

IN THE SUPREME COURT OF INDIA

WP (CRL.) NO. 76/2016

IN THE MATTER OF:

NAVTEJ SINGH JOHAR & ORS.

...PETITIONERS

AND

UNION OF INDIA

...RESPONDENT

NOTE ON BEHALF OF PETITIONERS
THROUGH MR. MUKUL ROHATGI, SENIOR ADVOCATE

I. INTRODUCTION

1. All males, as a class and all females, as a class do not have the same sexual orientation i.e. being attracted to the opposite sex. Such individuals are called gay men / lesbian women / bisexual persons. Such orientation is not acquired by way of choice and is genetic. Typically a person becomes aware of such orientation at adolescence. Sexual orientation is immutable and not a medical condition to be “cured”. Such individuals live with this orientation and they do not consider the same to be either wrong, unnatural or against the “laws of nature” / “order of nature” because it is nature which has given them this orientation. Reference may be made to para 22 of the *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 (“**NALSA Judgment**”). Reference will also be made during the course of submissions to certain medical studies.
2. Such individuals (sexual minorities in society) need protection, more so than those having the more common orientation (heterosexual), to achieve their full potential, to live freely, without fear, apprehension or trepidation and not be discriminated against by society, openly or insidiously, or by the State in its multifarious avatars in the matter of employment, choice of partner, testamentary rights, insurability, medical treatment in hospitals or the like, rights arising from live-in relationships (now recognized even by the Protection of Women from Domestic Violence Act, 2005 for various kinds of live-in relationships – except same-sex relationships – in *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755, paras 38 and 39)
3. The instant batch of cases relate not only to striking down Section 377 of the Indian Penal Code (“**IPC**”), but to a recognition by the court of the full panoply of rights, described in brief above. Reference may be made to the prayers in WP (Crl) 76/2016, WP (Crl) 88/2018 and WP (Crl) 121/2018 in this behalf.
4. The instant batch of cases relate to a group of individuals, commonly referred to as ‘LGBT’. While there is already a declaration as to the rights of transgenders by the NALSA judgment, yet, in view of the existence of Section 377 of the IPC, their sexual activities would also be an offence. It may be

stated that in the NALSA judgment, transgenders have been recognized as a third gender, apart from male and female and given certain rights. It is submitted that the same rights inhere in the 'LGB' community also and Section 377 ought to be struck down/ read down qua LGBT as a whole so as to confine the provision only to the offence of bestiality and non-consensual sex (because the Protection of Children from Sexual Offences Act, 2012 (POCSO) is already on the statute books in so far as children and minors are concerned).

5. It is a matter of common knowledge, apart from what is stated in the NALSA judgment, in *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*, (2017) 10 SCC 1 (“**Puttaswamy judgment**”), and in *Naz Foundation v. Government of NCT of Delhi*, 2009 (111) DRJ 1 (Delhi High Court) (“**Naz Foundation**”) that individuals belonging to this group suffer discrimination – open, insidious and invidious – throughout their lives, whether it be in school, college, employment (under the State or in private quarters) and even within their family. This is principally because of the existence of Section 377 on the statute book for more than the past 150 years, which is a remnant of Victorian morality. Seen closely, Section 377 seems to refer to a mindset of societal values of that era, where sexual activities were considered relevant mainly for procreation. The Puttaswamy judgment, popularly called the privacy judgment, is a nine-judge bench decision. Dr. DY Chandrachud J, speaking for himself and three other learned judges, refers to *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 (“**Koushal judgment**”) of this Hon’ble Court as erroneous (in paras 144-146). Kaul J, relying on Nariman J’s decision, arrives at the same conclusion (in para 647). There is no contrary view in this regard in the decision of the nine-judge bench. Thus, it would be deemed to be nine-judge bench verdict in so far as the view in the Koushal judgment has been termed as erroneous.
6. It is submitted that the phrase “order of nature” is not sanctioned by the Indian Constitution. As submitted above, being a genetic or in-born trait, such sexual orientation is also a product of nature.
7. A significant feature of this case is that Section 377 is a pre-constitutional law. Nevertheless, it has been retained post the Constitution coming into effect, by virtue of Article 372 of the Constitution. However, it ought to be noted that the presumption of constitutionality is merely an evidentiary burden, initially on a person seeking to challenge the vires of a statute. Once any violation of a fundamental right or suspect classification is *prima facie* shown, as in this case, such presumption has no role.

II. SEXUAL ORIENTATION IS AN INNATE FACET OF INDIVIDUAL IDENTITY

1. National Legal Services Authority v. Union of India, (2014) 5 SCC 438, Per Radhakrishnan J, para 22
2. Naz Foundation v. Government of NCT of Delhi, 2009 (111) DRJ 1, Para 47

3. Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., (2017) 10 SCC 1, Per Dr. DY Chandrachud J, para 145
4. Medical literature to show that homosexuality is no longer treated as a mental disorder. Refer to the Indian Psychiatric Society's Position Statement on Homosexuality.

III. SECTION 377 VIOLATES PART III OF THE CONSTITUTION

1. The case under Article 21

1.1. **The right to life includes right to gender identity and sexual orientation**

- a. National Legal Services Authority v. Union of India, (2014) 5 SCC 438, Per Radhakrishnan J: paras 19, 20, 21, 22, 24, 25, 60, 66 83, Per Sikri J: paras 91- 95, 116.1, 125, 129

1.2. **Sexual orientation is protected under the right to privacy**

- a. Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., (2017) 10 SCC 1, Dr. DY Chandrachud J: paras 42, 46, 96, 127, 130, 266, 271, 323; Bobde J: paras 403, 424; Nariman J: paras 521, 535; Kaul J: paras 582, 644-646

1.3. **Right to dignity**

- a. Francis Coralie Mullin v. Administrator, Union Territory of Delhi, 1981 SCC (1) 608, paras 8-9
- b. National Legal Services Authority v. Union of India, (2014) 5 SCC 438, Per Radhakrishnan J: paras 73-75; Per Sikri J: paras 101 – 106, 109
- c. Common Cause v. UOI, (2018) 5 SCC 1, Per Dipak Misra CJ, para 202.9; Per Dr. DY Chandrachud: para 437, 438
- d. Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., (2017) 10 SCC 1, Per Dr. DY Chandrachud: para 108, 113, 119, 127, 298

1.4. **Right to autonomy includes sexual autonomy and choice of partner**

- a. Common Cause v. UOI, (2018) 5 SCC 1, Per Dipak Misra CJ: paras 166-168, 202.8; Per Chandrachud J: paras 437, 438, 441
- b. Shafin Jahan v. *Asokan K M* (Hadiya case), 2018 SCC OnLine SC 343, Per Dipak Misra CJ: paras 1, 28, 54; Per Chandrachud J: paras 57, 88, 90, 93-96
- c. Shakti Vahini v. UOI (Khap Panchayat case), (2018) SCC OnLine 275, Per Dipak Misra CJ: paras 1, 27, 36-38, 44-46, 55
- d. Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., (2017) 10 SCC 1, Dr. DY Chandrachud J: paras 297-299; Bobde J, para 525; Nariman J, para 479

2. The case for equality: Articles 14, 15 & 16

2.1. **Sexual minorities have a right to equality, equal protection of the laws and non-discrimination under Articles 14-16**

- a. Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1, paras 21, 26, 36, 42, 43, 46, 47, 50, 51

- b. National Legal Services Authority v. Union of India, (2014) 5 SCC 438, Per Radhakrishnan J: paras 81-83; Per Sikri J: para 122

2.2. Section 377 is arbitrary and unconstitutional

- a. ***Koushal's view on classification contrary to effects test - the legislation must be gauged by its effect***
- (i) Naz Foundation judgment, para 94 - 98
 - (ii) Bennett Coleman & Co. v. Union of India, (1972) 2 SCC 788, paras 39 – 42
 - (iii) Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248, para 55
 - (iv) Khandige Sham Bhat v. Agriculture Income Tax Officer, Kasaragod, AIR 1963 SC 591, para 7
- b.
- (i) **Hostile class legislation i.e. legislation which furthers discrimination is contrary to Article 14. Section 377 discriminates between consensual sexual acts of adults, on the basis of sex of the chosen partner**
 - (ii) **Legislative object may be discerned from the legislative history; in this case, object itself has always been discriminatory;**
 - (iii) **If the object itself is discriminatory then the question of reasonableness of classification, rational nexus etc are immaterial**
 - Shayara Bano v. UOI, (2017) 9 SCC 1, paras 70 - 87, 101
 - Subramanian Swamy v Director, CBI, (2014) 8 SCC 682, para 58
 - Nagpur Improvement Trust v. Vithal Rao, (1973) 1 SCC 500, para 26
 - UOI v Tulsi Ram Patel, (1985) 3 SCC 398, para 90
- c. **Over-broad and vague: Statute void for vagueness – “against the order of nature”**
- (i) Shreya Singhal v. UOI, (2015) 5 SCC 1, para 53 - 70
- d. **Evolving interpretation of Constitution**
- (i) **Perception of morality v. constitutional morality**
 - Independent Thought v. UOI, 2017 10 SCC 800, Para 91
 - Shakti Vahini v. UOI (Khap Panchayat case), (2018) SCC OnLine 275, Per Dipak Misra CJ: paras 44 – 46
 - (ii) Common Cause v. UOI, (2018) 5 SCC 1
 - (iii) Satyavati Sharma v. UOI, (2008) 5 SCC 287, para 32 onwards
 - (iv) John Vallamotham v UOI (2003) 6 SCC 611, para 28 onwards
 - (v) Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., (2017) 10 SCC 1, (2017) 10 SCC 1, at Dr. DY Chandrachud J: paras 130, 259, 262, 324; Kaul J, para 598-602

- (vi) Manoj Narula v. UOI, (2014) 9 SCC 1, Para 73, 74
- (vii) Lawrence v. Texas, 539 U.S. 558 (2003) overruling Bowers v. Hardwick, 478 U. S. 186

IV. ARTICLE 32 – ROLE OF SUPREME COURT – PROTECTOR OF THE CONSTITUTION

- 1. Romesh Thappar v. State of Madras, 1950 SCR 594, para 3
- 2. High Court of Judicature of Bombay v. Shirishkumar Rangrao Patil, (1997) 6 SCC 339, para 3
- 3. Shakti Vahini v. UOI (Khap Panchayat case), (2018) SCC OnLine 275, (2018) SCC OnLine 275, Per Dipak Misra CJ: para 54
- 4. Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1, para 348
- 5. Shafin Jahan v. Asokan KM, 2018 SCC OnLine SC 343, paras 54 – 55
- 6. Independent Thought v UOI, 2017 10 SCC 800, Para 91
- 7. D.K. Basu v. State of W.B., (1997) 1 SCC 416, para 4