

SECTION:X

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

WRIT PETITION (CIVIL) NO. _____ OF 2016

BETWEEN:

Dr. Akkai Padmashali & Ors. ...Petitioners

Vs.

Union of India & Ors. ...Respondents

I N D E X

| SI No | Particulars | Copies | Court Fee |
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| 2. | Writ Petition with Affidavit | 1+3 | Rs. |
| 3. | Annexure-P-1 to P- | 1+3 | Rs. |
| 4. | Listing Proforma | 1+1 | |
| 5. | Vakalatnama with Memo of Appearance. | | Rs. |

Rs.

Filed By:

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Filed On: .07.2016

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ADVOCATE FOR THE PETITIONERS: **O.P. BHADANI**

I N D E X

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PROFORMA FOR FIRST LISTING

A-1

SECTION: X

The case pertains to (Please tick/check the correct box):

- Central Act: (Title) Indian Penal Code, 1860
- Section: **SECTION 377 OF INDIAN PENAL CODE.**
- Central Rule: (Title) N/A
- Rule No(s): N/A
- State Act: (Title) N/A
- Section: N/A
- State Rule: (Title) N/A
- Rule No(s): N/A
- Impugned Interim Order: (Date) N/A
- Impugned Final Order/Decree: (Date) N/A
- High Court: (Name): N/A
- Names of Judges: N/A
- Tribunal/Authority: (Name) N/A
-

1. Nature of matter: Civil Criminal
2. (a) Petitioner/appellant No.1: Dr. Akkai Padmashali & Ors.
(b) e-mail ID: N/A
(c) Mobile Phone number: N/A
3. (a) Respondent No.1: Union of India & Ors.
(b) e-mail ID: N/A
(c) Mobile Phone number: N/A
4. (a) Main category classification: 18
(b) Sub classification: 1807
5. Not to be listed before: N/A
6. Similar/Pending matter: Writ Petition (Criminal) No. 76 of 2016
[Navtej Singh Johar v. Union of India]

7. Criminal Matters:

(a) Whether accused/convict has surrendered: Yes No

(b) FIR No. N/A Date: N/A

(c) Police Station: N/A

(d) Sentence Awarded: N/A

(e) Sentence Undergone: N/A

8. Land Acquisition Matters:

(a) Date of Section 4 notification: N/A

(b) Date of Section 6 notification: N/A

(c) Date of Section 17 notification: N/A

9. **Tax Matters:** State the tax effect: N/A

10. **Special Category** (first petitioner/appellant only): N/A

Senior Citizen > 65 years SC/ST Woman/child Disabled

Legal Aid case In custody

11. Vehicle Number (in case of Motor Accident Claim matters): N/A

11. Decided case with citation: N/A

Date: .07.2016

(O.P. Bhadani)
AOR for the Petitioners
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Office:- O-1/B, LGF (Basement)
Jangpura Extension,
New Delhi-110014
rohshar@gmail.com

SYNOPSIS

1. The Petitioners, who are members of the transgender community, are filing the present Writ Petition seeking a declaration that Section 377 of the Indian Penal Code is unconstitutional, being violative of their fundamental rights under Articles 14, 19 and 21 of the Constitution.

2. The Constitutionality of Section 377 IPC has been upheld by this Hon'ble Court in the judgment reported as *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1. After dismissal of Review Petitions filed to challenge the said judgment, Curative Petitions were filed, and this Hon'ble Court has been pleased to direct the matters to be heard by a Constitution Bench. The Petitioners, being members of the transgender community, respectfully pray that they may be allowed to demonstrate before this Hon'ble Court how criminalization of their sexual identity / orientation under Section 377 IPC violates their fundamental rights, which have been subsequently recognized by this Hon'ble Court in the case of *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 (hereinafter referred to as "NALSA").

3. The Petitioners are challenging the constitutional validity of Section 377 of the Indian Penal Code as it violates their fundamental rights to life, autonomy and dignity guaranteed

under Article 21, their right to equality under Article 14 and their right to expression and freedom under Article 19.

4. The *NALSA* judgment was pronounced by this Hon'ble Court on 15th April, 2014, i.e., after the *Suresh Kumar Koushal* judgment. While dealing with various forms of discrimination faced by members of transgender community on account of their gender identity and sexual orientation, this Hon'ble Court *inter alia* observed that Section 377 of the IPC though associated with specific sexual acts, was used as an instrument of harassment and physical abuse against hijras and transgender persons. This Hon'ble Court held in *NALSA* that, "*each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom...*" It held that, "*Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Rights of transgenders, pure and simple, like hijras, eunuchs, etc. also have to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity.*" In *NALSA*, this Hon'ble Court held that discrimination of transgender persons on the ground of sexual orientation or gender identity impairs their right to equality before the law and equal protection of the law guaranteed under Article 14.

It held that discrimination on the ground of “sex” under Article 15 and 16 also includes discrimination on the ground of gender identity and the expression ‘sex’ used in Article 15 and 16 is not limited to biological sex but intended to include people who consider themselves to be neither female nor male and transgender persons have been systematically discriminated under Article 15. It held that Article 19 (1) (a) of the constitution states that all persons shall have the right to freedom of speech and expression, which includes one’s right to expression of his self-identified gender. The self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one’s personal appearance or choice of dressing, subject to the restrictions contained in Article 19 (2) of the constitution. It held that the values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19 (1) (a) and the State is bound to protect and recognize those rights. Finally, this Hon’ble Court held that Article 21 includes the right to recognition of one’s gender identity, which lies at the core of the fundamental right to dignity.

5. Thus, *NALSA* guarantees to transgender persons the protection of fundamental rights under Articles 14, 19 and 21.

6. It is submitted that Section 377 of the IPC is in direct contravention of these fundamental rights. If transgender persons are to express their gender and sexual identities freely, they would be criminalized under Section 377 of the IPC. Under Section 377, any sexual intercourse against the order of nature is a criminal offence. “Against the order of nature” is interpreted as any intercourse that is not penil-vaginal intercourse between a man and a woman. In the case of transgender persons, their gender identity may not be the same as their biological sex, they may have had sex reassignment or not. This Hon’ble Court has held that one’s gender identity is not limited to one’s biological sex. Hence if transgender persons were to have intercourse with their partners, the same would fall foul of the section and would amount to a criminal offence. Section 377 of the IPC would thus not give them equal protection of the law as transgender persons would be particularly vulnerable to being criminalized under Section 377. Further, if they were to express their gender identity through dress or actions as guaranteed under Article 19(1) (a), they would be immediately identified as transgender, making them further vulnerable to Section 377.

7. In *NALSA*, this Hon’ble Court held that “*each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom...*” It is submitted that the

Constitutional recognition of fundamental rights of transgender persons in *NALSA* cannot be complete if Section 377 of the IPC continues to criminalize their sexual identities.

8. The clear constitutional protections set out by this Hon'ble Court in *NALSA* protecting the fundamental rights of the Petitioners as transgender persons under Articles 14,15, 19 and 21, are violated by Section 377 of the IPC. Hence it is prayed that a constitutional Bench of this Hon'ble Court decides on the constitutionality of Section 377 of the IPC.
9. Hence, the present Writ Petition.

LIST OF DATES

- | | |
|------------|---|
| June, 2003 | Peoples Union for Civil Liberties (Katmataka) in its study, Human Rights Violations against the Transgender Community” documented how the transgender community was facing harassment and abuse at the hands of the police which have enormous powers under Section 377 of the IPC. |
| 02.07.2009 | In <i>Naz Foundation v. Government of NCT, Delhi</i> , which was a petition challenging the constitutional validity of section 377 of the IPC, |

allowed the petition and read down Section 377 holding that Section 377 insofar as it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. It held that the provisions of [Section 377](#) IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors and held that this clarification will hold till, of course, Parliament chooses to amend the law.

03.11.2013

At midnight of 3rd November 2013, the Hassan police barged into the house of a sexual minority person in Hassan and asked him to accompany them to the police station under the guise of requiring him to provide counseling to an HIV positive person. After this, within 3 hours the Hassan police carried out a systematic arrest of 13 persons charging them all under section 377, out of which many were transgender persons. This was documented in the report, "Police Terror on Sexual Minorities in Hassan, Karnataka"

11.12.2013

The *Naz Foundation* judgment of the Delhi High Court was challenged by many other

persons by filing a Special Leave Petition before this Hon'ble Court in *Suresh Kumar Koushal and Anr v. Naz Foundation and Ors* [SLP (C) No. 15436 of 2009 converted to Civil Appeal No. 10972]. This Hon'ble Court allowed the appeal and set aside the Naz Foundation judgment holding that Section 377 "did not suffer from the vice of unconstitutionality". It held that those who indulge in carnal intercourse and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that section 377 suffers from the vice of arbitrariness and irrational classification. It also held that the legislature was free to consider the "desirability and propriety of deleting Section 377 from the statute book or amend the same."

Year, 2014

A Report was released by the 1st Petitioner's organization "Ondede" titled, "A Report on the Human Rights Violations against Transgender in Karnataka, 2014" and documents the malocous arrests and harassment by the police of transgender persons.

28.01.2014 Against the judgment of this Hon'ble Court in *Suresh Koushal*, Naz Foundation filed a review petition seeking to review *Suresh Kumar Koushal* and this Hon'ble Supreme Court dismissed the same. Thereafter curative petitions were filed by Naz Foundation and all other Respondents and these curative petitions are pending consideration before this Hon'ble Court.

15.04.2014 Subsequent to the decision in *Suresh Kumar Koushal*, this Hon'ble Court pronounced its decision in *National Legal Service Authority vs. Union of India*, (2014) 5 SCC 438, whereby this Hon'ble Court expressly recognized the right to gender identity and self identification of gender of transgender persons and further declared hijras, eunuch, apart from the binary gender, as 'third gender' and called for safeguarding their rights under Part III of the Constitution. This decision elaborated on and delineated the rights of transgender persons and called for recognition and protection of their right to gender identity and sexual orientation as an integral part of their rights

under Articles 14, 15, 16, 19 and the right to life under Article 21 of the Constitution of India, 1950.

25.04.2015

Following the judgment in *NALSA*, the Rajya Sabha passed The Rights of Transgender Persons Bill, 2014 was tabled before the Rajya Sabha “to provide for the formulation and implementation of a comprehensive national policy for ensuring overall development of the transgender persons and for their welfare to be undertaken by the State and for matters connected therewith and incidental thereto.”

Year, 2015

The India Exclusion Report 2013-14 highlights in its chapters titled, “Transgender, Transcending the Binaries: Transgender Exclusions in Law and Policy” how the transgender community has been facing discrimination and harassment due to the presence of Section 377 of the IPC.

02.02.2016

The curative petition in *Naz Foundation Trust v. Suresh Kumar Koushal*, Curative Petition (Civil) No. 88-102/2014 and connected Review Petitions 41-55 of 2014 and Civil Appeal 10972 of 2014 concerning section 377 of the

IPC were ordered to be placed before a Constitution Bench by this Hon'ble Court.

Despite the Judgment of this Hon'ble Court in *NALSA*, the fundamental rights of the petitioners as members of the transgender community continue to be violated by section 377 of the IPC.

.07.2016

Hence, the Present Writ Petition.

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)
WRIT PETITION (CIVIL) NO. _____ OF 2016
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

1. Dr. AkkaiPadmashali
D/o Smt. Indira JS and N. Jayaram
Aged 32 years
Residing at: No. 1, 4th Cross,
Maramma Temple Street
Krishnapalya, NGEF Layout,
Bangalore-560038. ...Petitioner No.1

2. Uma Umesh, S/o
Sh. Perumalaiah,
Aged 38 years
Residing at: No. 41/6, 1st Floor,
E Cross, 3rd Main, Mathikere
Bangalore-560054Petitioner No.2

3. Suma M., D/o
Sh. Muniswamy C.,
Aged 28 years,
Residing at: No. 421,
Anthoniswamy Main Road,
Bengaluru – 560045. ...Petitioner No.3

Vs.

1. Union of India
Through its Secretary
Ministry of Law and Justice
New Delhi – 110001. ...Respondent No.1

2. Union of India
Through the Secretary
Ministry of Home Affairs
Central Secretariat
New Delhi - 110001 ...Respondent No.2

A WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF
INDIA FOR ENFORCEMENT OF THE FUNDAMENTAL RIGHTS OF THE
PETITIONERS BY WAY OF ISSUANCE OF AN APPROPRIATE WRIT,

ORDER OR DIRECTION IN THE NATURE OF MANDAMUS AND/OR
CERTIORARI, OR ANY OTHER WRIT, ORDER OR DIRECTION
UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA INTER-ALIA
DECLARING:

SECTION 377 OF THE INDIAN PENAL CODE, 1860 TO BE ULTRA
VIRES PART – III OF THE CONSTITUTION, AND PARTICULARLY THE
GUARANTEE UNDER ARTICLES 14, 15, 19 AND 21 OF THE
CONSTITUTION OF INDIA.

TO

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

THE HUMBLE PETITION OF THE
PETITIONERS ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. The Petitioners, who are members of the transgender community, are filing the present Writ Petition seeking a declaration that Section 377 of the Indian Penal Code is unconstitutional, being violative of their fundamental rights under Articles 14, 19 and 21 of the Constitution.
2. The constitutional validity of Section 377 of IPC is pending consideration before a Constitution Bench of this Hon'ble Court in Curative Petition (Civil) Nos. 88-102 of 2014. The

Petitioners seek to respectfully place before this Hon'ble Court, the discrimination faced by them and members of transgender community on account of their continued criminalization under Section 377 of the IPC despite the protection of their right to gender identity and orientation by this Hon'ble Court in *NALSA*.

3. The brief facts and background giving rise to the filing of this petition are narrated below:

PARTICULARS OF THE PETITIONERS

4. The Petitioners are members of the transgender community. The 1st Petitioner herein is a male to female transgender person and a very well-known transgender rights activist based in Karnataka. The 1st Petitioner runs an organisation based in Bangalore called "Ondede" (Kannada for "convergence") that works with children, women and sexual minorities. In 2015, she was awarded the Karnataka Rajyotsava Award, which is the highest award in the State for her contribution as a social rights activist working for the rights of sexual minorities. She is also the first transgender woman in the State to be given this award. In 2016, she was awarded an honorary Doctorate by the Indian Virtual University for Peace and Education and has become the first transgender person in the country to be awarded a

Doctorate. The 1st Petitioner, for the past eleven years, has been working to educate the sexual minority community members about their rights and has also worked on issues concerning Right to Health and the right to access health services. She has been working on issues of gender and gender based violence with the community of gender and sexual minorities, media, civil society organisations, police, judiciary and the legislature, to bring awareness and change for the community. True Copy of the article titled, "Transgender awarded Honorary Doctorate in Bengaluru", in the Times of India dated 1st June 2016, is annexed herein and is marked as **ANNEXURE-P-1.** (Page No.

True Copy of the article titled, "The one with many "Firsts"" in the Bangalore Mirror, dated 1st November 2015 is annexed herein and is marked as **ANNEXURE-P-2.** (Page No.

True Copy of the news article, titled "A hope for Sexual Minorities" from Deccan Chronicle, dated 2nd November 2015 is annexed herein and is marked as **ANNEXURE-P-3.** (Page No.

True Copy of the Article titled, "Will Dedicate my Award to Civil Movement: Akkai" in the Indian Express dated 1st November 2015 is annexed herein and is marked as **ANNEXURE-P-4.** (Page No.

True copy of the online article titled, "At 12 she wanted to Die. Today she is inspiring Hundreds to fight for Transgender Rights and Justice", on www.betterindia.com, dated 14th April 2015 is annexed herein and is marked as **ANNEXURE-P-5.**
(Page No.

5. In 2014, the 1st Petitioner's organisation 'Ondede', brought out a report on the Human Rights Violations Against Transgenders in Karnataka. This Report documents violence by the police that sexual minorities face on a daily basis, including harassment faced by the threat of Section 377 of the IPC. It highlights various first person accounts of gender-based violence and concludes with certain recommendations to improve the present situation of transgender persons in the state.
6. It is submitted that the work done by the 1st Petitioner herein has been recognized not only by the State government but also at the central government and national level. The 1st Petitioner, in recognition of her work and services was invited by the President of India to attend the swearing-in ceremony of the Hon'ble Chief Justice Shri Altamas Kabir, Supreme Court of India in 2012 and was also invited to attend the swearing in ceremony of the Hon'ble Chief Justice Smt Manjula Chellur of the Kerala High Court. The 1st Petitioner was also part of many consultations at the national level that

made recommendations on rape laws to the Justice Verma Committee. The 1st Petitioner both individually and through her organisation 'Ondede' has taken many measures to bring the issues surrounding Section 377 to the notice of higher authorities, especially the police violence caused to the transgender community due to this section.

True copy of the Report on the Human Rights Violations against Transgenders in Karnataka 2014 compiled by Prerana Kodur and Gowthaman Ranganathan, published by Ondede, is annexed herein and marked as **ANNEXURE-P-6**.
(Page No.

7. The 2nd Petitioner is Uma Umesh, a transgender person. She heads an organization known as 'Jeeva' in Bangalore that works around issues affecting sexual minorities. The 2nd Petitioner's organization spreads awareness on issues facing sexual minorities through a community radio series known as Jeeva's Diary on Radio Active. The 2nd Petitioner has conducted workshops for female born sexual minorities to address the mental health issues using creative arts. Jeeva has organized workshops on photography, sports and internet for the transgender community. Jeeva also brings out a community magazine, titled 'Ananya' which comprises writings and stories by community members, narratives of their experiences, information on their struggles and

campaigns, legal awareness articles and updates on government welfare programmes. The magazine especially creates awareness around issues of discrimination due to Section 377 of the Indian Penal Code.

8. The 3rd Petitioner is a male to female Transgender female. She was born male and underwent sex reassignment surgery and now identifies as female. She is pursuing a BA degree in Journalism, Political Science and Sociology at St. Josephs' College, Bangalore University and is Karnataka's first open transgender student in Bangalore University. She has faced an immense amount of violence, including sexual and physical violence at the hands of the police due to the fact that she is a transgender person.

9. All the Petitioners are transgender persons. The term "transgender" would also encompass various other terminologies and groups of persons who are referred to under different names. In order to clarify the meaning of "transgender" as referred to in this petition, the following definitions may be referred to:
 - a. Transgender: A transgender person is someone whose sense of gender is different from his/her physical characteristics at the time of birth. A person may be a female-to-male transgender (FTM) in that he has a gender identity that is predominantly male, even though

he was born with a female body. Similarly, a person may be a male-to-female transgender (MTF) in that she has a gender identity that is predominantly female, even though she was born with a male body or physical characteristics.

- b. Hijra: An indigenous cultural term used in South Asia to refer to male or female transgender persons.
- c. Transsexual: A transsexual person is one who has undergone physical or hormonal alterations by surgery or therapy in order to assume new physical gender characteristics.
- d. Transvestite: A transvestite is a person who derives pleasure from cross- dressing.
- e. Intersexuality: 'Intersexuality' is a general term used for a variety of conditions in which a person is born with a particular reproductive or sexual anatomy but does not fit the typical definitions of female or male.
- f. Kothi: A feminine homosexual man who usually is the receptive sexual partner.
- g. Eunuch: A castrated male.
- h. Aravani: The Tamil name for hijras. Aravanis trace their name back to the myth of Aravan, Arjuna's son who

was given in sacrifice by the Pandavas before the Mahabharata war.

- i. Queer: The word queer is increasingly being used to connote a diversity of ways of living that contest the embedded nature of heterosexism in law, culture and society. The term denotes a diversity of sexual orientations and gender identities in the Indian context that includes gay, lesbian, bisexual, transgender, hijra, kothi, transsexual, and intersex persons.

RECOGNITION OF FUNDAMENTAL RIGHTS OF TRANSGENDER PERSONS

10. Subsequent to the decision of this Hon'ble Court in *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, this Hon'ble Court passed its landmark judgment reported as *National Legal Service Authority vs. Union of India*, (2014) 5 SCC 438, (hereinafter "NALSA"), where it was specifically held that the transgender community has the right to gender identity and gender orientation as an integral part of their right to life guaranteed under Article 21; the right to equality under Article 14, 15 and 16, and the right to freedom of expression under Article 19.

VIOLATION OF RIGHTS OF TRANSGENDER PERSONS BY SECTION 377

11. The operation of Section 377 of the IPC against the Petitioners militates against the protection mandated to be

given by the State in *NALSA*. The transgender community, being identifiably distinct, is highly vulnerable to repeated harassment through complaints under Section 377, IPC. The violence faced by the transgender community especially at the hands of the police, using Section 377 against them has been documented extensively in many well-researched reports. The Ministry of Social Justice and Empowerment under its 2014 Report of the Expert Committee on the Issues Relating to Transgender Persons specifically refers to police violence and discrimination. In 2003, the Peoples Union for Civil Liberties-Karnataka published a report titled, "Human Rights Violation against the Transgender Community" which is an in-depth study of hijras, kothis and sex-workers in Bangalore. In 2012, the United Nations published a report on the Legal Recognition of Gender Identity of Transgender People in India which analyses the current situation of the transgenders in India and the potential methods for the legal recognition of the gender status of hijras and other transgender people. In 2013-14, the India Exclusion Report contains a complete chapter on the violence faced by transgenders in India. The Petitioners herein have also been subject to repeated harassment by being criminalized and being threatened to be criminalized under Section 377 of the Indian Penal Code. True Copy of a Report titled, "Police

Terror on Sexual Minorities in Hassan Karnataka” is annexed herein and is marked as **ANNEXURE-P-7**. (Page No.

True Copy of the relevant Extracts of the Report of the Expert Committee on the Issues Relating to Transgender Persons 2014 prepared by the Ministry of Social Justice and Empowerment is annexed herein and is marked as **ANNEXURE-P-8**. (Page No.

True Copy of the relevant extracts of Peoples Union for Civil Liberties-Karnataka report titled, “Human Rights Violation against the Transgender Community” of the year 2003 is annexed herewith as **ANNEXURE-P-9**. (Page No.

True Copy of the relevant extracts of the India Exclusion Report dated 2013-14 is annexed herein and marked as **ANNEXURE-P-10**. (Page No.

12. Therefore, in order to protect the rights of transgender persons, it is necessary to declare Section 377 as *ultra vires* Part III insofar as it applies to consenting adults. If Section 377 is allowed to stay on in the statute book, the protection guaranteed to transgender persons by *NALSA* under Articles 14, 15, 19 and 21 of the constitution will be negated.

PRIOR LITIGATION ON THE CONSTITUTIONAL VALIDITY OF SECTION 377

13. The present petition arises out of the following background:

- (a) In *Naz Foundation v. Government of NCT, Delhi*, (2009) 111 DRJ 1 [W.P. (c) 7455/2001], the Hon'ble High Court of Delhi, on hearing the petition challenging the validity of Section 377 of the Indian Penal Code 1860, declared that Section 377 insofar as it criminalizes consensual sexual acts of adults, was ultra vires Part III of the Constitution, particularly, Articles 14, 15 and 21 of the Constitution of India.
- (b) Subsequently, certain citizens, not being parties in *Naz Foundation*, challenged the judgment of the Delhi High Court by filing a Special Leave Petition before this Hon'ble Court in *Suresh Kumar Koushal and Anr v. Naz Foundation and Ors* [SLP (C) No. 15436 of 2009 converted to Civil Appeal No. 10972 of 2013 reported in (2014) 1 SCC 1]. This Hon'ble Court allowed the appeal, holding that Section 377 "did not suffer from the vice or unconstitutionality" and held the *Naz* decision by the Delhi High Court to be "legally unsustainable." The Hon'ble Court clarified that the decision was "merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of Section 377" and that the legislature was free to consider the "desirability and propriety of deleting Section 377 from the statute book or amend the same." True Copy of Judgment dated 11.12.2013 titled as "*Suresh Kumar*

Koushal and Anr Vz. Naz Foundation and Ors” passed by this Hon’ble Court in Civil Appeal No.10972 of 2013 is annexed herewith as **ANNEXURE-P-11**. (Page No.

- (c) Against this Judgment, Naz Foundation filed a review petition seeking to review *Suresh Kumar Koushal* and this Hon’ble Supreme Court dismissed the same.
- (d) In the same year as, but subsequent to, the decision in *Suresh Kumar Koushal*, this Hon’ble Court pronounced another decision in *National Legal Service Authority vs. Union of India*, (2014) 5 SCC 438, whereby this Hon’ble Court expressly recognized the right to gender identity and self identification of gender of transgender persons and further declared hijras, eunuch, apart from the binary gender, as ‘third gender’ and called for safeguarding their rights under Part III of the Constitution. This decision elaborated on the rights of transgender persons and called for recognition and protection of their right to gender identity and sexual orientation as an integral part of their right to life under Article 21; the right to equality under Article 14, 15 and 16, and the right to freedom of expression under Article 19 of the constitution. True Copy of the Judgment dated 15.04.2014 titled as “*National Legal Service Authority vs. Union of India*” passed by this Hon’ble

Court in Writ Petition(C) No.400 of 2012 is annexed herewith as **ANNEXURE-P-12**. (Page No.

- (e) Naz Foundation and the other parties thereafter filed a curative petitions in *Naz Foundation Trust v. Suresh Kumar Koushal*, Curative Petition (Civil) No. 88-102/2014. This Hon'ble Court directed the Curative Petition (Civil) No. 88-102/2014 and connected Review Petition 41-55 of 2014 and Civil Appeal 10972 of 2014 to be placed before a Constitution Bench. True Copy of the Order dated 02.02.2016 passed by this Hon'ble Court in Curative Petition (Civil) No. 88-102/2014 is annexed herewith as **ANNEXURE-P-13**. (Page No.
- (f) While the said curative petitions are pending, the rights of transgender persons under Articles 14, 15, 19 and 21 of the constitution have been protected under *NALSA*. In light of the decision in *NALSA*, the issue of the rights of transgender persons and violation of their rights due to the operation of Section 377, IPC is necessary to be considered by this Hon'ble Court.

LEGISLATIVE MEASURES RECOGNIZING RIGHTS OF TRANSGENDER PERSONS

10. In 2014, following the judgment in *NALSA*, The Rights of Transgender Persons Bill, 2014 was tabled before the Rajya Sabha “ to provide for the formulation and implementation of

a comprehensive national policy for ensuring overall development of the transgender persons and for their welfare to be undertaken by the State and for matters connected therewith and incidental thereto.” [Preamble]

True Copy of the Rights of Transgender Persons Bill, in the year 2014 is annexed herewith and marked as **ANNEXURE-P-14**.(Page No.

11. Despite these developments, Section 377 of the IPC which criminalizes transgender persons, acts as an obstacle to the full realization of the rights of transgender persons and meaningful recognition of their right to life with dignity, personal autonomy and self-determination.
12. The Petitioners 1 to 3 are transgender persons whose right to gender identity and autonomy as read into Article 14, 15, 19 and 21 by *NALSA* are adversely affected and violated by the continued existence and enforcement of Section 377 of the Indian Penal Code against consenting adults, particularly against transgender persons and therefore the Petitioners are constrained to file this present petition under Article 32 of the Constitution of India before this Hon’ble Court.
13. The Petitioners submit that since they are challenging the vires of a statute, i.e., Indian Penal Code, no representation to any authority is warranted before invoking the powers of

this Hon'ble Court under the provisions of Article 32 of the Constitution of India.

14. The Petitioners submit that the challenge in the present petition pertains to the validity of:

SECTION 377 OF THE INDIAN PENAL CODE, 1860,
WHICH READS:

“377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

15. That the present writ petition involves the following substantial questions of law as to the interpretation of the Constitution:

- I. Whether, in light of the decision in *NALSA*, it can be held that Section 377 of the Indian Penal Code, 1860, violates the rights of the Petitioners as members of the transgender community?
- II. Whether Section 377 of the Indian Penal Code, 1860 insofar as it applies to consenting adults violates the rights of the Petitioners being transgender persons

under Articles 14, 15, 19 and 21 of the Constitution of India and hence is ultra vires Part III of the Constitution of India?

16. That the Petitioners have filed the present Writ Petition seeking protection of their fundamental rights on the following grounds:

GROUND

- (A) **THAT** this Hon'ble Court in **NALSA**, held that the right to equality has been declared as a basic feature of the constitution and that Article 14 guarantees to everyone the equal protection of laws so that everyone including transgender persons are afforded equal protection of the laws. It acknowledged that the non-recognition of the identity of transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail and also by the police. It is submitted that Section 377 of the IPC works unequally against transgender persons based on the non-recognition of their gender and sexual identity. Because the gender identity of transgender persons is not based on their biological sex, section 377 makes an unreasonable classification against transgender persons making all acts of sexual intercourse by them a criminal offence due to the non-recognition of their gender identity,

therefore treating them unequally and violating their fundamental right to equality under Article 14 of the Constitution.

(B) THAT in *NALSA*, this Hon'ble Court held that discrimination on the ground of sexual orientation or gender identity impairs equality before the law and equal protection of the law and violates Article 14 of the constitution. In the present case, Section 377 is ultra vires Article 14 of the Constitution as it discriminates against the Petitioners as members of the transgender community by not recognizing their gender identity or sexual orientation and criminalizing their acts of sexual intercourse.

(C) THAT the decision in *Suresh Kumar Koushal* mainly concerned the rights to privacy, equality and dignity of the LGBT community, i.e., the which includes 'lesbian', gay, bisexual and transgender persons. However, the ratio of the judgment focused mainly on rights of homosexual men and did not address the specific instances of discrimination and harassment faced by the transgender community. The rights of the transgender community in particular were left unaddressed and undecided. The transgender community faces specific types of discrimination and is more vulnerable than other LGBT members, because the members of this group are publicly identifiable by their mannerisms. They are

stigmatized and discriminated against in the criminal justice system. The police especially target transgender persons when they find them involved in begging and sex work. As detailed in Annexure – P-7, transgender persons are subjects of brutal attacks, harassment and false criminal cases with the aid of section 377 of the IPC, forcing transgender persons to seek release by payment of fines or through intervention from NGOs and community-based organizations. Hence the question of the rights of transgender persons and the applicability of Section 377 in the context of the transgender persons, necessitates distinct reasoning and discussion of issues than the reasoning offered in *Suresh Kumar Koushal*. Therefore, despite the ratio of *Suresh Kumar Koushal* and the subsequent curative petitions, the rights of transgender persons vis-a-vis Section 377 largely remains unanswered and requires a new ratio to be laid down by this Hon'ble Court.

(D) THAT this Hon'ble Court in *NALSA*, specifically observed that historically, “**Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons.**” [Para 19] The Hon'ble Court further held that that sexual orientation includes transgender and

gender-variant people which also includes homosexuals, bisexuals, heterosexuals, asexuals etc. The Hon'ble Court held, "***Gender identity and sexual orientation... are different concepts. Each person's self - defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self - determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.***" [Para 22]

Thus, this Hon'ble Court, in *NALSA*, has recognized certain essential ingredients of the rights of transgender persons and has specifically noted that these are threatened by the operation of Section 377. Therefore, the constitutionality of Section 377 requires to be reconsidered not only under the curative petitions pending before this Hon'ble Court but also under the present petition because the protections to transgendered persons delineated in *NALSA* pose new challenges to the ratio in *Suresh Kumar Koushal* on validity of Section 377, requiring a new ratio to be laid down.

- (E) **THAT** this Hon'ble Court in *NALSA*, contrary to its finding in *Suresh Koushal*, observed that even as far back as in 1884 in *Queen Empress v. Khairati* [ILR (1884) 6 All 204] a transgender person was arrested and prosecuted under

Section 377 on suspicion that he was a “habitual sodomite” and was later acquitted on appeal. Following this, this Hon’ble Court held that “*Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons.*” Thus, this Hon’ble Court clearly recognized that Section 377, IPC is used to harass and abuse transgender persons. In fact, even till date Section 377 is used by the police to harass and criminalize transgender persons, thus depriving them their rights under Part III of the Constitution and should be declared to be unconstitutional.

(F) **THAT** Section 377 does not meet the test of reasonable classification under Article 14. In *D.S. Nakara v. Union of India*, (1983) 1 SCC 305, this Hon’ble Court, relying on *Ram Krishan Dalmia v. Justice S.R. Tendolkar*, AIR 1958 SC 538, held,

“In order, however, to pass the test of permissible classification, two conditions must be fulfilled, viz., (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that that differentia must have a rational relation to the objects sought to be achieved by the statute in question” [Para 11]

It is clear that Section 377 does not satisfy both the above conditions. There is no intelligible differentia that justifies the classification between transgender persons and persons of other genders. Section 377 by criminalizing carnal intercourse 'against the order of nature' which means non-penile-vaginal intercourse between a man and a woman, makes an unintelligible classification against transgender persons because their gender identity and sexual orientation is not recognized within section 377, and hence all their acts of sexual intercourse would automatically fall as being 'against the order of nature' thus making them criminal offences. Such classification is unreasonable, arbitrary and in violation of the right to equality under Article 14 of the Constitution.

(G) **THAT** as held by this Hon'ble Court in *NALSA*, sex discrimination under Article 15 includes discrimination on the basis of gender identity and sexual orientation. It held "*Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of 'sex' under*

Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female". If such an interpretation is given to 'sex' within Article 15, then section 377 would be ultra vires Article 15 as it violates the right to transgender persons against sex discrimination. Section 377 criminalizes all sexual intercourse by transgender persons without recognizing that the gender identity of transgender persons may not match with their biological sex, and they may consider themselves to be of a different gender than the gender that they are born with. Such non-recognition of a person's gender identity under Section 377 amounts to discrimination on the basis of sex, which is one of the prohibited grounds of discrimination under Article 15 of the constitution.

- (H) **THAT** as held by this Hon'ble Court in NALSA, the right to freedom of speech and expression, includes in the context of transgender persons, their freedom to express their chosen gender identity through varied means, including clothing, words, action and conduct, and that the values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19 (1) (a). This right to

self-expression of their chosen gender identity would include the most basic feature of expressing themselves through acts of sexual intercourse with their chosen partners, and Section 377 by making all acts of sexual intercourse other than penile-vaginal intercourse between 'men' and 'women' as criminal offences. Since transgender persons' gender identity has been recognized and it has also been recognized that they have the right to be declared as third gender, by criminalizing their forms of expression of their gender identity section 377 violates their fundamental right to freedom of speech and expression, privacy and autonomy.

- (I) **THAT** Section 377, by discriminating against transgender persons, restricts their freedom of speech and expression under Article 19 91) (a), as it restrains them from even expressing their gender identity in manner of words, dressing or other forms of expression. Because transgender persons are largely recognizable as being transgender due to their manner of dressing, mannerisms, conduct, they are vulnerable to harassment by the police under Section 377 of the IPC, which has been recognized by this Hon;ble Court in NALSA, and hence Section 377 is ultra vires Article 19 (1)(a) of the constitution.

- (J) **THAT** Section 377 of the IPC violates the right to life of transgender persons under Article 21 of the Constitution of

India. This Hon'ble Court, in a plethora of cases, has read the right to dignity, privacy and health etc., as a part of the right to life under Article 21. By depriving transgender persons the freedom to self-determine their gender identity and engage in consensual sexual acts as adults, Section 377 violates the rights to dignity, privacy and health of transgender persons.

- (K) **THAT** this Hon'ble Court in *NALSA*, has recognized the right to gender identity and sexual orientation as an essential part of the right to a dignified life of transgendered persons. *NALSA* held that, "*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 right to dignity and freedom guaranteed under our Constitution*".
- "*Article 21, as already indicated, protects one's right of self determination of the gender to which a person belongs. Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of "personal autonomy" and "self-determination"*. If one's gender identity is to be respected and protected as being integral to their dignity, the presence of Section 377 would go to the root of violating their autonomy and right to life. This is

because Section 377 prohibits any sexual conduct that is 'unnatural' or against the order of nature. For the transgender community, their sexual identity may not be addressed in what is termed as "the order of nature" and hence their most basic expression of their gender identity would be termed as a criminal offence.

- (L) THAT the right to life under Article 21 of the constitution includes the right to live with dignity. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608, this Hon'ble Court held,

"We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings...Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights." [Para 8]

Section 377, by depriving transgendered persons of their right to gender identity and by criminalizing acts by prohibiting the expression of their gender identity and sexual

orientation, damages the foundation of the right to a dignified life of transgender persons and is ultra vires Article 21 of the constitution.

(M) **THAT** in *NALSA* this Hon'ble Court clearly held that self-identification is the basis of gender identity:

“Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other identified category.”

[Para 21]

Thus, while *NALSA* recognizes the right of transgender persons to determine their individual gender identity, Section 377 criminalizes sexual acts depending on the gender identity of the transgender person. For instance, a male to female transgender person would face the threat of criminal action under Section 377 if such person were to engage in sexual acts with a female or another transgender identifying herself as female. Therefore Section 377 deprives transgender persons the freedom to choose their gender identity without facing the threat of criminalization.

(N) **THAT** the constitutional invalidity of Section 377 is clear in light of the observations in *NALSA* that reiterate sexual orientation as an integral part of a person's right to life:

Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexuals, bisexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. [Para 22]

Section 377 criminalizes self-identification and self-definition of sexual orientation of transgender persons as it makes it criminal for transgender persons to act on their self-defined sexual orientation and gender identity, thereby depriving transgender persons of integral parts of their right to self-determination, dignity and freedom.

(O) **THAT** this Hon'ble Court has recognized the right to privacy as one of the facets of the right to life. The right to identity, personal autonomy and the right to be left alone, all form a

part of this right to privacy that is infringed by the implementation of Section 377 on transgender persons. In *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295, this Hon'ble Court held: *"Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures."*

In *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148, this Hon'ble Court held,

"Any right to privacy must encompass and protect the personal intimacies of the home, the family marriage, motherhood, procreation and child rearing."

Section 377, permits interference with the private life of adult transgender persons by attempting to regulate their actions within the privacy of their home and actions that are a result of the exercise of their personal autonomy and liberty. The implementation of Section 377 on consensual acts of adults, results in a calculated interference with privacy of a transgender person, thereby violating Article 21 of the Constitution of India.

- (P) **THAT** Section 377 violates the rights to gender identity and sexual orientation as guaranteed to transgendered persons in *NALSA*. In *Suresh Kumar Koushal*, the Hon'ble Court held that Section 377 does not criminalize a particular people, identity or orientation. In giving such a finding, there has been a total non-recognition of the history of discrimination that the transgender community faces due to their gender identity. As held in *NALSA*, the transgender community has been criminalized as a people historically by a series of criminal laws, and Section 377 of the Indian Penal Code, is but one of them as it criminalizes their sexual conduct and also makes them vulnerable to harassment and violence by the police.
- (Q) **THAT** the principles highlighted in *NALSA* have been followed by various High Courts in the country. The Hon'ble High Court of Madras in *K. Prithika Yashini (Transgender) v. Chairman, Tamil Nadu Uniformed Services Recruitment Board*(2015) 8 MLJ 734, in a petition filed by a transgender person during the recruitment of Sub-Inspector posts, held that post-*NALSA*, it was mandatory for every public authority to enforce and safeguard rights of persons from transgender community and ordered the recruitment authority to mandatorily include third gender as a separate category for the purpose of recruitment and selection. In *Nangai v. Superintendent of Police*[(2014) 4 MLJ 12] the Hon'ble High Court of Madras referred to *NALSA* and observed that

termination of service of the employee by labeling her as 'Transgender' was against the fundamental rights of the person as no service could be terminated on the basis of sexual identity of the person.

(R) THAT the Hon'ble Allahabad High Court in *Ashish Kumar Misra v. Bharat Sarkar*, AIR 2015 All 124 recognized the rights of transgender persons to obtain a ration card in the context of Section 13 of the National Food Security Act, 2013. The Hon'ble Court, relying on NALSA, held, "*Preventing discrimination in all walks of life is one facet of the right of transgenders to live in dignity, with the confidence that they can lead their lives on their own terms in realization of gender identity.*"

(S) The Hon'ble High Court of Delhi, in a case of harassment complaint by a transgender person in *ShivaniBhat v. State of NCT &Ors.* [2016 II AD (Delhi) 12], explained the need to protect transgender persons by highlighting the vulnerable status of the community: "*Transgenders have long lived on the fringes of society, often in poverty, ostracized severely, because of their gender identity. They have for too long had to endure public ridicule and humiliation; have been socially marginalized and excluded from society, their basic human rights have been severely denuded*". The Hon'ble Court noted, "*Despite the decision of the Hon'ble Supreme Court in*

National Legal Services Authority v. Union of India and Ors., the trauma, agony and pain, which members of the transgender community have to undergo continues unabated”.

- (T) THAT even in a decision that pre-dated *NALSA*, the Madras High Court in *Jayalakshmi v. State of Tamil Nadu*, (2007) 4 MLJ 849 dealt with an allegation of sexual harassment of a Transgender person in police custody. The Hon’ble Court held that rape of a transgender person in police custody by the officers was a grave offence that violates basic fundamental rights of the victim. The Hon’ble Court extended the protection provided by the legal system to transgender persons and held that in cases of sexual harassment, “*the state is obliged to pay interim compensation while dealing with victims of rape after criminal trial reaches finality*”. Thus, the High Courts across the country have inculcated the principles underlined in *NALSA* and the rights recognised therein. Therefore, the law laid down in *NALSA* has become a settled proposition and the High Courts have imbibed the spirit of the principles laid down in *NALSA*. Section 377 of the IPC however is in complete violation of the recognition of fundamental rights as laid down in *NALSA* and is ultra vires part III of the constitution.

(U) That there is an apparent difference in views expressed by this Hon'ble Court in *Suresh Kumar Koushal*, and in *NALSA*. Whereas in *Suresh Kumar Koushal* it was observed that there is no material to justify a finding that homosexuals, gays, etc. are being subjected to discriminatory treatment either by the State or its agencies or the society, in *NALSA* this Hon'ble Court recognized the widespread oppression and discrimination faced by members of the transgender community, which includes homosexuals, etc. In *NALSA* this Hon'ble Court upheld the right to gender identity of transgender persons. Thus, these two judgments reflect differing views, and hence this petition should be placed before the Constitution Bench that is hearing the other pending curative petitions on Section 377, as held by this Hon'ble Court in ***Rakesh Kumar v. State of Haryana and Others***, (2014) 8 SCC 892.

(V) THAT it is imperative that the Petitioners are permitted to challenge the vires of Section 377 IPC, because while upholding the validity of Section 377 in *Suresh Kumar Koushal*, this Hon'ble Court had proceeded on the basis that the respondent no. 1 therein (Naz Foundation) had failed to furnish adequate material to establish that homosexuals, gays, etc. face hostile discrimination at the hands of the State or its agencies or the Society. This is in stark contrast to the discrimination faced by transgender persons like the

petitioners, which is recognized by this Hon'ble Court in the *NALSA* judgment, and is also well established through material placed on record in the present petition. It is therefore necessary that an extremely important issue of Constitutional jurisprudence that affects the most fundamental and basic rights of a large number of people does not get thwarted due to lack of factual particulars.

(W) THAT the finding of this Hon'ble Court in *Suresh Kumar Koushal* that Section 377 IPC does not criminalise a particular people or identity or orientation is erroneous and requires reconsideration. Transgender persons have a gender and sexual identity different from the sex assigned to them at birth. The free expression of their gender identity by transgender persons automatically falls foul of Section 377 IPC. Therefore, Section 377 IPC criminalizes transgender persons, and the law laid down in *Suresh Kumar Koushal* requires reconsideration in that light.

(X) THAT while recognizing that vagueness of a statutory provision can be a ground for declaring it as unconstitutional, this Hon'ble Court in *Suresh Kumar Koushal* however held that harassment and mistreatment of persons belonging to the LGBT community is neither mandated by Section 377 nor condoned by it and the mere fact that the Section is misused by police authorities is not a reflection on the vires of the

section. It is submitted that this finding is erroneous and requires reconsideration. If Section 377 IPC is held to apply to consenting adults in private, as was done in *Suresh Kumar Koushal*, then enforcement of the Section against consenting adults is not “misuse” of the provision by police authorities, but “invocation” of the provision. This “invocation” is on account of the interpretation placed upon Section 377 by this Hon’ble Court in *Suresh Kumar Koushal*, and results in denial of expression of their gender or sexual identities by transgender persons. Thus, application of Section 377 has the direct effect of violating the fundamental rights of transgender persons.

SUBMISSIONS ON MAINTAINABILITY OF THE PRESENT PETITION

17. It is submitted that this Petition under Article 32 is maintainable despite the pendency of curative petitions before this Hon’ble Court. The present Petitioners were not parties in the pending petitions and cannot file a review or curative petition against the judgment in *Suresh Kumar Koushal*’s case. Hence, as held by this Hon’ble Court in *Ramachandra Shankar Deodhar v. State of Maharashtra and Others*, (1974) 1 SCC 317, the Petitioners, not being parties to the earlier decision, cannot be said to have an adequate alternative remedy available to them.

18. In *P. Sudhakar Rao and Ors. v. U. Govinda Rao and Ors.* , (2007) 12 SCC 198, this Hon'ble Court held that pendency of a similar matter before the larger Bench did not prevent the Court from dealing with a similar appeal on its merits. Further, as held by a Constitution bench of this Hon'ble Court in *Amalgamated Coalfields v. Janpada Sabha*, AIR 1964 SC 1013, the principle of constructive res judicata cannot be applied to petitions under Article 226 and 32 and that "petitioners cannot be precluded from raising new contentions on which their challenge is based."
19. That the present petition is maintainable despite the pending curative petitions filed pursuant to the decision in *Suresh Kumar Koushal* in view of the law laid down in ***Sanjay Singh and Anr v. U.P. Public Service Commission, Allahabad and Anr***, (2007) 3 SCC 720, where this Hon'ble Court held that a petition under Article 32 cannot be dismissed as not maintainable merely because it seeks to distinguish or challenge the ratio decidendi of an earlier judgment. This Hon'ble Court held:
- "..where violation of a fundamental right of a citizen is alleged in a petition under Article 32, it cannot be dismissed, as not maintainable, merely because it seeks to distinguish or challenge the ratio***

decidendi of an earlier judgment, except where it is between the same parties and in respect of the same cause of action. Where a legal issue raised in a petition under Article 32 is covered by a decision of the Supreme Court, the Court may dismiss the petition following the ratio decidendi of the earlier decision. Such dismissal is not on the ground of “maintainability” but on the ground that the issue raised is not tenable, in view of the law laid down in the earlier decision. But if the Court is satisfied that the issue raised in the later petition requires consideration and in that context the earlier decision requires re-examination, the Court can certainly proceed to examine the matter (or refer the matter to a larger Bench, if the earlier decision is not of a smaller Bench). When the issue is re-examined and a view is taken different from the one taken earlier, a new ratio is laid down.” [Para 10]

20. The present petition seeks to challenge Section 377 of the IPC, in light of the decision in *NALSA* that specifically recognized the rights to gender identity and gender orientation of the transgender persons and this requires the reconsideration of the ratio decidendi of the earlier decision in ***Suresh Kumar Koushal***, Thus, the present petition is maintainable.

21. That another writ petition was recently filed challenging the constitutional validity of Section 377, bearing Writ Petition (Criminal) No. 76 of 2016. In its order dated 29.06.2016, a Division Bench of this Hon'ble Court noticed that the issue relating to Constitutional Validity of Section 377 is pending before a Constitution Bench, on account of which the Writ Petition was directed to be placed before the Hon'ble Chief Justice for appropriate orders. True copy of Order dated 29.06.2016 passed in Writ Petition (Criminal) No. 76 of 2016 is attached herewith as **ANNEXURE P-15** (Page No.
22. That the Petitioners have not filed any other petition before this Hon'ble Court or any other court seeking the same relief.

PRAYER

In view of the facts and circumstances stated hereinabove, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to:-

- (a) Declare Section 377 of the Indian Penal Code, 1860 as ultra vires Part III of the Constitution of India, 1950, as violative of Articles 14, 15, 19 and 21 of the Constitution insofar as it applies to consensual acts of adults; and
- (b) Grant such other reliefs as this Hon'ble Court may deem fit and proper in light of the facts and circumstances of the case.

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

DRAWN BY:

FILED BY:

(JAYNA KOTHARI), (VARSHA IYENGAR)

&

(ROHIT SHARMA)

ADVOCATES

(O.P. BHADANI)

ADVOCATE FOR THE PETITIONERS

DRAWN ON: .07.2016

FILED ON: .07.2016