IN THE SUPREME COURT OF INDIA

Criminal Original Jurisdiction

W.P. (Crl.) No. 88 of 2018

In the matter of:

Keshav Suri … Petitioner

Vs.

Union of India …Respondent

Written submissions on behalf of the petitioner by Mr.Arvind P. Datar, Senior Advocate

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I. The historical background:

1.1 The entire history, from 1534 to the present day, has been traced in "*377 and the Unnatural Afterlife of British Colonialism in Asia*" by Professor Douglas Sanders[1]. Similar history is also contained in the Amicus Brief of Professors of History submitted in *Lawrence v. Texas*[2].

1.2 Briefly, the historical background indicates that s. 377 was based primarily on blind prejudice and without any scientific basis. As the Indian Penal Code, 1860 was successful in bringing out an orderly and systematic criminal law, its success lead to its adoption in other British colonies in Asia including section 377.

1.3 Significantly, the criminal code of Napoleon was silent on sexual relations between consenting adults.

1.4 In the US, the efforts of Senator Joseph McCarthy lead to wide-spread persecution of gays and lesbians at every level of government activity. Even private corporations and defence corporations were required to ferret out and discharge homosexual employees by an executive order of President Eisenhower (pp. 75-80 of Module I).

1.5 After 1970, the view that homosexuality was pathological and dangerous was gradually discarded. By 1973, the American Psychiatric Association, American Psychological Association and American Medical Association removed homosexuality from the list of mental disorders. Several Protestant denominations officially condemned discrimination against homosexuals after the late 1970s. In the 1990s, executive orders were issued banning

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[1] Module 1, Pg.10-49.
[2] (2003) 539 US 558. The Amicus Brief is in Module 1, Pg.50-49.

discrimination in federal and state level government offices. This has been followed by almost all leading private corporations.

II. Constitutional provisions – Article 13:

2.1 Article 13(1) reads as follows:

> ***13. Laws inconsistent with or in derogation of the fundamental rights***
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> *(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.*

2.2 After January 26, 1950, any existing law which was inconsistent with Part III of the Constitution became void "*to the extent of such inconsistency*". It is submitted that the inconsistencies that are mentioned in Article 13(1) are not only with the provisions of Part III but also with the derivative rights that are found to be inherent in Part III. Laws may also become inconsistent with an interpretation placed upon the provisions of Part III by the Supreme Court.

2.3 When a Court declares a law to be unconstitutional, that declaration does not repeal or amend the law, for to repeal or amend a law is a legislative and not a judicial function.[3] Therefore, striking down the offending portions of section 377 will not amount to judicial legislation.

2.4 With the decisions in *Puttaswamy*[4] and *NALSA*[5], sexual orientation and gender identity are innate attributes of every individual. This has been held also as a facet of the right to privacy which includes, in turn, decisional autonomy. With these decisions, it is submitted that, Articles 14, 15 and 21 will have an extended meaning. Section 377, as submitted later, will therefore be inconsistent with the provisions of Part III of the Constitution to the extent

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[3] *Behram Khurshed Pesikaka v. State of Bombay,* (1995) 1 SCR 613, 636, 655, 661 – see also *Seervai*, 4th edition, page 416.
[4] *Justice K.S. Puttaswamy v. Union of India,* (2017) 10 SCC 1, at paras 108, 118, 127, 144, 145, 248-250 and 647.
[5] *National Legal Services Authority v. Union of India,* (2014) 5 SCC 438.

it makes consensual same-sex relationship a crime/offence on the ground that it amounts to "*carnal intercourse against the order of nature*".

2.5 The proper test will be: can section 377 be enacted by Parliament today after the decisions of the Supreme Court in *NALSA* and *Puttaswamy*? Section 377 would be struck down as unconstitutional under Article 13(2). If a State cannot make a law violating Part III after 1950, pre-constitutional laws, *which become void,* will also have to be struck down under Article 13(1).

III. Article 14 – right to equality:

3.1 Section 377 is *ultra vires* Article 14 as it does not satisfy the twin tests of classification[6] as laid down in *Ram Krishna Dalmia*[7] and numerous other decisions.

3.2 If sexual orientation is a "natural right" as held in *Puttaswamy*, there is no intelligible differentia between opposite sex and same-sex couples. Sexual orientation towards the same sex is, as observed in the *amicus brief* in *Lawrence* (supra), a ***"normal and benign variation of human sexuality"***.

3.3 Even assuming that the differentiation on grounds of sexual relationship constitute intelligible differentia, it has no nexus with the object sought to be achieved. In *Nagpur Improvement Trust v Vithal Rao*[8], it was held that the object of the statute itself should be lawful and it cannot be discriminatory. The Supreme Court held-

> *"if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved."*

3.4 The object of a penal code is to punish a crime. The object of punishment can be retributive, punitive, reformative, preventive etc. The Indian Penal Code, 1860 also intends punishment to be a deterrent against other persons committing similar acts. The essence of the theory of punishment is that a person has a choice in transgressing the limits of law. If he chooses to do so,

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[6] i) That the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question.
[7] *Ram Krishna Dalmia v. Justice S.R. Tendolkar,* AIR 1958 SC 538.
[8] (1973) 1 SCC 500, at para 26.

punishment is a likely consequence. In the case of sexual orientation or gender identity, it is now well-settled that this orientation is not a matter of choice but is an inherent attribute of persons but who happen to be in the minority.

3.5 It is also well settled by medical science the that sex orientation of a person cannot be changed. The earlier attempts to cure this orientation electric shocks, psychiatric treatment, administration of drugs have proved useless. Thus, same-sex relationships are not "*against the order of nature*". This is conclusively established internationally and accepted by the United Nations as well. Thus, section 377 fails the test of Article 14.

3.6 There is also no rational differentiation since, medically and biologically, sexual orientation is accepted to be an attribute of an individual just as gender identity is. According to American Psychological Association, the manifestation of sexual attraction towards persons of the opposite sex or same sex starts manifesting itself in early adolescence. Sexual orientation is thus a natural condition – attraction towards the same sex or opposite sex are both equally natural – the only difference is that same sex attraction arises in far lesser number of persons. (Till date, many persons suppress or hide their orientation because of the social stigma attached to same-sex relationships)

3.7 Section 377 is thus liable to be struck down as it results in discrimination and results is denial of equality. The scope of the term "discrimination" is well explained by Justice Aharon Barak in *El-Al Israel Airlines Ltd. v. Jonathan Danielwitz*[9]

[9] HCJ 721/94, decision of the Supreme Court of Israel dated November 30, 1994. Module 2, Pg. 1-40.

3.8 When transgenders have been granted equal protection under Article 14, there is no justification in denying the same to persons who have a sexual orientation towards people of the same sex. Indeed, in *NALSA*, it has been held that discrimination on the basis of *sexual orientation or gender identity* violates the guarantee of equal protection of laws. Section 377, which makes consensual same-sex relationship a crime, denies equal protection of laws to LGBT community. Similarly, the decision in *NALSA* recognizes gender identity as a matter of choice by an individual and an inseparable part of human life. If this is an inseparable part of human life, then sexual orientation and the right to have a same-sex relationship must equally be so. Section 377, to the extent it criminalizes consensual same-sex relationship, is liable to be struck down on the ground of manifest arbitrariness as per the decision of this Hon'ble Court in *Shayara Bano v. Union of India.*[10] Making such relationships criminal on the ground that it is against the "*order of nature*", is a clear case of "manifest arbitrariness". In *Shayara Bano,* this Hon'ble Court held as follows:

> "*Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally, and/or without adequate determining principle."*[11]

3.9 Treating same-sex relationship as "*carnal intercourse against the order of nature*" is, in 2018, is irrational and/or without adequate determining principle. It is impermissible to have section 377 on the statute book in the light of overwhelming evidence about the origins and nature of sexual orientation.

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[10] (2017) 9 SCC 1.
[11] *Id,* at para 101.

3.10 **Class legislation:** Section 377 is a classic case of class legislation which is prohibited under Article 14. All persons having sexual orientation towards the same sex are treated as a class who are liable to be punished up to life imprisonment or ten years. A human being's natural orientation is made a crime, they are subjected to serious repercussions which includes matters of public employment.

IV. Articles 15 and 16

4.1 Articles 15(1) and 15 (2) prohibit discrimination against citizens on grounds of, *inter alia,* sex. Similarly, Article 16(2) prohibits discrimination, *inter alia,* on grounds of sex nature matters of public employment. It is submitted that the word "sex" would include sexual orientation and gender identity. This Hon'ble Court has conferred transgenders with the right to be recognized as a third gender. This judgment has also been accepted by the executive by making suitable changes *qua* passports, application forms and even public employment, etc.

4.2 Section 377 renders even a private consensual same-sex relationship as a crime. If such persons are arrested and prosecuted, they can be removed from service under Rule 3 of the All India Services (Discipline and Appeal) Rules, 1969 and Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. Therefore, the existence of section 377 as a valid statutory provision can, merely by filing a criminal case, deny such persons, their right to public employment under Article 16 and other rights under Article 15.

V. Article 21

5.1 According to medical evidence, there is nothing unnatural or criminal about sexual orientation towards persons of the same sex. A fundamental facet of the right to life is the right to choose one's partner. In the cases of heterosexual relationships, this Hon'ble Court has prohibited any impediments on grounds of caste, religion, etc. The decisions of Khap Panchayats have been severely and repeatedly condemned.[12]

5.2 If sexual orientation towards the same sex is as natural as orientation towards the opposite sex, the choice of partner will equally inure to persons of both orientations. Section 377 effectively bars such choice and results in denial of this most fundamental facet of Article 21 on the untenable ground that it is against the "order of nature".

5.3 In the landmark judgment in *Puttaswamy,* it was held that right to privacy includes decisional privacy which is an ability to make intimate decisions primarily consisting one's sexual or procreative nature and decisions in respect of intimate relations.[13]

5.4 The decision in *Suresh Kumar Koushal v Naz Foundation*[14] relies on the earlier judgments of *Gobind v. State of M.P*[15] and *Kharak Singh v. State of U.P*[16] where it was held that there was no fundamental right to privacy. With the *Puttaswamy* decisions, the *Koushal* judgment deserves to be overruled.

5.5 It is submitted that the judgment in *Koushal* is liable to be overruled, *inter alia*, on the following grounds:

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[12] *Shakti Vahini v. Union of India,* 2018 SCC Online SC 275.
[13] (2017) 10 SCC 1, at para 250.
[14] (2014) 1 SCC 1.
[15] (1975) 2 SCC 148.
[16] AIR 1963 SC 1295.

i. In para 38, it was held that both pre and post-constitutional laws are manifestations of the will of the people through Parliament, particularly if no amendment is made to a pre-constitutional law.

ii. In para 45, it was held that since Parliament did not amend section 377 despite the recommendation in the 172nd Law Commission Report, it is a guide to the nature and scope of section 377.

iii. In para 60, the Court noted that all the earlier cases under section 377, the victims were women or children. The Court observed- "*All the aforementioned cases refer to non-consensual and markedly coercive situations and keenness of the Court in bringing justice to the victims who were either women or children cannot be discounted while analyzing the manner in which the section has been interpreted"*- but went on to hold that section 377 will apply irrespective or age and consent in view of the plain meaning and legislative history of that section.

iv. In para 65, it was held that persons engaging in the carnal intercourse in the ordinary course and those indulging in carnal intercourse against the order of nature constitute different classes; the later cannot claim that section 377 is arbitrary or irrational.

v. In para 66, the miniscule number of people were prosecuted was a ground to set aside the High Court judgment.

VI. Section 377 of the Indian Penal Code, 1860.

> *"It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."*[17]
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> *-Oliver Wendell Holmes.*

6.1 As submitted in the note on historic background, this is a colonial law and has been wrongly referred to as representing the will of the people in *Koushal* (para 44.2).

6.2 In *Puttaswamy,* it has been held, at paras 144 to 148, that rights of the lesbian, gay, bi-sexual and transgender population cannot be construed as "so-called rights" but are real rights and part of the right to life and entitled to the benefits of pride, privacy and dignity. It was categorically held that sexual orientation is an essential component of identity.

6.3 These observations of a nine-judge Bench categorically treat the LGBT population as "*persons*" having all the rights which the rest of the population has. This includes all the rights in Part III of the Constitution as well as in other provisions of the Constitution. Making LGBT population alone as liable to criminal action clearly renders part of section 377 is unconstitutional.

6.4 After the decision in *Puttaswamy,* which was rendered on August 24, 2017, section 377, to the extent of its inconsistency with Part III of the Constitution, is void. It cannot be permitted to stand in the way of the exercising of the fundamental rights of LGBT population. This is made clear by *Keshavan*

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[17] Holmes, *The Path of the Law,* 10 Harvard Law Review, 457, 469 (1897).

Madhav Menon v State of Bombay[18] as cited in para 9 of *Bhikaji Narain Dhakras v State of Madhya Pradesh*[19].

6.5 Section 377 is primarily based on the premise that intercourse between members of the same sex are against the order of nature. As mentioned earlier, this was based on Judeo-Christian beliefs and a blind hatred against same-sex relationship. One example is the note of Macaulay, who called it an "*odious class of offence*".

6.6 Justice Michael Kirby has pointed out that criminalizing same sex relationship is wrong for the following reasons:

> *"[C]riminalisation of private, consensual homosexual acts is a legacy of one of three very similar criminal codes (of Macaulay, Stephen and Griffith), imposed on colonial people by the imperial rules of the British Crown. Such laws are wrong:*
> *Wrong in legal principle because they exceed the proper ambit and function of the criminal law in a modern society;*
> *Wrong because they oppress a minority in the community and target them for an attribute of their nature that they do not choose and cannot change. In this respect they are like other laws of colonial times that disadvantaged people on the ground of their race or sex;*
> *Wrong because they fly in the face of modern scientific knowledge about the incidence and variety of human sexuality; and*
> *Wrong because they put a cohort of citizens into a position of stigma and shame that makes it hard to reach them with vital messages about safe sexual conduct, essential in the age of HIV/AIDS."*[20]

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[18] AIR 1951 SC 128.
[19] AIR 1955 SC 781, 784. Module 1 at page 280.
[20] Justice Michael Kirby, *Homosexual Law Reform : An Ongoing Blind Spot of the Commonwealth of Nations*, 16th National Commonwealth Conference, Hong Kong, Apr. 8, 2009 as cited in *Naz Foundation v. Government of NCT of Delhi,* 2009 (111) DRJ 1.

6.7 The Supreme Courts of the following countries have struck down laws similar to section 377. In most of these statutes, a reference has been made to *"carnal intercourse against the order of nature"*. These are:

(i) Belize- *Caleb Oroczo v. The Attorney General of Belize,* Claim No. 668 of 2010, Supreme Court of Belize, decision dated August 10, 2016.

(ii) Fiji- *Dhirendra Nadan v. State,* High Court of Fiji, Case No. HAA0085 of 2005, decision dated August 26, 2005.

(iii) Nepal- *Sunil Babu Pant v. Nepal Government,* Writ No. 917 of 2007, decision dated December 21, 2007.

(iv) South Africa- *The National Coalition for Gay and Lesbian Equality v. The Minister of Home Affairs,* Case CCT 10/99, Constitutional Court of South Africa, decision dated December 2, 1999.

ECHR

(v) *Modinos v. Cyprus,* Application No. 15070/89. ECHR decision dated April 12, 2018.

(vi) Norris v. Ireland, Application No. 10581/83, ECHR decision dated October 26, 1988.

(vii) Dudgeon v. The United Kingdom, Application No. 7525/76, ECHR decision dated October 21, 1981.

VII. Statutory interpretation

7.1 The Indian Penal Code, 1860 must be subject to doctrine of updating construction. It has been held that the Indian Evidence Act, 1872[21] and the Code of Criminal Procedure, 1973[22] are continuing acts. The principle of updating construction has been set out in *Bennion on Statutory Interpretations* with reference to certain cases.

7.2 Section 377 is also liable to be struck down on the basis of the Latin Maxim *cessante ratione legis, cessat ipsa lex* (the reason for a law ceasing, the law itself ceases). This maxim has been recognized by this Hon'ble Court in *H.H. Shri Swamiji of Shri Amar Mutt v. Commissioner, Hindu Religious and Charitable Endowments Deptt,* (1979) 4 SCC 646, and *State of Punjab v. Devans Modern Breweries Ltd.,* (2004) 11 SCC 26.

7.3 It is submitted that there is no better occasion to apply/use this maxim than in the context of section 377. At the time of its drafting, same-sex relationships were condemned as unnatural, queer, abhorrent, revolting, etc. Over the years, medical and psychiatric studies have shown that there is nothing "unnatural" or "revolting" about such relationships. The fact that a much smaller percentage of human being have this orientations does not make it against the "order of nature". The "*de minimis"* rationale has been overruled by this Hon'ble Court in *Puttaswamy.*

7.4 In most civilized nations, same-sex relationships have been either de-criminalized or their respective Supreme Court/High Courts have declared such "sodomy" laws as unconstitutional.

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[21] *State v. S.J. Choudhary,* AIR 1996 SC 1491.
[22] *State of Maharashtra v. Dr. Praful Desai,* AIR 2003 SCW 1885.

7.5 The United Nations has also called for a repeal of such laws. The *Yogyakarta* principles have also been approved by this Hon'ble Court in *NALSA*.

7.6 In the face of overwhelming and virtually irrefutable evidence, the earlier stamp of criminalization has been internationally replaced by the stamp of approval. Indeed, the British Prime Minister has apologized for making these relationships a crime in the colonial area.[23]

7.7 The very foundation on which the crime of section 377 is built is that same-sex relationships are against the "order of nature". If this foundation is grossly flawed, it has to be removed. Once this is done, consenting same-sex relationships can no longer be a criminal offence.

7.8 The LGBT community not only have the right to be left alone and enjoy all the consequences that follow from their sexual orientations and gender identity but also have the right to be acknowledged as equals and embraced with dignity.

Dated at New Delhi on this the 10th day of July, 2018.

[23] https://www.bbc.com/news/world-africa-43795440 (April, 2018)