IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

(ORDER XL, RULE 1)

REVIEW PETITION (CIVIL) No. of 2014

(Against the Order dated 11.12.2013 in Civil Appeal No. 10972 of 2013 (arising out of Special Leave Petition (Civil) No. 15436 of 2009) passed by this Hon'ble Court: Sought to be Reviewed)

IN THE MATTER OF:

Dr. Shekhar Seshadri & Others …Petitioners

Versus

Suresh Kumar Koushal & Others …Respondents

WITH

I.A. No. of 2014 : An application seeking oral hearing in open court

AND

I.A. No. of 2014 : An application for stay

AND

I.A. No. of 2014 : An application for condonation of delay in filing review petition

PAPER-BOOK

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ADVOCATE FOR THE PETITIONERS: GAUTAM NARAYAN

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CIVIL /~~CRIMINAL~~ APPELLATE JURISDICTION

REVIEW PETITION (CIVIL) NO. _____ OF 2014

IN THE MATTER OF:

Dr. Shekhar Seshadri & Others …Petitioners

Versus

Suresh Kumar Koushal & Others …Respondents

OFFICE REPORT ON LIMITATION

1. The Petition is/are within limitation.

2. The Petition is barred by time and there is a delay of """"____ days in filing the present review petition against the order dated 11.12.2013 in Special Leave Petition (C) No. 15436 of 2009 a and petition for condonation of """"_____ days' delay has been filed.

3. There is delay of ____ days in re-filing the petition and petition for condonation of ____ days' delay in re-filing has been filed.

[BRANCH OFFICER]

NEW DELHI

FILED ON:

SYNOPSIS AND LIST OF DATES

The present review Petitioners seek review of the judgment and final order of this Hon'ble Court dated 11.12.2013 in C.A. 10972 of 2013 (arising out of SLP(C) 15436/2009OF) whereby this Hon'ble Court was pleased to set aside the judgment of the Delhi High Court in *Naz Foundation* v. *Government of the NCT of Delhi,* WP (C) 7455 of 2001, holding Section 377 of the Indian Penal Code, insofar as it criminalises consensual sexual acts of adults in private to be unconstitutional and in violation of Articles 14, 15 and 21 of the Constitution. In order to save the provision from the vice of unconstitutionality, the High Court had read down the provisions of Section 377 to apply only in respect of non-consensual penile non-vaginal sex, and sexual acts by adults with minors. This Hon'ble Court, by the impugned judgment, set aside the judgment of the High Court and held that Section 377 of the Indian Penal Code was constitutional and that it applied to acts, irrespective of age or consent of the parties involved.

The Petitioners herein are 13 senior psychiatrists, psychologists, counsellors and mental health professionals – including a Professor of Psychiatry at the National Institute of Mental Health and Neurosciences, Bangalore; a fellow of the Indian Psychiatric Society who is also head of the psychiatry department of Sitaram Bhatia Institute of Science and Research; a Member of the International Advisory Board, International Journal of Social Psychiatry; an editor of the influential Lancet Series on Global

Health; and a Lecturer in psychiatry, Maharashtra Institute of Mental Health – who applied to be impleaded before this honourable Court, but were allowed to intervene, in special leave petitions that challenged the Delhi High Court Judgement that decriminalised sex between consenting adults.

It is submitted that the Petitioners through their Counsel were heard and a detailed written submissions along with authoritative scientific literature from reputed academic peer-reviewed journals supporting the declaration of the Hon'ble Delhi High Court was also filed. However, it respectfully submitted that the impugned judgment does not mention, refer to, or deal with the submissions of the review petitioners. Failure to consider the contentions of the review petitioners is a material error, manifest on the face of the judgement that undermines its soundness and that has resulted in a serious miscarriage of justice. {See Indian charge chrome vs. Union of India (2005) 4 SCC 67 @ Pr. 13 & 16}

The Petitioners' contention which was not controverted regarding the consensus of expert opinion from the field of mental health, which is as under:

a) homosexuality was not a mental disorder but a normal and natural variant of human sexuality, even the International Classification of Diseases (ICD-10) of the World Health Organisation (WHO) and The Diagnostic and Statistical Manual (DSM IV) of the American Psychiatric Association (APA), the globally accepted standards for classification of mental health, no longer considered non-peno-vaginal sex between consenting as mental disorders or illness.

b) homosexuals had no choice in their attraction to persons of the same sex;

c) the criminalization of Lesbian, Gay, Bisexual and Transgender ('LGBT', for short) persons adversely affected their mental health.

It is relevant to note that the Petitioners' contentions were also urged by the original Writ Petitioner i.e. Naz foundation India before the Hon'ble High Court of Delhi. It is further relevant to note that this petition was earlier rejected by the Hon'ble High Court of Delhi on the ground of lack of cause of action. However, this Hon'ble Court vide order dated 03.02.2006 in SLP (C) Nos. 7217-7218/2005 remitted the matter for consideration to the Hon'ble High Court.

It is further submitted that the issue as to whether factual foundation had been laid for the challenge to the constitutionality of section 377 was not raised or contended after this Hon'ble Court's order dated 03.02.2006. it is further pertinent to mention that none of the respondents contended the said issue i.e. "lack of cause of action" or "absence of factual foundation for the challenge to section 377" before the Hon'ble High Court, after this Hon'ble Court's order dated 03.02.2006.

It is further relevant to note that even before this Hon'ble Court, none of the special leave petitions raised the issue of "lack of factual foundation" as a ground of challenge. It is therefore submitted that the issue of 'lack of factual foundation' having attained finality vide order dated 03.02.2006, and the same being

held in the impugned judgement by this Hon'ble Court is contrary to the principles of res judicata, being contrary to the orders of a four judge bench of this Hon'ble Court. (See Subhash Chandra and Another v. Delhi Subordinate Services Selection Board and Others (2009) 15 SCC 458)

It is respectfully submitted that the finding of 'lack of factual foundation' has resulted in grave and manifest error apparent on the face of the record since it had not been raised or urged and none of the parties therefore, had fair opportunity to meet the said contention. (See order dated 02.09.2004 in WP (C) No. 7455/2001 passed by the Hon'ble High Court at New Delhi and Order dated 3.2.2006 of this Hon'ble Court in SLP (C) Nos. 7217-7218/2005.)

The finding of lack of factual foundation is also erroneous in fact since the record reveals that the petition before the High Court laid detailed factual foundation establishing the direct and inevitable effect of section 377 on the health and well-being of Lesbian, Gay, Bisexual and Transgender persons ('LGBT', for short) and their families. The record also reveals that Respondent No. 8 before the High Court, a coalition of organizations representing child rights, women's rights, human rights, health concerns as well as the rights of same sex desiring people, 'Voices against 377', had also laid detailed factual foundation that medically, scientifically and legally established direct and inevitable harmful effects of section 377 on LGBT persons and their fundamental rights at paragraph 8.1.1 of its counter affidavit.

After the matter was remitted by this Hon'ble Court, the Hon'ble High Court in its judgment considered the consensus of expert opinion from the field of mental health in paragraphs 67-70, and returned a finding that evidence before it revealed that section 377 as it stood, violated the Fundamental Rights of LGBT persons.

It is respectfully that conclusion stating that

"Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes",

the impugned judgment is in material error since there is no intelligible differentia, i.e.,– no 'real and substantial difference', no 'yardstick or measure', 'no policy or principle' for guidance to distinguish 'carnal intercourse in the ordinary course' from 'carnal intercourse against the order of nature'. The judgement itself, after reviewing reported judgements on section 377, recorded at para 38 that not only was it not possible to list acts which were covered by section 377, but no test could be laid down to differentiate "carnal intercourse against the order of nature". Section 377 therefore, from the impugned judgements' review of reported judgements that applied section 377, failed the first test of Article 14, i.e., there was no intelligible differentia to distinguish 'carnal intercourse in the ordinary course' from 'carnal intercourse against the order of nature'. (See *Chiranjit Lal Chowdhury v. The Union of India and Others*, [1950] S.C.R. 869, page 913 and 932, *State of West Bengal v. Anwar Ali Sarkar ,* [1952] SCR 294, page 315)

The impugned judgement is also in error apparent on the face of the record since the test of whether there was a rational nexus of the classification of acts punished by section 377 with what the section sought to achieve was not applied. Indeed there has never been clear consensus about what section 377 sought to achieve. The judgement itself notes deliberate obviation of all discussion around the section at the time of its legislation (at para 37), and also notes, (at para 38), the complete lack of judicial consensus of the acts which fall within section 377. The impugned judgement, has it is respectfully submitted, carried the presumption of constitutionality of section 377 to the extent of assuming an "undisclosed intention or reason" for the classification of acts into "carnal intercourse against the order of nature" and "carnal intercourse within the order of nature". In doing so, the protection of article 14 has been rendered "a mere rope of sand, in no manner restraining state action." The error in applying the presumption of unconstitutionality is compounded by the fact that “good faith and knowledge of existing conditions” on the part of the body that legislated the Indian Penal Code cannot be presumed, since the Legislative Council consisted of 12 unelected Enghlishmen.(See State of West Bengal v. Anwar Ali Sarkar , [1952] SCR 294, page 316)

Error is also apparent on the face of the record in the judgement’s application of the ‘object and form’ test of ‘A.K. Gopalan’ case, discarded by this Hon’ble Court in favor of the

'intended and real effect' or the 'direct and inevitable effect' test of Maneka Gandhi to examine whether section 377 unduly burdened a class.(See Maneka Gandhi vs Union Of India, 1978 SCR (2) 621, State of Maharashtra & Anr. Versus Indian Hotel & Restaurants Assn. & Ors., CIVIL APPEAL NO.2705 OF 2006, decided on July 16, 2013)

The conclusion that section 377 merely identifies certain acts as offences and does not criminalize LGBT people is also erroneous on the face of the record since, by punishing the only form of sexual intercourse available to LGBT persons – i.e., non-peno vaginal - section 377 entirely denies sexual intercourse to the class of LGBT persons. Further, none of the 200 prosecutions dealt with in reported judgements (referred to at para 43 of the judgement), involved prosecutions of sexual intercourse involving consenting heterosexual adults. In its 'effect and operation' therefore, section 377 unduly burdens the class of LGBT. The judgement of the Delhi High Court clarified and declared that there was no rationale for this uneven application of the law and henceforth, consent would remove all consensual non-peno-vaginal sexual intercourse from the ambit of section 377 altogether, whether practiced by LGBT persons or heterosexuals.(See Khandige Sham Bhat And Others vs The Agricultural Income Tax officer, 1963 AIR 591, 1963 SCR (3) 809)

The impugned judgement is erroneous on the face of the record in misconstruing the ratio of its judgement in A.K. Roy to hold that the 'vagaries of language' saved section 377 from the challenge

of vagueness. In *A.K. Roy*, this Hon'ble Court made a distinction between

d) expressions which were difficult to define since they comprehended "an infinite variety of situations"

e) and expressions which did not comprehend such an infinite variety of situations(See *A. K. Roy, Etc vs Union Of India And Anr*, 1982 SCR (2) 272, page 323)

In the light of the fact that section 377 describes an offence against the human body and requires penetration to constitute the offence, 'carnal intercourse against the other order of nature' cannot comprehend an "infinite variety of situations" and it should be possible to 'enumerate' the acts of penetration which constitute the offence. Absent such enumeration, the clause will be capable of wanton abuse as was held in A.k. Roy, where the phrase "maintenance of supplies and services essential to the community" was held to be not only "vague and uncertain" but "capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21." This court in A.K. Roy cautioned that courts must strive to give even expressions which by their very nature were difficult to define, a narrower construction than the literal words suggested, limiting their application to as few situations as possible.

The judgement is also in error in introducing a numerical requirement for the protections of Chapter III of the constitution, since it is long settled that Fundamental Rights of miniscule minorities, even minorities of one, are entitled to full protection.

The judgement is also in factual error in concluding that in the "last more than 150 years less than 200 persons have been prosecuted (as per the reported orders)". Most prosecutions do not reach the appellate stage, and not all appellate judgements are reported. The judgement is therefore clearly in error in assuming that the number of reported judgments offers any indication of the numbers of persons prosecuted. Further, FIRs may be registered, intrusive investigations conducted into private affairs, searches carried out, bail applications granted or refused, cases tried and persons convicted without finding any reflection in the docket of the appellate courts.

It is further submitted that the error is also apparent on the face of the record from the judgement's failure to even attempt at identifying a compelling state interest requisite to justify the denial of the rights to privacy and dignity - guaranteed by article 21 of the Constitution - by the criminalization of consensual acts in private.

The Judgement impugned is also in error for having referred to some of the contentions urged by parties regarding the direct and inevitable impact of section 377 on the Right to Health of LGBT

persons, but not having considered or dealt with it as a ground of challenge to its constitutionality.

For these and other compelling reasons, it is respectfully submitted that the judgement of this Hon'ble Court must be reviewed, Civil Appeals restored and matter be heard on merits.

2001	The Writ Petitioner Naz Foundation filed WP (C) 7455/2001 before the High Court of Delhi praying that Section 377 be declared as unconstitutional and violative of Articles 14, 15, 19(1)(a) and 19(1)(d) and 21 of the Constitution insofar as it criminalises consensual sexual activity between adults.
2.9.2004	The division bench of the Hon'ble High Court of Delhi dismisses the writ petition in the following terms:

> "In this petition we find there is no cause of action as no prosecution is pending against the petitioner. Just for the sake of testing the legislation, a petition cannot be filed….
>
> In consequence the court does not express opinion when nobody is really aggrieved by the action which is impugned and does not examine merely academically the impugned action of the legislature or the

executive. In view of the above, we feel that an academic challenge to the constitutionality of a legislative provision cannot be entertained.

Hence, the petition dismissed."

3.11.2004 The Hon'ble High Court of Delhi vide its order dated 3.11.2004 dismissed the review petition filed against its order dismissing WP(C) 7455/2001

Thereafter the Writ Petitioner Naz Foundation filed SLP(C) Nos. 7217-7218/2005 against the orders dated 02.09.2004 and 3.11.2004 before the this Hon'ble Court

3.3.2006 This Hon'ble Court allowed the appeal and remanded the writ petition for fresh decision by the High Court in the following terms

"The challenge in the writ petition before the High Court was to the constitutional validity of Section 377 of the Indian Penal Code, 1860. The High Court without examining the issue, dismissed the writ petition by the impugned order observing that there is no cause of action in favour

of the appellant as the petition cannot be filed to test the validity of the legislation and therefore, it cannot be entertained to examine the academic challenge to the constitutionality of the provision.

The learned Additional Solicitor General, if we may say so, rightly submits that the matter requires examination and is not of a nature which ought to have been dismissed on the ground afore-stated…We are, however, not examining the issue on merits but are of the view that the matter does require consideration and is not of a nature which could have dismissed on the ground afore-stated. In this view, we set aside the impugned judgment and order of the High Court and remit Writ Petition(C) No. 7455 of 2001 for its fresh decision by the High Court.

22.11.2006 The Voices Against 377 was impleaded as Respondent No. 8 before the Hon'ble High Court of Delhi

2.7.2009 The Hon'ble High Court of Delhi rendered its decision and gave its declaration in the following terms:

"We declare that Section 377 IPC,

insofar as it criminalises consensual sexual acts of adults in private, is violative of Article 21, 14 an 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act."

09.07.2009 This Hon'ble Court vide its order dated 9.7.2009 issued notice on a special leave petitions by parties who who were neither parties before the High Court, nor personally aggrieved by the judgment of the High Court.

The Union of India accepted the declaration granted by the High Court and refused to file an appeal against this judgment.

07.02.2011 This Hon'ble Court disposed off the impleadment application IA No. 9 of 2010 of the present review petitioner and granted leave to the petitioner to act as

	intervenors in the proceedings of the batch of the special leave petitions.
13.02.2012	This Hon'ble Court begins hearing final arguments in this matter.
23.2.2012	This Hon'ble Court records that the learned Additional Solicitor General made submissions on behalf of the Union of India. The learned additional solicitor argued that the Union of India was opposed to the declaration granted by the High Court. As soon as the said Additional Solicitor General concluded his submissions, another Additional Solicitor General stated that the Union of India had not filed an appeal and had not yet taken a stand in this case.
28.2.2012	The Additional Solicitor General appears on behalf of the Union of India and submitted the recommendations of the Group of Ministers and the decision of the Cabinet. The recommendations of the Group of Ministers and the decision of the Cabinet was that the Delhi High Court's declaration was correct in law and ought not to be

appealed by the Union of India. This Hon'ble Court was pleased to record that the

> learned Additional Solicitor General appeared and read out what he termed as the recommendations made by the Group of Ministers and the decision of the Cabinet.

By the same order, the Union of India was directed to

> file an affidavit of the concerned Secretary incorporating therein the recommendations made by the Group of Ministers and the decision taken by the Cabinet.

1.3.2012 An affidavit was filed on behalf of the Union of India by the Home Secretary which negatived the earlier submissions made by the earlier Additional Solicitor General. In this affidavit, filed by the Home Secretary, it was stated that there was no legal error in the impugned judgment by the High Court.

21.3.2012 The present Review Petitioners appeared addressed this Hon'ble Court and concluded

the arguments. Furthermore, the learned Attorney General appeared before this Court on behalf of the Union of India and reiterated the stand of the Union of India that it finds no legal error in the judgment of the High Court accepts the same.

22.03.2012 The learned Attorney General again appeared before this Court and reiterated that the Union of India finds no error in the High Court's declaration and accepts the same. He also filed written submissions before this Hon'ble Court stating that Union of India does not find any legal error in the judgment of the High Court and accepts the correctness of the same. This is also clear from the fact that it has not filed any appeal against the judgment of the High Court.

27.03.2012 The oral hearings in this case were conclude and judgment is reserved.

19.06.2013 The Protection of Children from Sexual Offences Act is enacted and assented to by the President. This statute criminalizes all forms of sexual assault committed on any

	person under the age of 18.
03.02.2013	The Criminal Law Amendment Act, 2013 comes into force amending, inter alia, s. 375 of the IPC.This amendment criminalizes all forms of non consensual penetrative acts committed by a man on a woman.
11.12.13	This Hon'ble Court allowed the Civil Appeals and set aside the order of the Delhi High Court in WP (C) 7455 of 2001. It is submitted that in rendering the impugned judgment order, this Hon'ble Court failed to consider the contentions raised by the Petitioners to the effect that Section 377 was violative of Articles 15 and 21 of the Constitution. The impugned judgment also erroneously concludes that no factual foundation was placed on record and no material was produced to demonstrate that Section 377 was being used to harass and discriminate against the LGBT community, without taking into account the affidavits, documents and orders placed on record by the various parties, in this context, before

the High Court as well as this Hon'ble Court. Further, the impugned judgment erroneously holds that the LGBT community was only a "miniscule fraction" and that their possible persecution could not be a basis for holding that the provision was unconstitutional. It is humbly submitted that this conclusion is entirely contrary to fundamental principles of Constitutional Law which mandate that the human rights of even the smallest minorities be protected against a tyrannical majority. It is submitted that the impugned judgment, which permits an abridgement of the Petitioner's fundamental rights on an erroneous reading of the law, without taking into consideration the contentions of the Petitioners as well as the material placed on record, suffers from errors apparent on the face of the record, mandating review by this Hon'ble Court.

16.1.2014 Hence, this Review Petition.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

REVIEW PETITION (CIVIL) No. of 2014

IN THE MATTER OF:

A PETITION UNDER ORDER XL, RULE 1 OF THE SUPREME COURT RULES, 1966 FOR REVIEW OF THE ORDER OF THIS HON'BLE COURT DATED 11.12.2013 PASSED IN CIVIL APPEAL NO. 10972 OF 2013 (ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NO. 15436 OF 2009)

IN THE MATTER OF:

1. Dr. Shekhar Seshadri
Son of P. Seshadri
Residing at E-304,
Adarsh Palace, 47th Cross,
5th Block, Jayanagar,
Bangalore 560004

2. Dr. Alok Sarin
Son of B.K. Sarin
Residing at A 52/1, SFS Flats,
Saket, New Delhi 110017

3. Dr. Soumitra Ramesh Pathare
Aged about 45 years
Son of Ramesh Pathare
Residing at Plot 134 Sector 27A
Pradhikaran, Nigdi
Pune 411044

4. Dr. Vikram Patel

Sangath Centre,

841/1 Alto Porvorim,

Goa 403521

5. Dr. Devendra Shirole
Son of Keshav Shirole

432, Shukrawar Peth

Shivaji Road

Pune – 411 002

6. Arvind Mukund Panchanadikar
Son of Mr. Mukund Panchanadikar

41 Shantala Manisha Society,

Karve Nagar, Pune-52

7. Dr. Bhooshan Dattatraya Shukla
Son of Dattatraya Shukla

B-804, Padmavilas Apartments

Survey no. 131/1,

Pashan - Baner Link Road

Pune - 411021

8. Dr. Kaustubh Ashok Joag
Son of Ashok Joag

Residing at C 6 , Flat No 5,

Sarita Nagari Phase 2,

Sinhagad Road,

Pune 411030

9. Dr. Raman Shivkumar Khosla

Son of Shivkumar Khosla

Residing at 805

DSK Vasant Vaibhav Apts,

Lakaki Road, Model Colony,

Pune 411016

10. Dr. Subir Kumar Hajra Chaudhuri

Son of Dilip Hajra Chaudhuri

Residing at 39 B, Creek Row,

Kolkata 700014

11. Dr. Debashish Chatterjee

Son of Amalesh Chatterjee

Residing at 199 Block A,

Bangur Avenue,

Kolkata 700055

12. Sarbani Das Roy

Daughter of Upal Chatterjee

Residing at 193A/2,

Picnic Garden Road,

Flat 8; Kolkata 7000039

13. Jolly Laha

Daughter of Madhusudan Laha

Residing at 20B,

Deshapriya Park Road,

Kolkata 700026 ..Petitioners

Versus

1. Suresh Kumar Koushal
S/o Shri S.D. Koushal,

C-105, Nirman Vihar,

Delhi- 110092

Delhi

2. Dr. Mukesh Kumar Koshal
S/o Shri S.D. Koushal

C-105, Nirman Vihar,

Delhi – 110 092

3. Naz Foundation,
A Trust registered under the

Indian Trust Act,

Having its registered office at

A-86, East of Kailash

New Delhi- 110065

4. Government of NCT Delhi,
through the Secretary

Social Welfare Delhi Secretariat

ITO, New Delhi

Delhi

5. Commissioner of Police
Police Headquarters,

ITO, New Delhi

Delhi

6. Delhi State AIDS Control Society
B.S. Ambedkar Hospital

Dharamshala Block

Rohini, Sector 6

Delhi

7. National AIDS Control Organization,
Set up by the Union of India,

Having its office

9th Floor, Chandralok Building

Opp. Imperial Hotel,

New Delhi

Delhi

8. Union of India,
through Secretary

Ministry of Home,

North Block, India Gate

New Delhi

9. Union of India,
Through Secretary

Ministry of Health Family Welfare,

Having its office at

344, Nirman Bhavan,

Maulana Azad Road,

New Delhi

10. Union of India,
Through Secretary

Ministry of Social Welfare

Shashtri Bhavan,

New Delhi

11. Joint Action Council Kannur
C-38, Anand Niketan

New Delhi-110 021

12. Voices Against Section 377
A coalition of 12 organisations

Having its address at

11, Mathura Road,

First Floor, Jangpura B

New Delhi – 110013 ..Respondents

TO

THE HON'BLE THE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUSTICES OF THE HON'BLE SUPREME COURT

THE HUMBLE PETITION OF THE PETITIONERS ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. That the present petitioners are filing the present review petition seeking a review of the final judgment and order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972 of 2013 and other connected appeals. The present petitioners are interveners in Civil Appeal No. 10972 of 2013 arising out of SLP (Civil) No. 15436 of 2009 vide I.A. No.8/2010, having been permitted to intervene in the matter by this Hon'ble Court vide its order dated 07.02.2011.

2. The aforementioned civil appeals had been filed by various persons against the Judgment and final order dated 02.07.2009 passed by the High Court of Delhi in WP(C) 7455/2001. By its judgment, the Hon'ble High Court of Delhi had declared section 377 of the Indian Penal Code, 1860 unconstitutional insofar as it criminalised private, consensual sexual activity between adults and in doing so, de-criminalised millions of LGBT citizens of India. By order dated 11.12.2013, this Hon'ble Court has reversed the order of the High Court

without taking into account the pleadings and materials placed on record by the Petitioners. A certified copy of this Hon'ble Court's order dated 11.12.2013 in Civil Appeal No. 10972 of 2013 and other connected matters, allowing the said appeals, is annexed herewith as **ANNEXURE P-1 (Page Nos.)**.

3. The Petitioners have not filed any other petition seeking review of the judgment and final order dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal No. 10972 of 2013.

4. **GROUNDS**:

A. Because there are errors apparent on the face of the record as this Hon'ble Court has failed to consider facts before it and has misapprehended and misapplied law.

B. Because the impugned judgement does not mention, refer to, or deal with the submissions of the review petitioners despite the fact that Counsel for the review petitioners was heard on 22 March 2012 and Petitioners filed detailed written submissions along with authoritative scientific literature from reputed academic peer-reviewed journals supporting the declaration of the Hon'ble Delhi High Court. Review petitioners are 13 senior psychiatrists, psychologists, counsellors and mental health professionals – including a Professor of

Psychiatry at the National Institute of Mental Health and Neurosciences, Bangalore; a fellow of the Indian Psychiatric Society who is also head of the psychiatry department of Sitaram Bhatia Institute of Science and Research; a Member of the International Advisory Board, International Journal of Social Psychiatry; an editor of the influential Lancet Series on Global Health; and a Lecturer in psychiatry, Maharashtra Institute of Mental Health – who applied to be impleaded before this Hon'ble Court, but were allowed to intervene, in special leave petitions that challenged the Delhi High Court Judgement that decriminalised sex between consenting adults. Failure to consider the contentions of the review petitioners, the only party before this Hon'ble Court with professional expertise in the medical and mental health issues of LGBT persons, is a material error, manifest on the face of the judgement that undermines its soundness and that has resulted in a serious miscarriage of justice. {See Indian charge chrome vs. Union of India (2005) 4 SCC 67 @ Pr. 13 & 16}

C. Because the impugned judgement failed to consider the submissions of the review petitioner despite the fact that they were the only representatives from the mental health and medical community. The petitioners had contended – and their contentions had not been controverted – that the consensus of expert opinion from the field of mental health was that

a. Homosexuality was not a mental disorder but a normal and natural variant of human sexuality. The International Classification of Diseases (ICD-10) of the World Health Organisation (WHO) and The Diagnostic and Statistical Manual (DSM IV) of the American Psychiatric Association (APA), the globally accepted standards for classification of mental health, no longer considered non-peno-vaginal sex between consenting adults, mental disorders or illness

b. Homosexuality was innate and immutable; persons did not choose to become homosexual; the criminalization of homosexuality was therefore akin to criminalizing persons on the basis of their skin colour, the colour of their eyes, their race, or ethnic origin.

c. the criminalization of Lesbian, Gay, Bisexual and Transgender ('LGBT', for short) persons caused them mental stress and anxiety and adversely affected their mental health

d. Homosexuality cannot 'spread' from one person to another; the fear that homosexuality may spread due to the impugned judgment of the Hon'ble Delhi High Court was therefore unscientific and irrational.

e. Sexual activity between two men, did not, *per se,* lead to the spread of HIV/AIDS. Unprotected sex, between men and men, and men and women spread HIV/AIDS.

f. Section 377 created a climate for discrimination, harassment and abuse of LGBT persons as it conveyed the message that LGBT persons were criminals, not entitled to the dignity of other citizens.

g. Section 377 of the IPC encouraged hatred and prejudice in society as it conveyed the message that people who were different were not to be tolerated.

D Because the impugned judgement's finding of 'lack of factual foundation' for the challenge to the constitutionality of section 377 violates *res judicata,* being contrary to the orders of a four judge bench of this Hon'ble Court. The petitioners' contentions had been taken before the Delhi High Court by Naz foundation India, the petitioners in those proceedings, at paragraphs 40 and 41 of their petition. This petition had once been rejected by the Delhi High Court for lack of cause of action. However, this Hon'ble Court, vide order dated 03.02.2006 in SLP (C) Nos. 7217-7218/2005 (of a bench of four judges of this Court) had reversed that judgement and remitted the matter for consideration to the Delhi High Court. Whether factual foundation had been laid for the challenge to the constitutionality of section 377 was not at issue after this Hon'ble Court's order dated 03.02.2006. None of the respondents contended lack of cause of action or absence of factual foundation for the challenge to section 377 before the High Court, after this Hon'ble Court's judgement of 03.02.2006. Before this Hon'ble Court in the proceedings that led to the judgement impugned as well, none of the petitions urged lack of factual foundation as a ground of challenge to

the judgement of the Delhi High Court. The issue of 'lack of factual foundation' having attained finality vide orders of this Hon'ble Court dated 03.02.2006 was no longer in issue before the High Court or before this Hon'ble Court. The finding that the petition before the High Court lacked factual foundation has resulted in grave and manifest error apparent on the face of the record since it had not been raised or urged until oral arguments (by Senior Advocate appearing for the appellants in SLP (C) No. 24334/2009)); none of the parties therefore, had fair opportunity to meet the contention.{See Subhash Chandra and Another v. Delhi Subordinate Services Selection Board and Others (2009) 15 SCC 458}

E. Because the impugned judgement's finding of 'lack of factual foundation' for the challenge to the constitutionality of section 377 is also erroneous in fact since the record reveals that the petition before the High Court laid detailed factual foundation establishing the direct and inevitable effect of section 377on the health and well-being of Lesbian, Gay, Bisexual and Transgender persons ('LGBT', for short) and their families. The record also reveals that respondent number 8 before the High Court, a coalition of organizations representing child rights, women's rights, human rights, health concerns as well as the rights of same sex desiring people, 'Voices against 377', had also laid detailed factual foundation that medically, scientifically and legally established direct and inevitable

harmful effects of section 377 on LGBT persons and their fundamental rights at paragraph 8.1.1 of its counter affidavit. After the matter was remitted, the judgement of the Delhi High Court considered the consensus of expert opinion from the field of mental health in paragraphs 67-70, and returned a finding that evidence before it revealed that section 377 as it stood, violated the Fundamental Rights of LGBT persons.

F. Because the impugned judgement is in material error on the face of the record in concluding that "Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes", since there is no intelligible differentia, i.e.,– no 'real and substantial difference', no 'yardstick or measure', 'no policy or principle' for guidance to distinguish 'carnal intercourse in the ordinary course' from 'carnal intercourse against the order of nature'. The judgement itself, after reviewing reported judgements on section 377, recorded at para 38 that not only was it not possible to list acts which were covered by section 377, but no test could be laid down to differentiate "carnal intercourse against the order of nature". Section 377 therefore, from the impugned judgements' review of reported judgements that applied section 377, failed the first test of Article 14, i.e., there was no intelligible differentia to distinguish 'carnal intercourse in the ordinary course' from 'carnal intercourse against the

order of nature'. {See *Chiranjit Lal Chowdhury v. The Union of India and Others*, [1950] S.C.R. 869, page 913 and 932, *State of West Bengal v. Anwar Ali Sarkar ,* [1952] SCR 294, page 315}

G. Because the impugned judgement is also in error apparent on the face of the record since the test of whether there was a rational nexus of the classification of acts punished by section 377 with what the section sought to achieve was not applied. This is particularly important since there has never been consensus even about what the object sought to be achieved by section 377 is. The judgement itself notes deliberate obviation of all discussion around the section at the time of its legislation (at para 37), and also notes, (at para 38), the complete lack of judicial consensus of the acts which fall within section 377. The impugned judgement, has it is respectfully submitted, carried the presumption of constitutionality of section 377 to the extent of assuming an "undisclosed intention or reason"for the classification of acts into "carnal intercourse against the order of nature" and "carnal intercourse within the order of nature". In doing so, the protection of article 14 has been rendered "a mere rope of sand, in no manner restraining state action." The error in applying the presumption of unconstitutionality is compounded by the fact that "good faith and knowledge of existing conditions" on the part of the body that legislated the

Indian Penal Code cannot be presumed, since the Legislative Council consisted of 12 unelected Englishmen.{See State of West Bengal v. Anwar Ali Sarkar , [1952] SCR 294, page 316}

H. Because there is an error apparent on the face of the record as this Hon'ble Court failed to even consider that the Union of India, in refusing to appeal the judgment of the Hon'ble High Court, had offered no reasonable objective for the criminalisation of consensual sexual activity between adults. As a party before this Hon'ble Court as well, the Union of India had refused to justify the criminalisation of consensual sexual activity and had clearly accepted the proposition that the criminalisation of consensual sexual activity had no reasonable objective and was clearly violative of Article 14.

I. Because this Hon'ble Court's raising the presumption of constitutionality in evaluating section 377 is an error apparent on the face of the record. While it may be presumed that legislatures are cognizant of limits on their powers imposed by the Constitution when they legislate after the commencement of the Constitution, no such knowledge can be presumed of the acts of legislatures that pre-date the Constitution. Article 372 of the Constitution, which this Hon'ble Court relies upon in support of the presumption of constitutionality for pre-constitutional statutes, merely states that "all laws in force in the territory of India immediately before the commencement

of this Constitution shall continue in force…". It does not suggest a presumption of constitutionality in the case of pre-constitutional statutes. In raising this presumption, this Court has not considered that the Legislative Council consisted of 12 unelected Enghlishmen could have had no knowledge of subsequent restrictions imposed by Chapter III of the Constitution on their legislative power. In Gulabbhai Vallabbhai Desai & Others v. Union of India, AIR 1967 SC 1110, at 1117 this Hon'ble Court held that it could not be presumed that the law making body knew of the limits on its authority while enacting a law, if the limits were only introduced later in time. Section 377 therefore cannot be presumed to be constitutional since at the time of its enactment, the legislating power had no knowledge of fundamental rights or other Constitutional limitations on its power. In this context, this Hon'ble Court in Anuj Garg & Another v. Hotel Association of India & Others (2008) 3 SCC 1 at pare 20 held:

> "When the original Act was enacted, the concept of equality between two sex es was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on

> the anvil of equality clauses contained in Articles 14 and 15, the burden therefore would be on the State."

J. Because this Hon'ble Court's raising the presumption of constitutionality is also an error apparent on the face of the record, absent indication on the face of the law or the surrounding circumstances, of the basis on which the classification made by Section 377 IPC can reasonably be regarded as based in the light of the law laid down by this Hon'ble Court in *Ram Krishna Dalmia*'s case:

> "while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionally cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

K. Because the impugned judgement has also committed error on the face of the record in applying the 'object and form' test of '*A.K. Gopalan'*, discarded by this Hon'ble Court in favor of the 'intended and real effect' or the 'direct and inevitable

effect' test of *Maneka Gandhi* to examine whether section 377 unduly burdened a class. {See Maneka Gandhi vs Union Of India, 1978 SCR (2) 621, State of Maharashtra & Anr. Versus Indian Hotel & Restaurants Assn. & Ors., CIVIL APPEAL NO.2705 OF 2006, decided on July 16, 2013}

L. Because the impugned judgement has also committed error on the face of the record in concluding that section 377 merely identifies certain acts as offences and does not criminalize LGBT people since, by punishing the only form of sexual intercourse available to LGBT persons – i.e., non-peno vaginal - section 377 entirely denies sexual intercourse to the class of LGBT persons. Further, none of the 200 prosecutions dealt with in reported judgements (referred to at para 43 of the judgement), involved prosecutions of sexual intercourse involving consenting heterosexual adults. In its 'effect and operation' therefore, section 377 unduly burdens the class of LGBT. The judgement of the Delhi High Court clarified and declared that there was no rationale for this uneven application of the law and henceforth, consent would remove all consensual non-peno-vaginal sexual intercourse from the ambit of section 377 altogether, whether practiced by LGBT or heterosexuals.

M. Because this Hon'ble Court erred in not considering the contentions of the petitioners that the acts in question, and

the identity or orientation of LGBT persons were so deeply connected that criminalizing the acts amounted to criminalizing identities. The Petitioners had contended that:

a. It was established medical fact that a person's sexual orientation comprised four components:

   a.i. Sexual Attraction

   a.ii. The labeling of this attraction as reflecting a particular sexual orientation i.e. self identification.

   a.iii. Disclosure of attraction and self identification to others, and

   a.iv. Sexual behaviour

b. The first component, sexual attraction was at the core of sexual orientation.

c. Homosexuality referred to sexual behaviour, desires, attractions and relationships among people of the same sex, as well as to the cultures, identities and communities associated with them.

d. Both homosexual and heterosexual behavior and attraction were common across species and were normal and natural aspects of human sexuality.

e. Medical and psychiatric opinion was near unanimous that homosexuality was not a disease or disorder and was just another expression of human sexuality.

It is submitted that this Hon'ble Court erred in failing to consider the above before arriving at a finding that section 377 IPC did not criminalise an identity or an orientation.

N. Because there is an error apparent on the face of record in as much as the judgment of the Hon'ble Court is not based on scientific or medical opinion reflecting the mental and psychological harm caused LGBT persons as a direct and inevitable effect of Section 377 IPC:

a. LGBT persons across the world faced extensive prejudice, discrimination and violence because of their sexual orientation. A recent study of the mental health needs of LGB persons in India showed that they faced a sense of isolation, confusion and difficulty in reconciling rigid images of hetero-normative and gender appropriate behaviour that were a part of their social world and their internal processes and feelings. This study showed that invisibility, silence and a lack of language to express desire was a major issue that Lesbian, Gay and Bisexual youth faced in India and the stigmatization of gay lesbian and bisexual persons posed a risk to their mental well-being.

b. Criminalization had adverse consequences for the right to health of those who practiced same-sex conduct through the creation of the societal perception that they were "abnormal" and criminals. Anti sodomy statutes fostered a climate of intolerance in which LGBT persons felt compelled to conceal or lie about their sexual orientation to avoid personal rejection. This compulsion to remain "in the closet" reinforced anti-gay prejudices.

c. Section 377 of the Indian Penal Code by criminalizing expressions of intimacy among LGBT persons adversely affected their mental health and was a violation of the right to live with dignity protected under Art 21 of the Constitution.

{See Report of the United Nations Commissioner on Human Rights titled "Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity", 17th November, 2011 in compilation (Vo.2) of Respondent 11 (Voices Against 377) compilation, pp 75-79

Ketki Ranade, "Process of Sexual Identity Development for Young People with Same-Sex Desires: Experiences of Exclusion", Psychological Foundations – The Journal (2008). Issue 1, Vol. X, pp. 1-15.

American Psychological Association, American Psychiatric Association et al, Brief as Amicus Curae in Lawrence v. Texas 539 U.S. 558 (2003), pp. 28-30}

O. Because there is an error apparent on the face of the record as this Hon'ble Court did not consider that the American Psychiatric Association ('APA', for short) had, in 1973, removed homosexuality from the list of mental disorders on the basis of rigorous scientific scrutiny. The APA reasoned that behavior constituted psychiatric disorder if it regularly caused subjective distress or was regularly associated with generalized impairment in social effectiveness or functioning. It was the considered opinion of the APA, that homosexuality *per se*, did not meet the requirements of a psychiatric disorder. Gradually a scientific consensus had built that

homosexuals or bisexual orientation, *per se*, was not a mental disorder and therefore not "against the order of nature" until both the International Classification of Diseases (ICD- 10) of the World Health Organisation (WHO), and the Diagnostic and Statistics Manual IV (DSM IV) of the American Psychiatrist Association, followed by mental health fraternity worldwide, acknowledged that homosexuality was not a mental disorder. The impugned judgement's failure to consider conclusive medical opinion while holding certain sexual activities between consenting adults as 'criminal', is palpably arbitrary and irrational.

P. Because the impugned judgement is erroneous on the face of the record in misconstruing the ratio of its judgement in *A.K. Roy* to hold that the 'vagaries of language' saved section 377 from the challenge of vagueness. In *A.K. Roy*, this Hon'ble Court made a distinction between

a.i. expressions which were difficult to define since they comprehended "an infinite variety of situations"

a.ii. and expressions which did not comprehend such an infinite variety of situations

In the light of the fact that section 377 describes an offence against the human body and requires penetration to constitute the offence, 'carnal intercourse against the other order of nature' cannot comprehend an "infinite variety of situations" and it should be possible to 'enumerate' the acts of

penetration which constitute the offence. Absent such enumeration, the clause will be capable of wanton abuse as was held in A.k. Roy, where the phrase "maintenance of supplies and services essential to the community" was held to be not only "vague and uncertain" but "capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21." This Hon'ble Court in A.K. Roy cautioned that courts must strive to give even expressions which by their very nature were difficult to define, a narrower construction than the literal words suggested, limiting their application to as few situations as possible.{See *A. K. Roy, Etc vs Union Of India And Anr*, 1982 SCR (2) 272, page 323}

Q. Because there is an error apparent on the face of the record in this Hon'ble Court's conception of the stand of the Union of India, a necessary and proper party to these proceedings.

a. On 23.02.2012 the Learned Additional Solicitor General appeared on behalf of the Ministry of Home Affairs and argued that the Ministry was opposed to the Writ Petition. However, after he finished his arguments, another Learned Additional Solicitor General, submitted that he was instructed by the Attorney-General to state that the Union of India had not yet taken any stand on the matter.

b. On 28.02.2012 Mr. Mohan Jain submitted the recommendations of the Group of Ministers and the decision of the Cabinet with regard to this case and this Hon'ble Court was pleased to record that –

> "Learned Additional Solicitor General appeared and read out what he termed as the recommendations made by the Group of Ministers and the decision of the Cabinet."

By the same order, the Union of India was directed to file an affidavit of the concerned Secretary incorporating therein the recommendations made by the Group of Ministers and the decision taken by the Cabinet. Thereafter, an affidavit dated 1.3.2012 was filed on behalf of the Union of India by the Home Secretary which negatived the earlier submissions made by the learned Additional Solicitor General on behalf the Ministry of Home Affairs. In this affidavit, filed by the Home Secretary, it was stated that there was no legal error in the impugned judgment by the High Court.

c. On 22.03.2012 and 23.03.2012 the learned Attorney General appeared before this Hon'ble Court on behalf of the Union of India and reiterated the stand of the Union of India that it found no legal error in the judgment of the High Court and accepted the same. The learned Attorney General also filed written submissions before this Hon'ble Court stating that the Union of India:

"does not find any legal error in the judgment of the High Court and accepts the correctness of the same. This is also clear from the fact that it has not filed any appeal against the judgment of the High Court."

R. Because the impugned judgement is also in error in misconstruing the submissions of the Attorney General as being the submissions of Amicus Curiae, when in fact they were made in his constitutional capacity as Chief Legal Advisor and lawyer of the government of India - a relationship akin to that between lawyer and client - whose submissions were upon instructions from the Union executive. As a result, the judgement impugned committed error apparent from the face of the record in not even dealing with the submissions of the Attorney General, let alone considering them as the view of the Union of India. { *See B.P. Singhal v. Union of India*, 2010 (5) SCALE 134}

S. Because there is an error apparent on the face of the record as this Hon'ble Court has not respected the dignity of persons who belong to the LGBT community. Dignity is an intrinsic part of Article 21 as held in various decisions of this Hon'ble Court. Dignity is related to autonomy and self-realisation. Denial of sexual expression is tantamount to violating the dignity of homosexual individuals. In the decision under review, this Hon'ble Court considers the arguments with respect to dignity but does not apply them to the case in question. Given that

persons of the LGBT community have to face several affronts to their dignity in a society that is still averse to such identities, legal sanction against them will further compromise their constitutional right to dignity.

T. Because the judgement is also in error apparent from the face of the record in introducing a numerical requirement for the protections of Chapter III of the constitution, since it is long settled that Fundamental Rights of miniscule minorities, even minorities of one, are entitled to full protection.

U. Because the judgement is also in factual error apparent from the face of the record in concluding that in the "last more than 150 years less than 200 persons have been prosecuted (as per the reported orders)". Most prosecutions do not reach the appellate stage, and not all appellate judgements are reported. The judgement is therefore clearly in error in assuming that the number of reported judgments offers any indication of the numbers of persons prosecuted, without even taking into consideration that, FIRs may be registered, intrusive investigations conducted into private affairs, searches carried out, bail applications granted or refused, cases tried and persons convicted without finding any reflection in the docket of the appellate courts.

V. Because error is also apparent on the face of the record from the judgement's failure to even attempt at identifying a compelling state interest requisite to justify the denial of the rights to privacy and dignity - guaranteed by article 21 of the Constitution - by the criminalization of consensual acts in private.

W. Because there is an error apparent on the face of the record as this Hon'ble Court has come to a wrong finding with regard to the possibility of abuse of section 377. While it is a well established legal principle that the possibility of abuse is not ordinarily sufficient to strike down a law, uncertainty in law and the infringement of a guaranteed freedom coupled with the probability of misuse should result in the court striking down the provision. This principle was clearly enunciated in paragraph 47 in the case of *Abbas v. Union of India* as follows:

> "Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. 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". In the instant case, it is unclear as to what acts are covered under sexual activities "against the order of nature". This Hon'ble Court has in fact expressed the inability to prepare a list of activities that the section would apply to in paragraph 38 of the order under review. In this background of "the boundless sea of uncertainty" coupled with the infringement of constitutional guarantees under Articles 14, 19 and 21, section 377 ought to be struck down.

X. Because there is an error apparent on the face of the record in that this Hon'ble Court has failed to consider that the vagueness of Section 377 confers unfettered discretion on police officials and other agents of the state. The unfettered discretion that the section confers is evident from the voluminous material that the Respondent no. 1 and Respondent no.11 has placed on the record and from the harassment, blackmail and torture of LGBT persons that this Court very briefly mentions at para 51 of the judgment under review.

Y. Because there is an error apparent on the face of the record as this Hon'ble Court has not respected the dignity of persons who belong to the LGBT community. Dignity is an intrinsic part of Article 21 as held in various decisions of this Hon'ble Court.

Dignity is related to autonomy and self-realisation. Denial of sexual expression is tantamount to violating the dignity of homosexual individuals. In the decision under review, this Hon'ble Court considers the arguments with respect to dignity but does not apply them to the case in question. Given that persons of the LGBT community have to face several affronts to their dignity in a society that is still averse to such identities, legal sanction against them will further compromise their constitutional right to dignity.

Z. Because there is an error apparent on the face of record in as much this Hon'ble Court did not consider that Section 377 IPC in its operation creates an association of criminality towards LGBT persons. It is most respectfully submitted that because of the existence of the section 377 many LGBT persons face consequences including blackmail and sexual abuse as well as consequences such as stigma and discrimination. Section 377 in its operation as well as its over broad classification which includes consensual sexual acts between adults violates the mandate of equality in Article 14.

AA. Because there is an error apparent on the face of record in as much this Hon'ble Court arbitrarily criminalized consensual same sex acts. The Hon'ble Court erred in not considering that homosexuality is not a disease or mental illness that needs to be, or can be, 'cured' or 'altered', it is merely a natural variant

of human sexuality. It is most respectfully submitted that to criminalise what is a characteristic of some human beings over which they have no control is much like criminalizing left handed people for being left handed. The very criminalization of homosexuality which is not only natural but also inborn characteristic of LGBT Persons lacks any clear rationale, is prima facie arbitrary and a violation of Article 14.

AB. Because there is an error apparent on the face of the record as this Hon'ble Court has not considered the arguments, or reached a finding with respect to Article 15(1). The High Court had read sexual orientation and gender identity into 'sex' in Article 15(1). Arguments to this effect were also made before this Hon'ble Court which has not made any reasoned order in the judgment under review. As a fall-out of the judgment under review it is submitted that now not only the private employers but state agencies can discriminate between people on the basis of sexual orientation of individuals, leaving no remedies for the LGBT persons to be used against.

AC. Because there is an error apparent on the face of the record as this Court has failed to consider that the harassment, torture, rape, extortion, and blackmail of LGBT persons is a direct and inevitable consequence of Section 377. This Court brushes off the documented instances the fundamental rights violations of LGBT persons at para 51 by stating:

> "Respondent No. 1 attacked Section 377 IPC on the ground that the same has been used to perpetrate harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community. In our opinion, this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vires of the section."

It is submitted that this "misuse" of the section is a direct and inevitable consequence of the provision. It is not a question of a mere 'misuse' of the provision.

AD. Because there is an error apparent on the face of the record as this Hon'ble Court makes no finding of whether section 377 violates the right to life, liberty, privacy and dignity of LGBT persons. The Court commences its discussion at para 45 of the judgment under review and concludes it at para 50. However, while it cites the precedents of this Hon'ble Court with regard to the right to privacy and dignity, it fails to apply them to the case at hand. This Court does not even mention that section 377 criminalises consensual sexual activity between adults even within the privacy of a home.

AE. Because there is an error apparent on the face of the record as this Court fails examine whether the State has a compelling interest to violate the right to privacy of LGBT people, where such sexual activity involves adults, and harms no one. In

Gobind v. State of Madhya Pradesh (1975) 2 SCC 148, which this Court cites at para 47 of the judgment under review, it is stated –

> "There can be no doubt that privacy-dignity claims deserve to be examined with care and only denied when an important countervailing interest is shown to be superior. If the Court does find 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 that right."

While considering whether section 377 violated the right to privacy and dignity of LGBT persons in India, this Court had to address two issues.

a.i. Whether there was a violation of the liberty, privacy and dignity of LGBT persons?

a.ii. Was there a paramount state interest that would justify the gross invasion of liberty, privacy and dignity?

It is respectfully submitted that this Hon'ble Court has not considered whether there was a violation of the right to liberty, privacy and dignity and has merely dismissed demonstrated violations of privacy and dignity as misuse, (at para 51). The Court does not consider that on a plain reading, section 377 allows the police to enter even the private sanctity

of the home and ask searching questions about the most intimate parts of a persons life.

AF. Because there is an error apparent on the face of record as this Hon'ble Court did not consider that that section 377 of the IPC violates right to privacy and dignity embodied in Article 21 of the Constitution. The right to privacy as embodied in Article 21 interpreted by the Hon'ble Supreme Court includes right to form intimate attachments with those of one's choice, provided that it is done consensually and without harm. The formation of intimate ties include consensual sexual relationships with other adult human beings is a sensitive, key aspect of human existence and is at the core of what is meant by the right to privacy. Personal intimacy is so core an aspect of the right to privacy that neither the state nor society has a role in dictating or controlling those choices. Further the right to privacy and respect for intimate choices of a human being is integrally linked to the notion of autonomy which enables persons to attain fulfillment, grow in self-esteem and build relationships of one's choice. The the impugned judgment by criminalizing expression of same sex adult consensual relationships denies LGBT persons the very opportunity to form intimate attachments, to grow and flourish as members of the human family and thereby violates the right to live with dignity and the right privacy of LGBT persons.

AG. Because there is an error apparent on the face of record in as much this Hon'ble Court failed to consider that homosexuals have no choice in their attraction to persons of the same sex. This Hon'ble Court did not consider that the review petitioners have placed on record the recent studies that have shown that homosexuals generally have little or no choice in their attraction to members of the same sex. This Hon'ble Court erred in not considering that an individual's sexual orientation is mostly determined by hereditary and pre-natal factors. It is submitted that homosexuality is not a manifestation of a choice that can be prevented by the presence of criminal law. It is respectfully submitted that the section 377 in targeting LGBT persons whose sexual orientation is immutable, natural and innate, is prima facie arbitrary and a violation of Article 14 and 21 of the Constitution.

AH. Because there is an error apparent on the face of record in as much this Hon'ble Court failed to consider that the existence of Section 377 both through the social attitudes fosters and directly impact on the mental well being of LGBT persons and thereby violates their right to live with dignity. This Hon'ble Court did not consider the petitioner's contention that in their experience as mental health professionals they have repeatedly come across instances of LGBT persons who suffer mental health issues ranging from depression, low self esteem to suicidal tendencies. It is respectfully submitted that the

origin of such grave mental health issues faced by LGBT persons is the stigma, social isolation and discrimination fostered by Section 377 of the IPC. Section 377 of the IPC causes mental stress and anxiety in LGBT persons as it forced LGBT persons to hide their sexuality. It also encourages discrimination, harassment and abuse of LGBT persons by conveying the message that LGBT persons are criminals and are hence to be accorded less dignity than other citizens.

AI. Because there is an error apparent on the face of the record as this Hon'ble Court has not considered the impact that re-criminalising the LGBT community will have on the efforts to control the spread of HIV/AIDS. The stand of the National Aids Control Organisation and the Union of India through the Ministry of Health and Family Welfare, even in the High Court, was in favour of reading down section 377 in so far as it applied to sexual practices of consenting adults in private. Persons engaged in same sex behaviour belong to a High Risk Group with respect to contracting HIV/AIDS as they are forced to hide their sexual practices hence making it difficult to gain access to health facilities and preventive measures. In the case of VHAP v. Union of India, the Supreme Court has considered the importance of treating HIV/AIDS and directed state governments to consider policies to combat it. Renewed fear of law enforcement agencies following the decision of this Hon'ble Court will drive same sex practices further

underground thereby thwarting efforts of public health officials to reach out to the LGBT community. Protecting and promoting the rights of the LGBT community is crucial in ensuring safe sex practices for them, and consequently in the control of spread of HIV/AIDS which is a larger public health concern.

AJ. Because there is an error apparent on the face of the record as this Hon'ble Court has denied the LGBT community the right to free speech and expression. Articles 14, 19 and 21 are to be read compositely, since the right to equality, the right to expression and the right to life are inextricably linked. The right of individuals to express themselves, including their sexual identities, is core to the human experience. To deny the right to express one's sexuality, apart from violating the dignity and equal protection of individuals, is a violation of Article 19. The fear arising from section 377 creates a chilling effect on speech regarding the sexuality of members of the LGBT community thereby forcing on them a culture of silence. Further, none of the prohibitive grounds to deny the right under Article 19 have been made out.

AK. Because there is an error apparent on the face of the record in as much this Hon'ble Court did not examine the effect of consent in sexual relationships between adults of same or different sexes. As has been urged by the

intervenor/petitioner herein through scientific material, same sex behaviour is harmless and just as natural as opposite sex behaviour and there arises no need for State intervention in this matrix. In fact, the Union of India has not preferred an appeal of the impugned order of the Delhi High Court which is reflective of its stand that there is no compelling state interest in preventing consensual same sex behaviour. Further, this Hon'ble Court in paragraph 38 considers previous instances in which the court has had to determine the applicability of section 377, and has also acknowledged that these were instances of coercion and not consent. Despite this, this Hon'ble Court proceeds to conclude that consent is immaterial the Hon'ble Court in Paragraph 38 noted:

"all the aforementioned cases refer to non-consensual and markedly coercive situations and the keenness of the court in bringing justice to the victims who were either women or children cannot be discounted while analyzing the manner in which the section has been interpreted. We are apprehensive of whether a 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 under the section. Nonetheless, in light of plain meaning and legislative history of the section, we hold that section 377 would apply irrespective of age and consent"

This Hon'ble Court erred in not considering that in cases of consensual sexual relationship between adults in private, there are no victims – children, men or women. In so far as reading down of the provision to exclude consensual same sex activities between two adults is concerned, Section 377 IPC even after reading down would apply to coercive and non-consensual sexual activities as it was applied before.

AL. Because there is an error apparent on the face of record in as much this Hon'ble Court did not consider the fact that by virtue of the existence of Section 377 IPC a normal variant of human sexuality is perceived and treated as abnormal. The larger climate of intolerance fostered by the law encroached on the individual rights of LGBT persons and causes severe mental distress and loss of self-esteem. Section 377 of the IPC creates immense pressure on homosexuals which severely affects the ability of the homosexuals to live his/her normal lives. This Hon'ble Court erred in not considering that the criminalization of homosexuality by Section 377 contributes to social isolation of homosexuals and leads to their harassment. The presence of section 377 results in homosexuals being forced to live a dual life, causing anguish and leading to range of mental health problems.

AM. Because there is an error apparent on the face of record as this Hon'ble Court while upholding the constitutionality of

Section 377 of the Indian Penal Code vindicated the stand of the parties who have filed SLP against the High Court judgment and holding that the homosexual relationship between two consenting male adults in their private sphere is "unnatural" and "against the order of the nature" and akin to perversion. It is submitted that this view is irrational, arbitrary and unscientific. It is submitted that 'homosexuality' is innate and immutable characteristic of a human being and hence the criminalization of homosexuality would be like criminalizing persons on the basis of their skin colour, the colour of their eyes or their race, or ethnic origin.

AN. Because the Judgement impugned is also in error for having referred to some of the contentions urged by parties regarding the direct and inevitable impact of section 377 on the Right to Health of LGBT persons, but not having considered or dealt with it as a ground of challenge to its constitutionality.

AO. Because the Protection of Children from Sexual Offences Act, 2012 and the Criminal Law (Amendment) Act, 2013, enacted after the conclusion of oral hearings are new and important evidence which - both acts having been passed and notified after judgement was reserved in these proceedings - could not be placed for consideration of this Hon'ble Court. Two

justifications offered the Union of India before the High Court for the retention of s. 377 were –

a. The protection of children from child sexual abuse

b. The protection of women from penile, non-vaginal sexual assault.

Both objectives have been comprehensively dealt with and taken care of by the 'Protection of Children from Sexual Offences Act, 2012' and the 'Criminal Law (Amendment) Act, 2013'. There is even less reason therefore to retain section 377 on the statute book. Further, the Criminal Law Amendment Act by making absence of consent the gravamen of the offences legislated is in keeping with the reasoning of the judgement of the Delhi High Court that was successfully challenged before this Hon'ble Court.

PRAYER

It is, therefore, respectfully prayed that this Hon'ble Court may be pleased to:-

(a) Allow this review petition, review the final order dated 11.12.2013 passed by this Hon'ble Court in Civil Appeal 10972/2013 and consequently restore the said Civil Appeals for hearing; and

(b) And pass such other or further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of justice.

DRAWN BY:
Rajat Kumar and
Sahana Manjesh, Advocate

FILED BY

GAUTAM NARAYAN
(ADVOCATE FOR THE PETITIONERS)

DRAWN ON: 5/1/2014

FILED ON: 16/1/2014