

**IN THE SUPREME COURT OF INDIA
(CRIMINAL ORIGINAL JURISDICTION)
I.A. NO. 6791 OF 2018
IN
WRIT PETITION (CRL.) NO. 76 OF 2016**

IN THE MATTER OF

Navtej Singh Johar and Ors

...*Petitioners*

versus

Union of India and Ors

...*Respondents*

AND IN THE MATTER OF:

Dr. Alok Sarin

...*Intervenor*

**WRITTEN SUBMISSIONS ON BEHALF OF SNR. ADV., MR. CHANDER
UDAY SINGH, FOR, DR. ALOK SARIN, APPLICANT FOR INTERVENTION
(I.A. NO. 6791 OF 2018) IN W.P. (CRL) 76/2016**

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I. Background Of Intervention

1. The Intervenor is a senior psychiatrist, practicing in New Delhi for the last twenty-four years. He is currently, head of psychiatric services at Sitaram Bhartia Institute of Science and Research, New Delhi, a leading multi-specialty hospital in New Delhi. Applicant has been involved in clinical practice, research and teaching for the last two decades.¹

¹The Applicant is an MBBS, and an MD in Psychiatry, from the All India Institute of Medical Sciences, New Delhi. He is a Fellow of the Indian Psychiatric Society,

2. Along with 12 other mental health professionals, the Intervenor had participated in Civil Appeal No. 10972/2009, *Suresh Kumar Koushal v Naz Foundation*.

II. Homosexuality is a normal and natural variant of human sexuality.

- a. Homosexual behaviour has been documented in a variety of cultures and across civilisations². **[FLAG-E]**
- b. Homosexual behaviour has been documented in a variety of animal species³.**[FLAG-E]**
- c. However, before 1973, many mental health professionals reflected societal prejudice in regarding homosexuality as a pathological condition⁴.**[FLAG-E]**
- d. By 1973, the consensus was that homosexual orientation was normal and natural and the American Psychiatric Association's Board of Trustees voted to remove homosexuality from the psychiatric Association's, Diagnostic and Statistical Manual of Mental Disorders.⁵ **[FLAG-E]**
- e. Until 1992, homosexuality was classified as a disorder by the WHO's ICD Guidelines. In 1992, homosexuality as a diagnostic category was removed from the ICD-10 Classification of Mental and Behavioural Disorders.⁶
- f. The Indian Psychiatric Association made the following statement on 2 July, 2018: **[FLAG-B]**

“The IPS recognized same sex sexuality as a normal variant of human sexuality much like heterosexuality and bisexuality. There is no scientific evidence that sexual orientation can be altered by any treatment and that any such attempts may in fact lead to low self-esteem and stigmatization of the person.”

a member of the Indian Medical Association, the World Psychiatric Association, the Indian Association of Private Psychiatry, the Indian Association of Biological Psychiatry, the Indian Association of Social Psychiatry, a corresponding member of the American Psychiatric Association and the International Board Member of the World Association of Psychosocial Rehabilitation

² Amici Curiae brief of the ‘American Psychological Association’, ‘American Psychiatric Association’, ‘National Association Of Social Workers, And Texas Chapter Of The National Association Of Social Workers’, in support of petitioners in John Geddes Lawrence And Tyron Garner V. State Of Texas, in the Supreme Court of the United States, No. 02-102 (*internal page number 6*)

³ Ibid (*internal page number 7*)

⁴ Ibid (*Internal page number 10*)

⁵ Ibid (*Internal Page Number 11*)

⁶ World Health Organization, The International Classification of Mental and Behavioural Disorders, Clinical Descriptions and diagnostic guidelines) (*internal page number 8-11*)

III. The Mental Healthcare Act, 2017, has provided legislative acknowledgement of the scientific consensus that homosexuality is a natural variant of human sexuality.

1. By enacting the *Mental Healthcare Act, 2017*, parliament has provided legislative acknowledgement of the scientific consensus that homosexuality is a natural variant of human sexuality and that LGBT persons need protection against discriminatory treatment. The Mental Healthcare Act, 2017, has, *inter alia*:
 - a. Legislated that sexual orientation is not a mental illness: Section 3 of the act mandates that mental illness is to be determined in accordance with ‘nationally’ or ‘internationally’ accepted medical standards and lists the International Classification of Disease of the World Health Organisation as an ‘internationally’ accepted medical standard. As stated above, The International Classification of Diseases (ICD-10) does not consider non-penovaginal sex between consenting adults either a “mental disorder” or an “illness”.
 - b. Provided for protection against discrimination on the grounds of sexual orientation –
 - i. section 18 (2) stipulates that there shall be no discrimination in the matter of providing access to mental health care and treatment on several listed grounds, including, gender, sex, religion, etc. One of the grounds of discrimination forbidden by section 18 (2) is “sexual orientation”.
 - ii. Section 21 legislates the right to equality and non-discrimination in treating persons with mental illness and sub clause (a) lists forbidden grounds of discrimination. This list includes “sexual orientation”.

IV. Criminalising homosexuality denies LGBT the right to share intimacies with persons of their choice.

- a. The right to share intimacies with persons of one’s choosing is a part of the right to life.⁷
- b. Sexual intimacy is an important part of the development of the self and of the establishment of close relationships.⁸ **[FLAG-E]**
- c. LGBT individuals engage in forms of sexual activity other than oral and anal sex but research shows that anal sex is a primary means of expressing sexual intimacy for gay men. Research also shows that for gay people in particular, oral sex and anal sex provide emotional satisfaction and promote the formation of long-term bonds.⁹ **[FLAG-E]**

⁷ *Shafin Jahan v Asokan K.M.*, (2018) SCCOnLine SC 343, concurring opinion, J. Chandrachud, paragraph 88.

⁸ Amici Curiae brief of the ‘American Psychological Association’, *Supra*, n. 1 (*Internal page number 2*)

⁹ *Ibid.* (*Internal Page number 3*)

- d. Sexual satisfaction in intimate relationships is linked not just with a sense of satisfaction with those relationships but also with a sense of general satisfaction with life.¹⁰ **[FLAG-E]**

V. Criminalising homosexuality has a debilitating effect on the mental health of members of the LGBT community.

- a. Section 377 renders members of the LGBT community vulnerable to blackmail, violence and abuse. Abuse is often from the family, or at the workplace, or at the hands of public authorities such as police, health care workers et cetera.¹¹ **[FLAG-H]**
- b. Section 377 fosters a climate of prejudice in which dubious and discredited practices in the medical health setting, such as electroshock therapy, revulsion therapy et cetera, proliferate¹². This is contrary to International Human Rights Law in relation to sexual orientation and gender identity¹³. **[FLAG-A] & [FLAG-D]**
- c. Research has shown that prejudice against a community decreases with contact with that community. By compelling people to suppress their sexual orientation for fear of discrimination, violence, harassment, and arrest, section 377 reinforces stigma and prejudice¹⁴. **[FLAG-E]**
- d. Section 377 'stigmatises' LGBT by criminalising sexual acts close identified with the group. A stigmatised condition or status is one that is negatively valued by society, fundamentally defines a person's social identity, and disadvantages and this disempowers those who have it.¹⁵ **[FLAG-F]**

¹⁰ Ibid, (**Internal Page number 3**)

¹¹ Vinay Chandra, "Contexts of Distress for LGBT People: A Counsellor's Guide in Arvind Narrain and Vinay Chandran", in Nothing to Fix: Medicalisation of Sexual Orientation and Gender Identity. New Delhi: Yoda Press and SAGE Publications, 2015, (**internal page number 250**) and Vinay Chandran, No need for treatment, :A year after re-criminalization, mental health emerges as an important concern for LGBT youth, Fri, Dec 05 2014, Live Mint

¹² Ketki Ranade, Medical Response to Male Same-sex Sexuality in Western India: An Exploration of 'Conversion Treatments' for Homosexuality, in Nothing to Fix: Medicalisation of Sexual Orientation and Gender Identity. New Delhi: Yoda Press and SAGE Publications, 2015

¹³ 'The Yogyakarta Principles Plus 10', 'Additional Principles And State Obligations On The Application Of International Human Rights Law In Relation To Sexual Orientation, Gender Identity, Gender Expression And Sex Characteristics To Complement The Yogyakarta Principles', as adopted on 10 November 2017, Geneva

¹⁴ Amici Curiae brief of the 'American Psychological Association', Supra, n. 1 (**internal page number 3**)

¹⁵ Amici Curiae brief of the 'American Psychological Association', 'National Association of Social Workers', And National Association of Social Workers Colorado Chapter, as Amici Curiae in support of respondents in Masterpiece Cake Shop Limited and Jack C Phillips v. Colorado Civil Rights Commission, Charlie Craig and David Mullins, In the Supreme Court of the United States No. 16-111

- e. In the US, studies have shown that large numbers of gay men and lesbians experience stigma in the form of violence, discrimination and other negative acts against them.¹⁶ **[FLAG-E]**
- i Sexual orientation bias crimes were the third most common type of hate crimes recorded by the Federal Bureau of Investigation and comprised approximately 18% of all hate crime victims although they constituted only 2%-4% of the adult population.¹⁷ This is despite the fact that much of the violent crime against gay and lesbian people goes unreported.¹⁸ **[FLAG-E]**
 - ii Gay, lesbian, and bisexual high school students were twice as likely as their heterosexual counterparts to be attacked with weapons on school property, and nearly 3 times as likely to say they had not attended school on at least one day during the previous month because they feared they would be unsafe while on their way to work from school.¹⁹ **[FLAG-E]**
 - iii Stigma also results in psychological and physical illness.²⁰ **[FLAG-E]**
 - iv One study in the US found that LGB individuals living in states with constitutional amendments banning gay marriage on the ballot in the 2004-2005 elections experienced increased rates of psychiatric disorders when compared to states that had not.²¹
 - v The US suffers persisting health disparities based on sexual orientation and gender identity.²² **[FLAG-E]**
- f. Professor Dinesh Bhugra, president of the World Psychiatric Association, and a former president of the Royal College of Psychiatrists, called for "radical solutions" to combat the high levels of mental illness among the LGBT population. He described a "clear correlation between political and social environments" and how

¹⁶ Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (*internal page number 10*)

¹⁷ Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (*internal page number 14*)

¹⁸ Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (*internal page number 15*)

¹⁹ Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (*internal page number 16*)

²⁰ Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (*internal page number 20-23*)

²¹ Katie A. McLaughlin et al. "The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations"

²² Amici Curiae brief of the 'American Psychological Association', Supra, n. 14 (*internal page number 23*)

persecutory laws against LGBT people are leading to greater levels of depression, anxiety, self-harm, and suicide.²³ [FLAG-J]

VI. Proscribing homosexual intimacy is arbitrary, unscientific, and perverse.²⁴

VII. Section 377 is motivated by animus towards LGBT.

Note M on Clauses 361 and 362 - which were to later become section 377 of the IPC - of the Draft Penal Code presented by Lord Macaulay reads as follows:

*“Clauses 361 and 362 relate to an **odious class of offences** respecting which it is desirable that as little as possible be said. We leave without comment to the judgment of his Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this **revolting subject**; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.” (Emphasis supplied)*

Self-evidently, this part of the Indian Penal Code was motivated by an irrational *animus* towards those whose sexual choices did not comport with Victorian morals.

VIII. The ‘presumption of constitutionality’ of all laws is undercut in the case of section 377.

- a. The presumption of constitutionality is based on two prongs –
 - i. an assumption that the legislature understands and correctly appreciates the needs of its own people
 - ii. laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds
- b. In the case of section 377, the law was not made by “legislature” and the makers of the law were not making law for their “own people”. Further, section 377 cannot be said to have been directed to problems made manifest by “experience”, or that its discriminations are based on adequate grounds.

IX. Relief.

In light of the fact that the impact of Section 377 travels well beyond arrest and prosecution to harm intimate aspects of the human personality which are entitled to constitutional protection under the Right to Dignity under Article 21, Intervenor joins the petitioners to pray that this Court be pleased to declare that -

- a. Section 377 be read down to exclude consenting sex between adults; and,

²³ https://www.buzzfeed.com/patrickstrudwick/top-psychiatrist-calls-for-radical-solutions-to-address-ment?utm_term=.dax1mnGeY#.st8yVG2wa, accessed on 11 July 2018

²⁴ *Natural Resources Allocation, in Re, Special Reference Number 1 of 2012*, (2012) 10 SCC 1.

- b. Discrimination on the grounds of sexual orientation and gender identity is prohibited.

New Delhi
11 July 2018

Snr. Adv. Chander Uday Singh