**IN THE SUPREME COURT OF INDIA**

**(ORIGINAL JURISDICTION)**

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**

1. **Section 377 has been used historically, in a disproportionate manner against transgender persons.**
   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. Transgender persons have been criminalized historically by Section 377 and other criminal legislations. They were referred to as ‘eunuchs’ under colonial legislations.
  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.
  3. The Criminal Tribes Act: The earliest legislation referring to them was the Criminal Tribes Act 1871 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.
  4. 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.
  5. “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 by identified as women and had feminine characteristics, or transwomen.
  6. 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.
  7. 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.
  8. 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.
  9. 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.
  10. Since historically transgender persons have been suspected of committing offences under Section 377, this presumption of criminality against the trans 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.
  11. Reports of Violence: 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.

1. **Article 14 violation:**
   1. Section 377 is a serious violation of the right to equality and non-discrimination guaranteed under Article 14 of the constitution against transgender persons. Although it is facially gender neutral and related to ‘acts’ against the order of nature, it is used mainly against the transgender community, who are visible and whose non-conforming gender identity is obvious in public spaces and who often do not have the luxury or means of private homes.
   2. 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.
   3. Section 377 violates the principle of guarantee of substantive equality. Prof. Sandra Fredman proposes a four dimensional approach that substantive equality should aim to redress disadvantage, address stigma, stereotyping and prejudice, enhance voice and participation and accommodate difference and achieve structural change. This 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, Section 377 serves to impose the very stigma, stereotypes and disadvantages faced by the transgender community for their gender non-forming identities and expression and criminalizes them and should be held to be unconstitutional.
2. **Section 377 is a violation of Article 15 – sex discrimination:**
   1. In *NALSA*, 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. The expression ‘sex’ used in Articles 15 is not just limited to biological sex of male or female but intended to include transgender persons.
   2. If sex discrimination is understood to include ‘gender’ and ‘gender identity’ then the impact of Section 377 on transgender persons who are targeted because of their gender identity not conforming to their biological sex, is due to sex discrimination based on Article 15, and is unconstitutional.
   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 any 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.
3. **Section 377 and Violation of Article 19 – Right to Freedom of Expression**
   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. This Hon’ble Court has 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).
   2. 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 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.
   3. The Yogyakarta Plus 10 Principles in Principle 33 states that “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.
   4. 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.
4. **Article 21 – Section 377 violates the right to life, dignity and privacy:**
   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. 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. 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.
   3. For transgender persons, any sexual intercourse even with their legally married spouse or unmarried 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 ‘against the order of nature’.
   4. In *NALSA*, this Hon’ble Court held that 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 and the legal recognition of gender identity is held to be part of the right to dignity and freedom guaranteed under Article 21. If there is indeed such a right to gender identity, one cannot be criminalized for expressing it and living in the gender one identifies it. 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 invariable 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.
   5. 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.
   6. 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.”***

* 1. In the ***Puttuswamy judgement*** this Hon’ble Court held “***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. ……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****.*
  2. It held that the rights of the LGBT community were inherent in the right to life and constitute the essence of liberty and freedom.
  3. In ***Shafin Jahan v. Asokan***, this Hon’ble Court held,

“***the constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects, which define one’s personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy which is inviolable***.” (J.Dipak Mishra)

“***….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]

* 1. 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***.”

* 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.
  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. The right to privacy under the Yogyakarta principles in Principle 6 states that ”The right to privacy ordinarily includes the choice to disclose 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.
  4. 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: Counsel for the Petitioners