UN Doc. A/HRC/RES/32/2, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/154/15/PDF/G1615415.pdf?OpenElement>

Periodic Review, the Government of India was asked by Ireland to ensure “equality and non-discrimination in line with its international obligations by developing public human rights awareness programmes and taking concrete steps to advance the rights of women and girls, members of religious minorities, and lesbian, gay, bisexual, transgender and intersex persons ...”. However, India merely noted, but did not accept this recommendation.⁴⁹

7. Have there been any attempts by the legislature to repeal or amend Section 377?

In *Suresh Kumar Koushal v. Naz Foundation*, in December 2013, a two-judge bench of the Supreme Court upheld the constitutional validity of Section 377 and stated that the legislature has the prerogative to decide whether Section 377 should be repealed.⁵⁰

The Indian Government has been largely silent on the issue. However, Shashi Tharoor, a Member of Parliament from the Indian National Congress party, attempted to introduce a private member bill in December 2015 for the repeal of Section 377 in the Lower House of the Parliament. His Bill was eventually defeated by a vote of 71-24. He tried again in March 2015 but was similarly defeated.⁵¹

As the Indian Penal Code falls under the Concurrent List of the Constitution,⁵² the Parliament can amend the Indian Penal Code and/or State Assemblies can amend the State Penal Codes, hence a legislative route is available to individual States to amend the State Penal Codes to ensure the decriminalization of consensual sexual relations in their jurisdictions, with the view to striving, in turn, to achieve equality and freedom for all, irrespective of one’s real or imputed SOGI.

Media reports indicated that the Kerala State Government was considering introducing a bill to amend Section 377 in the State Assembly and the Law Secretary B. G. Harindranath had drafted a Bill, however, to date, ICJ is not aware that there has been any further movement on the issue.⁵³

⁴⁹ Para 161.71 of UN Doc. A/HRC/36/10, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/193/56/PDF/G1719356.pdf?OpenElement>.

⁵⁰ *Suresh Kumar Koushal and another v. Naz Foundation and others*, [(2014)1 SCC 1].

⁵¹ “Shashi Tharoor’s bill on homosexuality defeated in LS for 2nd time” *Hindustan Times*, March 11, 2016, available at:

<https://www.hindustantimes.com/india/shashi-tharoor-s-bill-to-decriminalise-homosexuality-defeated-in-ls/story-XzoKkwf9ouPBoEWWxVAznL.html>.

⁵² In India, as per the Seventh Schedule of the Indian Constitution, legislative power is allotted to the Union, the States, and to the Concurrent List. The Concurrent List includes 52 items, where each item is under the legislative power of both the Union and the State Legislature. Criminal Law including the Indian Penal Code is the first item on the Concurrent List.

⁵³ “State to be a trendsetter in promoting gay rights?” *The Times of India*, March 23, 2017, available at:

The ICJ considers that it is imperative that Parliament, in recognition of the constitutional invalidity of S. 377, repeal S. 377 entirely, and pending repeal there should be a wide-ranging review to consider which gaps, if any, the repeal of S. 377 in its entirety would leave, e.g., with respect to acts constituting male rape or other sexual offences, and to make recommendations as to how any eventual gaps should be filled by Parliament.

Conclusion

Section 377 has allowed homophobic and transphobic attitudes to continue unabated leading to discrimination and violence by State and non-State actors in India. The judiciary has taken some long-overdue and very necessary steps towards decriminalizing consensual same sex relations. The *Puttaswamy* judgment, which held that, at its core, privacy includes “the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation...”, and referred to sexual orientation as an essential component of identity, is a welcome judgment and its arguments on the rights to equality and non-discrimination strengthen the prospects of an expansion of the jurisprudence on equality and non-discrimination so as to include recognition of diverse sexual orientations.

It is hoped that the Supreme Court in its forthcoming judgment in the case of *Navtej Singh Johar et al v. Union of India*, which the Constitution Bench of the Court has recently heard, will review the constitutional validity of Section 377, and will find that the provision is inconsistent with India’s international human rights obligations; further, it is hoped that the Supreme Court will take the opportunity to acknowledge the human rights violations and the violations of fundamental rights guaranteed by the Indian Constitution, such as the violations of the rights to equality and non-discrimination, of the rights to dignity, liberty, security of the person, freedom of expression, equality in employment and health to which Section 377, gives rise. Such a ruling would be a truly momentous from a human rights perspective, and would underscore that all human beings, whatever their sexual orientation or gender identity or express are all born free and equal.

In addition, it is hoped that the Indian authorities will repeal S. 377 entirely. Pending repeal, there should be a wide-ranging review to consider which gaps, if any, the repeal of S. 377 in its entirety would leave, e.g., with respect to acts constituting male rape or other sexual offences, and to make recommendations as to how any eventual gaps should be filled by Parliament.