IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

I.A. NO. OF 2018

IN

WRIT PETITION (S) (CRIMINAL) NO: 76 OF 2016

IN THE MATTER OF:

NAVTEJ SINGH JOHAR & ORS. …PETITIONERS

VERSUS

UNION OF INDIA, MINISTRY OF LAW
AND JUSTICE, SECRETARY ....RESPONDENTS

WRITTEN SUBMISSIONS BY ADV.MANOJ V GEORGE ON BEHALF OF APOSTOLIC ALLIANCE OF CHURCHES AND THE UTKAL CHRISTIAN COUNCIL - ORIGINAL RESPONDENTS IN CURATIVE PETITION 88-102/2014 AS RESPONDENT NOs.16 & 18.

(A) PRELIMINARY SUBMISSIONS:

1. The Scope of the Challenge:

The petitioners herein have sought to challenge that part of Section 377 pertaining to carnal intercourse against the order of nature by consenting acts between two adults. Section 377, IPC reads as follows….

IPC Sec *377.* *Unnatural offences — Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*

This section proceeds to penalise all carnal intercourse against the order of nature. This can be easily understood by the pictorial representation **(Part of the Compilation- See page)**. In a criminal prosecution of non-consensual same-sex acts, the penal statute has to be strictly construed. Section 377 IPC only makes a classification on the basis:

a. Carnal Intercourse within the order of nature
b. Carnal Intercourse against the order of nature

This is a reasonable classification and is on an intelligible differentia which distinguishes persons that are grouped together. This differentia has a rational object of prosecuting offenders under the Penal Code. This classification is required, at any cost, to prosecute in situations where carnal intercourse against the order of nature is committed without consent. The State has an imminent interest in prosecuting all the offenders who have committed carnal intercourse against the order of nature without consent. The Court should not venture to interpret what is the '*order of nature' or 'an unnatural offence'* because this would lead to the watering down of the Sec. 377 and prosecutions related to acts done, without consent, which fall under Sec 377 IPC. As noted in the reference order in the present case, (2018 (1) SCC 791), "**The consent between two adults has to be the primary pre-condition".** Section 375 IPC which defines 'Rape' in its Explanation talks about four types of consent. The Court while interpreting Sec 377 IPC has to consider all these circumstances:

a. Section 377 IPC can also have situations where a consent is obtained by putting a person in fear of death or hurt or,
b. When a consent is given under some misconception regarding the other person, or,

c. Consent given despite reasons of unsoundness of mind, intoxication, unable to understand the nature and consequence of that to which a person gives consent, or,

d. Consent given when the person is under 18 years of age.

Section 377 no-where provides for consent for the four other circumstances of consent mentioned above. The petitioners are seeking a blanket declaration from this court that carnal intercourse against the order of nature between consenting adults should be taken out of the purview of Section 377. The circumstances falling under the descriptions provided under Section 375 IPC are also applicable when consent is discussed.

2. <u>Section 377 does not violate Articles 14 of the Constitution.</u>

a. Violation of Article 14 of the Constitution of India

Section 377 merely defines a particular offence and its punishment. The State has the power of determining who should be regarded as a class for the purpose of legislation and in relation to a law enacted on a particular subject. The classification must not be arbitrary, must be rational and it must not only be based on some qualities and characteristics which are to be found in all persons grouped together and not in others who are left out but those qualities or characteristics must have reasonable relation to the object of the legislation. The twin test is :

1. That classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others

2. The differentia must have a rational relation to the object sought to be achieved.

Article 14 categorises on an intelligible differentia regarding those:

(1) who indulge in carnal intercourse in ordinary course and

(2) the other class who indulge in carnal intercourse against the order of nature.

There is no arbitrariness or irrational classification in the same. Whereas the present attempt of the petitioners to make a classification on the basis of consent is irrational and arbitrary.

The Court should not therefore give a blanket declaration that same-sex relationships are not against the order of nature as it would clearly disturb the penal provisions in prosecuting non- consenting adults. By a declaration as sought by the petitioner that the same sex consenting acts out of Section 377 would lead to a situation where the judiciary is called upon to make a class legislation i.e. One class with consent and another without consent. This is not permissible under Article 14 of the Constitution. The Petitioners propose an unintelligible differentia of adults engaging in same-sex relationships just on the basis of consent. This court in the reference order agreed to look only into consenting adults of the same sex. Thus two classes of people are created herein namely…(1) same-sex adults acting with consent and (2) same-sex adults acting without consent. Article 14 prohibits class discrimination. By conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of persons similarly situated in relation to the

privileges sought to be conferred or liabilities proposed to be imposed is against Art.14 .

3. **Section 377 does not violate Article 15 of the Constitution** Article 15 of the Constitution reads as:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste**, sex,** place of birth or any of them…

(a) Article 15 talks of religion, race, caste, **sex** or place of birth or any of them, not sexual orientation. There is no religious orientation, race orientation or caste orientation, domicile orientation. Sexual orientation is a word that is alien to the Constitution of India and cannot be imported in the context of testing a constitutionality of a legislation.

(b) If sex has to be replaced with sexual orientation it would require a constitutional amendment. Section 377 starts with the expression 'Whoever' which means a man or a woman and there is no discrimination as provided for under Article 15 on the grounds of sex. Article 15 postulates that there shall not be a gender discrimination on the basis of sex. Thus Art.15 is not violated in Sec 377 IPC.

(c) Confusion between Sex and Sexual Orientation: There is no Definiteness or Definition for Sexual Orientation. The word 'sex orientation' finds no mention in the constitution or even dictionary till date. This is not a new phenomenon but has been in existence for many centuries according to the petitioners. The framers of our Constitution however, never thought it appropriate to incorporate sex and sexual orientation interchangeably in the Constitution. The concept of sexual orientation as explained by the petitioners is in a state of mind

without any definiteness. Sex and Gender are an attribute of the body with certainty. Sexual Orientation is an attribute of the mind with no certainty. There are 30 different Sexual Orientations stated by psychologists across the world. **(Refer the List of Sexual Orientations)- Pg. 2-7 (Compilation)**

(d) Yogyakarta Principles:

The concept of sexual orientation gained impetus on the basis of Yogyakarta principles which were concluded by a group of NGOs and has no legal sanctity of an international treaty and thus Article 51 does not come into play – The Yogyakarta principles have been heavily relied upon by the petitioners in the ensuing petition. However, what are the Yogyakarta principles and what is the legal sanctity of these principles needs to be looked into. The intervener would like to state that the Yogyakarta Principles and the Yogyakarta Plus 10 that have been heavily relied upon by the petitioners are a set of 29 Principles that were developed at a meeting of the International Commission of Human Rights Jurists, the International Service of Human rights and various other Non-Governmental Organisations. The sanctity of these principles is limited in as much as to say that they do not amount to an international treaty that is binding on the State Parties. **(Refer: Preface of Yogyakarta Principles. Pg. 8–41 - Compilation)** There are no inter-governmentally negotiated international instruments or agreed human rights treaties on the issue of LGBT.

e) Sexual Orientation cannot be treated as a person's identity

The Constitution (Article.15) recognises only binary sexual existence of a citizen. Because if sexual orientation is a part of one's identity, criminalising an act of a person without the consent of the other person is actually criminalizing his identity. It is a matter of choice as it is agreed upon by medical research that it arises and manifest in early childhood. It is a morally relative belief system with no absolutes. In human beings, bodies are designed for reproduction. **(Ref: Executive Summary: Journal of Technology & Society Pg. 42 – 44 - Compilation)**

(B) **<u>In the case of National Legal Services Authority v. Union of India, (2014) 5 SCC 438, the issue was different and distinct</u>**

This Judgement provided that it is imperative to assign a proper sex for transgenders. The relevant paras read as follows:

85. *As is clear, these petitions essentially raise an issue of "gender identity", which is the core issue. It has two facets viz.:*

(a) Whether a person who is born as a male with predominantly female orientation (or vice versa), has a right to get himself to be recognised as a female as per his choice more so, when such a person after having undergone operational procedure, changes his/her sex as well;

(b) Whether transgenders (TGs), who are neither males nor females, have a right to be identified and categorised as a "third gender"?

119. *Therefore, gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as "third gender" would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a*

passport and a ration card, a driver's licence, the right to education, employment, health and so on.

120. *Further, there seems to be no reason why a transgender must be denied of basic human rights which includes right to life and liberty with dignity, right to privacy and freedom of expression, right to education and empowerment, right against violence, right against exploitation and right against discrimination. The Constitution has fulfilled its duty of providing rights to transgenders. Now it is time for us to recognise this and to extend and interpret the Constitution in such a manner to ensure a dignified life for transgender people. All this can be achieved if the beginning is made with the recognition of TG as third gender.*

121. *In order to translate the aforesaid rights of TGs into reality, it becomes imperative to first assign them their proper "sex". As is stated earlier, at the time of birth of a child itself, sex is assigned. However, it is either male or female. In the process, the society as well as law, has completely ignored the basic human right of TGs to give them their appropriate sex categorisation. Up to now, they have either been treated as male or female. This is not only improper as it is far from truth, but undignified to these TGs and violates their human rights.*

132. *By recognising TGs as third gender, this Court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights. It is, therefore, the only just solution which ensures justice not only to TGs but also justice to the society as well. Social justice does not mean equality before law in papers but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive Principles of State Policy into action, whose arms are long enough to bring within its*

reach and embrace this right of recognition to TGs which legitimately belongs to them.

135. *We, therefore, declare:*

135.1. *Hijras, eunuchs, apart from binary genders, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature. Here in this petition the petitioner is not seeking declaration of a gender, but a declaration of a very fluid concept of sexual orientation.*

(C) Article 21, Right to Privacy not violated by Section 377

The petitioners' prayer is for a declaration that only non-consensual same-sex relation is criminal in nature and not the consensual relationship. The issue here is whether in exercising the Right to Privacy which is guaranteed by the Constitution and reinforced by the Puttuswamy judgment 2017 (10) SCC 1 it is done with consent or without consent. The differentia the petitioners attempted to draw is whether carnal intercourse of the same sex persons against the order of nature is done with consent or without consent. The Right to Privacy is never violated. The Petitioners themselves are accepting the fact that carnal intercourse against the order of nature done in the domain of privacy without consent is an offence.

(D) Test of Constitutionality of Section 377 IPC in light of Article 13 of the Constitution –

It is not a matter of dispute that Article 13 empowers this Court to declare a law to become inconsistent when in violation of Part III of the Constitution. However, there is always a presumption in favour of constitutionality of an enactment as it is a legislative function of the Legislature which is the representative body of the people and who is accountable to them and is aware about their needs and acts in their best interests within the confines of a Constitution. If a pre-

Constitutional law which has been adopted by the Parliament is left as it is and this decision is no different from a decision to amend change or enact a new law. In determination of constitutionality the Courts should be reluctant to declare a law invalid and should accept an interpretation which would be in favour of constitutionality rather than the one which would render the law unconstitutional. Declaring the law unconstitutional is one of the last resorts taken by the courts. The courts would preferably put into service the principle of reading down or reading into the provisions to make it effective, workable and ensure the attainment of the object of the Act. But while reading down the Court cannot change the essence of law and create a new law which in its opinion is more desirable **(Ramakrishna Dalmia vs Justice S R Tendulkar and Ors AIR 1958 SC538 Para 11 ; DTC vs DTC Mazdoor Congress 1991 Supplementary 1 SCC 600; Minerva Mills vs UOI 1980 (3) SCC 625 para 69; DS Nakra vs UOI 1983 (1) SCC 305,paras 66-68).**

(E) No requirement of reconsideration of Suresh Kumar Kaushal vs.Naz Foundation 2014 (1) SCC 1

The interveners before this Hon'ble Court today were SLP petitioners in the matter of *Suresh Kumar Koushal* case and this Court refused to grant the prayer of the respondents therein due to the following reasons which are enumerated in the judgment:

(A) Presumption of Constitutionality and Self-restraint by the courts (kindly refer Para 44, 45 of the judgement)

(B) Granting of the prayer of the petitioner amounts to Judicial Legislation.

Para 82…*We would like to make it clear that this Court has merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality*

of Section 377 IPC and found that the said section does not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.

(C) Section 377 does not criminalise a particular people, or identity or orientation.

Section 377 would apply irrespective of age and consent. It merely identifies certain acts, which if committed would constitute an offence. Such prohibition regulates sexual conduct regardless of gender identity and orientation (Para 65 Suresh Kumar Koushal vs Naz Foundation and Ors).

*(*D*)* Right to Privacy was never discounted

The intervener would like to state that a bare perusal of the Koushal judgement would give a clear idea of how the judgement did not discount the Right to Privacy. Whereas it has been in this judgment where it was clearly spelt out that Right to Privacy has to be read into Article 21 through an expansive reading of Right to Life and Liberty (Para 77). The court also further proceeds to observe that Right to Privacy is an essential component of the Right to Life envisaged by Article 21. It held that however this right is however not absolute and maybe lawfully restricted for prevention of crime, disorder or protection of health or morals, or protection of rights and freedom of others. The Bench appreciating the judgements of other jurisdictions, relying on the view expressed in Jagmohan Singh vs State of UP 1973 (1) SCC 20 (para 13, 14), regarding abolition of capital punishment in India held that capital

punishment considering the conditions in India cannot risk the experiment of abolition of capital punishment. The harassment, blackmail and torture of same-sex partners were to be considered by the Legislature, judging the desirability of Section 377, IPC (Para 77).

(F) <u>Legislative Wisdom</u>

(a) The Hon'ble Delhi High Court clarified Section 377 till Parliament choose to amend the law to remove the great deal of confusion. This court in Suresh Kumar Koushal Judgment also felt that the parliament had to amend section 377 IPC if desired so.

(b) Parliament declined to pass the Private Bill to amend Sec 377 IPC

After the Koushal judgment, private bills were introduced in the Parliament which failed reflecting that it was not the will of the constitutional democracy. – It is pertinent to note that post *Suresh Kumar Koushal* judgement, private bills were introduced in Parliament to strike down Section 377 IPC and to further the cause of the LGBTQI population. However these bills were defeated and therefore it is amply clear that India as a nation is well aware of the alternative lifestyle as prescribed by the LGBTQI community. **(Ref. Private Bill in Parliament Pg. 126 – Compilation)**

(c) *State Legislature in its wisdom never amended Sec 377 IPC in the manner required by the Petitioner*.

IPC falls under the Concurrent List of the VIIth Schedule of the Constitution of India. Thus States were empowered to make amendments but States have not done so. Interestingly none of the States are impleaded in this petition and are not being heard in the case to strike down Sec 377 IPC. The States are the actual wing of their executive which looks after police, law and order.

(G) **<u>Petitioners through this petition are seeking Judicial Legislation which is not permissible according to settled law.</u>**

***P. Ramachandra Rao v. State of Karnataka, (2002) 4 SCC 578*, at page 602:** (5 Bench)

Para 25: The primary function of the judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation. Patrick Devlin in The Judge (1979) refers to the role of the Judge as law-maker and states that there is no doubt that historically, Judges did make law, at least in the sense of formulating it. Even now when they are against innovation, they have never formally abrogated their powers; their attitude is: "We could if we would but we think it better not." But as a matter of history, did the English Judges of the golden age 601 make law? They decided cases which worked up into principles. The Judges, as Lord Wright once put it in an unexpectedly picturesque phrase, proceeded "from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science". The golden age Judges were not rationalisers and, except in the devising of procedures, they were not innovators. They did not design a new machine capable of speeding ahead; they struggled with the aid of fictions and bits of procedural string to keep the machine on the road.

***26.** Professor S.P. Sathe, in his recent work (year 2002) Judicial Activism in India — Transgressing Borders and Enforcing Limits, touches the topic "Directions: A New Form of Judicial Legislation". Evaluating legitimacy of judicial activism, the learned author has cautioned against court "legislating" exactly in the way in which a legislature legislates and he observes by reference to a few cases that the guidelines laid down by court, at times, cross the border*

of judicial law-making in the realist sense and trench upon legislating like a legislature.

"Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court." (p. 242).

"In a strict sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law … through directions … is not a legitimate judicial function." (p. 250).

27. *Prescribing periods of limitation at the end of which the trial court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused, and further, making such directions applicable to all the cases in the present and for the future amounts to legislation, which, in our opinion, cannot be done by judicial directives and within the arena of the judicial law-making power available to constitutional courts, howsoever liberally we may interpret Articles 32, 21, 141 and 142 of the Constitution. The dividing line is fine but perceptible. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and*

fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature. Binding directions can be issued for enforcing the law and appropriate directions may issue, including laying down of time-limits or  *chalking out a calendar for proceedings to follow, to redeem the injustice done or for taking care of rights violated, in a given case or set of cases, depending on facts brought to the notice of the court. This is permissible for the judiciary to do. But it may not, like the legislature, enact a provision akin to or on the lines of Chapter XXXVI of the Code of Criminal Procedure, 1973.*

(H) Courts cannot add/delete any new words into a Statute

The Petitioners are making an attempt to impress upon this Hon'ble Court to introduce new words into the statute. The words 'carnal intercourse', 'order of nature' and 'unnatural offences' are dealt with to find new meanings. Courts may not venture to interpret new meanings for statutes which are not provided for by the Legislature. This Hon'ble Court may not make any definition of words used in the section like '***carnal intercourse', 'order of nature'***, or interpret the word '***unnatural offence'***. Because the petitioners had conceded to retain non- consensual sexual acts as unnatural, carnal and against the order of nature. The only distinction they are drawing is of consent. Section 377 which is sought to be read down after the granting of the prayers of the Petitioner should be good enough to prosecute non-consensual same sex relations. In other words, the Petitioners have sought a declaration of offence on the basis of consent.

It is pertinent to note that Consent and without consent are not mentioned in the plain reading of Section 377. The Court thus should not make an artificial distinction because if the court defines any of these, it will actually water down a non-consensual act under Section 377 IPC.

CASE LAWS

***Supreme Court Women Lawyers Assn. (SCWLA) v. Union of India, (2016) 3 SCC 680*:** (Just. Deepak Mishra)

Para 5. At the very outset, we must make it clear that the courts neither create offences nor do they introduce or legislate punishments. It is the duty of the legislature. The principle laid down in *Vishaka case*[1] is quite different, for in the said case, the Court relied on the International Convention, namely, "Convention on the Elimination of All Forms of Discrimination against Women" especially articles pertaining to violence and equality in employment and further referred to the concept of gender equality including protection from sexual harassment and right to work with dignity and on that basis came to hold that in the absence of enacted law to provide for effective enforcement of the basic human right of gender equality and guarantee against the sexual 684harassment and abuse, more particularly against sexual harassment at work places, guidelines and norms can be laid down in exercise of the power under Article 32 of the Constitution, and such guidelines should be treated as law declared under Article 141 of the Constitution.

The following passage from the said authority makes the position clear: (SCC p. 251, para 14)

1. "*14*. … The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."

We have referred to the said passage from *Vishaka case*[1] as it is clear that the Court has clearly taken note of

the constitutional silence or constitutional abeyance and dealt with the constitutional obligation to protect the right of women at the workplace. The Constitution Bench in *Manoj Narula* v. *Union of India*[3], while dealing with the said principle, has observed: (SCC pp. 45-46, para 65)

"*65*. … The said principle is a progressive one and is applied as a recognised advanced constitutional practice. It has been recognised by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest. Liberalisation of the concept of locus standi for the purpose of development of public interest litigation to establish the rights of the have-nots or to prevent damages and protect environment is one such feature. Similarly, laying down guidelines as procedural safeguards in the matter of adoption of Indian children by foreigners in *Laxmi Kant Pandey* v. *Union of India*[4] or issuance of guidelines pertaining to arrest in *D.K. Basu* v. *State of W.B.*[5] or directions issued in *Vishaka* v. *State of Rajasthan*[1] are some of the instances."

Para 7. In the case at hand, the legislature has enacted the law and provided the punishment and, therefore, we cannot take recourse to the *Vishaka*[1] principle. There is no constitutional silence or abeyance.

Para 8. In *Sakshi*[2], the Court was dealing with a public interest litigation filed by the petitioner Association to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, in particularly those who are victims of any kind of sexual abuse and/or harassment, violence or any kind of atrocity or violation. The Court took note of various statutory provisions and the constitutional command, referred to the 685international conventions, pronouncement in *S. Gopal Reddy* v. *State of A.P.*[6] and the report of the Law

Commission, and opined as follows: (*Sakshi case*[2], SCC p. 545, para 34)

"*34*. The writ petition is accordingly disposed of with the following directions:

(1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(*i*) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(*ii*) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(*iii*) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

These directions are in addition to those given in *State of Punjab* v. *Gurmit Singh*[7]."

We shall refer the said authority at a later stage, but suffice to say here that the Court neither proceeded to legislate nor did it provide for a punishment.

Para 14: This Court cannot provide a higher punishment. It can only suggest to the legislature. We are absolutely conscious that IPC provides punishment for the offence of rape. There can be no doubt that a girl child is a minor but may be a time has come where a distinction can be drawn between the girl children and the minor, may be by fixing the upper limit at 10 for the girl children. We are

> disposed to think so as by that age, a child, a glorious gift to mankind, cannot conceive of any kind of carnal desire in man. Once she becomes a victim of such a crime, there is disastrous effect on her mind. The mental agony lasts long. Sorrow and fear haunt forever. There is need to take steps for stopping this kind of child abuse and hence, possibly there is a need for defining the term "child" in the context of rape and thereafter provide for more severe punishment in respect of the culprits who are involved in this type of crime. In the light of the said decision, we part with the suggestion with the fond hope that Parliament would respond to the agony of the collective, for it really deserves consideration. We say no more on this score.

Further in *Sakshi v. Union of India, (2004) 5 SCC 518*, at page 524:

Para: This writ petition under Article 32 of the Constitution has been filed by way of public interest litigation, by Sakshi, which is an organisation to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, in particular 525those who are victims of any kind of sexual abuse and/or harassment, violence or any kind of atrocity or violation and is a violence-intervention centre. The respondents arrayed in the writ petition are: (*1*) Union of India; (*2*) Ministry of Law and Justice; and (*3*) Commissioner of Police, New Delhi. The main reliefs claimed in the writ petition are as under:

(*A*) Issue a writ in the nature of a declaration or any other appropriate writ or direction declaring inter alia that "sexual intercourse" as contained in Section 375 of the Indian Penal Code shall include all forms of penetration such as penile/vaginal penetration, penile/oral

penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration.

(*B*) …….

(C) ……

"The petition is thus restricted to a declaratory relief and consequential directions."

Para 19: It is well-settled principle that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute. It is equally well settled that a statute enacting an offence or imposing a penalty is strictly construed. The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear. (Justice G.P. Singh: *Principles of Statutory Interpretation*, pp. 58 and 751, 9th Edn.)

35. The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and [546]rape are increasing at an alarming speed and appropriate legislation in this regard is, therefore, urgently required. *We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.*

Also in *Union of India v. Deoki Nandan Aggarwal, 1992 Supp (1) SCC 323*,

14. We are at a loss to understand the reasoning of the learned Judges in reading down the provisions in paragraph 2 in force prior to November 1, 1986 as "more than five years" and as "more than four years" in the same paragraph for the period subsequent to November 1, 1986. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the constitutional harmony and comity of instrumentalities. Vide *P.K. Unni* v. *Nirmala Industries*[4], *Mangilal* v. *Suganchand Rathi*[5], *Sri Ram Ram Narain Medhi* v. *State of Bombay*[6], *Hira Devi (Smt)* v. *District Board, Shahjahanpur*[7], *Nalinakhya Bysack* v. *Shyam Sunder Haldar*[8], *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha*[9], *G. Narayanaswami* v. *G. Pannerselvam*[10], *N.S. Vardachari* v. *G. Vasantha Pai*[11], *Union of India* v. *Sankal Chand Himatlal Sheth*[12] and *CST* v. *Auriaya Chamber of Commerce, Allahabad*[13]. Modifying and altering the

scheme and applying it to others who are not otherwise entitled to under the scheme, will not also come under the principle of affirmative action adopted by courts sometimes in order to avoid discrimination. If we may say so, what the High Court has done in this case is a clear and naked usurpation of legislative power.

R.M.D. Chamarbaugwalla v. Union of India, 1957 SCR 930 : AIR 1957 SC 628 (Five Bench)

That being the position in law, it is now necessary to consider whether the impugned provisions are severable in their application to competitions of a gambling character, assuming of course that the definition of "prize competition" in Section 2(*d*) is wide enough to include also competitions involving skill to a substantial degree. It will be useful for the determination of this question to refer to certain rules of construction laid down by the American courts, where the question of severability has been the subject of consideration in numerous authorities. They may be summarised as follows:

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide *Corpus Juris Secundum*, Vol. 82, p. 156; *Sutherland on Statutory Construction*, Vol. 2 pp. 176-177.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide *Cooley's Constitutional*

Limitations, Vol. I at pp. 360-361; *Crawford on Statutory Construction*, pp. 217-218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Vide *Crawford on Statutory Construction*, pp. 218-219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; (Vide *Cooley's Constitutional Limitations*, Vol. I, pp. 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

6. <u>If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation.</u> Vide *Sutherland on Statutory Construction*, Vol. 2, p. 194.

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide *Sutherland on Statutory Construction*, Vol. 2, pp. 177-178.

(I) **<u>Principle of Imminent State Interest</u>**:

There is a compelling state interest of public health. Controlling of the diseases of AIDS and other diseases will become a major issue and once Section 377 is decriminalised the propensity of spreading of their disease even as per the petitioners is very high.

(Refer to the arguments on the amicus brief of ***Lawrence vs Texas. Pg.)***

J. **<u>Homosexual Marriages as a consequence of a decriminalisation is not approved by European Court of Human Rights</u>**

Refer Case Law: Gas& Dubois Vs. France decided on 15.06.2012 (Pg. 174-1997 Compilation)

K. **<u>Harassment & Criminal Prosecution</u>**

Section 377 cannot be used against as stated by the petitioner who are same sex partners. As the declaration is sought for same sex with consenting adults out of the purview of Sec 377 IPC, in a consenting act there is no complainant thus there cannot be a prosecution. <u>As on date it is cognizable and non-bailable as per First Schedule of the CrPC,1973. The only reading down that can be done is to make it non- cognizable and bailable to take away the fear of harassment of same sex couples by the police</u>. The Union of India in the Delhi High Court, Naz Foundation Case filed a counter-affidavit seeking retention of section 377 IPS. Para 9 at page 152 of the counter-affidavit by Ministry of Home Affairs reads as under:

A perusal of cases decided under Section 377 shows that it has only been applied on a complaint of a victim and there are no instances of it being used arbitrarily or being applied to situation its terms do not naturally extend to. Section 377 has been applied to cases of assault where bodily harm is intended or caused and deletion of the said Section can open flood gates of

delinquent behaviour and be misconstrued as providing unbridled license for the same.

L. **Cascading Effects on the Existing Law** :

Decriminalization of Sec 377 opens up a floodgate of social issues which the legislative domain is unable to accommodate.

a. Right to Intimacy thus Right to Marriage – It is an attempt to redefine the institution of marriage which has existed since time immemorial. Same- sex marriages are social experiments with unpredictable outcomes. Marriage in India is not a civil marriage solemnised by the State but is purely religious and cultural ceremonies backed by Vedas, holy texts like Bible and Quran. Therefore Indian society will never have a legal ecosystem to cater to same-sex relationships unless the Legislature does so.A striking down or repeal of Sec 377 IPC should not leave a legislative vaccum. The legislature is aware about the social needs of the people guaranteed by Constitutional democracy as to who can make a final decision on this issue of Section 377.

b. The following laws are likely to suffer a backlash in the event of decriminalizing Section 377.

i. **Section 32 (d) Parsi Marriage and Divorce Act 1936** – 32.Grounds for divorce.—Any married person may sue for divorce on any one or more of the following grounds, namely:—… (d) that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an ***unnatural offence***: Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years after the plaintiff came to know of the fact;

ii. **Section 27 (i), Special Marriage Act:-** 27. Divorce.—1[

(1)] Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent—

(i) that her husband has, since the solemnization of the marriage, been guilty of rape, ***sodomy*** or bestiality;

c. Section 10(2) in THE INDIAN DIVORCE ACT, 1869

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, ***sodomy*** or bestiality.]

d. **Section 13(2) in The Hindu Marriage Act, 1955**

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, ***sodomy*** or [23][bestiality; or]

(iii)If sodomy is treated as a part of the Right to Life (Art. 21) even penal provisions prohibiting and prosecuting prostitution which is done by consenting adults in private would be arbitrary and absurd. (Immoral Trafficking Act)

M. **Right to have Children** - Right of a Child who is adopted to have a biological family in the warmth of a father, mother is of serious consideration. The child who may have no orientation may be forced to adopt the orientation of their same sex parents. The vulnerable children and adolescents who are in the process of establishing identities and in search of identities are persuaded to different sexual orientations which would be

far from their own biological bodies that are designed for reproduction. Surrogacy as a common platform of child birth will create social imbalance.

N. **<u>Right to Religious Freedom</u>** – The interveners profess, practice and propagate the tenets of the Holy Bible which teaches them to love homosexuals as a people but condemn homosexuality as a lifestyle. The Book of Genesis Chapters 18 and 19 describe an event regarding God pouring His judgement on Sodom and Gomorrah.

(2) In Leviticus Chapter 18.v. 22 it is said– "*Do not lie with a man as one lies with a woman"*.

(3) In Romans Chapter 1.v. 24-27 it is said - ***24*** *"Therefore God gave them over in the sinful desires of their hearts to sexual impurity for the degrading of their bodies with one another.* ***25*** *They exchanged the truth about God for a lie, and worshiped and served created things rather than the Creator—who is forever praised. Amen.* ***26*** *Because of this, God gave them over to shameful lusts. Even their women exchanged natural sexual relations for unnatural ones.* ***27*** *In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed shameful acts with other men, and received in themselves the due penalty for their error."*

(4) And in 1st Corinthians 6:9-20 it says: ***9*** *Or do you not know that wrongdoers will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral nor idolaters nor adulterers nor men who have sex with men*[a] ***10*** *nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God.* ***11*** *And that is what some of you were. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God.*

Sexual Immorality

12 "I have the right to do anything," you say—but not everything is beneficial. "I have the right to do anything"—but I will not be mastered by anything. 13 You say, "Food for the stomach and the stomach for food, and God will destroy them both." The body, however, is not meant for sexual immorality but for the Lord, and the Lord for the body. 14 By his power God raised the Lord from the dead, and he will raise us also. 15 Do you not know that your bodies are members of Christ himself? Shall I then take the members of Christ and unite them with a prostitute? Never! 16 Do you not know that he who unites himself with a prostitute is one with her in body? For it is said, "The two will become one flesh."[b] 17 But whoever is united with the Lord is one with him in spirit.[c]

18 Flee from sexual immorality. All other sins a person commits are outside the body, but whoever sins sexually, sins against their own body. 19 Do you not know that your bodies are temples of the Holy Spirit, who is in you, whom you have received from God? You are not your own; 20 you were bought at a price. Therefore honor God with your bodies.

The State by permitting homosexuality as a norm is preventing the religious beliefs and the right to practice, profess and propagate one's religious teachings. (Refer: Masterpiece Cake Shop Case Pg. 202-259 - Compilation)

O. **Right to Freedom of Speech and Expression** – The Intervenors have to enter into a zone of silence and cannot teach about sin and sinfulness of homosexuality as propounded in the Holy Books including the Bible. The intervenors believe that the abandoning of one's God-given gender is against their teachings.

***In Shayara Bano v. Union of India, (2017) 9 SCC 1*, at page 53 the court held:**

26. *When issues of such nature come to the forefront, the discourse often takes the form of pitting religion against other constitutional rights. I believe that a reconciliation between the*

same is possible, but the process of harmonising different interests is within the powers of the legislature. Of course, this power has to be exercised within the constitutional parameters without curbing the religious freedom guaranteed under the Constitution of India. However, it is not for the courts to direct for any legislation.

54 ***27.*** *Fortunately, this Court has done its part in Shamim Ara[1]. I expressly endorse and reiterate the law declared in Shamim Ara[1]. What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well.*

371. *A perusal of the details pertaining to legislation in India with regard to matters pertaining to "Personal Law", and particularly to issues of marriage and divorce for different religious communities reveals that all issues governed by "Personal Law" were only altered by way of legislation. There is not a singular instance of judicial intervention brought to our notice except a few judgments rendered by the High Courts (for details, refer to Part 6 — Judicial Pronouncements, on the subject of "Talaq-e-Biddat", above). These judgments, however, attempted the interpretative course, as against an invasive* 286 *one. The details depicted above relate to marriage between Christians, Parsis, inter-faith marriages, Muslims and Hindus, including Buddhists, Sikhs and Jains. The unbroken practice during the pre-Independence period, and the post-Independence period, under the Constitution, demonstrates a clear and unambiguous course, namely, reform in the matter of marriage and divorce (which are integral components of "Personal Law") was only introduced through legislation. Therefore, in continuation of the conclusion already recorded, namely, that it is the constitutional duty of all courts to preserve and protect "Personal Law" as a fundamental right, any change thereof, has to be only by legislation under Articles 25(2) and 44, read with Entry 5 of the*

Concurrent List contained in the Seventh Schedule to the Constitution.

P. LAW COMMISSION VIEWS

The Law Commission of India 527Report (No. 42) of 1971, p. 281. While considering whether or not to retain Section 377 IPC, the Commission found as under:

"There are, however, a few sound reasons for retaining the existing law in India. First, it cannot be disputed that homosexual acts and tendencies on the part of one spouse may affect the married life and happiness of the other spouse, and from this point of view, making the acts punishable by law has social justification. Secondly, even assuming that acts done in private with consent do not in themselves constitute a serious evil, there is a risk involved in repealing legislation which has been in force for a long time…. Ultimately, the answer to the question whether homosexual acts ought to be punished depends on the view one takes of the relationship of criminal law to morals. … We are inclined to think that Indian society, by and large, disapproves of homosexuality and this disapproval is strong enough to justify it being treated as a criminal offence even where adults indulge in it in private."

Thus, it is most humbly prayed that Section 377 IPC if required to be amended should be left to the legislative wisdom of the parliament.

MANOJ V. GEORGE
Arguing Counsel for Intervenor

New Delhi
16.07.2018

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

I.A. NO.76790 OF 2018

IN

WRIT PETITION (S) (CRIMINAL) NO: 76 OF 2016

IN THE MATTER OF:

NAVTEJ SINGH JOHAR & ORS. …PETITIONERS

VERSUS

UNION OF INDIA, MINISTRY OF LAW
AND JUSTICE, SECRETARY ....RESPONDENTS

WRITTEN SUBMISSIONS

BY ADV.MANOJ V GEORGE ON BEHALF OF APOSTOLIC ALLIANCE OF CHURCHES AND THE UTKAL CHRISTIAN COUNCIL-ORIGINAL RESPONDENTS IN CURATIVE PETITION 88-102/2014 AS RESPONDENT NOs.16 &18