

**IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION  
I.A. NO. 91147 OF 2018  
IN  
WRIT PETITION (Crl) No. 000076 of 2016**

**IN THE MATTER OF:**

Navtej Singh Johar & Ors. .. Petitioner

Versus

Union of India & Anr .. Respondents

**AND IN THE MATTER OF:**

Harish Iyer .. Applicant/Impleader

**APPLICATION FOR IMPLEADMENT**

To

Hon'ble the Chief Justice and His  
Hon'ble Companion Justices of the  
Hon'ble Supreme Court of India.

The humble Application of  
the Applicant abovenamed

**MOST RESPECTFULLY SHEWETH THAT:**

1. The subject-matter of the present petition pending before this Hon'ble Court is an important issue, which has wide implications on the citizens of the nation and will be cited as a reference globally. The call for a more diverse and inclusive community is gaining momentum, not only nationally but also globally. The decision of this Hon'ble Court in the present petition would not only impact the sexual minority in India but also change the discourse on Gay, Lesbian, Bi-Sexual, Transgender and Queer (LGBTQ) rights in India.

2. The Applicant herein seeks liberty of this Hon'ble court to allow him to be impleaded in the present proceedings and permit the applicant to make submissions before this Hon'ble Court at the time of hearing as the Petitioner herein is seeking this Hon'ble Court to pass such orders which can adversely affect the life of the Applicant.
3. The Applicant namely Harish Iyer is a citizen of this country, a respectable columnist for various English newspapers, a self-confessed homosexual and an activist for a number of causes, including promoting the rights of the lesbian, gay, bisexual, transgender and queer (LGBTQ) community, children, women, animals and survivors of child sexual abuse and has been the recipient of the Energising Bharat Award and Zindagi Live Awards for the same
4. There is positive correlation between law and human behavior. The mere fact that the law of this land deems a homosexual act as a criminal offense, adversely affects the way our society treats people from LGBTQ community. The Applicant was sexually abused by a family member of his for a period of 11 years since the age of 7 and was gang-raped/sexually assaulted by a group of men at the age of 12. The Applicant, Harish Iyer, is one of the first male victims of rape/sexual abuse in India to have publicly shared their story of surviving sexual abuse. He appeared on Bollywood star Aamir Khan's show called "*Satyameva Jayate*" on Star

Plus television channel to share his gut-wrenching tale. The Applicant's story of surviving sexual abuse, which was televised and broadcasted both nationally and internationally, reaching millions of viewers, although reopened the discourse on LGBTQ rights in India and brought it to the forefront of gender rights issue, the Applicant was at the receiving end of homophobic verbal and physical attacks. **(Annexure 1)**

5. The Applicant had written a commentary in Wall Street Journal on December 11, 2013 titled "Being Gay in India" wherein he confessed of being a homosexual and having faced discrimination on account of his sexual orientation. **(Annexure 2)**
6. The Applicant catapulted into the spotlight when his mother placed India's first gay matrimonial advertisement for him in May, 2015 in a local newspaper, MidDay after the advertisement request was initially rejected by several leading newspapers on account of it being "illegal" do so. As of December, 2017, 26 countries in the world had legalized same-sex marriage. The Applicant is India's leading proponent for legalizing same-sex marriage in India and has been instrumental in galvanizing support for this cause. **(Annexure 3 and Annexure 4)**
7. The Applicant has been a victim of persecution by police authorities for having openly confessed to being gay. He

continues to live in fear of s.377 of the Indian Penal Code being used against him primarily due to his sexual orientation.

8. The Applicant has been involved in various awareness campaigns on child sexual abuse, sexual abuse within the LGBTQ community and gender rights by appearing on many television shows hosted by leading English and regional news channels of the country, including CNN-IBN, NDTV, Times Now, India Today and Mirror Now. He has been a Guest Speaker in over 150 events and public forums such as TEDx, where while speaking for LGBTQ rights, many a times he was ridiculed, condemned and threatened for “vitiating the Indian culture” by fellow panelists.
9. The Applicant was pleased to be listed at no. 71 by The Guardian, a British national daily naming the applicant as one among the 100 most influential LGBT people in the world. He also remains as the only Indian national ever to have featured on this list. (**Annexure 5**)
10. The Applicant was pleased to receive global recognition for his activism work on LGBTQ rights in India and was the only Indian to be invited by the Department of State, Government of USA for an International Visitor Leadership Programme, a three-week long USA based multinational summit on the issue of Human Rights for the LGBTQ community.

11. The Applicant is responsible for co-organizing annual “Gay Pride” march in Mumbai to shed light on the shame and stigma faced by the LGBTQ community across the country and galvanize democratic support against s.377 of the Indian Penal Code as it has been often used to persecute and threaten the gay community in India.
12. That s.377 of the Indian Penal Code is in contravention of the Applicant’s rights guaranteed under Article 14 of the Indian Constitution for it denies him equality before the law on account of his sexual orientation and sexual preference.
13. That s.377 of the Indian Penal Code is highly discriminatory and against the spirit of Article 15 of the Constitution of India for it discriminates against people on the basis of their sexual orientation and sexual preferences.
14. That in light of the Judgment delivered by the Constitution Bench of this Hon’ble Court in *Justice K S Puttaswamy (Retd.) and Anr v. Union of India & Ors.* W.P. (C) no. 494 of 2012, recognizing Privacy as a Fundamental Right under Article 21 of the Indian Constitution and affirming that one’s sexual orientation falls within the ambit of privacy, s.377 of the Indian Penal Code is in direct violation of Article 21 of the Indian Constitution for invasion of one’s privacy is an essential element for the application of s.377. The said

paragraph from *Justice K S Puttaswamy (Retd.) (Supra)* is reproduced below:

“647. There are two aspects of the opinion of Dr. D.Y.Chandrachud,J., one of which is common to the opinion of Rohinton F. Nariman, J., needing specific mention. While considering the evolution of Constitutional jurisprudence on the right of privacy he has referred to the judgment in *Suresh Kumar Koushal Vs. Naz Foundation*. In the challenge laid to Section 377 of the Indian Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High Court, inter alia, observed that the right to live with dignity and the right of privacy both are recognized as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find favour with the Supreme Court and it was observed that only a miniscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the Section ultravires of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not

*rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon. The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y.Chandrachud, J., who in paragraphs 123 & 124 of his judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India.*

***Ones sexual orientation is undoubtedly an attribute of privacy.****(emphasis supplied)*

15. The Applicant submits that s.377 of the Indian Penal Code is unsecular and against the spirit of the Constitution of India. Section 377 of the Indian Penal Code was a construct of British colonial rulers of India, whose head of the State was also the head of the Church of England and thus s.377 of the IPC reflected the religious teachings of Christian faith, which viewed sex in purely functional terms, i.e., for the purpose of procreation only and thus, viewed any non-procreative

sexual activity as being “against the order of the nature”. Non-procreative sex had always been a part of the Indian culture as is evident from the relic depicts on Hindu and Jain temples. The presence of these relics depicting non-procreative sexual acts on the walls of Hindu and Jain temples such as:

#### Hindu Temples

- i. *Sun Temple Konark* in Odisha,
- ii. *Kandaria Mahadeva Temple* in Khajuraho, Madhya Pradesh
- iii. *Jagdish Mandir*, Udaipur, Rajasthan
- iv. *Markandeshwar Temple* in Maharashtra
- v. *Padawali Temples* in Madhya Pradesh
- vi. *Sun Temple*, Modhera, Gujarat
- vii. *Virupaksha Temple*, Hampi, Karnataka
- viii. *Tripuka Temple*, Karnataka
- ix. *Kailasa Temple*, Ellora Caves. Maharashtra
- x. *Bhoramdeo Temples*, Chhatisgarh
- xi. *Nanda Devi Temple*, Almora, Uttarakhand
- xii. *Lingaraja Temple*, Bhubhaneshwar, Odisha



## II Jain Temples

- i. Shwetambar Jain Temple,  
Osian, Rajashtan
- ii. Ranakpur Temple dedicated to  
the 1<sup>st</sup> Jain Tirthankar - Adinath

prove that non-procreative sexual act was not considered an “unnatural” and/or “un-cultured” act by the indigenous religions and culture of this country. On the contrary, they were an integral part of the Indian culture as otherwise, they would not have found place on India’s holiest shrines.

### **(Annexure 6)**

16. That as per the Hindu philosophy, the pursuit of the 4 essential elements of a human life called “the four Purusharthas” namely, *Dharma (duty) – Artha (wealth) – Kama (sexual desire) – Moksha (liberation)* are articulated by the ancient Hindu sages as the “ultimate goal of every human life”. The Vedic Texts not only recognized homosexuality as being determined at the time of conception but also deemed non-procreative sex among human beings, both homosexuals and heterosexuals, as an essential component of life. They reflect the liberal, inclusive and tolerant ethos of the indigenous religions and cultures of this country. Some of the references from ancient Indian Vedic texts are reproduced below:

- i. Vedic medical texts (the Ayur Shastra) specifically mention how third-sex conditions (homosexuality, transgender

identity and intersex) are caused at the time of conception. (***Sushruta Samhita 3.2.38, 42-43, Caraka Samhita 4.4.30-31***)

ii. Three categories of sex or gender are mentioned throughout the Vedic canon—virile males, fertile females, and an impotent third sex having both male and female qualities. (***Svetasvatara Upanisad 5.10, Srimad Bhagavatam 8.3.24 and 10.1, notes by Srila Prabhupada***)

iii. The primary definition of third-gender people is that they do not beget offspring, being either physically impotent or devoid of any desire for the opposite sex. (***Narada-smriti 12.12-13, Sushruta Samhita 3.2.36-43, Caraka Samhita 4.2.17-21, Kamatantra, Smriti-ratnavali, Sabda-kalpa-druma, etc.***)

iv. No Vedic law specifically penalizes third-gender men or women (*napumsa, kliba, svairini, etc.*) for their characteristic behavior (homosexuality, crossdressing, etc.). They could be penalised like other citizens for any crime but were never fined for their sexuality. (***Narada-smriti 15.12-15, Srimad Bhagavatam 4.17.26***)

v. Everyone should work for Krsna or God according to their respective nature (*svakarma* or *svadharmā*), even if

performed imperfectly. To follow another's path or to artificially suppress one's nature is considered dangerous and ill-advised. (**Bhagavad Gita 3.33, 35; 18.45-48**)

- vi. The Kama Shastra acknowledges third-gender marriages wherein same-sex couples with great attachment and complete faith in one another get married. (**Kama Sutra 2.936**)
- vii. Truthfulness, being open and straightforward, revealing one's mind in confidence, compassion, inclusiveness and so on are all important Vaishnava qualities that should be practically applied in cases of third-gender (LGBTI) people and issues. (**Srimad Bhagavatam 8.20.4, Bhagavad Gita 10.4-5, Sri Upadesamrta 4, Jaiva Dharma, Ch. 20, p. 490, Krsna book, Ch. 24, p. 198**)
- viii. Vedic texts state that men with inborn impotence such as homosexuals (*irshyaka, sevyaka* and *mukhebhaga*) are unfit for marriage to the opposite sex. Furthermore, *ayurvedicaphrodisiacs* (*vajikarana*, which cure impotence in males) are useless on third-gender men who are impotent with women by nature. Bisexuals (*paksha*) are possibly fit for opposite-sex marriage if confirmed as potent after a period of one month. (**Sushruta Samhita 4.26.3; Caraka Samhita 6.2.1-4, commentary by Gangadhara; Narada-smriti 12.11-19**)

- ix. Vedic teachings recommend minimizing and moderating the four basic necessities of life (eating, sleeping, mating and defending). Forbidding these entirely, however, is deemed unrealistic and inhumane. Regarding mating, even people outside the *varnasrama* system are entitled to marry and establish households. **(Bhagavad Gita 6.16, Jaiva Dharma, Ch. 7, p. 172, Kama Sutra 7.2.59)**
- x. It is an offense to vilify or publicly mock people of the third sex. This is punishable by various small fines. **(Artha Shastra-3.18.45, Manusmriti 28.274, Narada-smriti 15.19)**
- xi. Vaishnavas should not get married with the desire to beget children or worship their ancestors. Rather, a marriage is considered ideal when it is God-centered and one's spouse (irrespective of the gender) is viewed as a servant of Krsna. **(Jaiva Dharma, Ch. 7, p. 164)**
- xii. Vedic law considers male (*pums*) homosexuality a minor offense and only if the offender is brahminically initiated (twice-born). It is easily atoned for by taking a ritual bath or paying relatively small fines. If the offending party does not atone, his brahminical caste can be lost. **(Manusmriti 11.175, 11.68; Artha Shastra 4.13.40)**
- xiii. Vedic law books regard heterosexual crimes such as rape, adultery and the propagation of unwanted progeny as the foremost threat to human society (not

homosexuality). (***Manusmriti* 8.352-387; Bhagavad Gita 1.40-41**)

- xiv. Parents must provide basic necessities (food, clothing, etc.) to their third-gender offspring, according to their means. The king should provide for third-gender citizens without family. (***Manusmriti* 9.202, Artha Shastra 3.5.32, VasisthaDharmasutra 19.35-36**)

17. That this Hon'ble Court in *Suresh Kumar Kaushal and Others v/s Naz Foundation and Others* 2014 1 SCC 1 grievously erred by concluding that prosecution of 200 citizens of India formed a small number and thus cannot be made sound basis for declaring s.377 IPC as ultra vires the provisions of Article 14, 15 and 21 of the Constitution. The said paragraph is reproduced below:

“ 66. While reading down Section 377 IPC, the Division Bench of the High Court overlooked that a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 IPC and this cannot be made sound basis for declaring that

*section ultra vires the provisions of Article 14, 15 and 21 of the Constitution.”*

18. That this Hon’ble Court in *National Legal Services Authority v. Union of India* (2014) 5 SCC 438 held that:

*“135.1.- Hijras, eunuchs, apart from binary genders be treated as “Third Gender” for the purpose of safeguarding their rights under Part III of the Constitution of India and the laws made by the Parliament and the State Legislature.”*

Section 377 of the Indian Penal Code goes against judgment of the Supreme Court in the above-mentioned matter and continues to violate the Fundamental Rights of Transgender persons and Transsexual persons along with LGBTQI persons.

19. The Applicant submits that in the absence of a legal penalty for sexual assault on non- females (males, trans-genders, transsexual) in India, declaring the entire s.377 of IPC as unconstitutional would leave non-females above the age of 18 without any legal remedy against sexual assault.

20. That this Hon’ble Court in *State Of U.P. &Ors vs Jai Prakash Associates Ltd.*, SLP (C) No. 11305 of 2013 held that “if an enactment cannot be saved by construing it consistent with its constitutionality, it may be seen whether it can be partly saved.”

21. That this Hon'ble Court in *R.M.D. Chamarbaugwalla v. The Union of India* AIR 1957 SC 628 was of the view that a significant canon of determination of constitutionality is that the Courts would be reluctant to declare a law invalid or ultra vires on account of unconstitutionality. The Courts would accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional. The relevant para is reproduced below:

“ 14. ....*The doctrine of severability rests, as will presently be shown, on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute...*”

22. That this Hon'ble Court in *Kihoto Hollohan vs Zachillhu And Others* 1992 SCR (1) 686 held that the doctrine of severability envisages that if it is possible to construe a statute so that its validity can be sustained against a constitutional attack it should be so construed and that when part of a statute is valid and part is void, the valid part must be separated from the invalid part.

## II. Questions of Law

1. Whether the State has a compelling reason to abridge fundamental right to privacy under Article 21 of the Indian Constitution, when no aspect of one's life is considered more private and intimate than that of sexual relations?
2. Whether in the absence of a legal remedy for non-females (males above the age of 18, trans-genders, transsexuals) against sexual assault, this case does not warrant the application of the doctrine of severability to the extent that any sexual activity/intercourse between willing adults in privacy is saved and excepted from the penal provisions contained in s.377 of the IPC?
3. Whether s.377 of the IPC does not contravene Article 14 of the Indian Constitution for creating a classification between procreative and non-procreative sexual acts between consenting adults?
4. Whether s.377 of the IPC does not contravene Article 15 of the Indian Constitution for being discriminatory based on one's sexual orientation?



**PRAYER**

In view of the above facts and circumstances it is most respectfully prayed that this Hon'ble Court be pleased to:

- (a) allow the applicant – Harish Iyer to be impleaded as Petitioner in Writ Petition (Cri) no. 76 of 2016; and
- (b) pass such other and further orders as this Hon'ble Court may deem fit in the facts and circumstances of the present case and in the interests of justice.

Settled by Sr. Adv. Mahesh Jethmalani

Drawn by Adv. Mugdha Pande

Filed by: Pallav Mongia

Date: 07.07.2018