

IN THE HON'BLE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION
W.P. (Crl.) No. 121 of 2018

In the matter of:

ANWESH POKKULURI & ORS.

... PETITIONERS

VERSUS

UNION OF INDIA

... RESPONDENT

Note on Arguments on behalf of the Petitioner by Dr. Menaka Guruswamy

INDEX

I. SECTION 377 IS ARBITRARY AND UNCONSTITUTIONAL AND VIOLATES ARTICLE 14.....	1
II. SECTION 377 VIOLATES ARTICLE 15 THAT PROHIBITS DISCRIMINATION ON THE GROUNDS OF SEX	2
2. Section 377 discriminates based on the sex of the partner	3
3. Section 377 is based on sex-based stereotypes	4
4. The prohibition against discrimination on the grounds of 'sex' in Article 15 includes within its fold 'sexual orientation'	5
5. Section 377 denies LGBT citizens equal participation in professional life.....	7
III. SECTION 377 VIOLATES ARTICLE 19(1)(A) AND ARTICLE 19(1)(D) OF THE CONSTITUTION... ..	9
1. The freedom of speech and expression includes expression of sexual identity.....	9
2. Section 377 has a chilling effect on LGBT persons' freedom of speech and expression.....	9
3. Section 377 impoverishes political discourse	10
4. Section 377 is not a reasonable restriction under Article 19(2).....	11
5. Section 377 violates the right of sexual minorities to form associations under Article 19(1)(c).....	12
IV. SUPREME COURT'S JURISPRUDENCE CONSTITUTIONAL MORALITY HAS IMPACT ON CONSTITUTIONAL COURTS	13

I. Section 377 is arbitrary and unconstitutional and violates Article 14

1.1 Section 377 is a hostile class legislation which furthers discrimination, and hence is contrary to Article 14. Section 377 discriminates between consensual sexual acts of adults, on the basis of sex of their chosen partner. The hostile legislative object of the Section is evident from its legislative history (see Prof. Douglas Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, November 2008, Sl. 2 in Module 1 filed by Sh. Arvind Datar, Sr. Advocate).

1.2 In *Subramaniam Swamy v Director, Central Bureau of Investigation & Anr.*, (2014) 8 SCC 682, this Hon'ble Court held,

“58. The Constitution permits the State to determine, by process of classification, what should be regarded as a class for purposes of legislation and in relation to law enacted on a particular subject. There is bound to be some degree of inequality when there is segregation of one class from the other. However, such segregation must be rational and not artificial or evasive. In other words, the classification must not only be based on some qualities or characteristics, which are bound to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. Differentia which is the basis of classification must be found and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial.”

1.3 “Manifest arbitrariness” was defined in *Shayara Bano v Union of India*, (2017) 9 SCC 1, as under:

“The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-judge bench decision in *McDowell* when it is said that a constitutional challenge can succeed on the ground that a law is ‘disproportionate, excessive or unreasonable’, yet such challenge would fail on the very ground of the law being ‘unreasonable, unnecessary or unwarranted’. The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve the law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.” (Para 87)

“Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally, and/or without adequate determinative principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.” (Para 101)

1.4 In a constitutional democracy, a statute that protects and furthers the morality of colonial monarchs is per se arbitrary.

II. Section 377 violates Article 15 that prohibits discrimination on the grounds of sex

1.5 Article 15(1) prevents discrimination by the State on the prohibited grounds of religion, race, caste, sex, place of birth or any of them.

1.6 This Hon'ble Court has held that the State has a positive obligation to create a just and equal society under Articles 15 and 16 of the Constitution. Section 377 IPC interferes with this obligation. As held in *NALSA*,

“The basic spirit of our Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community, and social status...There cannot be social reforms till it is ensured that each and every citizen of this country is able to exploit his/her potentials to the maximum.”¹

1.7 As far back as *Sakal Papers*, this Hon'ble Court has held that the fundamental rights should be interpreted broadly:

“It must be borne in mind that the Constitution must be interpreted in a broad and not in a narrow and pedantic sense. Certain rights have been enshrined in our constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a matter which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.”²

1.8 The Constitution is built on a central set of enduring values including forging a just and equal society. The constitutional promise to uphold these values of justice, liberty, equality and fraternity is broken by discrimination on the basis of sexual orientation.

The United States Supreme Court in *Obergefell v. Hodges* [135 S. Ct. 2584], observed:

“The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.”

(para 4, pg.8)

¹ *National Legal Services Authority v. Union of India and Ors*, page 496 para 99.

² *Sakal Papers v. Union of India*, (1962) 3 SCR 842. para 28.

2. Section 377 discriminates based on the sex of the partner

2.1 In addition, Section 377 discriminates based on the sex of a persons' sexual partner and hence violates Articles 15 and 16. Under Sections 376 to 376E IPC, a person can be prosecuted for certain acts with an opposite-sex partner only if the partner did not consent. However, the same acts with a same-sex partner are criminalized even if the partner consents. Hence, Section 377 IPC discriminates against persons based on the sex of their partners.

2.2 In *El-Al Israel Airlines v. Danielowitz* [HCJ 721/94], the Supreme Court of Israel held:

Conferring a benefit on a permanent employee for his recognized companion and not conferring it on a permanent employee for a same-sex companion (who complies with all the requirements of a recognized companion apart from the requirement of sex) amounts to discrimination in conditions of employment because of sexual orientation. This discrimination is prohibited. Consider A, a permanent employee of El- Al, who shares his life for several years with a woman B. They cohabit and run a common household (as required by El-Al for complying with the conditions of a recognized companion). A is entitled to an aeroplane ticket for B. Now consider A who lives in the same way with a man C. They too cohabit and run a common household. A is not entitled to an aeroplane ticket for C. How can this difference be explained? Does the one carry out his job as an employee differently from the other? The only explanation lies in A's sexual orientation. This amounts to discrimination in conditions of employment because of sexual orientation. No explanation has been given that might justify this discriminatory treatment. There is nothing characterizing the nature of the job or the position that justifies this unequal treatment (see s. 2(c) of the Equal Employment Opportunities Law).

(pg.14-15)

2.3 In *Toonen v. Australia* [Communication No.488/1992, U.C. Doc CCPR/C/50/D/488/1992 (1994)], the Human Rights Committee held:

Section 122 of the Tasmanian Criminal Code outlaws sexual intercourse between men and between women. While Section 123 also outlaws indecent sexual contacts between consenting men in open or in private, it does not outlaw similar contacts between consenting women. In paragraph 8.7, the Committee found that in its view, the reference to the term "sex" in article 2, paragraph 1, and in article 26 is to be taken as including sexual orientation. I concur with this view, as the common denominator for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating under Sections 122(a), (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant.

Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact that the law has not been enforced over a considerable period of time: the designated behaviour none the less remains a criminal offence.

(pg.9)

2.4 The right to choose a partner has been recognised as a fundamental right by this Hon'ble Court in *Shafin Jahan*³ and *Shakti Vahini*.⁴ Section 377 IPC places unconstitutional restrictions on this right by criminalizing the choice of a same-sex partner.

3. Section 377 is based on sex-based stereotypes

3.1 Section 377 discriminates against LGBT persons on the basis of gender stereotypes and assumptions about sexual preferences. Section 377 is based on a Victorian morality that assumes that people should have intercourse only with persons of the opposite sex and that sexual intercourse is of the “order of nature” only when it is for the purpose of procreation. By criminalizing certain acts based only on stereotypes based on gender and sexual identity, Section 377 violates of Article 15's prohibition of sex discrimination.

3.2 Such stereotyping is impermissible. In *Anuj Garg v. Hotel Association of India*⁵, this Court observed as follows:

“...This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the Court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy....”

“...Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.”

3.3 In *Price Waterhouse v. Hopkins*, the US Supreme Court held that sex stereotyping cannot be used to discriminate against persons:

“... As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for, “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁶

³ *Shafin Jahan v. Asokan K.M. & Ors.*, 2018 SCC OnLine SC 343.

⁴ *Shakti Vahini v Union of India & Ors.*, 2018 SCC OnLine 275, para 46.

⁵ *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1, para 46.

⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

4. The prohibition against discrimination on the grounds of ‘sex’ in Article 15 includes within its fold ‘sexual orientation’

4.1 The Justice JS Verma Committee on the Amendments to Criminal Law found that “sex” in Article 15 includes “sexual orientation” as a prohibited ground of discrimination:

“We must also recognize that our society has the need to recognize different sexual orientations a human reality. In addition to homosexuality, bisexuality, and lesbianism, there also exists the transgender community. In view of the lack of scientific understanding of the different variations of orientation, even advanced societies have had to first declassify ‘homosexuality’ from being a mental disorder and now it is understood as a triangular development occasioned by evolution, partial conditioning and neurological underpinnings owing to genetic reasons. Further, we are clear that Article 15(c) of the constitution of India uses the word “sex” as including sexual orientation.⁷

4.2 The Supreme Court of Canada in *Delwin Vriend and others v Her Majesty the Queen in Right of Alberta and others*, ([1998] 1 SCR 493), when interpreting a breach of Section 15(1) of the Canadian Charter of Rights and Freedoms arrived at the conclusion that ‘sex’ includes sexual orientation. Section 15(1) of the Charter reads:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or physical disability.”

4.3 In *Vriend*, the Supreme Court of Canada, relying on the reasoning adopted by it in *James Egan and John Norris Nesbit v Her Majesty the Queen in Right of Canada and Another* ([1995] 2 SCR 513), applied it’s now well-known test of grounds analogous to those specified textually. The *Egan* test is:

In *Egan*, it was said that there are two aspects which are relevant in determining whether the distinction created by the law constitutes discrimination. First, “whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated”. Second “whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others” (para. 131). A discriminatory distinction was also described as one which is “capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration” (*Egan*, at para. 56, per L’Heureux-Dubé J.). It may as well be appropriate to consider whether the unequal treatment is based on “the stereotypical application of presumed group or personal characteristics” (*Miron*, at para. 128, per McLachlin J.)

(para 89, pg.21)

⁷ Report of the Justice JS Verma Committee on Amendments to Criminal Law, page 51-52, para 65 (January 23, 2013).

In *Egan*, it was held, on the basis of “historical social, political and economic disadvantage suffered by homosexuals” and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation is a ground analogous to those listed in s. 15(1). Sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs” (para. 5). It is analogous to the other personal characteristics enumerated in s. 15(1); and therefore this step of the test is satisfied.

(para 90, pg.21-22)

- 4.4 The South African Constitutional Court in *National Coalition for Gay and Lesbian Equality & Another v. Minister of Justice and Others* [1998 (12) BCLR 1517 (CC)], which was the challenge to South Africa’s sodomy provision under Section 20A of Sexual Offences Act 23 of 1957. South Africa’s top court looked to the Canadian Supreme Court’s decision in *Egan*:

Despite the fact that section 15(1) of the Canadian Charter 71 does not expressly include sexual orientation as a prohibited ground of discrimination, the Canadian Supreme Court has held that sexual orientation is a ground analogous to those listed in section 15(1):

"In *Egan*, it was held, on the basis of 'historical social, political and economic disadvantage suffered by homosexuals' and the emerging consensus among legislatures (at para 176), as well as previous judicial decisions (at para 177), that sexual orientation is a ground analogous to those listed in s. 15(1)."

(para 49, pg.19)

- 4.5 The South African Constitutional Court makes the point that the symbolic effects of the sodomy statute:

“Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. **Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men.**”

(para 28, pg.15)

- 4.6 Therefore, the South African Constitutional Court makes the powerful point that in the history of apartheid in South Africa, the lives of interracial couples were perpetually at risk and as a group they suffered vulnerability and degradation. Similarly, the sodomy offence in our jurisdiction creates the same insecurity and vulnerability that was not just recognised in South Africa, but is familiar to us in India. We are familiar with this vulnerability due to inter-religious and inter-caste relationships, both of which this Hon’ble court has recognized must be protected from discrimination and degradation of

any kind. If anything, sexual orientation is not just a ground analogous to the prohibited grounds listed in Articles 15 and 16 of the Indian Constitution, but LGBT relationships also warrant the same kind of constitutional protection and sensitivity that this Hon'ble Court has displayed to relationships that were not traditionally sanctioned.

- 4.7 In *Shakti Vahini v. Union of India & Ors.* [2018 SCC OnLine SC 275], this Hon'ble Court, recognising the vulnerability of an inter-caste couple held that an individual's exercise of choice in choosing their partner is a feature of dignity:

“...dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation.”⁸

(para 46, pg.13)

- 4.8 In *Shafin Jahan v. Asokan KM & Ors.* [2018 SC OnLine SC 343], this Hon'ble Court protected the right of a couple in an inter-religious relationship to choose their partner:

“Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible.”

(para 54, pg. 14)

- 4.9 In *Common Cause v. Union of India* [(2018) 5 SCC 1], this Hon'ble Court held:

“Our autonomy as persons is founded on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives.”

(para 346, pg. 193-194)

5. Section 377 denies LGBT citizens equal participation in professional life

- 5.1 In *Jeeja Ghosh v. Union of India*, “(d)iscrimination occurs due to arbitrary denial of opportunities for equal participation.”⁹ Section 377 prevents LGBT persons from accessing their constitutional rights and state welfare measures, from pursuing their

⁸ *Shakti Vahini v Union of India & Ors.*, 2018 SCC OnLine 275, para 46.

⁹ *Jeeja Ghosh v. Union of India*, (2016) 7 SCC 761, para 40.

vocation – including state employment and constitutional office – and from seeking electoral office or even raising their demands through the electoral process. As this Hon’ble Court recognized in *Supreme Court Advocates-on-Record Association v Union of India*:

“For example, in the recent past, there has been considerable debate and discussion, generally but not relating to the judiciary, with regard to issues of sexual orientation. It is possible that the executive might have an objection with regard to the sexual orientation of a person being considered for appointment as a judge but the Chief Justice of India may be of the opinion that that would have no impact on his/her ability to effectively discharge judicial function or the potential of that person to be a good judge.”¹⁰

- 5.2 This Hon’ble Court then noted in footnote 683: “Australia and South Africa have had a gay judge on the bench. The present political executive in India would perhaps not permit the appointment of a gay person to the Bench.”
- 5.3 In *Jamil Ahmad Qureshi v. Municipal Council Katangi*,¹¹ the Appellant was found to be ineligible for appointment in service due to a prior conviction under Section 377 IPC, which was held to be an offence involving “moral turpitude”.
- 5.4 Further, Rule 3 of the All India Services (Discipline and Appeal) Rules, 1969 and Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 provide for automatic suspension from service upon a public servant's being detained in official custody for more than 48 hours on a criminal charge or on conviction. Moreover, even where a public servant is not arrested and is being merely investigated, s/he may be suspended at the discretion of the Government if the offence involves “moral turpitude”. In the current petition, out of the 350+ members of the pan-IIT LGBT support group, Pravritti, about a dozen members are at the topmost levels of government (Ann P-1 @ pg.107 of the brief). All of whom, should they be persecuted under Section 377, would incur the wrath of the abovementioned rules.

¹⁰ *Supreme Court Advocates-on-Record Association v. Union of India*, (2016) 5 SCC 1, para 927 (Lokur, J.).

¹¹ 1991 Supp (1) SCC 302.

III. Section 377 violates Article 19(1)(a) and Article 19(1)(d) of the Constitution

1. The freedom of speech and expression includes expression of sexual identity

1.1 The expression of sexual and gender identity comes within the protection of Article 19(1)(a).¹² As this Court held in *National Legal Services Authority of India v. Union of India*, “each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”¹³

1.2 The Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality & Anr. v. Minister of Justice and Ors*, also recognized that “the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of Section 10 of the Constitution.”¹⁴

2. Section 377 has a chilling effect on LGBT persons' freedom of speech and expression

2.1 Section 377 impedes the exercise of the freedom of speech and expression by LGBT persons. It has a chilling effect on self-expression of sexual and gender identity. Laws that encourage self-censorship are liable to violate Article 19(1)(a). In *Shreya Singhal v. Union of India*,¹⁵ this Hon'ble Court struck down Section 66-A of the Information Technology Act, 2000 because it had a chilling effect on free speech:

“These two Constitution Bench decisions (*T. Rajagopal v. Tamil Nadu* and *Khushboo v. Kanniammal*) bind us and would apply directly on Section 66A. We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth.”

2.2 Section 377 has a chilling effect on the expression of sexual orientation and gender identity. LGBT people are afraid to be open about their sexual identity and their relationships for fear of coercive state action. By contrast, heterosexuals express their sexual identity constantly, whether explicitly or implicitly. Opposite sex couples receive public affirmation and approval when they appear together at social and

¹² (2014) 5 SCC 438, para 22, 106.

¹³ (2014) 5 SCC 438, para 22.

¹⁴ 1998 (12) BCLR 1517. para 28.

¹⁵ (2015) 5 SCC 1. paras 6-9, 94.

professional gatherings. Social recognition and affirmation helps people nurture committed, long-term relationships.

- 2.3 The Indian Psychiatric Society also does not consider homosexuality or bisexuality to be a mental illness. To the contrary, the IPS has recognized that LGBT persons suffer increased rates of suicide, depression and other mental illnesses because of the societal stigma that they suffer on account of their sexual orientation.

3. **Section 377 impoverishes political discourse**

- 3.1 LGBT people cannot participate in the marketplace of ideas without the lurking fear that they may be prosecuted for self-expression. In *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal (CAB)* [(1995) 2 SCC 161], this Court recognized that the freedom of speech and expression enables people to contribute to debates on social and moral issues.¹⁶ However, LGBT persons cannot lobby their elected representatives to seek protection of their fundamental rights of the passage of legislation that would protect their interests. There are also no known cases of persons who openly identify as sexual minorities contesting elections. By contrast, after *NALSA*, several transgender persons have successfully run for political office.
- 3.2 By contrast, following this Court's judgment in *NALSA v. Union of India*, members of the transgender community have sought to participate the democratic process. There are prominent examples of transgender persons who have held elected office, such as C. Devi, who contested in the RK Nagar constituency of Tamil Nadu.¹⁷ Mumtaz became the first transgender candidate to contest the Punjab Assembly polls last year.¹⁸ In 2015, Madhu Kinnar became Raigarh, Chattisgarh's first transgender mayor.¹⁹ Evidently, the continued criminalization of sexual minorities has had a chilling effect on their participation in the democratic process.

¹⁶ *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal (CAB)*, (1995) 2 SCC 161, para 43.

¹⁷ *Meet C Devi, Tamil Nadu's First Transgender Candidate*, available at <https://www.thequint.com/news/politics/meet-c-devi-tamil-nadus-first-transgender-candidate>.

¹⁸ *Meet Mumtaz, The First Transgender Candidate to Contest Punjab Assembly Polls*, available at https://www.huffingtonpost.in/2017/01/25/meet-mumtaz-the-transgender-candidate-contesting-punjab-assembly_a_21663076/.

¹⁹ *History is made as newly elected Third Gender Mayor won't face legal hurdle*, available at https://www.huffingtonpost.in/2015/01/05/madhu-kinnar_n_6415540.html

4. Section 377 is not a reasonable restriction under Article 19(2)

4.1 Section 377 is not a reasonable restriction in the interest of public order, decency, or morality. The State must discharge a high burden of proof to restrict the freedom under Article 19(1)(a), which it fails to meet in the present case.

4.2 The restrictions under Article 19 are narrowly defined, in contrast to the fundamental freedoms, which this Court interprets broadly. In *S. Rangarajan v. P. Jagjivan Ram*,²⁰ this Hon'ble Court held:

“our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest.” (Para 45)

4.3 Since “public order” is of narrower ambit than mere “law and order”, the State must discharge a high burden of proof to restrict the freedom under Article 19(1)(a).²¹ However, Section 377 has no direct or proximate connection to public order. Self-expression by sexual minorities is not “intrinsically dangerous to the public interest’. It does not cause riots, turbulence, or acts of violence. It does not affect the security of the State or promote its overthrow. To the contrary, self-expression by minorities is essential to preserve the democratic fabric and to create a vibrant and diverse society.

4.4 Section 377 is also not a reasonable restriction in the interests of decency and morality. As held in *Khushboo v. Kanniammal*,²²

“Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co-extensive...the law should not be used in a manner that has chilling effects on the ‘freedom of speech and expression’.” (Para 46-47)

4.5 Section 377 is not intended to preserve any notion of decency or morality that is consistent with the constitutional ethos. At best, it imposes notions of Victorian morality sought to be imposed upon India by its erstwhile colonial rulers. Indian society has always accepted sexual diversity and gender expression as evidenced by our myths and traditions.

²⁰ (1989) 2 SCC 574, para 45-48, 51.

²¹ *The Superintendent, Central Prison Fatehgarh v. Ram Manohar Lohia*, A.I.R 1960 SC 633, para 12.

²² (2010) 5 SCC 600, para 46.

4.6 Hence, Section 377 is not a reasonable restriction in the interest of public order, decency or morality.

5. Section 377 violates the right of sexual minorities to form associations under Article 19(1)(c)

5.1 Association has different facets including political, social and personal association.²³ LGBT persons are unable to form or join associations where they must identify as sexual minorities because they fear coercive state action and social stigma.

5.2 The inability to form a legally recognised association deprives LGBT persons of the very tangible benefits that the state extends to such associations, for example, tax exempt status offered to a registered society or charitable trust under Section 80G of the Income Tax Act, 1961. Although such tax exemption can be availed by corporations which promote interests of notified minority communities,²⁴ LGBT persons are unable to avail of such exemptions because of Section 377.

5.3 Similarly, LGBT persons are hesitant to register companies to provide services for the benefit of sexual minorities. In fact, conviction under Section 377 would render an LGBT person ineligible for appointment to directorship of a company. Under Section 164 of the Companies Act, 2013, a person shall not be eligible for appointment if:

“he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence. If a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company”.

5.4 Sexual minorities are also unable to agitate for their rights through the democratic process unlike other historically disadvantaged groups. There is no known case of an elected representative in India who identified as sexual minority.

²³ *K.S. Puttuswamy v. Union of India*, (2017) 10 SCC 1, para 374.

²⁴ Section 10(26BB) of the Income Tax Act, 1961. “10. Incomes not included in total income.— In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included— (26-BB) any income of a corporation established by the Central Government or any State Government for promoting the interests of the members of a minority community. Explanation.—For the purposes of this clause, “minority community” means a community notified as such by the Central Government in the Official Gazette in this behalf;”

5.5 LGBT persons, like all citizens, have the right to form meaningful, intimate relationships with persons of their choice. This is an aspect of personal association which ought to be protected by Article 19(1)(c).

IV. Supreme Court's jurisprudence constitutional morality has impact on constitutional courts

Constitutional courts do not arrive at constitutional law jurisprudence in isolation. In that sense, "comparative constitutional law" is a misnomer: all constitutional jurisprudence is inherently comparative. Even when Courts do not explicitly refer to judgments from other jurisdictions, they are participating in an ongoing, rich and sometimes sharply divided conversation about the nature of rights. In post-colonial courts in particular face a large shared body of colonial law that they continue to interpret as they also face similar issues of changing societies. The Indian Supreme Court's judgments act as moral, legal and philosophical trailblazers for courts around the world. For instance:

- In *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu*, [2014] eKLR [Judicial Review 147 of 2013], the High Court of Kenya cited the observations of the Supreme Court of India in *NALSA v Union of India* [(2014) 5 SCC 438] regarding sexual identity and sexual orientation.
- The Supreme Court of Canada, in Reference re: Judicature Act, 1984 ABCA 354 cited *All India Bank Employees Association v. The National Industrial Tribunal* (1962) 49 A.I.R. S.C. 171 on the question of whether the imposition of compulsory interest arbitration in place of strikes and lockouts has interfered with the freedom of association of the workers involved.
- The Sri Lankan Supreme Court in *Elmore Perera v. Major Montague Jayawickrema Minister of Public Administration and Plantation Industries and Others* [1985] 1SLR 285 decided the issue of fundamental rights under Articles 12 and 14(1)(g) of the Sri Lankan Constitution by applying the interpretation placed on Article 14 in *Maneka Gandhi's* case.
- The Nepali Supreme Court applied *Satwant Singh Sawney vs. Ramarathnam and Maneka Gandhi* in *Punyawati Pathak et.al. v. HMG* [Decision no. 7585] (2005)
- The Pakistani Supreme Court, in *Shehla Zia v. WAPDA*, PLD 1994 SC 693, quoted *Kharak Singh v. State of UP* (ASR 1963 SC 129), *Francis Coralie Mullin v. Union*

Territory of Delhi (AIR 1981 SC 746), *Olga Tellis and others v. Bombay Municipal Corporation* (AIR 1986 SC 180) and *State of Himachal Pradesh and another v. Umed Ram Sharma and others* (AIR 1986 SC 847). The Pakistani Supreme Court observed that “Thus, apart from the wide meaning given by US Courts, the Indian Supreme Court seems to give a wider meaning which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence.”