

IN THE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) NO. 572/2016

CONNECTED WITH

W.P. (CRL) NO. 76/2016, W.P. (CRL.) 88/2018, W.P. (CRL.) 100/2018,
W.P. (CRL.) 101/2018, W.P. (CRL.) 121/2018

IN THE MATTER OF:

DR. AKKAI PADMASHALI & ORS.

...PETITIONERS

VERSUS

UNION OF INDIA & ANR.

...RESPONDENTS

WRITTEN ARGUMENTS OF JAYNA KOTHARI -

COUNSEL FOR THE PETITIONERS

Summary of Arguments

- I. Section 377 has been used historically, in a disproportionate manner against transgender persons
 1. Section 377 and Transgender Persons
 2. The Criminal Tribes Act
 3. Other Criminal legislations and Presumption of Criminality under Sec. 377
- II. Section 377 violates Article 14 of the Constitution
 1. Formal and Substantive Equality
- III. Section 377 amounts to Sex discrimination under Article 15
 1. NALSA and the inclusion of gender identity in Article 15
 2. Comparative Jurisprudence on inclusion of gender identity within sex discrimination
 3. Sex discrimination would also include gender non-conformity and sex stereotyping:
- IV. Section 377 obstructs the enjoyment of the freedom speech and expression under Article 19(1)(a).
 1. NALSA
 2. Yogyakarta Plus 10 Principles:
- V. Section 377 violates the right to autonomy, privacy, & dignity under Article 21.
 - i. Right to Life and Dignity includes the right to gender identity
 - ii. Right to Privacy and Dignity
 - iii. Yogyakarta Principles on Dignity

I. Section 377 has been used historically, in a disproportionate manner against transgender persons

1. Section 377 and Transgender Persons

1.1 Section 377 of the IPC states as follows:

377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 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.

1.2 Transgender persons are people whose gender identity is different from the sex assigned to them at birth. Some transgender persons identify themselves as male or female, whereas some other identify themselves as transgender. People who are intersex can have many types of intersex conditions, who are born with XY chromosomes but have female genitals and secondary sex characteristics or with XX chromosomes and no uterus or have external genitalia that is not clearly male or female. Due to their adoption of different gender identities, transgender persons have been ostracized, criminalized and subjected to severe violence.

1.3 Transgender persons have been criminalized historically by Section 377 and other criminal legislations. They were referred to as 'eunuchs' under colonial legislations.

2. The Criminal Tribes Act:

2.1 The earliest legislation referring to them was the Criminal Tribes Act 1871 (“Act”) which branded a number of marginalized population groups as innately criminal and made elaborate arrangements for their surveillance. The Criminal Tribes Act entailed registration of all members of notified tribes irrespective of their criminal precedents and imposed restriction on their movements. “Eunuchs” or transgender persons were specifically included as a criminal group.

2.2 The Preamble of the Act states that it is “An Act for the Registration of Criminal Tribes and Eunuchs.” Part II of the Act deals with “Eunuchs” and Section 377 of the IPC. It states in Section 24 that the local government shall maintain a register of the names and residences of all eunuchs who are reasonably suspected of kidnapping or castrating children, or of committing offences under Section three hundred and seventy seven of the Indian Penal Code, or of abetting the commission of any of the said offences.

2.3 “Eunuchs” were defined as persons of the male sex who admit themselves or on medical inspection clearly appear, to be impotent. In common parlance, these were transwomen – or persons who were born male but identified as women and had feminine characteristics, or transwomen.

2.4 It goes on to provide in Section 26, that any “eunuch” who appears dressed or ornamented like a woman in a public street or place, or in any other place, who dances or plays music or takes part in any public exhibition in a public street or place or for hire in a private house may be arrested without warrant and shall be punished with imprisonment for a term extending to two years. Section 27 provides that any ‘eunuch’ who has in his charge or keeps in his house any boy who has not completed the age of sixteen years shall be punished with imprisonment for a term, which may extend to two years. Section 29 states that no ‘eunuch’ shall be capable of being or acting as a guardian to any minor, of making a gift, of making a will or of adopting a son.

2.5 In this manner, transgender persons were criminalized as a group, irrespective of whether they had committed crimes or not. As a class, they were suspected for having committed offences under Section 377. Their cross-dressing, dancing or even appearing in public in female clothes or having female mannerisms, was criminalized. They were not deemed to have legal capacity for carrying out routine property transactions such as making a will or a gift or to have a family. Their fundamental freedoms were taken away and they were not considered as full human beings. The Criminal Tribes Act 1871 was repealed in 1949. However, Section 377 continued to remain on the statute books.

2.6 Even the earliest cases of Section 377 were registered against transgender persons. In the case of *Queen Empress v. Khairati*, (1884) ILR 6 All 2014 a person was charged and tried for an unnatural offence under section 377 and convicted without any proof or particulars of the charge and the only facts against him were that he habitually wore women's clothes. The conviction was held to be not sustainable.

3. Other Criminal legislations and Presumption of Criminality under Sec. 377

3.1 There were other criminal legislations where provisions similar to the Criminal Tribes Act were retained. The Andhra Pradesh (Telangana Area) Eunuchs Act 1329F and Section 36A of the Karnataka Police Act 1963 are examples. Both these legislations contain language identical to the Criminal Tribes Act, stating that the government shall maintain a register of all 'eunuchs' ...who are reasonably suspected of committing unnatural offences or abetting the commission of the said offences. These unnatural offences are carnal intercourse against the order of nature, under section 377 of the IPC. Section 36A of the Karnataka Police Act was amended in 2016 to remove the word 'eunuchs' from the Section. The Andhra Pradesh (Telangana Area) Eunuchs Act 1329F is currently under challenge in W.P. No 44 / 2018 pending before the High Court of Andhra Pradesh and Telangana in Hyderabad.

3.2 Since historically transgender persons have been suspected of committing offences under Section 377, this presumption of criminality against the transgender community has persisted with the continued presence of Section 377 in the IPC. Even without committing offences, transgender persons are charged with Section 377. Even where it is not used to register FIRs, Section 377 is an ever-present ideological and physical threat in the lives of particularly transgender persons, whose livelihood comes from the street and in public places, where it forms part of the arsenal for police harassment of hijras and kothis.

3.3 There are many documented reports of violence against the transgender community by the police: The Report of the Ministry of Social Justice and Empowerment, (2014) Report of the Expert Committee on the Issues relating to Transgender Persons, the PUCL Report, the India Exclusion Report, among others.

II. Section 377 violates Article 14:

1. Formal and Substantive Equality

1.1 Section 377 is a serious violation of the right to equality and non-discrimination guaranteed under Article 14 of the constitution to transgender persons. Article 14 of the constitution reads: The State shall not deny to any

person equality before the law or the equal protection of the laws within the territory of India.” Transgender persons are in fact viewed as ‘non-persons’, with no rights to work, to use a public bathroom or even walk down the street in safety. People whose gender identities and gender expression do not conform to their assigned birth sex are not even seen to count as humans or persons, who can seek the protection of equality. Often dehumanizing arguments are used that transgender persons cannot be classified as either male or female and therefore, do not fall into a protected category.

1.2 Section 377 may seem to comply with the requirement of formal equality since the Section is facially gender neutral and seems to be and related to ‘acts’ against the order of nature. However it does not comply with substantive equality as it is used mainly against the transgender community, who are visible and whose non-conforming gender identity is obvious in public spaces. Section 377 is targeted against transgender persons even when they have not committed any offence, only based on the centuries of stigma and presumption of criminality against them that they are committing acts under Section 377, based on their appearance, mannerisms and gender expression and thus treats them unequally. It also treats them unequally as it regards their acts of intimacy to be

'against the order of nature' which presumes that only penile-vaginal sexual intercourse to be in the order of nature. Transgender persons who have not had gender re-assignment surgery or those who have had partial reassignment would fall under the category of having carnal intercourse against the order of nature while having consensual sexual relations with their partners and this amounts to manifest arbitrariness.

1.3 Prof. Sandra Fredman has expounded on the concept of substantive equality in her book "Human Rights Transformed: Positive Rights and Positive Duties" (2008 OUP Oxford) proposes a four dimensional approach. According to her approach, substantive equality should aim to a.) redress disadvantage, b.) address stigma, stereotyping and prejudice, c.) enhance voice and participation and d.) accommodate difference and achieve structural change. This 4-pronged conception of the right to equality is one that is responsive to those who are disadvantaged, excluded or ignored. Using the framework of substantive equality in this manner, Section 377 would have to be declared unconstitutional and by doing so, it would result in removing the stigma, stereotypes and disadvantages faced by the transgender community for their gender non-conforming identity, would enhance their voice and participation in society and accommodate their difference

and achieve structural change in public and private life for transgender persons.

III. "Sex" under Article 15 includes gender identity and Section

377 amounts to a violation of Article 15:

1. NALSA and the inclusion of gender identity in Article 15

1.1 In *NALSA v. Union of India*, this Hon'ble Court held that 'sex' in Article 15 would include 'gender' and gender identity. It held:

"...Both gender and biological attributes constitute distinct components of sex. The biological characteristics of course include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of sex under Article 15 therefore includes discrimination on the ground of gender identity." [Para 66]

1.2 The expression 'sex' used in Articles 15 is not just limited to the biological sex of male or female but intended to discrimination based on gender identity and thus include transgender persons. If sex discrimination is understood to include 'gender' and 'gender identity' then the impact of Section 377 on transgender persons who are targeted and criminalized by this section, only because of their gender identity not conforming to their biological sex, is due to sex discrimination based on Article 15, and is unconstitutional.

1.3 Under *NALSA*, while a person has the right to self-identify herself as a woman even without sex reassignment surgery,

she would be hit by Section 377 for having any consensual sexual intercourse with a man, as it would not fall within the definition of penile-vaginal intercourse. This is discrimination on the ground of sex under Article 15.

2. Comparative Jurisprudence on inclusion of gender identity within sex discrimination:

2.1 Even comparative jurisprudence shows that discrimination on the basis of gender identity has been held to be sex discrimination. Many equality legislations in other countries include “gender identity” within sex discrimination. They are as follows:

- (i) The *Canadian Human Rights Act 1985* was amended on 9 February 2011 to include ‘gender identity’ and ‘gender expression’ as prohibited grounds of discrimination.
- (ii) The *Equality Act 2010* in the United Kingdom prohibits discrimination on grounds of ‘sex’ and ‘gender reassignment’. This is defined to include a person who is, proposes to change, or is changing their sex and a transgender person would be able to receive protection from discrimination.
- (iii) The *Human Rights Act 1993* (New Zealand) prohibits discrimination on the grounds of ‘sex’ or ‘sexual orientation’ and the Solicitor General issued public advice on 2 August 2006 that sex discrimination covers transgender people.

2.2 In May 2012, the Equal Employment Opportunity Commission of the United States delivered a landmark ruling in *Macy vs. Holder* EE-CA-3054, recognizing that denial of employment to a transgender woman on account her gender identity would amount to sex discrimination under Title VII of the Civil Rights Act, 1964.

3. Sex discrimination would also include gender non-conformity and sex stereotyping:

3.1 An individual who experiences discrimination due to his or her perceived gender nonconformity as in the case of section 377 in the manner in which impacts the transgender community, should also be understood to be sex-based discrimination under Article 15.

3.2 The US Supreme Court in the case of Price Waterhouse v. Hopkins, held that a person who has been discriminated against based on his or her nonconformity to gender stereotypes would amount to sex discrimination

4. Section 377 and Violation of Article 19 – Right to Freedom of Expression:

1. NALSA protects freedom of expression of one’s self-identified gender

1.1 Article 19(1) (a) guarantees the right to freedom of speech and expression. Expression has been held in

NALSA to include one's right to expression of one's self-identified gender. The self-identified gender can be expressed through dress, words, action or behavior or any other form. In *NALSA*, it was observed that

“69...Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. The self-identified gender can be expressed through dress, words, action, or behavior or any other form...”. [para 69]

1.2 This Hon'ble Court has thus held that since gender identity lies at the core of one's personal identity, gender expression and presentation would have to be protected under Article 19(1)(a).

1.3 The Criminal Tribes Act, and other criminal legislations have always criminalized even the gender expression of transgender persons. In the case of transgender persons, their chosen gender identity is outwardly visible through their features, clothes, mannerisms and behavior, which also exposes them criminalization under Section 377. While on the one hand, the freedom of speech and expression under Article 19(1) (a) protects their right to express their self-identified gender, and their gender identity is protected as an inherent part of their right to life, the expression of it makes them vulnerable to arrest under Section 377, as they have been historically criminalized. Thus, the very existence of Section 377 has

a chilling effect on the transgender community, to not express themselves freely, or risk the harm of being arrested.

2. Yogyakarta Plus 10 Principles:

2.1 The Yogyakarta Plus 10 Principles in Principle 33 states

“Everyone has the right to be free from criminalization and any form of sanction arising directly or indirectly from that person’s actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.”

2.2 Section 377, in the manner that it operates against the transgender community, clearly violates their freedom of speech and expression protected under Article 19(1)(a) as it renders them vulnerable to arrest and threats of arrest and compels them to not express their gender identity and gender expression.

IV. Section 377 violates the right to life, dignity and privacy

guaranteed under Article 21:

1. Right to Life and dignity includes the right to gender identity:

1.1 In *NALSA* this Hon’ble Court held that each person’s self identified sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of

self-determination, dignity and freedom and no one shall be forced to undergo medical procedure, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. This Hon'ble Court held:

“The recognition of one’s gender identity lies at the heart of the fundamental right to dignity. Gender constitutes the core of one’s sense of being and as well as an integral part of a person’s identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution.” [para 74]

- 1.2 The right to gender self-determination encompasses the right to *indetermination* and must extend to persons whose gender expressions are not named and not conforming.

2. Right to Privacy and Dignity:

- 2.1 The right to personal liberty and privacy as part of Article 21 has been held to include the right to marry and to decide on one’s intimate relationships. If transgender persons are to have the right to have intimate relationships and even marry as many of them are indeed married, then Section 377 would criminalize them for exercising the right to have sexual and intimate relationships with their partners and the persons they marry. For transgender persons, any sexual intercourse even with their partners would fall within Section 377 as carnal intercourse against the order of nature and be a criminal offence. Transgender persons who do not have gender reassignment would be termed as

having sexual intercourse against the order of nature. This is in violation of their right to life and dignity, as their intimacy and sexual relations with their partners cannot be termed as being 'against the order of nature'.

2.2 If there is a right to gender identity, one cannot be criminalized for expressing it and living in the gender one identifies with. This would include living and having sexual relations with one's partner, and for a transwoman or a transman, having sexual intercourse with a male or female would invariably fall foul of section 377 and be a crime. Section 377 therefore denies transgender persons the right to live with dignity where their most intimate relations are criminalized.

2.3 This was also held by the European Court of Justice in ***P v. S and Cornwall County Council***, Case C-13/94, [1996] IRLR 347 where the Court held that where a person is treated unfavourably due to her gender reassignment, to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard.

2.4 In ***Muhamad Juzaili Bin Mohd Khamis and Others v. State Government of Negeri Sembilan and Others***, Civil Appeal

No. N-01-498-11/2012, the Court of Appeal in Malaysia had a constitutional challenge to Section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) held that, “Any male person who, in any public place wears a woman’s attire or poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringitt or imprisonment for a term not exceeding six months or both.” In this case, the Court relied on the this Hon’ble Court’s rulings on dignity and held, “

“The existence of a law that punishes the gender expression of transsexuals, degrades and devalues persons with GID in our society. As such section 66 directly affects the appellants’ right to live with dignity, guaranteed by Art. 5 (1) by depriving them of their value and worth as members of our society.

We find merit in this argument. As long as section 66 is in force the appellants will continue to live in uncertainty, misery and indignity. They now come before this Court in the hope that they may be able to live with dignity and be treated as equal citizens of this nation. We therefore hold that section 66 is inconsistent with Art. 5 (1) of the Federal Constitution in that the section deprives the appellants of their right to live with dignity.”

- 2.5 A 9 Judge Bench of this Hon’ble Court has held that the right to privacy is a fundamental right granted constitutional protection under Part III of the Constitution. In ***Justice K.S. Puttaswamy (Retd.) & Anr vs. Union of India & Ors.*** (2017) 10 SCC 1, this Hon’ble Court while referring to the reasoning adopted in the decision in ***Suresh Kumar Koushal vs. Naz Foundation*** (2014) 1 SCC 1 this Hon’ble Court observed:

“....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 favorably 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..... [para 144]

....The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called rights" seems to suggest the exercise of a liberty in the grab of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population..."[para 145]

- 2.6 In *Puttaswamy* (supra) this Hon'ble Court has further held held that every individual is entitled to the intimacy and autonomy protected by a privacy right. Elucidating on the essential nature of the privacy right, it has been held that *"298....The intersection between one's mental integrity privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of an individual..."* held that the rights of the LGBT community were inherent in the right to life and constitutes the essence of liberty and freedom.

2.7 This Hon'ble Court in *Shafin Jahan vs. Asokan K.M. & Ors* 2018 SCC OnLine SC 343 has taken the forward the jurisprudence on the right to autonomy over intimate personal choices. Noting that autonomy and liberty are constitutionally recognised rights inherent in each individual, it was observed that the choice of a partner, whether within or outside of marriage, would be one such aspect of personhood over which the individual must have an absolute right. In a concurring opinion delivered by Chandrachud J. it has was held:

“Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognizing them. Indeed, the Constitution protects personal liberty from disapproving audiences. [para 88]

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.....The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage.”[para 93]

2.8 Section 377 in placing a restrictive meaning on sexual activity as permissible under the order of nature and in criminalizing consensual sexual activity between individuals, thus denies them such autonomy over choice of partner to share intimacies with.

2.9 The European Court of Human Rights in the case of *Van Kuck v. Germany*, Application No. 35968/97; (2003) 37

EHRR 51 where the question related to reimbursement of gender reassignment surgery the Court held:

“ ..the concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person....Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world...” [para 69]

3. Yogyakarta Principles on Dignity

- 3.1 The Yogyakarta Principles under Principle 1, state that “All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights. States shall amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of human rights.
- 3.2 They state in Article 2 that States shall repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent and ensure that an equal age of consent applies to both same sex and different sex sexual activity.
- 3.3 Principle 6 of the Yogyakarta principles states that “The right to privacy ordinarily includes the choice to disclose or

or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's body and consensual sexual and other relations with others.

- 3.4 The Yogyakarta Principles have been held in NALSA to be binding and also as per the rulings of this Hon'ble Court in ***Vishaka v. State of Rajasthan and others***, AIR 1997 SC 3011 wherein it was held that international conventions and treaties would be binding where there was a vacuum in municipal law.
- 3.5 Hence under all the above grounds, it is prayed that Section 377 be held to be unconstitutional and in violation of the fundamental rights of the Petitioners.

Place: New Delhi

Date: 11.7.2018

Counsel for the Petitioners