

IN THE SUPREME COURT OF INDIA
CRL MP No. 6712 of 2018
IN
WRIT PETITION (CRIMINAL) NO. 76 OF 2016

IN THE MATTER OF:

Navtej Singh Johar & Ors. ...Petitioners
Vs.
Union of India ...Respondent

AND IN THE MATTER OF:

Professor Nivedita Menon & Ors. ...Interveners

NOTE ON ARGUMENTS ON BEHALF OF THE INTERVENERS

"Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level, it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution."

J. Sachs in *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*, Constitutional Court of South Africa (1998)

1. The above statement captures the heart of the contentions raised by the present interveners, who have been party to the proceedings in this Hon'ble Court, since 2010.
 2. The interveners are a group of renowned academicians from the central universities based in Delhi, and have engaged with gender and sexuality issues for decades.
- I. Article 19(1)(a) of the Constitution guarantees the freedom of speech and expression, which includes the freedom to express one's sexual identity and personhood**
3. Section 377, under the guise of targeting conduct, actually targets the identity of LGBT persons. Once it is accepted that homosexual orientation is innate, and not learned or deviant behavior, it follows that LGBT-persons cannot freely express themselves about their own sexual orientation and, therefore, their identity because they potentially become the target for criminal prosecution under Section 377. Article 19(1)(a), therefore, protects the fundamental freedom of LGBT persons to express their sexual identity, and orientation, through speech, manner of dressing, choice of romantic/sexual

partner, expression of romantic/sexual desire, acknowledgement of relationships, or any other means.

4. Section 377 has been instrumental in the harassment, intimidation, blackmail, rape and torture homosexual men in India. There have been numerous reported instances of harassment against homosexual men by the police as well as by other persons, including organized gangs specifically. The perpetrators lure persons 'into situations where the fear prosecution under Section 377 and then use the fear of the law to commit offences of sexual assault, theft and blackmail. The perpetrators take advantage of the atmosphere of stigma, isolation, and silence created by Section 377, preying on those who are most isolated and alone. [See: **Unnatural Offences": Obstacles to Justice in India based on Sexual Orientation and Gender Identity', Report by International Commission of Jurists (February, 2017)]**

5. Because Section 377 exists on the statute book, the police are able to harass the LGBT community through extortion, entrapment, illegal detention, abuse and outing the identity of homosexual men as well as rape and sexual assault. Often, police befriend gay men on social networking sites, and then blackmail them, or subject them to sexual abuse. Other cases include gay men meeting other people on social media applications, and when they meet in person, the other person blackmails or threatens to disclose the identity of gay men to their families. [See: **Violence against MSM, Transgenders & Hijra, a hidden reality', India HIV/AIDS Alliance, New Delhi (2015) at pages 19-20]**

6. The fear of being prosecuted under Section 377 prevents LGBT persons to approach the police for other offences committed against them. In effect, Section 377 ousts LGBT persons from the protections criminal law guarantees to other citizens in the country.

7. In essence, freedom of expression includes expressing one's identity, intimacy, intellect, interest, tastes, and personality in public, as well as private expression of oneself, being in sanctuary or in seclusion. One should not be forced to hide one's sexual identity. In **State of Karnataka v. Associated Management of English Medium Primary and Secondary Schools**, (2014) 9 SCC 485, this Hon'ble Court held at para 37:

"Freedom of choice in the matter of speech and expression is absolutely necessary for an individual to develop his personality in his own way."

8. This Hon'ble Court in ***National Legal Services Authority v. Union of India***, (2014) 5 SCC 438, held that at para 69:

"Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any, other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution."

9. Elaborating on the strong linkages between Article 19(1) and Article 21, this Hon'ble Court held in ***K.S. Puttaswamy vs. Union of India*** (2017) 10 SCC 1

"The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences."

10. LGBT persons should be free to express themselves in society, without the fear of backlash of criminal law and the accompanying stigma that it sanctions.

II. Section 377, in so far as it criminalises the innate sexual expression of gay men and transgender persons, violates the fundamental freedom of expression under Article 19(1)(a)

11. Fear of criminalisation severely hinders the freedom of LGBT persons, who live their lives in secret, hiding from the world and from their own selves, always fearful that their orientation would be disclosed, resulting in backlash and criminal sanction.

12. In United States and Canada, the Courts have held that denying gay persons their right to bring their same sex partner to school events is a violation of their rights under the First Amendment. One of the critical forms of expression of sexual orientation is through the formation of relationships, and the acknowledgement of such relationships in public.

[See:

— ***Fricke v. Lynch***, 491 F.Supp at 385 (D.R.I. 1980);

— ***Constance McMillen v. Itawamba County School District***, 702 F.Supp.2d 699 (2010),

— *Hall v. Powers*, 59 O.R. (3d) 423, Ontario Superior Court of Justice]

13. One of the direct effects of Section 377 is to curb discussion around homosexuality and the expression of same sex desire, which is a direct limitation on the freedom to receive information, which has been recognised to be a part of the freedom of speech and expression under Article 19(1)(a) [See: *Secy, Ministry of Information and Broadcasting v. Cricket Association for Bengal and Ors.*, (1995) 2 SCC 161, paras 192 and 193].

14. The **Yogyakarta Principles** in Principle 19 recognise that the freedom of speech and expression in the context of gender identity and sexual orientation includes the expression of identity and personhood, through speech, deportment, dress, and other means as well as to seek, receive and impart information relating to human rights, sexual orientation and gender identity. States are obligated to, amongst others,:

- a. Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;
- b. Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.

III. **Section 377 has a 'chilling effect on the freedom of expression**

15. The entire edifice of Section 377 is built on creating a culture of fear and silence around homosexuality or on same sex relationships, which was evident from even before the enactment of IPC in 1860.

16. In 1837, in Note M of the Report of the Indian Law Commission of the Draft Penal Code of 1837, Lord Macaulay referring to unnatural offences, which were slightly different from the present Section 377, stated that:

"Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible be said. We leave without comment to the judgement of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could give

rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefit which be derived from legislative measures framed with the greatest precision." [See: page 4 of the Documents Compilation]

17. This remains one of the biggest effects of Section 377, i.e., deafening silence on homosexuality, same sex desires and expression. The culture of fear and silence has resulted in a society, where many people do not know a single homosexual or transgender person amongst their friends, colleagues and family.

18. The mere existence of Section 377 is sufficient to gag an individual's right to self-expression, and creates a climate of fear and panic that has a chilling effect on alternate sexuality.

19. In **Khushboo v. Kanniammal** (2010) 5 SCC 60), this Hon'ble Court held at para 46:

"If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the freedom of speech and expression".

20. This Hon'ble Court in **Shafin Jahan v. Asokan K.M. & Ors.** [2018 SCCOnLine SC 343] has recognised the chilling effect of State control on the exercise of rights, by holding:

"95. Interference by the State in such matters has a seriously chilling effect on the exercise of freedoms. Others are dissuaded to exercise their liberties for fear of the reprisals, which may result upon the free exercise of the choice. The chilling effect on others has a pernicious tendency to prevent them from asserting their liberty. Public spectacles involving a harsh exercise of State power prevent the exercise of freedom, by others in the same milieu. Nothing can be as destructive of freedom and liberty. Fear silences freedom."

IV. Section 377 constitutes an 'unreasonable restriction' and is not covered under Article 19(2)

21. Section 377, to the extent it criminalises adult consensual sexual conduct, does not constitute a 'reasonable restriction' within the meaning of Article 19(2), and is unreasonable. It cannot be justified

on the ground of 'morality', or any other restriction mentioned in Art. 19(2).

22. With respect to 'morality' in Article 19(2), the term 'morality' should be construed as 'constitutional morality' and not public morality. Constitutional morality means strict and complete adherence to the principles enshrined in the Constitution and not to act in a manner violative of the rule of law.

— *Manoj Narula v. Union of India* (2014) 9 SCC 1 at para 74-76;

— *Independent Thought v. Union of India* (2017) 10 SCC 800 at para 91.

23. In *Government of NCT of Delhi v. Union of India*, C.A. No. 2357 of 2017, decided on 04.07.2018, this Hon'ble Court held that

"constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution." (para 61)

24. This was succinctly developed by the High Court in *Naz Foundation v. NCT of Delhi* (2009) 111 DRJ 1, wherein the High Court held:

"Popular morality, as distinct from constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality." (para 79)

...The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals on account of their sexual orientation would be against the constitutional morality (para 80)

25. It is well-settled that penal law cannot be used to impose or sanction social morality. In *Khushboo* (supra), this Hon'ble Court held at para 45:

"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."

V. **Section 377 offers a legal basis to suppress artistic expression around alternate sexuality**

26. Section 377, and the stigma associated with homosexuality, severely restricts the freedom of speech and expression of artists and filmmakers, who want to make content on homosexuality, or portray stories about LGBT lives.

27. In 2013, the Government of Gujarat denied tax exemption to a Gujarati film on 'homosexuality' (*Meghdhanushya*). Though the High Court of Gujarat struck down the government's decision, the Gujarat Government appealed to this Hon'ble Court on the ground of reinstatement of Section 377, and got a stay on that High Court's order. [See: **Gujarat High Court decision in Kiran Kumar Devmani v. State of Gujarat at pages 109-125**]

VI. **International human rights law protects the fundamental right to speech and expression to all persons, irrespective of sexual orientation**

28. It is well-settled that the limitations on the right to expression, on the basis of sexual orientation, violate the right guaranteed under Article 19 of the International Covenant on Civil and Political Rights ('ICCPR').

- a. Office of the United Nations High Commissioner for Human Rights, "**Born Free and Equal**", 2012
- b. United Nations Human Rights Committee, '*Irina Fedotova v. Russian Federation*', **Communication No. 1932/2010** (November, 2012) (CCPR/C/106/D/1932/2010) at para 10.7 and 10.8
- c. United Nations Human Rights Committee, "**Concluding Observations on the Fourth Periodic Report of Georgia**", August, 2014 at para 8 [CCPR/C/GEO/CO/4]
- d. Report of the Special Rapporteur in the field of Cultural Rights (March, 2013) at paras 101-104 (A/HRC/23/34/Add.1)
- e. Report of the Office of the United Nations High Commissioner for Human Rights, "**Discrimination and violence against individuals based on their Sexual Orientation and Gender Identity**" (May, 2015) at paras 18, 48 and 49 (A/HRC/29/23)

- f. *Kaos GL v. Turkey*, European Court of Human Rights (Application No. 4982/07, date of decision: 22.11.2016)
- g. *Bayev And Others v. Russia*, European Court of Human Rights (Application No. 67667/09, date of decision: 20.06.2017) at paras 61-90

VII. Section 377 violates the fundamental freedoms of peaceful assembly and association guaranteed under Articles 19(1)(b) and (c)

- 29. It is well-settled that freedom of assembly is an essential element of any democratic system. It performs a 'vital function in our constitutional system, and public streets are the 'natural' places for expression of opinion and dissemination of ideas [*Himat Lal Shah v. Commissioner of Police, Ahmedabad* (1973) 1 SCC 227 at para 69-70]
- 30. Freedom of assembly to organize gay pride marches has been categorically recognised by the European Court of Human Rights.
 - a. *Alekseyev v. Russia* (Application No. 4916//07, date of decision: 21.10.2010), European Court of Human Rights, at para 68-88
 - b. *GenderDoc-M v. Moldova* (Application No. 9106/06, date of decision: 21.06.2012), European Court of Human Rights, at para 48-55
 - c. *Identoba & Ors. v. Georgia* (Application No. 73235/12, date of decision: 12.05.2015), European Court of Human Rights, at para 91-99
- 31. Freedom of association of LGBT persons has been recognised in many countries.
 - a. *Gay Alliance of Students v. Matthews*, 544 F.2d 162, United States Court of Appeals, Fourth Circuit (1976) (denial of official recognition to a gay student group by Virginia Commonwealth University)
 - b. *Gay Student Services v. Texas*, 737 F.2d 1317 (5th Cir. 1984), United States Court of Appeals for the Fifth Circuit (denial of registration as a student group by Texas A&M University)
 - c. *Ang Ladlad LGBT party v. Commission of Elections*, G.R. No. 190582, Supreme Court of Philippines (2010) (denial of registration as a political party)

- d. *Thuto Rammoge v. Attorney General of Botswana*, MAHGB-000175-13, High Court of Botswana (2014) (denial of registration as a NGO on LGBT rights)
- e. *Eric Gitari v. NGO Coordination Board & Ors.*, Petition No. 440 of 2013, High Court of Kenya (2015) (denial of registration as a NGO working on LGBT rights)

32. Section 377 directly impinges on the freedom of assembly and association of LGBT persons because they fear being criminally prosecuted.

VIII. Section 377 violates the fundamental right to freedom of conscience protected under Article 25 of the Constitution

33. Article 25 of the Constitution guarantees the freedom of conscience to all persons. Conscience is not necessarily limited to religious beliefs, but refers to the moral compass of a person with respect to her core beliefs. Accordingly, deeply and sincerely held beliefs derived from purely ethical sources can be termed as 'conscience', thereby entitled to protection under Article 25.

34. As evident from Article 25, conscience and religion are related, but cannot be inter-changed. It falls within the domain of 'liberty of thought', as referred to in the Preamble.

35. This Hon'ble Court in *Puttaswamy* (supra) has referred to J.S. Mill's essay 'On Liberty' (1959), which stated:

"This, then is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological" (paras 408 and 523)

36. Pertinently, this Hon'ble Court in *Puttaswamy* also held that:

"there are areas other than religious beliefs which form part of the individual's freedom of conscience such as political belief, etc, which form part of liberty under Article 21" (para 372)

37. Accordingly, the freedom of conscience guaranteed under Article 25 extends to the entire consciousness of a human, including beliefs of

her sexual identity, which, in fact, go to the core of each individual's sense of self, as well the intensely personal nature of her own sexual orientation. In this regard, conscience refers to the liberty and autonomy, which inheres in each individual, and the ability to take decisions on matters that are central to the pursuit of happiness.

38. Article 1 of **Universal Declaration of Human Rights** (1948) states:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience, and should act towards one another in a spirit of brotherhood."

39. Section 377, by prohibiting sexual acts that are innate to homosexual men and transgender persons, thereby penalizing their ways of life and beliefs on love, intimacy and desires, violates the freedom of conscience of such individuals protected under Article 25 of the Constitution. It impairs their moral sense of self, personhood and personal integrity, by treating them as a second-class citizens for being who they are.

IX. Private parties cannot defend the constitutionality of Section 377, IPC

40. Only the State has locus to defend the constitutionality of a law. No private parties have such standing in law.

— **Diamond v. Charles**, 476 US 54 (1986, US Supreme Court)

— **Hollingsworth v. Perry**, 133 S.Ct. 2652 (2013, US Supreme Court)

41. The Union of India, vide its affidavit dated 11.07.2018 submitted in this Hon'ble Court, has clarified that "so far as the constitutional validity of Section 377 to the extent it applies to "consensual acts of adults in private is concerned, the Union of India would leave the said question to the wisdom of this Hon'ble Court" (para 6).

42. Private parties possess no locus to defend the constitutionality of laws, and ought not to be allowed to do so.

X. Section 377 undermines the democratic framework by targeting a minority community

43. In **NALSA** (supra), this Hon'ble Court held at para 129:

"Our Constitution inheres liberal and substantive democracy with the rule of law as an important and fundamental pillar. It has its own internal morality based on dignity and equality of all human beings. The rule of law demands protection of individual human rights. Such rights are to be guaranteed to each and every human beings."

44. The essence of democracy lies in its celebration of diversity and plural values and norms. Section 377, by criminalizing sexual practices that are usually associated with sexual minorities, impairs the democratic foundation of this country, by imposing majority social and sexual mores, and negatively impacts the free exchange of ideas, and views on myriad forms of sexuality.

XI. Section 377 is not about only about 'prosecution', but about the real damage done to LGBT persons, which is unreported

45. The oft-repeated phrase '*unapprehended felon*' to describe the effect of Section 377 fails to capture the sheer devastating impact the law has had on the rights and health of LGBT persons, with lives destroyed, bodies brutalized, and minds scarred forever. No act of decriminalization itself can compensate for the decades lost, bullying in childhood, loneliness and isolation suffered, and constant feeling of being considered '*less than human*'.

46. The pressure of pretending to be somebody else, to hide one's true feelings, to constantly watch one's gestures and behaviour, so as not to reveal one's sexuality, engaging in risky sexual activity in secret, basically to lead a life of a lie, is excruciating. The pain of being different, having no one to talk to, feeling dirty and guilty about oneself, coming to terms with one's sexuality after years, realising that homosexuality is both socially and legally disapproved, not being able to live freely, and having no legal recognition of same sex relationships, all these make LGBT persons either resign to a closeted life or to embark on a life of struggle and violence, without any social, legal or institutional support. Only few have the courage or tenacity to go through the latter.

XII. The decision in *Koushal* ought to be overruled and the fundamental rights of LGBT persons affirmed

47. This Hon'ble Court's decision in *Koushal* needs to be overruled. The damage done by the said decision is unimaginable. In one stroke, thousands of gay men and transgender persons became recriminalized in 2013, after almost five years of freedom. The Number of cases of harassment and violations saw a sharp rise, especially cases of blackmail and extortion. From 260 cases in 2012, the numbers went up to 1155 in 2014 [See: pages 19-20].

48. This Hon'ble Court in *Puttaswamy*, in effect, has removed the entire basis of *Koushal* but refrained from making a determination on the constitutional validity of Section 377, specifically because the curative petitions were pending.

49. The Supreme Court of United States in *Lawrence vs. Texas*, while categorically overruling *Bowers vs. Hardwick*, held:

"Bowers was not correct when it was decided, and it is not correct today. It ought not to remain a binding precedent. Bowers vs. Hardwick should be and now is overruled".

50. Further, in *Obergefell vs. Hodges*, the U.S. Supreme Court held that

"Yet, in effect, Bowers upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. As evidenced by the dissents in that case, the facts and principles necessary to a correct holding were known to the Bowers Court. That is why Lawrence held Bowers was "not correct when it was decided." Although Bowers was eventually repudiated in Lawrence, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after Bowers was overruled. Dignitary wounds cannot always be healed with the stroke of a pen."

51. Similarly, in the present case, *Koushal* was not correct when it was decided, and it is not correct today, as held in *Puttaswamy*. It ought to be overruled with immediate effect.

52. And Section 377, to the extent it criminalises sexual acts between consenting adults, ought to be struck down for violating the fundamental rights guaranteed under Articles 14, 15, 19(1), 21 and 25 of the Constitution.

53. This case is not just about 'consensual sexual acts', but essentially about the freedom to live, express oneself, love, intimacy, and association. For far too long, far too many people have been denied the benefits of being full citizens of this country, and this Hon'ble Court, in its jurisdiction as the guarantor of the fundamental rights, be pleased to rectify that.