IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
REVIEW PETITION (C) NO. _____ OF 2014
IN
CIVIL APPEAL NO. 10972 OF 2013

IN THE MATTER OF:

1. Suresh Kumar Koshal
S/o Shri S.D.Koushal
C-105, Nirman Vihar
Delhi-110 092 ...Not Party Petitioner-1

2. Dr. Mukesh Kumar Koshal
S/o Shri S.D.Koushal
C-105, Nirman Vihar
Delhi-110 092 ...Not Party Petitioner-2

VERSUS

1. Naz Foundation
A Society Registered under
The Societies Registrar Act,
D-45, Gulmohar Park
New Delhi-110049
..Petitioner Respondent-1

2. Government of India
Through the Secretary
Social Welfare Delhi Secretariat
ITO, New Delhi
...Respondent-1 Respondent-2

3. Commissioner of Police
Police Headquarters
ITO, New Delhi
...Respondent-2 Respondent-3

4. Delhi State AIDS Control Society
11, Lancess Road, Timarpur
Delhi-110054 ...Respondent-3 Respondent-4

5. National AIDS Control Organization
Setup by the Union of India
Having its office
9th floor, Chandralok Building
Opp. Imperial Hotel
New Delhi ...Respondent-4 Respondent-5

6. Union of India
Through Secretary
Ministry of Home
North Block, Indian Gate
New Delhi …Respondent-5(a) Respondent-6

7. Union of India
Through Secretary
Ministry of Health Welfare
344, Nirman Bhavan,
Maulana Azad Road
New Delhi …Respondent-5(b) Respondent-7

8. Joint ActionCouncil Kannur
C-38, Anand Niketan
New Delhi-110021 …Respondent-6 Respondent-8

AND IN THE MATTER OF:

9 Ms. Ratna Kapur
Visiting Professor,
Jindal Global Law School, (Sonepat)
And Co-Founder, Centre for Feminist Legal Research (Delhi)
R/o C-602 New Friends Colony,
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10 Mr. Amit Bindal
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12 Ms. Bhawna Gulati
Research Associate,
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D/o Mr. Rakesh Gulati
R/o A1/186-B,

Keshav Puram, New Delhi-35

14 Ms. Latika Vashist
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Jindal Global Law School
D/o Kamlesh and Om Datt Vashist
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18 Dr. Jyoti Dogra Sood
Sr. Asst. Research Professor,
Indian Law Institute
D/o Sh. K.C. Dogra
R/o A 3/602, Printers Apartment,
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19 Mr. Babu Mathews,
Visiting Professor,
National Law University, Delhi,
Sector-14, Dwarka,
New Delhi-110078.

SERIAL NO 9 TO 19 ARE REVIEW PETITIONERS

REVIEW PETITION UNDER ARTICLE 137 OF THE CONSTITUTION OF INDIA READ WITH ORER XL RULE 1 OF THE SUPREME COURT RULES

To

The Hon'ble Chief Justice of India
and his companion Justices of the
Hon'ble Supreme Court of India

The Review Petition of the Respondent above-named

MOST RESPECTFULLY SHOWETH:

1. The Review Petitioners are seeking the Review of the Judgment and Order dated 11.12.2013 in Civil Appeal No. 10972/2013 ("Impugned Judgment") wherein this Hon'ble Court was pleased to allow the said Civil Appeal thereby setting aside the Judgment and Order dated 2.7.2009 of the Hon'ble High Court of Delhi in Writ Petition No.7455 of 2001. The impugned Judgment has the impact of re-criminalizing consensual sexual acts between adults in private thereby setting aside the Order and Judgment of the Delhi High Court which had allowed the writ petition filed in the nature of a Public Interest Litigation by 'Naz Foundation', a Non Governmental Organisation (NGO) challenging the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC). The Review Petitioners had filed IA No. 13/ 2013 and were intervenors in the said Civil Appeal to assist this Hon'ble Court in proper adjudication of the instant case.

The Review Petitioner are all academicians, law professors, and lawyers with legal research backgrounds with various law schools in India. Review Petitioner No. 1 is also the co-founder of the Centre for Feminist Legal Research. Review Petitioners include a professor with the Indian Law Institute, the former Executive Director of Action Aid India, and currently a visiting professor with the National Law University, Delhi. The Review Petitioners teach, research and practice in various fields of law such as jurisprudence, human rights, sexuality studies and law, criminal justice, and cultural studies and law, and feminist legal theory.

2. The Review Petitioners are not reiterating the facts and the pleadings contained in their Application for Intervention which are part of the record of this Hon'ble Court for the sake of brevity. The Review Petitioners crave reliance to refer to and rely upon the record of this Court as being part of this review petition.

3. The Review Petitioners respectfully submit that the Impugned Judgment requires reconsideration and review on account of the various grounds iterated herein, which are without prejudice to each other and which render the same to be incorrect in law, and productive of grave public mischief:

A. That the impugned Judgment suffers from errors that are apparent on the face of the record.

B. That the controversy in question, namely the constitutionality of the criminalization of private consensual acts in terms of Articles 14, 15, 19 and 21 of the Constitution constituted a "*substantial question of law as to the interpretation of the Constitution*" and as such was required under Article 145(3) of the Constitution to be heard by at least 5 judges. Insofar as the Impugned Judgment was that of a Division Bench, the same is an error that merits correction in Review proceedings.

C. That while considering the constitutionality of Section 377 of the IPC, this Hon'ble Court has failed to consider that the Union of India had not chosen to defend the Constitutionality of the aforesaid section and had not challenged the Judgment pronounced by the Hon'ble High Court. While it is correct that every statute is presumed to be Constitutional, the fact that the Union Government deliberately chose not to defend the law before this Hon'ble Court is a fact that ought to have weighed in the calculus of this Hon'ble Court while deciding the issue. In every case where the argument was made in favor of this presumption of constitutionality, the primary defender of the statute in question was the Union of India or the relevant

government. In the instant case, the only persons who argued for section 377 were private individuals and associations. The impugned Judgment has erred in not considering the implications of the stand of the Union of India upon the presumption of Constitutionality of Section 377.

D. That the Impugned Judgment is erroneous insofar as it does not take into account that Civil Appeal No. 10972/2013 was in exercise of the powers of judicial review and that the Court of the first instance, i.e. the Hon'ble Delhi High Court had given a detailed, meticulous and well-reasoned judgment considering the facts on record as well as the law. In judicial review, the findings of the Hon'ble High Court ought not to have been interfered with in the absence of perversity and strong reasons for the same. It is well-established that judgments ought not to be reversed by appellate courts merely on the basis that another view is possible. Re-appreciation of evidence is also counseled against in the absence of compelling reasons to do so.

E. That the Impugned Judgment does not deliver a finding as regards the actual claims made by the challengers to Section 377 of the IPC as had been upheld by the Hon'ble High Court in Writ Petition No. 7455/2001 and

which were the subject matter of the Civil Appeal No. 10972/2013. *Firstly*, no finding has been delivered on whether or not consensual and private sexual relations between homosexuals are protected under the ambit of the right to life, right to dignity and the right of privacy despite the extensive discussion of the Hon'ble High Court on the same. After a discussion of the general principles of Article 21, including a reference to the judgments cited by the Hon'ble High Court in paragraphs 45 to 50 of the Impugned Judgment, the impugned Judgment simply holds that blackmail and harassment as reported of homosexuals was not condoned by the section which could not be held to be unconstitutional based on foreign cases and the mere possibility of misuse. This analysis fails to take into account the stigma imposed uniquely upon homosexual persons for whom all sexual expression is illegal, whether consensual and private or otherwise. It is submitted that this Hon'ble Court ought to have delved into the merits of the matter as discussed by the Hon'ble High Court before overturning the logical and well-reasoned decision/conclusions of the Hon'ble High Court. *Secondly*, as regards the finding of the High Court that Section 377 was in violation of Article 14 as

it did not constitute reasonable classification with a rational nexus sought to be achieved, the impugned Judgment, without expressing an opinion/reasoning in paragraphs 42-44 proceeds to hold that (a) it does not suffer from arbitrariness and irrational classification (para 42); (b) homosexuals constitute such a small percentage of the population and that 200 cases in 150 years is not enough to deem section 377 to be *ultra vires* as though numerical strength were a prerequisite for the application of Article 14 (para 43); and (c) Because of prior applications, it cannot be said that the law is vague to be unconstitutional. (para 44, despite the holding in para 38 that it is impossible to find a common thread in the cases). It is submitted that these findings are contrary to the previous decisions of this Hon'ble Court and to the findings of facts returned by the Delhi High Court as submitted hereafter.

F. The Constitution does not prescribe a *de minimis* requirement as regards individual suffering to hold a law causing the suffering to be unconstitutional. That said, it must be stated that prosecutions alone are not a stand-alone indicator of the suffering of homosexual and other persons other Section 377. There are also well documented cases of abuse by unscrupulous police

persons and others. In addition, it is submitted that the mere presence of the unread down section in statute books perpetuates a stigma over homosexuality and gives legal sanction to discrimination and contemptuous treatment that is contrary to the spirit of equality that is a brooding omnipresence over the Constitution. Laws that, by design or effect, single out small and discrete minorities for discrimination are the epitome of laws that are struck due to Article 14 violations. In any case, section 377 was challenged on behalf of the estimated 25 million homosexual men in the country who become criminals by its operation. No discussion has been carried out at all as regards Article 15 of the Constitution in the impugned Judgment.

G. That the observations of this Hon'ble Court in paragraphs 39 and 40 of the Impugned Judgment, insofar as they hold that the Hon'ble High Court had entertained the challenge to section 377 despite not laying down the factual basis of the same is an error apparent on the face of the record. The Delhi High Court in its judgment has placed extensive factual material on record i.e. *Firstly*, the factual basis in the form of affidavits and pleadings has been referred to even in the Impugned Judgment, particularly paragraphs 17.9

(referring *inter-alia* to the High Court Judgment in paras 21, 22, 50, 74 and 94), and 18.1, dealing with the contentions of the challengers of Section 377. In fact in paragraph 51 of the Impugned Judgment the Hon'ble Court deals with these factual considerations holding that even if there was abuse, it was not mandated by the Section 377 and thus could not be enough to declare it unconstitutional. It is submitted that the reading of both these paragraphs apparently fails to take into consideration the internationally accepted human rights of a segment of society and its right of privacy in matters of sexual orientation while proceedings to hold them liable to criminal prosecution.

H. That the Hon'ble Delhi High Court has highlighted in great detail the abuse of Section 377. This Hon'ble Court however, finds the material insufficient. Nevertheless, it proceeds to hold that even the abuse of the provisions of section 377 is not enough to render it unconstitutional. Given that even a lesser abuse of S.377 results in invasion of privacy and equality, and impinges on human rights of segment of society, the quantum of material adduced before the Court is immaterial, when abuse, howsoever small is established. Furthermore, beyond placing several

incidents of abuse before the court, there was nothing further the Petitioners could do to establish factually the suffering of homosexuals by this pernicious provision. No one denies the high level of *onus probandi* needed to invalidate any statutory provision but the conditions imposed by the Impugned Judgment are impossible to meet. *Secondly*, a reference to the above cited paragraphs of the High Court judgment make it evident that extensive factual materials were relied upon and discussed before the Hon'ble Court. It is submitted that paragraph 40 of the Impugned Judgment insofar as it seeks to re-evaluate the evidence before the Delhi High Court is an incorrect exercise in the light of established principles of judicial review.

I. That the Impugned Judgment is in error in holding that "*It is relevant to mention here that the Section 377 IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.*" It is submitted that the above holding has been made without considering the contentions of the Review Petitioners and is also a misreading of the law. The constitutionality of a statutory provision

cannot be adjudicated *de hors* the impact it has on the section of the population whose actions it criminalises and stigmatizes. In this regard this Court has laid down in *Anuj Garg* v. *Hotel Association of India*,(2008) 3 SCC 1 that "*Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.*"*Firstly*, as this Hon'ble Court has laid down in the landmark case of *State of West Bengal* v. *Anwar Ali Sarkar*, (1952) SCR 284 at p. 324 "*If it is established that the person complaining has been discriminated against as a result of the legislation and denied equal privileges with others occupying the same position, I do not think that it is incumbent upon him…to assess and to prove that in making the law, the legislature was actuated by a hostile or inimical intention against a particular person or class.*" It was further held at p. 310 "*…that it would be extremely unsafe to lay down that unless there was evidence that discrimination was 'purposeful or intentional' the equality clause would not be infringed…it should be noted that there is no reference to intention in Article 14 and the gravamen of*

that Article is equality of treatment." *A fortiori*, the task of the Courts is to see whether particular provisions of the law infringe any provisions of the Constitution. If they do so, regardless of the intent, the same are void. *Secondly*, it is important to iterate that the Hon'ble High Court had, on the basis of materials placed on record come to the conclusion that Section 377 was targeting homosexual persons. The contents of paragraph 94-98 of the High Court judgment are relevant in this regard. The Impugned Judgment has not addressed these issues at all. Even assuming *arguendo* that such re-appreciation of evidence is justified in judicial review, this Hon'ble Court has in paragraph 37 of the impugned Judgment correctly laid down that *animus* against homosexual acts was the prime and in fact the only motive for the enactment of the ban in the IPC. Further, the cases cited by this Court in paragraph 38 relate primarily to homosexual conduct, albeit non consensual conduct in most cases. This further indicates that Section 377 has a disproportionate impact on homosexual persons, as indeed was the intention of the Victorian lawmakers in the mid 1800s. *Thirdly*, in addition to the findings as regards "carnal intercourse" against the course of nature, this Hon'ble Court has

itself held in the impugned Judgment (strongly contested by the Review Petitioners) that "*the orifice of mouth is not, according to nature, meant for sexual or carnal intercourse*". Indisputably then, all sexual relations between homosexual persons are as per the reading of this Court "against the course" of nature and therefore hit by the provisions of Section 377. While heterosexual couples can, without the stigma of illegality, have sexual relations unless the same are forced or without consent, homosexual persons simply cannot have any sexual relations regardless of consent or privacy. To say that this does not disproportionately impact homosexual persons who are stigmatized in their sexual expression is to ignore the essential meaning of the restriction on a facile reading of the face of a statute instead of a consideration of its merits. In this regard it is pertinent to consider the dissenting observations of Justice Stevens of the US Supreme Court in *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 US 701 (2007): *"There is a cruel irony in The Chief Justice's reliance on our decision in Brown v. Board of Education,349 U. S. 294 (1955) . The first sentence in the concluding paragraph of his opinion states: "Before Brown, schoolchildren were told where they could and*

could not go to school based on the color of their skin." Ante, at 40. This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, The Chief Justice rewrites the history of one of this Court's most important decisions. (internal citations removed)" It is humbly and respectfully submitted that this Hon'ble Court has failed to note that in the overwhelming majority of cases, homosexual persons who are targeted under Section 377 and that the records and affidavits filed do not tell stories of heterosexual persons being so afflicted in cases of voluntary relations between adults in the privacy of bedrooms.

J. That this Hon'ble Court has erred in failing to appreciate that even as per its own findings in paragraphs 37 and 38, Section 377 is void in law for being impermissibly vague and arbitrary. After an exhaustive summary of case law, this Court has found, "*However, from these cases no uniform test can be culled out to classify acts as*

"carnal intercourse against the order of nature"… "We are apprehensive of whether the Court would rule similarly in a case of proved consensual intercourse between adults. Hence it is difficult to prepare a list of acts which would be covered by the section." It is submitted that the obvious *sequitur* of this finding would be that Section 377 is struck as both vague and arbitrary. In paragraph 44 of the Judgment, this Court has held that past practice and the vagaries of language ought to be considered while analyzing a provision of law. This Hon'ble Court has cited the decisions of this Court in *AK Roy* v. *State of West Bengal*, (1982) 1 SCC 271 and *KA Abbas* v. *Union of India*(1970) 2 SCC 780 in order to protect section 377 from Constitutional invalidity. It is submitted that neither of these decisions protect Section 377 from the vice of unconstitutionality. *Firstly*, as this court has held in paragraph 38, that the phrase, "Order of nature" cannot be adequately defined and is thus different from expressions like "bring into hatred or contempt" or "annoyance to the public" that "do not elude a just application to practical situations". In accordance with *AK Roy*, Section 377 cannot be defended from the charge of vagueness without a factual finding that it is possible to make a just application to

practical situations. The doubts that this Court has expressed as regards its application to consenting adults are enough to refute this presumption, which is rebuttable in law. *Secondly*, it is pertinent to reiterate the cited paragraph in *KA Abbas* to establish that the Hon'ble High Court has exactly done the same,"*Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases*". Since the wordings of Section 377 are admittedly ambiguous and the admitted ambiguity as regards the issue of consent takes away a guaranteed freedom, i.e. human dignity and the right to life, the action of the Hon'ble High Court to read down Section 377 to exclude consenting homosexual acts is a laudable example of following the precedent in *KA Abbas*. In fact this Hon'ble

Court has held in *Jagdish Pandey* v. *Chancellor, Bihar University*, (1968) 1 SCR 231, " *There is no doubt that if one reads s. 4 literally it does appear to give uncanalised powers to the Chancellor to do what he likes on the recommendation of the Commission with respect to teachers covered by it... We are of opinion that s. 4 must be read down and if we read it down there is no reason to hold that the legislature was conferring a naked arbitrary power on the Chancellor. It seems to us that the intention of the legislature was that all appointments, dismissals etc. made between the two dates should be scrutinised and the scrutiny must be for the purpose of seeing that the appointments, dismissals etc., were in accordance with the University Act and the. Statutes, Ordinances, Regulations and Rules framed thereunder, both in the matter of qualifications, and in the matter of procedure prescribed for these purposes... We have therefore no hesitation in reading down the section and hold that it only authorises the Chancellor to scrutinise appointments, dismissals etc. made between these two dates for the purpose of satisfying himself that these appointments, dismissals etc., were in accordance with the University Act and the Statutes, Ordinances, Regulations or Rules made thereunder, both as to the*

substantive and procedural aspects thereof... Read down this way, s. 4 does not confer uncanalised power on the Chancellor; as such it is not liable to be struck down as discriminatory under Art. 14." It is submitted that the Hon'ble High Court while reading down Section 377 to de-criminalize consensual private homosexual acts has acted within the letter and spirit of the aforementioned decision. It is submitted that this Hon'ble Court has erred insofar as the impugned Judgment does not apply correctly the standards it correctly lays down in the light of its own factual findings.

K. Because the Impugned Judgment fails to appreciate that in its application to consenting adults, Section 377 is either impossibly vague and thus arbitrary and bad in law or lays down standards that are entirely based on undue hostility and actuated by malice and thus run afoul of the Constitutional scheme. The Hon'ble Court has misdirected itself by finding that the section has been applied in a way so that no principle can be derived as to what is covered (paragraph 38) and then relying upon *KA Abbas* and *AK Roy* to hold that it should not be struck down as it is possible to make a just application in practical cases (paragraph 44). The

two findings are contradictory and constitute a *non-sequitur*.

L. Because the Hon'ble Court has erred in holding that "*But, at the same time it could be said without any hesitation of contradiction that the orifice of mouth is not, according to nature, meant for sexual or carnal intercourse. Viewing from that aspect, it could be said that this act of putting a male-organ in the mouth of a victim for the purposes of satisfying sexual appetite would be an act of carnal intercourse against the order of nature.*" The aforementioned statement has not been supported by reasoning or a recording of contentions. *Firstly*, it is submitted that voluntary sexual relations in private spaces ought not to be classified as being "in the course of nature" or "against the course of nature" based solely on Victorian English morality. The said "morality" is neither of Indian origin nor currently accepted as valid, and is based on a discriminatory *animus* against homosexuals no longer accepted in the light of the principles of equality and equal protection not to mention human life and dignity that have been given importance in our Constitutional scheme. *Secondly*, such a statement unsupported by reasoning or evidence, amounts to a rejection, based entirely on

conjecture, of the claims of the Petitioners that have been upheld by the Hon'ble High Court. It is submitted that this Hon'ble Court has correctly observed in the light of scientific and sociological research that consensual sexual relations are no longer exclusively for procreation but has fallen into error by failing to appreciate that the natural consequence of such reasoning is to negate the very foundation of the "order of nature" classification.

M. That the Impugned Judgment errs insofar as it holds that "*judgments of other jurisdictions cannot be applied blindfolded for deciding the constitutionality of a law enacted by the Indian legislature*" while overturning the Judgment passed by the Hon'ble High Court of Delhi. *Firstly*, it is submitted that it is a mischaracterization of the well-reasoned judgment of the Hon'ble High Court to hold that judgments of other jurisdictions have been applied blindfolded. The said Judgment speaks for itself and cannot be said to "blindly" or otherwise follow the practice of other countries or the principles of international law. *Secondly*, Section 377 was not made by an Indian legislature but rather is a vestigial relic of the British Raj that has been long abandoned in the land of its origin and indeed in all the rest of the

civilized world. It ought not to be lightly presumed that the Indian legislature has "ratified" or approved of Section 377. It is submitted that the section was deliberately and consciously designed to sequester and restrict sexual relations of the "native population" and was a technique for colonial governance and not enacted for the benefit of Indians or out of respect for some amorphous notion of "Indian cultural values". *Thirdly*, the Impugned Judgment relies only upon 2 cases to restrict the application of international law and foreign case laws while not considering scores of others where foreign law and international law have been cited with approval. As regards the contents of international treaties/covenants to which India is a party or which have become universally accepted as customary international law, this Court has consistently held that the same can be used to interpret constitutional provisions and statutes reasonably capable of more than one meaning. In particular reference may be made to *PUCL* v. *Union of India*, AIR 1997 SC 1203: (1997) 3 SCC 433; *Jolly George Verghese* v. *Bank of Cochin*, AIR 1980 SC 470: 1980(2) SCC 360; *Javed Abidi* v. *Union of India*, (1999) 1 SCC 467; *Dwarka Prasad Agarwala* v. *BD Agarwala*, (2003) 6 SCC 230; *Visakha* v. *Rajasthan*,

(1997) 6 SCC 241; *AnujGarg* v. *Union of India*, (2008) 3 SCC 1; *VineetNarain* v. *Union of India*, (1998) 1 SCC 226. There are a plethora of judgments further illustrating the adoption of international human rights law into our Constitutional jurisprudence. As regards the decisions of foreign cases, the Hon'ble Supreme Court has long held that the same are not binding but have persuasive value. Indeed the impugned Judgment while quoting the law as it currently stands on Article 21 and 14 cannot but be aware of the immense value derived from judgments of the US, UK, Europe, Australia, Canada and others and their influence on the jurisprudence of this Court. The precedent cited by this Hon'ble Court for this proposition, *Jagmohan Singh* deals with the issue of the death penalty and were held inapplicable in part because India does not have a constitutional provision banning cruel and unusual punishment, unlike the USA. As held in *Jagmohan Singh*, "*So far as we are concerned in this country, we do not have, in our constitution any provision like the Eighth Amendment nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause.*" Further, the quotation as

regards western experience being unsuited to Indian conditions was made in regard to the reference made to western studies to show the ineffectiveness of the death penalty and no Indian crime statistics were referred to. It is humbly submitted that reasoned reference to the reasoning of foreign law when constitutional provisions were *in paramateria* is not hit by this judgment. As regards the decision in *Surendra Pal*, it is submitted that the facts and pleadings of that case are decidedly dissimilar to the facts and law at hand. In any case, it is reiterated that the Hon'ble High Court of Delhi has sought light but not been blinded by the light from foreign precedent. In this instant case, the rights to life, human dignity, equality and privacy are equally applicable to all the nations whose judgments have been quoted (and not exclusively relied upon) by the Hon'ble High Court. It is submitted that the judgment of the Hon'ble Delhi Court was not based upon an unprecedented and wholesale adoption of foreign notions but rather upon a thoughtful consideration of legal principles that were in part illustrated by the unanimous view in all the developed world that anti sodomy statutes are in violation of the rights to equality, life and privacy.

N. That this Hon'ble Court has erred in relying upon the decision of *Sushil Kumar Sharma* v. *Union of India*, (2005) 6 SCC 281 in striking the Judgment of the Hon'ble Delhi High Court. *Firstly*, as can be established by a reference to the affidavits as have been discussed in paragraphs 21 and 22 of the Delhi High Court's judgment, it was established before the Hon'ble Delhi High Court that there was abuse of the section to intimidate, harass and blackmail homosexuals. It was not mere apprehension but an established fact. *Secondly*, in *Sushil Kumar Sharma*, the Hon'ble Supreme Court had been able to identify the social evil sought to be defeated by section 498A of the IPC. It could not be disputed that there was a legitimate social evil that was sought to be remedied. On the other hand, there is conspicuous silence about the "social evil" that punishment of voluntary homosexual activity conducted in privacy seeks to arrest. The Impugned Judgment has not accepted or endorsed any arguments relating to morality as were sought to be made by the various religious and private groups, including the main appellant who was an astrologer, protesting the landmark decision of the Hon'ble Delhi High Court. In the instant case it was proved to the satisfaction of the

Hon'ble Delhi Court that "administration and application of a particular law would be done "with an evil eye and unequal hand."Thus the precedent has been misapplied in the Impugned Judgment.

O. That theImpugned Judgment has fallen into error while evaluating the Constitutional propriety of Section 377. In *Namit Sharma v. Union of India*, (2013) 1 SCC 745, at paragraph 13, this Court has observed, *"A law which violates the fundamental right of a person is void. In such cases of violation, the Court has to examine as to what factors the Court should weigh while determining the constitutionality of a statute….(b) Conversely, a statute which violates the Constitution cannot be pronounced valid merely because it is being administered in a manner which might not conflict with constitutional requirements. In the case of CharanLalSahu v. UOI [(1990) 1 SCC 614 (667) (para 13), MUKHERJEE, C.J. made an unguarded statement, viz., that "In judging the Constitutional validity of the Act, the subsequent events, namely, how the Act has worked out, have to be looked into." It can be supported only on the test of 'direct and inevitable effect' and, therefore, needs to be explained in some subsequent decision. (c) When the constitutionality of a law is challenged on the ground that it infringes a*

fundamental right, what the Court has to consider is the 'direct and inevitable effect of such law." It is submitted that the 'direct and inevitable effect' of keeping S. 377 alive or maintaining it in the statute book is the authoritative denial of the right to live with dignity of homosexual persons and the stigmatization of acts and persons who are sexual minorities.

P. That the Impugned Judgment fails to correctly incorporate the two fold test carved out of Art. 14. In the absence of an understanding or inclusive definition of the expression "against the order of nature", it is unreasonable to create a classification on the basis of the manner in which carnal or sexual intercourse is conducted. This Hon'ble Court in *State of Maharashtra and Anr. v. Indian Hotel and Restaurants Assn. and Ors.*, (2013) 8 SCC 519, has observed at paragraph 92, while reaffirming the decision of this Hon'ble Court in *BudhanChoudhry v. State of Bihar,* AIR 1955 SC 191, *"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes*

persons or things that are grouped together from others left out of the group, and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure." The same test fails completely when put to Section 377 of the IPC insofar as it applied to consensual homosexual adult private acts. It is submitted that a common thread runs through the entire law of sexual offences with the exception of Section 377 insofar as what is criminalised are sexual acts without consent, with coerced consent or with persons lacking the capacity to consent. Section 377 alone does not deal with the issue of consent at all. It is established law that for the two fold test prescribed for Article 14, the object of the classification itself should be lawful. This Hon'ble Court held in Nagpur Improvement Trust v. VithalRao (1973) 1 SCC 500, "*The object itself*

cannot be discriminatory, for otherwise, for instance, if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the, object sought to be achieved."It is also important to iterate that this Court has held in *RK Garg* v. *Union of India* (1981) 4 SCC 675, "*It was then contended that the Act is unconstitutional as it offends against morality by according to dishonest assessees who have evaded payment of tax, immunities and exemptions which are denied to honest tax payers… We do not think this contention can be sustained. It is necessary to remember that we are concerned here only with the constitutional validity of the Act and not with its morality. Of course, when we say this we do not wish to suggest that morality can in no case have relevance to the constitutional validity of a legislation. There may be cases where the provisions of a statute may be so reeking with immorality that the legislation can be readily condemned as arbitrary or irrational and hence violative of Article 14. But the test in every such case would be not whether the provisions of the statute offend against morality but whether they are arbitrary and irrational having regard to all the facts and circumstances of the*

case. Immorality by itself is not a ground of coustitutional challenge and it obviously cannot be, because morality is essentially a subjective value, except in so far as it may be reflected in any provision of the Constitution or may have crystalised into some well-accepted norm of special behaviour." The obvious *sequitur* is the object of singling out homosexual acts for particular approbrium based only on outdated Victorian notions of morality, is an unconstitutional object bringing section 377 into violation of Article 14.

Q. That the Impugned Judgment fails to consider the important principle that laws, in particular laws enacted prior to the commencement of the Constitution of India, must be construed in a broad and expansive manner, taking into account continually changing circumstances, conventions, usages and customs. Penal statutes in particular are deemed to be always speaking as are constitutional statutes. In this regard heed must be paid to the decision of this Hon'ble Court in *AnujGarg* v. *Hotel Association of India*, (2008) 3 SCC 1. Further, this Hon'ble Court in *State of Karnataka v. Union of India*, (1977) 4 SCC 608, at paragraph 81 has acknowledged, *"A written Constitution, like any other enactment, is embodied in a document. There are certain*

general rules of interpretation and construction of all documents which, no doubt, apply to the Constitution as well. Nevertheless, the nature of a Constitution of a Sovereign Republic, which is meant to endure and stand the test of time, the strains and stresses of changing circumstances, to govern the exercise of all Governmental powers, continuously, and to determine the destiny of a nation could be said to require a special approach so that judicial intervention does not unduly thwart the march of the nation towards the goals it has set before itself." Further at paragraph 83, it has been stated, *"Although, a written Constitution, which is always embodied in a document, must necessarily be subject to the basic cannons of construction of documents, yet, its very nature as the embodiment of the fundamental law of the land, which has to be adapted to the changing needs of a nation, makes it imperative for Courts to determine the meanings of its parts in keeping with its broad and basic purposes and objectives."* The South African Constitutional Court in *TheState v. T Makwanyane and M Mchunu*, Case No. CCT/3/94, has noticed at paragraph 9, *"In S v. Zuma and Two Others (Constitutional Court Case No. CCT/5/94), this Court dealt with the approach to be adopted in the*

interpretation of the fundamental rights enshrined in Chapter Three of the Constitution. It gave its approval to an approach which, whilst paying due regard to the language that has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution." The same indisputable propositions militate in favor of decriminalization of consensual adult homosexual acts in private as the phrase "against the order of nature" ought also to be read as having evolved in keeping with modern conditions and mores.

R. That the Impugned Judgment failed to appreciate that international trends reveal the adoption of a forbearing and tolerant disposition towards the LGBT community based on growing respect for human rights of all persons including sexual minorities. The Report of the United Nations High Commissioner for Human Rights, dated 17.11.2011, has incorporated several judicial decisions rendered by Courts belonging to multiple jurisdictions on the burning issue of treatment of the LGBTs and it states, *"In 1994, in the case Toonen v. Australia, the Human Rights Committee held that States are obligated to protect individuals from discrimination on the basis of their sexual orientation."* Further at point 14,

it has been said, *"Since Toonen in 1994, the Human Rights Committee has held that laws used to criminalize private, adult, consensual same-sex sexual relations violate rights to privacy and to non- discrimination. The Committee has rejected the argument that criminalization may be justified as "reasonable" on grounds of protection of public health or morals, noting that the use of criminal law in such circumstances is neither necessary or proportionate."*

S. That the Impugned Judgment does not deal with the *"compelling state interest"*. The fundamental right to privacy implicit in the right to life, as recognized by this Hon'ble Court in innumerable decisions, is a pivotal right which vests in the members of the LGBT community as indeed with all other persons. This Hon'ble Court in *Govind v. State of Madhya Pradesh and Anr.,* (1975) 2 SCC 148, has declared at paragraph 22, *"If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right."* Therefore, it is necessary for a compelling state interest or strong public interest to

exist on the basis of which fundamental rights are denied or contextually unavailable.

T. That the Impugned Judgment does not squarely address the fact that Section 377 of the IPC forbids sexual activity between two consenting individuals including adults over the age of 18 years, which is against the right to life under Article 21 and right to equality under Article 14 as determined by the Hon'ble High Court of Delhi. The section has been used to address the problem of child sexual abuse, in the absence of any comprehensive legislation to address this abuse, a protection that may not be needed in the future due to a 2013 amendment of criminal laws and also the fact that 377 has been declared unconstitutional only for consensual private acts by the Delhi High Court. However, empirically, the provision has been used overwhelmingly against men who have sex with men and is symptomatic of animus against them. Law enforcement authorities as well as homophobic persons have constantly harassed persons who are homosexuals, transsexuals and transgendered by this provision. Keeping in mind the abuses faced by sexually marginalised individuals and groups and the way in which section 377 has been used to specifically target

gay men and men who have sex with men, as well as the way in which the provision was impeding work within the community on safe sex practices, the Hon'ble High Court of Delhi struck down the applicability of the said provision to consenting adults i.e., persons over 18 years of age.

U. That the Impugned Judgment does not address the central issue that there are now enough studies to demonstrate that homosexuality is neither an entirely inherent biologically determined fact, nor is it a deviant practice or criminal form of conduct. This negates the outdated Victorian notions of "course" or "order of nature". Because section 377 effectively criminalises homosexual conduct, gay men and lesbian women have been seen as criminals. And because such conduct is implicitly regarded with moral disgust or revulsion, gay men and lesbian women have been treated with moral disgust and revulsion.

V. That Section 377 contributes to the pervasive stereotype of gays and lesbians as deviants and criminals and also child molesters. The stereotype is not at all credible, and gay men and lesbian women are no more likely to pose a threat to society or to children than heterosexuals. There is plenty of research available in other countries

that the gender of a child's parent is not a factor in a child's adjustment. The sexual orientation or preference of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.

W. That in fact, this private discrimination against sexually marginalised people and groups result in the denial of their civil and political rights simply because of their sexual status and conduct. The current challenge to the judgment of the Hon'ble Delhi High Court, is further evidence of how some groups and individuals are actually putting efforts into perpetuating the discrimination against sexually marginalised individuals and groups. Furthermore, as sexuality is not entirely determined by science, and is also socially constructed, the issue at stake is the freedom of choice, which cannot be overlooked.

X. It is submitted in view of the above submission that Section 377 is against the fundamental rights guaranteed by the Constitution to the citizens of India.

It is submitted that this Hon'ble Court in Maneka Gandhi v. Union of India AIR 1978 SC 597 held that Article 21 of the Constitution not only protects right to life but also personal liberty. The term personal liberty would include liberty to self-determination and developing one's personality to the fullest. This right to self-determination is protected under the Constitution and any law in violation thereof would be unconstitutional and would be liable to be invalidated. It is of course subject to reasonable restrictions, i.e., the same cannot harm rights of another person. It is submitted that criminalizing sexual conduct between two consenting adults in no way interferes with the rights and freedoms of any other person. Nor did the makers of the Constitution intend to oppress one class of people for the mere moral satisfaction of the majority. This Hon'ble Court in I.C. Golaknath v. State of Punjab, [AIR 1967 SC 1643], while discussing the importance of fundamental rights under Part III of the Constitution observed that:

"*They are primordial rights necessary for the development of human personality. They are the rights, which enable a man to chalk out his own life in the manner he likes best. Our Constitution, in addition to the*

well-known fundamental rights, also included the rights of the minorities, untouchables and other backward communities, in such rights."

Through the above quote, this Hon'ble Court recognised the importance of fundamental rights as an integral part of determining and developing one's own personality and chalking out one's own life. The said right is integral to the right to develop one's own personality, which is well advocated to be a fundamental human right guaranteed by the Constitution.

Y. It is submitted that Section 377 so far as it criminalizes sexual conduct between homosexuals i.e., consenting adults is not only against the fundamental rights guaranteed by the Indian Constitution, but is also against Article 26 of the International Covenant on Civil and Political Rights, which India has ratified. The Article states as under:

"Article 26

All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion,

political and other opinion, national or social origin, property, birth or other status."

The Human Rights Committee, the treaty body charged with monitoring implementation of the International Covenant on Civil and Political Rights (hereafter referred to as "the ICCPR"), has found that "the reference to 'sex' in [the nondiscrimination provisions of the Covenant] is to be taken as including sexual orientation" (Toonen v. Australia CCPR/C/50/D/488/1992, para. 8.7). In the Toonen case, Article 26 was also read with Article 17 of the ICCPR. Article 17 of the Covenant reads as under:

"Article 17:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks."

The Human Rights Committee found that two provisions of Tasmanian law (i.e., Section 122 (a) and (c) and Section 123 of the Tasmanian Criminal Code criminalizing sexual conduct between men violated article 17, paragraph 1 of the ICCPR, quoted above. The Committee rejected the argument of criminalizing sexual

conduct between men on the grounds of spread of HIV/AIDS. The UNHRC held as under:

"8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalisation of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Government of Australia observes that statues criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection." Criminalizing of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalisation of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

8.6 The Committee cannot accept either that for the purposes of Article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the committee's scrutiny a potentially large number of statues interfering with privacy. It further notes that with the

exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that even in Tasmania, it is apparent that there is no consensus as to whether section 122 and 123 {Tasmanian Criminal Code} should not also be repealed, considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the "reasonableness" test in the circumstances of the case, and that they arbitrarily interfere with Mr. Tonne's right under article 17, paragraph 1…"

It is submitted that the above observation is squarely applicable to the instant case. It is submitted that even in the present case, as the Government of Australia, the Government of India through the Union Ministry of Health and Family Welfare had also, submitted before the Hon'ble High Court of Delhi that Section 377 IPC, by criminalising consensual sex between adults of the same sex, not only are homosexuals denied due process and equality before the law, the provision also hampers HIV intervention efforts aimed at sexual minorities. In view of the above, the provision is in violation of the

rights of sexually marginalised individuals and groups and there is no compelling state interest that has been argued to continue to apply such a provision to consenting adults. It is further submitted, in view of the contention of the Ld. Additional Solicitor General before the Hon'ble High Court of Delhi that Section 377 is gender neutral and nothing in the provision indicates that it is to be enforced against homosexuals, the argument that the provision is necessary for the protection of the morals of non-homosexual Indians is therefore not valid. It is submitted that in view of the above judgement, Tasmania repealed its sodomy laws.

Z. In the context of homosexuality in India, it is relatively significant to discuss present laws regarding homosexuality in the United Kingdom, since Indian law has been based on the laws from the colonial era and British rule. In England, homosexuality was a criminal offence till 1967. In 1967, The Sexual Offences Act was passed. This Act provided for a limited decriminalization of homosexual acts on basis of certain conditions. It decriminalized consensual sex between adults in private who have attained the age of 21. But this Act discriminated between homosexuals and heterosexuals. There was a higher age of consent for homosexuals than

that for heterosexual acts, which was set at 16. In 2004, the Sexual Offences Act, 2003 came into force. It introduced neutral laws for everyone and removed the discrimination regarding age of consent. It introduced similar provisions for homosexuals and heterosexuals. In 2002 the Adoption and Children Act, was passed. It provided same-sex couples the right to adopt. It removed the earlier condition of marriage. In 2005, same-sex couples got the right to enter into civil partnerships because of Civil Partnership Act. These partnerships were civil unions and approved similar rights as a marriage. The Equality Act 2010 serves the primary purpose of protecting against discrimination in employment on grounds of religion or belief, sexual orientation and age. It is important to note that legislation to allow same-sex marriage in England and Wales was passed into law by the parliament of the United Kingdom in July 2013 and is expected to be brought into force on March 29th, 2014. Thus the very country that imposed section 377 on colonial India, has completed removed all vestiges of this prejudicial and discriminatory law from its statute books. Besides this there are numerous other laws like The Human Fertilization and Embryology Act 2008, Gender

Recognition Act 2005 etc., which were passed in order to remove discrimination against homosexuals and same-sex couples. Thus, the United Kingdom provides an example of how the rights of sexually marginalised persons and groups have acquired full recognition and how new laws have been enacted to removed the historical and system discrimination experienced by such individuals and groups.

AA. It is submitted that there has been significant acceptance of homosexuals as well as persons belonging to the lesbian, gay, bi-sexual, transsexual and transgendered community in a large number of other countries across the globe, and such acceptance is not limited to Western democracies. The Supreme Court of Nepal recently decided that all the fundamental rights included in the Constitution must be made available to all persons, regardless of their sexual orientation or sexual preferences. In a vast number of African countries such as Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Central African Republic, Chad, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Republic of Congo, Saint Helena, Mozambique, Rwanda, South Africa same-sex sexual activity is legal. In a number of Central American countries such as

Costa Rica, El Salvador, Guatemala, and Nicaragua, not only is same-sex sexual activity legal, but there is also a ban on some anti-gay discrimination. Argentina, Uruguay, and Brazil permit same sex sexual activity, and also recognize same-sex relationships, same-sex adoption, and allow gays to serve openly in the military. Same-sex marriage has been legal in Argentina since 2010. In a large number of South American countries same-sex sexual activity is legal. The same is the case with a number of Central and Western Asian countries such as Kazakhstan, Kyrgyzstan, Iraq, Jordan, the Palestinian West Bank, and Israel (which also recognizes same-sex relationships, same-sex marriage, same-sex adoption, allows gays to serve openly in the military, bans some anti-gay discrimination, and has adopted laws concerning gender identity/expression). In East Asia, China, Hong Kong, Japan, Macau, Mongolia, North Korea and South Korea, all permit same-sex sexual activity and have different levels of legal recognition for homosexual relationships as well as bans on anti-discrimination practices. In addition a large number of European countries, the United States, and Commonwealth countries such as the United Kingdom, Canada, Australia, New Zealand have accorded legal

recognition to homosexuals in a number of different capacities, including same-sex sexual activity. Canada, Belgium, the Netherlands, Spain, South Africa, Norway, Sweden and some states of US have struck down laws that discriminate against lesbian and gay individuals and their relationships. Also, Canada is one country that permits same-sex marriage without any residency requirement. Hence, same-sex couples from anywhere in world can get married in Canada.

BB. It is submitted that the provision under consideration is not only inconsistent with the trend in a vast number of countries globally, it is also against the principles of justice and the fundamental rights enshrined in the Constitution. It is submitted that the intention behind the Constitution of conferring equal rights and liberties on all citizens, drafted by some eminent persons who were part of the freedom movement and fought against discrimination and oppression should prevail over the provisions of an archaic law drafted when India was under colonial rule. Sexuality was a highly stigmatised concept in Victorian England and the laws enacted to regulate sexuality in India were invariably designed to introduce Victorian cultural values into the colony, as well as the discipline and subjugate the colonial subject.

In view of the development of the law in a number of countries and in light of the provisions of the Indian Constitution, which guarantee the right to life and personal liberty , the idea of penalising homosexual conduct simply because it is considered as morally offensive to some is both untenable and unjust.

CC. It is submitted that in the Hon'ble Delhi High Court has relied on the decision of the Supreme Court of the United States of America in Lawrence v. Texas. The said judgment is relevant in the present context in so far as the U.S. Supreme Court not only invalidated sodomy laws that criminalized consensual sexual behaviour amongst homosexual adults but also between heterosexuals. The Supreme Court of the United States in Lawrence v. Texas overruled its earlier decision in Bower, wherein it had upheld the sodomy law on the basis of "ancient roots" of the country and since the majority condemns non-procreative sex especially amongst same sex partners. The Court held:

"*The Bowers Court was, of course, making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court's obligation is to define the liberty of all, not to mandate its own moral code.*

While holding thus, the Supreme Court of the U.S. relied on its decision in Planned Parenthood v. Casey, case concerning contraceptives being used by married couples. It is submitted that irrespective of whether homosexuality or carnal intercourse is offensive to the moral sentiments of some segments of a society, the state does not have any compelling interest that justifies interference with the personal liberty of consenting adults engaged in same-sex sexual relations. It is further submitted that the Ministry of Health and Family Welfare has itself acknowledged the hindrance created by the provision in question in efforts made by the Ministry to counter the spread of HIV/AIDS. It is submitted that a true democracy is one that guarantees dignity and status to all of its citizens including minority groups. It is hence wrong to compare homosexuals to terrorists or describe homosexuals as part of an organized crime network against society as has been done by those who are appealing against the Delhi High Court decision. Indeed, the reverse situation is more accurate. Criminalising sodomy has not only reinforced the stigmatisation of homosexuals as a group, but also renders them vulnerable to threats, harassment and even subject to extreme violence and bodily harm.

Section 377 as it originally stood prior to the Delhi High Court decision, enabled prejudice and intolerance to prevail. The reading down of the provision is consistent with the fundamental rights to equality as well as to life, which includes the right to live with dignity and without fear of harm or threat simply because of ones sexual preferences.

It is submitted that the state needs to demonstrate a compelling state interest when attempting to curtail or restrict the fundamental rights of a citizen. It is submitted that in the present case, the state had miserably failed to demonstrate how sexual relations between same-sex consenting adults attracts any compelling interest on the part of the state. Mere moral offense to some sections of the society does not constitute a compelling state interest.

DD. It is further submitted that recently, the Centre for Health Law, Ethics and Technology at Jindal Global Law School carried out a survey to assess the impact of the Delhi High Court Naz Foundation decision on homosexuals in Delhi. It was found that most of the interviewees felt that the police harassment and stigmatization by society had reduced substantially as a

result of the reading down of section 377 by the Hon'ble Delhi High Court.

EE. It is submitted qua the contention of those who insist that homosexuality or carnal intercourse even between adults over 18 years of age is against "Indian culture", that Indian culture is not homogenous nor can any single group of individuals declare what constitutes "Indian culture" or "Indian cultural values." It is also ironic that these groups are invoking the impugned section 377 as constituting part of Indian culture, when in fact such a provision is thoroughly Victorian in its origins and was designed to stigmatise as well as erase the erotic practices prevalent on the subcontinent and found to be repugnant to Victorian conservative morality and the colonial power.

FF. It is submitted that sexual practices in India have been heterogeneous and diverse, and that healthy sexual interactions acknowledged as an important aspect of an individual's sexual life. There is ample evidence of sex not being viewed as a sin but as a way of connecting with one's partner. The Khajuraho temples, built during the time span of 950-1050AD, depict the life and times of the Chandelas, and celebrate the erotic state of being. These temples explicitly depict homosexuality prevalent

and acceptable in the cultural ethos of that period. Many texts recognise the existence of three genders (i.e., male, female, eunuch/ transgender). The ancient texts including the Rig Veda, sculptures and vestiges depict sexual acts between women as revelations of a feminine world where sexuality was based on pleasure and fertility. The Rig Veda dates back to around 1500 BC and it talks about lesbian lifestyle i.e. female sexuality. (Ruth Vanita and SaleemKidwai, Same-Sex Love in India: Readings from Literature and History, Palgrave Macmillan, 2000). There are some references prescribing punishments for gay sex in some traditional texts. But as noted academics, Ruth Vanita and SaleemKidwai point out, the prescribed punishments were not concerned with homosexuality, but with the loss of virginity. The same punishment was prescribed for a man who had intercourse with a virgin girl outside of marriage. There is no penalty prescribed for two non – virgins who have sex together. In the 'Arthshastra' written by 'Kautilya' an ancient treatise setting out guidelines regarding governance of a state, refers to non-vaginal sex by men and women, which including sodomy, and oral sex. The texts like 'SushrutaSamhita, CharakSamhita' etc. refer to the intimate sexual

relationships between women. These texts also mention the term ‘Sakhi’ ostensibly used to denote a lesbian community. The ‘Ramayana’, written by ‘Valmiki’ also provides descriptions regarding homosexuality. This text describes an instance in which Hanuman is said to have seen Rakshasa women kissing and embracing other women in Lanka. There is another reference in the Ramayana to Sri Rama as ‘PurusamohanaRupaya’, which means so handsome as to be pleasing even to men. One version of the KrittivasaRamayana, contains a narrative of two queens who conceive a child together. The narrative discusses same-sex sexual relations, and same-sex co-parenting in the context of the birth of the heroic child, Bhagiratha. He was called as ‘Bhagiratha’ because it means born of two vaginas.

In the Mahabharata an ancient Hindu text written by VedVyasa , there is a reference to ‘Arjuna’ who disguised himself as a 'eunuch dance teacher' called ‘Brihanalla’ during the last year of his exile. Similarly, according to a folk narrative from Koovagam in Tamil Nadu, the Pandavas were told to sacrifice Arjuna's son ‘Aravan’ if they wished to win the war at Kurukshetra. No woman would marry Aravan knowing she would be a widow the next day. Thus Krishna assumed the female form of

Mohini and married him. Mohini spent a night with Aravan and when Aravan was finally beheaded, Mohini mourned for him like a widow.

That similarly, there is no uniform understanding of sexuality within the Islamic tradition. In Sufi literature homosexual eroticism was used as a metaphorical expression of the spiritual relationship between the divine and man, and a great deal of Persian poetry and fiction invoke homosexual relationships as examples of moral love. For instance, in Urdu poetry Rektitalks about same-sex love between women. It uses a term Doganna, which means women's intimate companion. Also in late medieval Urdu poetry the term 'chapti' also depicts lesbianism. It basically refers to 'clinging or sticking together for sex' and to refer to women's erotic relationships.

GG. Under the Muslim rulers homosexuality entered court life. The Mughal emperor, Babur was known to have sexual relations with young men, a fact that has been documented in his biography Baburnama, written by Amir Khusrau. Also, there are references in the 'Masnavi' to the homoerotic romance of Sultan Mahmud of Ghazana (Lahore) with his servant, cupbearer and lover named, Ayaz. It is submitted that the prejudicial

and intolerant view that such practices are sinful or against the order of nature are not born out in the cultural literature and historical context of India. Such prejudices are entirely Victorian in their origin rather than integral to "Indian culture values" as some would argue.

HH. It is submitted that to deprive a particular class of individuals of their dignity is not a trait of any of the cultural practices in India. Rather, mutual tolerance and respect is a deeply embedded norm. In the Prison diary of Pandit Jawaharlal Nehru, one of the principal architect of the Indian Constitution, in 1944 on "the variety and unity" of India, he wrote:

"*The diversity of India is tremendous; it is obvious: it lies on the surface and anybody can see it.... There was something living and dynamic about this heritage which showed itself in ways of living and a philosophical attitude to life and its problems. Ancient India, like ancient China, was a world in itself, a culture and civilization, which gave shape to all things. Foreign influences poured in and often influenced that culture and were absorbed. Disruptive tendencies gave rise immediately to an attempt to find a synthesis. Some kind of a dream of unity has occupied the mind of India since*

the dawn of civilisation. That unity was not conceived as something imposed from outside, a standardisation of externals or even of beliefs. It was something deeper and, within its fold, the widest tolerance of beliefs and customs was practiced and every variety acknowledged and even encouraged…"

It is respectfully submitted that apart from the argument that a majority of developing and forward looking economies have relaxed or invalidated their laws regarding sodomy, the provision under consideration is against the principles of inclusion in India as well as contrary to the cultural heterogeneity of the country.

4. That the Review Petitioner has not filed any other Review Petition against the judgment and order dated 11.12.2014 delivered by this Hon'ble Court in Civil Appeal No. 10972 of 2013.

PRAYER

5. In the premises, it is most respectfully prayed that this Hon'ble Court may be pleased to:-

a) Review the judgment and order dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972/2013.

b) Grant opportunity of hearing in Court to the Review Petitioner;

c) Pass such order and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

AND FOR THIS ACT OF KINDNESS, THE REVIEW PETITIONER, AS IS DUTY BOUND, SHALL EVER PRAY.

DRAWN & FILED BY:

Rahul Narayan
Advocate for the Review Petitioners

Drawn on: 19.12.2013
Filed on: 10.01.2014

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
REVIEW PETITION (C) NO._____OF 2014
IN
CIVIL APPEAL NO. 10972 OF 2013

Suresh Kumar Koushal & Anr. .....Petitioners
Versus
Naz Foundation & Ors. .....Respondents

AND IN THE MATTER OF:

Ms. RatnaKapur and ors. .....Review Petitioners

CERTIFICATE

Certified that the Review Petition is confined only to the pleading before the Court Tribunal whose order is challenged and the other documents relied upon in those proceedings. No additional facts, documents or grounds have been taken therein or relied upon in the Review Petition. It is further certified that the copies of the documents/annexures attached to the Review Petition are necessary to answer the question of Law raised in the petition or to make out grounds urged in the Review Petition for consideration of this Hon'ble Court. This certificate is given on the basis of the instructions given by the Petitioner/person authorised given by the Petitioner whose affidavit is filed in support of the Review Petition.

DRAWN & FILED BY:

Drawn on: 19.12.2013
Filed on: 10.01.2014

[RAHULNARAYAN]
Advocate for the Review Petitioners

IN THE SUPREME COURT OF INDIA

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WITH

I.A.NO. OF 2014: APPLICATION FOR EXEMPTION FROM FILING CERTIFIED COPY OF IMPUGNED JUDGMENT

AND

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AND IN THE MATTER OF:

Ms. RatnaKapur and ors. .....Review Petitioners

APPLICATION FOR EXEMPTION FROM FILING CERTIFIED COPY OF THE IMPUGNED JUDGMENT AND ORDER DATED

To,

Hon'ble the Chief Justice of India
And His Companion Judges of the
Supreme Court of India

The humble Petition of the Petitioner abovenamed.

MOST RESPECTFULLY SHEWETH:

The Review Petitioners are seeking the Review of the Judgment and Order dated 11.12.2013 in Civil Appeal No. 10972/2013 ("Impugned Judgment") wherein this Hon'ble Court was pleased to allow the said Civil Appeal thereby setting aside the Judgment and Order dated 2.7.2009 of the Hon'ble High Court of Delhi in Writ Petition No.7455 of 2001. The impugned Judgment has the impact of re-criminalizing consensual sexual acts between adults in private thereby

setting aside the Order and Judgment of the Delhi High Court which had allowed the writ petition filed in the nature of a Public Interest Litigation by 'Naz Foundation', a Non Governmental Organisation (NGO) challenging the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC). The Review Petitioners had filed IA No. 13/ 2013 and were intervenors in the said Civil Appeal to assist this Hon'ble Court in proper adjudication of the instant case.

2. The facts and circumstances giving rise to the present Application are narrated in the accompanying Review Petition and the same are not reiterated herein for the sake of brevity. The Petitioners crave leave to refer to and rely upon the accompanying Review Petition at the time of hearing of the present Application.

2. The Petitioners submit that the certified copy of the impugned judgment and order is not available with them. In view of urgency of the matter, the Petitioners crave exemption of this Hon'ble Court to file the accompanying Review Petition with a true copy of the impugned Judgment and Order.

3. That unless and until this Hon'ble Court exempts the Petitioner from filing certified copy of the impugned Judgment and Order dated 11.12.2013, the Petitioners will suffer serious prejudice and hardship.

PRAYER

4. In the premises it is most respectfully prays that this Hon'ble Court may be pleased to:

A. Exempt the Petitioner from filing a certified copy of final Judgment and Order dated 11/12/2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013;

B. Pass such other and further Order(s) as may be deemed fit and proper in the facts and circumstances of the present case.

DRAWN & FILED BY:

Drawn on: 09.01.2014
Filed on: 10.01.2014

(RAHUL NARAYAN)
Advocate for the Petitioner