**SYNOPSIS & LIST OF DATES**

1(a) This petition under Article 137 of the Constitution of India arises in an exceptional case impacting Human Rights and Dignity.

(b) The petitioners request this Court to review and reconsider its judgment dated 11.12.2013 in a set of civil appeals captioned *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors.*

(c) The petitioners (‘Voices Against 377’) were parties before the Delhi High Court and supported the writ petition. In this Court, the petitioners were respondents in the civil appeals disposed of on 11.12.2013.

2(a) Human Rights and Dignity in their myriad forms and aspects enjoy an exalted status in the Constitution of India. Indeed, nothing is placed higher. This status derives not just from the ringing language in the Preamble and Part III of the Constitution, but equally from the powerful institutional machinery in the form of Constitutional Courts established to protect these values.

(b) A vital aspect of an individuals’ identity is his or her sexual orientation. The development of intimate relationships is a crucial facet in the enjoyment of life and to deny any individual his or her right to physical intimacy is an egregious affront to the person’s Human Rights and Dignity.

(c) Modern science tells us that while the vast majority of humans are heterosexual, being attracted to the opposite sex, a significant and stable minority, throughout human history are homosexual or belong to a minority community of individuals attracted to the same sex. Moreover and crucially, the weight of scientific material shows that each of us has little or no control in deciding our sexual orientation which is innate or at any rate evolves before a person attains majority. Like the colour of our eyes or hair or skin or whether we are right-handed or left-handed, we as individuals have little or no control in deciding these core aspects of who we are.

(e) Universal Human Rights and the Constitutional obligation to protect Dignity require that this sexual minority is accorded full protection of law and its members are not discriminated against merely for being who they are. This is the promise of the Constitution. An Indian citizen can rise to be the President or the Prime Minister or the Chief Justice of India, regardless of his or her sexual orientation. This is why the Delhi High Court correctly limited the scope of Section 377 of the India Penal Code so that it did not taint a sexual minority.

(f) Section 377, without a suitable declaration, stigmatizes homosexuals and forces them to live a life of celibacy or condemns them to the status of ‘un-apprehended felons’. Constitutionally, this cannot be. The Indian State has no business to breach the privacy of the bedroom and police acts of intimacy between consenting adults.

(g) It is the primary business, responsibility and obligation of this Court to recognise the violation of Human Rights by the State and the trampling upon of Human Dignity by invasive laws and to then remedy the wrong. Respectfully, this Court in *Koushal* abdicated its role as guardian of Universal Human Rights and the protector of minorities.

1. Consistent with its Constitutional obligation to protect Human Rights guaranteed under the Constitution of India, this petition lends an opportunity to this Court to undo the grave consequences flowing from *Koushal*

***Why this Review.***

1. Rendered 624 days (over 1 year 8 months) after the hearing concluded and the case was reserved for judgment, the *Koushal* judgment dated 11.12.2013 suffers from mistakes and errors that are apparent on the face of the record. In addition, there are other sufficient reasons that warrant review of the *Koushal* decision. While the detailed grounds for review are set out in the main petition, the following summary highlights the principal reasons why this case merits review.

(A) Two paramount issues arose in the case and the Court failed to address both of them:

1. The first issue was about Identity and Dignity of the individual. LGBT (Lesbian, Gay, Bisexual and Transgender) persons who are defined by their different sexual orientation and gender identity exists across classes, in urban and rural areas and belong to different castes and religious communities. Their sexual desires are different from the majority. The great question before this Court was whether LGBT persons may be criminalised merely for being who they are. Though facially neutral, Section 377 in its interpretation, operation and working targets LGBT persons. In doing so, it offends the dignity of LGBT persons as a class, makes them second class citizens and denies them full moral citizenship. This issue has not been considered by the Court in *Koushal* although urged in oral as well as written submissions by the Petitioner.
2. The second paramount issue was about this Court’s Constitutional role as guardian of Fundamental Rights and the protector of minorities including a sexual minority. After the Delhi High Court judgment *decriminalised* homosexuality, and the Union government through the Attorney General informed the Court that in the government’s view, the High Court judgment was correct, this Court ought not to have *recriminalized* homosexual conduct between consenting adults in private. The declaration made by the Delhi High Court was accepted as correct by the government. This is because Liberty to be oneself and develop intimate relationships as an individual is not the privilege of the majority but is an Inalienable and Universal right of each and every human being. As our knowledge grows with the advance of science, a medieval and blinkered statutory provision must yield to interpretations by Constitutional Courts that liberate those unjustly condemned by outdated understandings of human sexuality. This Court’s role is to expand Liberty not *re-criminalize* law abiding citizens.

(B) The finding by this Court that the material before the High Court was insufficient to conclude that homosexuals were being subjected to discriminatory treatment, is *ex-facie* incorrect. It is incorrect for two reasons.

(i) *First*, there was overwhelming uncontroverted material before the High Court and which found mention in the High Court judgment that clearly showed how members of the LGBT community were being targeted by the State. This evidence was specifically referred to and relied upon by the petitioner in oral arguments as well as written submissions in this Court. Indeed, the *Koushal* judgment records in paragraph 18.1:

“*[Counsel] referred to the incident, which took place at Lucknow (2002 and 2006), Bangalore (2004 and 2006), Delhi (2006), Chennai (2006), Goa (2007), and Aligarh (2011) to bring home the point that LGBT persons have been targeted by the Police with impunity and the judiciary at the grass root level has been extremely slow to recognise harassment suffered by the victims*.”

None of this material was contradicted. To conclude that this material was insufficient to establish hostile discrimination, amounts to an error apparent on the face of the record.

(ii) *Second*, it was not permissible for this Hon’ble Court comprising two learned Judges to ignore the binding order of a four member bench of this Court passed on 3.2.2006, remitting the case back to the High Court for a fresh decision. Earlier, when the High Court dismissed the writ petition on the basis that absent a factual foundation the challenge was “academic” in nature, the bench comprising four learned Judges reversed the Delhi High Court and remitted the case back for consideration on merits.

(C) The material on the record placed by the petitioner establishes the extreme brutality of the State apparatus in physically abusing, torturing, exploiting and targeting members of the LGBT community. It is the obligation and duty of this Court to take note of such widespread physical and mental brutality perpetrated on human beings and to respond judicially rather than leave matters to the Legislature. This Court, being a Court of Conscience committed a grave error in failing and neglecting to give due weight to:

(i) Human Rights Watch Report dated July, 2002 documenting harassment, wrongful arrest, verbal and physical abuse of social workers and persons working in the sexual health field with MSMs (Men who have Sex with Men);

(ii) Personal testimony of Kokila (a hijra from Bangalore) detailing how she was raped by 10 Goondas and subsequently exploited and tortured by the police on her complaint about the rape on 18.6.2004;

(iii) Affidavit testimony of a gay man physically assaulted by two policemen on 19.9.2006 and subsequently raped and sexually abused by the Delhi Police;

(iv) Custodial torture and sexual abuse at the hands of the police of a hijra and her subsequent suicide as noted by the Madras High Court judgment in *Jayalakhsmi v. State of Tamil Nadu* (2007) 4 MLJ 849;

(v) Affidavit of Madhumita explaining how a false case was filed against her under Section 377 at Bangalore and how she was targeted by the police;

(vi) FIR lodged by the Delhi Police in 2006 showing how Section 377 is abused by the police to target LGBT persons including adult women in a romantic relationship;

(vii) Records from a Bombay High Court case of 2007 showing how Goa Police targeted two men in a consensual relationship.

Moreover, in 2011 the United Nations High Commissioner for Human Right presented a Report to the UN Human Rights Council which expressly noted that LGBT persons are subject to killings, rape, torture, discrimination and harassment across diverse jurisdictions where provisions such as Section 377 remain on the statute book. The material on the record regarding targeting of LGBT persons was overwhelming, un-contradicted and extended to locations across India as well as beyond India.

(D) This Hon’ble Court erred fundamentally in failing to consider and follow judgments from foreign jurisdictions dealing with the issue of Human Rights in relation to LGBT persons. The foundation of the Delhi High Court judgment and the writ petitioner’s case was built on Universal Human Rights. The Right to Dignity, Personal Autonomy, Privacy and the Right to Life are now recognized as inalienable to human beings. They are universal. Sexual rights and sexuality are important facets of globally recognised Human Rights and it is the duty and obligation of this Court to ensure that persons living in India, constituting nearly 1/6th of humanity are not deprived of basic Human Rights. In this regard, it is respectfully submitted that the Delhi High Court correctly appreciated international development in the field through judgments by the Higher Courts in United States of America, South Africa, decisions of the European Court of Human Rights, Fiji and Nepal. There is an error apparent in dismissing foreign judgments despite *Koushal* recognizing that “*these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities* . . . ”.

(E) Denying relief to the LGBT community because it constitutes “*a miniscule fraction of the country’s population*” reveals a profound misunderstanding on the part of this Hon’ble Court of the Constitutional role and obligation of the Supreme Court of India in protecting minority rights. The technical literature on the record of this Court showed that the LGBT community, across countries and cultures where efforts at estimating the population has been made, range between 5-7 % of the adult population. In the context of India with a population of over 1.2 billion people, the number of adults would work out to over 60- 84 million. This is a staggeringly large number of human beings, each of whom is entitled to enjoy all the Fundamental Rights guaranteed under the Constitution of India. Moreover, the material on the record establishes that according to the Ministry of Health and Family Welfare, the estimated number of MSMs was 25,00,000. In the circumstances the approach of the Court in *Koushal* is legally as well as factually flawed.

(F) The duty of the Supreme Court of India is to have regard to developments in science and the state of human knowledge and to bring this recent knowledge to bear on the interpretation of old legislation. Extensive scientific and technical material was placed by the petitioners before this Court. The technical material was uncontroverted and established:

* Homosexual conduct was normal conduct. Homosexuality is simply one normal variant of sexual identity.
* Homosexuality was not a disorder.
* Heterosexual and homosexual behaviour are both normal aspects of human sexuality.
* Sexual intimacy is a core aspect of the human experience and is important to mental health, psychological well beings and for the social adjustment of homosexuals.
* Human beings develop a sexual orientation between middle childhood and early adolescence.
* Sexual orientation is innate and cannot be changed at will.

The technical material supporting this state of knowledge included

1. K.K. Gulia and H.N Mullick, *Homosexuality a dilemma in discourse,* Ind. J. Physiol. Pharmacol. 2010; 54(1): 5-20
2. *Amicus* Brief of the American Psychological Association filed in *Lawrence v. Texas 539 US 558 (2003)*
3. *The Concise Corsini Encyclopedia of Psychology and Behavioural Sciences* (3rd edn., W. Edward Craighead and Charles B. Neemroff Eds., 2004)
4. *Encyclopedia of Psychology,* Alan E Kazdin Ed., OUP, 2003.
5. Alisson Abbot, *But is it Natural?*, Nature Vol 446, 26 October, 2006.

(G) This Hon’ble Court failed to apply the settled principle of law that legislation that may be reasonable and rational at a one point of time may become arbitrary, unreasonable and violative of Fundamental Rights due to a change of circumstances. (*Satyawati Sharma v. Union of India,* (2008) 5 SCC 287 at para 32; *John Vallamotham v. Union of India,* (2003) 6 SCC 61 at para 36).

Here the error apparent on the face of the record is with respect to Court failing to test the validity of Section 377 with reference to developments in our understandings of human sexuality.

(H) The material on record established that a number of persons belonging to the LGBT community had distinguished themselves and had attained fame in various disciplines and callings. These persons included:-

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| --- | --- | --- | --- | --- |
| Indian and South Asia | Literature | Judges/ Lawyers/ Jurists | Sports | Science and Humanites |
| Vikram Seth | Oscar Wilde | H.L.A Hart | Martina Navratilova | Alan Turing |
| Bhupen Khakkar | Virginia Woolf | Michael Kirby | Billie Jean King | John  Maynard  Keynes |
| Onir | Truman Capote | Edwin Cameron | Greg Louganis | Michel  Foucault |
| Ismail Merchant | James Baldwin | Kenji Yoshino | Steven Davies |  |
| Amir Khusro | C.P. Cavafy |  |  |  |
| Sunil Babu Pant | E.M Forster |  |  |  |
| Hoshang Merchant |  |  |  |  |

This Court in *Koushal* committed a grave mistake when it mischaracterised the Fundamental Rights of ordinary members of the LGBT community as “*so called rights of LGBT persons*”. This erroneous characterisation neglects the entitlement of LGBT persons to enjoy all Fundamental Rights and fails to note the extraordinary contribution made by all persons belonging to the LGBT community. The contributions of this community are no different from the contributions made by other segments of society including minorities.

(I) This Hon’ble Court comprising two learned Judges failed to observe the mandate of Article 145 (3) of the Constitution of India which requires that the minimum number of Judges who are to sit for the purpose of deciding a case involving a substantial question of law as to the interpretation of the Constitution shall be five.

(J) When it comes to Human Rights and Dignity the Supreme Court of India is in the business of expanding rights not constricting freedoms. It is manifestly unjust to deprive a significant section of citizens the legal right to develop intimate relationships is the only natural manner known to them. By effacing the declaration granted by the Delhi High Court, the *Koushal* judgment takes away the protective shield provided by the declaration to LGBT persons. Now, an LGBT person is viewed by members of society as a person who engages in criminal conduct. It could not have been the intent of the Supreme Court of India to visit harm on tens of thousands of law abiding citizens. The failure on the part of the court to gauge the immense negative psychological, physical and social impact on tens of thousands of citizens -- such that it exposes them to daily ridicule and destroys their self-esteem has caused manifest injustice. It is respectfully submitted *ex debito justitiae* this Court ought to review *Koushal*.

***Why Hear the Parties***

1. It is respectfully submitted that this review petition merits a hearing in Court. The case involves Human Rights and Dignity. As set out in this synopsis and in greater detail in the main review petition, a number of points advanced during the oral arguments and recorded in the written submissions have been entirely ignored. The effect and impact of *Koushal* is to demote honest and law abiding members of the LGBT community to a status of second class citizen in India. This amounts to an extraordinary regression in Human Rights jurisprudence and severely dents the record of this Court in protecting and expanding the liberty assured to all persons. The *Koushal* judgment is discordant in terms of global Human Rights jurisprudence and social developments across the world. It is respectfully submitted that the petitioners would like to explain the enormous adverse psychological, physical, social and health ramification of *Koushal* in the course of an oral hearing in open court.

***Why it is necessary to Stay the Judgment dated 11.12.2013, Pending Review***

1. The Delhi High Court judgment in *Naz Foundation* was rendered on 2.7.2009. The effect of this judgment was that homosexual conduct between consenting adults in private was *decriminalized*. Consequently, Indians belonging to the LGBT community no longer suffered any legal taint in the course of their social and professional interactions and they enjoyed the status of full moral citizenship. This development in the law helped foster a better understanding of sexual orientation and enabled members of the LGBT community to interact as equals with other citizens. At an individual level, the self-esteem of LGBT persons increased because of the legitimacy conferred by the Delhi High Court declaration. Individuals became more open about their sexual orientation and shared this aspect of their personality with family, friends, colleagues and peers. At the work place, in the wake of the *Naz* judgment, employers treated LGBT persons on a more equal basis. Prejudice and homophobia decreased. There was a perceptible decline in hostile action by police and a safe environment was created for the spread of health programmes to combat HIV/AIDS.

The impact of the Supreme Court judgment is that police harassment has increased; social prejudice has sharpened; individuals have suffered psychological trauma and reduced self-esteem; employment has been jeopardized; young members of the LGBT community find themselves shut out of public employment opportunities because of potential criminality; family bonds carefully nurtured since 2009 have been disrupted and there is increased hostility towards the LGBT persons in their family as well as social circles.

In the circumstances, it is absolutely necessary and in the interest of justice that the *Koushal* judgment dated 11.12.2013 be stayed pending review. The balance of convenience is overwhelmingly in favour of the grant of such a stay order.