

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI NAIROBI
CONSTITUTIONAL AND HUMAN RIGHT DIVISION
PETITION NO. 234 OF 2016

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS
 UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 10,
 27, 28, 29, 31, 43 AND 50 OF THE CONSTITUTION OF KENYA (2010)

IN THE MATTER OF ARTICLES 1,2,3,7,9,12, 28 OF THE UNITED NATIONS
 UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF ARTICLES 2,3,4,6,10,19,28 OF THE AFRICAN CHARTER
 ON HUMAN AND PEOPLES RIGHTS.

IN THE MATTER OF SECTIONS 162 AND 165 OF THE PENAL CODE

BETWEEN

JOHN MATHENGE.....1st PETITIONER
 MAUREEN OCHIENG.....2nd PETITIONER
 MARY AKOTH OCHIENG.....3rd PETITIONER
 YVONE POWERS.....4th PETITIONER



MARK ODHIAMBO.....5th PETITIONER
 GAY AND LESBIAN COALITION OF KENYA.....6th PETITIONER
 NYANZA WESTERN AND RIFT VALLEY NETWORK.....7th PETITIONER
 KENYA HUMAN RIGHTS COMMISSION.....8th PETITIONER

-VERSUS-

ATTORNEY GENERAL.....RESPONDENT

AND

KATIBA INSTITUTE..... AMICUS CURAIE

KENYA LEGAL & ETHICAL ISSUES

NETWORK ON HIV & AIDS..... INTERESTED PARTY

EXPERT AFFIDAVIT

I, ANAND GROVER, of Delhi, Indian Inhabitant, having my chambers at 1st Floor, A-13 Nizammudin (West), New Delhi 110013, India, do hereby make oath and state as follows:

1. THAT I am a male adult Indian of sound mind, and a Senior Advocate, practicing in the Supreme Court of India and High Courts of Delhi and Mumbai. That I have over thirty six years of practice as an Advocate and over thirty years of experience in the areas of HIV/ AIDS and human rights law and I am conversant with this petition in which capacity I swear this affidavit. That I was designated as a Senior Advocate by the Bombay High Court.



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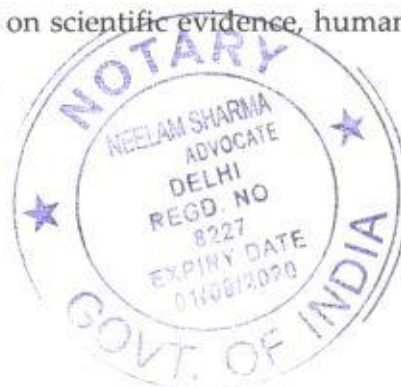
2. THAT I am also an Adjunct Professor at Georgetown University Law Centre, Washington D.C and at the University of Chicago Law School. I have been widely published in the area of health, law and human rights.

3. THAT I hold a B.Sc (Hons) in Bio-Chemistry from Surrey University in Guildford, Surrey, UK, Post Graduate Diploma in Education from Chelsea College, London University, UK and Bachelor of Laws from the University of Bombay, Mumbai in India. (A copy of my CV is attached and marked as "Annexure AG-1")

4. THAT I am also the Director and co-founder of the Lawyers Collective, a non-government organization inter alia that has pioneered law and policy reform to promote the rights of people living with HIV and other vulnerable groups.

5. THAT from 2008-2014, I served as the United National Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health in which capacity I undertook nine country missions and produced fourteen thematic reports, one of which examined the relationship between the right to health and the criminalization of private, adult, consensual sexual behaviour including same-sex conduct and sexual orientation. (The Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, A/HRC/14/20, dated 27th April 2010, is annexed hereto as "Annexure AG-2")

6. THAT presently I serve as a Member of the Independent Panel on Global Governance for Health, established by the Lancet-University of Oslo Panel on Global Governance on Health. I am a Commissioner on the Guttmacher-Lancet Commission on Sexual and Reproductive Health and Rights in a post-2015 World. I am also a Commissioner on the Global Commission on Drug Policy - a panel of world leaders and experts THAT examines drug policies on scientific evidence, human rights and public health and safety indices since 2011.

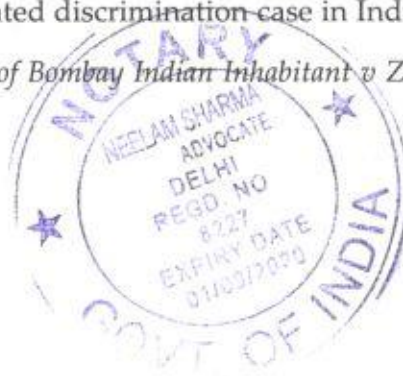


7. **THAT** earlier I was a member of the drafting group of the International Guidelines on Human Rights & HIV/AIDS, a member of the Reference Group on Human Rights to Michel Sidibe, the Executive Director, UNAIDS as well as a member of the National Council on AIDS, chaired by the Prime Minister of India in 2005.

8. **THAT** I am the lead counsel for the *Naz Foundation (India) Trust* that mounted the constitutional challenge to section 377 of the Indian Penal Code, 1860, which criminalizes adult consensual same-sex relations. I argued the case before the Delhi High Court, which declared section 377 to be unconstitutional (See *Naz Foundation v. Government of NCT 160* (2009) DLT 277) as well as before the Supreme Court of India in *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors* (2014) 1 SCC 1. I continue to represent the *Naz Foundation* – the original Petitioner in proceedings related to section 377, which are pending before a Constitution bench of the Supreme Court of India.

9. **THAT** I was one of the lead counsel in the case of *National Legal Services Authority v Union of India* 2014 (5) SCC 438, where the Supreme Court of India, in a seminal judgment, recognized the fundamental right to determine one's gender identity whether as man, woman or third-gender and secured the rights to dignity, autonomy, equality and freedom of expression for transgender persons.

10. **THAT** I am one of the foremost lawyers in India to prosecute cases for people living with HIV and affected communities for the advancement of their rights. I was the lead counsel in the first HIV-related litigation in India, i.e. the '*Lucy D'Souza case*', which involved a constitutional challenge to the isolationist Goa Public Health Amendment Act. (See *Lucy D'souza v. State of Goa and Ors*, AIR 1990 Bom 355). I successfully argued the first HIV-related discrimination case in India, i.e. '*MX v ZY*' in the Bombay High Court (See *MX of Bombay Indian Inhabitant v ZY*, AIR 1997 Bom



406), which was cited with approval by the Constitutional Court of South Africa in *Hoffman v South African Airways*, (CCT17/00) [2000] ZACC 17. I have contributed to the development of jurisprudence on HIV and human rights, which is now embraced in the HIV and AIDS (Prevention and Control) Act, 2017, passed by the Indian Parliament.

11. THAT I appeared as lead counsel on behalf of patients groups challenging patent monopolies on key HIV drugs through patent oppositions, most significant being the *Novartis case* which upheld the constitutional validity of Section 3 (d) of the Patents Act, 1970, *Novartis v Union of India*, (2007) SCC Online Mad 658, and in the Supreme Court while refusing Novartis a patent on Gleevec. (*Novartis AG v. Union of India and Ors* (2013) 6 SCC 1).

12. THAT apart from the above cases, I have appeared in a large number of constitutional cases before various Courts in India, including *Olga Tellis v Bombay Municipal Corporation*, (1985) 3 SCC 545 [relating to rights of pavement dwellers before the Supreme Court of India], *Bombay Hawkers Union v. Bombay Municipal Corporation and Others*, 1985 (3) SCC 528 [relating to the constitutional rights of hawkers qua the Municipal law before the Supreme Court of India], *Yeshwanee Merchant (Airhostess) v. Air India*, 2001 (3) CLR 815 [relating to a constitutional challenge on gender discrimination practiced by Air India before the Bombay High Court], *Sahyog Mahila Mandal v. State of Gujarat*, (2004) 2 GLR 1764 [relating to constitutionality of a notification issued under the Immoral Traffic (Prevention) Act, 1956, prohibiting the carrying on or engaging in sex work in notified areas before the Gujarat High Court], *State of Maharashtra v Indian Hotel and Restaurants Association* (2013) 8 SCC 519 [relating to constitutional validity of certain provisions of the Bombay Police Act, which prohibited dancing in certain hotel establishments before the Supreme Court of India], *Indian Harm Reduction Network v Union of India* 2012 BomCR (Cri) 121, [constitutional challenge to the imposition of mandatory death



penalty for drug-related offences before the Bombay High Court], *Nitu and anr v Govt of NCT Delhi*, 226 (2016) DLT 457 [constitutional challenge to the closure and eviction of sex workers from brothels under the Immoral (Traffic) Prevention Act, 1956 before the Delhi High Court], *Vishal Puri v Union of India* 240 (2017) DLT 500, [relating to the *vires* of a notification classifying Ketamine as a psychotropic substance under the Narcotic Drugs and Psychotropic Substances Act, 1985 before the Delhi High Court], *Shayara Bano v Union of India* (2017) 9 SCC 1 [a case involving the constitutional validity of triple *talaak* (divorce) amongst the Sunni Muslims in India before the Supreme Court of India], *Justice K. S. Puttaswamy (Retd.) v Union of India* 2017 SCC OnLine SC 996 [relating to the fundamental right to privacy before the Supreme Court of India].

13. THAT I have previously been admitted as an *amicus curiae* by the Kenyan High Court in the case titled *KELIN & Ors v. The Cabinet Secretary Ministry of Health & Others*, Petition 250 of 2015, which was relied upon by the Kenyan High Court used in passing its judgment dated 7.12.2016.

14. THAT I have previously been admitted as *amicus curiae* in the High Court of Kenya in the case titled *Patricia Asero Ochieng and Others v Attorney General*, Petition 409 of 2009, given my particular expertise regarding HIV and access to medicines.

15. THAT I have read and understood the contents of the Petition No. 234 of 2016, which challenges the constitutionality of sections 162 and 165 of the Penal Code.

16. THAT I have read and understood the contents of sections 162 and 165 of the Penal Code.



17. THAT I have read and understood the contents and provisions of the Constitution of Kenya, 2010 and am very familiar with them having filed amicus briefs before the Court.

History and Origin of Section 162 and Section 165 of The Penal Code

18. THAT Section 162 (*Unnatural Offences*) of the Penal Code reads:

"Any person who –

(a) has carnal knowledge of any person against the order of nature;

(b) has carnal knowledge of an animal;

(c) permits a male person to have carnal knowledge of him or her against the order of nature,

is guilty of a felony and is liable to imprisonment for fourteen years:

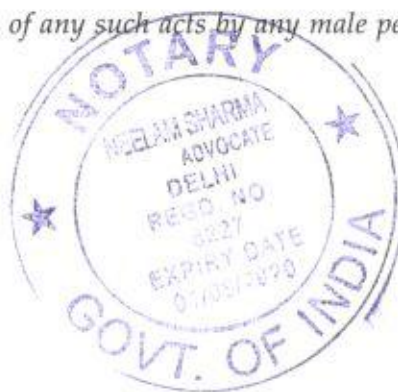
Provided that, in the case of an offence under paragraph (a), the offender shall be liable for imprisonment for twenty years if –

(i) the offence was committed without the consent of the person who was carnally known; or

(ii) the offence was committed with the person's consent but the consent was obtained by force or by means of threat or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act".

19. THAT Section 165 (*Indecent practices between males*) of the Penal Code reads:

"Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such acts by any male person with himself



or with another male person, whether in public or private, is guilty of a felony and liable to imprisonment for five years".

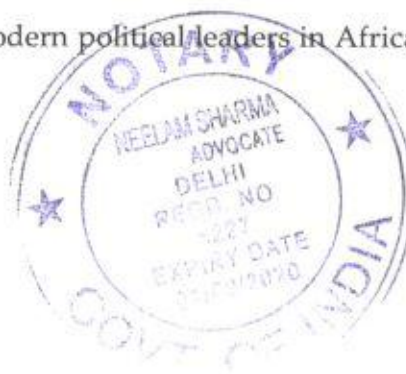
20. **THAT** a report by Human Rights Watch comprehensively documents the historical origins of laws around the world such as Section 162 and 165 of the Penal Code in British Colonialism. [See: *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism*, Human Rights Watch, 2008].

21. **THAT** the codification of sexual offences in the British Colonies began in 1825, when the mandate to devise law for the Indian colony was handed to the politician and historian Thomas Babington Macaulay. Macaulay chaired the first Law Commission of India and was the main draftsman of the Indian Penal Code, 1860 – the first codified and comprehensive criminal law developed in any part of the British Empire.

22. **THAT** Section 377 of the Indian Penal Code, 1860 was the first "anti-sodomy law" in any penal code created by the British across its Empire, and it became a model anti-sodomy law for the Commonwealth countries in Asia, Pacific Islands and Africa. The draft Indian Penal Code was an experiment in producing a model criminal code across the British Empire, to test how codified law will work.

23. **THAT** in Africa, countries that inherited versions of the anti-sodomy law from the British Empire are: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. Between 1897 and 1902, British administrators also broadly applied Indian Penal Code, 1860 -based codes to African colonies, in particular to Kenya and Uganda.

24. **THAT** it is well-documented that the personal views on morality of the colonial officials, rather than logic or respect for indigenous traditions, led to application of Indian Penal Code, 1860 -based penal codes uncritically across the African continent. Despite claims of modern political leaders in Africa and Asia that



the anti-sodomy laws represent values of their independent nations, Indian Penal Code, 1860 -based codes spread across Africa and Asia indifferently to the local will and public opinion.

25. **THAT** almost none of these laws modelled on Section 377, Indian Penal Code, 1860 expressly mention 'homosexuality' or 'homosexual acts', as the term 'homosexual' was only coined in 1869.

26. **THAT** the so-called anti-sodomy laws, including Section 162 of the Penal Code, universally make no distinction based on age or consent of persons, thereby conflating and identifying homosexuality by association with pedophilia or rape, and intensifying legal stigma.

1. 'Sodomy' is explained to mean *penetrative* anal sex, as the jurist Edward Coke in his treatise on English law phrases it as "*acts committed by carnal knowledge against the ordinance of the Creator, and order of Nature...*".
2. Kenyan judges have also relied upon the interpretation of Section 377 of the Indian Penal Code, 1860 to in turn interpret Section 162 of the Penal Code. The Indian of *Khanu v. Emperor*, 1925 High Court of Sindh and *Lohana Vasantlal v. State*, 1968 All India Report, Guj High Court held that '*carnal intercourse against order of nature*' criminalized all non-procreative sex, including acts of oral sex, regardless of age or consent. These two judgments became a guidance for anti-sodomy laws throughout British colonies in Asia and Africa.

27. **THAT** the overbroad '*gross indecency*' laws such as Section 165 of The Kenyan Penal Code allow police to blackmail or arrest people based on mere suspicion or appearance. In 1885, the British Member of Parliament, Henry Labouchere introduced an amendment to England's criminal law that punished 'gross indecency', an offence that included all forms of *non-penetrative* sexual acts between men. This new offence was so unrelated and disproportionate the debate on

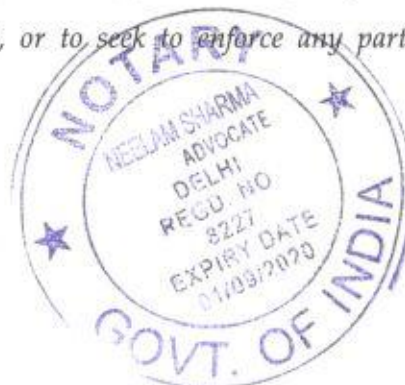


regulating sexuality in England at the time, the press quickly dubbed it as "*the blackmailer's charter*". Subsequent penal codes in British colonies incorporated versions of the law.

28. **THAT** in practice the law was intended to be used in Britain to prosecute men who have sex with men, who were caught in parks or railway stations, bathhouses and bars and private homes. However, even though Labouchere's amendment only sought to criminalize male-male sex, some colonial governments extended the law to sex between women.

29. **THAT** one explanation to understand why criminalization of homosexuality was so important to the colonial governments and post-colonial states is to look at some other laws and practices the colonial governments imported along with the anti-sodomy laws. These laws seen together served '*civilizing mission*' of Europe over its '*barbaric*' colonial subjects. Vagrancy laws, public nuisance laws and anti-begging laws target people whom officials see as wandering or loitering in public with no purpose. Enforcement was always directed at, and continues to this day in Kenya, India and other former colonies, at selectively targeting despised and vulnerable groups such as homeless, beggars, indigenous people, migrant labourers, transgender persons, sex workers, nomadic tribes or travelers. These laws in effect criminalize poverty and '*despised*' identities, to keep the social and economic inequality out of public sight.

30. **THAT** England and Wales themselves decriminalized sexual relations between consenting, adult males in 1967, on the recommendation of The Wolfenden Committee in 1957 that urged "*homosexual conduct between consenting adults should no longer be a criminal offence...The law's function is to preserve public order and decency, and to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior...*".



31. **THAT** however, this came too late for most of Britain's colonies who gained independence in 1950s and 1960s, who uncritically retained such laws.

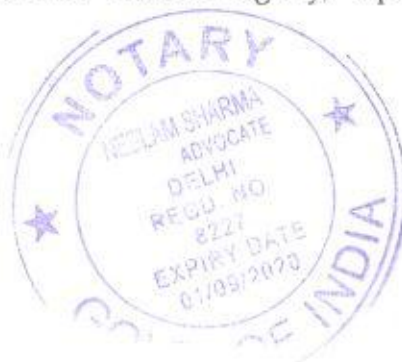
32. **THAT** anti-sodomy laws, even when unenforced, express contempt, create inequality, increase vulnerability and reinforce second-class citizen status in all areas of life for lesbian, gay, bisexual and transgender persons .

33. **THAT** presently, the *Special Rapporteur on Prison, Conditions of Detention and Policing in Africa*, in partnership with the African Commission on Human and People's Rights (ACHR), are in the process of issuing recommendations to the 47 Member African Union that are parties to the African Charter on Human and People's Rights (ACHR) on declassification and decriminalization of sexual relations between consenting adults of same sex and offences relating to vagrancy, begging and public nuisance, which may have a significant impact on the lives of lesbian, gay, bisexual and transgender persons in the African Union. The Rapporteur and the Commission are currently holding public consultations to finalize their recommendations, whereafter States will decide on adopting the same[See: *Zero Draft Principles on Declassification and Decriminalization of Petty Offences in Africa*, African Commission on Human Rights, 1st March 2017].

Interpretation of the Kenyan Constitution and the Bill of Rights

34. **THAT** in interpreting the rights and freedoms guaranteed under the Bill of Rights, the Constitution has outlined the following key principles under Articles 20 and 21:-

- a. the court must adopt an interpretation **THAT** most favours the enforcement of a right or fundamental freedom
- b. the court must promote the values **THAT** underlie an open and democratic society based on human dignity, equality, equity and freedom.



- c. the court must promote the spirit, purport and objects of the Bill of Rights.
- d. the courts, among other State organs, are required to “observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights” and further address the needs of marginalized populations including children and youth.

35. **THAT** further, Article 259(1) requires **THAT** the Constitution be interpreted in a manner **THAT**—

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and
- (d) contributes to good governance

36. **THAT** it is well-settled that a Constitution is not an ephemeral legal document but rather, a living document that must be interpreted in accord with the passage of time and developments in law. As society evolves, so must the constitutional doctrine.

37. **THAT** the Bill of Rights, in particular, must not be in a narrow and pedantic fashion but in an expansive and purposive manner, with regard to the underlying purpose of the right or freedom. It is well-established **THAT** the:- “*object of a Constitutional Court is to expand the boundaries of fundamental human freedoms rather than to attenuate their content through a constricted judicial interpretation.*” [See Justice K. S. Puttaswamy (Retd.) v Union of India, 2017 SCC OnLine SC 996]



38. That it is a settled position in law that the statutes enacted by the Legislature have to be in consonance with the Bill of Rights under the Constitution and if they are not they are liable to be struck down or declared so.

Application of international law and jurisprudence

39. THAT as per Article 2(5) & (6) of the Constitution of Kenya, 2010, general rules of international law as well as treaties and conventions ratified by Kenya form part of the law of Kenya. Courts in Kenya have held that international law forms an integral part of Kenyan law and is applicable in Kenya, especially in the interpretation of constitutional provisions. (See *Wanjiku & Another v the Attorney General & Others*, Petition No. 190 of 2011, High Court at Nairobi, [2012] eKLR, para 18; *Barasa v the Cabinet Secretary Ministry of Interior and National Coordinator and Others*, Constitutional Petition No. 488 of 2013, High Court at Nairobi, [2014] eKLR, para 44; *Sheria and Others v Attorney General*, Petition No. 19 & 115 of 2013, High Court at Nairobi, [2013] eKLR, para 51)

40. THAT Kenyan Courts have rejected judicial-insularity in favour of accepting comparative jurisprudence and acknowledged the relevance of judicial decisions of other similarly-situated countries, especially in adjudicating the nature and content of constitutional rights. (See *Law Society of Kenya v The Centre for Human Rights and Democracy and Others*, Civil Appeal No. 308 of 2012, Court of Appeal at Nairobi, [2013] eKLR, 27.)

41. THAT even where there is no lacuna or ambiguity, Kenyan courts have looked to international law in interpreting constitutional rights. [See *Karua v Radio Africa Ltd t/a Kiss F.M. Station & 2 Others*, Civil Suit 288 of 2004, High Court of Kenya at Nairobi, [2006] eKLR at 14]



Yogyakarta Principles on Application of International Human Rights Law in Relation to Sexual Orientation & Gender Identity

42. **THAT** the *Yogyakarta Principles* are a set of principles of international human rights law in relation to *sexual orientation* and *gender identity*. The Principles are accompanied by detailed recommendations and law and policy with which all States must comply.

43. **THAT** the Principles were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds, including judges, academics, UN officials, members of treaty bodies, NGOs and others.

44. **THAT** the Principles affirm the primary obligation of States to implement human rights. Each principle is accompanied by detailed recommendations to States. The Principles also emphasize that all actors have responsibilities to protect and promote human rights.

45. The principles have gained the force of law in India, as the Supreme Court of India has domesticated them in it's application to rights of transgender persons. In *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, the Court held: "*The principles discussed herein before on transgender persons and the international conventions, including Yogyakarta Principles, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country*" [See: *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438]

The Right to Health



46. **THAT** under Article 43(1)(a) of the Constitution, *"Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care"*.

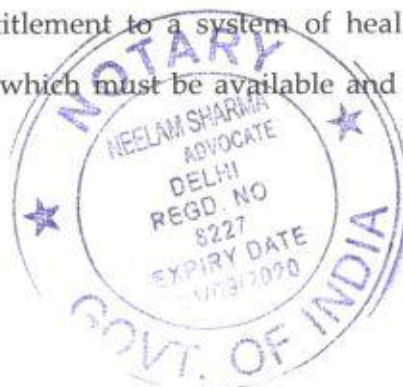
47. **THAT** Article 27(4) of the Constitution forbids the State from discriminating, directly or indirectly against any person on various enumerated grounds including 'health status'.

48. **THAT** Principle 17 of the Yogyakarta Principles, states:-*"Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right"*.

49. **THAT** Article 56 of the Kenyan Constitution reiterates the State's commitment towards protection of rights of minorities and marginalised groups including through affirmative action programmes and by ensuring reasonable access to health services and infrastructure.

50. **THAT** read together, Article 43(1)(a), Article 27(4) and Article 56 of the Kenyan Constitution are corresponding to Article 12(1) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), which recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The contents of the right to health have been elaborated in General Comment 14, which was adopted at the twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4).

51. **THAT** the right to health guarantees certain: - i) *freedoms*, i.e. the right to control one's own health and body including including sexual and reproductive and, ii) *entitlements*, in particular, the entitlement to a system of health protection, to goods, services and health facilities, which must be available and accessible to all,



especially the most vulnerable and marginalized sections, without discrimination. In *Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others* [2016] eKLR, the Court reaffirmed (at para 98) THAT: *"the right to health under Article 43(1) of the Constitution must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."*

52. THAT it is well-understood that human rights and fundamental freedoms are indivisible and inter-related. In *P.A.O and 2 Others v The Attorney General* (2012) eKLR, the Court specifically recognized the nexus between the right to health and other fundamental rights and freedoms in the following terms:-

"In my view, the right to health, life and human dignity are inextricably bound. There can be no argument that without health, the right to life is in jeopardy...one's inherent dignity as a human being with the sense of self-worth and ability to take care of oneself is compromised".

53. THAT the aforesaid view resonates in the observations of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, who, while examining the impact of criminal laws against adult sexual conduct and sexual orientation on the right to health, observed that:- *"Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights, including the right to health. These laws are generally inherently discriminatory and, as such, breach the requirements of a right-to-health approach, which requires equality in access for all people. The health related impact of discrimination based on sexual conduct and orientation is far-reaching, and prevents affected individuals from gaining access to other economic, social and cultural rights."* [See Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, A/HRC/14/20, dated 27th April 2010 at para 6.]



54. **THAT** the criminalization of consensual sexual acts between adults under sections 162 and 165 of the Penal Code presents a significant impediment to the realization of the right to health, particularly of those against whom the law is directed, namely - lesbian, gay, transgender, bisexual and intersex persons ("LGBTI") in Kenya. [See Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, A/HRC/14/20, 27th April 2010 at para 2.]

55. **THAT** by criminalizing homosexuality and same-sex expression, sections 162 and 165 of the Penal Code incite violence, hate and brutality against gay men, which directly and indirectly interferes with the enjoyment of the right to health.

56. **THAT** sections 162 and 165 of the Penal Code violate the right to health guaranteed under Article 43(1)(a) of the Kenyan Constitution because the criminalization of sexuality and sexual orientation compounds stigma, prejudice and social disapproval of LGBTI persons, which instills anxiety, fear, guilt, shame and self-censure, even depression. The psychological harm caused by laws criminalizing same-sex conduct is well-documented in mental-health studies and has been taken note of by Courts. [See *Norris v. Republic of Ireland* (1991) 13 ECHR 186 at para 21; *Vriend v. Alberta* (1998) 1 S.C.R. 493 at para 102]

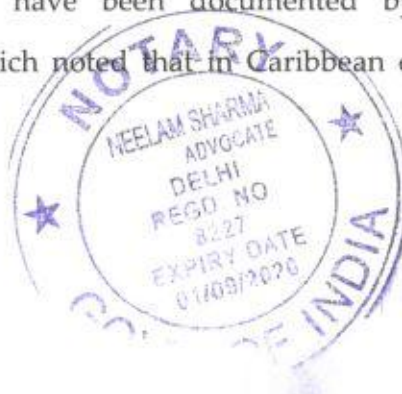
57. **THAT** sections 162 and 165 of the Penal Code violate the right to health by impeding access and delivery of essential health services to men who have sex with men, who are at high risk of HIV in Kenya. The UN estimates that while overall HIV prevalence in Kenya is at 6%, among gay men and other men who have sex with men, HIV prevalence is nearly three-times higher at 19%. The heightened vulnerability of gay and other men who have sex with men to HIV cannot be ignored or overlooked.

58. **THAT** criminal sanctions against same sex activity under sections 162 and 165 of the Penal Code:-



- a. dissuade gay men and other men who have sex with men from seeking health services. Fear of discrimination, breach of confidentiality and police-reporting deters gay men from accessing health-care providers, especially for sexual health needs.
- b. hamper the collection of data around same-sex activity and sexual practices as individuals may be reluctant to disclose their sexual orientation due to fear of the law. Underreporting and inaccurate data leads to poorly designed or insufficient programmes, which increase the risk of HIV among homosexual and transgender persons.
- c. restrict information and advocacy on sex, sexuality and safer practices for prevention of HIV among gay and other men who have sex with men. They also limit contact with and outreach to individuals and communities at risk, who remain underground due to fear of the law.
- d. create barriers for the supply of health goods and services like condoms, lubricants, pre and post-exposure prophylaxis, HIV counseling and testing and ARV medicines, which are essential for containing HIV. The provision and uptake of such measures can be construed as aiding the commission of offence under section 162 or 165 of the Penal Code.
- e. hinder the ability of gay and transgender persons to organize and participate meaningfully in the design and implementation of HIV-related programmes. The right to health cannot be realized without the participation of affected groups and communities. Studies have demonstrated THAT the involvement of gay men and transgender people in peer outreach and community interventions can reduce HIV risk behaviours by up to 25%.

59. **THAT** the aforesaid findings have been documented by the Global Commission on HIV and the Law, which noted that in Caribbean countries with

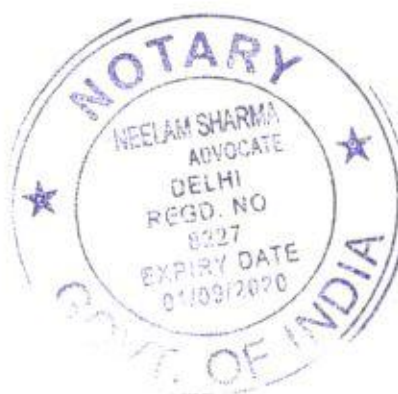


laws that criminalize homosexuality, almost 1 in 4 men who have sex with men is HIV positive; the equivalent figure in Caribbean countries with no such laws is 1 in 15. [See Risks, Rights and Health, Global Commission on HIV and the Law, UNDP, 2012, in particular pp. 44-54.]

60. **THAT** in *Toonen v. Australia* [Communication No. 488/1992, decision dated 31/03/1994, the UN Human Rights Committee categorically rejected the contention that the prohibition on homosexual practices prevents the spread of HIV/AIDS. Instead, the Committee found that criminalization of same-sex activity runs counter to the implementation of effective educational programmes in respect of HIV prevention. [See *Toonen v. Australia* [Communication No. 488/1992, decision dated 31/03/1994 at para 8.5]

61. **THAT** in *R v Morgentaler* [1998] 1 S.C.R. the Supreme Court of Canada overturned section 251 of the Criminal Code [abortion provisions] for violating the right to life, liberty and security under s.7 of the Canadian Charter. According to the majority, the law did not allow a woman to make a decision about her pregnancy without the threat of criminal sanction and therefore, constituted a profound interference with her body and a violation of the security of her person. In a concurring opinion, Beetz J. held that: -

"Security of person within the meaning of s.7 of the Charter must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate or no treatment at all, the right to security of the person has been violated." [See *R v Morgentaler* [1998] 1 S.C.R. at pg 81]



62. THAT by creating a punitive environment around sexual health and HIV services for gay and other men who have sex with men men, sections 162 and 165 of the Penal Code violate their right to health.

63. THAT, I therefore conclude that Sections 162 and 165 of the Penal Code infringe Article 43 (1) (a) of the Constitution.

The Right to Privacy

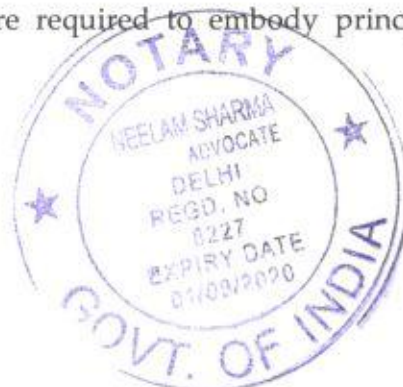
64. THAT Article 19(3)(a) of the Kenyan Constitution states: *"The rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State"*.

65. THAT Article 19(3)(b) of the Constitution states: *"The rights and fundamental freedoms in the Bill of Rights do no exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent THAT they are inconsistent with this Chapter"*.

66. THAT Article 31(a) of the Constitution states: *"Every person has the right to privacy, which includes the right not to have their person, home or property searched"*.

67. THAT right to privacy is also an entrenched part of international human rights law as illustrated by Article 17 of International Covenant on Civil and Political Rights (ICCPR) 1966, Article 12 of Universal Declaration of Human Rights and Article 8 of European Convention on Human Rights, 1950.

68. THAT the Principle 1(Right to Universal Enjoyment of Human Rights) of Yogyakarta Principles states that *"All human beings are born free and equal in dignity and rights. Human beings of all sexual orientation and gender identities are entitled to the full enjoyment of human rights"*. States are required to embody principles of the



universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions and appropriate legislations.

69. THAT Principle 6 (the Right to Privacy) of Yogyakarta Principles states *"Everyone regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary interference or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others"*. States are required to take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are above the age of consent, without arbitrary interference.

70. THAT the Constitutional Court of South Africa has declared that right to privacy also includes intimate sexual conduct. Protection of one's personal relations and sexual intimacies lies at the heart of the right to privacy. The way in which one gives expression to one's sexuality is at the core of the area of private intimacy [See *National Coalition of Gay and Lesbian Equality v. Minister of Justice & Ors.*, (1998) ZAC 15].

71. THAT the UN Human Rights Committee has held that criminalization of sex between consenting adults in private constitutes arbitrary interference and therefore a violation of Article 17 (right to privacy) of The International Covenant of Civil and Political Rights, by declaring that the prohibited ground of discrimination of 'sex' includes 'sexual orientation' [See: *Toonen v. Australia*, Communication No. 488/1992].



72. **THAT** the European Court of Human Rights has held in several cases there is no social or penological justification for the criminalization of homosexuality between consenting adults in private, and any purported justification was outweighed by the 'detrimental effects' such anti-sodomy laws have on the private, family and working lives of homosexual persons. It particularly held that the right to form and develop relationships with other human beings is integral to Article 8 (right to privacy) of The European Convention of Human Rights (hereinafter, 'ECHR') [See: *Dudgeon v. United Kingdom*, Application No. 7525/1976; *Norris v. Ireland*, Application No.10581/1983].

73. **THAT** the Court held that criminalization and punishment of acts of 'gross indecency' between consenting adults of same sex in private constitutes a violation of Article 8 (right to privacy) of ECHR [See: *ADT v. United Kingdom*, Application No. 35765/1997].

74. **THAT** the European Court of Human Rights held that mere existence of legislation prohibiting consenting adults of same sex from participating in intimate, sexual conduct in private directly and adversely impacts a person's right to privacy under Article 8 of ECHR [See: *Modinos v. Cyprus*, Application No. 15070/1989].

75. **THAT** the European Court of Human Rights held that a policy by the Ministry of Defence against hiring homosexual persons in the UK army violates Article 8 (right to privacy) of ECHR, as it constitutes an arbitrary interference by a public authority in the intimate sphere of a person's life on basis of *sexual orientation* [See: *Perkins and R v. The United Kingdom* (Application No. 43208/1998 and 44875/1998), *Lustig Prean and Beckett v. The United Kingdom* (Application Nos. 31417/1996 and 32377/1996) and *Smith and Grady v. The United Kingdom* (Application Nos. 33985/1996 and 33986/1996)].

76. **THAT** the Inter American Court of Human Rights (Inter American Court) declared that Chilean Court's decision to declare the complainant as an 'unfit parent'



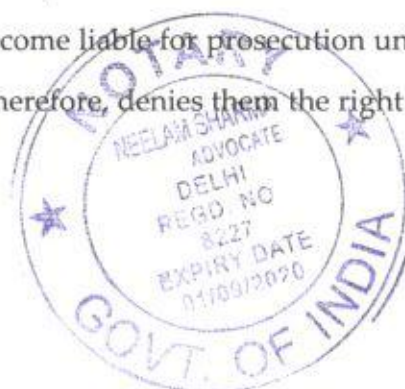
and deprive her of child custody on basis of her sexual orientation violated Article 11 (right to privacy) and Article 17(1) and (4) (right to family) of the Inter-American Convention of Human Rights (hereinafter, 'IACHR'). It further held the right to family shall be interpreted to include decisions relating to intimate, sexual relations as sexual orientation is a fundamental aspect of an individual's private life [See: *Case of Atalo Rifo & Daughters v. Chile*, IACHR, decision dated February 24, 2012].

77. **THAT** the Inter American Court held that the decision of the Ecuadorean military to discharge a soldier on basis of his sexual orientation, a well-established protected characteristic, constitutes a violation of Article 11 (right to privacy and dignity) of IACHR [See: *Homero Flor Freire v. Ecuador*, Case No. 12/743].

78. **THAT** the Indian Supreme Court held that expression of sexual orientation is an essential attribute of privacy, and discrimination against an individual on basis of sexual orientation is deeply offensive to the dignity and self-worth of an individual. [See: *J. Puttuswamy & Ors. v. Union of India*, 2017 SCC Online SC 996].

79. **THAT** the United States Supreme Court struck down an anti-sodomy law as unconstitutional, by holding that the State cannot regulate intimate, sexual conduct between consensual adults on same sex without any compelling State interest, as homosexual persons are entitled to the privacy of expression of sexuality without fear of law. [See: *Lawrence v. Texas*, 539 US 558 (2003)].

80. **THAT** sexual intimacy is a core aspect of human experience and is important to mental health, psychological well-being and social adjustment. By criminalising consensual sexual acts between adult men in private, Section 162 and 165 of the Penal Code deny them the very opportunity to participate in a profound and fundamental aspect of human relationships. The effect is that homosexual persons either deny themselves a basic human experience to avoid committing a crime, or, otherwise engage in sexual acts and become liable for prosecution under Section 162 and Section 165 of the Penal Code. It, therefore, denies them the right to form private



intimate sexual relationships, which is otherwise available to heterosexuals without fear of prosecution or persecution.

81. THAT, I therefore conclude 162 and 165 of the Penal Code infringe the fundamental rights guaranteed under Article 31 (a) of the Constitution of Kenya.

The Right to Equality and Non-Discrimination

82. THAT Article 27(1), 27(4) and 27(5) of the Kenyan Constitution states:

"(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

.....

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

.....

(5) A person shall not discriminate directly or indirectly against another".

83. THAT similar rights are provided for under international law. The ICCPR provides for the right to equality under article 26 and under article 2(1) the right to be free from discrimination on the basis of gender, health status, with respect to the exercise of the rights guaranteed in the ICCPR, including the right to privacy and the right to be free from cruel, inhuman and degrading treatment. Moreover, Article 2 of the African Charter provides for the right to be free from discrimination on basis of 'sex'.



84. Principle 2 (Right to Equality & Non-Discrimination) of Yogyakarta Principles states as follows:-

"Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

"Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status."

States are required to embody principles of equality and non-discrimination on basis of sexual orientation and gender identity in their national constitutions and appropriate legislations.

85. Principle 4(Right to Life) of Yogyakarta Principles states *"Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity."* States are required to repeal or amend criminal and other legal provisions that prohibit, or are in effect employed to prohibit consensual sexual activity among people of the same sex who are above the age of consent.



86. THAT the Kenyan High Court relied on the principle of interpreting the Constitution in a manner that will most favour the enforcement of a right or fundamental freedom and promote the values of an open and democratic society, as contained in Article 20(3) and (4) of the Constitution and to interpret the term 'person' in the Constitution of Kenya to mean and apply the freedom of association to every person before law, regardless of sexual orientation [See: *Eric Gitari v. Non-Governmental Organizations Co-ordination Board*, Petition No. 440/2013].

87. THAT the UN Committee on Economic, Social and Cultural Rights has noted that everyone has the right to highest attainable standard of physical and mental health without any discrimination on basis of race, colour, sex, language, religion, political opinion, national origin, health condition (including HIV/AIDS), *sexual orientation* or other status, as per Articles 2.2 and 3 of The International Covenant on Economic, Social and Cultural Rights (hereinafter, 'ICESCR') [See: *General Comment No. 14: The Right to Highest Attainable Standard of Health (Article 12)*, 11th August 2000].

88. THAT the Committee has noted that 'other status' as recognized in Article 2(2) of ICESCR includes 'sexual orientation'. It recommends State parties to ensure that a person's sexual orientation is not a barrier to realizing Covenant rights. In addition, 'gender identity' is recognized as among the prohibited grounds of discrimination [See: *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights*, 10th June 2009].

89. THAT the European Court of Human Rights held that rejection of permission to a non-governmental organization to advocate in favour of human rights of lesbian, gay, bisexual and transgender persons constitutes a violation of Article 11 (right of peaceful assembly and freedom of association) and Article 14 (right to equality and non-discrimination) of ECHR, on basis of sexual orientation of the subject matter of advocacy [See: *Genderdoc v. Moldova*, Application No. 9106/2006].

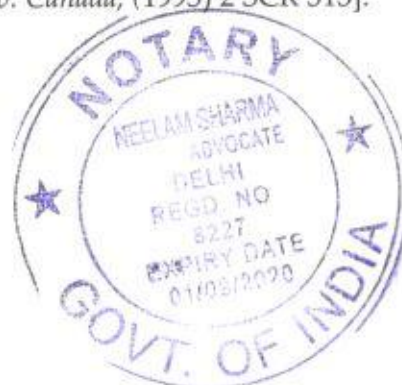


90. THAT the Special Rapporteur on Human Rights Defenders in Africa and Focal Point on Reprisals has recommended African States to amend or repeal punitive laws, policies and practices that undermine the rights to freedom of association and assembly and stigmatize and discriminate against certain classes of human rights defenders according to sex, health status, sexual orientation, gender identity or expression or other status [See: *Inter-Session Activity Report by Special Rapporteur on Human Rights Defenders Africa & Focal Point on Reprisals, presented to the 60th Ordinary Session of African Commission of Human and People's Rights (2017)*].

91. THAT the Inter American Court declared that Chilean Court's decision to declare the complainant as an 'unfit parent' and deprive her of child custody on basis of her sexual orientation violated Article 24 (right to equality) of the IACHR, as the prohibited category of discrimination "*other social condition*" includes *sexual orientation* [See: *Case of Atalo Rizzo & Daughters v. Chile, IACHR, decision dated February 24, 2012*].

92. THAT the Inter American Court held that the decision of the Ecuadorean military to discharge a soldier on basis of his sexual orientation, a well-established protected characteristic, constitutes a violation of Article 24 (right to equality and non-discrimination) of IACHR. In particular, it held that the military's policy of punishing 'sexual acts' between persons of same sex have the effect of punishing persons on basis of *actual or perceived sexual orientation*, and as such is not compatible with IACHR [See: *Homero Flor Freire v. Ecuador, Case No. 12/743*].

93. THAT the Canadian Supreme Court declared that sexual orientation is a deeply personal characteristic, that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of Section 15 of The Canadian Charter of Rights & Freedom's protection as being analogous to the enumerated grounds [See: *Egan v. Canada, (1995) 2 SCR 513*].



94. THAT Article 27 requires a more purposive interpretation to enforce the right to equality and freedom from discrimination, in light of the developments of international law which recognizes that '*sexual orientation*' is a prohibited ground of discrimination that is analogous to '*sex*'.

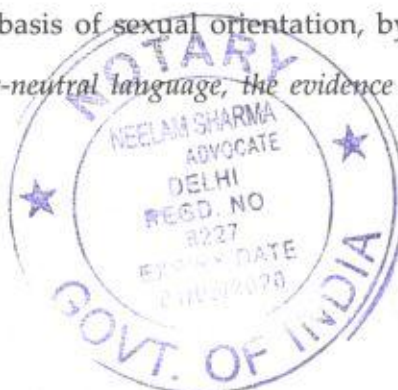
Disparate Impact or Indirect Discrimination

95. THAT the principle that a facially neutral provision of law or State-action may disproportionately affect a particular class of persons is accepted across jurisdictions in the world.

96. THAT in Europe, the principle is statutorily recognized. Council Directive 76/207 states, "*the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status...*" [See: Council Directive of 9th February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions].

97. THAT Council Directive 2000/78/EC defines the concept of indirect discrimination as, "*indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*" [See: Council Directive 2000/78/EC of 27th November 2000 establishing a general framework of equal treatment in employment and occupation].

98. THAT the Supreme Court of Belize struck down the anti-sodomy law under Section 53 of Belize Criminal Code for violation the equality and discrimination clause of the Belize Constitution on basis of sexual orientation, by noting "...in as much as Section 53 is framed in gender-neutral language, the evidence demonstrates it is



discriminatory in effect. The Claimant has shown that he has been rendered a criminal by virtue of his homosexuality" [See: *Caleb Orozco v. Attorney General of Belize*, Claim No. 668/2010].

99. THAT the European Court of Justice decided a reference where the applicant alleged that a requirement to be a full-time employee to secure pension benefits is discriminatory against women, as women are far more likely than men to perform part-time work so as to take care of the family and home, by holding "*Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex*" [See: *Bilka-Kaufhaus GmbH v. Weber von Hartz*, (1986) ECR 1607].

100. THAT the Canadian Supreme Court has consistently held that the fundamental aspect to examine the validity of discriminatory action is whether or not the effect of the action has a disproportionate impact on a class of persons, by holding "*It arises where an employer [...] adopts a rule or standard [...] which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force*" [See: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, (1985) 2 SCR 536; *Andrews v. Law Society of British Columbia*, (1989) 1 SCR 143].

101. THAT the Supreme Court of South Africa has similarly observed on indirect discrimination, by noting "*The concept of indirect discrimination, as I understand it, was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them...*" [See: *The City Council of Pretoria v. Walker Case*, CCT 8/97].

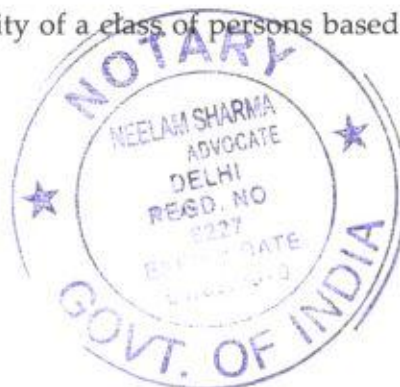


102. THAT the Canadian Supreme Court has also applied the same test in cases involving hate-speech against lesbian, gay, bisexual and transgender persons, holding “...I do not accept Mr. Wharcott’s submission that the flyers targeted sexual activities, rather than sexual orientation. While the publication at issue may appear to engage in the debate about the morality of certain sexual behavior, they are only aimed at that sexual activity when it is carried out by persons of a certain sexual orientation.” [See: *Saskatchewan Human Rights Commission v. Wharcott*, (2013) 1 RCS].

103. THAT the Indian Supreme Court has held that when the Court examines the Constitutional validity of a legislation, it must not only be assessed on its stated aims but also consider the implications and effect of the law. It observed that biological or social determinants often find expression in legal policy, and it is the Court’s mandate to review such laws so that majoritarian politics or moral beliefs rooted in religious/cultural fabric of the society do not violate individual autonomy. A statute could have been held to be a valid piece of legislation keeping in view the social condition of the times it was enacted it, but with changes occurring therein both domestically as also internationally, such a law can also be declared invalid.” [See: *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1].

104. THAT it is clear from the history of Section 162 and Section 165 of the Penal Code that it proscribes all sexual acts between males, whether penile-non-vaginal acts by the former and all non-penetrative acts by the latter. As penetrative sexual acts between men are essentially penile-non-vaginal, in effect, Section 162 along with Section 165 criminalizes all forms of sexual acts between men on basis of sexual orientation.

105. THAT although, technically, Section 162 criminalizes the ‘acts’ and not the ‘identity’, it effectively results in the criminalization of identity as it is the only form of expression of sexuality available to homosexual and transgender persons. Once acts proscribed are associated with an identity of a class of persons based on one or



more characteristics (in this case 'sexual orientation'), the threat of criminalization extends to the identity as well.

106. THAT notwithstanding the facially-neutral provision of Section 162 of the Penal Code, which purportedly targets '*carnal knowledge of any person against order of nature*' by heterosexual as well as homosexual persons equally in letter, the experience of law in spirit across the world demonstrates that the so-called 'anti-sodomy laws' are used as an instrument of persecution of gay, bisexual and transgender persons. On this count alone, Section 162 deserves to be declared unconstitutional as it violates the guarantee of equal treatment and non-discrimination in practice. Sexual orientation is an innate and immutable characteristic of homosexual persons, but the expression of that sexuality is criminalized by Section 162 and Section 165 of the Penal Code.

107. I am therefore of the opinion that Sections 162 and 165 of the Penal Code infringe Articles 27(1), 27(4) and 27(5).

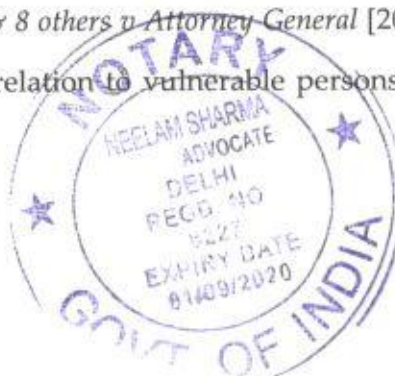
The Right to dignity

108. THAT the inherent dignity of all people is a core value recognized in the Constitution as well as all international legal instruments.

109. THAT Article 28 of the Kenyan Constitution states:- "*Every person has inherent dignity and the right to have that dignity respected and protected.*"

110. THAT Principle 1 (Right to Universal Enjoyment of Human Rights) of the Yogyakarta Principles, states:- "*All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.*"

111. THAT in *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR, the Court discussed the right to dignity in relation to vulnerable persons like refugees in the following terms:-



"66. In *S v Makwanyane and Another* [1995] ZACC 3 para 144 Chaskalson P said the following, "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others." In the same case, para 328, O'Regan J said the following:- "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched."

112. **THAT** similar views have been expounded by the Supreme Court of India in *M Nagaraj v Union of India* (2006) 8 SCC 212, where the Court observed **THAT** dignity is intrinsic to and inseparable from human existence and **THAT** every human being has dignity by virtue of his existence.

113. **THAT** dignity is not only protected in Article 28 of the Constitution but underpins and pervades all other rights and freedoms. [See *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR at para 67] In *Justice K.S Puttuswamy (Retd) and another v Union of India and others* 2017 SCC OnLine SC 996, it was held at para...:-

"To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence."



114. **THAT** in *Egan v. Canada* [1995] 2 SCR 513, the Supreme Court of Canada held that dignity is at the very heart of individual rights and is violated when a person is demeaned, degraded or treated as a second-class citizen.

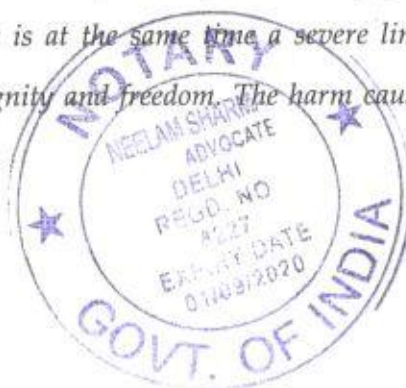
115. **THAT** by making a particular type of sexual conduct between consenting adults an offence, sections 162 and 165 of the Penal Code, by their very existence, demean and devalue homosexual persons, as they stifle their inherent nature and personality. Instead of respecting personal decisions in matters of sexual expression and orientation, sections 162 and 165 of the Penal Code intrude upon and cast judgment on LGBTI individuals, thus affronting their dignity and humanity.

116. **THAT** in *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, the Supreme Court of Canada observed:-

"Human dignity means that an individual or group feels self-respect or self-worth.Human dignity is harmed when individuals and groups are marginalised, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law."

117. **THAT** in *National Coalition for Gay and Lesbian Equality & Ors. v. Minister of Justice & Ors* 1999 (1) SA 6 (CC) the Constitutional Court of South Africa, while considering the constitutional validity of the common law offence of sodomy held that:-

"36. The criminalization of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's right to privacy, dignity and freedom. The harm caused by the provision



can, and often does, affect his ability to achieve self-identification and self-fulfillment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social good and services and the award of social opportunities for gays"

118. **THAT** sections 162 and 165 of the Penal Code attach criminality and fear to the everyday lives of homosexual persons. First, the provisions breed a lingering threat that at any time, the police can barge into the home and arrest them for the commission of offences under section 162 and 165 of the Penal Code. Second, the law implies that every gay man is a criminal or a potential criminal, on account of his sexual orientation. Laws that subject a section of Kenyan society to constant fear, insecurity and ridicule for being who they are, do nothing but impair human dignity.

119. I therefore am of the opinion that Sections 162 and 165 of the Penal Code infringe Article 28 of the Constitution.

The Right to Freedom and Security of Person

120. **THAT** Article 29 of the Constitution states:-

"Every person has the right to freedom and security of the person, which includes the right not to be —

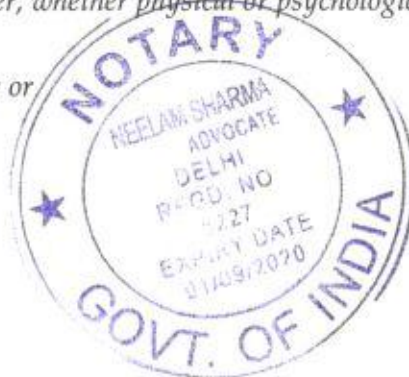
(a) deprived of freedom arbitrarily or without just cause;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c) subjected to any form of violence from either public or private sources;

(d) subjected to torture in any manner, whether physical or psychological;

(e) subjected to corporal punishment; or



(f) treated or punished in a cruel, inhuman or degrading manner."

Vague, arbitrary and contrary to the rule of law

121. **THAT** Article 29(1)(a) of the Constitution of Kenya guarantees the right to freedom and security of every person, which includes the right not to be deprived of one's freedom arbitrarily or without just cause.

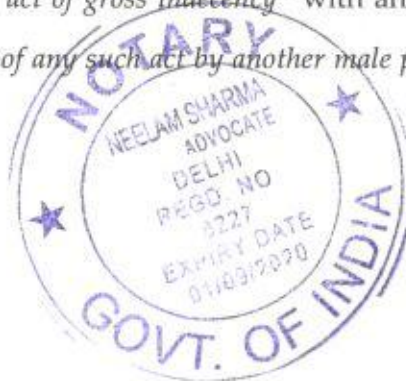
122. **THAT** further, several provisions of the Constitution lay down the commitment towards creating a State governed by the rule of law.

123. **THAT** it is a cardinal principle in criminal law and jurisprudence that what constitutes an offence must be clear and not vague. Citizens must know with certainty where lawful conduct ends and unlawful conduct begins. A person cannot be deprived of her liberty by a law which is nebulous in its definition and uncertain in its application.

124. **THAT** in *Kartar Singh v. State of Punjab* (1994) 3 SCC 569, the Indian Supreme Court held at para 130:- *"vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so THAT he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."*

125. **THAT** section 162 of the Penal Code penalizes a person who voluntarily has or permits another person to have:- *"carnal knowledge of [the] person against the order of nature"* and prescribes punishment of imprisonment of fourteen years. The terms 'carnal knowledge' and 'against the order of nature' are neither defined nor explained in the Penal Code.

126. **THAT** section 165 of the Penal Code punishes 'any male person who, whether in public or in private, commits *"any act of gross indecency"* with another male person or attempts to procure the commission of any such act by another male person for himself or



with another male person' by imprisonment for five years. Again, there is no definition or explanation in the Penal Code of what constitutes 'acts of gross indecency' between two men.

127. **THAT** further, under section 165 of the Penal Code, it is irrelevant whether the act is committed in public or in private. Whereas in the case of heterosexual persons, consensual sexual activity between a man and a woman in private is perfectly legitimate, but may not be so, when carried out in public view.

128. **THAT** therefore, persons whose sexual orientation, conduct and practices is not heterosexually aligned, have no way of knowing what intimate conduct, act or expression of theirs may attract penal liability under section 162 and/or 165 of the Penal Code.

129. **THAT** the vagueness and uncertainty inherent in sections 162 and 165 of the Penal Code, allows the law to be applied arbitrarily, in contravention of Article 29(1)(a) of the Constitution.

130. **THAT** the vagueness and uncertainty inherent in sections 162 and 165 of the Penal Code, allows the law to be applied arbitrarily, in contravention of Article 29(1)(a) of the Constitution.

131. **THAT** in creating an offence, section 162 of the Penal Code makes no distinction between acts that consenting adults engage in and sexual acts without consent, which ought to be considered sexual assault or rape. In the former, there is no injury or harm and therefore, no 'victim' of the crime. Arresting and prosecuting consenting adults for their intimate actions and when no one is harmed or aggrieved, or even affected, cannot be considered a "just cause" within the meaning of Article 29(1) of the Constitution. [See *Dudgeon v. United Kingdom*, [1981] ECHR 5 (22 October 1981); *Norris v. Ireland*, [1988] ECHR 22 (26 October 1988);



132. **THAT** section 165 of the Penal Code suffers from similar arbitrariness, more so, when the acts in questions are engaged in private. [See *ADT v. United Kingdom*, Application No. 35765/1997]

133. **THAT** laws that are manifestly arbitrary and patently unjust and unreasonable can be struck down. [See *Shayara Bano v Union of India* (2017) 9 SCC 1]

Security of Persons

134. *The Right to Freedom from Arbitrary Deprivation of Liberty (Principle 7 of Yogyakarta principles)* requires States to take all necessary legislative, administrative and other measures to ensure that sexual orientation or gender identity may under no circumstances be the basis for arrest or detention, including the elimination of vaguely worded criminal law provisions that invite discriminatory application or otherwise provide scope for arrests based on prejudice.

135. *The Right to Freedom from Criminalization and Sanction on basis of Sexual Orientation, Gender Identity, Gender Expression or Sex Characteristics (Principle 30)* requires States to ensure that all legal provisions, including customary, religious or indigenous law, whether explicit provisions, or the application of general punitive provisions such as *acts against nature, morality, public decency, vagrancy, sodomy and propaganda laws*, do not criminalize sexual orientation, gender identity and expression, or establish any form of sanction relating to them.

136. That the Court held that medico-legal directives that isolate people living with HIV in confined spaces or compel people living with HIV to disclose their health condition to sexual partners or medical personnel, purportedly for prevention of transmission of HIV, is violative of Article 5 (right to liberty) of ECHR on basis of health condition, in this case, HIV-status [See: *Enhorn v. Sweden*, Application No. 56529/2000].

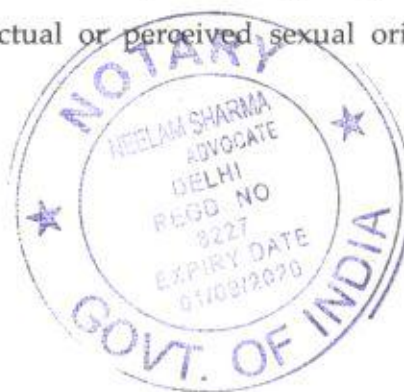


137. The Inter American Commission on Human Rights (IACHR) has requested State parties to adopt *precautionary measures* to prevent irreparable harm to persons due to their association with organizations, groups or persons on basis of sexual orientation or gender identity (**no source available online**).

138. The Committee for the Prevention of Torture in Africa has observed that “forced examinations to obtain physical evidence of homosexuality, which takes the form of non-consensual anal examinations is medically worthless and amounts to torture and ill-treatment”. The Commissioner particularly recommends African States to respect and protect rights of persons and groups at heightened risk of torture and other ill-treatment including persons with intellectual and psychosocial disabilities, homeless persons, women and children, lesbian, gay, bisexual, transgender and intersex persons, migrants, refugees, internally displaced persons and to ensure that perpetrators are held accountable by law [See: *Inter-Session Activity Report & Annual Situation on Torture and Other Ill-Treatment in Africa Report*, presented to the 60th Ordinary Session of African Commission of Human and People’s Rights by Commissioner Lawrence M. Mute (2017)].

139. The African Commission on Human and People’s Rights urged Member States to take immediate steps to address the widespread sexual and gender-based violence against lesbian, gay, bisexual and transgender and intersex persons by State as well as non-State actors [See: *General Comment No. 4 on African Charter on Human and People’s Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman and Degrading Punishment or Treatment (Article 5)*].

140. The African Commission on Human and People’s Rights adopted a resolution on protection from violence and other human rights violations on basis of actual or perceived sexual orientation or gender identity, whereby it urged Members States of the African Union to enact appropriate laws prohibiting and punishing all forms of violence including on basis of actual or perceived sexual orientation or gender



identity [See: Resolution 275 adopted at ACHPR Meeting at it's 55th Ordinary Session held in Luanda, Angola from 28th April to 12th May 2014].

141. The UN Committee Against Torture has urged Member States to protect persons who are vulnerable violence and discrimination, as it is a core part of their obligation to prevent torture or other ill-treatment. Member states shall make sure that their national legislations apply to all persons regardless of race, colour, ethnicity, age, religious affiliation, belief, political opinion, sex, sexual orientation, gender identity, health status, economic condition, indigenous identity or other status [See: General Comment No. 2, Implementation of Article 2 of Convention Against Torture and Other Ill Treatment by State Parties, 24th January 2008].

142. That the Office of United Nations High Commissioner for Human Rights has noted that criminalization of same-sex relations by law directly leads to homophobic and transphobic hate crimes, police torture, family and community violence and stigma against lesbian, gay, bisexual and transgender persons, and States have a positive duty under international human rights law to prevent violence and discrimination on basis of sexual orientation and gender identity [See: Reports of the Office of UNHCHR, A/HRC/29/23 dated 4th May 2015 and A/HRC/19/41 dated 17th November 2011].

The right to be free from cruel, inhuman and degrading treatment

143. THAT Article 29(f) of the Constitution states: "Every person has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading manner."

144. THAT Article 25(a) of the Constitution provides that the freedom from torture and cruel, inhuman or degrading treatment or punishment is absolute and non-derogable.



145. THAT Article 7 of the International Covenant on Civil and Political Rights prohibits the use of torture and cruel, inhuman or degrading treatment or punishment. Further Article 9(1) of the ICCPR states that *"everyone has the right to liberty and security of the person..."* In its General Comment on Article 7, the HRC stated that the purpose of the article was to:- *"protect both the dignity and the physical and mental integrity of the individual from acts THAT cause physical and mental suffering."*

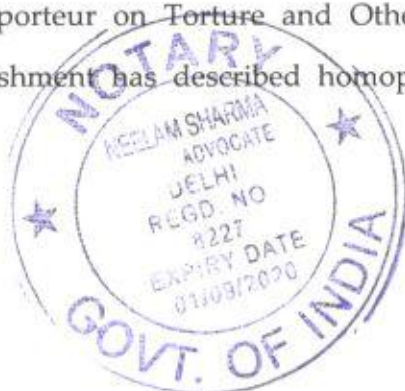
146. THAT the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) acceded to by Kenya on 21 February 1997, also prohibits cruel, inhuman or degrading treatment under article 16(1).

147. THAT the prohibition against cruel, inhuman or degrading treatment is also contained in Article 5 of the African Charter on Human and People's Rights ("African Charter") and the Protocol to the African Charter on the Rights of Women in Africa. The African Commission on Human and Peoples Rights has, in the case of *Doebbler v. Sudan*, African Comm. on Human and People's Rights, 236/00 emphasized at para 36, that:- *"the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses"*

148. THAT Principle 10 of the Yogyakarta Principles states:- *"Everyone has the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender identity"*.

149. THAT international human rights bodies and experts have expressed concerns at the torture and ill-treatment of LGBT persons in detention by or with the acquiescence of State officials. [See Committee against Torture CAT/C/KGZ/CO/2 at para19 and Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/19/61/Add.4, paras. 168, 172,.]

150. THAT the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has described homophobic ill-treatment in



health- care settings as well as subjecting men suspected of homosexual conduct to non-consensual anal examinations to 'prove' their homosexuality, as amounting to cruel, inhuman or degrading treatment. [See Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/HRC/22/53, dated 1st February 2013 at para..] Such practices are more likely to occur in jurisdictions THAT proscribe consensual same sex conduct, since the law may itself sanction or tolerate the cruel, inhuman or degrading treatment of LGBTI persons.

151. **THAT** by causing the apprehension, arrest and detention of LGBTI persons on account of their actual or perceived sexual orientation, sections 162 and 165 of the Penal Code infringe the protection guaranteed under Article 29(f) of the Constitution of Kenya, 2010.

Conclusion

152. **THAT** the Universal Declaration of Human Rights begins with the declaration:- *"All human beings are born free and equal in dignity and rights"*. Commenting on this universal and enduring principle, the United Nations High Commissioner on Human Rights, in her first report to the Human Rights Council on the issue of 'discrimination and violence against individuals based on their sexual orientation and gender identity' observed THAT:- *"All people, including LGBT persons, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly."* (See Report of the United Nations High Commissioner for Human Rights, A/HRC/19/41, dated 17th November 2011 at para 5)



153. **THAT** in a subsequent report submitted to the Human Rights Council on the issue of 'discrimination and violence against individuals based on their sexual orientation and gender identity', the UN High Commissioner for Human Rights stated:- *"States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination."* (See Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23, dated 4th May 2015 at para 43)

154. **THAT** it is well-settled that Courts may take into consideration events and circumstances which were non-existent at the time that the law was enacted. A law may be constitutional when enacted, but with the passage of time, the same may be held to be unconstitutional in view of the changed conditions. [See *John Vallamattom v Union of India* (2003) 6 SCC 611 at paras 33, 34, 35 and 36, *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 at paras 8-9]

155. For the reasons outlined above, it is submitted and it is my opinion:-

- a) That by criminalizing the conduct of LGBTI persons implicitly under 162 of the Penal Code or gay men explicitly under 165 of the Penal Code, gay men are dissuaded from accessing health services, dissuading health care providers from providing information to gay men, thus drive the diseases like HIV, Hepatitis, underground and increasing the sero-prevalence and also dissuading the LGBTI communities from participation in programs that affect them and thereby infringes the right to health under Article 43 (1) (a) of the Constitution.
- b) That sexual intimacy is a core aspect of human experience and is important for all persons in society. The Constitutional right to privacy protects against such acts of interference by the State. However, for gay men it particular, their practices are criminalized vide Section 162



and 165. Thus these provisions violate their right to privacy under Article 31(a) of the Constitution.

- c) That sections 162 and 165 hang like the Damocles sword over the gay community. The mere existence of these provisions in the Penal Code threatens the freedom and security of gay men as at any time their liberty can be deprived arbitrarily. There is no just cause in these provision except phobia, animus and hostility against the gay community, which has no place in a liberal constitutional framework of the Constitution. Resultantly the provisions infringe Article 29 (a) of the Constitution.
- d) That Sections 162 and 165 don't indicate what is carnal knowledge or gross indecency. These terms are vague. It is settled position in law that a vague provision is liable to rendered unconstitutional. Sections 162 and 165 are so liable to be declared unconstitutional.
- e) That section 162 indirectly and 165 directly discriminates against the gay community on the ground of their sexual orientation and practices. The acts covered under Sections 162 and 165 are the core of the sexual activities of the gay community. Though Section 162 is facially neutral, the data from all over the world shows that it disproportionately impacts gay men. On the other hand the law does not really impact heterosexual persons Therefore both Sections 162 and 165 of the Penal Code infringe Articles 27(1), 27(4) and 27(5) of the Kenyan Constitution.
- f) That sections 162 and 165 makes gay men criminals. Thus, for their natural practices they are made criminals in the eyes of society. This impairs their dignity and thus infringes their rights under Article 28 of the Constitution. To have a law in place which criminalizes something innate to his being, nay the core of his being is also cruel, inhuman and



degrading and therefore also infringes Article 29 (f) of the Constitution.

- g) That in the circumstances above the Court can grant the relief sought by declaring that both Sections 162 and 165 infringe the Constitutional rights as set out above.
- h) That in doing so the Court would be acting in consonance with International treaties on the issue, the constitutional values enshrined in the Constitution and undoing the wrong done to the LGBTI communities in general and the gay men in particular by colonial rulers.

156. **THAT** what is deposed to herein is true to the best of my knowledge, belief and information



Anand Grover

New Delhi

Sworn at New Delhi this 5th day of February 2018



Verify the Deponent who
Signed put it in my presence



VALID OUT SIDE INDIA

ATTESTED

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