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	v. An article by Leila Seth, the former Chief Justice of the Punjab and Haryana High Court and mother of the acclaimed writer and homosexual writer Vikram Seth, titled "A Mother and a Judge Speaks Out On Section 377", <i>Times of India</i> , 26 January, 2014	
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## SYNOPSIS & LIST OF DATES

1. This curative petition under Article 142 of the Constitution of India arises in an exceptional case impacting Human Rights and Dignity.
  - a. The petitioners request this Court to reconsider its judgment dated 11.12.2013 in a set of civil appeals captioned *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors (2014) 1 SCC 1*.
  - b. 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
  - c. The Petitioners filed Review Petition (Civil) 222-233 of 2014 which came to be dismissed by this Court on 28.01.2014.
2. 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.
  - a. A vital aspect of an individuals' identity is his or her sexual orientation. 'Sexual Orientation' is the general attraction a person feels towards people of one sex or another. Sexual orientation is statutorily recognize in the Information Technology (Reasonable Security Practices and Procedures and Sensitive a Personal Data or Information) Rules, 2011. Recognizing varied sexual orientation is important because it is the bedrock of intimate relationships. 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.

- b. 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.
- c. 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.
- d. 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.
- e. 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 *Suresh Kumar Koushal & Ors. Vs. Naz Foundation & Ords. [(2014) 1 SCC 1]* abdicated its role as

guardian of Universal Human Rights and the protector of minorities.

- f. 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 *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors (2014) 1 SCC 1*.

#### *Why this Curative Petition*

3. Rendered 624 days (over 1 year 8 months) after the hearing concluded and the case was reserved for judgment, the *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors (2014) 1 SCC 1* judgment dated 11.12.2013 suffers from mistakes and errors that are apparent on the face of the record. The decision shocks the judicial conscience, perpetuates a grave injustice towards LGBT persons and shakes the public confidence in this Court to protect and defend the Constitution. In addition, there are other sufficient reasons for this Court to exercise its curative jurisdiction. 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.A. Two paramount issues arose in the case and the Court failed to address both of them:

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 *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors* [(2014) 1 SCC 1] although urged in oral as well as written submissions by the Petitioner.

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 re-criminalized 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.

a.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.

a.B.1.a.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

*Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* 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.

a.B.1.a.ii.

Second, it was not permissible for this 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.

a.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:

a.C.1.a.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);

a.C.1.a.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;

a.C.1.a.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;

a.C.1.a.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 Jayalakshmi v. State of Tamil Nadu (2007) 4 MLJ 849;

a.C.1.a.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;

a.C.1.a.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;

a.C.1.a.vii. Records from a Bombay High Court case of 2007 showing how Goa Police targeted two men in a consensual relationship.

a.C.1.a.viii. In 2011 the United Nations High Commissioner for Human Rights 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.

a.D. This 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 developments 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. It oppresses the judicial conscience to dismiss foreign judgments despite *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors (2014) 1 SCC 1* recognizing that "these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities

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, if one takes the ration of 5-7% of the population being LGBT, then the

*number of LGBT persons would work out to over 60-84 million out of a total population of 1.2 billion. 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 Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1] is legally as well as factually flawed.*

a.E. 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:

a.E.1.a. *Homosexual conduct was normal conduct. Homosexuality is simply one normal variant of sexual identity.*

a.E.1.b. *Homosexuality was not a disorder.*

a.E.1.c. *Heterosexual and homosexual behaviour are both normal aspects of human sexuality.*

a.E.1.d. *Sexual intimacy is a core aspect of the human experience and is important to mental health, psychological well being and for the social adjustment of homosexuals.*

a.E.1.e. *Human beings develop a sexual orientation between middle childhood and early adolescence.*

a.E.1.f. *Sexual orientation is innate and cannot be changed at will.*

*The technical material supporting this state of knowledge that was placed on record by the petitioners, included*

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

a.F. 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.

a.G. 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.

a.H. This Court in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors* (2014) 1 SCC 1 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.

a.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

a.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 *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* 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 exercise its curative jurisdiction in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors (2014) 1 SCC 1*.

#### *Why Hear the Parties*

4. It is respectfully submitted that this curative 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 curative 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 *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors* [(2014) 1 SCC 1] 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 *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors* [(2014) 1 SCC 1] 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 *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors* [(2014) 1 SCC 1] in the course of an oral hearing in open court.

2001                      The Writ Petitioner Naz Foundation files 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.

02.09.2004              Division Bench of the 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

High Court passes order dismissing review petition filed against its order dismissing WP(C) 7455/2001

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

03.03.2006

Hon'ble Supreme 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 Curative Petitioner, Voices Against 377, was impleaded as Respondent No. 8 before the High Court

02.07.2009

The High Court 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 and 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

Notice is issued in the present SLP(C) 15436/2009 is by parties who were neither parties before the High Court, nor personally aggrieved by the judgment of the High Court.

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

13.02.2012

This Hon'ble Court begins hearing final arguments in this matter.

23.02.2013

This Hon'ble Court records that the learned Additional Solicitor General Mr. P.P. Malhotra makes submissions on behalf of the Union of India. Mr. P.P. Malhotra argued that the Union of India was opposed to the declaration granted by the High Court.

As soon as Mr. P.P. Malhotra concluded his submissions, another Additional Solicitor General Mr. Mohan Jain stated that the Union of India had not filed an appeal and had not yet taken a stand in this case.

28.2.2012

Mr. Mohan Jain, Additional Solicitor General appears on behalf of the Union of India and submits 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.*

01.02.2012

Affidavit was filed on behalf of the Union of India by the Home Secretary which negated the earlier

submissions made by the learned Additional Solicitor General Mr. P.P. Malhotra on behalf the Union of India. 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 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 Attorney General again appears before this Court and reiterates 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 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.

11.12.2013

After 1 year and about 8 months, 1 week and 6 days (624 days) from the conclusion of oral hearings, this Court allows the Special Leave Petitions and dismisses the Writ Petition.

10.1.2014

Review Petition Nos. 222-233 of 2014 are filed by the present Petitioner

28.1.2014

Review Petitions are dismissed by this Court.

31.03.2014

Hence this Curative Petition.

**IN THE SUPREME COURT OF INDIA**

**CURATIVE PETITION NOS. \_\_\_\_ OF 2014**

**IN**

**REVIEW PETITION (C) NOS. 222-233 OF 2014**

**ARISING FROM**

(ARISING OUT OF THE FINAL COMMON ORDER DATED 11.12.2013 PASSED BY THIS HON'BLE COURT IN CIVIL APPEAL NO. 10972, 10974, 10986, 10981, 10984, 10985, 10976, 10980, 10977, 10978 and 10979 OF 2013)

**BETWEEN :**

**Position of Parties**

<b>In the High Court</b>	<b>Before this Court</b>
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**IN THE MATTER OF:**

**CIVIL APPEAL NO. 10972 OF 2013**

Voices Against Section 377

A coalition of 12 organisations

Having its address at

11, Mathura Road,

First Floor, Jangpura B

New Delhi – 110013

Respondent No.8 Respondent No.11

Versus

1. Suresh Kumar Koushal

S/o Shri S.D. Koushal,

C-105, Nirman Vihar,

Delhi- 110092

Del-

Not party

Petitioner No.1

2. Dr. Mukesh Kumar Koshal

S/o Shri S.D. Koushal

C-105, Nirman Vihar,

Delhi – 110 092

Not party

Petitioner No.2

3. Naz Foundation,  
A Trust registered under the Indian Trust Act,  
At having its registered office  
A-86, East of Kailash  
New Delhi- 65                      Petitioner                      Respondent No.1                      un-
4. Government of NCT Delhi,  
through the Secretary  
Social Welfare  
Delhi Secretariat  
ITO, New Delhi  
Delhi                      Respondent No.1                      Respondent No.2
5. Commissioner of Police  
Police Headquarters,  
ITO, New Delhi  
Delhi                      Respondent No.2                      Respondent No.3
6. Delhi State AIDS Control Society  
B.S. Ambedkar Hospital  
Dharamshala Block  
Rohini, Sector 6  
Delhi                      Respondent No.3                      Respondent No.4
7. National AIDS Control Organization,  
Set up by the Union of India,  
Having its office  
9th Floor, Chandralok Building  
Opp. Imperial Hotel,  
New Delhi                      Respondent No.4                      Respondent No.5
8. Union of India,  
Through Secretary  
Ministry of Home,  
North Block, India Gate  
New Delhi                      Respondent No.5(a)                      Respondent No.6

9. Union of India,  
Through Secretary  
Ministry of Health Family Welfare,  
Having its office at  
344, Nirman Bhavan,  
Maulana Azad Road,  
New Delhi                      Respondent No.5(b)                      Respondent No.7
10. Union of India,  
Through Secretary  
Ministry of Social Welfare  
Shashtri Bhavan,  
New Delhi                      Respondent No.5(c)                      Respondent No.8
11. Joint Action Council Kannur  
C-38, Anand Niketan  
New Delhi-110 021                      Respondent No.6                      Respondent No.9
12. Shyam Benegal,  
802, Brahmaputra,  
Dr. Bishambar Das Marg,  
New Delhi                      Not a party                      Intervener
13. Trust God Missionaries,  
Through its authorised  
person,  
Mr.Sebastian, s/o Jose  
Kattukaren,  
The Member Trustee, H.No.84,  
Church Compound,  
Mehrauli,  
New Delhi – 110 030                      Not a party                      Intervener
14. Minna Saran & Others,  
Residing at E-301,  
Krishna Apra Residency,  
Sector 61, Noida                      Not a party                      Intervener

15. Dr. Shekhar Seshadri & Others,  
S/o P.Seshadri, Residing  
at E-304, Adasrh Palace,  
47<sup>th</sup> Cross,  
5<sup>th</sup> Block, Jayanagar,  
Bangalore – 560004      Not a party      Intervener

**AND IN THE MATTER OF:**

**CIVIL APPEAL NO. 10974 OF 2013**

1. Voices Against Section 377  
A coalition of 12 organisations  
Having its address at  
11, Mathura Road,  
First Floor, Jangpura B  
New Delhi – 110013      Respondent No.8      Respondent No.11

Versus

1. Ram Murti  
S/o. Sh. Dalip Rai  
R/o. D-54, First Floor  
Hauz Khas,  
New Delhi- 110016      Not a party      Petitioner
2. Government of NCT Delhi,  
through the Secretary  
Social Welfare Delhi  
Secretariat ITO,  
New Delhi      Respondent No.1      Respondent No.1
3. Commissioner of Police  
Police Headquarters,  
ITO, New Delhi      Respondent No.2      Respondent No.2
4. Delhi State AIDS Control Society  
B.S. Ambedkar Hospital

Dharamshala Block

Rohini, Sector 6

Delhi

Respondent No.3 Respondent No.3

5. National AIDS Control Organization,

Set up by the Union of India,

Having its office

9th Floor, Chandralok Building

Opp. Imperial Hotel,

New Delhi

Respondent No.4 Respondent No.4

6. Union of India

Through Secretary

North Block, India Gate

New Delhi

Respondent No.5 Respondent No.5

7. Ministry of Home

through Secretary

North Block, India Gate

New Delhi

Respondent No.5(a) Respondent No.6

8. Ministry of Health

Through Secretary

Having its office at

344, Nirman Bhavan,

Maulana Azad Road,

New Delhi

Respondent No.5(b) Respondent No.7

9. Ministry of Social Justice

And Empowerment

Through Secretary

Shashtri Bhavan,

New Delhi

Respondent No.5(c) Respondent No.8

10. Joint Action Council Kannur

C-38, Anand Niketan

New Delhi-110 021

Respondent No.6

Respondent No.9

11. Naz Foundation

Society Through Anjali Gopalan

Executive Director

A-86, East of Kailash

New Delhi- 11006

Petitioner

Respondent No.10

**AND IN THE MATTER OF:**

**CIVIL APPEAL NO. 10986 OF 2013**

1. Voices Against Section 377

A coalition of 12 organisations

Having its address at

11, Mathura Road,

First Floor, Jangpura B

New Delhi –13

Respondent No.8

Respondent No.11

Versus

1. Sanatan Dharam Pratinidhi

Sabha Delhi (Registered),

Delhi-110015

Through its Chairman

Shri Manohar Lal Kumar

(Delhi)

Applicant

Petitioner No.1

2. Shri Manohar Lal Kumar

Chairman, Sanatan Dharam

Pratinidhi Sabha

Delhi (Registered)

Delhi – 110015

Kumar House 4940-47,

Chowk Bara Tooti,

Sadar Bazar,

Delhi - 110006

Applicant

Petitioner No.2

3. Naz Foundation,

A Society registered under the

Societies Registration Act

D-45, Gulmohar Park

New Delhi- 110049                      Petitioner                      Respondent No.1

4. Government of NCT Delhi,  
through the Secretary  
Social Welfare Delhi  
Secretariat  
ITO, New Delhi      Respondent No.1                      Respondent No.2
5. Commissioner of Police  
Police Headquarters,  
ITO, New Delhi  
Delhi                      Respondent No.2                      Respondent No.3
6. Delhi State AIDS  
Control Society  
11, Lances Road,  
Timarpur,  
Delhi -110 054      Respondent No.3                      Respondent No.4
7. National AIDS Control  
Organization,  
Set up by the Union of India,  
Having its office  
9th Floor, Chandralok Building  
Opp. Imperial Hotel,  
New Delhi                      Respondent No.4                      Respondent No.5
8. Union of India  
Through Secretary  
Ministry of Home Affairs  
North Block,  
India Gate  
New Delhi                      Respondent No.5(a)                      Respondent No.6
9. Union of India  
Through Secretary  
Ministry of Health  
Having its office at

344, Nirman Bhavan,  
Maulana Azad Road,  
New Delhi            Respondent No.5(b)    Respondent No.7

10. Union of India  
Ministry of Social Welfare  
Through Secretary  
Shashtri Bhavan,  
New Delhi            Respondent No.5(c)    Respondent No.8

11. Joint Action Council Kannur  
C-38, Anand Niketan  
New Delhi-  
110 021              Respondent No.6        Respondent No.9

**AND IN THE MATTER OF:**

**CIVIL APPEAL NO. 10981 OF 2013**

1. Voices Against Section 377  
A coalition of 12 organisations  
Having its address at  
11, Mathura Road,  
First Floor, Jangpura B  
New Delhi –13            Respondent No.8    Respondent No.11

*Versus*

1. Utkal Christian Council,  
Rep. by its Secretary,  
Miss. Jyotsna Rani Patro,  
Aged about 69 years,  
D/o. late Parom Patro  
R/o. Thavittangarath Kuniyil House,  
Bidanathpur PS,  
Ganjam District.  
Orissa                      Not a party                      Petitioner

2. Naz Foundation  
A Society registered under the Societ-  
ies Registration Act                      D-45,

Gulmohar Park

New Del-

hi -110049

Petitioner

Respondent No.1

3. Government of NCT Delhi,  
through the Secretary  
Social Welfare Delhi Secretariat  
ITO, New Delhi  
Delhi Respondent No.1 Respondent No.2
4. Commissioner of Police  
Police Headquarters,  
ITO, New Delhi  
Delhi Respondent No.2 Respondent No.3
5. Delhi State AIDS Control Society  
11, Lances Road, Timarpur,  
Delhi -110 054 Respondent No.3 Respondent No.4
6. National AIDS Control Organization,  
Set up by the Union of India,  
Having its office  
9th Floor, Chandralok Building  
Opp. Imperial Hotel,  
New Delhi Respondent No.4 Respondent No.5
7. Union of India  
Through Secretary  
Ministry of Home  
North Block, India Gate  
New Delhi Respondent No.5 Respondent No.6
8. Union of India  
Ministry of Health Welfare  
Through Secretary  
Having its office at  
344, Nirman Bhavan,  
Maulana Azad Road,  
New Delhi Respondent No.5(b) Respondent No.7

9. Union of India  
Ministry of Social Welfare  
Through Secretary  
Shashtri Bhavan,  
New Delhi                      Respondent No.5(c)    Respondent No.8
10. Joint Action Council  
Kannur  
C-38, Anand Niketan  
New Delhi-21                  Respondent No.6    Respondent No.9
11. Shri B.P. Singhal  
Retd. DGP, Ex-MP  
C-001, Stellar Kings Courts,  
F-32, Sector 50  
Noida – 201305                  Respondent No.7    Respondent No.10

**AND IN THE MATTER OF:**

**CIVIL APPEAL NO. 10984 OF 2013**

1. Voices Against Section 377  
A coalition of 12 organisations  
Having its address at  
11, Mathura Road,  
First Floor, Jangpura B  
New Delhi – 110013                  Respondent No.8    Respondent  
No.11
- Versus
1. Apostolic Churches Alliance,  
Rep. by its Bishop Salm T. Varghese  
T.C 11/2147-1  
Tilak Nagar, Nalanohira P.O.  
Trivandrum, Kerala                  Not a party                  Petitioner
2. Naz Foundation  
A Society registered under the

Societies Registration Act

D-45, Gulmohar Park

New Delhi- 110049

Petitioner

Respondent No.1

3. Government of NCT Delhi,

through the Secretary

Social Welfare Delhi

Secretariat

ITO, New Delhi

Respondent No.1

Respondent No.2

4. Commissioner of Police

Police Headquarters,

ITO, New Delhi

Delhi

Respondent No.2

Respondent No.3

5. Delhi State AIDS Control Society,

Through Secretary

11, Lances Road,

Timarpur,

Delhi -54

Respondent No.3

Respondent No.4

6. National AIDS Control Organization,

Through Secretary

Set up by the Union of India,

Having its office

9th Floor, Chandralok Building

Opp. Imperial Hotel,

New Delhi

Respondent No.4

Respondent No.5

7. Union of India

Through Secretary

Ministry of Home

through Secretary

North Block, India Gate

New Delhi

Respondent No.5

Respondent No.6

8. Union of India,

Ministry of Health Welfare

Through Secretary  
Having its office at  
344, Nirman Bhavan,  
Maulana Azad Road,  
New Delhi                      Respondent No.5(b)      Respondent No.7

9. Union of India  
Ministry of Social Welfare  
Through Secretary  
Shashtri Bhavan,  
New Delhi                      Respondent No.5(c)      Respondent No.8

10. Joint Action Council Kannur  
C-38, Anand Niketan  
New Delhi-110 021      Respondent No.6      Respondent No.9

**AND IN THE MATTER OF:**

**CIVIL APPEAL NO. 10985 OF 2013**

1. Voices Against Section 377  
A coalition of 12 organisations  
Having its address at  
11, Mathura Road,  
First Floor, Jangpura B  
New Delhi – 110013                      Respondent No.8      Respondent  
No.11

Versus

1. Prof. Bhim Singh  
Chairman,  
J&K National Panthers Party  
17, V.P. House,  
Rafi Marg,  
New Delhi-01                      Not a party                      Petitioner No.1

2. Naz Foundation  
A Society registered  
under the,

Societies Registration Act

D-45, Gulmohar Park

New Delhi- 49

Petitioner

Respondent No.1

3. Government of NCT Delhi,  
through the Secretary  
Social Welfare  
Delhi Secretariat  
ITO,  
New Delhi                      Respondent No.1    Respondent No.2
4. Commissioner of Police  
Police Headquarters,  
ITO, New Delhi  
Delhi                              Respondent No.2    Respondent No.3
5. Delhi State AIDS Control Society,  
Through Secretary  
11, Lances Road,  
Timarpur,  
Delhi -110 054              Respondent No.3              Respondent No.4
6. National AIDS Control Organization,  
Through Secretary  
Set up by the  
Union of India,  
Having its office  
9th Floor, Chandralok Building  
Opp. Imperial Hotel,  
New Delhi                      Respondent No.4              Respondent No.5
7. Union of India  
Through Secretary  
Ministry of Home  
through Secretary  
North Block,  
India Gate  
New Delhi                      Respondent No.5(a)    Respondent No.6

8. Union of India  
Ministry of Health Welfare  
Through Secretary  
Having its office at  
344, Nirman Bhavan,  
Maulana Azad Road,  
New Delhi Respondent No.5(b) Respondent No.7

9. Union of India  
Ministry of Social Welfare  
Through Secretary  
Shashtri Bhavan,  
New Delhi Respondent No.5(c) Respondent No.8

10. Joint Action Council Kannur,  
Through Secretary  
C-38, Anand Niketan  
New Delhi-21 Respondent No.6 Respondent No.9

**AND IN THE MATTER OF:**

**CIVIL APPEAL NO. 10976 OF 2013**

1. Voices Against Section 377  
A coalition of 12 organisations  
Having its address at  
11, Mathura Road,  
First Floor, Jangpura B  
New Delhi –13 Respondent No.8 Respondent No.11

Versus

1. B.Krishna Bhat  
S/o. Late B. Narayan Bhat,  
Aged About 79 years.  
Residing at No. 399, J.P.Road,  
I Phase, Girinagar,  
Bangalore-560085,

(Karnataka)                      Not a party                      Petitioner

2. Naz Foundation

A Society registered under the  
Societies Registration Act

D-45, Gulmohar Park

New Delhi-49

Petitioner

Respondent No.1

3. Government of NCT Delhi,  
through the Secretary

Social Welfare

Delhi Secretariat

ITO,

New Delhi

Respondent No.1

Respondent No.2

4. Commissioner of Police

Police Headquarters,

ITO,

New Delhi

Respondent No.2

Respondent No.3

5. Delhi State AIDS Control Society,

Through its Chairman

11, Lances Road,

Timarpur,

Delhi -110 054

Respondent No.3

Respondent No.4

6. National AIDS Control Organization,

Through its Director

Set up by the Union of India,

Having its office

9th Floor, Chandralok Building

Opp. Imperial Hotel,

New Delhi

Respondent No.4

Respondent No.5

7. Union of India

Through Secretary

Ministry of Home

through Secretary

North Block, India Gate

New Delhi

Respondent No.5(a)

Respondent No.6

8. Union of India

Ministry of Health Welfare

Through Secretary

Having its office at

344, Nirman Bhavan,

Maulana Azad Road,

New Delhi

Respondent No.5(b)

Respondent No.7

9. Union of India

Ministry of Social Welfare

Through Secretary

Shashtri Bhavan,

New Delhi

Respondent No.5(c)

Respondent No.8

10. Joint Action Council Kannur,

Through its Secretary

C-38, Anand Niketan

New Delhi- 21

Respondent No.6

Respondent No.9

**AND IN THE MATTER OF:**

**CIVIL APPEAL NO. 10980 OF 2013**

1. Voices Against Section 377

A coalition of 12 organisations

Having its address at

11, Mathura Road,

First Floor, Jangpura B

New Delhi –13

Respondent No.8

Respondent No.11

Versus

1. Krantikati Manuvadi Morcha Party

F-62, Sector 11,

NOIDA,

Uttar Pradesh

Through the

President



Opp. Imperial Hotel,  
New Delhi Respondent No.4 Respondent No.5

8. Union of India

Through Secretary

(a) Ministry of Home

North Block, India Gate

New Delhi Respondent No.5(a) Respondent  
No.8(a)

(b) Ministry of Health

Nirman Bhawan,

Maulana Azad Road,

New Delhi -11 Respondent No.5(b) Respondent  
No.8(b)

(c) Ministry of Social

Justice and Empowerment

Through Secretary

Shashtri Bhavan,

New Delhi Respondent No.5(c) Respondent  
No. 8(c)

9. Joint Action Council Kannur,

Through its Director,

C-38, Anand Niketan

New Delhi-21 Respondent No.6 Respondent No.9

**AND IN THE MATTER OF:**

**CIVIL APPEAL NO. 10977 OF 2013**

1. Voices Against Section 377

A coalition of 12 organisations

Having its address at

11, Mathura Road,

First Floor, Jangpura B

New Delhi –13 Respondent No.8 Respondent No.11

Versus

1. Joint Action Council, Kannur  
Through its General Convenor,  
Having its office at  
C- 38, Anand Niketan,  
New Delhi-110021      Respondent No.6      Petitioner
  
2. Naz Foundation  
A Society registered under the  
Societies Registration Act  
D-45,  
Gulmohar Park  
New Delhi- 49      Petitioner      Respondent No.1
  
3. Government of NCT Delhi,  
through the Secretary  
Social Welfare  
Delhi Secretariat  
ITO,  
New Delhi      Respondent No.1      Respondent No.2
  
4. Commissioner of Police  
Police Headquarters,  
ITO,  
New Delhi      Respondent No.2      Respondent No.3
  
5. Delhi State AIDS Control Society,  
Through its Secretary  
11, Lances Road,  
Timarpur,  
Delhi -54      Respondent No.3      Respondent No.4
  
6. National AIDS Control  
Organization,  
Through its Secretary

Setup by the  
Union of India,  
Having its office  
9th Floor, Chandralok Building  
Opp. Imperial Hotel,  
New Delhi                      Respondent No.4    Respondent No.5

7. Union of India, through Secretary

(a) Ministry of Home  
North Block, India Gate  
New Delhi

(b) Ministry of Health Welfare

Through Secretary  
Having its office at  
344, Nirman Bhavan,  
Maulana Azad Road,  
New Delhi                      Respondents No.5    Respondents No.6

8. Shri B.P. Singhal

Retd. DGP, Ex-MP  
C-003, Stellar Kings Courts,  
F-32, Sector 50  
Noida –201305                      Respondent No.6    Respondent No.7

**AND IN THE MATTER OF:**

**CIVIL APPEAL NO. 10978 OF 2013**

1. Voices Against Section 377

A coalition of 12 organisations

Having its address at

11, Mathura Road,  
First Floor, Jangpura B

New Delhi – 110013                      Respondent No.8    Respondent No.1

Versus

1. The Tamil Nadu Muslim

Munnetra Kazhagam,  
Represented by  
Its General Sectary  
S. Hyder Ali  
S/o. Mr. Syed Mohammed  
7, Vadamaricoir Street,  
Mannady

Chennai:-600 001            Not party            Petitioner No.1

2. S. Hyder Ali  
S/o Mr. Syed Mohammed  
Mannady  
Chennai 600 001            Not party            Petitioner No.2

3. Naz Foundation  
A Society registered under the  
Societies Registration Act  
D-45, Gulmohar Park  
New Delhi-49            Petitioner            Respondent No.1

4. Government of NCT Delhi,  
through the Secretary  
Social Welfare  
Delhi Secretariat  
ITO, New Delhi            Respondent No.1            Respondent No.2

5. Commissioner of Police  
Police Headquarters,  
ITO,  
New Delhi            Respondent No.2            Respondent No.3

6. Delhi State AIDS Control Society,  
Through its Secretary  
11, Lances Road,  
Timarpur,  
Delhi -54            Respondent No.3            Respondent No.4

7. National AIDS Control

Organization,  
Through its Secretary,  
Setup by the Union of India,  
Having its office  
9th Floor, Chandralok Building  
Opp. Imperial Hotel,  
New Delhi            Respondent No.4            Respondent No.5

8. Union of India  
Through Secretary  
Ministry of Home  
through Secretary  
North Block, India Gate  
New Delhi            Respondent No.5(a)            Respondent No.6

9. Union of India  
Ministry of Health Welfare  
Through Secretary  
Having its office at  
344, Nirman Bhavan,  
Maulana Azad Road,  
New Delhi            Respondent No.5(b)            Respondent No.7

10. Union of India  
Ministry of Social Welfare  
Through Secretary  
Shashtri Bhavan,  
New Delhi            Respondent No.5(c)            Respondent No.8

11. Joint Action Council Kannur,  
Through its Secretary  
C-38, Anand Niketan  
New Delhi-21            Respondent No.6            Respondent No.7

**AND IN THE MATTER OF:**

**CIVIL APPEAL NO. 10979 OF 2013**

1. Voices Against Section 377  
A coalition of 12 organisations  
Having its address at  
11, Mathura Road,



Through its Secretary  
Set up by the Union of India,  
Having its office  
9th Floor, Chandralok Building  
Opp. Imperial Hotel,  
New Delhi                      Respondent No.4                      Respondent No.5

7. Union of India  
Through Secretary  
Ministry of Home  
through Secretary  
North Block, India Gate  
New Delhi                      Respondent No.5                      Respondent No.6

8. Union of India  
Ministry of Health Social Welfare  
Through Secretary  
Having its office at  
344, Nirman Bhavan,  
Maulana Azad Road,  
New Delhi                      Respondent No.5(b)                      Respondent No.7

9. Union of India  
Ministry of Social Welfare  
Through Secretary  
Shashtri Bhavan,  
New Delhi                      Respondent No.5(c)                      Respondent No.8

10. Joint Action Council Kannur,  
Through its Secretary  
C-38, Anand Niketan  
New Delhi- 21                      Respondent No.6                      Respondent No.9

**A Petition under Article 142 of the Constitution of India**

To,

The Hon'ble Chief Justice of India  
and His Companion Justices of the  
Supreme Court of India at New Delhi

The humble petition of the  
Petitioner abovenamed

**MOST RESPECTFULLY SUBMITS:**

1. That by the present petition under Article 142 of the Constitution of India, the petitioners seek *ex debito justitiae* to remedy the manifest injustices which have been caused to millions of Lesbian, Gay, Bisexual and Transgender (LGBT) persons residing in India aggrieved by the order dated 28.1.2014 dismissing the Review Petitions Nos. 222- 233 of 2014 filed by the Petitioner seeking a review of the final common judgment and order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972, 10974, 10986, 10981, 10984, 10985, 10976, 10980, 10977, 10978 and 10979 of 2013 which were also dismissed by this Hon'ble Court. Copy of the final common judgment dated 11/12/2013 passed by this Hon'ble Court titled Suresh Kumar Koushal & Ors. Vs Naz Foundation & Ors. (2014) 1 SCC 1 is annexed to this petition as **Annexure P1**.
2. The present petition is being filed due to the grave injustice caused by the impugned judgement of this Court dated 11 December, 2013. By this judgment, this Court reversed judgment of High Court of Delhi dated 02.07.2009, in WP(C) 7455/2001. The High Court in a historic and well-reasoned judgment declared Section 377 of the Indian Penal Code, 1860, unconstitutional insofar as it criminalised private consensual sexual activity between adults. The High Court rightly found that by criminalising sexual acts most closely associated with LGBT persons, the provision criminalised the very identity of millions of LGBT citizens of India. Further the High Court found that the provision was not based on any intelligible criteria and furthered no legitimate state object. The High Court correctly found that Section 377 violated Articles 21, 14 and 15 of the Constitution of India, in so far as it criminalised consensual sexual acts between

adults in private.

3. The Union of India refused to appeal this judgment and by affidavit dated 01.03.2012 stated that it had accepted the judgment of the High Court. However, this judgment was appealed by persons who had no interest in the matter and whose rights were in no way prejudiced by the judgment of the High Court. The appellants sought to place themselves in the shoes of the Union of India and sought to usurp the sovereign function of defending the vires of a statute. Further, the appellants raised no issue of law of public importance and it was argued by the present petitioner that the jurisdiction of this Court under Article 136 had been wrongly invoked. This Court in the impugned judgment dated 11.12.2013 did not consider these arguments.
4. This Court by judgment dated 11.12.2013 set aside the decision of the High Court. This Court held that even though sexual acts prohibited by the section could not be enumerated, it nevertheless created a classification based on intelligible differentia. Even though the present petitioner submitted affidavits, FIR's, orders of lower courts, to demonstrate the brutality meted out to LGBT people, this Court did not consider these facts and held that there was no factual basis for the petition. Further, while this Court considered the precedent of this Court regarding the right to liberty, privacy and dignity, this Court did not apply these precedents to Section 377 and arrived at no finding on this question of law.
5. The present petitioners had approached this Court under Article 137 of the Constitution to address apparent errors on the face of the record. The said review petition was rejected by this Court vide order dated 28.1.14. True Copy of the order dated 21/01/2014 in the Review Petition 222-233 of 2014 is annexed as **Annexure P2.**
6. By setting aside the judgment of the High Court, this Court has *recriminalised* millions of LGBT persons in India. It is submitted

that the judgment of this Hon'ble Court suffers from mistakes and errors apparent on the face of the record, so grave that it perpetuates a state of continuing injustice to LGBT citizens of India and violates fundamental principles of the Constitution. The judgment of this Court has deprived LGBT citizens of India of the rights to equality, liberty, privacy and dignity. This petition is filed to address the manifest injustices thereby caused to millions of LGBT persons and is filed *ex debito justitiae*.

7. This Hon'ble Court has recognised that grave and manifest injustice caused by the order of superior Courts ought not to be allowed to subsist purely on the ground that there must be finality to litigation. While finality is clearly an objective of all legal systems, the objective of finality cannot be allowed to prevail over the need to do justice in particularly egregious cases of violation.
8. In *A.R. Antulay v. R.S. Nayak* (1988) 2 SCC 602, this Court held at para 48 that

*We are of the opinion that this Court is not powerless to correct its error which has the effect of depriving a citizen of his Fundamental Rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application. Powers of review can be exercised in a petition filed under Article 136 or Article 32 or under any other provision of the Constitution if the Court is satisfied that its directions have resulted in the deprivation of the Fundamental Rights of a citizen or any legal right of the petitioner*

10. In *Ramdeo Chauhan v. Bani Kanta Das* (2010) 14 SCC 209, this Court held

*51. This Court in exercise of its appellate jurisdiction has to deal with many judgments of High Courts and Tribunals in which the High Courts or the Tribunals, on an erroneous perception of facts and law, have rendered decisions in breach of Human Rights of the parties and this Court corrects such errors in those judgments. The instances of this Court's judgment violating the Human Rights of the citizens may be extremely rare but it cannot be said that*

*such a situation can never happen.*

*52. We can remind ourselves of the majority decision of the Constitution Bench of this court in Additional District Magistrate Jabalpur v. Shivakant Shukla reported in (1976) 2 SCC 521...*

*54. There is no doubt that the majority judgment of this court in the ADM Jabalpur case (supra) violated the Fundamental Rights of a large number of people in this country.*

11. It is precisely, these rare but not unprecedented situations when the order of the Superior Courts end up perpetuating grave injustice, that ought to trigger the corrective mechanism established by this Hon'ble Court. In *Rupa Ashok Hurra V. Ashok Hurra (2002) 4 SCC 388*, a Constitution Bench of this Court elucidated the doctrine of the curative petition. This Court observed:

*We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question we are persuaded to hold that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essentially in public interest that a final judgment of the final court in the country should not be open to challenge yet there may be circumstances, as mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and cause perpetuation of irremediable injustice. (emphasis supplied)*

In the concurring opinion, J. Banerjee observed:

*The principal basis being the concept of justice and this is where the principle of ex debito justitiae comes to play. Can it be said that the justice delivery system of the country is such that in spite of noticing a breach of public interest with a corresponding social ramification, this Court would maintain a delightful silence with a blind eye and deaf ear to the cry of a society in general or even that of a litigant on the ground of finality of an Order as passed by this Court ? True the finality shall have to be maintained but is it the principal requirement, which the law envisages? Roscoe Pound stated that flexibility is the greatest virtue of law and thus its applicability should also be flexible rather than a rigid insistence on a strict format. Justice of the situation shall have to be considered with a fair perception of such a concept rather than with a blinking light attention ought to be focussed on a larger social perspective since law is meant for the society and if flexibility is its virtue, which law enjoys, its corresponding primary duty thus would be to change the legal horizon and perspective with the appropriate socio-economic change.(emphasis supplied)*

Justice Banerjee further holds that

*The oft quoted statement of law of Lord Hewart, CJ in R v. Sussex Justices, exp McCarthy (1924 (1) KB 256) that it is of fundamental importance that justice should not only be done, should manifestly and undoubtedly be seem to be done had this doctrine underlined and administered therein. In this context, the decision of the House of Lords in R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2) seem to be an ipoc making decision, wherein public confidence on the judiciary is said to be the basic criteria of the justice delivery system any act or action even if it a passive one, if erodes or even likely to erode the ethics of judiciary, matter needs a further*

*look.* (emphasis supplied)

12. This Court in *Rupa Ashok Hurra V. Ashok Hurra* (2002) 4 SCC 388, has laid down three situations in which the curative jurisdiction of this Court may be invoked
  - ≡ The judgement causes the perpetuation of irremediable injustice.
  - ≡ The judgment would be oppressive to judicial conscience
  - ≡ The judgment shakes public confidence in the judiciary
13. This petition falls squarely within the rule of this Hon'ble Court in *Rupa Ashok Hurra v. Ashok Hurra* and in *Indian Council for Enviro-Legal Action v. Union of India & Others*, (2011) 8 SCC 161. The judgment of this Court in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors* [(2014) 1 SCC 1] falls within the 'rarest of rare' category that merit being re-opened and re-examined.
14. The present petitioners are seeking to invoke the curative jurisdiction of this Court on the following grounds

### **GROUNDS**

- A. The judgement of this Court in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors* [(2014) 1 SCC 1] perpetuates a state of irremediable injustice.
- B. That the judgment of this Court fails to appreciate that LGBT persons are rendered criminal for no fault of their own and perpetuates a irremediable injustice as enumerated below:
  - a. Between 60-84 million citizens of India are reduced to the status of unapprehended criminals. The scientific literature on the record of this Court showed that the LGBT community ranges 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 who would be LGBT would work out to between 60- 84 million. This is a staggeringly large number of human beings, whose rights are breached by Section 377.

- b. That 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. Crucially, the weight of scientific material shows that each of us has little or no control in deciding our sexual orientation, which is innate to our personality 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.
  
- c. That LGBT persons exist 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 *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* although urged in oral as well as written submissions by the Petitioner.
  
- d. That for all human beings, 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. That the judgment failed to consider that Section 377 is

directly responsible for the rape, torture, extortion and harassment of LGBT persons as enumerated below:

- a. The material on the record placed by the petitioner unequivocally established the extreme brutality of the State apparatus in physically abusing, torturing, exploiting and targeting members of the LGBT community. This material has not been contradicted by any of the appellants and was not contradicted by this Court in its judgment dated 11.12.2013. 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 to even consider the following factual material placed on the record by the present petitioners:
  - a.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);
  - a.ii. Affidavit of Kokila (a hijra from Bangalore) detailing how on 18.6.2004 she was raped by 10 Goondas and subsequently exploited and tortured by the police when she went to the police for help.;
  - a.iii. Affidavit of a gay man physically assaulted by two policemen on 19.9.2006 and subsequently raped and sexually abused by the Delhi Police;
  - a.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;
  - a.v. Affidavit of Madhumita (a transgender person in Bangalore) explaining how a false case was filed against her under Section 377 at Bangalore and

how she was targeted by the police for merely being a Hijra;

- a.vi. FIR lodged by the Delhi Police and subsequent order by a Metropolitan Magistrate in 2006 showing how Section 377 is abused by the police to target LGBT persons including adult women in a romantic relationship;
- a.vii. Order of the High Court of Bombay at Goa of 2007 showing how Goa Police targeted two men in a consensual relationship.
- a.viii. A report published in 2011 by the United Nations High Commissioner for Human Right presented 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.

- b. That a grave miscarriage of justice was occasioned in this Courts finding, at paragraph 40, that there was insufficient factual basis for “*a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by State or its agencies or the society.*” This finding by this Hon’ble Court is directly contradicted by paragraph 51 of the same judgement which records that Section 377 was challenged on the ground that it was 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.*”
- c. The material placed on record by the Petitioner demonstrates that the direct and inevitable effect of Section 377 was violence, rape, torture, discrimination,

and harassment of LGBT people by the agencies of the State and other members of society. The High Court recorded findings in respect of these grounds at paragraphs 21 and 22 of the impugned judgment.

- D. The finding of this Court at para 40 of its judgment that the High Court was not justified in entertaining the challenge to section 377 since factual foundation for challenge to the constitutionality of section 377, IPC had not been laid is an error of law and of fact apparent on the face of the record which occasions a grave miscarriage of justice.
- a) It is an error of law since -
- a.i) the finding was arrived at without considering that a division of four judges of this Court had already reversed an earlier judgement of the High Court that had held that the petition lacked cause of action, and had remitted the matter to the High Court. Therefore, the question of whether factual foundation had been laid for challenging the constitutionality of section 377 had attained finality and was no longer in issue before the High Court, and was also not in issue in the SLPs before this Court. It is settled law that *res judicata* applies between two stages in the same litigation. *Satyadhan Ghosal v. Sm. Deorajin Debi*, [1960] 3 S.C.R. 590, *Arjun Singh vs Mohindra Kumar & Ors*, 1964 AIR 993, 1964 SCR (5) 946. Annexure P 2 to the review petition no. 222- 233 of 2014 is a true typed copy of the order of the Delhi High Court dated 02.09.2004 in WP (C) No. 7455/2001. Annexure P3 to the to the review petition no. 222- 233 of 2014 is a true typed copy of the order of this Hon'ble Court dated 03.02.2006 in SLP (C) Nos. 7217- 7218/2005.
- a.ii) After the matter was remitted to the High Court, all parties supplemented pleadings and evidence. Most importantly, the petitioner - who had been impleaded as respondent number 8 by the High Court, after the matter was remanded - pleaded detailed grounds of challenge and supported the grounds of challenge with substantial evidence. Those respondents who were resisting the

challenge to the constitutionality of section 377 also supplemented their pleadings and evidence after the matter was remitted to the High Court.

a.iii) At no point after the matter was remanded, did any of the parties challenge the petitioner before the High Court (Naz Foundation India) or the present petitioner's pleadings for lack of factual foundation or cause of action. Petitioner therefore had no opportunity to meet the challenge of lack of factual foundation or to amend or supplement pleadings or evidence to supply factual foundation.

a.iv) The judgement of the High Court has no finding on the issue of lack of factual foundation since it was not in issue before it and was answered comprehensively by the judgment of this Hon'ble Court in its order dated 03.02.2006 in SLP (C) Nos. 7217-7218/2005.

a.v) In the petitions before this Court as well, lack of factual foundation was not urged on behalf of any of the petitioners and was urged for the first time only during oral arguments.

(a.i..b) The conclusion that the petition lacked factual foundation is also an error of fact apparent on the face of the record since -

a.i) the record reveals that the present petitioner had, before the Delhi High Court filed a detailed affidavit in support of the challenge to the constitutionality of section 377 and had also filed detailed evidence in support of the grounds of challenge. The pleadings and the evidence of the present petitioner were not traversed by any of the parties before the High Court. The judgment of the High Court extensively cites the pleadings and the evidence of the present petitioner. The order in review as well, sets out some of the pleadings and evidence that was placed before this Court at oral arguments.

a.ii) Naz foundation India, the petitioner before the High Court had laid detailed factual foundation in the form of pleadings and evidence in support of a challenge to the constitutionality of section 377.

- E. That there is an irremediable injustice as this Court has failed to appreciate the law relating to pleadings in Public Interest Litigation. At paragraphs 39 and 40, this Court discusses the precedent laid down with regard to pleadings and holds that the petitioner had *“miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basic Human Rights to them. Respondent No. 1 has also not furnished the particulars of the cases involving harassment and assault from public and public authorities to sexual minorities.”* It is submitted that assuming, but not admitting, that the petition was laconic on facts, this Court has held that strict rules of pleadings need not apply in Public Interest Litigation. It has been held several times by this Court in *M.C. Mehta & Another v. Union Of India & Others* AIR 1987 SC 1086, *S.P. Gupta v. Union of India* (1981) Supp. SCC 87, *Peoples’ Union for Democratic Rights v. Union of India* AIR 1982 SC 1473, that even a letter is enough to invoke the jurisdiction of a High Court under Article 226 or to this Court under Article 32.
- F. These and many other errors apparent on the face of the record, which were brought to the attention of this Hon’ble Court in a review petition filed by the petitioner and dismissed by circulation, have thereby occasioned a grave miscarriage of justice. The fact that these errors remained uncorrected by this Hon’ble Court has meant that its decision, which ignored compelling material of brutal human rights violations, continues to impede the right of LGBT persons to live their lives free from harassment, persecution and discrimination.
- G. That the continuing vagueness of Section 377 emboldens arbitrary police actions, results in police harassment and causes irremediable harm.
- a. This Hon’ble Court at para 38 on page 77 of the judgment under review, failed to state which sexual acts were covered by section 377 and which acts were not. It is a fundamental principle of criminal law, as this

Hon'ble court acknowledges at para 44 of the judgment under review, that vagueness of a law may render it unconstitutional as its implementation would be a matter of unfettered discretion. As this Hon'ble Court observed in *A.K. Roy v. Union of India* (1982) 1 SCC 271 at para 62,

- b. The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in *Menaka Gandhi*. The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity.
- c. This Court erred in not taking note of the fact that its unequivocal finding that “no uniform test can be culled out to classify acts as “carnal intercourse against the order of nature”” and “the acts which fall within the ambit of the section can only be determined with reference to the act itself and the circumstances in which it was executed” meant that the section did not provide adequate warning of the conduct proscribed and was thereby void for vagueness.
- d. That there is an irremediable injustice caused as this Court failed to consider that the vagueness of Section 377 conferred unfettered discretion on police officials and other agents of the state, evident from the voluminous material that the present petitioner placed on record reflecting harassment, blackmail and torture of LGBT persons that this Court refers to in passing at para 51 of the judgment against which this curative petition has been filed.
- e. That the judgment perpetuates continuing injustice to a section of the Indian population, namely LGBT persons. The fact that the ambiguity in the law has been allowed to persist, empowers local level police officers to continue the pattern of harassment, a record of which had been placed before this Court by the petitioner.

H. That an irreparable injustice has been caused as *the direct and inevitable effect of Section 377 is to brutalize the LGBT community.*

a. This Court perpetuates a grave injustice by relying upon the object and form of section 377 in determining its validity and not the 'direct and inevitable' consequence of section 377. Although in form section 377 targeted 'acts', these acts are so closely identified with a class of persons, namely LGBT persons, that its direct and inevitable consequence is to criminalise all sexual activity on the part of this class of persons. *Rustom Cavasjee Cooper Vs. Union of India*, (1970) 1 SCC 248, *Maneka Gandhi Vs. Union of India & Anr.*, (1978) 1 SCC 248, *State of Maharashtra & Anr. Versus Indian Hotel & Restaurants Assn. & Ors.*, (2013) 8 SCC 519 *Namit Sharma v. Union of India*, (2013)1 SCC 745.

b. That gross injustice is perpetuated and continues to subsist 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.*

Abuse of police power, blackmail and torture are integral to the very logic of Section 377 and inherent in its construction. Being so, the arbitrary actions which are executed under cover of this provision cannot be dismissed as mere 'misuse'.

I. That a situation of irremediable injustice is perpetuated by this Court finding that there are minimal instances of prosecution of LGBT persons under Section 377 and failing to consider that it was persecution of LGBT persons under Section 377 which was the basis of the constitutional challenge.

a. At para 43, of the judgment against which the curative petition has been filed, this Hon'ble Court says that "*there are less than 200 persons who have been prosecuted (as per reported orders) for committing offence under Section 377.*" It is submitted that even assuming, but not admitting, that this figure is correct, this only constitutes the number of cases reported at the level of the High Court or the Supreme Court and does not include figures from the vast majority of courts in the country, i.e. the trial Courts. More importantly, the present petitioner's case has always been that the instances of harassment, torture, rape, blackmail of LGBT people is a direct and inevitable consequence of section 377. The persecution of LGBT people as a consequence of Section 377 is a far wider phenomenon and is attested to by material placed before this Hon'ble Court. Hence to dismiss the case of the petitioner based purely upon the lack of adequate number of prosecutions misapprehends the case of the petitioner which is based upon documented evidence of a history of persecution of LGBT persons as a direct and inevitable consequence of Section 377.

b. That the prosecution of LGBT persons under Section 377 has severe consequences. The petitioner seeks to place on record details of how the liberties of an individual person is violated if prosecution is launched under Section 377. Annexure P-4 of the application for permission to file additional documents filed along with the review petition is an affidavit of a HIV/AIDS outreach worker in Hassan, Karnataka. He states how he was falsely implicated, arrested and sent to judicial custody for thirteen days on a false case under Section 377. He describes how he was subjected to severe humiliation

by his fellow inmates, tortured by the police and physically and verbally abused. Annexure P-5 (Colly) of the application for permission to file additional documents filed along with the review petition is an unofficial translation of the FIR under which the deponent was arrested. Annexure P-6 of the application for permission to file additional documents filed along with the review petition is a fact-finding report about the true antecedents of this FIR and demonstrates continued harassment of LGBT people.

- J. That the judgment of this Court has caused an irremediable injustice as this Hon'ble Court has overlooked the fact that section 377 criminalises sexual acts most closely associated with one group of persons, namely LGBT persons. At paragraph 38, at page 77 of the judgment under review, this Hon'ble Court has held

*It is relevant to mention here that Section 377 IPC does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.*

While it is true that on a plain reading of section 377 it would cover a number of sexual acts regardless of sexual orientation or gender identity, the sexual acts it criminalises are most closely associated with LGBT persons. By criminalizing conduct most closely associated with one class of persons, the law in effect criminalizes a entire class of persons for whom the prohibited conduct is the only mode through which intimate bonds are expressed and formed.

- K. This Court gravely misunderstands the connections between sexual bonds and the identity of a person. If sexual conduct of a certain nature is prohibited, this has grave and serious implications for the right and ability of an entire community to establish intimate bonds with others and to establish themselves as full persons entitled to enjoy all rights under the Constitution. The right to form intimate bonds with those of one's choice unhampered by police actions, the right to

express oneself through the formation of personal ties with those whom one loves are all deeply intimate aspects of personhood. It is precisely these aspects which form central aspects of what it means to be human, which stand prohibited under Section 377. By failing to recognize that the criminalization is not of a sexual act alone but rather of intimate aspects of the human person, the decision of this Court in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* causes irremediable injustice to the LGBT community right to an existence based upon human dignity.

L. That *the Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* judgment has resulted in documented cases of continued and increased persecution of members of the LGBT community, thereby perpetuating a state of injustice. Since the date of the judgment of this Court there have been increased instances of harassment and threats towards LGBT persons that arise as a direct consequence of the judgment of this Court. In the review petition filed before this Court the present petitioner presented instances of harassment and violation perpetrated on LGBT persons through nine affidavits from people of diverse backgrounds including LGBT persons, parents of LGBT persons, counselors and psychiatrists. These affidavits have been annexed to the Application for Permission to File Additional Documents filed along with the Review Petition:

a.i. Annexures P-7 and P-8 are affidavits from two *kothi*'s (effeminate men who may identify themselves as women) residing in Haveri district, Karnataka, who are working as HIV/AIDS prevention outreach workers. Their work includes promoting HIV awareness, condom distribution and encouraging HIV testing. Both these affidavits testify to separate incidents of harassment after the Supreme Court's judgment currently under review.

In Annexure P-7 the deponent states

7. *Post the judgment of the Supreme Court re-criminalizing homosexuality, the problem of police harassment has only increased. On the Saturday following the judgment on 11 December, 2013, myself and a counsellor Prem who works in my organization were in the field. Again two police officers came and checked my bag and threw the contents down including pamphlets, condoms and lubes. They dragged Prem by the collar hurting him. When I and Prem protested this harsh and uncalled for treatment, we were told that anyway people like us were illegal.*

*I was told that anyway our community was being talked about on all media including the TV and the newspaper. I was told that inspite of such a big publicity of the Supreme Court judgment which made it a criminal offence to be a sexual minority, I and Prem were still indulging in homosexuality. The police said that we should stop being homosexual since the judgment had now come out*

8. *I answered by saying that we have not come to the railway station to have sex, I and Prem had only come there to hear the community members speak about their pains and sorrow. The police then threatened us and told us that they will file cases against us as anyway now what we were doing was illegal.*

In Annexure P-8 it is stated

*On 20.11.13, I was in a meeting with sexual minority community members, when a police officer came to us and started asking us questions in an aggressive, demeaning and rude manner. They inquired about the reasons for our gathering and the reasons for the meeting. I explained the work of our organization to him and duly answered all his*

questions.

5. However, the police officer was not convinced and asked to check my bag. He emptied the contents of the bag which had condoms, gels, training material and flipchart with information on STDs. The officer asked what these disgusting photographs for. All my attempts at explaining our work to prevent sexually transmitted diseases were unheeded to.

6. The officer went on to say that carrying condoms is illegal and alleged that we distribute it to everyone in the name of distributing it to sexual minority community members. When I denied such allegations, the officer got very angry and exasperated and said that the societal attitudes against members of the community are correct and that we are the reason HIV is prevalent. Further, they abused us for taking up such a job and asked us to pursue other respectable jobs.

7. All my attempts at explaining that this is a project recognised by NACO and the kind of harassment that community members face in other job settings including being called chakka, gandu and other such derogatory terms for having female mannerisms and being effeminate was received with a severe admonishment that we never be spotted again at that place. Subsequent, yet again, a week after the judgment of the Supreme Court recriminalizing homosexuality, two police officers harassed members of the community. We had just then received the details of the judgment at our office and I had gone to the field to check on the members of the community. To my utter shock and distress I

*saw two police officers beating community members. I urged the police to stop beating them and asked them why they were doing so. The officers mockingly said that I should be knowing the reason better as the news is out everywhere including the news papers, TV and everyone is talking about it. They said that they are aware of the judgment and will not tolerate seeing us in the open in spite of it.*

...

*11. I was accepted at home by my family before the Supreme Court delivered its verdict criminalising homosexuality. My father came for family counselling to my organization and was accepting of my identity as a kothi. However, subsequent to the judgment of the Supreme Court, there is immense pressure on me to get married. A lot of my friends have stopped talking to me as they are afraid that people will think they are homosexual as well like me. I am facing sever ostracization from all quarters. I was so scarred by the harassment by the police that I have asked my project officer to not send me on field work anymore.*

- a.ii. Annexure P-9 is an affidavit of a gay man in Madurai who attests to the hatred towards LGBT people that has been sanctioned by the judgment under review. On 18.12.2013, the deponent notes that he saw posters in Tamil appearing in several parts of the city. A photograph of the poster has been annexed to this affidavit. The posters state:

*Government of India:*

*\* Forget about legalizing homosexuality in the name of personal liberty*

*\* Change the punishment for homosexuality under Sec 377, from life in prison to death penalty*

*Government of Tamil Nadu:*

*Arrest those people, the cultural terrorists,  
who support homosexuality*

*"If a society turns a blind eye to social evil, it  
will be punished by god" - Prophet Mohammad  
INL Party, Madurai*

- a.iii. Annexure P-10 is an affidavit by Dr. Shekhar Seshadri, Professor of Psychiatry, National Institute of Mental Health and Neuro Sciences. He states that in his professional opinion, the continued existence of section 377 has negative impacts on the mental health of LGBT individuals.

*14. That in the doctoral dissertation "Validity of Ego-Dystonicity in Homosexuality: An Indian Perspective" by Dr. Ami Sebastian Maroky that I was co-guide on, the scientific data clearly showed the links between LGBT persons facing psychological distress and the prejudice that they face in their daily lives. That in my understanding of Dr. Maroky's data it is clear that LGBT persons felt socially disadvantaged and at risk due to the Section 377 of the Indian Penal Code (IPC). LGBT people expressed that they felt ashamed due to the harassment and disapproval they faced from many sources, legitimized by the law. This torment forced many LGBT people to try to change their orientation medically, thereby further eroding their sense of well being. It is my belief that an important step to ensure that LGBT persons do not succumb to different psycho-social stresses is to remove consensual sexual relationships from the ambit of the criminal code as well as remove civil legal restrictions placed on LGBT people.*

*15. That the prejudice fostered by Section 377*

*of the Indian Penal Code accentuates the isolation and helplessness that LGBT people feel and the psychological distress experienced by LGBT persons thereby making them vulnerable to self-harm and suicide. ....*

*17. That it is my understanding that there is a clear established link between public perception on LGBT issues and psychological distress felt by LGBT persons. In my understanding, Section 377 exacerbates the apprehension of persecution, isolation, fear and helplessness felt by LGBT people. That this persecution of LGBT persons is based on unscientific foundations and is based on nothing more than irrational prejudice.*

*18. That it is clear to me that the legal environment in India had to change to protect the rights of LGBT persons. I have come to the conclusion that treating LGBT persons as full citizens as per the law is integrally linked to fulfilling the objective of a life free of unnecessary stress, unproductive anxiety and life disrupting fears which is the lot of LGBT persons...*

*19. That since the Delhi High Court judgment, my professional work on sexuality and gender had been greatly eased owing to the emergence of many organisations working with LGBT issues and the numerous public individuals who openly claimed their different sexuality or gender identity and thereby provided my LGBT clients multiple sources for role models that made it easier for them to reclaim their sense of self and to live their lives with dignity. The increased social acceptance following the Delhi High Court judgment created a strong sense of mental well being and belonging among LGBT persons.*

*21. That I was deeply shocked by the Supreme Court judgment on 11<sup>th</sup> December 2013, re-criminalising homosexual relationships. The effect of the judgment is the return of a feeling of oppressive and continuous persecution for my LGBT clients. My LGBT clients again feel a sense of isolation and helplessness which is particularly strong among those who lack support systems. It is also true that LGBT individuals from small towns, with little social support in terms of friends and family are the ones who are most at risk psychologically.*

*22. That it is my fear that these feelings of helplessness and isolation will once again increase numerous vulnerabilities of LGBT persons: including a variety of mental health crises; multiple discriminatory experiences that will demoralise them and affect their sense of self; severe stigmatisation of their lives and relationships that will increase depression and suicidal tendencies; various forms of violence both within families and outside that will further disempower them and affect their productive lives as citizens of a free country.*

a.iv. Annexure P-11 is an affidavit by Vinay Chandran, a trained counselor in Bangalore. He attests to the marked increase of distress amongst his clients and the deleterious impact on their mental health and their sense of self as a direct result of the Supreme Court's judgment under review. He states that

*32. That in another instance, D, a 39-year old Bangalore-based medical transcriptionist, called on the SAHAYA helpline, which I run, on the 12th December 2013 to state a few of his worries. He revealed to me that because he*

*was effeminate he was harassed in his office. He said that his colleagues knew that he was attracted to men and they treat him with contempt because of his sexual orientation. He also said that he was very fearful for his life. He was worried that his office colleagues could complain to the police and have him arrested. I believe that the fear that D speaks of and feels is very real and is affecting his health seriously.*

*33. That in another instance, E, a 32-year old self-identified gay man, who works as a software analyst at an investment bank told me that after the news broke about the Supreme Court judgment, he has heard demeaning, violent and hateful statements from colleagues in his office against homosexuals suggesting that people like him should be jailed. E told me that he feels helpless in tackling this kind of prejudice in his work place, because the law of the land had essentially made him a criminal.*

...

*36. That about 20 people, including my clients, and members of different support groups came to me and broke down crying and were in need of immediate counselling that could help them regain a sense of self and confidence that was lost to them due to the animosity, hatred and prejudice that the Supreme Court judgment fostered.*

a.v. Annexure P-12 is an affidavit filed by Pawan Dhall, who works in the area of HIV/AIDS prevention in West Bengal, Odisha, Manipur and other eastern states. He states that transgender individuals have been arrested under section 377 in Manipur. In Odisha, LGBT individuals are opting out of health services for fear that they

might be identified and arrested by the police. He states that, based on incoming data and reports from the field, HIV/AIDS outreach workers fear that they may be seen as abettors to an offence under Section 377.

a.vi. Annexure P-13 is an affidavit of Vijayalakshmi Chaudhuri a former school teacher in Chandannagar, West Bengal whose son is a gay man. She states that

*5. I along with my husband was thus deeply elated by the decision of the Delhi High Court decriminalizing homosexuality on July 2, 2009. What the judgment of the Delhi High Court did was to signal that my son was a full and equal member of society. It helped enormously in decreasing popular prejudice and lessening public opposition to people of a different sexual orientation such as my son. It was an important moment, which marked the fact that my family was no more vulnerable to the fear of police harassment and violence. It allowed me and my family to for the first time, peacefully enjoy my family life, without the fear of unjust persecution.*

*6. It was thus a deep shock for both me and my husband, when we heard about the decision of the Supreme Court re-criminalizing homosexuality on December 11, 2013.*

*7. The decision of the court has re-induced a deep level of trauma in me as I fear once again for my son. I am more fearful than ever before that the law could be used to unfairly target my son. Now that post the wide publicity given to the judgment of the Supreme Court, more people know that my son is a criminal.*

...

*9. Some members of our extended family, who never supported my son's right to be what he is and were unhappy with our decision of coming*

*out in his support are emboldened by the 11<sup>th</sup> December judgment of the Hon'ble Supreme Court and have started expressing prejudicial opinions against me and my family members. I am also apprehensive of this form of prejudice which has now been legitimized by the verdict of the Supreme Court being used to adversely impact my family's ability to make a living. This form of unreasonable prejudice is now being sought to be used to even deprive me and my family of our stake in the family business and even deprive us of our place of residence. This form of prejudiced action was unthinkable in the days before the Supreme Court judgment.*

- a.vii. Annexure P-14 is the affidavit of Chitra Palekar, a film maker from Mumbai, whose daughter Shalmalee Palekar is a lesbian. She states that:
- The judgment calls only "the sexual act" between same sex people criminal and not the people themselves. However I am afraid that this ruling can be easily misinterpreted to target the LGBT people. My fear was justified when, immediately after the Supreme Court ruling, I read in press, the comments of Shri.Yashwant Sinha, "... Now, after the Supreme Court ruling, it (same sex relationship) is completely illegal in our country." He further added, "So, why does not the Government of India go ahead and arrest them (companions of same sex) and punish them?" No doubt Mr. Sinha's comment was in the context of a diplomatic row between India and the USA, in relation to an Indian diplomat, and he suggested arrest only of the American diplomats' same-sex partners. However, the fact is that the comments were based on misinterpretation of the judgment. When such a senior Indian politician with a reputation of being a moderate, learned and balanced figure, can misinterpret the ruling and*

*brand same-sex 'companions' as criminal, the less informed police force as well as society are bound to do the same. Such perception of criminality can only adversely affect my daughter and her partner' life if they come to live in India.*

*I am currently the co-owner along with my daughter of the flat I occupy in a housing society in Mumbai, and in the course of time my daughter will inherit this flat. However in the light of the Supreme Court judgment, I am afraid that she may face problems in being able to claim the flat. The judgment will allow hostile neighbours to claim that she is considered a criminal under the law and she can be barred from membership of the housing society. If she lives there with her partner, any homophobic neighbour can use section 377 to complain that "immoral" and 'criminal' activity is going on in the flat and harass her. Housing societies are notorious as places of conflict where personal issues of members are used against them. The Supreme Court judgment provides excellent ammunition to hostile neighbours to attack the LGBT people including my daughter.*

a.viii. Annexure P-15 is the affidavit of Vijay Mogli who identifies as a gay man. He testifies to the increasing prejudice he faces within his own family, after the passing of the judgment under review. Vijay Mogli states:

*That the judgment of the honourable Supreme Court of India in the case Suresh Kumar Kaushal and Others Vs. Naz Foundation and others shocked me and threw me and my parents back by 15 years.*

*That my father now strongly feels that his negative bias against homosexuality has been endorsed by the Supreme Court and insists that I should undergo conversion or reparative*

*therapies again. My father uses threatening language to blackmail me emotionally and to attack my character and says that I am a threat to the society because of my homosexuality. My father also calls me a pervert in these threats.*

*That consequent to the judgment of the apex court, the situation in my house is either tense or gloomy with my father trying to persistently pressurize me to get married immediately to a girl. He refuses to understand that this could have a deleterious effect on my mental health and is most importantly a fraudulent transaction with an innocent girl. That he now feels that the Supreme Court judgment that criminalises homosexuality thus legitimises conversion or reparative therapy as conversion or reparative therapy seeks to convert homosexuals into heterosexuals.*

- M. *The judgement in Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1] is oppressive to judicial conscience*
- N. That the Constitutional Courts are the custodians of the Constitution. The judicial conscience would stand oppressed if Constitutional values are neglected, Constitutional principles are ignored and constitutional precedents are laid waste in a cavalier fashion by judgments which ignore the very purpose for which the judiciary was invested with powers under the Constitution. It is submitted that it is precisely this high constitutional responsibility that had been ignored by the Court in its judgment dated 11.12.2013 as delivered in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]*.
- O. The judgment of this Court dated 11.12.2013 goes against the grain of what a judgment should be, i.e. a reasoned decision based upon a proper appreciation of precedent. When judges pronounce their verdicts, what they demonstrate is the power

of reasoned argument, of how they have come to a conclusion after considering all sides to a vexed question. It is the power of this form of deliberative reason, which nourishes and sustains the legitimacy of the judiciary.

P. That the judgement in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* fails in exercising this most fundamental tool of a deliberative democracy – public reasoning. The key questions before the Court was whether Section 377 violates the right to equality, the right to privacy and dignity as well the right to non discrimination. On the question of whether Section 377 violates Articles 21, 14 and 15, the Court chose not to come to a reasoned finding.

a. This Court has erred in its application of the doctrine of classification under Article 14. At para 41 of this Court's judgment, the case of in *Re: Special Courts Bill, 1978 (1979) 1 SCC 380* has been cited. Here, this Hon'ble Court has laid down the following principles, which have been quoted at page 81 of the judgment under review:

*7. ...In order to pass the test (of classification), two conditions must fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.*

This Hon'ble Court has held in *Deepak Sibal & Another v. Punjab University (1989) 2 SCC 145* at page 156 para 20 that:

*In considering the reasonableness of classification from the point of view of Article 14 of the Constitution, the Court has also to consider the objective for such classification. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable.*

b. Thus the test for reasonable classification under Article 14 is made of three parts

- (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others;
- (2) that differentia must have a rational relation to the object sought to be achieved by the Act.
- (3) The Act itself must have a reasonable object. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable.

At para of 42 of the judgment dated 11.12.2013, this Hon'ble Court has held:

*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 and the people falling in the latter category cannot claim that Section 377 suffers from the vice or arbitrariness and irrational classification.*

- c. In the present case, this Court did not even examine whether there was intelligible differentia to distinguish carnal intercourse against the order of nature from carnal intercourse within the order of nature, merely recording the non sequitur "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 and the people falling in the later category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification." There was no question therefore of this Hon'ble Court considering the object of such classification or enquiring into whether the classification purportedly made by the provision had any rational nexus to its objective. In so doing, this court appears to have relied on the presumption of constitutionality, without any advertence to the fact that "the presumption of constitutionality 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.”  
*Saurabh Chaudri & Ors vs Union Of India & Ors*, 2003  
(11) SCC 146.

- d. That the decision shakes the judicial conscience as this Court states that Section 377 makes valid classifications, but at the same time cannot state what intelligible differentia would determine which sexual acts are covered by the section and which are not. At para 38 of its judgment at page 77, this Hon’ble Court states that “Hence it is difficult to prepare of list of acts which would be covered by the section.” Yet at para 42 of the judgment under review, this Court states “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 and the people falling in the latter category cannot claim that section 377 suffers from the vice of arbitrariness and irrational classification.” It is a fundamental principle under Article 14, that any classification must be based on intelligible differentia. Yet despite the fact that this Court holds that it cannot list the intelligible differentia that would determine those acts which fall within section 377 and those that fall outside it, it goes on to hold that the section does not suffer the vice of “irrational classification.”
- e. That it shakes the judicial conscience that this Hon’ble Court failed to notice 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, the Union of India had refused to justify the criminalisation of consensual sexual activity and accepted the High Court’s declaration that proposition that the criminalisation of consensual sexual activity has no reasonable objective and is clearly violative of Article 14.
- Q. That it oppresses the judicial conscience that Hon’ble Court does not even consider Article 15(1) of the Constitution and

instead at para 42 of the judgment under review merely states that the “High Court was not right in declaring section 377 IPC ultra vires Articles 14 and 15 of the Constitution.” It is submitted that the High Court at paras 99 to 104 of its judgment, after careful consideration of precedents of this Hon’ble Court held that sexual orientation and gender identity were grounds analogous to ‘sex’ in Article 15(1) of the constitution and that discrimination on these grounds were prohibited as well. Further, the present petitioner made extensive submissions on the interpretation of Article 15(1) as well. However, in the judgment under review, this Hon’ble Court has neither discussed nor made any reasoned order on Article 15 (1).

R. That it oppresses the judicial conscience that Hon’ble Court makes no finding on the question of whether section 377 violates the right to life, liberty, privacy and dignity of LGBT persons.

a. The judgment commences its discussion in this regard at para 45 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.

b. That it shocks the judicial conscience as this Court fails to 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. *Gobind v. State of Madhya Pradesh* (1975) 2 SCC 148 at para 22, cited at para 47 of the judgment under review holds that -

*“22. 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.”*

- c. It is submitted that while considering whether section 377 violated the right to privacy and dignity of LGBT persons in India, this Hon'ble Court was required to address two issues.
  - 1) Whether there was a violation of the liberty, privacy and dignity of LGBT persons?
  - 2) Was there a paramount state interest that would justify the gross invasion of liberty, privacy and dignity?
- d. This Hon'ble Court has not considered whether there was a violation of the Right to liberty, privacy and dignity and has merely dismissed the demonstrated violations of privacy and dignity by terming it (at para 51 of the judgment), a misuse of section 377. This 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 person's life. Further this Hon'ble Court fails to consider the material on record which clearly and unequivocally demonstrates the invidious impact of Section 377 on LGBT persons' rights to privacy, dignity and liberty.
- e. That this Hon'ble Court fails to notice the Union of India refuses to offer any compelling state interest to justify a violation of the right to liberty, privacy and dignity.
- S. That it is oppressive of the judicial conscience that this Court has extended the presumption of constitutionality to even pre-constitutional legislation.
  - a. This Court holds at paragraph 28 of its judgment that there is a presumption of constitutionality of pre-constitutional legislation. Article 372 of the Constitution, which this Hon'ble Court cites in its judgment in support of the proposition that there is a 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...”. Article 372 does not support the proposition that pre-constitutional laws are presumed to be constitutional after the commencement of the Constitution.

b. This Court has not considered that there can be no presumption of constitutionality for pre-constitutional enactments when the legislature of that time, had no knowledge of subsequent restrictions on their legislative power. This Hon’ble Court has held in *Gulabbhai Vallabbhai Desai & Others v. Union of India* AIR 1967 SC 1110, at 1117 that it cannot be presumed that the law making body knew of the limits on its authority while enacting a law, when the limits were only introduced later in time. While it may be presumed that the legislature was cognizant of the limits on its power after the commencement of the Constitution, no such knowledge can be presumed of the legislature prior to the Constitution, before the Constitutional checks on legislative power were established. Section 377 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.

c. Further, this Hon’ble Court has held in *Anuj Garg & Another v. Hotel Association of India & Others* (2008) 3 SCC 1 at para 21:

*When the original Act was enacted, the concept of equality between two sexes 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.*

T. That it is oppressive of the judicial conscience that this Court has failed to appreciate or apply the precedent laid down by this Court or of fundamental constitutional principles or the arguments made by the petitioner.

a. Ignoring the doctrine of precedent weakens constitutional protections to all citizens. The very institutional legitimacy of the judiciary is founded not necessarily upon the outcomes of judicial deliberations but more importantly the method used to arrive at those outcomes. In the present instance, there is a failure of judicial reasoning. The doctrine of precedent has been neglected and the law declared by the Supreme Court which is binding on all Courts has been ignored. The decision in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* dilutes existing legal standards and protections developed over sixty years by both ignoring developments in the law and by misreading existing precedent.

b. Even though it cited *In Re Special Courts Bill (1979) 1 SCC 380*, the judgment nevertheless holds that in order to justify discrimination, the state need not even clearly make a classification, and may by vague standards ask the court to develop the classification criteria on a case-to-case basis. Further, it ignores the precedent of *Deepak Sibal AIR 1989 SC 903*, and holds the State need not even justify the object of the legislation. Under the law laid down by this judgment, the State may criminalise left-handed people or may legitimately discriminate against balding men, simply because it wants to.

More egregiously, by virtue of this judgment, the State need not even demonstrate a compelling state interest. This clearly goes against the precedent laid down by this Court in *Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148*, *Kharak Singh v. State of Uttar Pradesh, [1964] 1 SCR 332*, *District Registrar and Collector, Hyderabad v. Canara Bank, AIR 2005 SC 186*, all of which held that the State must

demonstrate a compelling state interest to deprive a citizen of his rights under Article 21.

c. The judgment fails to fully comprehend the precedent it cites. For example, the judgment cites *A.K. Roy* to hold that the 'vagaries of language' saved section 377 from the challenge of vagueness. However, in *A.K. Roy*, this Hon'ble Court made a distinction between

(a.i.1.a) expressions which were difficult to define since they comprehended "an infinite variety of situations"

(a.i.1.b) and expressions which did not comprehend such an infinite variety of situations(See *A. K. Roy, Etc vs Union Of India And Another* , 1982 SCR (2) 272, page 323)

d. 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.

- e. It is further submitted that the misconstrual of existing precedent leads to a situation of weakening the framework of constitutional protections for all citizens. The high benchmark set by the Constitution of the inviolability of fundamental rights is significantly diluted by the erroneous reading of the precedent established by this Hon'ble Court in the decision against which this curative petition has been filed.
- U. That the idea that Fundamental Rights are not universal is oppressive of the judicial conscience.
  - a. The Court in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* has failed to note that the Constitution is meant to secure to *all citizens*, Justice, Liberty, and Equality and to promote Fraternity amongst them. The judgment is not in consonance with these basic Constitutional values.
  - b. This Court has not appreciated a key principle – the Universality of Fundamental Rights - i.e., all citizens are entitled to Fundamental Rights. The preamble to the Universal Declaration of Human Rights, 1948 declares *Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*

The Universal Declaration of Human Rights then stipulates

*Article 1.*

*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

*Article 7.*

*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*

The universality of Human Rights is also acknowledged in the Preamble to the Indian Constitution

*WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:*

*JUSTICE, social, economic and political;*

*LIBERTY of thought, expression, belief, faith and worship;*

*EQUALITY of status and of opportunity; and to promote among them all*

*FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation*

Universality of Fundamental Rights finds specific expression in Part III of the Indian Constitution and is a foundational tenet of the Indian Constitution. Every person regardless of caste, religion, sex or sexual orientation is entitled to the protection of the Fundamental Rights Chapter regardless of the size of the social grouping to which the person belongs.

- v. That in this judgment the Court has oppressed the judicial conscience and has abdicated its constitutional role as the guardian of Fundamental Rights by disregarding the principle that all persons are entitled to the protection of the Constitution.
  - a. The deprivation of fundamental rights for a “miniscule fraction” of the population is antithetical to the meaning of the Constitution and is oppressive of the judicial conscience. This Court in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* misapprehended its Fundamental Rights’ jurisdiction. At para 43 of the judgment under review, this Hon’ble Court held -

*While reading down section 377 IPC, the Division Bench of the High Court overlooked that a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders and in the last more than 150 years less than 200 persons have been prosecuted (as per reported orders) for committing*

*offence under Section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution. (emphasis supplied)*

- b. Liberty to be oneself and develop intimate relationships as an individual is not the privilege of the majority but an Inalienable and Universal right of each and every human being. With advances in science, a medieval and blinkered statutory provision embodying outdated understandings of human sexuality must yield to interpretations by Constitutional Courts that liberate those unjustly condemned. The role envisioned for this Court and for the High Court in the Constitutional scheme is to protect, defend and expand the Fundamental Rights of citizens, and to protect individual citizens and minorities – including miniscule fractions of the country’s population - from the vagaries of the opinions of hostile majorities. By holding that the violation of the rights of a ‘miniscule fraction’ of society does not constitute a sound basis for a declaration of unconstitutionality, this Hon’ble Court goes against its Constitutional Role and against its own legacy as the defender and expander of the rights of all citizens. In so doing, it renders Fundamental Rights subject to the whims and fancies of a perceived majority of the population.
- c. That this judgment, in holding that the violations of the rights of a “miniscule” minority does not invite the protections of the constitution and of this Court, has oppressed the judicial conscience. In so doing, the Supreme Court has lent credence to the idea that there is a numerical requirement to qualify for Fundamental Rights protections. This violates the binding legal precedent laid down by this Hon’ble Court in *Ram Krishna Dalmia v. Justice S.R. Tendolkar*, AIR 1958 SC 538, where this Court held that the constitutionality of a law may be judged, even though the rights of only one person are affected and *Sunil Batra v. Delhi*

*Administration* AIR 1978 SC 1675 ; (1978) 4 SCC 494, where this Court held -

*“...we cannot be oblivious to the fact that the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast would certainly be arbitrary and can be questioned under Article 14.”*

- d. A number of persons belonging to the LGBT community had distinguished themselves with contributions to society in various disciplines and callings, including -

SI No.	Indian, South Asian	Literature	Judges/ Lawyers/ Jurists	Sports	Science and Humanities
1	Vikram Seth	Oscar Wilde	H.L.A Hart	Martina Navratilova	Alan Turing
2	Bhupen Khakkar	Virginia Woolf	Michael Kirby	Billie Jean King	John Maynard Keynes
3	Onir	Truman Capote	Edwin Cameron	Greg Louganis	Michel Foucault
4	Ismail Merchant	James Baldwin	Kenji Yoshino	Steven Davies	
5	Amir Khusro	C.P. Cavafy			
6	Sunil Babu Pant	E.M Forster			
7	Hoshang Merchant				

- e. That the material before this Court had clearly established the fact that LGBT persons exist as a part of the diversity of India and that deprivation of rights of this section of the population which comprises members with high achievements in spheres of literature, science and arts to ordinary members of society, would be a fundamental betrayal of the promise of the Constitution to guarantee rights to all its citizens.

W. That the judgment misapprehends the role of the Court in the constitutional scheme.

- a. The finding in the judgment that only parliament had the jurisdiction to make changes to Section 377 oppresses the judicial conscience. In so doing, this Hon'ble Court ignored precedent in *Mithu v State of Punjab*, (1983) 2 SCC 277 (5 judges), where this Hon'ble Court struck down Section 303 of the Indian Penal Code, and several other decision of this Hon'ble Court that settled the law that the adjudication of the constitutionality of statutes on the touchstone of Fundamental Rights was squarely in the domain of Constitutional Courts.
- b. This legal and constitutional position regarding the role of the Courts vis a vis the legislature has been unequivocally clarified in the recent judgment of this Hon'ble Court in *Shatrughan Chauhan v. Union of India* 2014 (1) SCALE 437 at para 44 (page 461)

*“The question of violation of Article 21, its effects and the appropriate relief is the domain of this Court. There is no question of remanding the matter for consideration because this Court is the custodian and enforcer of fundamental rights and the final interpreter of the Constitution. Further, this Court is best equipped to adjudicate the content of those rights and their requirements in a particular fact situation. This Court has always granted relief for violation of fundamental rights and has never remanded the matter. For example, in cases of preventive detention, violation of free speech, externment, refusal of passport etc., the impugned action is quashed, declared illegal and violative of Article 21, but never remanded. It would not be appropriate to say at this point that this Court should not give relief for the violation of Art. 21.”*

x. That the judgment fails to consider the basic question of whether its jurisdiction under Article 136 has been properly invoked by the Appellants.

- a. The Petitioners do not urge a single instance to demonstrate how they are aggrieved by the High Court's Judgment; they do not demonstrate what legal interests were affected by the High Court's judgment; and they do not show what rights were conferred on them by section 377 which were affected by the High Court's Judgment. By their own showing, the petitioners are not intended beneficiaries, or members of any affected class of persons identified by the judgment. Their legal rights are in no way directly or remotely affected by the decriminalizing of adult consensual sex in private. The High Court judgment decriminalized and de-stigmatized LGBT citizens – a substantial segment of Indian citizenry. The consequence of its reversal is to re-criminalise millions of individuals. In these circumstances, this Hon'ble Court ought to have insisted on strict compliance with the requirements of *locus standi* before considering the challenge to the judgment of the Delhi High Court.
  - b. That this Court has failed to consider whether third parties have the right to defend the validity of a law on behalf of the State. It is the State alone that has the power to create criminal offences and it is the Union Executive alone (and not private parties) - made responsible to Parliament by the scheme of the Indian Constitution – that has the requisite *locus standi* to maintain an appeal against an order of a High Court declaring a provision of criminal law unconstitutional. In the High Court, the burden of defending the constitutional validity of section 377 was on the Union of India. The Union of India signaled its acceptance of the judgment of the High Court by refusing to challenge it. In the circumstances, this Court ought not to have entertained challenge to the High Court's judgment which was clearly and patently incompetent.
- Y. These errors of judicial reasoning, non-application of constitutional principles as well as abdication of constitutional

responsibilities are grave errors in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]*, which oppress the judicial conscience. These errors in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* neglect the very premise of which the Constitution has envisaged the establishment of the judiciary armed with the power of judicial review. The role and responsibility of the judiciary as a custodian of the Constitution has been specifically abdicated thereby disturbing the delicate balance of power envisaged in the Constitution. The combination of a lack of reasoning in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* combined with a failure to appreciate the law laid down by this Hon'ble Court as well as a failure to appreciate the role of the judiciary in protecting the rights of all persons are grave errors which oppress the judicial conscience.

- Z. The judgment in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* shakes public confidence in the judiciary
- AA. The judgment in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* has been subject to an extraordinarily wide ranging public criticism from eminent intellectuals, public figures, jurists as well as eminent constitutional lawyers. This serious academic criticism to which *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* has been subjected has exposed the shaky foundations of the *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* judgment in terms of both appreciation of constitutional principles as well as constitutional precedents. This criticism of the judgment clearly demonstrate the dangerous consequences for our constitutional republic if *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* remains valid law. A compilation of the scholarly material is already annexed as Annexure P 3 (colly) of the application for permission to file additional documents filed along with this petition.
- AB. Prof Upendra Baxi an eminent jurist and former Vice

Chancellor of Delhi University concludes that:

*In sum, [it] is a poorly reasoned decision; it is self-contradictory; it has many a fault-line, the most perverse being its conception of sexuality; no matter how read, its conception of constitutionality and adjudicatory leadership is grossly inconsistent with the very ones entertained by the Court itself, and it is incoherent in its operative result. One hopes that the Supreme Court will either reverse itself on review or curative petition and if needs further exploration it convenes a larger bench, possibly of the size of Kesvananda, if not a full Court. At stake for the Court is nothing less than its institutional integrity; at stake for millions that constitute sexual minorities is nothing less than fundamental human right to live with dignity.*

*(Upendra Baxi, "Naz 2" A critique." Economic and Political Weekly February 8, 2014 vol XLIX no. 6 )*

AC. Dr. Rajeev Dhavan an eminent constitutional jurist, author of reputed treatise on many aspects of law and Senior Advocate observed that:

*'But let us come to the core argument about India's Constitution protecting life and liberty (Article 21), the various freedoms (Article 19) and non-discrimination (Article 14). Eleven judges in the Bank Nationalization case (1970) case held that these are to be read together and tested under an over-arching principle of reasonableness. What Justice Singhvi does is use these tests separately to hold same sex is a distinct classification and therefore valid, adding: "What Sec 377 does is merely to define the particular offence and prescribes punishment from the same". Is not that what all offences do? But his refusal to uphold the HC judgment is because "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgender and in the last 150 years less than 200 persons have been prosecuted." An assumption made by all criminologists is that the*

*number of prosecutions is a tip of the iceberg. The numbers are not miniscule. But even if they were, do they not need protection for consensual adult preferences?’*

(Rajeev Dhavan S”C judgment on Section 377, A flawed pre-retirement order written in a rush” *Times of India*, 13, December , 2013 )

AD. Navroz Seervai an eminent lawyer and Senior Advocate practising at the Bombay Bar observed that :

*The most disturbing aspect of the judgment is the court’s approach to the fundamental rights of LGBTs, and by implication, of all minority communities. The Delhi High Court had upheld those rights and in doing so had relied on judgments and scholarly literature, both Indian and foreign. The SC repeatedly relies on foreign judgments when it serves its purpose. It dismisses these foreign judgments on the false premise that the high court had blindly applied such judgments for deciding the constitutionality of Section 377.*

*Sixty-three years after the Constitution was written, the judges discovered that these articles contain an exception: they are not for minuscule minorities. For them, these rights are paper rights, “so-called rights”, and woe to the minority that invokes such rights. J.M. Keynes, in his withering indictment of the men of Versailles, described the treaty as conceived “without nobility, without morality, without intellect”. It is the perfect epitaph for the judgment in Kaushal.*

(Navroz Seervai “Failing the minority” *Indian Express* 18 December, 2013)

AE. Raju Ramchandran a former Additional Solicitor General and a Senior Advocate practising in the Supreme Court observed that:

*It was no longer a mere case of presumption of constitutionality of a statute. It was a case where a High Court judgment (which also started with such a*

*presumption) was now being overturned, and the consequence was recriminalizing what had ceased to be criminal over four years ago. And that is where the Supreme Court has let us down.*

*The Court has devoted a disproportionate amount of space to its critique of the High Court relying on foreign judgments, and has implied that these judgments have been applied 'blindfolded.' No one who has read the High Court's judgment can get that impression. Foreign judgments have only been used for throwing light on the issue. Here, one must also worry over the oversensitivity of many judges in our country when foreign precedents are cited. Counsel are often asked "Do courts in that country allow our judgments to be cited?", and the judges smugly feel that they have done their bit for national honour.*

*Finally, the Court's view that there wasn't sufficient factual foundation to sustain a challenge to the constitutional validity of the law is contradicted by its own recording of the fact that there have been two hundred prosecutions. It is the miniscule minority which needs the court's protection. It was this very court which said in VG Row that "as regards fundamental rights this court has been assigned the role of sentinel on the quivive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute." Today, the sentinel says 'go to Parliament.'*

(Raju Ramachandran "The Sentinel who would not protect"  
<http://jilsblognujs.wordpress.com/2013/12/13/the-sentinel-who-will-not-protect/>)

AF. Justice Leila Seth, a former Chief Justice of the Punjab and Haryana High Court as well as the mother of well known writer, Vikram Seth who is gay, observes that:

*But what has pained me and is more harmful is the spirit of the judgment. The interpretation of law is untempered by any sympathy for the suffering of others.*

*The voluminous accounts of rape, torture, extortion and harassment suffered by gay and transgender people as a result of this law do not appear to have moved the court. Nor does the court appear concerned about the parents of such people, who stated before the court that the law induced in their children deep fear, profound self-doubt and the inability to peacefully enjoy family life. I know this to be true from personal experience. The judgment fails to appreciate the stigma that is attached to persons and families because of this criminalization.*

*The judgment claimed that the fact that a minuscule fraction of the country's population was gay or transgender could not be considered a sound basis for reading down Section 377. In fact, the numbers are not small. If only 5% of India's more than a billion people are gay, which is probably an underestimate, it would be more than 50 million people, a population as large as that of Rajasthan or Karnataka or France or England. But even if only a very few people were in fact at threat, the Supreme Court could not abdicate its responsibilities to protect their fundamental rights, or shuffle them off to Parliament. It would be like saying that the Parsi community could be legitimately imprisoned or deported at Parliament's will because they number only a few tens of thousands. The reasoning in the judgment that justice based on fundamental rights can only be granted if a large number of people are affected is constitutionally immoral and inhumane.*

*The judgment has treated people with a different sexual orientation as if they are people of a lesser value.*

*What makes life meaningful is love. The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalization or, worse, to recriminalize it, is to display the very opposite of compassion. To show exaggerated deference to a*

*majoritarian Parliament when the matter is one of fundamental rights is to display judicial pusillanimity , for there is no doubt, that in the constitutional scheme, it is the judiciary that is the ultimate interpreter.*

(Leila Seth, “A mother and a judge speaks out on section 377” *Times of India*, 26 January, 2014)

AG. Well known political scientist and political commentator, Pratap Bhanu Mehta observed that:

*The Supreme Court verdict upholding the constitutionality of Section 377 of the IPC has shamed the Constitution. Its decision will be remembered in infamy as one of those decisions that, like Dred Scott, show how liberal democracies can sometimes give rein to a regime of oppression and discrimination under the imprimatur of law. The court’s decision is morally regressive, constitutionally dubious, legally arbitrary and smacks of the kind of hypocrisy that gives the rule of law, and the institutions that uphold it, a bad name. When the Delhi High Court, in a magnificent decision, read down Section 377, a new light had been kindled. It looked like the nation was ready to confront its deepest prejudices. The court has, in one fell swoop, extinguished the flame of humanity and reason from our Constitution. It has given free rein to prejudice, hollowed out the meaning of constitutional protections. And in doing so, it has undermined its own authority.*

(Pratap Bhanu Mehta, “Justice Denied” *Indian Express*, 21 December 2013)

AH. Well known philosopher and academic, Martha Nussbaum observes that

*... such laws are intolerably intrusive in any nation committed to the protection of human dignity. Although it is debatable to what extent sexual behaviour in public may be legally regulated, the very idea of the police in the bedroom - or indeed, in a private hotel room or any other place where people expect privacy for intimate*

*expression - rightly alarms us today, raising the spectre of fascist or totalitarian tyranny. Such regulations never formed part of Indian traditions, and they did not even have a secure home in Europe as a whole. France got rid of all restrictions on same-sex conduct early in the 20th century, and Germany's short-lived sodomy law (passed only in 1871), though strengthened by the Nazis, became a simple age-of-consent law in East Germany in 1957 and in West Germany in 1969. The special anxieties of Victorian Britain (shared by Puritan America) were foisted on India by the Raj, but even Britain got rid of such laws in 1967.*

(Martha Nussbaum, "A Law Against Dignity" *Indian Express*, 27 December 2013 )

AI. Anup Surendranath, A faculty member at the National Law University, Delhi, and an expert on the criminal law observes that:

*In a span of about 45 days, the Supreme Court of India has delivered two judgments that have received diametrically opposite reactions — one will count among the Court's most poorly reasoned judgments while the other is likely to be heralded as one of its finest for its clarity and fidelity to earlier decisions. The contrast between Justice Singhvi's judgment upholding the criminalisation of homosexuality and that of Chief Justice Sathasivam affirming the rights of mercy-rejected death row prisoners could not be starker. After Justices Singhvi and Mukhopadhaya upheld the constitutionality of Section 377 of the IPC in Suresh Kumar Koushal, the credibility of the Court as a counter-majoritarian institution had suffered a serious setback. However, the Chief Justice, along with Justices Ranjan Gogoi and Shiva Kirti Singh, has done a remarkable job in partly restoring the credibility of the Court through a thoroughly reasoned judgment in Shatrughan Chauhan v Union of India. In Chauhan,*

*the Court has concluded that inordinate delay in the rejection of mercy petitions of death row convicts amounted to torture and that it is a sufficient basis, in and of itself, to commute a sentence of death to life imprisonment. It is not just about the contrast in outcomes in these two cases but the processes adopted by these two judgments will go a long way in determining the position they will occupy in the judicial history of this country.*

*(Anup Surendranth, Redeeming the Supreme Court, The Hindu, 28.1.14 )*

AJ. The Attorney General of India, Mr Ghoolam Vanhavati also expressed his view point on the judgement:

*I referred to a book written by Lawrence James, Raj: The making and unmaking of British India. James wrote, and i quoted extensively from his book, that in Britain homosexuals were widely despised and 'buggery' was a capital crime until 1861. An anti-homosexual feeling had erupted in England. Homosexuals were arrested and pilloried in 1810. In London, mobs used to bay for their blood. As a result, several persecuted homosexuals left England and came to India where opportunities were more and risks were less. There was a reaction to this on the part of missionaries who had become increasingly active in India. This led Macaulay to formulate Section 377.*

*As far as Indian society was concerned i said: "Indian society prevalent before the enactment of the IPC had a much greater tolerance for homosexuality than its British counterpart, which at this time was under the*

*influence of Victorian morality and values in regard to family and the procreative nature of sex."*

*The categorical stand was: "Introduction of Section 377 in India was not a reflection of existing Indian values and traditions. Rather, it was imposed upon Indian society due to the moral views of the colonisers."*

- AK. The range of serious criticism to which *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* has been subjected to makes several points. Firstly, that the rights of LGBT persons ought to be taken as seriously as the rights of any other social grouping as that is the mandate of the Constitution. Secondly, that the mandate of the judiciary is to expand rights and not contract them. Further the criticism by eminent scholars and stake holders in the machinery of justice delivery makes the point that it is the responsibility of the Court to protect and expand Fundamental Rights. In fact the very *raison d'être* of the judiciary is to serve as a bulwark against majoritarian sentiment. The legitimacy of the judiciary flows not from its power, but rather from the perception that when all else fails, it will be the judiciary which will step in to right the scales of justice.
- AL. It is these important judicial responsibilities which this Court failed to discharge in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]*. It is this deep rooted failure which is bound to shake the confidence of the public in the judiciary as the custodian of the Constitution.
- AM. The judgment signals a grave and egregious failure of this Court to protect both the rights of a small section of the population as well as to fulfil the constitutional responsibility which has been bestowed upon it by the Constitution. These failures render the judgment in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors [(2014) 1 SCC 1]* a fit one for the exercise of the curative jurisdiction of this Court.
- AN. It is submitted that no new grounds have been raised in the present curative petition that were not raised by the petitioners

in the review petition.

- AO. The present petitioner submits that no other curative petition has been filed by the present petitioner against the order and decision of this Hon'ble Court on 11.12. 2013 in Civil Appeal No. 10972 of 2013 and connected matters and the review petition dismissed by this Hon'ble Court on 28.01.2014 vide order in Review Petition Nos. 41-55 Of 2014.

**PRAYER**

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

- (a) Allow the present curative petition and set aside final common judgment and order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972, 10974, 10986, 10981, 10984, 10985, 10976, 10980, 10977, 10978 and 10979 of 2013 confirmed by order dated 28/01/2014 in Review Petition (Civil) No. 222-33 of 2014;
- (b) Pass any other or further order(s) as this Hon'ble Court may deem fit in the facts and circumstances of the present case and in the interest of justice and equity.

**AND FOR THIS ACT OF KINDNESS, THE PETITIONERS AS  
IN DUTY BOUND SHALL EVER PRAY.**

Drawn By:

Settled By:  
Mr. Shyam Divan,  
Senior Advocate

Filed By:  
P. Ramesh Kumar,  
AOR

New Delhi

Date:

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**I.A. NO. \_\_\_\_\_ OF 2014**

**IN**

**CURATIVE PETITION NOS. \_\_\_\_\_ OF 2014**

**IN**

**REVIEW PETITION (C) NOS. 222-233 OF 2014**

(ARISING OUT OF THE FINAL COMMON ORDER DATED 11.12.2013 PASSED BY THIS HON'BLE COURT IN CIVIL APPEAL NO. 10972, 10974, 10986, 10981, 10984, 10985, 10976, 10980, 10977, 10978 and 10979 OF 2013)

BETWEEN :

Voices Against 377... ...Petitioners/Applicants

Versus

Suresh Kumar Koushal

& Others... ...Respondents

**Application under Section 151 for Oral Hearing in Open Court of  
the Accompanying Curative Petition**

To,

The Hon'ble Chief Justice of India

and His Companion Justices of the

Supreme Court of India at New Delhi

The humble application of the  
applicant abovenamed

**MOST RESPECTFULLY SHOWETH:**

1. That by the present petition under Article 142 of the Constitution of India, the petitioners seek *ex debito justitiae* to remedy the manifest injustices which have been caused to millions of Lesbian, Gay, Bisexual and Transgender (LGBT) persons residing in India aggrieved by the order dated 28.1.2014 dismissing the Review Petitions Nos. 222- 233 of 2014 filed by the Petitioner seeking a review of the final common judgment and order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972, 10974, 10986,

10981, 10984, 10985, 10976, 10980, 10977, 10978 and 10979 of 2013 which were also dismissed by this Hon'ble Court.

2. That the contents of the curative petition are not repeated herein for the sake of brevity, but the Petitioners/Applicants seeks to rely on the contents of the accompanying curative petition.
3. That the present Petitioners/Applicants had approached this Court under Article 137 of the Constitution to address apparent errors on the face of the record. The said review petition was rejected by this Court vide order dated 28.1.14, thus effectively upholding the judgment of the court dated 11.12.13.
4. That the judgment to be reconsidered by this Court had set aside the judgment dated 02.07.2009 of the Hon'ble High Court of Delhi in Writ Petition (C) 7455 of 2001. The judgment of the Hon'ble High Court of Delhi declared Section 377 of the Indian Penal Code, 1860 unconstitutional insofar as it criminalised consensual sexual activity between adults in private. By this historic judgment, the Hon'ble High Court decriminalized millions of Lesbian, Gay, Bisexual and Transgender (LGBT) citizens of India and removed the taint of criminality from their lives.
5. The judgment of this Hon'ble Court, however, has re-criminalised millions of LGBT people for no fault of their own, and has sanctioned the view that the State may not only discriminate against, but also criminalise, certain types of people that it disapproves of.
6. That by effacing the declaration granted by the Delhi High Court, the judgment to be reconsidered by this Hon'ble Court 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 exercise its curative jurisdiction in the judgment dated 11.12.13 in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors (2014) 1 SCC 1*.

7. That since judgment dated 11.12.13, there have been many instances of harassment, torture and threats towards LGBT persons that have arisen as a direct consequence of the judgment of this Hon'ble Court. Several of these instances have been attested on affidavit and formed part of the review petition.
8. That the present curative petition is being filed to prevent the further violations of the fundamental rights of LGBT persons.
9. That it is essential in the interests that justice is not only done, but also seen to be done, that the curative petition be disposed of after hearing oral arguments in open court.
10. That several submissions made by the Petitioners/Applicants during oral arguments and through written submissions have been ignored in the judgment that is sought to be reconsidered, and hence the Petitioners/Applicants humbly request that they be allowed to explain the enormous adverse psychological, physical, social and health ramification of the judgment dated 11.12.13, in the course of an oral hearing in open court.
11. That even at the stage of the review petition, an application for an open hearing in court was made for the above reasons, but the said application was not allowed. It is humbly requested that at the stage of deciding the curative petition, the right of the parties to be heard in open court be allowed.
12. That the Petitioners/Applicants have a good *prima facie* case for reconsideration of the judgment dated 11.12.2013 in Civil Appeal No. 10972 Of 2013, Civil Appeal No. 10986 Of 2013, Civil Appeal No. 10986 Of 2013, Civil Appeal No. 10981 Of

2013, Civil Appeal No. 10983 Of 2013, Civil Appeal No. 10984 Of 2013, Civil Appeal No. 10975 Of 2013, Civil Appeal No. 10973 Of 2013, Civil Appeal No. 10985 Of 2013, Civil Appeal No. 10976 Of 2013, Civil Appeal No. 10980 Of 2013, Civil Appeal No. 10982 Of 2013, Civil Appeal No. 10977 Of 2013, Civil Appeal No. 10979 Of 2013, as upheld in the order dated 28.1.13 dismissing Review Petitions 222-233.

13. That the present Application is made *bona fide* and in the interests of justice.

### **PRAYER**

It is therefore most respectfully prayed that this Hon'ble Court be pleased to

- a) direct that the accompanying curative petition be disposed of after hearing oral arguments in open court, of the parties;
- b) and pass any further orders as this Hon'ble Court may deem fit and proper in the interests of justice

Filed By

(Pukhrambam Ramesh Kumar)  
Advocate for the Petitioners/Applicants

Filed On:  
New Delhi

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. NO. \_\_\_\_\_ OF 2014

IN

CURATIVE PETITION NOS. \_\_\_\_\_ OF 2014

IN

REVIEW PETITION (C) NOS. 222-233 OF 2014

(ARISING OUT OF THE FINAL COMMON ORDER DATED 11.12.2013 PASSED BY THIS HON'BLE COURT IN CIVIL APPEAL NO. 10972, 10974, 10986, 10981, 10984, 10985, 10976, 10980, 10977, 10978 and 10979 OF 2013)

BETWEEN :

Voices Against 377... ...Petitioners/Applicants

Versus

Suresh Kumar Koushal

& Others... ...Respondents

**Application under 142 of the Constitution read with Section 151 of the Code of Civil Procedure, 1908 for a stay of the final common judgment and order dated 11<sup>th</sup> December 2013, as upheld by the order dated 28.1.14 dismissing Review Petitions Nos.222-233.**

To,

The Hon'ble Chief Justice of India

and His Companion Justices of the

Supreme Court of India at New Delhi

The humble application of the  
applicant abovenamed

**MOST RESPECTFULLY SHOWETH:**

1. That by the present petition under Article 142 of the Constitution of India, the petitioners seek *ex debito justitiae* to remedy the manifest injustices which have been caused to millions of Lesbian, Gay, Bisexual and Transgender (LGBT) persons residing in India aggrieved by the order dated 28.1.2014 dismissing the Review Petitions Nos. 222- 233 of 2014 filed by the Petitioner seeking a review of the final

common judgment and order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972, 10974, 10986, 10981, 10984, 10985, 10976, 10980, 10977, 10978 and 10979 of 2013 which were also dismissed by this Hon'ble Court.

2. That the contents of the curative petition are not repeated herein for the sake of brevity, but the Petitioners/Applicants seeks to rely on the contents of the accompanying curative petition.
3. That the present Petitioners/Applicants had approached this Court under Article 137 of the Constitution to address apparent errors on the face of the record. The said review petition was rejected by this Court vide order dated 28.1.14, thus effectively upholding the judgment of the court dated 11.12.13.
4. That the judgment to be reconsidered this Court had set aside the judgment dated 02.07.2009 of the Hon'ble High Court of Delhi in Writ Petition (C) 7455 of 2001. The judgment of the Hon'ble High Court of Delhi declared Section 377 of the Indian Penal Code, 1860 unconstitutional insofar as it criminalised consensual sexual activity between adults in private. By this historic judgment, the Hon'ble High Court decriminalized millions of Lesbian, Gay, Bisexual and Transgender (LGBT) citizens of India and removed the taint of criminality from their lives.
5. That the effect of the judgment of the Hon'ble Delhi High Court 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.

6. The judgment of this Hon'ble Court, however, has re-criminalised millions of LGBT people for no fault of their own, and has sanctioned the view that the State may not only discriminate against, but also criminalise, certain types of people that it disapproves of.
7. That 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.
8. That there is already compelling evidence of the deleterious impact of the law. As such the Petitioners/Applicants crave leave of this Court to file additional information regarding harassment and abuse, which may continue to occur in the near future. The Petitioners/Applicants have documented harassment and violation perpetrated on LGBT persons which formed part of the review petition filed before this Hon'ble Court, which included affidavits of members of the LGBT community who have faced harassment, affidavits of mental health professionals who work on issues of homosexuality and affidavits of parents of members of the LGBT community. It is submitted that instances of harassment and discrimination unleashed by the full force of Section 377 will only increase in number over a period of time.
9. That by effacing the declaration granted by the Delhi High Court, the judgment to be considered by this Hon'be Court 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 exercise its curative jurisdiction in the judgment dated 11.12.13 in *Suresh Kumar Koushal & Anr. v. Naz Foundation and Ors (2014) 1 SCC 1*.

10. That the present curative petition is being filed to prevent further violation of the fundamental rights of the LGBT community.
11. That the present curative petition satisfies the requirements set out in the case of *Rupa Hurra v. Ashok Hurra*.
12. That the balance of convenience tilts overwhelmingly in favour of the Petitioners/Applicants and against the Respondents.
13. That no prejudice would be caused to the Respondents if the interim reliefs as prayed for are granted.
14. That on the other hand grave prejudice would be caused to the LGBT community if the reliefs as prayed for are not granted.
15. That it is in the interests of justice the judgment dated 11.12.2013 rendered by this Court in Civil Appeal No. 10972 Of 2013, Civil Appeal No. 10986 Of 2013, Civil Appeal No. 10986 Of 2013, Civil Appeal No. 10981 Of 2013, Civil Appeal No. 10983 Of 2013, Civil Appeal No. 10984 Of 2013, Civil Appeal No. 10975 Of 2013, Civil Appeal No. 10973 Of 2013, Civil Appeal No. 10985 Of 2013, Civil Appeal No. 10976 Of 2013, Civil Appeal No. 10980 Of 2013, Civil Appeal No. 10982 Of 2013, Civil Appeal No. 10977 Of 2013, Civil Appeal No. 10979 Of 2013, and confirmed by the order dated 28.1.2014 dismissing the Review Petitions Nos. 222- 233 of 2014, ought to be stayed by this Court.
16. That this application is *bona fide* and in the interest of justice.

PRAYER

It is therefore most respectfully prayed that this Hon'ble Court be pleased to:

- a. Stay the judgment and final common judgment and order dated 11.12.2013 passed by this court in Civil Appeal No. 10972 Of 2013, Civil Appeal No. 10986 Of 2013, Civil Appeal No. 10986 Of 2013, Civil Appeal No. 10981 Of 2013, Civil Appeal No. 10983 Of 2013, Civil Appeal No. 10984 Of 2013, Civil Appeal No. 10975 Of 2013, Civil Appeal No. 10973 Of 2013, Civil Appeal No. 10985 Of 2013, Civil Appeal No. 10976 Of 2013, Civil Appeal No. 10980 Of 2013, Civil Appeal No. 10982 Of 2013, Civil Appeal No. 10977 Of 2013, Civil Appeal No. 10979 Of 2013, as confirmed by the order dated 28.1.2014 dismissing the Review Petitions Nos. 222-233 of 2014;
- b. and pass any further orders as this Hon'ble Court may deem fit and proper in the interests of justice

Filed By  
(Pukhrambam Ramesh Kumar)  
Advocate for the Petitioners/Applicants

Filed On:  
New Delhi

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**I.A. NO. \_\_\_\_\_ OF 2014**

**IN**

**CURATIVE PETITION (CIVIL) NOS. \_\_\_\_\_ OF 2014**

**IN**

**REVIEW PETITION (C) NOS. 222-233 OF 2014**

(ARISING OUT OF THE FINAL COMMON ORDER DATED 11.12.2013 PASSED BY THIS HON'BLE COURT IN CIVIL APPEAL NO. 10972, 10974, 10986, 10981, 10984, 10985, 10976, 10980, 10977, 10978 and 10979 OF 2013)

BETWEEN :

Voices Against 377... ...Petitioners/Applicants

Versus

Suresh Kumar Koushal

& Others... ...Respondents

**Application for Exemption from Filing a Certified Copy of the final common Judgment**

To,

The Hon'ble Chief Justice of India

and His Companion Justices of the

Supreme Court of India at New Delhi

The humble application of the  
applicant abovenamed

**MOST RESPECTFULLY SHOWETH:**

1. That by the present petition under Article 142 of the Constitution of India, the petitioners seek *ex debito justitiae* to remedy the manifest injustices which have been caused to millions of Lesbian, Gay, Bisexual and Transgender (LGBT) persons residing in India aggrieved by the order dated 28.1.2014 dismissing the Review Petitions Nos. 222- 233 of 2014 filed by the Petitioner seeking a review of the final common judgment and order of this Hon'ble Court dated 11.12.2013 in Civil Appeal No. 10972, 10974, 10986,

10981, 10984, 10985, 10976, 10980, 10977, 10978 and 10979 of 2013 which were also dismissed by this Hon'ble Court.

2. That the contents of the curative petition are not repeated herein for the sake of brevity, but the Petitioners/Applicants seeks to rely on the contents of the accompanying curative petition.
3. That the present Petitioners/Applicants had approached this Court under Article 137 of the Constitution to address apparent errors on the face of the record. The said review petition was rejected by this Court vide order dated 28.1.14.
4. That the present Petitioners/Applicants have furnished an uncertified copy of the order dated 28.1.14 and undertake to file a certified copy of the same as and when called upon to do so.
5. That the Petitioners/Applicants have not furnished a certified copy of the order since the matter is of some urgency and they have not had the time to procure a certified copy. Additionally, this Hon'ble Court was shut for a short period of time in the duration between the review being dismissed and the current curative petition being filed.
6. That the Petitioners/Applicants herein have a good *prima facie* case in the curative stage.
7. That grave and irreparable harm and injury will be caused to the Petitioners/Applicant if not allowed to rely upon the uncertified copy of the judgment dated 28.1.14 during the course of the hearing of this curative petition.
8. That no prejudice will be caused to the Respondents if the Petitioners/Applicants are allowed to rely on the uncertified copy of the judgment dated 28.1.14.
9. That this application is *bona fide* and in the interest of justice.

#### **PRAYER**

It is therefore most respectfully prayed that this Court be pleased to:

- a) Exempt the Petitioners/Applicants from filing a certified copy of the judgment in Review Petitions (C) Nos. 222- 233 of 2014.
- b) And pass any other orders that this Hon'ble Court may deem fit and proper in the interests of justice.

Filed By

(Pukhrambam Ramesh Kumar)

Advocate for the  
Petitioners/Applicants

Filed On:  
New Delhi



10984, 10985, 10976, 10980, 10977, 10978 and 10979 of 2013 which were also dismissed by this Hon'ble Court.

2. That the contents of the curative petition are not repeated herein for the sake of brevity, but the Petitioners/Applicants seek to rely on the contents of the accompanying curative petition.
3. That the matter that dates back from the year 2001 and involves complex legal and factual arguments and hence the Applicant craves leave to file an extended synopsis and list of dates beyond the 10 pages limit prescribed by the rules of this Hon'ble Court.
4. That the Petitioner/Applicant will face irreparable harm if it is not allowed to file this extended list of dates and synopsis as the Petitioner/Applicant will not be able to present the full essential facts and circumstances of the matter before this Hon'ble Court. On the other hand, no harm or prejudice will be caused to the Respondents if the Petitioner/Applicant is allowed to file an extended List of Dates and Synopsis.
5. That this application is *bona fide* and in the interests of justice.

#### **PRAYER**

It is therefore most respectfully prayed that this Hon'ble Court be pleased to:

- a. Allow the Petitioner/Applicant mentioned above to file an extended Synopsis and List of Dates.
- b. and pass any further orders that this Hon'ble Court may deem fit.

Filed By:

(Pukhrambam Ramesh Kumar)

Advocate for the Petitioner

New Delhi

Dated \_\_.01.2014



2. That the contents of the curative petition are not repeated herein for the sake of brevity, but the Petitioners/Applicants seek to rely on the contents of the accompanying curative petition.
3. The present Petitioners/Applicants had approached this Court under Article 137 of the Constitution to address apparent errors on the face of the record. The said review petition was rejected by this Court vide order dated 28.1.14.
4. By setting aside the judgment of the High Court, this Court has *recriminalised* millions of LGBT persons in India. It is submitted that the judgment of this Hon'ble Court suffers from mistakes and errors apparent on the face of the record, so grave that it perpetuates a state of continuing injustice to LGBT citizens of India and violates fundamental principles of the Constitution. The judgment of this Court has deprived LGBT citizens of India of the rights to equality, liberty, privacy and dignity. This petition is filed to address the manifest injustices thereby caused to millions of LGBT persons and is filed *ex debito justitiae*.
5. That the judgment in *Suresh Kumar Koushal* has been subject to an extraordinarily wide ranging public criticism from eminent intellectuals, public figures, jurists as well as eminent constitutional lawyers. This serious academic criticism to which *Suresh Kumar Koushal* has been subjected has exposed the shaky foundations of the *Koushal* judgment in terms of both appreciation of constitutional principles as well as constitutional precedents. This criticism of the judgment clearly demonstrates the dangerous consequences for our constitutional republic if *Koushal* remains valid law. It is humbly submitted that these articles which form **Annexures P3 (Colly)** of the application seeking permission to file additional documents with this petition be allowed to form part of the court records.
6. That the list of scholarly articles forming **Annexure P3 (Colly)** (**pages** ) are as follows:
  - a. An article by Upendra Baxi, the eminent jurist and formal Vice Chancellor of the Delhi University, titled

“Naz 2: A Critique”, *Economic and Political Weekly* February 8, 2014 vol XLIX no. 6.

- b. An article by Dr. Rajeev Dhavan, an eminent constitutional jurist, author of reputed treatise on many aspects of law and Senior Advocate, titled “SC judgment on Section 377, A flawed pre-retirement order written in a rush”, *Times of India*, 13, December, 2013.
  - c. An article by Navroz Seervai, an eminent jurist and a Senior Advocate, titled “Failing the Minority”, *Indian Express* 18 December, 2013
  - d. An article by Raju Ramachandran, the former Additional Solicitor General and Senior Advocate titled, “The Sentinel who would not protect”, <http://jilsblognujs.wordpress.com/2013/12/13/the-sentinel-who-will-not-protect/>.
  - e. An article by Leila Seth, the former Chief Justice of the Punjab and Haryana High Court and mother of the acclaimed writer and homosexual writer Vikram Seth, titled “A Mother and a Judge Speaks Out On Section 377”, *Times of India*, 26 January, 2014.
  - f. An article by Pratap Bhanu Mehta, well-known political scientist and political commentator, titled “Justice Denied”, *Indian Express*, 21 December 2013”.
  - g. An article by Martha Nussbaum, well-known philosopher and academic, titled “A Law Against Dignity”, *Indian Express*, 27 December 2013”.
  - h. An article by Anup Surendranath, a faculty member at the National Law University, Delhi and an expert in Constitutional Law, titled “*Redeeming the Supreme Court*”, *The Hindu*, 28.1.14.
  - i. Views expressed by the Attorney General of India, Mr Ghoolam Vanhavati.
7. That no prejudice will be caused to the Respondents if the Petitioners/Applicants are allowed to rely on the aforementioned scholarly articles.

8. That this application is *bona fide* and in the interest of justice.

**PRAYER**

It is therefore most respectfully prayed that this Hon'ble Court be pleased to

- a. permit the Petitioner to file additional documents as **Annexures P-3 (Colly)**.
- b. pass any other or further orders as may be deemed fit and proper in the circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

Filed On:  
New Delhi

Filed By\_  
(Pukhrambam Ramesh Kumar)  
Advocate for the Petitioners/Applicants