

**IN THE SUPREME COURT OF INDIA IN IT'S
EXTRAORDINARY ORIGINAL WRIT JURISDICTION
WRIT PETITION (CRIMINAL) NO.____OF 2018 (Under
Article 32 of Constitution of India)**

IN THE MATTER OF:

1. Ashok Row Kavi,

[REDACTED]

[REDACTED]

[REDACTED]

...Petitioner No. 1

2. Vivek Raj Anand,

[REDACTED]

[REDACTED]

[REDACTED]

...Petitioner No. 2

3. Gautam Yadav,

[REDACTED]

[REDACTED]

[REDACTED]

...Petitioner No. 3

4. Yashwinder Singh,

[REDACTED]

[REDACTED]

[REDACTED]

...Petitioner No. 4

5. Humsafar Trust,

[REDACTED]

[REDACTED]

[REDACTED]

...Petitioner No. 5

Versus

Union of India:

(a) Through the Secretary,

Ministry of Law & Justice,

Shastri Bhawan, New Delhi.

...Respondent No. 1

(b) Through the Secretary,

Ministry of Health & Family Welfare,

Nirman Bhawan, New Delhi.

...Respondent No. 2

(c) Through the Secretary,

Ministry of Home Affairs,

North Block, New Delhi.

...Respondent No. 3

IN THE MATTER OF:

**INFRINGEMENT OF FUNDAMENTAL RIGHTS
GUARANTEED UNDER ARTICLES 14, 15, 19 AND 21 OF
THE CONSTITUTION OF INDIA**

AND

IN THE MATTER OF:

**SECTION 377 (UNNATURAL OFFENCE) OF THE INDIAN
PENAL CODE, 1860**

AND

IN THE MATTER OF:

**PETITION UNDER ARTICLE 32 OF THE CONSTITUTION
OF INDIA SEEKING A DECLARATION THAT SECTION
377 (UNNATURAL OFFENCE) OF THE INDIAN PENAL
CODE, 1860 IS UNCONSTITUTIONAL TO THE EXTENT IT
CRIMINALIZES SEXUAL CONDUCT BETWEEN NON-HETEROSEXUAL
ADULTS IN PRIVATE.**

TO,

**THE HONOURABLE CHIEF JUSTICE OF INDIA,
AND HIS OTHER COMPANION JUDGES,
OF THE HON'BLE SUPREME COURT OF INDIA.**

**THE HUMBLE PETITION OF
THE PETITIONERS ABOVENAMED.**

MOST RESPECTFULLY SHOWETH:

1. That the present Writ Petition under Article 32 of the Constitution of India is filed to protect and enforce the fundamental rights of persons, including the Petitioners herein, and to challenge the Constitutional vires of S. 377 (*Unnatural Offence*) of The Indian Penal Code, 1860 (hereinafter referred to as 'Section 377, IPC') which criminalizes and penalizes what it terms an 'unnatural offence', in so far as the provision adversely affects consensual relations between adults in private. This petition seeks to redress the gross miscarriage of justice that is caused to the Petitioners, amongst others, due to the effect of the Criminal Law (Amendments) Act 2013 in Section 375 (*Rape*), IPC in 2013, which substantially alters the interpretation, and, impact of enforcement of Section 377, IPC now solely on consensual, sexual conduct between two men, and a man and a transgender person. Prior to the amendments, penile non-vaginal sex (including anal sex and oral sex) between man and woman, between two men and between a man and a transgender person were all prohibited under Section 377, IPC. After the amendments in 2013, Section 375, IPC has been broadened to include non-consensual penile non-vaginal sexual acts, between man and woman, to be an offence. By implication,

such consensual penile non-vaginal sexual acts between man and woman, are culled out of the ambit of S. 377, IPC and are not criminalized effectively since the 2013 Amendments, otherwise the amended Section 375, IPC would be redundant for now proscribing an offence already punishable under S. 377, IPC prior to the 2013 Amendments. The decision of this Hon'ble Court in the matter of *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438, the decision of the 9-judge bench decision in *Justice K.S Puttuswamy (Retd.) and anr v Union of India and ors*, (2017) 10 SCC 1 and the decision in *Shafin Jahan v Asokan K.M & ors*, Criminal Appeal No. 366 of 2018, dt. 9th April 2018 and other developments in law since 2013 also have imminent and substantial bearing on the validity of prosecution of consensual, sexual conduct between non-heterosexual adults in private, and particularly on *de facto* criminalization of persons on basis of gender identity and sexual orientation under Section 377 IPC. At present, Section 377, IPC effectively only criminalizes all forms of penetrative sex, i.e., penile-anal sex and penile-oral sex, between two men, a man and a transgender person and a man and an intersex person, thereby being *ex facie* discriminatory against homosexual men, transgender persons and intersex persons and thus violative of Article 14, 15, 19 and 21 of the Constitution of India.

ARRAY OF PARTIES:

2. The Petitioner Nos. 1-4 are homosexual men who work on access to HIV-related healthcare and rights of lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) persons with the Petitioner No. 5, Humsafar Trust (hereinafter referred to as 'HST'). The Petitioner No. 5 is a Non-Governmental Organization (NGO) registered under the Indian Trusts Act, 1882 and The Societies Registration Act, 1860. It is one of the oldest community-based organization of self-identified lesbian women,

gay men, bisexual persons, transgender, *hijra* and intersex persons based out of Mumbai and New Delhi.

3. The Petitioner No. 1 is the first person who gave an interview on being homosexual in India and what it meant to be gay in Indian society of those times in those times. The interview in *Society* magazine in 1984 nearly cost him his job in *The Malayalala Manorama*, the largest newspaper in India selling one million copies a day from Kerala but his editor and owner stood by him. He also reviewed Shakuntala Devi's book on homosexuality in India from a Hindu perspective in the *Express Group* of papers in the late 1970s. He graduated with honours in Science from Mumbai University after schooling in the Bombay Scottish High School. As he undertook further studies in textile engineering, he also joined an order of monks in the Ramakrishna Mission started by the reformer Swami Vivekananda. In fact, it is here that the Petitioner No. 1 first identified as a gay man after counseling by a senior monk, and credits it with his liberal views on sexuality and gender. He has worked with a range of prestigious newspapers and magazines in India starting with the *Indian Express* group in Bombay, *Debonair*, *Free Press Journal*, *The Week* and wrote for magazines and newspapers like *India Today* and the *Hindustan Times* before starting his own magazine, *Bombay Dost*, India's first registered LGBTQI newsmagazine in 1990.
4. The huge response to the magazine, which first warned the LGBTQI community about the impact of anti-sodomy laws such as Section 377, IPC on the upsurge of HIV/AIDS among gay men finally proved correct and led to his co-founding one of India's first community based organizations Humsafar Trust, Petitioner No. 5, in 1994 of which he is still the chairperson.

5. The Humsafar Trust held South Asia's first conference of gay men in the winter of 1994, the year of its founding, where a little over 80 young men from all India chosen from the subscribers of Bombay Dost came together at the SNDT Women's University Campus in Mumbai and brought out a charter that endorsed the liberation of LGBTQ persons in India.
6. The Humsafar Trust was India first gay organization to get a pilot project to reach out to men having sex with men (MSM) in Bombay with outreach services in 1999 to reduce the incidence of HIV and STIs in the community. It was also the first group to get a Drop-In-Centre allotted by a city government, the Brihan-Mumbai Municipal Corporation and therefore operated as the first gay rights organization completely over ground, despite criminalization and the stigma of homosexuality.
7. Within two years, Humsafar Trust up scaled its prevention program among MSM to reach out to 14,000 gay men in Mumbai and added an STI clinic and HIV testing and counseling centre. With his friends and allies like Owais Khan of Bhopal and Pawan Dhall of Kolkata, the Petitioner No. 1 participated in India's first Pride, the Rainbow Walk through Kolkata's crowded roads where he says he lost his penchant for victimhood as parents and old grandmothers walked with them and shouted: "*Government out of our bedrooms!*" loud enough to intimidate policemen. The Rainbow Walk was on July 2, 1999, exactly ten years before the historic decision of the Hon'ble High Court of Delhi decriminalising consensual, sexual conduct between adults.
8. The Petitioner No. 1 was inducted in the Technical Resource Groups of the National AIDS Control Program by the Union Health Ministry besides working closely with the World Health Organisation (WHO) in Delhi, in

recognition of Humsafar Trust's work with the LGBTQI communities around India. In 2009 he joined as National Program Officer with UNAIDS to facilitate access and prioritize MSM/TG (men having sex with men/transgender persons) issues in the national HIV prevention effort.

9. Mr. Row Kavi still sits on the Technical Resources Groups (TRG) of the National AIDS Control Organisation (NACO) in the Health Ministry for information to be supplied to public health authorities for facilitating access hospitals and clinics for homosexuals and same-sex behaving men. In January 2017 he presented a paper on "Hybrid models in targeted interventions to reach hard to reach MSM in India" for NACO's programs. He participated in a high powered meeting constituted by NACO on "HIV Surveillance in India", along with the Centre for Disease Control (CDC), Atlanta, UNAIDS, UNDP, and WHO in Delhi in March 2018. This high powered committee is also now looking at "size estimates of key populations for HIV/AIDS and STI control in India". The Petitioner No. 1's inputs were taken as "very important" for NACO's work.
10. The Petitioner No. 1 was member of the high powered group constituted on behalf of the Bombay Municipal Corporation (BMC) and its AIDS cell, Mumbai District AIDS Control Society (MDACS) group which will be fast tracking HIV/AIDS interventions in Mumbai metro to reach zero prevalence by 2030, which met last month in Mumbai.
11. The Petitioner No. 1 has attended and presented oral presentations and posters in more than eight International AIDS Conferences in various cities of the world since 1989 (Montreal) to (Melbourne) and was awarded the first Shivanand Khan Award for work with MSM and gay populations in India, in Bangkok last year by the Asia Pacific Coalition of MSM (APCOM) an official body set up by UNDP and UNAIDS to monitor

and evaluate HIV prevention measures and empowerment of sexual minorities in Asia.

12. The Petitioner No. 1 also initiated the Integrated Network for Sexual Minorities (INFOSEM) in October 2003, a national web of over a 125 community based organizations of MSM, TG and LBT (lesbian, bisexual and transgender persons) groups.
13. Besides being an advisor for the Bill and Melinda Gates Foundation on MSM issues, he also participated as community advisor for the country's first IBBA (integrated Behavioral and Biological Assessment) in the MSM and TG communities in 2010/11 and then got the national programme to accept a community-led Strategy Document embedded in the program implementation of interventions among MSM and TG. The very same year, the Petitioner No. 1 and the Technical Resource Group requested that MSM and TG programs be separated and administered differently through TG community owned and based groups. This too was a first for the country, whose HIV prevention program among MSM and TG became a model for UNAIDS and UNDP.
14. In 2010, after the strategy document for NACP (National AIDS Control Program) Phase IV was accepted and initiated he returned to Mumbai as chair of Humsafar Trust. He has taught as visiting faculty at the prestigious Tata Institute of Social Sciences (TISS) and at the Clinical Psychology Department of Bombay University. He writes on gay issues for most of India's mainstream media and news portals and has authored articles in India's first Penguin book of gay writing, 'Yaraana', edited by Prof Hoshang Merchant.

15. Though the Petitioner No. 1 has been fortunate in being able to come out of the closet, throughout his life he has personally witnessed the humiliation that LGBTQI people face and the detrimental emotional impact criminalization and stigma has on them. More than anything else he has witnessed the negative, impact of the law under Section 377, IPC on the lives of LGBTQI persons, particularly gay men and transgender persons, both physically and emotionally, as a result of which they live double lives. The criminalization of their core being has devastating impact on their psyche. Humsafar Trust was primarily set up to empower LGBTQI communities to overcome the stigmatization resulting from the law. Therefore it is the very strong belief of the Petitioner No.1 that Section 377, IPC must exclude consensual, sexual conduct between adult homosexual males and transgender persons in private.
16. The Petitioner No. 2 is the Chief Executive Officer of Humsafar Trust. He has done his graduation in commerce and finance management and post-graduation in business management from Mumbai University in 1991. He oversees the development of new grants, financial management, execution of the HIV/AIDS related healthcare interventions as well as undertakes research and advocacy initiatives related to the LGBTQ community.
17. Since the beginning of his association with Humsafar Trust, the Petitioner No. 2 has also worked as a community counselor for LGBTQ persons, working on issues relating to understanding and accepting one's sexuality and 'coming out' to one's near and dear ones. He has also assisted in the establishment of HIV/AIDS related healthcare programmes for MSM and TG in Karnataka and Tamil Nadu and in development of information, education and counseling content on gender, sexuality and HIV/AIDS through the medium of film, theatre and

posters. He has overseen the development of online outreach programmes to expand the coverage and provision of HIV/AIDS related healthcare services.

18. The Petitioner No. 2 has nurtured many youth groups who actively organize and campaign on issues relating to gender, sexuality and HIV/AIDS such as *Umang*, *Yaariyaan* and *Sajeevani*. He has also worked with USAID on HIV/AIDS related healthcare interventions for MSM and TG in Mumbai.
19. Like the Petitioner No. 1 the Petitioner No. 2 also has personally experienced witnessed the privations that the LGBTQI persons undergo and the devastating impact that section 377 has on them and therefore resolved to fight it.
20. The Petition No. 3 was forced to drop-out from school at the age of 14 years due to the constant bullying, molestation and violence he faced by his peers at school, as he was deemed 'effeminate' due to his sexuality. The school had no trained counsellor who could have provided therapeutic intervention to Petitioner No. 3, who was facing verbal, physical and sexual abuse and also struggling to understand and accept his sexual orientation as a gay person. The humiliating experience at school combined with the lack of access to suitable mental-healthcare services led to the Petitioner No. 3 contemplating suicide, as a conspiracy of silence on the subject of human sexuality and gender identity in our educational institutions – a product of social stigma as well as the *de facto* criminalization of homosexuality under Section 377, IPC - ensure that the Petitioner No. 3 and other's similarly situated like him during adolescence do not have access to information which can affirm

one's identity and save lives. However, an otherwise caring family and home prevented him from extinguishing his life prematurely.

21. The Petitioner No. 3 started working as an office assistant at a Life Insurance Company (L.I.C.) office in New Delhi at the age of 15 years, as he was forced to discontinue his education. Over a period of 2 years at the workplace, the Petitioner No. 3 faced constant verbal abuse from his co-workers, and even escaped attempts at sexual assault at the workplace. The Petitioner No. 3 did not share his experiences of humiliation and abuse with his immediate family as he was still in developmental stages of understanding of his sexuality, and feared being misunderstood and rendered homeless by his family.
22. The Petitioner No. 3 only fully understood and came to accept his sexuality around the age of 18 years when he read about the experiences of other lesbian, gay, bisexual and transgender rights activists in the media and started corresponding with them. Through such correspondence, the Petitioner No. 3 came across the NGO Naz Foundation India situated in New Delhi and started attending its weekly Thursday evening workshops and visiting a counsellor around 2008.
23. At the age of 19 years the Petitioner No. 3 learnt he is HIV-positive, after undergoing counselling and testing at one of Naz Foundation India's drop-in-centres. The Petitioner No. 3 braved the double-stigma of being a homosexual man living with HIV and 'came out' to his parents around 2008-2009, who accepted and loved their son unconditionally.
24. Between the years 2009-2011, the Petitioner No. 3 became an active youth organizer in LGBTQI and people living with HIV (PLHIV) communities, as he started working with HST in Mumbai. In 2012, the

Petitioner No. 3 worked on HIV/AIDS-related healthcare advocacy with the University of California, Los Angeles (U.C.L.A.) on a photographic project titled '*Through Positive Eyes*'. Then from the years 2013-2016, the Petitioner No. 3 continued his engagement on HIV/AIDS-related healthcare advocacy with HIV/AIDS Alliance India, AIDS Health Foundation and Mamta Health Institute for Mother and Child in New Delhi. From 2017 onwards, the Petitioner No. 3 is working with HST in New Delhi where he handles crisis management cases and advocacy efforts on sexuality and HIV.

25. The Petitioner No. 3 is presently in a relationship with an adult male. However, despite his family accepting him, the Petitioner No. 3 is cautioned by his family to 'disguise' his sexuality and 'pass off' as heterosexual in the eyes of society, under fear of social ostracization by their relatives, community and society. The Petitioner No. 3 is therefore constantly apprehensive of social as well as legal consequences of appearing with his male partner in family, social and other public gatherings. The Petitioner No. 3 is often questioned and ridiculed by his relatives on his refusal to marry a woman, a situation that provokes intense social-anxiety as well as the fear of law. The Petitioner No. 3 currently co-habits with his male partner in New Delhi; however, as consensual, sexual conduct between two adult males is a cognizable offence under Section 377, IPC he lives in constant social insecurity of his neighbours and fear of the law, if the nature of their relationship is learnt and reported to the police. As a result of the *de facto* criminalization of homosexuality under Section 377, IPC the Petitioner No. 3 is constantly negotiating spaces between self-preservation and affirmation of identity: if he speaks openly and freely about his sexual orientation and expresses emotional, romantic and physical desire towards a person of the same sex, at best he risks being dispossessed

by the family and community due to the social stigma attached to homosexuality and at worst he risks legal harassment in terms threat of prosecution for consensual, sexual relations with an adult male; while disguising his relationship with his male partner as 'friendship' and passing-off as heterosexual may afford him the security and privileges that heterosexual persons are systemically endowed in society and law, it militates against his identity, dignity, freedom of expression and mental health.

26. The Petitioner No. 3 was a victim of extortion on a social media platform on basis of his sexual orientation in the year 2015, nearly a year after Section 377 was restored in law with full-effect by the order and judgment of this Hon'ble Court in *Suresh Kumar Koushal & Anr. v. NAZ Foundation & Ors, (2014) 1 SCC 1*. As working with the Humsafar Trust, the Petitioner No. 3 was witness to countless crises cases of gay and bisexual men who were victims of harassment and blackmail under fear of a false accusation of the offence under Section 377, who visited the organization's drop-in-centre seeking social support, legal advise as well as therapeutic intervention for trauma. The Petitioner No. 3 has experienced first-hand that as consensual, sexual conduct between two adult males is a cognizable offence under Section 377, IPC his liberty and reputation were acutely vulnerable in law for persecution as well as prosecution as a homosexual male.
27. The Petitioner No. 3 decided to report the incident to the local police station and accordingly visited the Okhla Industrial Area Phase – 1 Police Station along with his father in or around May 2015. At the said police station, the Petitioner No. 3 spoke to a police officer and explained to him that after developing a brief acquaintance online, the accused persons demand money to the amount of Rs. 60,000/- as 'hush money' for

keeping quiet on his sexuality to his family and the police. The police officer asked the Petitioner No. 3 if he is homosexual, and the Petitioner No. 3 responded in the affirmative. The police officer then asked Petitioner No. 3's father to step out of his cabin and to speak with him privately. Once they were alone, the police officer asked several questions to the Petitioner No. 3 in a berating manner which only served to humiliate and intimidate him. Instead of offering him the assistance to record the information he intended to report on the offence of extortion committed against him, the police officer asked him questions like, "*Are you not ashamed of yourself?*", "*Are you aroused when you look at me?*", "*Which sexual positions do you prefer?*", "*Do you like oral sex or anal sex?*", "*Why don't you get married, instead of having sex with men?*". Finally, the police officer said to the Petitioner No. 3 that everyone, including his family, will be better off if he (Petitioner No. 3) chooses to commit suicide. The Petitioner No. 3 learnt that there is effectively no remedy in law for offences committed against gay or bisexual men and transgender persons with respect to matters which may have a bearing to their sexuality, as any reference to sexual relations between two consenting adult males or a man and a transgender person immediately invites the grave risk of self-incrimination under Section 377, IPC. The Petitioner No. 3's experience illustrates how the law under Section 377, IPC lends so easily to harassment, blackmail and a real and imminent threat of abuse of law not only by ordinary persons but also acts as a fundamental barrier to access to justice by law enforcement officials.

28. The Petitioner No. 4 undertook most of his schooling education in a public school in Phagwara, Punjab till Class VIII. He routinely faced bullying and verbal abuse Class VII onwards from his classmates as he was deemed 'effeminate'. The Petitioner No. 4 was shamed for his perceived feminine gender expression on a daily basis, most notably when the class teacher recorded attendance by calling out student's

names. As the Petitioner No. 4's name was called out, his classmates usually whispered a list of derogatory abuses, such as "*Gandu*", "*Chakka*" etc. to publicly humiliate him and denounce his identity in front of the whole classroom. As no school teachers or counselors ever intervened to protect Petitioner No. 4 from the verbal abuse and discipline and re-educate the classmates, the verbal abuse inevitably escalated to physical abuse in Class VIII in the form of beatings and sexual abuse in school washrooms as the classmates felt tacitly emboldened by lack of any action against them from the school authorities. Even after he changed his school moved to a different public school in Phagwara, Punjab the abuse followed him. The Petitioner No. 4 was told by his tormentors that he deserved to be treated in this manner to 'correct' his gender expression. He didn't reveal anything to his family as he was terrified of the social ramifications of disclosing his sexual orientation. As a result, the Petitioner No. 4 spent a significant duration of his adolescence in guilt, shame and dilemma, as many LGBTQ persons do in the developmental stages of discovering their identity.

29. The Petitioner No. 4 was essentially physically sexually abused as a child, as many LGBTQI children and adults are also abused, as a 'punishment' for merely expressing his identity. LGBTQI persons are often victims of gender-based violence by non-State actors due to the criminalization and stigmatization of homosexuality.
30. The Petitioner No. 4 suffered clinical depression as a result of his adolescent experiences and chose to complete his higher education through open universities, to avoid further abuse and humiliation relating to his sexuality by minimizing his public and social life.

31. The Petitioner No. 4 also had to face the social pressures from the family, as a single adult male to marry. While some of his homosexual male friends with lesser economic privilege were forced to succumb to the pressures of marriage and lead dual lives by meeting men secretly, the Petitioner No. 4 painstakingly chose to not marry and compromise on his identity and the right to form a relationship with an adult male of his choosing, and in the process, came to fully accept his sexuality. The Petitioner No. 4 however was forced to compromise on his relationships with his family and relatives by choosing to stay away from get-togethers on festive occasions, in an attempt to evade the question of marriage. It is then that the Petitioner No. 4 realized the cruelty of the anti-sodomy law: he may choose to live his life as a homosexual male as freely as may be possible under a regime of criminalization, however, it would extract at an onerous price of severing all contact and relationships with family due to the stigma on homosexuality.

32. The Petitioner No. 4 discovered NAZ Foundation (India) through the news when he read about the organization filing a constitutional challenge to Section 377, IPC and the criminalization of homosexuality. He decided to work with the organization in New Delhi in 2005, and move away from his family home in Patiala

33. The Petitioner No. 4 has personally witnessed the fallout of re-criminalization of homosexuality by the order and judgment dated 11.12.2013 in *Suresh Kumar Koushal v. NAZ Foundation & Ors.* For the duration of 2009-2013, when the decision of the Hon'ble High Court of Delhi in *NAZ Foundation & Ors. v. NCT of Delhi, 160 DLT 277* was in force, as this Hon'ble Court did not order a stay on it pending final disposal of the appeals filed against it, many LGBTQ persons 'came out' of the closets in an attempt to live their lives more openly, have more

honest relationships with their families as they talked about their experiences as lesbian, gay, bisexual, transgender, queer and intersex persons, express their sexuality freely and form loving relationships without any fear. However, when the law was reinstated by this Hon'ble Court on 11.12.2013 by the aforesaid decision, it intensified the fear, anxiety and potential of abuse of law in it's wake with renewed force. LGBTQI persons' families, friends, acquaintances and colleagues, who were until recently coming of age in a society where the law now allowed possibilities to everyone to define one's own sexuality, gender identity and form relationships as per one's choice, now suddenly looked upon them as unapprehended criminals in law and immoral in the eyes of society. The Petitioner No. 4 to his astonishment realized the power of law to shape society, as he witnessed many open LGBTQ persons retreat in isolation due to the fear of law and social judgment.

34. As the Petitioner No. 4 works in HIV/AIDS related healthcare programs with homosexual men and transgender persons, he conducted public hearing of instances of harassment and violence due to fear of the law under Section 377, IPC on 11th December 2014. Nearly 700 and more instances emerged on the rampant abuse of law. There were case studies demonstrating how organized groups blackmailing homosexual men are active. Such reports came from Mumbai, Delhi, Bangalore and other cities, where police have arrested such organized networks, the news of such things also got published. In smaller towns, the abuse of law under Section 377, IPC goes largely unreported as there are no LGBTQ-friendly support groups available to seek social and legal services from.
35. The Petitioner No. 4 gravely apprehends that expression of his sexuality will imminently invite social opprobrium and criminal prosecution. The

fear of the law directly impacts his ability to explore and meet people romantically. In 2015 the Petitioner No. 4 was visiting Lucknow for work, where he stayed in a hotel room with his partner over a weekend. Once the Petitioner No. 4 and his partner were intimate, the hotel staff barged in without knocking and asked them rude and intrusive questions about the nature of their relationship. Two members of the hotel staff coerced the Petitioner No. 4 to have sex with them against his will, in exchange of not reporting to the police for committing '*unnatural sex*', as his partner was helplessly forced to watch in stunned silence. The Petitioner No. 4 and his partner also could not imagine reporting the sexual assault and blackmail they suffered to the police because they would directly risk self-incrimination by disclosing their identities and the nature of their relationship. Despite working with one of the most pioneering LGBTQI groups in the country, the Petitioner No. 4 realized his position in society was extremely precarious due to the legal policy of criminalization of consensual, sexual conduct between adults under Section 377, IPC.

36. This episode of abuse even as an adult left an everlasting impact on Petitioner No. 4. The fear and anxiety of law and social prejudice as a single homosexual male who is vulnerable to be disowned by his family and rendered homeless, or as a homosexual male desirous of forming an intimate relationship with a partner is a constant reminder to him that effectively his very identity is criminalized, and not merely a sexual act, as expression of sexuality is but only one physical manifestation of love and identity.
37. The Petitioner No. 5, Humsafar Trust was founded in April 1994 by Petitioner No. 1, to reach out to LGBTQ communities in Mumbai and neighbouring cities. HST works in the field of HIV-interventions, advocacy and public education on gender and sexuality, and currently manages

projects on prevention, care, support and treatment reaching out to about 9,000 gay men, transgender persons and *hijras* under NACO's HIV-related healthcare programme. HST also provides legal support, crisis management, mental health counseling and nutrition counseling to the communities of persons with a diversity of sexuality and gender expression.

38. The Petitioner No. 5 works collaboratively with public health delivery systems of Mumbai like LTMG, Nair, KEM and JJ Hospitals. The Petitioner No. 5 organizes advocacy workshops for healthcare workers, law enforcement agencies, judiciary, legislators, politicians and political parties, media and students to sensitize them on LGBTQ issues.
39. The Petitioner No. 5's work has involved working on various issues faced by the LGBTQ community, like understanding and acceptance of one's sexuality and gender identity, coming out to family, dealing with relationships, dealing with legal issues of gay and bisexual men and handling crisis situations with families, cheaters, extortion, blackmail and violence faced by the LGBTQ community due to the very real and imminent abuse of law under Section 377, IPC that criminalizes consensual, sexual conduct between adults in private.
40. Since 2010, the Petitioner No. 5 has been actively resolving crises cases involving LGBTQ individuals. During 2016–2018, the Petitioner No. 5's crisis response team attended to 83 crises cases in Mumbai. Of these 83, 6 cases involved an adult, homosexual male being blackmailed by the police under the fear of Section 377, IPC. In 12 cases, adult, homosexual males were threatened of a false accusation under Section 377, IPC and victims of extortion by ordinary persons, sometimes upto Rs. 1,00,000/-.

41. An online peer-reviewed research paper by Petitioner No. 5 involving MSM and TG revealed that around 57% (n = 448) MSM and TG respondents reported having being subject to the fear and misuse of law under Section 377, IPC at least once in their lifetime in varying degrees, with 37% having experienced victimization within the last 12 months at the time of the survey. The chief perpetrators were persons posing as potential partners who often initiated meetings with the intention to blackmail gay and bisexual males, sometimes with the connivance of the police.

42. Section 377, IPC creates an environment of fear and distrust and effectively stops people from seeking legal recourse. The Petitioner No. 5's crises data reports 52 independent instances were LGBTQ persons have faced harassment and discrimination in workplace and healthcare settings because of their identity but none of these individuals sought or could seek legal recourse. The online peer-reviewed research cited above indicated that of all respondents (n =448), less than 20% individuals were out about their sexuality to everyone they knew with around 25% being wholly 'closeted'. The research further revealed that of 16 cases of violence and discrimination that the Petitioner No. 5 handled in the immediate aftermath of the full re-instatement of Section 377, IPC in December 2013, only 5 persons sought any legal recourse. The Petitioner No. 5's research illustrates an unfavorable outlook for access to justice for LGBTQ persons. Attached herewith is a copy of the said online peer-reviewed research annexed and marked as **Annexure-1**.

43. In 2016, the Petitioner No. 5 undertook a study titled "*Understanding the Impact of the Supreme Court judgment on Section 377 on LGBTQ Communities*" and the results showed that 2 in 5 LGBTQ persons had faced blackmail or know someone who has been a victim of blackmail

since this Hon'ble Court's decision to recriminalize homosexuality. The study revealed that almost 47 per cent feel scared of the law and of disclosing their identities in public spaces for fear of misuse of law since December 2013. However, a substantial majority of nearly 60 per cent felt that this Hon'ble Court may rule in favour of the LGBTQ community in the curative petitions.

44. The Petitioner No. 5 has also conducted online and offline surveys with 148 participants and the study also documented narratives of 10 LGBTQ individuals regarding their experiences with the law and their opinions on the impact of the decision of the Hon'ble High Court of Delhi in contrast to the decision of this Hon'ble Court. The 2011 study on the impact of the decision of the Hon'ble High Court of Delhi reported that participants felt more comfortable being themselves and open about their sexuality after declaration of the judgement, as compared to this Hon'ble Court's decision where 54% of participants believed that the change in law is a major setback to the community as love and relationships for LGBTQ persons is effectively outlawed and their lives criminalized. While the decision of the Hon'ble High Court of Delhi is reported to have significantly lessened if not eliminated discrimination, harassment and violence against LGBTQ persons by civilians and the police alike, the new findings in the aftermath of the decision of this Hon'ble Court report that harassment and violence not only significantly increased but also lead to blackmail. 41.2% of the participants had been subjected to blackmail or knew someone who has faced extortion. 25% of the participants believed that people were going to stay in the closet as a result of the verdict, but 19.1% of the participants believed that there has been no change in the lives of LGBTQ individuals since the verdict. 47% of the participants responded saying they feel increasingly scared and anxious.

45. The Petitioner No. 5 has also conducted a study in 2017 with the Transgender community in three cities (Mumbai, Delhi and Bangalore) assessing the needs and situation of the Transgender communities. In this study, violence related question referred to all forms of violence like physical beating, sexual assault, teasing, bullying, threat, blackmail, extortion and financial abuse for creating public nuisance, soliciting and citing Section 377, IPC as a tool for harassment. In the study 59 percent of Transwomen experienced violence of which highest reporting was from Bangalore. Across the three cities, most common perpetrators of violence were family and relative (22%), common public (21%), Panthi (18%), police (13%) Hijras from other (9%) and own (7%) Gharanas. Despite the favourable judgement of this Hon'ble Court in *NALSA* the transgender community recognize that they still continue to be covered under Section 377, IPC and that having consensual sex with their partners in private spaces continues to criminalize a fundamental aspect of their identity.

46. The Petitioner number 5 has nurtured *UMANG*, a support group of Lesbian, bisexual and Transpersons (LBT) has done a literature review of documented cases of violences against LBT between 2016 and 2017. This review details women being battered, abused, held under house arrest or forced to marry by families. Section 377 affects lesbian women, bisexual women and transpersons (transmen in particular) as well. It is used to harass lesbian couples and as an impediment to lesbian relationships. There have been numerous reports of lesbian couples being harassed/ dissuaded from staying together using Section 377. Between 2017 and 2018, The Humsafar Trust, through its LBT support group Umang, handled 4 cases of lesbian couples facing harassment from police and their families for wanting be in a same sex relationship.

47. The experiences and active field work of Petitioner Nos. 1-5 are collectively demonstrative of the lived realities of many gay men, bisexual men and transgender persons. It may very well be that the fear of social consequences is the more effective barrier, however, it is undeniable that such fear will be largely remedied if the social consequences were not accompanied with the disproportionate and unfair legal consequence of imprisonment for engaging in consensual, sexual conduct with an adult male in private.

48. The Petitioner Nos. 1-5, having closely worked and collaborated with individuals and groups on issues of health, gender and sexuality for several years have witnessed an escalation of harassment, violence and extortion against gay men and transgender persons, especially since the declaration of the order and judgment of this Hon'ble Court dated 11.12.2013 in *Suresh Kumar Koushal and Anr. v. Naz Foundation and Ors., (2014) 1 SCC 1* which reversed the Hon'ble High Court of Delhi's decision in *Naz Foundation v. Govt. of NCT of Delhi, 160 DLT 277* and made Section 377, IPC applicable again regardless of age and consent, and have constantly engaged with gay men and transgender persons in distress and advising them to negotiate spaces safely within their families, workplaces and law enforcement agencies. The Petitioner Nos. 1 and 2 have also extensively engaged with law enforcement agencies in course of their work to implement Targeted Interventions for HIV-prevention and control amongst gay men and transgender persons, and organized socio-cultural events to inform public opinion on the diversity of expression in gender and sexuality, and by way of this Petition seek to further their legal advocacy to protect and promote civil rights of all persons regardless of gender identity and sexual orientation, particularly lesbian, gay, bisexual and transgender persons. The Petitioner Nos. 1

and 2 seek to challenge the constitutional validity of S. 377, IPC as it stands today in the aftermath of the Criminal Law Amendments of 2013 as it now directly and unfairly targets gay men and transgender persons, absent of any legitimate State-interest. The reading down of S. 377, IPC to exclude consensual, adult sexual relations in private on the ground that S. 377, IPC as it stands today deprives gay men and transgender persons of equality before law, freedom of expression, personal autonomy and right to dignity in direct violation of Articles 14, 15, 19 and 21 of the Constitution of India is the first step in according full legal and moral citizenship to all persons regardless of their gender identity and sexual orientation, which Petitioner Nos. 1 and 2 seek to address by way of this present Petition along with the co-Petitioner(s).

49. The Petitioners approach this Hon'ble Court for the reliefs prayed for herein on the following, amongst other grounds, which are without prejudice to one another:-

GROUND

ARTICLE 21:

- I. **Section 377, in criminalizing consensual, sexual acts between adults in private violates Right to Dignity under Article 21 of the Constitution of India:**

- A. This Hon'ble Court held in Paras 33 and 119 of *J. KS Puttaswamy (retd.) v. Union of India*, (2017) 10 SCC 1, that the right to dignity is inextricably linked to the right to privacy, as follows:

“33. The distinction between the public and private realms has its limitations. If the reason for protecting privacy is the dignity of the individual, the rationale for its existence does not cease merely because the individual has to interact with others in the public arena. The extent to which an individual expects privacy in a public street may be different from what she expects in the sanctity of the home. Yet if dignity is the underlying feature, the basis of recognizing the right to privacy is not denuded in public spaces. The extent of permissible State regulation may, however, differ based on the legitimate concerns of government authority.

...

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasizing, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights

seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.”

- B. The Constitutional Court of South Africa held in Paras 55-56 of *Teddy Bear Clinic for Abused Children v. Minister of Justice and Constitutional Development & Ors.*, 2014 (1) SACR 327 (CC), held that criminal law is an instrument of imposing morality and inflicting stigma by the State, as follows:

“55. It cannot be doubted that the criminalisation of consensual sexual conduct is a form of stigmatisation which is degrading and invasive. In the circumstances of this case, the human dignity of the adolescents targeted by the impugned provisions is clearly infringed. If one’s consensual sexual choices are not respected by society, but are criminalised, one’s innate sense of self-worth will inevitably be diminished. Even when such criminal provisions are rarely enforced, their symbolic impact

has a severe effect on the social lives and dignity of those targeted. It must be borne in mind that sections 15 and 16 criminalise a wide range of consensual sexual conduct between children: the categories of prohibited activity are so broad that they include much of what constitutes activity undertaken in the course of adolescents' normal development. There can also be no doubt that the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents. To my mind, therefore, the stigma attached to adolescents by the impugned provisions is manifest. The limitation of section 10 of the Constitution is obvious and undeniable.

56. I find untenable the respondents' contention that it is social mores, rather than the criminalisation imposed by the Sexual Offences Act, which stigmatise adolescents who are investigated and prosecuted under the impugned provisions. An individual's human dignity comprises not only how he or she values himself or herself, but also includes how others value him or her. When that individual is

publicly exposed to criminal investigation and prosecution, it is almost invariable that doubt will be thrown upon the good opinion his or her peers may have of him or her. In this regard, consideration of the “Jules High School case” is instructive. Two boys had sexual intercourse with a girl. All three children were investigated and subsequently prosecuted under section 15 of the Sexual Offences Act. As the NDPP explained in the High Court, “[the two boys] were arrested outside school premises in the late morning during the week. Their peers were aware that they had been arrested. The media had dubbed them ‘gang rapists’. The boys and their family were deeply shamed and traumatised”. The NDPP decided to prosecute the girl because she had “willingly sneaked out of the school yard to engage in consensual sexual intercourse with two boys.” At the time the proceedings were initiated in the High Court the female learner had yet to return to school or write her end-of-year examinations. I fail to see how, having admitted that section 15 was implemented against the three learners in full view of the public, and having acknowledged the resultant exposure

and trauma those learners suffered, the respondents can possibly claim that the impugned provisions do not lead to the shaming and stigmatisation

II. Section 377 in criminalizing of consensual, sexual conduct between adults in private violates the Right to Personal Autonomy under Article 21 of the Constitution of India:

- c. This Hon'ble Court held in *NALSA* at Paras 74-75 that personal autonomy includes both the negative right of not to be subject to interference by State or non-State actors and the positive right of individuals to make decisions about their life, as follows:

“75. The recognition of one’s gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one’s sense of being as well as an integral part of a person’s identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution.

*76. Article 21, as already indicated, guarantees the protection of ‘personal autonomy’ of an individual. In *Anuj Garg v. Hotel Assn. of India*, (SCC p. 15, paras 34-35), this Court held “that personal autonomy’ includes both the negative right of not to be subject to interference by others and the positive right of*

individuals to make decisions about the life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.”

- D. This Hon'ble Court in Paras 47 and 272 of *J. KS Puttaswamy (retd.) v. Union of India*, (2017) 10 SCC 1 held as follows:

“47. Distinguishing an inalienable right to an object from the object itself emphasizes the notion of inalienability. All human beings retain their inalienable rights (whatever their situation, whatever their acts, whatever their guilt or innocence). The concept of natural inalienable rights secures autonomy to human beings...

...Without a moral order of the law of nature sort, natural inalienable rights are difficult to pose. It is from natural law, and from it alone, that man obtains those rights we refer to as inalienable and inviolable...Human rights can have no foundation other than natural law.

...

272...The right to privacy can be both negatively and positively defined. The negative right to privacy entails the individuals are protected from unwanted intrusion by both State and private actors into their private life, especially features that define their personal identity such as sexuality, religion and political affiliation, i.e., the inner core of a person's private life...

The positive right to privacy entails an obligation of States to remove obstacles for an autonomous shaping of individual identities.”

- E. This Hon'ble Court in *J. KS Puttaswamy (retd.) v. Union of India* affirmatively relied on the Constitutional Court of South Africa's decision on the constitutional validity of anti-sodomy laws that *de facto* criminalized homosexuality in *National Coalition of Gay and Lesbian Equality v. Minister of Justice*, 1998 SCC Online ZACC 15 to elaborate on the content of the right to personal autonomy in relation to expression of sexuality:

“199...On the meaning of ‘autonomy’, the Court observed that:

“Autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the State. What is crucial is the nature of activity, not its site. While recognizing the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times...It is not for the State to choose or to arrange the choice of partner, but for partners to choose themselves.”

F. This Hon'ble Court in *Common Cause (A Regd. Society) v. Union of India*, 2018 SCC Online SC 208 defined the contours of the right to autonomy to mean and include the freedom to choose one's partner without interference from the State:

“358. ...Our autonomy as persons is founded on the ability to decide: on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to

believe and not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives.”

G. This Hon'ble Court in *Shafin Jahan v. Asokan KM*, 2018 SCC Online SC 343, held that:

“88. ...The Constitution recognizes the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects, which define one’s personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual...The absolute right of an individual to choose a partner is not in the least affected by matters of faith...Neither the State nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They also form the essence of personal liberty under the Constitution...Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognizing them.

Indeed, the Constitution protects personal liberty from disapproving audiences.

90. ...Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness...The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity...Society has no role to play in determining our choice of partners.”

III. Section 377 in criminalizing consensual, sexual conduct between adults in private violates the Right to Privacy under Article 21 of the Constitution:

H. This Hon'ble Court in *J. KS Puttaswamy (retd.) & Ors. v. Union of India*, (2017) 10 SCC 1, held that the Constitution of India does not confer the fundamental right to privacy, rather, it is a '*natural right*', i.e., the right to privacy pre-dates the Constitution of India as it

inheres in every human being from the moment of birth and it is inalienable. In Paras 42, 46 and 120 this Hon'ble Court held:

“42. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights.....

46. Natural rights are not bestowed by the State.

They inhere in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation....

120. The fundamental rights, in other words, are primordial rights which have traditionally been regarded as natural rights. In that character these rights are inseparable from human existence. They have been preserved by the Constitution, this being a recognition of their existence even prior to the constitutional document.”

- I. This Hon'ble Court in Para 84 of *J. KS Puttaswamy (retd.) & Ors. v. Union of India*, (2017) 10 SCC 1 held that the fundamental right to privacy is inextricably linked to expression of identity of every human being, as follows:

“84. NALSA indicates the rationale for grounding of a right to privacy in the protection of gender identity within Article 15. The intersection of Article 15 with Article 21 locates a constitutional right to privacy as an expression of autonomy, dignity and identity. NALSA indicates that the right to privacy does not necessarily have to fall within the ambit of any one provision in the chapter on fundamental rights. Intersecting rights recognize the right to privacy. Though primarily, it is in the guarantee of life and personal liberty under Article 21 that a constitutional right to privacy dwells, it is enriched by the values incorporated in other rights which are enumerated in Part III of the Constitution.

- J. This Hon'ble Court in Paras 144-145 of *J. KS Puttaswamy (retd.) & Ors. v. Union of India*, (2017) 10 SCC 1, declared sexual orientation to be an essential attribute of the right to privacy, as follows:

"...Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."

- K. This Hon'ble Court held as *ratio decidendi* at Para 323 of *J. KS Puttaswamy (retd.) & Ors. v. Union of India* that all persons regardless of sexual orientation merit of the right to privacy in matters of expression of sexuality and forming intimate relationships:

"323. Privacy includes at it's core the preservation of personal intimacies, the sanctity of family life,

marriage, procreation, the home and sexual orientation.”

IV. The criminalization of consensual, sexual conduct between adults in private impedes HIV-prevention efforts and is a violation of Right to Health under Article 21:

L. In *Toonen v. Australia*, the UN Human Rights Committee categorically rejected the contention that the prohibition on homosexuality prevents the spread of HIV/AIDS. Instead, the Committee found that criminalization of same-sex activity runs counter to the implementation of effective educational programmes in respect of HIV prevention. [See *Toonen v. Australia* [Communication No. 488/1992, decision dated 31/03/1994 at Para 8.5]

M. T
The *UN Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health*, examined the impact of criminal laws against consensual, sexual conduct between adults in private, and observed:

“Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often

infringe on various human rights, including the right to health. These laws are generally inherently discriminatory and, as such, breach the requirements of a right-to-health approach, which requires equality in access for all people. The health related impact of discrimination based on sexual conduct and orientation is far-reaching, and prevents affected individuals from gaining access to other economic, social and cultural rights.” [Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, A/HRC/14/20, dated 27th April 2010 at Para 6]

v. Section 377 in criminalizing consensual, sexual conduct between adults in private undermines the value of Fraternity envisioned under of the Constitution:

N. The Constitution of India and its various chapters including the Preamble, Fundamental Rights (Part III) and Fundamental Duties (Part IV-A) is infused with humanism, i.e. the spirit to respect and cherish one another as human beings. In the same vein, the Constitution enjoins the State and citizens to show respect for diversity, accepting and valuing people’s differences rather than discriminating against them.

O. This Hon'ble Court in *Subramanian Swamy v. Union of India*, (2016) 7 SCC 221 held that fraternity is an integral component of the trinity of constitutional values of 'liberty, equality and fraternity':

"157. It is a constitutional value that is to be cultivated by the people themselves as a part of their social behavior. There are two schools of thought: one canvassing individual liberalization and the other advocating protection of an individual as a member of the collective. The individual should have all the rights under the Constitution but simultaneously he has the responsibility to live up to the constitutional values like essential brotherhood-fraternity-that strengthens the social interest...."

161...The concept of fraternity under the Constitution expects every citizen to respect the dignity of the other. Mutual respect is the fulcrum of fraternity that assures dignity.

162. In the context of constitutional fraternity, fundamental duties engrafted under Article 51-A of the Constitution gain significance. Clause (e)...of Article 51-A of the Constitution reads as follows:

“51-A (e). to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities;... ”

...

166. ...Respect for the dignity of another is a constitutional norm. it would not amount to an overstatement if it is said that the constitutional fraternity and the intrinsic value inhered in fundamental duty proclaim the constitutional assurance of mutual respect and concern for each other's dignity. The individual interest in each individual serves collective interest and correspondingly the collective interest enhance the individual excellence. Action against the State is different than an action taken by one citizen against the other. The constitutional value helps in structuring the individual as well as the community interest...”

- vi. Section 377 in criminalizing consensual, sexual conduct between adults in private violates the test of Substantive Due Process of Law:**

P. This Hon'ble Court has irrefutably held in a series of judgments, including in *J. KS Puttaswamy (retd.) v. Union of India*, that Article 21 of the Constitution of India guarantees both *procedural due process* as well a *substantive due process*, i.e., this Hon'ble Court is competent to decide on the constitutional validity of criminalization of consensual, sexual conduct between adults in private *per se*, rather than limiting it's jurisdiction to examine procedural 'safeguards' for appropriate law enforcement under Section 377, IPC:

*"291. ...the evolution of Article 21, since the decision in **Cooper** indicates two major areas of change. First, the fundamental rights are no longer regarded as isolated silos or water-tight compartments. In consequence, Article 14 has been held to animate the content of Article 21. Second, the expression 'procedure established by law' in Article 21 does not connote a formalistic requirement of a mere presence of procedure in enacted law. That expression has been held to signify the content of the procedure and its quality which must be fair, just and reasonable. The mere fact that the law provides for the deprivation of life or personal liberty is not*

sufficient to conclude its validity and the procedure to be constitutionally valid must be fair, just and reasonable. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21 but to the content of the law itself. In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable procedure under the law and a law which does so may yet be susceptible to challenge on the ground that its content does not accord with the requirements of a valid law. The law is open to substantive challenge on the ground that it violates the fundamental right.

...

294. The Court, in the exercise of its power of judicial review, is unquestionably vested with the constitutional power to adjudicate upon the validity of a law. When the validity of a law is questioned on the ground that it violates a guarantee contained in Article 21, the scope of the challenge is not confined only to whether the procedure for the deprivation of life or personal liberty is fair, just and reasonable. Substantive challenges to the validity of laws

*encroaching upon the right to life or personal liberty has been considered and dealt with in varying contexts, such as the death penalty (**Bachan Singh**) and mandatory death sentence (**Mithu**), among other cases. A person cannot be deprived of life or personal liberty except in accordance with the procedure established by law. Article 14, as a guarantee against arbitrariness, infuses the entirety of Article 21. The inter-relationship between the guarantee against arbitrariness and the protection of life and personal liberty operates in a multi-faceted plane. First, it ensures that the procedure for deprivation must be fair, just and reasonable. Second, Article 14 impacts both the procedure and the expression "law". A law within the meaning of Article 21 must be consistent with the norms of fairness which originate in Article 14. As a matter of principle, once Article 14 has a connect with Article 21, norms of fairness and reasonableness would apply not only to the procedure but to the law as well.*

...

295. *Above all, it must be recognized that judicial review is a powerful guarantee against legislative encroachments on life and personal liberty. To cede this right would dilute the importance of the protection granted to life and personal liberty by the Constitution. Hence, while judicial review in constitutional challenges to the validity of legislation is exercised with a conscious regard for the presumption of constitutionality and for the separation of powers between the legislative, executive and judicial institutions, the constitutional power which is vested in the Court must be retained as a vibrant means of protecting the lives and freedoms of individuals.*

296...*Reference to substantive due process in some of the judgments is essentially a reference to a substantive challenge to the validity of a law on the ground that it's substantive (as distinct from procedural) provisions violate the Constitution."*

Q. This Hon'ble Court in *J. KS Puttaswamy (retd.) v. Union of India* held that a law which encroaches on the fundamental right to privacy must

meet the three-fold requirement of (i) legality, which postulates existence of law, (ii) legitimate State aim and (iii) proportionality:

“180. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfillment of a three-fold requirement. These three requirements apply to all restraints on privacy (...). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of a law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate,

involves a value judgment. Judicial review does not re-appreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence the three-fold requirement for a valid law arises out of mutual inter-dependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.”

- R. The European Court of Human Rights (ECHR) has held in several cases there is no social or penological justification for the

criminalization of homosexuality between consenting adults in private, and any purported justification was outweighed by the 'detrimental effects' such anti-sodomy laws have on the lives of lesbian, gay, bisexual transgender and intersex persons. It particularly held that the right to form and develop relationships with other human beings is integral to Article 8 (right to privacy) of The European Convention of Human Rights [*Dudgeon v. United Kingdom*, Application No. 7525/1976; *Norris v. Ireland*, Application No.10581/1983].

- s. More importantly on protection and promotion of fundamental rights, this Hon'ble Court has not limited itself to merely analyze the avowed aim of a law, but emphasized on the, direct and inevitable effect of law, including the unintended consequences, on fundamental rights guaranteed under Part III of the Constitution of India. In the matter of *Maneka Gandhi v. Union of India and Anr.* (1978) 1 SCC 248, this Hon'ble Court developed the test of 'direct and inevitable effect' and mandated Courts to test the Constitutionality of a law not merely on stated legislative intent, but to consider the curtailment of fundamental rights as a result of direct and inevitable effect of its operation, stating thus:

“69...it is the substance and the practical result of the act of the State that should be considered rather than its purely legal aspect” and “the correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to the citizen and not merely what manner and method has been adopted by the State in placing the restriction.”

70... It is possible that in a given case the pith and substance of the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the challenge of the latter fundamental right. The pith and substance doctrine looks only at the object and subject-matter of the State action, but in testing the validity of the State action with reference to fundamental rights, what the Court must consider is the direct and inevitable consequence of the State action. Otherwise, the protection of the fundamental rights would be subtly but surely eroded.”

- T. It is submitted that the enforcement of ‘public morality’ on the subject of sex and sexuality through S. 377, IPC, which is the avowed object of S. 377, has the direct and inevitable consequence of exposing

lesbian, gay, bisexual and transgender persons to stigma, discrimination, violence and deprivation of fundamental rights under Articles 14, 15, 19 and 21 of the Constitution. Section 377, IPC permits State and non-State actors to extort and harass persons on grounds of their sexual orientation with impunity, as has evidently transpired with the Petitioner Nos. 1-2 herein. Section 377. The harm done by S. 377 far outweighs the purported aim and object of the statute.

ARTICLE 14:

vii. The effect of the change in Section 375, IPC after the Criminal Law Amendment Act, 2013 has a direct impact on Section 377, IPC in as much as it has rendered it patently discriminatory against non-hetero-sexual persons, including, homosexual men transgender persons and intersex persons

u. Parliament enacted the Criminal Law (Amendment) Act, 2013, which, inter alia, broadened the ambit of the offence of rape in Section 375, IPC. The amended Section 375 reads as:

“375. Rape - A man is said to commit "rape" if he—

- a. *penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
- b. *inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
- c. *manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any ~ of body of such woman or makes her to do so with him or any other person; or*
- d. *applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,*

under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.— For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

- v. Though Section 377, IPC has not been amended, the recent change in the definition of rape in Section 375, IPC has completely altered the scope of Section 377. Prior to the amendment, Section 377 would be applicable to all penile non-vaginal sexual acts between consenting adults, whether between man and man, between man and woman or between a man and a transgender person or a man and an intersex person. However, after the Criminal Law Amendment Act, 2013 non-consensual penile-non-vaginal sexual acts between a man and a woman would fall within the ambit of Section 375, IPC; the necessary implication of which is that consensual penile-non-vaginal sexual acts between a man and woman are not considered an offence anymore. These consensual acts between a man and a woman would not fall under Section 377, IPC. Thus, Section 377, IPC as it stands today, effectively applies only to all forms of penetrative penile non-vaginal sex including penile-anal sex and penile-oral sex, between a man and another who is not a woman, that is a man and a man or a man and a

transgender person or man and a transgender person, regardless of age and consent.

- w. At the time of enactment of the Criminal Law Amendment Act, 2013 Section 377, IPC as read down to exclude consensual, sexual conduct of adults in private by the judgment of Delhi High Court in the matter of *Naz Foundation v. Govt. of NCT & Ors.*, 160 DLT 277 was the law of the land, since the decision was not stayed by this Hon'ble Court in appeal. Further, despite the decision of the Hon'ble High Court, Parliament did not amend the law to restore the original Section 377, IPC which criminalized penile non-vaginal acts regardless of age and consent. If at all this Hon'ble Court were to read any legislative intent in enactment of the Criminal Law Amendment Act, 2013 it should have read it as legislative acceptance of exclusion of consensual, sexual conduct of adults in private from Section 377, IPC.
- x. The 2013 Amendments in Section 375 make it an offence if a man engages in penile-non-vaginal sexual acts with a woman, against her will, without her consent or where she is under 18 years of age or where her consent is vitiated on specified grounds. The necessary implication is that such acts between a man and a woman, with consent, are not criminalized. Accordingly, the element of consent becomes the fundamental criteria of distinguishing sexual acts, between man and

woman, which are permissible, from the sexual acts that would be considered as criminal offences. Therefore, Section 377, IPC as it stands today criminalizes and punishes all forms of consensual penetrative penile non-vaginal sex including penile-anal sex and penile-oral sex, between a man and another who is not a woman, that is a man and a man or a man and a transgender person or man and a transgender person, regardless of age and consent. *s ex facie* discriminatory.

VIII. Section 377, IPC is also discriminatory against non-heterosexual persons as it has a disparate impact on them basis of 'sexual orientation' and is violative of Article 14

Y. The data available in India on the application of Section 377 clearly shows that it is largely applied to persons whose sexual orientation and gender identity is not heterosexual.

Z. The Canadian Supreme Court has consistently held that the fundamental aspect to examine the validity of discriminatory action is whether or not *the effect of the action* has a disproportionate impact on a class of persons, by holding "*It arises where an employer [...] adopts a rule or standard [...] which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it*

imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force” [Ontario Human Rights Commission and O’Malley v. Simpsons-Sears Ltd., (1985) 2 SCR 536; Andrews v. Law Society of British Columbia, (1989) 1 SCR 143].

AA.The Supreme Court of South Africa has similarly observed on indirect discrimination, by noting *“The concept of indirect discrimination, as I understand it, was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them...”* [The City Council of Pretoria v. Walker Case, CCT 8/97].

AB.The Canadian Supreme Court has also applied the same test in cases involving hate-speech against lesbian, gay, bisexual and transgender persons, holding *“...I do not accept Mr. Wharcott’s submission that the flyers targeted sexual activities, rather than sexual orientation. While the publication at issue may appear to engage in the debate about the morality of certain sexual behavior, they are only aimed at that sexual*

activity when it is carried out by persons of a certain sexual orientation.”

[Saskatchewan Human Rights Commission v. Wharcott, (2013) 1 RCS].

AC. For that it is clear from the history of Section 377, IPC that it proscribes all sexual acts between two men or a man and a transgender person or a man and an intersex person are essentially penile non-vaginal. In effect, Section 377, IPC criminalizes all forms of sexual acts between two men or a man and a transgender person or a man and intersex person on basis of sexual orientation.

AD. Although, technically, Section 377, IPC criminalizes ‘acts’ and not ‘identities’, it effectively results in the criminalization of identity as it is the only form of expression of sexuality available to homosexual men or transgender or intersex persons. Once acts proscribed are associated with an identity of a class of persons based on one or more characteristics (in this case ‘sexual orientation’), the threat of criminalization extends to the identity as well. Therefore, the criminalization of consensual, sexual acts between non heterosexual adults in private under Section 377, IPC constitutes indirect discrimination against homosexual men, transgender persons and intersex persons.

AE. This Hon'ble Court's holding in *Suresh Kumar Koushal*, apart from it being *per incuriam*, wrongly holds at Para 60 that "...It is relevant to mention here that Section 377, IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation" is therefore incorrect in law.

IX. Section 377, IPC in criminalizing act of 'carnal intercourse against order of nature' is manifestly arbitrary and violative of Article 14 of the Constitution

AF. This Hon'ble Court in *Shayara Bano v. Union of India & Ors.*, (2017) 9 SCC 1 has held that statutory law can be declared to be *ultra vires* the Constitution of India if the provision is found to be '*manifestly arbitrary*' on the touchstone of Article 14. This Hon'ble Court held in paragraph 93:

"As is evident from the above, the expressions 'arbitrariness' and 'unreasonableness' have been used interchangeably as follows: (Natural Resource Allocation case, SCC p. 81, para 103):

...In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

AG. Section 377, IPC is *ex facie* blatantly vague and manifestly arbitrary, since there exists no clarity on the nature of sexual acts that are prohibited under the ambiguous rubric of '*carnal intercourse against the order of nature*'. The phrase '*carnal intercourse against the order of nature*' is of antiquated Victorian origin and lacking precise definition in the current times. Thus, the element of vagueness and manifest arbitrariness in Section 377, IPC has become writ large, especially when compared to the clarity of the penal offence under Section 375, IPC and that under the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO'),

ARTICLE 15:

x. Criminalizing by Section 377 IPC of sexual practices between non-heterosexual persons is discriminatory on the ground of sexual orientation.

AH. This Hon'ble Court in *National Legal Services Authority v. Union of India*, (2014) 5 SCC 428 (hereinafter 'NALSA') held that discrimination on the ground of 'sex' in Article 15 of the Constitution of India also includes discrimination on ground of 'gender identity' [Para 66].

AI. This Hon'ble Court in *NALSA* has further held that discrimination on ground of 'sexual orientation' or 'gender identity' impairs equality before law and equal protection of laws under Article 14 of the Constitution of India [Para 62].

AJ. This Hon'ble Court in *NALSA* adopted the *Yogyakarta Principles on Application of International Human Rights Law in relation to Sexual Orientation & Gender Identity*, which has acquired the force of law in its application to rights of transgender persons in India. In *NALSA*, this Hon'ble Court held: "*The principles discussed herein before on transgender persons and the international conventions, including Yogyakarta Principles, which we have found not inconsistent with the various fundamental rights guaranteed under the Indian*

Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country”.

AK. The *Yogyakarta Principles* affirm the primary obligation of States to implement human rights. Each principle is accompanied by detailed recommendations to States to the effect of amending national laws to decriminalize consensual, sexual conduct between two adults in private as well as develop policies in place that provide a remedy in law from discrimination, regardless of sexual orientation and gender identity. The *Yogyakarta Principles* also emphasize that all actors have responsibilities to protect and promote human rights.

AL. This Hon'ble Court has held in *J. KS Puttaswamy (retd.) & Ors. v.*

Union of India, (2017) 10 SCC 1 in Paras 144-145:

“Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

...Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.”

AM. The Canadian Supreme Court declared that sexual orientation is a deeply personal characteristic, that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the prohibited categories within ambit of Section 15 of The Canadian Charter of Rights & Freedom's protection as being analogous to the ground of 'sex' [*Egan v. Canada*, (1995) 2 SCR 513].

AN. The Human Rights Committee of the United Nations to oversee the implementation of the International Covenant on Civil and Political Rights (ICCPR) has held in the case of *Toonen v Tasmania* that "other status" within the meaning of Article 26 of ICCPR includes sexual orientation.

AO. Therefore 'sexual orientation' and 'gender identity' are now recognized as prohibited categories of discrimination.

ARTICLE 19:

XI. Section 377 in criminalizing consensual, sexual conduct between adults in private has a chilling effect on other fundamental rights, particularly under Article 19(1) (a) of the Constitution

AP. This Hon'ble Court in *NALSA* upheld the inter-connected and indivisible right to privacy, self-identity, autonomy and personal integrity guaranteed to transgender persons under Article 19 of the Constitution in Para 72 as follows:

“Gender identity, therefore, lies at the core of one’s personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender’s personality could be expressed by the transgender’s behavior and presentation. State cannot prohibit, restrict or interfere with a transgender’s expression of such personality, which reflects that inherent personality.”

AQ. This Hon'ble Court in Para 146 of *J. KS Puttaswamy (retd.) v. Union of India*, (2017) 10 SCC 1 held that criminalization of consensual, sexual conduct between adults in private under Section 377, IPC causes a ‘chilling effect’ on the free expression of sexuality, as follows:

“The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation.....

“The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfillment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime.

“

XII. Section 377 has to be viewed in the light of the march of time and changes in civilizational values

AR. This Hon'ble Court in *Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1 this Hon'ble Court prescribed as a duty of judicial scrutiny to strictly scrutinize laws which may unfairly discriminate against persons based on their gender identity, and remedy such laws to

harmonize with the increasing consciousness on equality of the sexes, or for that matter gender identities, with the passage of time and change in social mores. It stated thus:

“Legislation should not only be assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.

...

The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by passage of time...the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation.”

... 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. While considering validity of a legislation of this nature, the court was to take notice of the other provisions of the Constitution including those contained in Part IV- A of the Constitution.”

.....the issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do

not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.”

AS. For that the denial of equal protection of laws is also blatant against homosexual men and transgender persons with respect to non-consensual sexual conduct. Under POCSO, any penetrative or non-penetrative sexual assault or sexual harassment on a child, is covered regardless of gender, thereby protecting even male and transgender children from sexual offences. However, there is effectively no remedy in law available to an adult male or an adult transgender person from non-penile sexual assault, while penetrative sexual assault on a man would be covered under the vague notion of '*carnal intercourse against the order of nature*' in Section 377, IPC. In contrast, an adult woman who suffers any form of sexual assault, whether penetrative or non-penetrative, would be protected under the offence of rape under the revised Section 375, IPC. A child and adult women are protected in law from all kinds of sexual assault and violence, but an adult male and transgender person are protected only from penetrative sexual assault, thereby leaving large number of non-penile sexual assaults, including penetration by an object, stripping and molestation outside the ambit

of criminal sanction, thereby rendering Section 377, IPC violative of Article 14 of the Constitution of India.

XIII. The decision in *Suresh Kumar Koushal* requires reconsideration on the following grounds: -

AT. The decision of this Court in *Suresh Kumar Koushal* did not take into account the fact that the law in Section 375 had been amended which impacted on the interpretation of Section 377.

AU. This Hon'ble Court in the matter of *Suresh Kumar Koushal & Anr. v, Naz Foundation & Ors.*, 2014 (1) SCC 1 misread the intention of the Parliament in not changing Section 377, IPC during the amendment of Sections 375 and 376, IPC, along with other offences in enacting the Criminal Law Amendment Act, 2013. This Hon'ble Court, in paragraph 32 of the judgment, observed that:

“After the adoption of the IPC in 1950, around 30 amendments have been made to the statute, the most recent being in 2013 which specifically deals with sexual offences, a category to which Section 377, IPC belongs... This shows that Parliament, which is undisputedly the representative body of the people of India has not thought it proper to delete the provision. Such a conclusion is

further strengthened by the fact that despite the decision of the Union of India to not challenge in appeal the order of the Delhi High Court, the Parliament has not made any amendment in the law.”

AV. This observation is completely erroneous. It is very clear from the parliamentary debates on the Criminal Law Amendment Bill, 2013 that when the question of unnatural offences under Section 377, IPC was raised in Lok Sabha, the Hon'ble Speaker of the House said “*this matter is currently sub-judice. We do not need to deliberate on the same*”, as evident from the Lok Sabha debates. In effect, Parliament did not amend the Section 377, IPC while enacting the Criminal Law Amendment Act 2013 precisely because this Hon'ble Court was seized of the issue and the judgment was reserved. It is wholly erroneous that the fact of Parliament not amending the law in 2013 can be termed as evidence of the legislative endorsement of Section 377, IPC. Thus, there has been complete misreading of the legislative intention by this Hon'ble Court, which has resulted in manifest error in law and injustice. Therefore, the decision of this Hon'ble Court in *Suresh Kumar Koushal* is per incuriam as it is rendered in ignorance of law and need not be followed.

AW. Thus the decision in *Suresh Kumar Koushal* is *per incuriam* and need not be followed.

AX. The decision of this Hon'ble Court in *Suresh Kumar Koushal* also did not take into account that for sexual offences against the child, the POCSO was brought onto the statute book, wherein the definition of a 'child' in Section 2 (d) of the Act refers to any person below the age of eighteen years and is gender neutral in nature, i.e., includes male, female and transgender children.

AY. POCSO made the application of Section 377, IPC redundant for in cases of child sexual abuse. In effect, any penetrative sexual assault, including penile-vaginal, penile-anal or penile-oral and non-penile penetration, on any child, irrespective of gender or orientation is henceforth covered by POCSO and by implication Section 377IPC is ousted.

AZ. This Court in *Suresh Kumar Koushal* in not taking note of POCSO and its impact on 377 IPC renders that decision highly vulnerable to challenge.

BA. This Hon'ble Court in *J. KS Puttaswamy (retd.) v. Union of India, (2017) 10 SCC 1* has held that this Hon'ble Court's decision on the

constitutionality validity of Section 377, IPC in *Suresh Kumar Koushal v. Union of India & Ors.* is incorrect in law on several grounds [Paras 144-146]:

Suresh Kumar Koushal's analysis on the impact of

Section 377, IPC on Right to Privacy and Right to

Dignity is erroneous:

“... pre-publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the Koushal rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, we disagree with the manner in which Koushal has dealt with the privacy-dignity based claims of LGBT persons on this aspect.”

Sexual Orientation is a fundamental component of rights

under Articles 14, 15 and 21 of the Constitution:

“...Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

The view in Koushal that the High Court had erroneously relied upon international precedents "in its anxiety to protect the so-called rights of LGBT persons" is similarly, in our view, unsustainable. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is

illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.

Invasion of a fundamental right is not rendered tolerable based on the quantum of persons subjected to hostile treatment:

"That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian

opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the Rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties..."

"...The decision in Koushal presents a de minimis rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place..."

BB. Therefore the decision of this Hon'ble Court in *Suresh Kumar Koushal* is no longer good law.

50. That the Petitioners have no other alternate efficacious remedy but to approach this Hon'ble Court for the relief prayed for herein.

51. That the Petitioners have paid the requisite Court fees on this Petition.

52. The Petitioners have not filed any other petition in this Court or any other High Court or in the Supreme Court of India in respect of the subject matter of this Petition.

PRAYER

It is therefore, most respectfully prayed that your Lordships may graciously be pleased to:

- a. For a declaration that S. 377 of the Indian Penal Code, 1860 to the extent it penalizes adult, consensual, sexual relations between non-heterosexual persons, is violative of Articles 14, 15, 19 and 21 of the Constitution of India;

- b. For a an appropriate writ order or injunction prohibiting the Respondents arraigned herein by themselves, or through their officers, agents and/or servants from in any manner enforcing the law under Section 377, IPC to consensual, sexual conduct between adults in private;
- c. For costs of this Petition;
- d. For such further order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the instant case as well as in the interest of justice.

**AND FOR THIS ACT OF KINDNESS, THE PETITIONERS HEREIN
SHALL EVER PRAY.**

DRAWN BY:

Mr. Suraj Sanap

Advocate

SETTLED BY:

Mr. Anand Grover

Senior Advocate

FILED BY

[Mr. _____]

Advocate for the Petitioner

DRAWN ON _____ 2018

NEW DELHI

1. FILED ON: _____ 2018