IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

I.A. NO. OF 2018

IN

WRIT PETITION (CRIMINAL) NO. 76 OF 2016

IN THE MATTER OF

NAVTEJ SINGH JOHAR & OTHERS … PETITIONERS

VERSUS

UNION OF INDIA … RESPONDENT

AND IN THE MATTER OF

MINNA SARAN … APPLICANT

AN APPLICATION FOR INTERVENTION

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PAPER BOOK

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UNION OF INDIA … RESPONDENT

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Minna Saran,
aged 62 years,
Residing at E 301
Krishna Apra Residency,
Sector 61, Noida ... APPLICANT

AN APPLICATION FOR INTERVENTION

To,
The Hon'ble Chief Justice of India and
His Companion Justices of the Supreme Court of India

The Humble Application of the
Applicant abovenamed

Most Respectfully Submits :

1. That on 11th December 2013, in *Suresh Kumar Koushal and another* v. *Naz Foundation and others* (2014) 1 SCC 1, a two-judge bench of this Hon'ble Court allowed an appeal against the decision of the Hon'ble High Court of Delhi in *Naz Foundation* v. *Govt. of Delhi in NCT* (2009) 160 DLT 277, which had decided a challenge to the constitutional validity of

Section 377 of the Indian Penal Code. The Hon'ble High Court, while holding Section 377 partially unconstitutional, had observed:

> "We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Article 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors."

2. That this Hon'ble Court in appeal overruled the judgement of the Hon'ble High Court and observed:

> "in view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable"

3. That on 8th January 2018, this Hon'ble court in *Navtej Singh Johar & Ors.* V. *Union of India Ministry of Law and Justice Secretary*, admitted a writ petition challenging the constitutional validity of Section 377 of the IPC and referred the matter to a Constitution Bench. In the said order, the this Hon'ble Court stated that the decision in

Suresh Kumar Kaushal v. *Naz Foundation and others* requires reconsideration, noting that:

> "Taking all the apsects in a cumulative manner, we are of the view, the decision in Suresh Kumar Kaushal's case (supra) requires re-consideration. As the question relates to constitutional issues, we think it appropriate to refer the matter to a larger Bench."

A true copy of the Order dated 08.01.2018 passed by this Hon'ble Court is annexed herewith as **ANNEXURE A-1 (Page Nos. to)**.

4. That the abovenamed Applicant humbly seeks leave to intervene in the present writ petition.

5. That the abovenamed Applicant, along with a number of other persons (collectively referred to as "parents of LGBT persons"), has been a party before this Hon'ble Court in *Suresh Kumar Koushal vs Naz Foundation,* C.A. No. 10972/2013, at the stages of the Appeal by Special Leave, review proceedings, and curative proceedings, which are currently pending before this Hon'ble Court, and have been referred to a Constitution Bench by virtue of an order passed by the three senior-most judges of this Hon'ble Court, on 2nd February 2016.

6. That the parents of LGBT persons, including the Applicant, who are parties before this Hon'ble Court in the pending curative petitions (titled (Curative Petition No. 103/2014), are parents of lesbian, gay, bisexual and transgender (LGBT) person from different walks of life and regions of India. The Applicant therefore has a direct and immediate stake in the outcome of these proceedings. Hence, the Applicant abovenamed seek the leave of this Hon'ble Court to intervene in this Writ Petition.

7. Applicant respectfully submits that because of the paucity of time, vakalatnamas from the other parties in Curative Petition No. 103/2014 have not yet been obtained. However, the Applicant has received oral and written consent from the rest of the parties, who are desirous of being parties to these proceedings as well, and craves leave of this Hon'ble Court to join them to these proceedings as and when this Hon'ble Court may deem fit.

8. That the Applicant – Petitioner No.1 in Curative Petition 103/2014 is a business woman. Petitioner No. 2 in Curative Petition No. 103/2014 is retired, after a service of 27 years, as a colonel in the Indian Army in 1981.

9. Applicant and Petitioner No. 2 are the parents of (deceased) Nishit Saran, who was a film maker and gay rights activist based in Delhi. Nishit Saran had directed

and produced a path breaking documentary called “A Summer in my Veins”. This documentary is about Nishit Saran's disclosure of his homosexuality to the Applicant. The documentary shows the social isolation, stigma and pain that LGBT persons face in the process of growing up. It also shows the high level of societal ignorance and prejudice about homosexuality which initially constrained the Applicant in her ability to understand her son's homosexuality. Finally, it shows the triumph of a parent’s love for her child to transcend the barriers of social prejudice against LGBT persons fostered and perpetuated by Section 377 of the Indian Penal Code.

10. After the untimely and tragic death of Nishit Saran in a road accident, Applicant and Petitioner No. 2 set up the Nishit Saran Foundation in April 2006. The said Foundation is a registered charitable trust (registration no 104 dated 20th March 2006). Nishit Saran was a successful film maker, writer as well as a very courageous gay rights activist. Therefore, dispelling the myths about homosexuality and promoting a more empathetic and humane approach to LGBT persons is a philosophy which runs through the different programmes of the Foundation. The objectives and different activities undertaken by the Foundation are as follows:

A. OBJECTIVES OF NISHIT SARAN FOUNDATION

I. To promote a social understanding of homosexuality as a natural variant of human sexuality and therefore to promote an understanding of gay, lesbian, bisexual and transgender people.

II. To encourage parents to accept their children's homosexuality as a natural part of who they are.

III. To participate in public debates, TV discussions, film festivals and other media to promote a deeper understanding of homosexuality as a part of human nature and hence the need for society to be more inclusive and accept LGBT persons as part of humanity.

IV. To encourage and support young filmmakers who are of similar zeal and talent to Nishit Saran, but are bereft of the funds to achieve their goals.

V. To encourage proficiency in the English language to enable bridging the language divide in India.

B. RECENT ACTIVITIES OF NISHIT SARAN FOUNDATION

1. September 12th 2007 at the Jesus and Mary College

As part of the curriculum the department of psychology of Jesus and Mary College organized the screening of the movie ‘Summer In My Veins’ under the banner ‘Recollections Of A Filmmaker’. This was followed by an interactive

session between the teachers and the students with the Applicant.

2. **July 7th 2007‘NDTV Hindi’**

   The applicant was interviewed by NDTV Hindi for the ‘Salaam Zindagi’ show. The show was part of an initiative to talk to family members of LGBT persons and gauge the kind of support and bias that is prevalent. This show was broadcast on 22nd of September 2007.

3. **March 7th to 10th 2007 Film Festival organised by CREA**

   In a film festival titled ‘Films of Desire: sexuality and the cinematic imagination’ at Neemrana Fort which saw screenings of feature flims, short films, documentaries, animation, music videos and experimental films that engage with ideas of sexuality in South and south-east Asia. ‘Summer In My Veins’ by Nishit Saran was also screened. Applicant was invited as a panelist in a Question And Answer session after the movie. Applicant’s responses were well- received and encouraged her to be more proactive in supporting those parents caught in between the meshes of their societal conditioning and love for their children

who are gay.

4. **September 6th 2006 NDTV 24x7 Show, titled "Is it time to decriminalize homosexuality?"**

   In this special edition of 'We The People' a talk show hosted by Barkha Dutt on NDTV the debate was as to whether India was ready to accept homosexuality as legal and do away with the draconian Section 377 of the Indian penal code. Applicant was one among five panelists, which included former Attorney General, Shri Soli Sorabjee.

5. **August 27th, 2006 Screening at India Habitat Center**

   The Youth Parliament and the Nishit Saran Foundation screened 'Summer In My Veins', followed by a discussion on homosexuality.

11. Petitioners Nos. 3 and 4 in Curative Petition No. 103/2014 are parents of a gay man called Nikhil Aziz Hemmady. Petitioner No. 3 is an engineer by education and currently serves on the Board of Directors of India's first cooperative bank. Petitioner No. 4 is a house wife and active member of her community's women's association (mahila samaj). Their son, Nikhil Aziz holds a Doctorate in International Studies and

formerly taught at an American University. The Petitioners have submitted before this Hon'ble Court in Curative Petition No. 103/2014 that their son has had a normal and healthy upbringing in a loving and caring environment. He went to a co-educational school like most his friends. As a youngster he has had both male and female friends, and has interests and successes quite alike and similar to most children. Therefore, his homosexuality is something intrinsic and natural.

12. Petitioners Nos. 3 and 4 have submitted that for a long period of his life Nikhil Aziz concealed his homosexuality. It was only in 1998, that Nikhil Aziz told them that he was gay. He waited for many years to tell them despite the deep suffering of not being able to be honest to his family, because he wanted to ensure that his being gay would not have an impact on his sister's marriage, since there is widespread social stigma concerning homosexuality. Petitioners Nos. 3 and 4 have submitted that they were initially shocked by the news. At the same time they both expressed their support for their son and also their pride in his decision to tell them and the larger family about himself and not live a lie. They have further submitted that their son's life would have been even more fulfilling had he not had to live a secret for so many years because of the fear of stigma.

13. Petitioner No. 5 in Curative Petition No. 103/2014 is a retired teacher and lives in the city of Pune. She has two children,

and her elder son, Bindumadhav Vijaykumar Khire, a Computer Science Engineer, now 42 years old is gay. Under family and peer pressure and largely due the social stigma attached to homosexuality, much against his will, the Petitioner No.5's son married a woman. In Curative Petition No. 103/2014, Petitioner No. 5 has brought to the notice of this Hon'ble Court that if her son had the strength and the social and legal support to accept his homosexuality at an earlier stage, he would not have taken the decision to marry. She has submitted that as a result of the deeep social stigma, fostered by Section 377, her son has had to go through a prolonged period of isolation and difficulty. His marriage remained unhappy and finally he found the courage to confront and understand his homosexuality. Petitioner No. 5 has further submitted that after a prolonged difficult period in his life, her son got divorced and began a new life as a self confident gay man who now works for the rights of Lesbian, Gay, Bisexual and Transgender (Hereinafter referred to as LGBT) persons in Pune.

14. Petitioner No. 6 in Curative Petition No. 103/2014 is a film maker from Mumbai and an award winning theatre actor and script-writer/director. Her daughter Shalmalee Palekar a Ph. D holder in post colonial literature and currently a University Professor, is a lesbian. The Petitioner has submitted before this Hon'ble Court in the said curative petition that her

understanding of homosexuality has been aided by her daughter's attempts at giving her reading material, books and meeting other LGBT people. The Petitioner has further submitted that her experience as a mother of a lesbian woman has been a very isolating experience as social stigma prevented any discussion. She has submitted that easy accessibility of literature on the topic of homosexuality especially directed towards parents of LGBT people is necessary but not freely available. She has further submitted that she has benefited enormously from reading an anthology of writing by mothers of lesbian women, whose experience mirrored the Petitioner's and gave her the strength and the support that is lacking in our society. The Petitioner has submitted that the criminality associated with homosexuality makes it impossible to have open discussions on the issue, which further contributes to the isolation of the Petitioner No 6 in her role as a parent.

15. Petitioner No. 7 in Curative Petition No. 103/2014 is retired as a Senior Accounts Officer with the General Post Office in Bengaluru, where she worked for thirty years. The Petitioner has submitted before this Hon'ble Court in those proceedings that her son Nithin Manyath, a lecturer in Communication Studies, is gay. Though the Petitioner was initially taken aback, she came to the realisation that being gay was not that uncommon in India. The Petitioner No. 7 has submitted

that her knowledge and awareness of homosexuality was further aided by her work with an organisation called Sangama which works on LGBT Rights. As part of Sangama, the Petitioner No. 7 was called upon to speak to parents of LGBT people to accept their children's sexual orientation as a natural part of who they were. Petitioner No. 7 has submitted that through a number of conversations had with parents of LGBT people, she has been instrumental in ensuring that parents played a loving and nurturing role in accepting their children's sexuality.

16. Petitioner No. 7 has submitted that her son has a wide and caring circle of friends who know that he is gay and are accepting of his sexuality. Petitioner No. 7 has submitted that Nithin is a good teacher, loving son, caring brother and a well-adjusted and productive member of Indian society. However, despite her own personal acceptance and those of the friends of her son, she has expressed the fear that Section 377 and the gross potential for abuse embedded in it. Petitioner No. 7 has submitted that Section 377 is a gross intrusion into family life like an ever-present Damocles sword that could rend the fabric of her family.

17. Petitioner No. 8 in Curative Petition 103/2014 is the mother of Veena S, who identifies as a hijra and works as a social worker. The Petitioner has submitted that although Veena was born as a male child, she was always interested in

dressing up in women’s clothes and had many other conventional feminine interests. At that stage the Petitioner No. 8 did not understand Veena's different gender identity and hence Veena's specific needs. Instead, the Petitioenr No. 8 feared social stigma and prevented Veena from living her life the way she wished. At times, out of sheer frustration, misinformation and confusion, the Petiitoner No. 8 hit Veena a few times. However, Veena, was determined to live her life on her own terms. In the hijra community, Veena found acceptance by people like her, and this gave Veena the confidence that she needed both to face the social stigma and prejudice against transgender people and to access the support that Veena’s own family was unable to provide. The Petitioner has submitted that overtime, with several discussions with Veena, who the Petitioner has now come to accept as her daughter, the Petitioner now understands the naturalness of her transgender and hijra identity. The Petitioner No.8 hopes that more parents will step out in support of transgender people. Petitioner No. 9 is also a mother of a hijra identified woman called M. Suman, who works as a social worker in Bengaluru.

18. Petitioner No. 10 in Curative Petitioner 103/2014 is a home maker and a social worker living in Mumbai. Her younger son, Mr Shameet Doshi who is about 32 years old is gay. Petitioner No. 11 is an academic with a doctoral degree and

is presently working as a Lecturer in the field of media studies. Her elder daughter Ponni, aged 26 years, currently pursuing a law degree, identifies as a bisexual. Petitioner Nos. 12 and 13, a retired scientist and housewife in Chennai, are parents of a gay son, Anirudh Vasudevan, a bharatnatyam dancer, scholar and a PhD candidate. Petitioner No. 14 is the mother of a gay son, Rajarishi Chakrabarty, a historian and academic based in Murshidabad, West Bengal. Petitioner Nos. 15 and 16 are both Sanskrit scholars and their only son Anis Ray Chaudhari, a scholar himself and a social activist is gay. Petitioner No. 17 is the mother of a gay son, Jagadish Rana, who works as a counsellor. Petitioenr No. 18 is the mother of a gay son, Dr. Tirthankar Guha Thakurta, who teaches pathology at a medical college in Kolkata. Petitioner No. 19, a practising Advocate at the Calcutta High Court herself, is the mother of a gay son, Debjyoti Ghosh who works as a human rights lawyer.

19. As submitted above, in the present proceedings, out of the twenty parents of LGBT persons parties in the pending curative proceedings, at this stage, only the Applicant is before this Hon’ble Court. Applicant submits that she and her fellow-parties in Curative Petition No. 103/2014 come from different professional, socio-cultural backgrounds and different regions of India. They also come from a range of

professional backgrounds being scientists, teachers, government employees, private sector employees, lawyers, artists and home-makers. The states from which they come from traverse the diversity of India and include Maharasthra, Delhi, West Bengal, Karnataka, Tamil Nadu and Kerala. In the diversity of their representation the Petitioners represent the plurality which is an intrinsic part of Indian culture and values. Before this Hon'ble Court in Curative Petition No. 103/2014, they have submitted that they are all united by one common factor as parents of individuals who have come out to them as being lesbian, gay, bisexual or transgender/hijra. As parents of LGBT individuals, each of the Petitioners in Curative Petition No. 103/2014 has experienced the personal struggle of having to understand sexuality at odds with what Section 377 prescribes. Each of these personal struggles which the Petitioners have had to go through has resulted in acceptance of their children's sexuality. But this has also made them acutely aware of the social stigma, prejudice, myths and stereotypes that surround the subject of homosexuality in Indian society.

20. The Petitioners in Curative Petition No. 103/2014 have submitted that their own knowledge of homosexuality has emerged from the intimate context of having a son or daughter who was lesbian, gay, bisexual or transgender/hijra. They have submitted that since they had no initial information

on homosexuality, as is common in most people who encounter homosexuals for the first time, their response mirrored the shock and horror of the conventional societal response. They have submitted that reading on the subject, meeting other LGBT persons, attending meetings of support groups for parents of LGBT persons or meeting with psychiatrists and other mental heath experts has convinced them that:

I. Homosexuality is neither a disease nor a pathology which needs to be cured. It is instead a normal variant of human sexuality.

II. To punish homosexual behaviour as a crime is outdated, regressive and fundamentally at variance with the right to equality, the right to life, dignity, autonomy and self expression.

III. The role of parents whose children are lesbian, gay, bisexual or transgender is to support their children in resisting social stigma and enable them to become self confident young persons.

IV. That gay, lesbian, bisexual or transgender persons should be entitled to enjoy the full and equal citizenship rights guaranteed to them under the Indian Constitution.

21. The Applicant submits that the Hon’ble Delhi High Court had correctly appraised the constitutionality of Section 377 IPC based both on the current history of use of the law as well as the latest medical and scientific opinion. In particular the applicant would like to bring the following observations of the Hon’ble Delhi High Court to the attention of the Hon'ble Supreme Court. That in the well-reasoned opinion of the Hon’ble Delhi High Court:

I. There is almost unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality. In 1973, the American Psychiatric Association removed homosexuality from its Diagnostic and Statistical Manual of Mental Disorders (DSM) after reviewing evidence that homosexuality is not a mental disorder. In 1987, egodystonic homosexuality was not included in the revised third edition of the DSM after a similar review. In 1992, the World Health Organisation removed homosexuality from its list of mental illnesses in the International Classification of Diseases (ICD 10). Guidelines of the ICD 10 reads: “homosexuality in itself is no longer included as a category.” Thus, homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered', it is just another expression of human sexuality. (paras 67 and

68 of the impugned judgment)

II. The studies conducted in different parts of world including India show that the criminalisation of same-sex conduct has a negative impact on the lives of these people. Even when the penal provisions of Section 377 are not enforced, they reduce gay men or women to “unapprehended criminals”, thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion and discrimination. The Hon’ble High Court relying upon the extensive material placed on the record in the form of affidavits, authoritative reports by well known agencies and judgments, concluded that there is a widespread use of Section 377 IPC to brutalise members of the lesbian, gay, bisexual and transgender community. (para 50 of the impugned judgment) Some of the incidents illustrating the impact of criminalisation on homosexuality are noted at para 21 of the impugned judgment.

III. Section 377 condemns in perpetuity a sizable section of society, namely LGBT persons and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery. The Government of

India estimates the number of Men who have sex with Men (MSM) at around 25 lacs. The number of lesbians and transgenders is said to be several lacs as well. This vast number of people are denied “moral full citizenship”. (para 52 of the impugned judgment)

IV. The Hon’ble High Court rightly held that the one underlying theme of the Indian Constitution is that of ‘inclusiveness’. This Hon’ble High Court rightly held that the Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. In the words of the Hon’ble High Court “The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as “deviants' or 'different' are not on that score excluded or ostracised.” (para 130 of the impugned judgment).

22. That the Hon’ble Delhi High Court’s judgment decriminalising consensual sexual relationships between adults in private was rooted in a concrete understanding of the harm that Section 377 inflicts on the LGBT population. The Hon’ble High Court after a thorough reading of precedent laid down by this Hon’ble Court, and after a detailed discussion of current medical and scientific opinion of homosexuality, correctly held that Section 377 IPC was

unconstitutional insofar as it criminalised consensual same-sex sexual relationships between adults in private.

23. That the decision of the Hon'ble High Court was welcomed by large sections of the Indian Society and had significantly improved the lives of the both the members from the LGBT community as well as their friends and family as the judgement brought with it a feeling of acceptability which is essential for the life and livelihood of any individual. Moreover, it allowed it allowed the families of the applicants to live their lives without the constant fear of prosecution.

24. That the applicant was deeply distressed by the decision of this Hon'ble Court in *Suresh Kaushal* v. *Naz Foundation and others*. The decision of this court suffers from mistakes and errors which are apparent on the face of the judgement itself. The decision perpetuates a grave injustice towards the LGBT community which includes both the LGBT persons as well as their families. The applicant would like to bring to notice the following errors in judgement made by the court in the abovementioned decision:

    I. This Hon'ble Court relied on the fact that the Parliament reflects the will of the people, and that considering the fact that the parliament has not struck down or amended the law under Section 377 despite the 172nd Law Commission of the India recommending the same,

the court ought to decide on the Constitutionality of Section 377 in light of the reluctance of the parliament. Paragraph 32 of the judgement states that “while this does not make the law immune from constitutional challenge, it must nonetheless guide our understanding of character, scope, ambit and import.” Moreover, in the concluding paragraph of the judgement, this Hon’ble Court held that if the legislature wishes to amend the law, it would be free to do so. The Applicant contends that such an argument by this Hon’ble Court effectively amounts to an abdication of its duty to protect constitutional rights, and especially the rights of the minority sections of the society, who are often unable to protect their interests in a majoritarian forum such as the Parliament. Consequently, the Hon’ble High Court of Delhi had correctly held that “the role of the judiciary is to protect the fundamental rights. A modern democracy while based on the principle of majority rule implicitly recognizes the need to protect the fundamental rights of those who may dissent or deviate from the majoritarian view. It is the job of the judiciary to balance the principles ensuring that the government on the basis of number does not override fundamental rights.” A similar position was upheld by this Hon’ble court in its decision in *National Legal Services Authority* v. *Union of India & Ors* WP(C) No. 604/2013 wherein it

stated that “Article 21 has been incorporated to safeguard those rights and a Constitutional Court cannot be a mute spectator when those rights are violated, but it is expected to safeguard those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance.” The Applicant further maintains that if given an opportunity, the public morality concerning the LGBT community will change in the same manner as theirs did once they found out that their children belonged to the LGBT community.

II. That this Hon’ble Court, in paragraph 33, held that a Court is not empowered to strike down a law because it has fallen into disuse or the perception of the society has changed as regards the legitimacy of the law. Such a view regarding the impermissibility of the court striking down or reading down a law as a consequence of a change in perception of regarding its legitimacy in society is an incorrect view when analysed in light of other decisions of this Honourable Court. In *Anuj Garg* v. *Hotel Association of Indian and Others* (2008) 3 SCC 1, a two-judge bench of this Hon’ble Court held that changed social psyche and expectations are important factors to be considered in the upkeep of law and

therefore, a decision on relevance will be often be a function of the time we are operating in. Similarly, in *John Vallamattom* v. *Union of India*, AIR 2003 SC 2902, a three-judge bench of this Hon'ble Court held that "it is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation." More recently in *Satyawati Sharma* v. *Union of India*, (2008) 5 SCC 287 this Hon'ble Court held that an enactment which might have been considered reasonable at the time at which it was enacted, may with the lapse of time and with the change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality, thereby making it liable to be struck down by the judiciary. By not taking the views of the aforementioned cases, this Hon'ble Court has upheld an anachronistic law without considering its validity in light of the changed perspective and acceptability of the LGBT community.

III. That this Hon'ble Court, in paragraph 34 of its judgement, noted while analysing the history of Section 377, that the language of the provision was intentionally kept vague. Notwithstanding the same, this Hon'ble Court, in paragraph 38, held that vagueness does not affect the constitutionality of the Section. Applicant

respectfully submits that such an interpretation on the law of vagueness is in direct contradiction to the rationale adopted by a Constitution Bench of this Hon'ble Court in *Kartar Singh* v. *State of Punjab,*(1994)3 SCC 569, where it was stated that:

> "It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. 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…"

Relying on Kartar Singh v. State of Pubjab (Supra)**,** K.A. Abbas vs Union of India, (1971) 2 S.C.R. 446, Harakchand Ratanchand Banthia vs Union of India, (1969) 2 SCC 166 and A.K. Roy vs Union of India, (1982) 2 S.C.R. 272, a two judge bench of this Hon'ble Court in **Shreya Singhal vs Union of India, AIR 2015**

SC 1523, held that vagueness was a ground of striking down a statute:

> "These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". In Collins' case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence under Section 66A. This being the case, having regard also to the two English precedents cited by the learned Additional

> Solicitor General, it is clear that Section 66A is unconstitutionally vague. (**Shreya Singhal vs Union of India, supra, paragraph 82**)

Paragraph 82 of **Shreya Singhal, supra**, spells out the exact issue that plagues Section 377 of the Indian Penal Code – in particular, the phrase "carnal intercourse against the order of nature." Applicants submit that the phrase "carnal intercourse against the order of nature" was used by Thomas Macaulay, who drafted the first version of the Indian Penal Code in 1837, and his colonial successors, who based the final language of Section 377 on Edward Coke's seventeenth century compilation of English law (**Douglas Sanders, 'Section 377 and the Unnatural Afterlife of British Colonialism in Asia' (2009) 4(1) *Asian Journal of Comparative Law* 1, 7**); they used this term because, according to them, the issue was too disgusting to even permit an explanatory discussion that might have assisted courts in interpreting the provision's scope. (**Alok Gupta, 'Section 377 and the Dignity of Indian Homosexuals' (18 November 2006) 41(46) *EPW* 4817**). Consequently, it was left to the courts to put their own gloss to the meaning of "carnal intercourse against the order of nature", and the record shows that there has been absolutely no unanimity of

interpretation. The High Court of Sind, in 1925, observed that “the natural object of carnal intercourse is that there should be the possibility of conception of human beings”. ((**Khanu v Emperor AIR 1925 Sind 286**, **para 2**.) A few decades later, however, the Gujarat High Court drew a fine distinction between sexual acts of cunnilingus or fellatio that were performed for the purpose of exciting the sexual organs for coitus, and the same acts performed as substitutes for coitus. The Court classified the latter as “sexual perversions”, and against the order of nature (**Lohana Vasantlal Devchand v The State, (1968) 9 CLR 1052**, **affirmed in Brother John Anthony vs State, (1992) CLJ 818**, which also held manual sex to fall within the scope of Section 377.) In the facts of the case, it held that a man inserting his penis into the mouth of another performed “an imitative act of sexual intercourse for the purpose of his satisfying the sexual appetite [sic]” (**Ibid., para 12**) Since the “orifice of the mouth is not, according to nature, meant for sexual or carnal intercourse”, (**ibid., para 14)** Section 377 was attracted. The phrase “sexual perversity” was repeated by the Supreme Court a few years later, although without any further elaboration. (**Fazal Rab Choudhary v State of Bihar (1982) 3 SCC 9**). Before this, in **State of Kerala v Kundumkara Govindan, (1969) CLJ 818**, the High

Court of Kerala held that the (forcible) insertion of a man's penis between a woman's thighs constituted an offence under Section 377; in **Calvin John Francis v State of Orissa, (1992) I OLR 316**, the High Court of Orissa held that oral rape was an offence under Section 377; and in **Brother John Anthony vs State**, **supra**, it was held that Section 377 penalized manual sex, which need not be between two men).

It is therefore clear that Section 377 has been subjected to wildly different and irreconcilable interpretations over the course of its existence; this is entirely because of the phrase "carnal intercourse against the order of nature" is inherently – and unconstitutionally – vague. Applicant respectfully submits that even the judgment in **Suresh Kumar Koushal, supra**, declined to define what constituted "carnal intercourse against the order of nature", holding only that would be adjudicated on a "case to case basis." Applicant respectfully submits that determining the ingredients of a criminal offence on a case to case basis goes against the fundamental principles of the rule of law, as well as the principle underlying Article 20(1) of the Constitution, which mandates that individuals have a clear idea of the meaning and scope of a criminal offence *in advance*.

IV. That this Hon'ble Court, in paragraph 51 of its judgment, held that the possibility of a law being misused in order to target a certain community does not justify striking down the law. This Hon'ble Court, however, failed to recognise that the Respondents' argument was not that Section 377 mandates or condones abuse. The arguments by the respondents, *inter alia* were that the extreme vagueness of the provision would necessarily foster abuse, as it delegated excessive discretion to the enforcing authorities. While this Hon'ble Court noted the said argument in paragraphs 17.8 and 19.10 of its judgment, it did not, with respect, take it into consideration while pronouncing its decision.

V. That this Hon'ble Court held that Section 377 of the Indian Penal Code is facially neutral rejected the argument that the said section targeted any person or group of persons. In paragraph 16.2 of its judgement, this Hon'ble Court held that the Respondents had failed to establish the fact that the LGBT community was being specifically targeted by this law. The Hon'ble High Court, on the other hand, had agreed with the view that although Section 377 is facially neutral, it does in fact end up unfairly targeting a particular community. The court thereafter went on to note that

because the acts criminalised by section 377 are most closely associated with the LGBT community it does in fact have the affect of treating all LGBT personnel as criminals.

In this context, Applicant respectfully submits that the constitutional validity of a provision that is impugned on the grounds of Article 14 and 15(1) is to be judged not by its form, intent, or purpose, but by its effect. This has been the consistent position of law even from pre-constitutional times. In **Punjab Provinces vs Daulat Singh, (1946) 48 BOMLR 443,** a Full Bench of the Bombay High Court, while examining Section 298(2) of the Government of India Act (which was the non-discrimination provision that was the fore-runner of Article 15(1) of the Constitution), noted that:

> "The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of

> the Act, however laudable, will not obviate the prohibition of Sub-section (2).”

This proposition was upheld by a Constitution Bench of this Hon’ble Court in **State of Bombay vs Bombay Education Society, (1955) SCR 568,** while interpreting Article 29(2) of the Constitution. It was held that:

> “The arguments advanced by the learned Attorney-General overlook the distinction between the object or motive underlying the impugned order and the mode and manner adopted therein for achieving that object. The object or motive attributed by the learned Attorney-General to the impugned order is undoubtedly a laudable one but its validity has to be judged by the method of Its operation and its effect on the fundamental right guaranteed by article 29(2). A similar question of construction arose in the case of Punjab Province v. Daulat Singh... One of the questions in that case was whether the provision of the new section 13-A of the Punjab Alienation of Land Act was ultra vires the Provincial Legislature as contravening sub-section (1) of section 298 of the Government of India Act, 1935, in that in some cases that section would operate as a prohibition on the ground of descent alone.

> Beaumont J. in his dissenting judgment took the view that it was necessary for the Court to consider the scope and object of the Act which was impugned so as to determine the ground on which such Act was based, and that if the only basis for the Act was discrimination on one or more of the grounds specified in section 298 sub-section (1) then the Act was bad but that if the true basis of the Act was something different the Act was not invalidated because one of its effects might be to invoke such discrimination In delivering the Judgment of the Board Lord Thankerton at page 74 rejected this view."

This proposition was further upheld in **Prem Chand Garg vs Excise Commissioner AIR 1963 SC 966**, where this Hon'ble Court struck down its own rule that allowed it to impose security upon the petitioner in an Article 32 petition, on the basis that this financial barrier would obstruct the exercise of rights under Article 32. This Hon'ble Court held:

> "It may be conceded that the order is intended to protect the interest of the respondent and in that sense, may be treated as fair; but the fairness of the order or of the object intended to be achieved by it will not disguise the fact that its effect is not

> to aid the petition but to retard it to some extent. In considering the constitutionality of the order or the rule which permits the order to be made, the fact that the object intended to be achieved is good, just or unexceptionable would be immaterial, vide the State of Bombay v. Bombay Education Society(1), and Punjab Province v. Daulat Singh(2)."

The proposition was reiterated most recently in **Anuj Garg vs Hotel Association of Indiam AIR 2008 SC 663,** and in **Justice K.S. Puttaswamy vs Union of India, W.P. No. 494/2012.** Applicants therefore submit that the judgment in **Koushal, supra**, to the extent that it limited its examination of Section 377 to its form, that is, its text that punished a set of acts “carnal intercourse against the order of nature”, erred in not examining its effect upon the LGBT community

The Applicant – along with the Petitioners in Curative Petition No. 103/2014 – have all maintained in their pleadings and affidavits before this Hon’ble Court that as a consequence of Section 377, they were forced to live under constant threat of prosecution which arose because of the fact that their children were by the very virtue of their secuality considered to be Criminals.

In fact, this Hon'ble Supreme Court, in *National Association for Legal Services* v. *Union of India(Supra)*, while citing a case of the Hon'ble Allahabad High Court in Queen Empress v. Khairati (1884) ILR 6 All 204 wherein a member of the Transgender community was repeatedly prosecuted under section 377 because of the fear that he was a habitual sodomite, held that though Section 377 is associated with specific sexual acts, certain identities, including hijras are often targeted through its application. Therefore, as the effects of Section 337 of the IPC are discriminatory

VI. That this Hon'ble Court, while rejecting the case against Section 377 grounded in Article 14 of the Constitution, noted in paragraph 42 of the judgement that the two classes, namely those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that section 377 suffers from the vice of arbitrariness and irrational classification. This Hon'ble Court added that if a trial is conducted, it must be conducted while applying the provisions of the Code of Criminal Procedure, and

consequently, Articles 14 and 15 of the Constitution have no application.

Applicant respecfully submits that this approach by the Hon'ble Court deviates from the well-established test of intelligible differentia and rational nexus, as interpreted in a catena of judgments. For example, in the seven judge bench decision of *Re: Special Courts Bill,*(1979) 2 SCR 476, this Hon'ble court observed as follows,

"The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act."

VII. That this Hon'ble Court, in paragraph 43 of the impugned judgment, relied on the fact that the LGBT

community is a miniscule community which is rarely prosecuted under Section 377. This reasoning, Applicant respectfully submits, fly in the face of numerous prior rulings where this Hon'ble Court has recognised the need to protect the fundamental rights of each and every human being, immaterial of its impact on the larger dynamic of the law. In *Sunil Batra(II)* v. *Delhi Administration*, AIR 1980 SC 1579 a five judge bench of this Hon'ble court stated that, "in a democracy, wrong to one is wrong to everyone". Similarly, in *National Legal Services Authority* v. *Union of India,* supra, this Hon'ble Court held that Article 21 of the Constitution has been incorporated to safeguard rights, and a constitutional court cannot be a mute spectator when those rights are violated. Furthermore, the court held that there exists an express expectation to protect the rights of minorities that have gained universal recognition and status. It is submitted by the present Applicant that the Hon'ble Supreme Court has failed to take into consideration scenarios wherein frivolous FIR or prosecutions could have been instituted under Section 377 to harass members of the LGGBT community. Moreover The Applicant submits that immaterial of the number of persons who would be affected by Section 377 of the IPC, the provision does have an impact on the life and livelihood of the present

applicants as well as their children. Even if the Section has not been put to application, it has a chilling effect on the actions of their children as well as the Applicant as a consequence of which many of their choices cease to exist. In light of the same, the Applicant submits that even if Section 377 can be said to affect a minuscule section of society, the mere fact that it penalises, harms and injures even a small group of people, is enough reason for constitutional protection be granted, and Section 377 to be read down accordingly.

VIII. That the Hon'ble court has failed to provide reasons with regards to the Respondents' contention that Section 377 of the IPC violates Articles 19 and 21 of the Constitution. This Hon'ble Court, in paragraphs 45 to 50 of the impugned judgment, referred to various precedents on privacy, right of sexual choice, and dignity under Article 19 and 21 such as *Menaka Gandhi* v. *Union of India*, 1978 AIR 597, *Kharak Singh* v. *State of UP & Ors.* (1964) 1 SCR 332, *Gobind* v. *State of MP* (1975) 2 SCC 148, *Gobind* v. *State of M.P.* AIR 1975 SC 1378, and *Suchita Srivastava and Anr*. v. *Chandigarh Administration* (2009) 9 SCC 1. However, after citing these judgements, this Hon'ble Court did not pronounce any findings on the same. As

a consequence, even though the court recognised that contentions under Articles 19 and 21 are important, with respect, it did not provide any justification as to why these contentions did not require Section 377 to be read down in the manner in which the High Court had done so.

IX. That unlike the arguments regarding dignity, sexual choice and privacy which were accored token recognition by this Hon'ble Court, the Respondents' arguments on the violation of the Right to Health, arising out of the provision of Right to Life and Personal Liberty under Article 21, wre not even been considered by this Hon'ble court.

X. That this Hon'ble Court rejected numerous arguments provided by the respondents on the ground that they rely on Foreign judgements. The Hon'ble Court, in paragraphs 52 and 53 of the impugned judgment, held that the Respondents had extensively relied on foreign authorities in order to protect the so-called rights of the members of the LGBT community. This Hon'ble Court relied on *Jagmohan Singh* v. *State of Uttar Pradesh,*(1973)1 SCC 20 in order to hold that judgements from foreign jurisdictions cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian Legislature. This

Hon'ble Court, however, failed to recognise that in *Sunil Batra* v. *Delhi Administration*, AIR 1980 SC 1579, it had been held that even though *Jagmohan Singh* v. *State of Uttar Pradesh,*(1973)1 SCC 20 rightly mentioned that there exists no provision in the Indian Constitution which prohibits the State from imposing cruel and unusual punishment on the lines the U.S. Constitution, the Court must nonetheless prohibit such state actions which offend human dignity, impose avoidable torture and reduce the man to the level of a beast, as these would be arbitrary and questionable under Article 14 of the Constitution. Therefore, Applicant submits that this Hon'ble Court has erred in holding that foreign decisions cannot be used to throw light on the position or principles of law in India. The bar introduced by *Jagmohan Singh* pertains solely to the use of empirical data from foreign jurisdictions and not the use of legal principles.

XI. That the judgment in *Suresh Kumar Koushal* can no longer stand in light of the judgment of a nine-judge bench of this Hon'ble Court on 24th August 2017, in **Justice K.S. Puttaswamy vs Union of India, WP (Civ.) No. 494/2012**. In this judgment, the right to privacy was recognised as a fundamental right under

the Constitution of India. Applicant respectfully submits that both explicitly and implicitly, the basis of **Suresh Kumar Koushal vs Naz Foundation, supra,** stands overruled by the judgment in **Puttaswamy, supra.** While six Hon'ble Justices wrote separate and concurrent opinions in **Puttaswamy, supra,** there was unanimity about the proposition that "decisional autonomy" is one of the constituent elements of the fundamental right to privacy. For example, in his concurring opinion, Justice Nariman observed that "the privacy of choice... protects an individual's autonomy over fundamental personal choices." (**Justice K.S. Puttaswamy vs Union of India, supra, paragraph 81** (concurring opinion of Nariman J.)). Justice Nariman further observed that "… the core value of the nation being democratic… would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and their choice of how they are to be governed…" (**ibid., para 82**). According to Justice Nariman, the right to personal choice was inextricably linked to dignity and autonomy, because "… the dignity of the individual encompasses the right of the individual to develop to the full extent of his potential. And this development can only be if an individual has autonomy over fundamental personal choices." (**ibid., para 85**).

In a similar vein, Justice Kaul emphasized the centrality of *choice* to the right to privacy, noting that "[Privacy] is about respecting an individual and it is undesirable to ignore a person's wishes without a compelling reason to do so…" (**Justice K.S. Puttaswamy vs Union of India, supra, paragraph 10** (concurring opinion of Kaul J.) He also specifically highlighted that the concept of "choice" included within its ambit choice of *personal relationships*. In paragraph 78 of his judgment, he held that "… it is an individual's choice as to who enters his house, how he lives and in what relationship…" (**ibid., para 78**). As a result of this, Justice Kaul categorically noted that "the privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity" (**ibid., para 79)**, and also that "one's sexual orientation is undoubtedly an attribute of privacy." (**ibid., para 80**)

In his concurring opinion, Justice Bobde agreed with this formulation, noting that the freedom to associate (as an integral element of the right to privacy) must necessarily include the "freedom to associate with those of one's choice and those with common objectives." (**Justice K.S. Puttaswamy vs Union of India, supra, paragraph 31** (concurring opinion of Bobde J.)

Justice Chelameswar formulated the proposition in a slightly different manner, holding that the right to privacy had three aspects – "repose, sanctuary, and intimate decision" (**Justice K.S. Puttaswamy vs Union of India, supra, paragraph 36**, (concurring opinion of Chelameswar J.)), and the last among these included the right not "to be told by the State as to what [one] should eat or how [one] should dress or whom [one] should be associated with either in their personal, social or political life." (**ibid., paragraph 39**, concurring opinion of Chelameswar J.)).

However, the proposition was formulated most clearly and directly in the plurality opinion authored by Justice Chandrachud. Writing for himself and three other Hon'ble judges, Justice Chandrachud held that the right to privacy encompassed the right to decisional autonomy, which included "intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress." (**Justice K.S. Puttaswamy vs Union of India, supra, paragraph 142** (plurality opinion of Chandrachud J.). In **paragraph 168** of his judgment, he wrote: The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an

inviolable right to determine how freedom shall be exercised.

This observation was repeated in the operative part of Justice Chandrachud's judgment. In placitum "3F", under the heading titled "**Our Conclusions**", Justice Chandrachud wrote that "privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation."

It is therefore clear that all Hon'ble Judges in **Puttaswamy, supra,** held that intimate decisions are not only an elements of privacy, but at its very core. Some of the judgments, however, went even further. In **pararaph 80** of his judgment, Justice Kaul stated that:

> "There are two aspects of the opinion of Dr. D.Y. Chandrachud,J., one of which is common to the opinion of Rohinton F. Nariman,J., needing specific mention. While considering the evolution of Constitutional jurisprudence on the right of privacy he has referred to the judgment in Suresh Kumar Koushal Vs. Naz Foundation. In the challenge laid to Section 377 of the Indian Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision

amounted to an infringement of the right to dignity and privacy. The Delhi High Court, inter alia, observed that the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find favour with the Supreme Court and it was observed that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the Section ultra virus of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon. The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J., who in paragraphs 123 & 124 of his judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance

> of power envisaged under the Constitution of India. Ones sexual orientation is undoubtedly an attribute of privacy."

In his plurality opinion, Justice Chandrachud referred to the judgment in **Koushal vs Naz Foundation, supra**, as a discordant note in Indian constitutional history, on par with the notorious **A.D.M. Jabalpur vs Shivakant Shukla, (1976) 2 SCC 521**. Rejecting **Koushal's** analysis of the privacy-dignity principle, articulated in paragraphs 66 and 77 of that judgment, Justice Chandrachud's plurality noted that:

> "[that] a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and

insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

The view in Koushal that the High Court had erroneously relied upon international precedents "in its anxiety to protect the so-called rights of LGBT. persons" is similarly, in our view, unsustainable. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a

liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. Their rights are not “so-called” but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.

The decision in Koushal presents a de minimis rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because they

> discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the Koushal rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, we disagree with the manner in which Koushal has dealt with the privacy – dignity based claims of LGBT persons on this aspect. (**Justice K.S. Puttaswamy vs Union of India, supra, paragraphs 126 – 128,** (plurality opinion of Chandrachud J.))

Applicant respectfully submits, therefore, that five out of nine judges in **Justice K.S. Puttaswamy vs Union of India, supra**, expressly held that:

i. **Koushal's** rationale that sexual orientation was an issue that concerned only a "minuscule minority", and was therefore constitutionally irrelevant, was incorrect in law.

ii. **Koushal's** rationale that there had been very few prosecutions under Section 377, and that therefore the section did not affect LGBT persons in any serious way, was incorrect in law.

iii. Public morality or popular perceptions could not be a ground to deny the rights to privacy, dignity, and equality.

iv. Sexual orientation is an integral aspect of the right to privacy, dignity, and autonomy, and discrimination on the basis of sexual orientation affected fundamental rights under Articles 14 and 15(1) of the Constitution.

Applicant therefore submits that the judgment in **K.S. Puttaswamy, supra,** not only removed the foundations upon which **Koushal, supra,** was erected, but also provided an independent set of arguments that lead to only one possible conclusion: that the Hon'ble High Court of Delhi's analysis of Section 377 of the Indian Penal Code in light of Articles 14, 15(1) and 21 was correct, and consequently, that judgment ought to be resurrected by this Hon'ble Court.

XII. Furthermore, Applicant respectfully submits that the judgment in **Koshal vs Naz Foundation, supra**, is inconsistent, and cannot hold the field simultaneously

with the judgment in **NALSA vs Union of India, (2014) 5 SCC 438,** which was delivered a few month after.

In paragraph 42 of its judgment in **Koushal vs Naz Foundation, supra**, this Hon'ble Court noted that:

> "Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution."

Applicant submits that this Hon'ble Court's argument in **Koushal, supra**, rested upon a conceptual distinction between "conduct" and "identity". This Hon'ble Court held that because Section 377 only classified "acts" or "conduct" (carnal intercourse against the order of

nature or in accordance with the order of nature) and not “persons”, Articles 14 and 15 were not attracted. Applicant respectfully submits that the fundamental flaw in this reasoning was recognised by this Hon’ble Court in **Nalsa vs Union of India, supra.** In paragraph 11 of that judgment, this Hon’ble Court noted that

> “Section 377, though associated with specific sexual act, highlighted certain identities, and was used as an instrument of harassment and physical abuse…”

Consequently, in **Nalsa, supra**, this Hon’ble Court correctly recognised that issues of gender identity and sexual orientation are inextricably bound up with each other. Indeed, this Hon’ble Court went on to note that:

> “... gender identity is one of the most fundamental aspects of life… it refers to each person’s deeply felt internal and individual experience of gender… including the personal sense of the body which may involve a freely chosen modification of bodily appearances or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms.” (**paragraph 19**)

In other words, this Hon'ble Court held that gender identity and expressing that identity through conduct are inseparable. This is directly counter to, and irreconcilable with, the basis of **Koushal, supra**, which was that Section 377 only penalizes "conduct", and does not criminalise any "person." As this Hon'ble Court observed in **Nalsa, supra**:

> "each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom." (**paragraph 20**)

And, in the context of Article 15(1):

> "[Article 15(1) prohibits differential treatment] for the reason of not being in conformity with stereotypical generalizations of binary genders… therefore, the discrimination on the ground of sex under Articles 15 and 16 includes discrimination on the ground of gender identity." (**paragraph 59**)

Applicants respectfully submit that the reasoning in **Nalsa, supra**, is confirmed not only by the judgment in **Puttaswamy, supra**, but also by judgments from other jurisdictions. In **Lawrence vs Texas, 539 U.S. 558 (2003**), Justice Kennedy held that: "When sexuality

finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”This reasoning was echoed in **Elane Photography vs Willock, Docket No. 33687/213**, where the Supreme Court of New Mexico noted that: “… when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation.”

25. The Applicant submits that her role as a party to the present petition is necessary considering the fact that she can provide a perspective to this Hon’ble court which the current petitioners cannot provide. The Applicant’s unique experience of raising a child who belongs to the LGBT community can dispel the notion that LGBT persons pose a threat to the structure of family that is at the heart of Indian society. The Applicant submits that often persons fail to acknowledge that LGBT persons are indeed a part of the Indian family. The Applicant submits that in her experience, LGBT persons form an integral part of the Indian family and there is no contradiction between being an LGBT person and being a loving and caring member of the Indian family. The Applicant submits that it is important

to recognise that homosexuality is a natural reality of the diverse world we live and inhabit and shunning LGBT persons through social stigma and criminal proscriptions – will not make them disappear. However, decriminalisation of homosexuality will ensure the constitutional dream of equality and dignity for all.

26. The Applicant submits that the viewpoints of those who have an intimate stake in the matter, and therefore have the *locus standii* to intervene and assist this Hon'ble Court in these proceedings namely the parents of lesbian and gay individuals must be considered before this Hon'ble Court. The Applicant, based upon her intimate experience of raising a well adjusted young man who happens to be gay, craves leave to present her insights, arrived at through personal experience, of the impact of Section 377, the value of decriminalisation as well as on the notion of Section 377 as a threat to the Indian family and the pluralist culture of India.

SUBMISSIONS

A. Section 377 Is Violative of Fundamental Rights

27. The Applicant submits that section 377 fosters widespread violence, include harassment, blackmail, rape and torture, against LGBT persons at the hands of the police and society. Section 377 allows for the legal and extra-legal harassment, blackmail, extortion and discrimination against LGBT

persons. The Applicant further asserts that the harm inflicted by section 377 radiates out and affects the very identity of LGBT persons. Sexuality is a central aspect of human personality and in a climate of fear created by section 377 is impossible to own and express one's sexuality thereby silencing a core aspect of one's identity. It directly affects the sense of dignity, psychological well being and self esteem of LGBT persons.

B. Section 377 is Violative of the Right to Equality (Articles 14 & 15)

28. Section 377 confers unguided and unfettered discretion on state authorities and officials which allows them to arbitrarily target a class of people. The Applicant herein argues that the criminalization of consensual same-sex sexual activity between adults served no legitimate state purpose and the legislative object was both arbitrary and unreasonable. Applicant also submits that "sexual orientation" is a ground that arises out of sex, and therefore falls within Article 15(1) of the Constitution.

C. Section 377 violates the Rights of Privacy and Dignity under Article 21

29. The Applicant submits that section 377 infringes the Rights to Privacy and to a Life with Dignity contained within Article 21 of the Constitution. The Applicant submits that Article 21 protects the right to privacy of the individual and that this right to privacy protects places as well as persons. The Applicant

submits that Article 21 also protects the right to live with dignity, and that section 377 conveys the message the LGBT persons are of less value than other people, demeans LGBT persons and hence unconstitutionally infringes upon their right to live with dignity.

30. The Hon'ble High Court of Delhi also rightly held that public disgust or disapproval of certain section of society does not constitute a compelling state interest for the purposes of justifying an infringement of right under Article 21. Replying upon the Constitutional Assembly Debates and a speech by Dr. Ambedkar in the Constituent Assembly, the Hon'ble High Court rightly held that "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." The Hon'ble High Court rightly concluded that "The Constitution of India recognizes, protects and celebrates diversity. To stigmatise or to criminalise homosexual only on account of their sexual orientation would be against the constitutional morality."

D. Section 377 is violative of Article 19(1)(a) and is not protected by Article 19(2)

31. The Applicant submits that section 377 is violative of Article 19(1)(a) of the Constitution. Attempts at restricting free speech may either be in the form of direct curtailment, or structural impediments to the free expression of one's opinions in a meaningful manner. Section. 377 IPC by

criminalizing homosexual acts has a chilling effect on the free speech and expression of LGBT persons.

32. The Applicant further submits that the real test for Freedom of Speech and Expression lies in its ability to enable speech that may challenge popular or dominant opinions. The shadow of criminality cast by Section 377 curtails a free and frank discussion on issues of sexuality, which is vital to fight irrational public prejudices. To counter existing myths and social prejudices about LGBT persons it is essential that conditions be created that allow for a free expression of their views without fear of criminal sanction.

33. The freedoms guaranteed under Article 19(1) must be interpreted broadly and reasonable restrictions upon them must be construed narrowly. While public disapproval or unpopularity alone cannot be a justification to over ride Fundamental Rights, “public decency and morality” as a reasonable restriction on fundamental freedoms must be proved on a case by case basis and cannot merely asserted. Furthermore, the ‘public decency and morality’ must itself be in consonance with constitutional morality. Therefore, for example, even though ‘dowry’ may be sanctioned and celebrated by public morality, it nevertheless, flies against constitutional morality.

E. The Hon’ble High Court’s Interpretation is consistent with International Norms and Jurisprudence

34. The approach of the Hon'ble High Court is consistent with international norms on human rights; appreciation of contemporary science and medical knowledge; and global trends with regard to civil liberties. The impugned judgment of the Hon'ble High Court comes after the decisions of the Constitutional Court of Africa, the High Court of Fiji, the Supreme Court of Nepal, the Human Rights Committee, the Supreme Court of the United States, the European Court of Human Rights, the Constitutional Court of Colombia, and as a result of the judgment of the Hon'ble High Court, Indian became the 127th nation to decriminalize homosexuality.

F. Section 377 is a threat to family values

35. The Hon'ble Delhi High Court has upheld the constitutional challenge to section 377 by rightly acknowledging the prejudice and stigma the impugned provision associates with LGBT persons. However, the Applicant submits, that the said stigma and prejudice is not confined to the gay and lesbian person alone, but envelops the family as a whole. The Applicant submits that therefore families of LGBT persons are equally affected by the continued presence of section 377. Thus, the parents, siblings and other members of the family of a LGBT person harbour similar fears of disclosure, public ridicule and social exclusion, which stems from an erroneous

and misguided understanding of homosexuality as an unnatural curable disease alien to Indian culture.

36. The Applicant submits that it is increasingly accepted that the syndrome of ‘homophobia’ is a product of lack of information and exposure. Decriminalisation of homosexuality enables the circulation of both information and allows much needed exposure for the society at large, and especially for parents of gays and lesbians to better understand LGBT persons. The Applicant submits that decriminalization enables the creation of a safe and supportive environment for LGBT persons both outside and within the family.

37. The Applicant submits that often the level of harassment and social stigma against homosexuality is so acute that it makes it next to impossible for families of LGBT persons to cope with the different sexuality of their children, both in their youth and adulthood. This has led in numerous cases of misguided actions by parents by opting for unscientific aversion and reparative therapies, which operate on the wrongful basis that homosexuality is a curable disease. The Applicant submits these decisions are a product of fear of social stigma and misinformation about the adverse and ill effects of aversion and reparative therapies.

38. The Applicant submits that social stigma towards parents of LGBT persons also stems from archaic and superstitious

beliefs, often supported by unscientific opinions that fail to recognize homosexuality as a natural phenomenon and attribute it to bad parentage or genetic defects. The Applicant submits that criminalization of homosexuality and its active policing by the police authorities gives credence to such beliefs, bringing the families of LGBT persons into further shame and disrepute.

39. Applicant submits that as a parent, who initially had limited information about homosexuality, she had great difficulty in providing a safe and supportive environment for her child, both in youth and adulthood. The Applicant submits that some of them have witnessed the isolation and depression, exacerbated by social stigma faced by their children in complete helplessness. The Applicant therefore has had the difficult experience of raising a child in a hostile environment that deems them criminal, and therefore understand the need for de-criminalisation as a path by which a larger section of parents will become better equipped to provide a safe and supportive environment for LGBT youth and adults.

40. The Applicant submits that her role as parties to the present petition is further necessitated by baseless and unfounded allegations that LGBT persons pose a threat to the structure of family that is at the heart of Indian society. The Applicant submits this ofuscates the issue of decriminalization by drawing hypothetical concerns about same sex marriage, and

the threat to the heterosexual Indian families. The Applicant submits that LGBT persons form part of regular families. It is important to recognise that homosexuality is a natural reality of the diverse world we live and inhabit and shutting out LGBT persons – and shuning them through social stigma and criminal proscriptions – will not make them disappear. However, decriminalisation of homosexuality will ensure the constitutuonal dream of equality and dignity for many.

41. The Applicant submits that criminalization of consensual homosexual activity hinders the role of parents as a source of support and leads to further alienation and separation of LGBT persons from their families. This has the effect of disintegrating and destroying family bonds. Thus the threat to families comes from section 377 itself and not its eradication.

42. The Applicant therefore prays that she should be allowed to intervene to espouse the cause for decriminalization of homosexuality, which is *a priori* essential for full development and growth of LGBT persons in their youth and adulthood in loving families free from prejudice and social stigma.

43. It is therefore submitted that it would be in the interest of justice if the Applicant is permitted to intervene in the present Writ Petition and assist this Hon'ble Court on the questions of law raised.

44.

45. That no prejudice will be caused to the parties if the Applicant is permitted to intervene in this matter.

46. That this Application is *bona fide and* in the interest of justice.

PRAYER

In the premises it is most respectfully prayed that this Hon'ble Court may be pleased to:

A. Allow the present application for intervention, and permit the Applicant to assist this Hon'ble court in W.P. (Crl.) No. 76 of 2016; and

B. Pass any such further orders as this Hon'ble Court may deem fit.

DRAWN BY:

GAUTAM BHATIA

FILED BY:

Drawn On: 12.01.2018
Filed On: 15.01.2018

NIKHIL NAYYAR
ADVOCATE FOR THE APPLICANT