

**IN THE SUPREME COURT OF INDIA**  
**CRIMINAL ORIGINAL JURISDICTION**

**CRL.M.P. NO. \_\_\_ of 2018**

**IN**

**Writ Petition (Criminal) No(s). 76/2016**

**IN THE MATTER OF**

**NAVTEJ SINGH JOHAR AND ORS.**

**... PETITIONERS**

**VERSUS**

**UNION OF INDIA**

**... RESPONDENT**

**AND IN THE MATTER OF:**

**VOICES AGAINST 377**

**...APPLICANT**

**PAPER BOOK**

**ALONG WITH**

**AN APPLICATION FOR IMPLEADMENT IN W.P. No. 76/2016**

**(FOR DETAILED INDEX, KINDLY SEE INSIDE)**

**Advocate for the Applicant : Pukhrambam Ramesh Kumar**

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**AND IN THE MATTER OF:**

Voices Against 377,  
Through its Authorised Signatory  
11, Mathura Road,  
First Floor, Jangpura B,  
New Delhi – 13

APPLICANT

**AN APPLICATION FOR IMPLEADMENT**

To,  
The Hon'ble Chief Justice of India and  
His Companion Justices of the Supreme Court of India

The Humble Application of the  
Applicant abovenamed

**Most Respectfully Showeth:**

- 1) That the present Petition is pending before this Honble Court.
- 2) That the applicants are a coalition of twelve associations working on issues of Child Rights, Women's Rights, Human Rights, Health concerns, as well as the Rights of same sex desiring people including those who identify as Lesbian, Gay, Bisexual, Transgender, Hijra and Kothi persons (hereinafter LBGT persons). Over the years, in the course of their work, constituent members of the applicant coalition realized the seriously harmful effects of section 377 has on the lives of LBGT persons.
- 3) That the applicants were Respondent 8 in *Naz Foundation Versus Union of India*, WP (C) 7451 of 2001. The applicants supported the petitioners in

those proceedings. Those proceedings ended in the judgement of the Hon'ble Delhi High Court dated 02 July 2009; the Hon'ble High Court granted the challenge mounted by the petitioners and the present applicants and read-down section 377 of the Indian penal code. That decision of the Hon'ble Delhi High Court was challenged before this Hon'ble Court, and by judgement dated 11 December 2013, (SLP (C) 15436/09, *Suresh Koushal And Another vs Union of India And Others*), this Hon'ble Court was pleased to reverse the Delhi High Court's decision. Applicants filed a review petition impugning this Hon'ble Court's judgement (Review Petition (Civil) 222-233 of 2014); Review petition was rejected vide order dated 28 January 2014. Applicants filed Curative petition against that order (Curative Petition No. 108-119 of 2014) and vide order dated 02 February 2016, this Hon'ble Court was pleased to direct that the petitions be placed before a Constitution Bench constituting five Judges of this Court.

- 4) That Constitution bench has not yet been constituted in terms of this Hon'ble Court's order dated 02 February 2016.
- 5) That having participated in the proceedings which challenged the constitutionality of section 377 of the IPC from its original stage – i.e. before the Hon'ble Delhi High Court - the applicants seek to intervene in these proceedings in support of *Navtej Johar's* petition challenging the constitutionality of section 377.
- 6) That the applicants seek to be heard in the present petition in support of the petitioners' prayers. In addition to the issues already presented in the writ petition, the applicants seek to place before this Hon'ble Court the following further issues and material for consideration:
  - a) The judgment in *Justice K.S. Puttaswamy (Retd.) And Others vs Union of India And Others*, ('*Justice K.S. Puttaswamy*', hereafter) by finding that 'sexual orientation' was an integral aspect of the right to privacy, dignity, and autonomy, and further finding that discrimination on the basis of sexual orientation affected fundamental rights under Articles 14 and 15(1) of the Constitution, has rendered section 377, in so far as it applies to consenting adult conduct, unquestionably unconstitutional. *Justice K.S. Puttaswamy* was rendered by this Hon'ble Court after the present petition – i.e.,

*Navtej Johar And Others vs Union of India And Others*, was filed.

- b) *Justice K.S. Puttaswamy*, by its finding that “decisional autonomy” is one of the constituent elements of the fundamental right to privacy has rendered section 377, in so far as it applies to consenting adult conduct, unquestionably unconstitutional.
- c) *Justice K.S. Puttaswamy*, held that hostile discrimination of the kind condoned by this Hon’ble Court’s earlier judgement in *Suresh Kumar Kaushal vs Union of India*, was “constitutionally impermissible” because of the “chilling effect” on the exercise of fundamental rights. And further held that such discrimination “poses a grave danger to the unhindered fulfilment of one’s sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime.” Has rendered section 377 in so far as it applies to consenting adult conduct, unquestionably unconstitutional.
- d) *Justice K.S. Puttaswamy*, has not only removed the foundations upon which this Hon’ble Court had earlier upheld the constitutional validity of section 377 in *Koushal*, but also provided an independent set of arguments that lead to only one possible conclusion: that the Hon’ble High Court of Delhi’s analysis of Section 377 of the Indian Penal Code in light of Articles 14, 15(1) and 21 was correct, and consequently, that judgment ought to be resurrected by this Hon’ble Court.
- e) ‘Dignity’ as an aspect of the Right to Liberty and as explicated in the judgement of this Hon’ble Court in *Justice K.S. Puttaswamy (Retd.) And Others vs Union of India And Others*, renders section 377 unconstitutional. A vital aspect of an individuals’ identity is his or her sexual orientation. The development of intimate relationships is a crucial facet in the enjoyment of life and to deny any individual his or her right to physical intimacy is an egregious affront to the person’s Human Rights and Dignity.

- f) Section 377, in so far as it applies to consenting adults does not meet the three-fold requirement stipulated in *Justice K.S. Puttaswamy (Retd.) Vs Union of India And Others* as pre-requisite for intrusions into the privacy right to be valid (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.
- g) There are no “legitimate concerns of the state”, no “legitimate state aim”, to justify the intrusion on the right to privacy that is section 377 (conclusion 6, at page 265 of *Justice K.S. Puttaswamy (Retd.) Vs Union of India And Others*, (W.P. (C) No. 494/2012)
- h) Section 377, without a suitable declaration, stigmatizes homosexuals and forces them to live a life of celibacy or condemns them to the status of ‘un-apprehended felons’. Constitutionally, this cannot be.
- i) There are several documented instances of harassment, torture, rape, extortion, and blackmail of LGBT persons, which are of such a nature as to establish that they are a ‘direct and inevitable’ consequence of Section 377. There have been several incidents that were part of the public record – such as the incidents at Lucknow (2002 and 2006), Bangalore (2004 and 2006), Delhi (2006), Chennai (2006), Goa (2007), Aligarh (2011) - where Section 377 has been used to target LGBT persons. The applicants seek to place material establishing extreme violations of the Fundamental Right to Life and Liberty of the members of the LGBT community, including instances of physical abuse, torture, exploitation and targeting of members of the LGBT community by police and other state authorities. The material includes:
- i. Personal testimonies including the testimony of a Hijra social worker from Bangalore detailing how she was sexually exploited, assaulted, and tortured by the police on 18 June 2004.

- ii. Personal testimony in the form of an affidavit of a gay man who was physically assaulted, sexually abused and raped by the Delhi police on 19 September 2006.
- iii. Custodial torture and sexual abuse leading to the suicide of a hijra person noted in a judgement of the Hon'ble Madras High Court – *Jayalakshmi versus State of Tamil Nadu* (2007) 4MLJ 849
- iv. Personal testimony in the form of an affidavit describing targeting and harassment of Madhumita including the filing of a false case was filed against her under section 377
- v. FIR lodged by the Delhi police in 2006 to establish that section 377 is abused by the police to target even adult women
- vi. Records from a Bombay High Court proceeding of the year 2007 which reveals the use of section 377 even in cases of consensual incidents *Desmond Hope v. State of Goa* (Crim Misc. App No. 55 of 2007)
- vii. 2011 report of the United Nations High Commissioner for Human Rights which explicates and describes how LGBT persons are subject to killing, rape, torture, discrimination and harassment across diverse jurisdictions where provisions such as section 377 remain on the statute book
- viii. Reports of other local and international human rights organisations documenting violence and discrimination against LGBT persons as a result of section 377, such as a report by Human Rights Watch, (a reputed international human rights non-governmental organisation) titled *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India* published in 2002, which highlights the abuse of section 377, IPC.

This material – including affidavits of LGBT persons who have suffered rape, torture, extortion, harassment and discrimination as a result of section 377 - will demonstrate that section 377 is being

used to target, harass and blackmail LGBT persons and that the torture and even rape of LGBT persons is occurring due to the climate of impunity fostered by section 377 IPC.

- j) Section 377 so far as it criminalises adult consensual conduct is also unconstitutional on the grounds of “Manifest arbitrariness”, i.e., it is ‘capricious’ ‘irrational’ and/or ‘without adequate determining principle’, ‘excessive’ and ‘disproportionate’, as explicated in this Hon’ble Court’s decision in *Shayaro Bano vs Union of India*, W.P. (C) 118/2016, @ paras 44-55 of the opinion of R.F. Nariman, J.
- k) Scholarly medical and scientific authority has also established that consensual same sex conduct was not “against the order of nature” and that homosexuality was natural: Homosexuality is not a disorder but is a normal variant of sexual identity; human beings develop ‘sexual orientation’ between middle childhood and early adolescence; sexual orientation is innate and cannot be changed at will; sexual intimacy is a core aspect of human experience and is important to mental health, psychological well-being and social adjustment; treating homosexuality as a disorder has serious consequences for mental health and well-being. The following are a few articles that the applicants seek to place before this Hon’ble Court:
- i. K.K. Gulia and H.N. Mullick” Homosexuality: A Dilemma in Discourse” *Ind. J. Physio Pharmacol.* 2010; 54(1): 5-20
  - ii. *Encyclopaedia of Psychology* (Alan E Kazdin ed., OUP, 2003)
  - iii. Charles E. Roselli & Fred Stormshak “The Neurobiology of Sexual partners preference in rams” *Hormones and Behaviour* 55(2009) 611-620
  - iv. Aisson Abboot “But is it Natural?” *Nature* Vol. 446, 26 October, 2006
  - v. Final Regulatory Impact Assessment: Civil Partnership Act, 2006

- vi. *The Concise Corsini Encyclopaedia of Psychology and Behavioural Sciences* (3<sup>rd</sup>edn. , W. Edward Craighead and Charles B. Nemeroff eds., John Wiley and Sons, Inc., 2004)
  - vii. Amicus Brief of the American Psychological Association filed in *Lawrence v. Texas* 539 US 558 (2003)
  - viii. *William D. Mosher, Anjali Chandra et al, Sexual Behaviour and Selected Health measures: men and Women 15-44 years of Age, United States, 2002* (Centre for Disease Control)
  - ix. Frans B.M. de Waal “Bonobo Sex and Society” *Scientific American* 1995
- l) Scholarly legal authority – such as, articles written by Prof. Dr. Upendra Baxi and Prof. Dr. S.P Sathe, and the 172<sup>nd</sup> Report of the Law Commission - is in agreement that, without a declaration that section 377 should not apply to sexual acts by consenting adults in private, it unconstitutionally infringes the Fundamental Rights to privacy and dignity.
- m) By criminalizing conduct most closely associated with one class of persons, section 377, in effect, criminalizes an entire class of persons for whom the prohibited conduct is the only mode through which intimate bonds are expressed and formed. As such, Section 377 discriminates against LGBT persons as a class and is violative of Article 14.
- n) The test that must be applied in determining the validity of section 377 is the ‘direct and inevitable’ consequence test and not the ‘object and form’ test. Although in ‘form’ section 377 targets ‘acts’, these acts are so closely identified with a class of persons that its ‘direct and inevitable’ consequence is to criminalise all sexual activity on the part of this class of persons. *Rustom Cavasjee Cooper Vs. Union of India*, (1970) 1 SCC 248, *Maneka GandhiVs. Union of India & Anr.*, (1978) 1 SCC 248, *State of Maharashtra & Anr. Versus Indian Hotel & Restaurants Assn. & Ors.*, CIVIL APPEAL NO.2705 OF 2006, decided on July 16, 2013, *Namit Sharmav. Union of India*, (2013)1 SCC 745, *Justice K.S. Puttaswamy (Retd.) Vs Union of*

*India And Others*, (W.P. (C) No. 494/2012), at paragraphs 24 and 150.

- o) There is no intelligible differentia to distinguish carnal intercourse against the order of nature from carnal intercourse within the order of nature: There is no test to determine or classify which acts are “carnal intercourse against the order of nature”; section 377 therefore does not provide adequate warning of the conduct proscribed.
- p) The vagueness of Section 377 confers unfettered discretion on police officials and other agents of the state, evident from material available with the present applicant reflecting harassment, blackmail, and torture of LGBT persons.
- q) The Principle of Legality/ Rule of Law requires that all law be ‘clear’, ‘ascertainable’, and ‘non-retrospective’. In *A. K. Roy, Etc vs Union Of India And Anr*, 1982 AIR 710, 1982 SCR (2) 272, a Constitution Bench of this Hon’ble Court held that "The word 'established' is used in Article 21 in order to denote and ensure that the procedure prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right to life or liberty must know the precise extent of such deprivation." (emphasis supplied) This Hon’ble Court’s jurisprudence on the principle of Legality/Rule of Law requiring that all law be ‘clear’, ‘ascertainable’, and ‘non-retrospective’ is also a well established principle of Customary International Law. General comment No. 34, of the UN, Human Rights Committee under the International Covenant on Civil and Political Rights at its 102nd session Geneva, 11-29 July 2011, on Article 19: Freedoms of opinion and expression declared that –

“For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly (fn. 53, See communication No. 578/1994, *de Groot v. The Netherlands*, Views adopted on 14 July 1995.) and it must be made accessible to the public. A law may not confer unfettered discretion for the

restriction of freedom of expression on those charged with its execution. (fn. 54, See general comment No. 27.) Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

The Inter-American Court, in the *Case of Castillo Petruzzi et al. v. Peru*, Judgment of May 30, 1999 (*Merits, Reparations and Costs*), also declared that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment.

The European Court of Human Rights has also consistently asserted the principle that “only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment”. ECHR (Chamber) *Case Of Kokkinakis V. Greece*, (*Application no. 14307/88*) and ECHR (Grand Chamber) *Case Of Achour V. France*, (*Application no. 67335/01*).

- r) That it is the primary responsibility and obligation of this Court to recognise the violation of Human Rights by the State and the trampling upon of Human Dignity by invasive laws and to remedy the wrong.
- s) Though facially neutral, Section 377 in its interpretation, operation and working targets LGBT persons. In doing so, it offends their dignity as a class, making them second-class citizens, and denying them full moral citizenship.
- t) Allowing section 377 to remain on the statute book, without the declaration of the Hon’ble Delhi High Court reading it down will

cast a shadow of criminality on members of the LGBT community, which will affect their ability to enjoy fundamental rights guaranteed to all citizens in direct, as well as indirect, ways.

- u) That the Constitution secures to *all citizens*, Justice, Liberty, and Equality. Universality of Fundamental Rights is a foundational tenet of the Indian Constitution: that ‘all’ citizens are entitled to Fundamental Rights finds expression in the Preamble to the Indian Constitution and finds specific expression in Part III of the Indian Constitution. Every person, regardless of caste, religion, sex or sexual orientation is entitled to the protection of the Fundamental Rights Chapter regardless of the size of the social grouping to which the person belongs. By casting a shadow of criminality on relationships between persons of the same sex, Section 377 deprives LGBT persons of the ability to develop intimate relationships. This is not in consonance with Constitutional values.
- v) The issue of the constitutionality of section 377 implicates several substantial questions of law pertaining to the interpretation of the Constitution and must be heard and decided by a bench comprising five judges of this Court in terms of Article 145(3) of the Constitution.
- w) The principle of separability or severability of enforcement enunciated by this Court in *R.M.D. Chamarbaugwalla* AIR 1957 SC 628, and applied in *Kedar nath Singh* (to section 124A of the IPC) and *Indra Dass v. State of Assam* should be applied to hold section 377 unconstitutional insofar as it criminalises consensual sexual activity between adults, and tailoring the enforcement of the law to exclude consensual sexual activity between adults.
- x) There is no clear indication on the face of the law, or in circumstances surrounding the enactment of section 377, of the basis for hostile treatment of persons or proscribed acts. In *Ram Krishna Dalmia*’s case, this Hon’ble Court had held that:

“while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on

the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.”

- y) A fundamental basis for the presumption of constitutionality of laws – that the enacting legislature is a representative body of the people, accountable to them, aware of their needs, acting in their best interest and within the confines of the Constitution - does not obtain in the case of pre-constitutional laws generally, and certainly not for section 377. The Legislative Council which enacted section 377 consisted of 12 unelected Englishmen, who did not represent the people, were not accountable to them or aware of their needs, and did not act in their best interests or within the confines of the constitution, since they were acting before the constitution.
- z) Presumption of unconstitutionality is also not available in the case of section 377 since “good faith and knowledge of existing conditions” on the part of the body that legislated the Indian Penal Code cannot be presumed, since the Legislative Council consisted of 12 unelected Englishmen. {See *State of West Bengal v. Anwar Ali Sarkar* , [1952] SCR 294, page 316}
- aa) LGBT persons across the world faced extensive prejudice, discrimination, and violence because of their sexual orientation. A recent study of the mental health needs of LGB persons in India showed that they faced a sense of isolation, confusion and difficulty in reconciling rigid images of hetero-normative and gender appropriate behaviour that were a part of their social world and their internal processes and feelings. This study showed that invisibility, silence and a lack of language to express desire was a major issue

that Lesbian, Gay and Bisexual youth faced in India and the stigmatization of gay lesbian and bisexual persons posed a risk to their mental well-being.

- bb) Criminalization has adverse consequences for the right to health of those who practiced same-sex conduct through the creation of the societal perception that they were “abnormal” and criminals. Anti sodomy statutes foster a climate of intolerance in which LGBT persons feel compelled to conceal or lie about their sexual orientation to avoid personal rejection. This compulsion to remain “in the closet” reinforces anti-gay prejudices.
- cc) Articles 14, 19 and 21 are a composite charter, since the right to equality, the right to expression and the right to life are inextricably linked. The right of individuals to express themselves, including their sexual identities, is core to the human experience. To deny the right to express one’s sexuality, apart from violating the dignity and equal protection of individuals, is a violation of Article 19. The fear arising from section 377 creates a chilling effect on speech regarding the sexuality of members of the LGBT community thereby forcing on them a culture of silence.
- dd) There has never been consensus about what the object sought to be achieved by section 377 is. This Hon’ble Court in *Suresh Koushal* itself noted that deliberate obviolation of all discussion around the section at the time of its legislation (at para 37), and also noted, (at para 38), the complete lack of judicial consensus of the acts which fall within section 377.
- ee) Constituent Assembly Debates on Equality and Dignity provide the dynamic context in which Articles 14 and 15 of the Constitution must be read, interpreted, and applied: When so applied, they render section 377 unconstitutional unless read-down in the manner declared by the Hon’ble Delhi High Court.
- ff) Absent the declaration of the Hon’ble Delhi High Court, Section 377 of the IPC, mirrors, in important ways, the Criminal Tribes Act, 1871 as amended in 1897

gg) Allowing section 377 to stand on the statute books will be gross miscarriage of justice after the enactment of the Protection of Children from Sexual Offences Act, 2012 and the Criminal Law (Amendment) Act, 2013. Two justifications offered by the Union of India before the High Court for the retention of s. 377 at the hearings in *Naz Foundation vs Union of India* were –

- i. The protection of children from child sexual abuse
- ii. The protection of women from penile, non-vaginal sexual assault.

Both objectives have been comprehensively dealt with and taken care of by the ‘Protection of Children from Sexual Offences Act, 2012’ and the ‘Criminal Law (Amendment) Act, 2013’. There is even less reason therefore to retain section 377 on the statute book. Further, the Criminal Law Amendment Act by making absence of consent the gravamen of the offences legislated, has thrown the unreasonableness of section 377 in stark relief

hh) Many persons belonging to the LGBT community have distinguished themselves in diverse disciplines and callings both in India and abroad.

- 7) That the applicants had placed such material before the Hon’ble Delhi High Court in *Naz Foundation Versus Union of India* and the Hon’ble Delhi High Court was pleased to take note of some of the material placed by the applicant before it. However, it is most respectfully submitted, the judgement of this Hon’ble court in *Suresh Kaushal And Another Versus Union Of India And Others*, did not deal with the material placed before it by the applicants.
- 8) That if the applicants’ curative petition had been heard and allowed, they would have been in a position to advance arguments *de novo*, impugning the constitutionality of section 377 of the IPC and supporting the findings of the Hon’ble High Court.
- 9) That the judgement of this Hon’ble Court in *Justice K.S. Puttaswamy (Retd.) And Another versus Union of India and Others* expressly took note

of the fact that Curative Petitions – including petition filed by the present applicants - were pending consideration by a Constitution Bench and, therefore, left “the constitutional validity of 377 to be decided in an appropriate proceeding”. It is most respectfully submitted that, in the light of those observations of this Hon’ble Court in *Justice K.S. Puttaswamy’s* case, it would be appropriate and in the interests of justice that the applicants are heard in these proceedings as well.

- 10) That a decision in *Navtej Johar’s* petition will effectively render the applicants’ curative petitions irrelevant, the applicants are therefore necessary parties to this petition since they are “directly” interested; the result in that petition will affect the applicants legally.
- 11) That it is, therefore, appropriate and in the interests of justice that the applicants are impleaded in the present petition. That the non-applicants will suffer no prejudice if the applicants are impleaded and heard; if the applicants are not impleaded, however, they will suffer irreparable harm and injury.
- 12) That the applicants seek to be heard in the present proceedings since they seek to present the perspective of associations of persons who are committed to a just and humane society, but whose work has shown them that section 377 places Fundamental Rights beyond the reach of a significant section of society. **Annexure R 1** sets out in tabular form the specific areas of work of the associations that constitute the applicant.

### **PRAYER**

In the circumstances setout above, it is most respectfully prayed, that this Hon’ble Court be pleased to:

- a) Implead the applicants in the present Writ Petition – W.P. (C) 76 of 2016, *Navtej Johar And Others vs Union of India And Others* – as Petitioners No. 6 ;
- b) Pass such other or further orders as this Hon’ble Court may deem fit.

Filed by:

Pukhrambam Ramesh Kumar

Advocate for the Applicant

New Delhi: 15.1.2018