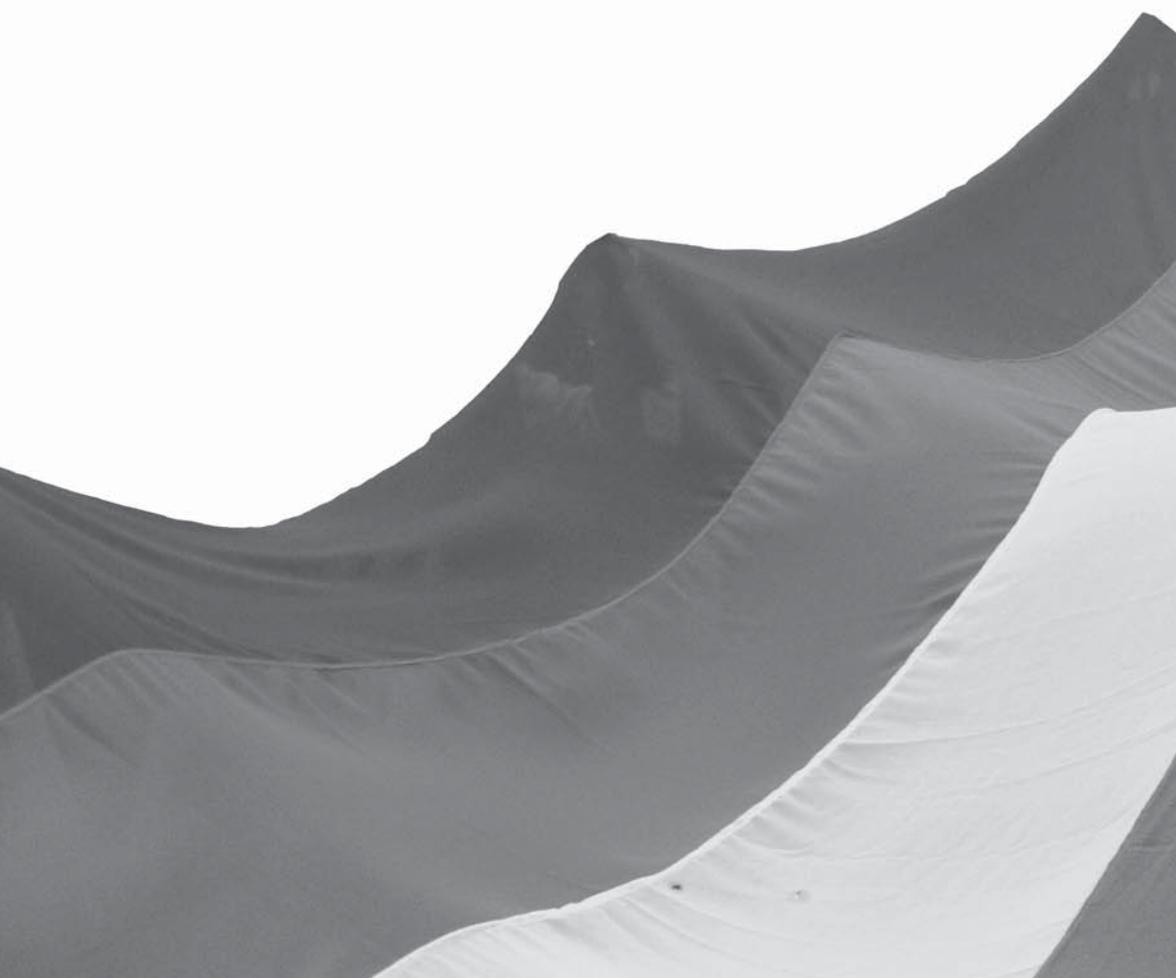


The Right that Dares to Speak its Name

Naz Foundation vs. Union of India and Others

**Decriminalising Sexual Orientation
and Gender Identity in India**

Published by: Alternative Law Forum, Bangalore, India



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The judgment of the Delhi High Court in *Naaz Foundation v. Union of India*, delivered on 2nd July, 2009, triggered a euphoric response from the Lesbian, Gay, Bisexual and Transgender (LGBT) community as well as from the wider activist community. The judgment was at the same time both a remarkable assertion that LGBT persons are indeed a part of the Indian nation as well as a statement that the judiciary remains an institution committed to the protection of those who might be despised by a majoritarian logic. What the *Naaz* judgment also triggered was a wider conversation on LGBT rights in living rooms, offices and tea shops across the country. LGBT persons were out of the closet and literally onto the front pages of all Indian papers and news channels. It's very rare for a judgment to have such an instantaneous social impact as to actually begin a national conversation. Therein lay the magic of the *Naaz* judgment!

The judgment in 2009 really built upon a decade of work by the LGBT activists. The most recent (prior to the *Naaz* judgment that is) visible manifestation of the wider profile that LGBT struggles were getting in India was really the Queer pride events which took place in Delhi, Bangalore, Kolkata, Bhubaneswar and Chennai on the

weekend before the *Naz* judgment, on June 28, 2009. The fact that the judgment was preceded by the Pride events, although coincidental, also points to the fact that the uniqueness of the struggle against Section 377 was that it was simultaneously a political demand and a legal battle.

As a political demand, the struggle against Section 377 can possibly date back to the protest against police harassment which was organised by AIDS Bedhbhav Virodhi Andolan (ABVA) in 1993 where for the first time the demand for the repeal of the law was raised in a public manner. Since then the LGBT community has engaged the public attention through numerous protests, demonstrations, Fact Finding Reports, Conferences, Film Festivals and of course (most recently) pride marches.

The court room struggle dates back to the first legal challenge to Section 377 which was filed by ABVA in 1994, in response to a statement by Kiran Bedi that she could not distribute condoms in prison as it would amount to abetting an offence under Section 377. However, the petition was dismissed as the ABVA group became defunct.

The next key development was the filing of a petition by the Naz Foundation challenging Section 377 in 2001. The uniqueness of the *Naz* petition is that though it began as a legal petition by one NGO it slowly gathered wider support both within the LGBT community as well as within sections of the public. Thus the *Naz* petition began to carry the burden of the expectations of a community, with each torturous turn in the legal proceedings followed with great interest by members of the community. Initially the way the LGBT community was kept abreast of the legal developments was both through the organising of periodic consultations on the petition by the Lawyers Collective (the Lawyers for Naz Foundation) for LGBT groups as well as by regular postings on an LGBT listserv. However the media soon began to evince more interest and report regularly on the developments. For building this uniquely 'public character' of the 'public interest litigation', credit must go to the Lawyers Collective which began a process of consulting with the community at each stage of the public interest litigation.

The various shifts and turns in the *Naz* petition which were so avidly followed by the LGBT community included:

2002	Joint Action Kannur (JACK) filed an intervention supporting the retention of the law on the ground that HIV does not cause AIDS, and that this law is required to prevent HIV from spreading.
2003	The Government of India (Ministry of Home Affairs) filed an affidavit supporting the retention of the law on the grounds that the criminal law must reflect public morality and that Indian society disapproved of homosexuality.
2004	The Delhi High Court dismissed the petition on the ground that the petitioner, Naz Foundation, was not affected by Section 377 and hence had no 'locus standi' to challenge the law.
2004	The Delhi High Court rejected a review petition filed which challenged the above mentioned order.
2006	On an appeal filed by Naz Foundation, The Supreme Court passed an order remanding the case back to the Delhi High Court so the matter could be heard on merits .
2006	National AIDS Control Organisation (NACO) filed an affidavit stating that the enforcement of Section 377 is a hindrance to HIV prevention efforts.
2006	An intervention was filed by B.P. Singhal stating that homosexuality is against Indian culture and that the law needs to be retained.
2006	An intervention was filed by Voices Against 377 supporting the petitioner and stating that Section 377 is violative of the fundamental rights of LGBT persons.
2008	The matter was posted for final arguments before C.J. Shah and J. Muralidhar.
2009	2 July – Judgment delivered.

As can be noted from the above time line, some of the key developments were the interventions filed by an AIDS denial group called Joint Action Kannur (JACK) as well as by B.P. Singhal, a former BJP Rajya Sabha MP. These developments indicated that the struggle against Section 377 not only had to factor in the state but also take on board civil society voices such as that of the Hindu Right as well as AIDS-deniers. In 2006, to further strengthen the petitioners Naz Foundation, 'Voices Against Sec 377', a coalition of child rights, women's rights and queer rights groups, filed an intervention supporting the demand for a reading down of the law.

So, when the Delhi High Court Bench of Chief Justice Shah and Justice Muralidhar heard the final arguments in 2008, they had to contend with the range of opinions, all of which had to be heard and considered before the judgment could be delivered. Though the final arguments were completed in November 2008, the judgment was finally delivered only on July 2, 2009. It was an eagerly awaited judgment both in terms of what it could mean for the LGBT community as well what it could portend for Indian Constitutional law. In both contexts it did not disappoint. As one activist noted, 'it was as if a weight had been lifted from our shoulders and one was finally set free' and legal academics noted how the *Naz* judgment could open out new interpretations of non-discrimination law.

Huge as the impact of this pronouncement was, not many can directly access this judgment due to the sometimes inaccessible nature of legal language. This compilation aims to aid a wider comprehension of the nature, the logic and reasoning followed by the Delhi High Court as well as to understand the implications of the *Naz* judgment. It aims to contextualise, elucidate and explicate on the *Naz* judgment.

To do so this compilation is envisaged in three parts:

In the first part titled *A Schematic Guide: Naz Foundation v. Union of India*, we aim to provide a schematic break-up and guide to the various components of the judgment. This section will introduce the judgment in a manner which will hopefully be easily comprehensible to a lay audience.

In the second part titled *Background: The Naz Judgment* we reproduce the Outline of arguments submitted by Mr. Shyam Divan to the Bench. We have selected this from the voluminous written submissions by all parties only because this written submission centrally focusses on the question of dignity on which the *Naz* judgment is hinged as well as because the suggested operative directions provides an insight into possible future legal demands. The second part also includes an edited transcript of the final arguments before the Delhi High Court. The edited final arguments provide an insight into the range of arguments before the Delhi High Court, the modes in which the arguments were made, as well as the responses of the Judges.

The third part has a range of opinion pieces which were published in the immediate aftermath of the judgment. The opinion pieces seek to contextualise the judgment within the larger historical canvas and also explicate on key aspects of the judgment.



Naaz Foundation vs. Union of India and Others

WP(C) 7455/2001 – Decided July 2, 2009

The Law

Section 377 of the Indian Penal Code was drafted by Lord Macaulay and enacted in 1860 during British colonial rule. Section 377 IPC is under a sub-chapter titled “Of Unnatural Offences”. It reads:

“377. Unnatural Offence- 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.”

The law makes it a crime to engage in ‘carnal intercourse against the order of nature’. This has been interpreted by the judiciary to include all sexual acts other than penile-vaginal intercourse. This includes anal

intercourse, oral sex, and even mutual masturbation. In practice, the law has been enforced almost exclusively against homosexuals and other sexual minorities and commonly used as a tool to threaten and harass Lesbian, Gay, Bisexual and Transgender (LGBT) persons.

The Parties

Naz Foundation [Petitioner] is a non-governmental organisation (NGO) dedicated to HIV/AIDS outreach and intervention with the men-who-have-sex-with-men (MSM) community. They filed a Public Interest Litigation challenging the constitutional validity of Section 377, arguing that it severely hampered HIV/AIDS public health efforts and thus the right to health of the MSM community.

The **Union of India** was represented by the **Ministry of Home Affairs** and the **Ministry of Health & Family Welfare**. Much to the Court's consternation, the two ministries took contradictory stands, with the Home Ministry supporting Section 377 and the Health Ministry siding with the petitioner's public health arguments against Section 377. The argument of the Home Ministry was that law cannot run separately from society and that Section 377 of the IPC reflected the values and morals of Indian society.

The **National AIDS Control Organisation (NACO)**, a subdivision of the Health Ministry, submitted an affidavit corroborating the Naz Foundation's contention that Section 377 hampers HIV outreach and prevention efforts. By driving high-risk activities underground, NACO said, Section 377 made it extremely difficult to get needed information and services to those most at risk of contracting HIV.

Voices Against 377 is a coalition of twelve women's rights, child rights and LGBT groups which was dedicated to ending Section 377's criminalisation of the lives of LGBT persons. In their affidavit, they advanced the argument that Section 377 creates an association of criminality towards people with same-sex desires and that its continued existence creates and fosters a climate of fundamental rights violations of the LGBT community.

Mr. B.P. Singhal, a former BJP politician, submitted an affidavit arguing that Indian society considers homosexuality to be repugnant,

immoral and contrary to the cultural norms of Indian society and therefore deserving of criminalisation.

Joint Action Committee Kannur (JACK) submitted an affidavit disagreeing with the Naz Foundation and NACO's contention that Section 377 hampers HIV/AIDS prevention and treatment. Essentially, they argued that Section 377 in fact served to prevent the spread of HIV by deterring people from engaging in high-risk activity. They also denied that HIV causes AIDS.

The **Government of NCT of Delhi**, the **Delhi State AIDS Control Society** and the **Delhi Commissioner of Police** were also parties to the petition. They did not file any affidavit or written submissions.

The Bench

The case was heard before a two-judge bench of the Delhi High Court, comprised of **Chief Justice A.P. Shah** and **Justice Dr. S. Muralidhar**.

Chief Justice Shah has authored several important opinions in the areas of freedom of speech and expression, environmental rights, disability rights and women's rights. One of Chief Justice Shah's important opinions has been the decision in *Anand Patwardhan v. Union of India*, 1997 (1) BCR 90, and *Anand Patwardhan v. Union of India*, 1997 (3) BCR 438, quashing the orders of the Government not to telecast the President's Award winning documentaries 'In Memory of Friends' (based on terrorism and violence in Punjab) and 'Ram Ke Naam' (based on Ayodhya issues), and directing Doordarshan to telecast those documentaries. Chief Justice Shah also struck down the decision of Censor authorities not to release the documentary 'Aakrosh' on recent Gujarat communal riots, directing that the film be granted certification.

Justice Muralidhar is a former human rights lawyer who served as Counsel for the National Human Rights Commission (NHRC) before joining the Delhi High Court. He was active as a lawyer for the Supreme Court Legal Services Committee and later was its member for two terms. His *pro bono* work included the cases for the victims of the Bhopal Gas Disaster and those displaced by the dams on the

Narmada. He was appointed *amicus curiae* by the Supreme Court in several PIL cases and in cases involving convicts on the death row.

The Ruling

The Court held that criminalisation of consensual sex between adults in private violates the Constitution's guarantees of dignity, equality, and freedom from discrimination based on sexual orientation (Articles 21, 14 and 15). Thus, the Judges 'read down' Section 377 so that it no longer criminalises consensual sex between adults in private.

However the Judges held that Section 377 will continue to govern cases of non-consensual sex between adults as well as any sex with children. The Court held that an adult would be any person above 18 and that any person below 18 would be presumed not to be able to consent to a sexual act.

The Court also noted that this clarification of the law would hold until parliament chose to effectuate the recommendations of the 172nd Law Commission Report, which simultaneously recommended the amendment of rape laws and the repeal of Section 377.

The Court also noted that the judgment will not result in the re-opening of criminal cases involving Section 377 that have already attained finality.

The Rationale

The Judges quote heavily from progressive judgments both in India and in other countries that have found rights to dignity, privacy, equality, and non-discrimination. These four concepts form the basis of the Court's judgment. In order for the dignity of each person to be protected, there must be a right to privacy that protects against arbitrary state interference with personal autonomy. Similarly, equality is meaningless without a corresponding prohibition on discriminating against certain classes of people.

The Justices also employ a novel concept of 'constitutional morality' to avoid discussing the religious propriety of homosexual conduct. Basically, they say that the government should only be concerned with the secular values enshrined in the Constitution, not with the moral codes of any particular religion.

Dignity/ Privacy

The Court begins by adopting a view of human dignity that privileges the ability to freely make choices about how to live one's life.

“At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others.” (para 26)

From this notion of dignity, the court derives a concept of privacy that “deals with persons and not places” (para 47). That is, the right to privacy is not merely the right to do what one wants in ‘private spaces’ like the home, but also a right to make choices about how to live one's own life. Privacy protects personal autonomy.

This dignity-autonomy includes the right to sexual expression, which necessarily entails being able to choose sexual partners without unjustified interference by the state. The Justices elaborate on this point by lengthily quoting the Constitutional Court of South Africa's germinal opinion in *The National Coalition of Gay and Lesbian Equality v. The Minister of Justice*:

“The privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one's sexuality is at the core of this area of private intimacy. If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.” (para 40)

“For every individual, whether homosexual or not, the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this

aspect of his or her identity wherever he or she goes. A person cannot leave behind his sense of gender or sexual orientation at home. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as 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. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.” (para 47)

Relying on several Supreme Court cases, the Justices locate the rights to dignity and privacy within the right to life and liberty guaranteed by Article 21 of the Indian Constitution. This is because the right to life necessarily includes the right to define one’s own life.

“In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution.” (para 48)

Thus, the Court concludes that Section 377 violates the Constitution, not only because it criminalises acts taking place within a special zone of privacy, but also because it criminalises individual choices which are central to personal dignity. The Court thereby concludes that Section 377 violates the right of privacy which is both zonal and decisional. The violation of this broadened notion of privacy infringes human dignity.

The Court further cites several studies and reports to illustrate how Section 377 violates the dignity of homosexuals even if it is not legally enforced. This violation happens through the reduction in self-worth that homosexuals felt, as well as through harassment from the police and the community at large. The Court says:

“The criminalisation of homosexuality condemns in perpetuity a sizeable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery.” (para 52)

The Justices specifically reference the colonial-era Criminal Tribes Act, which criminalised hijra identity, as a particularly horrendous instance of the criminalisation of sexual minorities. Even without actual enforcement, laws like Section 377 serve to stigmatise an entire section of society, thereby violating their dignity as citizens.

Equality

Article 14 of the Constitution guarantees that all citizens are equal under the law. Thus, Article 14 prohibits making legal classifications that are not reasonably related to achieving a legitimate government purpose. That is, before the government can treat one group of people differently from everyone else, it must first show that it is seeking to accomplish some legitimate goal, and then show that the differential treatment will achieve this legitimate goal.

In considering Article 14’s guarantee, the Court initially observes that popular morality cannot justify classifications based on private sexual behaviour. This is because upholding a certain vision of ‘moral’ conduct is not a legitimate state interest unless it prevents some demonstrable harm.

“[I]t is not within the constitutional competence of the State to invade the privacy of citizens lives or regulate conduct to which the citizen alone is concerned solely on the basis of public morals. The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision’s objective both arbitrary and unreasonable.” (para 92)

The Court further decides that although Section 377 technically criminalises conduct only, without specifying any class of people, in reality it acts to unfairly target homosexuals as a class.

The sexual acts which are criminalised are associated with gay men, so Section 377 IPC has the effect of viewing all gay men as criminals. “The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class.”

“When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself.” (para 94)

“The inevitable conclusion is that the discrimination caused to MSM and gay community is unfair and unreasonable and, therefore, in breach of Article 14 of the Constitution of India.” (para 98)

Non-discrimination

The Court follows another line of reasoning to find a second way that Section 377 unconstitutionally discriminates against homosexuals. Article 15 of the Constitution forbids discrimination based on certain specific characteristics, including sex. The Court finds that “sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Art 15” (para 104).

To arrive at the notion of analogous ground of discrimination, the Court draws from decisions of the Canadian and South African Supreme Courts which have understood analogous grounds of discrimination in these terms: “what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity” (para 102).

What in effect the Judges do by using the reasoning of analogous grounds is to keep the door open to other groups which might suffer discrimination availing the protection of Article 15. As the Judges

note, once again drawing from South African case law, some guidelines can be laid down as to what could be an unspecified [analogous] ground of discrimination. “In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features” (para 103).

The Justices thus construe the meaning of ‘sex’ in Article 15 to include not merely biological or physical sex, but also sexual orientation. Forcing someone to behave in accordance with predefined notions of what it means to be a “man” or a “woman” can be considered discrimination analogous to discrimination on grounds of sex. The Court says:

“The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalisation concerning “normal” or “natural” gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalisation about the conduct of either sex.” (para 99)

Moreover, the Court concludes the rights in Article 15 apply ‘horizontally’. Human rights theorists make a distinction between ‘vertical’ rights (rights of citizens against the state) and ‘horizontal’ rights (rights of citizens against each other). For example, if the government were to pass a zoning law that prohibited Muslims from living in a certain area, this would clearly be vertical discrimination, because the state is violating its citizens’ right to equality. On the other hand, if a Muslim person is refused permission to buy a house in a housing society because he is Muslim, it would be a case of horizontal discrimination, because other citizens are violating his right to equality.

Mindful of the harassment and abuse that homosexuals face at the hands of non-state actors like goondas, the Justices make it clear that the Constitutional right to non-discrimination based on sex is a horizontal right. “In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces” (para

104). This creates a powerful way to deal with police inaction when faced with harassment of homosexuals. Because the right to non-discrimination is horizontal, the police can violate that right simply by failing to protect homosexuals when they are discriminated against by fellow citizens. Without such horizontal protections, the police could simply outsource discrimination to private citizens by turning a blind eye to crimes perpetrated against LGBT people.

The Court's rule could have also implications beyond severe cases of harassment and abuse, in cases of more day to day discrimination. Article 15 lists specific public places where sex discrimination is illegal, including shops, restaurants, hotels, and places of public entertainment. Thus, if an LGBT person were turned away from a shop because of his sexual orientation or gender identity, then his right to non-discrimination would have been violated.¹

Right to Health

The Justices note that the Supreme Court has read the right to life in Article 21 of the Constitution to include a right to health. This right to health includes various entitlements, such as an equal opportunity to access a functioning healthcare system.

The Justices point out that the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the right to health is violated by discrimination based on sexual orientation or HIV status. They then canvass in detail the policies of international and domestic institutions involved in the struggle against HIV/AIDS, including several important declarations by U.N. bodies. They further cite statements by the Union Health Minister in 2008, saying that the stigma attached to sex workers and men who have sex with men by Section 377 presented a serious obstacle to HIV/AIDS prevention efforts.

In response to the Additional Solicitor General's argument that repeal of Section 377 would lead to an increase in the spread of HIV, the Justices issue a sharp rebuke, saying his argument "is completely unfounded since it is based on incorrect and wrong notions" (para 72). They say that there is absolutely no scientific evidence

¹ For a more extensive discussion of the implications of the horizontality ruling, see Tarunabh Khaitan's piece in this volume.

demonstrating a link between the decriminalisation of homosexuality and an increase in HIV transmission rates. In fact, the NACO affidavit indicates that decriminalisation would have a positive effect on HIV prevention efforts. The Justices therefore conclude that Section 377 is an impediment to public health which particularly infringes on the right to health of LGBT persons.

Safeguarding public health may indeed be a compelling state interest that can justify reasonable limitation on the right to privacy. However, the Court reasons, such an interest would in fact compel the state to *repeal* Section 377, because Section 377 demonstrably hampers HIV/AIDS prevention efforts.

Constitutional Morality

One of the core arguments of both the Government as well as Mr. B.P. Singhal was that law did not run separately from morality and that law in fact had to reflect the wider morality. They argued that the State could therefore infringe on fundamental rights to protect the larger legitimate interest of ‘public morality’. This was a core question which the Judges had to answer.

The Court’s reasoning was that, the government may only infringe on core constitutional rights if doing so is necessary to serve to a ‘compelling’ state interest. For example, the state may restrict the right to free movement in cases of violent unrest because there is a compelling state interest in maintaining public order and safeguarding security. Or, as the Court points out, the government may criminalise private sex between adults and minors because there is a compelling state interest in protecting children against sexual exploitation.

However, the Judges make it extremely clear that safeguarding popular morality is not a compelling state interest that can justify limiting the rights of dignity, privacy and equality of LGBT persons. Thus the public’s moral opinions cannot be used as a justification for limiting LGBT persons’ fundamental rights. The Court says:

“Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is

based on shifting and subjective notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interest, it must be “constitutional” morality and not public morality.” (para 79)

“Moral indignation, howsoever strong, is not a valid basis for overriding individual’s fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.” (para 86)

This ‘constitutional morality’ that the Court identifies is based on the liberal democratic ideals that underlie the Indian Constitution, not on any particular religious or cultural tradition. The Judges derive the concept from Dr. Ambedkar, who in the Constituent Assembly noted, “Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic” (para 79).

The concept serves as an effective way to advance the entire morality debate to a higher level; the Justices simply state that only moral values drawn directly from the Constitution can be used to limit the fundamental rights that the Constitution itself guarantees. Religious moral codes are irrelevant. Rather than draw a simple distinction between ‘private’ morality and criminal law, the Judges draw a more nuanced line between religious and civic morality. They acknowledge that the law is based on morality, but it is a special type of morality – constitutional morality.

The Judges further conclude that, “The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality” (para 80).

Court as a counter majoritarian institution

The other major argument that the Judges had to contend with was the argument of the Additional Solicitor General that the Judges must maintain judicial self restraint while exercising the power of judicial review of legislation. In effect, the Additional Solicitor General

contended that the Courts must defer to the legislature since the legislature represented the will of the people and was the best judge of what is good for the community. While the Judges concede that ordinarily the Courts would defer to the wisdom of the legislature, the degree of deference would depend upon the subject matter under consideration.

“When matters of ‘high constitutional importance’ such as constitutionally entrenched human rights – are under consideration, the courts are obliged in discharging their own sovereign jurisdiction, to give considerably less deference to the legislature than would otherwise be the case.” (para 118)

They further elaborate on their understanding of the judicial role,

“The role of the judiciary is to protect the fundamental rights. A modern democracy while based on the principle of majority rule implicitly recognises the need to protect the fundamental rights of those who may dissent or deviate from the majoritarian view. It is the job of the judiciary to balance the principles ensuring that the government on the basis of number does not override fundamental rights. After the enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme.” (para 125)

“In this regard, the role of the judiciary can be described as one of protecting the counter majoritarian safeguards enumerated in the Constitution.” (para 120)

The Judges refer to Justice Robert Jackson’s famous passage in *West Virginia State Board of Education v. Barnette*:

“The very purpose of the bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.” (para 120)

The Judges thereby assert the responsibility of the judiciary in protecting fundamental rights regardless of the opinion of the legislative majority. Thus the judiciary as an institution has a responsibility in ensuring that “legislative majorities in tantrum against a minority did not sterilise the grandiloquent mandate” (para 125).

Conclusion

The Court concludes by drawing upon the notion of equality which underlies the Indian Constitution and making an organic connection between the intention of the founding fathers and the need to ensure that LGBT persons are not discriminated against today. To quote what the Court has to say:

“The notion of equality in the Indian Constitution flows from the ‘Objective Resolution’ moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech, moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He said, ‘Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation’s passion..... (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future.’” (para 129)

After quoting from Nehru’s Objective Declaration, the Court goes on to say:

“If there is one constitutional tenet that can be said to be underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracised.” (para 130)

“Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was the ‘spirit behind the Resolution’ of which Nehru spoke so passionately. In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.” (para 131)

Basis of the Ruling

The material the Judges marshalled to come to their finding included judgments from other jurisdictions, judgments from Indian Courts, Affidavits and other legal materials, developing international law, legal academic writings, constituent assembly debates and scientific and medical literature. This section briefly list out how the Judges used this range of material.

Use of affidavits , FIRs, judgements and orders

The Judges note that, “to illustrate the magnitude and range of exploitation and harsh and cruel treatment experienced as a direct consequence of Section 377 IPC, respondent No. 8 (Voices Against 377) has placed on record material in the form of affidavits, FIRs, judgments and orders which objectively documented instances of exploitation, violence, rape and torture suffered by LGBT person. The particulars of the incidents are drawn from different parts of the country” (para 21). The use of this material helps the judges to come to the conclusion that the fears about the use of Section 377 are not just imaginary and that the materials on record clearly establish that “the continuance of Section 377 IPC on the statute book operates to brutalise a vulnerable, minority segment of the citizenry for no fault on its part” (para 22). To illustrate the violence and violation which LGBT persons suffer because of Section 377, one instance cited by the Judges based upon an affidavit filed by the affected person is extracted:

“Then there is a reference to ‘Bangalore incident, 2004’ bringing out instances of custodial torture of LGBT persons.

The victim of the torture was a hijra (eunuch) from Bangalore, who was at a public place dressed in female clothing. The person was subjected to gang rape, forced to have oral and anal sex by a group of hooligans. He was later taken to a police station where he was stripped naked, handcuffed to the window, grossly abused and tortured merely because of his sexual identity.” (para 22)

Use of academic literature

The Judges draw upon academic literature, and what is of particular significance to their conclusion is the study by Ryan Goodman on the impact that anti-sodomy laws have even if they are seldom enforced. The argument that the Judges rely upon is that even if anti-sodomy laws are seldom enforced they have an impact on the lives of LGBT persons.

“Prof. Ryan Goodman of the Harvard Law School, in his well researched study of the impact of the sodomy laws on homosexuals in South Africa argues that condemnation expressed through the law shapes an individuals identity and self- esteem. Individuals ultimately do not try to conform to the law’s directive, but the disapproval communicated through it, nevertheless, substantively affects their sense of self-esteem, personal identity and their relationship to the wider society. Based on field research, he argues that sodomy laws produce regimes of surveillance that operate in a dispersed manner, and that such laws serve to embed illegality within the identity of homosexuals.” (para 49)

Use of scientific and medical literature

The Judges draw upon scientific and medical literature to come to the conclusion that, “there is almost unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality. Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973 after reviewing evidence that homosexuality is not a mental disorder. In 1992, the World Health Organisation

removed homosexuality from its list of mental illnesses in the International Classification of Diseases (ICD-10)” (para 67).

The Judges also refer to the amicus brief in *Lawrence v. Texas* filed by the American Psychiatric Association to bolster their conclusion that “homosexuality is not a disease or mental illness that needs to be, or can be, ‘cured’ or ‘altered’, it is just another expression of human sexuality” (para 68).

Use of developing international law

The Judges also refer to cutting edge developments of jurisprudence in international law.

Yogyakarta Principles, 2007

The Judges refer to the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity. They state that, “the principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity”. In particular they note that the “The Principles recognise:

- Human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights;
- All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity;
- Every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination on the basis of sexual orientation and gender identity.” (para 44)

Declaration of Principles of Equality, 2008

The Judges also refer to the ‘Declaration of Principles of Equality’ issued by the Equal Rights Trust in April, 2008, which can be described as current international understanding of Principles on Equality. They

draw upon these principles to elucidate the notion of ‘indirect discrimination’. The Judges note that,

“Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.”

(para 93)

(emphasis supplied by the Judges)

Constituent Assembly Debates

The Judges also draw upon the Constituent Assembly Debates so as to place the challenge to the constitutionality of Section 377 within the broader framework of the philosophy underlying the Indian Constitution. They quote the two founding fathers of the Indian republic.

Famously the Judges quote Nehru to make the point that we need to consider the Constitution not “in a spirit of narrow legal wording but rather in terms of the spirit underlying the Constitution. The quote from Nehru reads, ‘Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation’s passion.... (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future.’” (para 129)

The Judges make the point that popular disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values is based upon shifting and subjective notions of right and wrong. If there is any type of morality that can pass the test of compelling state interest, it must be ‘constitutional’ morality and not public morality. The concept of constitutional

morality they derive from Dr. Ambedkar who in the Constituent Assembly noted, “Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic” (para 79).

Judgments from comparative jurisdictions

The Judges extensively drew from the jurisprudence of the Courts of many countries including Fiji, South Africa, Hong Kong, Canada, USA and Nepal. They also cited the decision of the European Court of Human Rights and the Human Rights Committee all of which decriminalised sodomy.

Perhaps of great influence on the Court in terms of its rhetorical force and impassioned argument was the decision of the South African Constitutional Court in the *National Coalition for Gay and Lesbian Equality* case, which was cited a number of times. The Judges use the judgment both to develop the link between privacy and dignity and to make the case that Section 377 has the effect of branding all gay men as criminals. To quote from the judgment,

“When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself.” (para 94)

Judgments of the Superior Courts in India

Regardless of the numerous sources as noted above, in the final analysis a finding of constitutionality has to be based upon the Indian Constitution and its interpretation by the Supreme Court. The Court does this by finding judicial decisions which lay out privacy jurisprudence, jurisprudence on dignity and equality, as well as on the power of the Courts to declare a statutory provision invalid. One of the core submissions of the Union of India was that since the parliament represented the will of the people, the Courts had no role

in adjudicating on the constitutionality of a law which parliament had approved. Among other judgments which the Judges drew upon were the words of J. Krishna Iyer in *Maneka Gandhi's* case,

“... The compulsion of constitutional humanism and the assumption of full faith in life and liberty cannot be so futile or fragmentary that any transient legislative majority in tantrums against any minority by three quick readings of a Bill with the requisite quorum, can prescribe any unreasonable modality and thereby sterilise the grandiloquent mandate.”
(para 125)

Territorial Applicability of the Judgment

There is some dispute about the territorial reach of the Court's judgment. Because the judgment modifies a parliamentary enactment for reason of Constitutional violations, there is a strong argument that the judgment should apply throughout the country. Judicial interpretation supports the position that if a High Court were to strike down a law as unconstitutional, then until another High Court comes up with a contrary position the law would indeed be unconstitutional throughout the territory of India. This is because it would be odd indeed for those living in Delhi to have stronger Constitutional rights than other Indian citizens; Constitutional rights by their very nature do not respect state boundaries.

However, there is a counter-argument that, technically, the Delhi High Court can only give orders within its own territorial jurisdiction. Thus, until the Supreme Court rules on this case, any other High Court is free to disagree with the Delhi High Court's judgment. If another court does disagree, this could create a very confusing situation regarding the territorial validity of Section 377. But as of now, the Delhi High Court judgment is the law of the land and applicable throughout the length and breadth of India.



**IN THE HIGH COURT OF DELHI AT NEW DELHI
WRIT PETITION NO. 7455 OF 2001**

NAZ FOUNDATION ... Petitioner

vs.

GOVERNMENT OF
N.C.T. OF DELHI & ORS
Respondents

**Outline of Counsel’s Arguments on Behalf of Respondent
No. 8 (“Voices Against 377”)**

A. INTRODUCTION

1.0 The purpose of this outline is to track the line of arguments advanced on behalf of Respondent No. 8 (“R-8”).

- 1.1 R-8 supports the Petitioner. R-8 has filed a detailed counter affidavit. This counter affidavit is in two separate paper books and is at pages 1062 to 1563 of the Court record.
- 1.2 R-8 has also filed detailed written submissions in a separate volume entitled “Written Arguments on Behalf of Respondent No. 8, Voices Against 377”. The written submissions cover 31 pages and are cross referenced to 51 primary documents. Each of these 51 documents is identified separately with a **Flag Number**. The documents bearing **Flag Nos. 1 to 51** are for convenience compiled in four spirally bound volumes. The flagged documents comprise judgments, extracts from scholastic material, affidavits of persons who have suffered the consequences of Section 377 and other material relied upon by R-8. Each of the affidavits is already on the record of this Court, but has been placed in these volumes for ease of reference.
- 1.3 The Written Arguments submitted on behalf of R-8 comprehensively cover the contentions advanced by this Respondent. In the course of counsel’s arguments, R-8 will refer to its Written Submissions and Volumes I to IV containing the supporting documents (**Flags 1 – 51**). R-8 will propose ‘*Suggested Operative Directions*’, which in its view, ought to be passed in the facts and circumstances of this case.

B. THE BACKGROUND OF RESPONDENT No. 8

- 2.0 R-8 is a coalition of 12 registered and unregistered associations that work in the field of Child Rights, Women’s Rights, Human Rights and the Rights of Persons who identify themselves as Lesbian, Gay, Bisexual, Transgender, Hijra and Kothi (‘LGBT persons’).
- 2.1 Paragraphs 16-22 of the Written Submissions set out details of the constituent organisations of R-8. These organisations are engaged in a range of activities across the country and the work of many of them has been recognised by the government. Several of the organisations have acquired an expertise in their respective niches, published works, organised workshops,

engaged in advocacy, conducted campaigns and have worked generally to promote and protect the rights of vulnerable sections of society.

- 2.2 Drawing on its counter affidavit, the Written Submissions also explain the context in which R-8 came to be formed and its deep concern for the issues that arise in this case.

C. THE IMPACT OF CRIMINALISATION OF HOMOSEXUAL ACTIVITY

- 3.0 Section 377 as applied in the field, subjects members of the LGBT community to harsh treatment at the hands of the law enforcement agencies. This provision subjects male and female homosexuals as well as transgenders to repressive, cruel and disparaging treatment that destroys their sense of self esteem, inflicts grave physical and psychological harm on members of the LGBT community, inhibits the personal growth of these persons and prevents them from attaining fulfilment in personal, professional, economic and other spheres of life. Section 377 degrades such individuals into sub-human, second class citizens, vulnerable to continuous exploitation and harassment.
- 3.1 To illustrate the magnitude and range of exploitation and harsh and cruel treatment experienced as a direct consequence of Section 377, R-8 has placed on record material in the form of affidavits, FIRs, judgments and orders that objectively document instances of exploitation, violence, rape and torture suffered by LGBT persons.
- 3.2 The particulars of the incidents drawn from different parts of the country are set out at paras 32-47 of the Written Submissions. The supporting material in the form of affidavits, reports and orders, etc. are appended as **Flags Nos. 18-27 & 46 (Volume III & IV)**. The counter affidavit refers to several other instances of harassment and exploitation with supporting material.
- 3.3 The material on the record clearly establishes that the continuance of Section 377 on the statute book operate to

brutalise a vulnerable, minority segment of the citizenry for no fault on its part. A segment of society is criminalised and stigmatised to a point where individuals are forced to deny the core of their identity and vital dimensions of their personality.

D. SEXUALITY AND IDENTITY

- 4.0 To understand and appreciate many of the profound issues that arise in this case, it is important to understand the notions of ‘sexual orientation’ and ‘gender identity’.
- 4.1 The *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (**Flag 8**) (Volume III) define these expressions:
- ‘Sexual Orientation’ is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.
 - ‘Gender Identity’ is understood to refer 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, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. (Page 6)
- 4.3 Justice Edwin Cameron defines sexual orientation by reference to erotic attraction: in the case of heterosexuals to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can be any one who is erotically attracted to members of his or her own sex. (**Flag 2, page 21-22**)(Volume I).

E. DIGNITY, PRIVACY AND AUTONOMY

DIGNITY

- 5.0 Dignity is a difficult concept to capture in precise terms. At its least, the protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. (**Flag 2, page-27**), (Volume I).
- 5.1 Statutes that criminalise homosexuality have the effect of viewing all gay men as criminals. The harm imposed by the criminal law is far more than symbolic. Gay men are at risk of arrest, prosecution and conviction of the offence under Section 377 simply because they seek to engage in sexual conduct which is part of their experience of being human. The homosexuality offence builds insecurity and vulnerability in the daily life of gay men. Such a law degrades and devalues gay men in the eyes of society. Such a provision invades and erodes the dignity of homosexuals (**Flag 2, page 27-28**), (Volume II).
- 5.2 The assault on dignity takes various forms. Professor Ryan Goodman of the Harvard Law School categorises how sodomy laws reinforce public abhorrence of lesbians and gays resulting in an erosion of self esteem and self-worth in numerous ways, including (a) self reflection, (b) reflection of self through family, (c) verbal harassment and dispute, (d) residential zones and migrations, (e) restricted public places, (f) restricted movement and gestures, (g) 'safe places' and (h) conflicts with law enforcement agencies. (**Flag 17, page 685-711**) (Volume II).
- 5.3 Homosexuals suffer tremendous psychological harm. Fear of discrimination leads to a concealment of true identity, which is harmful to personal confidence and self-esteem. Compounding that effect is the message of criminalisation that renders gays and lesbians unworthy of protection. (**Flag 2, page 24**) (Volume I).
- 5.4 In the case of gays, "it is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full

moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group” (**Flag 2, page 98**) (Volume I).

PRIVACY

- 5.5 The right to privacy is the right of an individual, to be free from unwarranted intrusion into matters so fundamentally affecting his or her person. Matters involving the most intimate and personal choices that a person may make are central to the personal dignity and autonomy of the individual and are protected from unwarranted intrusion. At the heart of personal liberty is the right to seek and develop personal relationships of an intimate character. Persons in a homosexual relationship are entitled to seek autonomy just as heterosexual persons do. (**Flag 1, page 1,13, Justice Kennedy’s opinion**) (Volume I).
- 5.6 Privacy recognises that we all have a right to a sphere of private intimacy and autonomy that allows us to establish and nurture human relationship without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of privacy (**Flag 2, page 30**) (Volume I).

AUTONOMY

- 5.7 Personal liberty presumes an autonomy of the individual that includes freedom of thought, belief, expression and certain intimate conduct (**Flag 1, page 1, Justice Kennedy’s opinion**) (Volume I). Individual adults have the freedom to determine their own actions and behaviour, particularly where such act or behaviour does not harm a third party. The notion of autonomy extends beyond the spatial dimension. It projects beyond the home or the closet, since individuals to attain growth and fulfilment cannot be confined to such spaces. The freedom of conduct enjoyed by an individual arising from his or her sexual orientation is protected insofar as the intimate conduct is between consenting adults.

F. GLOBAL TRENDS IN RESPECT OF LAWS RELATING TO HOMOSEXUALITY

- 6.0 Since 1967 a process of change has informed legal attitudes towards sexual orientation. This process has culminated in many jurisdictions with the de-criminalisation of sodomy in private between consenting adults (**Flag 2**, [page 35-43](#)) ([Volume I](#)).
- 6.1 In several jurisdictions the superior Courts and Tribunals have struck down anti- sodomy laws, where such laws remained on the statute book:
- US Supreme Court in 2003 (**Flag 1**);([Volume I](#))
 - Constitutional Court of South Africa in 1998 (**Flag 2**); ([Volume I](#))
 - Fijian High Court in 2005 (**Flag 3**); ([Volume I](#))
 - High Court of Hong Kong in 2005 and 2007 (separately tendered);
 - Nepalese Supreme Court in 2008 (separately tendered);
 - European Court of Human Rights in 1981 and 1988 (**Flags 4,5 and 6**); and ([Volume II](#))
 - UN Human Rights Committee in 1994 (**Flag 7**) ([Volume II](#))
- 6.2 The *Yogyakarta Principles* (**Flag 8**) ([Volume II](#)) embody the current status of human rights recognised globally with special reference to sexual orientation and gender identity. The *Yogyakarta Principles* are the work of acknowledged experts drawn from several countries. These *Principles* are designed to ensure that vulnerable minorities based on sexual orientation or gender identity enjoy human rights to the full extent. The necessity to articulate these principles arose since despite the universality of Human Rights in certain parts of the world individuals are being discriminated against on the grounds of sexual orientation or gender identity. The *Principles* recognise:

- Human beings of all sexual orientation and gender identities are entitled to the full enjoyment of all human rights; (page 10)
- All persons are entitled to enjoy the right to privacy, regardless of sexual orientation or gender identity; (page 14)
- Every citizen has a right to take part in the conduct of public affairs including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, without discrimination on the basis of sexual orientation or gender identity (page 28).

G. OPINIONS IN INDIA

- 7.0 In paragraphs 10-15 of the Written Submissions (**Flag 9 - Flag 15**) (Volume II), R-8 has summarised the emerging recognition in India of the need to decriminalise homosexuality.
- 7.1 As regards, the prevalence of homosexuality in South Asia, the Written Submissions of R-8 summarise the position in paragraphs 48-56 (**Flag 28- Flag 34**). (Volume III).

H. CONSTRUCTION OF “CARNAL INTERCOURSE AGAINST THE ORDER OF NATURE”

- 8.0 The submissions of R-8 in this behalf are set out at paragraphs 58-70 of the Written Submissions (**Flag 35- Flag 38**), (Volume III).
- 8.1 Section 377 criminalises ‘carnal intercourse against the order of nature’. For a homosexual male or female, his or her sexual orientation is ‘natural’. The sexual orientation of an individual arises from the depth of his or her being and it is not an aspect of his or her conduct that can be termed as ‘unnatural’ or ‘against the order of nature’. In most reported studies, persons have either no choice or very little choice in their attraction to members of their own sex.

- 8.2 The reports and studies placed on the record indicate that a sizeable portion of the population identifies itself as lesbian, gay or bisexual. In the counter affidavit of NACO (R4), the estimated number of male homosexuals has been put at about 25 lakhs (page 251, Court Record).
- 8.3 While it is difficult to ascertain the exact numbers of self-identifying LGBT persons in a given population, certain governments have generally adopted the position that about 5-7% of an adult population identifies itself as not heterosexual. The *Final Regulatory Impact Assessment: Civil Partnership Act 2004* conducted by the Department of Trade and Industry of the Government of the United Kingdom states that a “...wide range of research suggests that lesbian, gay and bisexual people constitute 5-7% of the total adult population” (**Flag 37**) (Volume III).
- 8.4 R-8 draws attention to the near unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality. Homosexuality was *removed* from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) in 1973 after reviewing evidence that homosexuality is not a mental disorder. In 1987, ego-dystonic homosexuality was not included in the revised third edition of the DSM after a similar review. The DSM is used worldwide as the standard benchmark of mental health practice and is also widely followed by the Indian Psychiatric Association.
- 8.5 In 1992, the World Health Organisation removed homosexuality from its list of mental illnesses in the *International Classification of Diseases* (ICD 10). Page 11 of the Clinical Descriptions and Diagnostic Guidelines of the ICD 10 reads: “Disorders of sexual preference are clearly differentiated from disorders of gender identity, and homosexuality in itself is no longer included as a category”. The Indian Medical fraternity also widely adopts this standard classification.

- 8.6 According to the *Amicus* brief filed in 2002 by the American Psychiatric Association before the United States Supreme Court in the case of *Lawrence v. Texas*:

“According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience.”

This *Amicus* brief is at **Flag 38**, (Volume III).

- 8.7 While individuals may undertake a range of sexual activity, homosexuality, like heterosexuality is not a disease or mental illness that needs to be, or can be ‘cured’ or ‘altered’.
- 8.8 Homosexuality, for the concerned individual, is as ‘natural’ as heterosexuality for a heterosexual. Same sex intimacy cannot fall within the term ‘carnal intercourse against the order of nature’ as used in Section 377. On a correct interpretation of Section 377, homosexual acts are not covered by that provision and a suitable declaration to that effect ought to be made by this Court.

I. ARTICLE 21, THE RIGHT TO LIFE AND THE PROTECTION OF A PERSON’S DIGNITY, AUTONOMY AND PRIVACY

- 9.0 The submissions of R – 8 in this behalf are set out at paragraphs 116 – 134 of the Written Submissions (Pages 22 – 26). It is submitted that the arguments relating to dignity, privacy and autonomy are based upon distinct legal principles and each of these grounds deserves separate consideration.
- 9.1 The expression ‘dignity of the individual’ finds specific mention in the Preamble to the Constitution of India. The dignity of an individual is clearly covered by Article 21 of the Constitution of India. An individual’s dignity is very closely linked to his identity. The sexual orientation of an individual lies at the core of his or her identity and arises from a deep well–spring. An

individual's sense of 'self', 'being', 'personhood' and 'self-esteem' are all a part of the core notion of identity. The testimony of a gay man, Mr. Gautam Bhan articulates the tension between Section 377 and his sense of identity as a male homosexual. (**Flag 46**), (Volume IV). The voice of Mr. Bhan is mirrored in the experience of thousands of similarly placed individuals across the country.

- 9.2 Any law or statutory provision that denies a person's dignity and criminalises his or her core identity violates Article 21 of the Constitution. Section 377 operates to criminalise, stigmatise, and treat as 'unapprehended felons' homosexual males. The provision targets individuals whose orientation may have formed before they attained majority. It criminalises individuals upon attaining majority, for no fault of the person and only because he is being himself.
- 9.3 Article 21 absolutely proscribes any law that denies an individual the core of his identity and it is submitted that no justification, not even an argument of 'compelling State interest' can sanction a statute that destroys the dignity of an estimated 25 lakh individuals.
- 9.4 With respect to the sphere of privacy protected under Article 21 of the Constitution of India, this notion has been judicially construed to deal with 'persons and not places' (*Canara Bank case*, (2005) 1 SCC 496, para 53). The distinction is very important. With respect to LGBT persons, these individuals cannot leave behind in their homes or closets their core identity. For every individual, be they LGBT or not, the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes. A person cannot leave behind his sense of gender or sexual orientation at home. R – 8 submits that the relief granted by this Court ought to be suitably moulded in a manner such that the privacy of LGBT persons is protected even in physical spaces beyond their home.
- 9.5 The issue of autonomy derives from the right to live with dignity and the right of privacy, both recognised dimensions under

Article 21 of the Constitution of India. The right to autonomy deserves articulation and acceptance since it enables an individual to make choices regarding intimate relationships which cause no harm to third parties. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set. The protected sphere of autonomy also extends beyond private spaces since it enables a homosexual or transgender to be himself or herself in public domains just like any other individual.

- 9.6 The moral justification argument, that may possibly be canvassed by the other Respondents, is no answer at all to the ‘Dignity’ submission. In her concurring opinion in *Lawrence v Texas*, Justice O’Connor held: “Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause . . . Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons. Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law’ . . . Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalise homosexual sodomy”.
- 9.7. The “majoritarian justification” was also discounted by Justice Kennedy who wrote the opinion of the Court in *Lawrence*. (Justice Thomas described the Texas law as “uncommonly silly”.)
- 9.8 Whose morality? The Constitutional Court of South Africa supplies an answer. Where the dictates of morality and nothing more is used to justify a law, that morality must be a *Constitutional* morality found in the text and spirit of the Constitution. (**Flag 2, page 104**) (Volume I). The South African Constitutional Court

has also rejected the “public opinion” test when striking down the death penalty in *Makwanyane case* (**Flag 49**) (Volume IV). The moral justification advanced to uphold Section 377 deserves to be rejected.

J. ARTICLES 14-16, DISCRIMINATION AND THE RIGHT TO BE TREATED EQUALLY

- 10.0 The submissions with respect to the violation of Articles 14 and 15 of the Constitution of India are set out in paragraphs 71 – 114 of the Written Submissions filed by R-8.
- 10.1 While reiterating these submissions, R-8 would like to underscore the need for appropriate directions where persons of the LGBT community are alleged to have committed offences other than Section 377. It is a widespread experience that law enforcement officials policing against obscene acts in the public, etc. proceed against LGBT persons not as they would in respect to heterosexuals but under Section 377 as well. This amounts to a particularly invidious discrimination inasmuch as an offence under Section 377 is non-bailable and is punishable with a sentence up to life imprisonment. In contrast, a heterosexual person is generally booked under Section 294 of the IPC which carries a relatively lighter sentence of three months imprisonment and is a bailable offence.
- 10.2 The Constitution of India in Articles 15 and 16 expressly prohibits discrimination against any citizen on the ground only of religion, race, caste, sex, place of birth or any of them. The Supreme Court in *Anuj Garg* (2008) 3 SCC 1 at 19, para 51 has construed Articles 14, 15 and 21 as prohibiting discrimination on the basis of sex, race, caste “*or any like basis*”. Sexual orientation is a “like basis” similar to the enumerated categories in these Constitutional provisions. Indeed, the expression “sex” has been construed by high judicial authority to take in the concept of sexual orientation. [*Toonen*, Human Rights Committee, ICCPR, para 8.7, **Flag 7** Volume II; *Vriend v. Alberta*, Canadian Supreme Court, see **Flag 2**, page 41, Volume I] If this submission is accepted, then Section 377 in so far as it

targets male homosexuals because of their sexual orientation alone, violates Article 15.

K. INTERPRETATION OF SECTION 377

- 11.0 It is submitted that the constitutionality of a provision must be judged keeping in view the changed situation with the passage of time. A law that is constitutional at a certain point of time may with the passage of time be held to be unconstitutional. (*Anuj Garg* at page 9). In matters impacting human rights, a progressive interpretation of the law is necessary (*M. C. Mehta Vs. Union of India* (1987) 1 SCC 395 at para 17). In a distinct context the Supreme Court has observed “it is not necessary and indeed not permissible to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the code was enacted. The notions...have considerably changed then and now during nearly a century that has elapsed. It is legitimate to construe the code with reference to the modern needs, whenever this is permissible, unless there is anything in the code or in any particular section to indicate the contrary” (*Mobarik Ali Vs. State of Bombay* (1958) 1 SCR 328 at para 44).
- 11.1 The court should avoid a construction that raises a serious constitutional question and should prefer an interpretation which saves a provision from being struck down as unconstitutional. The Supreme Court in *Shah & Co. Vs. State of Maharashtra* (1967) 3 SCR 466 (at para 33) held that “if certain provisions of law construed in one way would make them consistent with the Constitution, and not the interpretation that would render them unconstitutional, the Court would lean in favour of the former construction”.
- 11.2 To retain Section 377 as constitutional, it is necessary to construe the phrase ‘carnal intercourse against the order of nature’ to exclude consensual acts of sexual intercourse between consenting adults.
- 11.3 On the point of interpretation of a criminal sodomy statute, in the case of *Dhirendra Nadan v. State* (Crim App. Case Nos. HAA

85 and 86 of 2005) the High Court of Fiji declared that sections 175 (a) and 177 were “*inconsistent to the extent that this law criminalises acts constituting the private consensual sexual conduct against course of nature between adults*”. The Court further declared that “*Invalidity in this context does not mean that the offending sections in the Penal Code ceased to exist rather they are simply rendered inoperative to the extent of the inconsistency. Accordingly the sections dealing with carnal knowledge against the order of nature and acts of gross indecency will still apply to sexual conduct between adults and adult males where sexual activity occurs in public or without consent or involves parties under the age of 18 years*” (Flag 3), (Volume I).

- 11.4 Similarly, the Supreme Judicial Court of Massachusetts in *Commonwealth v. Richard L. Balthazar*, (318 N.E.2d 478 (Mass. 1974) held that law which prohibited an ‘unnatural and lascivious’ act was to be construed to be inapplicable to private consensual conduct of adults. It was held “*In light of these changes and in light of our own awareness that community values on the subject of permissible sexual conduct no longer are as monolithic as the Jacquith case suggested they were in 1954, we conclude that s. 35 must be construed to be inapplicable to private consensual conduct of adults. We do so on the ground that the concept of general community disapproval of specific sexual conduct, which is inherent in s. 35, requires such an interpretation*”.
- 11.4 The interpretation with respect to Section 377 urged by R-8 is in keeping with contemporary understanding of sexual orientation and gender identity; it is consistent with Indian constitutional values; it is consistent with international human rights standards; it is consistent with the developments in this field of the law worldwide as reflected from legislative changes and decisions of the superior courts in countries across the world.

L. CONCLUSION

- 12.0 At its root, this case is about the Emancipation of a large segment of our people. All of them Indian, all of them citizens. The Constitution of India in one of the great emancipatory charters, lifting as it does from the status of wretchedness and subordination — communities, castes, tribes and women — to

full Citizenship. This case is about an invisible minority of Indians that seek to unlock the assured liberties enshrined in the Constitution, but denied to them in an aspect of life that matters most to them: their own identity; their own sexuality; their own self.

- 12.1 As Justice Kirby puts it, *“The question is bluntly posed: can laws criminalising sexual minorities be any longer justified? Can violence and discrimination against this minority be tolerated or should the law adopt a leadership and educative role? In pluralistic societies, is it fair and realistic to demand that members of sexual minorities change their orientation or live completely celibate lives? Is it in society’s interests to protect supportive mutual relationships, given that sexual minorities exist, have always existed and will continue to exist, whatever the law and society say?”* (Michael Kirby, Discrimination on the ground of sexual orientation - a new initiative for the Commonwealth of Nations? *The Commonwealth Lawyer*, December 2007 Vol.16, 1. at p. 12.)
- 12.2 LGBT persons are a permanent minority in society and have suffered in the past from severe disadvantages. Their dignity has been and continues to be degraded, severely undermining their sense of self-worth. The criminalisation of homosexuality condemns in perpetuity this sizeable section of society and forces them to lead their lives in the shadow of harassment, exploitation, humiliation and cruel and degrading treatment at the hands of the law enforcement machinery. The Government of India estimates the MSM number at around 25 lakhs. The number of lesbians and transgenders would run into several lakhs of persons as well. This vast section of our society comprises honourable citizens who lead wholesome lives but, in the language of the South African Constitutional Court, are denied full *moral* citizenship. The ‘moral’ dimension of their citizenship is denied to them, *not* because of any harm that they have inflicted on any other person, but *only* because they seek to live lives and build relationships — so essential for the realisation and fulfilment of life’s goals – with others, based upon a inner aspect of their being.

- 12.3 To blot, to taint, to stigmatise and to criminalise an individual for no fault of his or hers, is manifestly unjust. To be condemned to life long criminality shreds the fabric of our Constitution. For the male homosexual in particular and by its expanded application to lesbians and transgenders as well, Section 377 has worked to silence the promise of the Preamble and Part III of the Constitution. It is the case of the Petitioner and those who support the petition that it is the liberating, emancipatory spirit underlying the Fundamental Rights invoked in this case that must prevail. The Constitution of India recognises, protects and celebrates diversity. LGBT persons are entitled to full *moral* citizenship.
- 12.4 This case ranks with other great constitutional challenges that liberated people condemned by their race or gender to live lives as second class citizens, such as *Mabo v. Queensland* [(1992) 175 CLR 1 (3 June 1992)] (where the High Court of Australia declared that the aboriginal peoples of Australia had title to lands prior to colonisation), *Brown v. Board of Education*, [344 U.S. 1 (1952)], (where the United States Supreme Court held that segregated schools in the several states are unconstitutional in violation of the 14th Amendment), *Loving v. Virginia*, [388 U.S. 1 (1967)], (where the United States Supreme Court held that laws that prohibit marriage between blacks and whites were unconstitutional) The debates about de-criminalisation of homosexuality belongs to another era circa –1957. The granting of basic rights to homosexuals did not lead to ‘opening up of floodgates of delinquent behaviour’ or any ‘erosion of moral fabric’ in those societies we look upon as models in terms of social and economic development.
- 12.5 With the permission of the Court, R-8 seeks to tender ‘*Suggested Operative Directions*’ that would meet the end of justice.

SUGGESTED OPERATIVE DIRECTIONS

- I. It is declared that all persons, regardless of their sexual orientation or gender identity, are entitled to the full enjoyment of all Fundamental Rights guaranteed under Part III of the Constitution of India.

- II. It is declared that persons who identify themselves as lesbian, gay, bisexual, transgender, *hijra* or *kothi* are:
- a) Entitled to equality before the law and equal protection of the laws within the territory of India as guaranteed under Article 14 of the Constitution of India;
 - b) Entitled to be treated without discrimination as guaranteed under Articles 14, 15 and 16 of the Constitution of India;
 - c) Entitled to the freedom of speech and expression in all its manifestations, the freedom to assemble peaceably and the freedom to form associations or unions, as guaranteed under Article 19 (1) (a), (b) and (c) of the Constitution of India;
 - d) Entitled to live with dignity and enjoy personal liberty to the fullest extent, as guaranteed under Article 21 of the Constitution of India; and
 - e) Entitled to privacy including autonomy with respect to decisions and choices concerning intimate personal relationships, as guaranteed under Article 21 of the Constitution of India.
- III. It is declared that Section 377 of the Indian Penal Code, 1860 is not applicable to and does not cover consensual, same-sex, sexual acts between adults. In particular, it is declared that intimate sexual acts between adult consenting males do not fall within the scope of Section 377 of the Indian Penal Code, 1860.
- IV. It is declared that inasmuch as homosexual activity between consenting adults has been held to fall outside the scope of Section 377 of the Indian Penal Code, 1860, offences arising from alleged intimate acts in public would be liable to be dealt with under other generally applicable provisions of law.
- V. It is declared that on the interpretation placed by this Court on Section 377 of the Indian Penal Code, 1860, the said provision is constitutional and will continue to be attracted, *inter alia*, in

respect of sexual activity between adults and minors; child sexual abuse cases; and non-consensual sexual intercourse.

VI. Having regard to the documented instances of the abuse of Section 377 and the special vulnerability of members of the LGBT community, the following directions are issued to Respondent Nos. 1, 2 and 5:

- Hijras, kothis and other transgender persons are not be detained over night in police stations and are not detained in all male cells in jails to prevent harassment, abuse and sexual assault.
- Allegations of illegal detention, custodial abuse and torture of LGBT persons are to be promptly investigated and suitable disciplinary proceedings, criminal and other legal action is taken.
- Police training at all levels shall include a module on sexual orientation and gender identity so that law enforcement officials are sensitised to the issues facing LGBT persons.



Edited Transcripts of day to day proceedings before the Delhi High Court in the matter of *Naz Foundation vs. Union of India**

Before Justices: Chief Justice A.P. Shah and Justice Dr. S. Muralidhar.

Day 1. (18.09.08) Morning Session

Mr. Anand Grover argued for Naz Foundation.

Mr. Grover stressed that the prayer in the petition is talking about decriminalising consensual sex between adults, and that the petitioners are very conscious about the fact that there is a vacuum when it comes to child sexual abuse cases. He argued that since there are very few reported cases where 377 has actually been applied to consensual acts between adults, the government needs to show what the compelling state interest is in keeping this law in place.

Chief Justice Shah asked Mr. Grover about how to deal with cases of public sex to which he replied that this could be dealt with the laws related to public nuisance, indecency etc.

When asked if there were examples of convictions of consenting adults, Mr. Grover said no.

Chief Justice Shah then went on to talk about the case of a transgender person who had self-immolated herself after being sexually molested by the police (which he had dealt with when he was the Chief Justice in the Madras High Court).

Mr. Grover also pointed out that there are acts of child sexual abuse that are non-penetrative and therefore Section 377 could in any case not be effective in dealing with it. Mr. Grover then explained how Section 377 was an impediment to propagating safe sexual practices. In response to Chief Justice Shah's query, he referred to the Lucknow arrests where employees of Bharosa Trust (an organisation that worked on safe sex practices with the MSM community) were held in custody for 100 days, and accused of the local media of running 'Sex Clubs' etc. He pointed out that Naz Foundation's interventions were sanctioned by the Central Government, and that they had

* These transcripts are based on daily postings during the course of the final arguments on <http://groups.yahoo.com/group/lgbt-india/>

distributed 13 million condoms per month to sex workers besides condoms that are distributed to MSM communities.

Chief Justice Shah remarked that safe sex messages can be effective only when there is more openness and recognition (of sexual practices).

Mr. Grover then quoted in great detail from the Wolfenden Committee Report that recommended the decriminalisation of sodomy in England in 1957. He argued that the government cannot make private sexual behaviour criminal when there was no overriding compelling state interest.

Justice Muralidhar commented that the criminal law is invariably used against the poor in the country and that there were no statistics on the number of convictions in the trial courts.

Chief Justice Shah observed that it was difficult to get third parties to testify in cases of consenting adults. Section 377 was used to extract money, and that it was “a case of persecution, not prosecution.”

Justice Muralidhar then talked about the opposition from Kiran Bedi to distribution of condoms in Tihar Jail.

Justice Muralidhar also mentioned the doctrine of desuetude, i.e. when a law is not used for a very long time it could lapse (usually used for delegated legislation).

Justice Muralidhar also asked if the law applied to lesbians, and Mr. Grover said that technically it did not.

Mr. Grover said, “Recently we had a gay Pride in Mumbai. One of the policemen remarked that if the law was repealed they would not have to do this kind of work and that we don’t want to do this sort of work”.

Chief Justice Shah then said, “In Bombay I dealt with a ragging case where a homosexual boy was ragged by his classmates. As a result, he was hospitalized just before his exams. He came to us asking for a chance to do his exams again. We have all seen what could happen to homosexuals”. He also added that homosexuality was ‘by nature, and not by choice’.

Day 1 Post-Lunch Session

The intervener B.P. Singhal's lawyer H.P. Sharma suddenly brought up the case of *R.V. Brown* (which dealt with consensual sadomasochism). He said that anal sex by homosexuals cannot be equated with other types of sex.

Mr. Grover mentioned the Law Commission's 172nd Report that recommended the deletion of Section 377, the right to dignity, privacy, and health under the Universal Declaration of Human Rights, and the fact that 'other status' in the Optional Protocol to the International Covenant for Civil and Political Rights has been interpreted to include 'sexual orientation.'

Justice Muralidhar inquired if the National Commission to Review the Working of the Constitution had suggested that sex be extended to include sexual orientation or the scope of discrimination to be widened to include sexual orientation.

Mr. Grover then argued that international principles linked notions of highest attainable standard of health to the conditions necessary to attain this. This would involve making health facilities accessible to all, especially the most vulnerable populations. He said that far from being a compelling state interest Section 377 is actually an impediment to HIV/AIDS programs.

Mr. Grover also argued that 'private' should not be restricted to mean spatial privacy and should be related to the intention, and should be left up to the interpretation of the court.

Justice Muralidhar then referred to the *Makwanyane Judgment* (relating to the death penalty in South Africa), saying that the court cannot be completely swayed by public opinion. "Minorities in terms of opinion and values have to be protected", he said.

Day 2 (19.09.08) Morning Session

Mr. Grover argued that the right to life includes the right to dignity, and all that goes with it. He argued that Section 377, by criminalising consensual sex between adults, violates their right to dignity.

Justice Muralidhar commented that the NACO affidavit was the strongest argument that Naz had, as it unequivocally said that Section 377 was a barrier to the right to health.

Chief Justice Shah also raised the concern that if the arguments related to Article 14 (right to equality) were accepted then it would mean that the court would have to strike down the law, while the prayer of the petition asks only for a reading down of the law.

Justice Muralidhar then sought more clarity on the exact nature of what the petitioners were asking for. “Are you saying the section should be read down? What kind of declaration can the court give without reading down the section?”

Chief Justice Shah observed that reading down and seeking a declaration were two separate things.

Both the judges asked for examples where the courts have read down a criminal statute – especially since the petitioners were not asking for the law to be struck down entirely.

Mr. Grover then argued that the wordings of Section 377 were vague and should be struck down.

Justice Muralidhar then asked Mr. Grover if the word ‘whoever’ in Section 377 could be read down. He observed that the petitioners were saying that the law had included categories that should not have been included – i.e. ‘overstretching or overbreadth’. He said that ‘vagueness’ was a difficult argument to make in terms of unnatural offences. He said that this line of argument would not help the petitioner as far as the final declaration was concerned.

Mr. Grover then argued that legislative interference needed to be justified and that any restriction needs to be proportionate to the offence.

Justice Muralidhar then observed that saying that the legitimate aim of Section 377 was to maintain ‘public safety’ was contraindicative. He suggested that the petitioners look at other statutes that overlap on issues related to public morality. He said that the petitioners could

not only refer to the Wolfenden Committee Report and should contextualise Wolfenden in the context of Indian society and culture.

Mr. Grover then referred to the *Modinos* case in Cyprus where the Cypriot government had argued before the European Commission of Human Rights that it should be able to retain the anti-sodomy law because culturally it was different from the rest of Europe.

Justice Muralidhar said that legitimate aim had to be seen in the context of our Constitution and that the government could argue that it was taking measures in the interests of morality and decency.

Mr. Grover replied that we live in a democratic set up where the rights of minorities needed to be protected, and the state needed to show what the legitimate aim of the law was to enter the zone of privacy.

Justice Muralidhar then pointed out that this argument would not be applicable to child pornography. Chief Justice Shah added, “To say that public morality cannot be a source of criminal law is not correct. What about cases of child sexual abuse?” He said that ‘decency’ and ‘morality’ could be legitimate aims that can be used to enact criminal law even in the ‘private zone.’

Mr. Grover then pointed out that in this specific example there was no harm being caused to anyone. He said, “While section 377 applies to both homosexuals and heterosexuals, the police are not going to target heterosexuals”.

Chief Justice Shah said that homosexuality, i.e. sexual orientation cannot be ‘cured’, so proscribing a penalty of 10 years would be disproportionate to the offence.

Mr. Grover said that it was inherent to gay men to do these acts (sodomy), and that this was a part of their personality. He pointed out that the European Community did not allow countries with an anti-sodomy law to join.

Mr. Grover argues that under Article 19 (1)(a) every person had a right to receive and impart information, and that Section 377 impeded this. He said that often homosexuals, who did not have adequate

information, went to psychiatrists, where they are often administered shock treatment.

Mr. B.P. Singhal's lawyer Mr. H.P. Sharma interrupted saying that in the United Nations office there were no spousal benefits for same sex couples.

Chief Justice Shah asked Mr. Sharma, "So you admit that there are people in this world with a different sexual orientation?" To which Mr. Sharma said that it (retention of the law) was because of fun (that homosexuals had) and perversity. Chief Justice Shah, expressing his displeasure shook his head and said, "This kind of assistance will not take us anywhere". Mr. Grover interjected to say that if being harassed by the police was fun, then they were having a lot of fun.

Both judges then pointed out that the petitioners need to take into account Article 19(2), which provides exceptions to the right to freedoms based on public order, morality etc. Mr. Grover replied that the government needed to discharge its burden to prove that there was a compelling state interest to legislate in this matter.

Mr. Grover then talked in some detail about judgements in other courts where similar anti-sodomy laws have been struck down. These included *Dudgeon* (in Northern Ireland), *Modinos* (in Cyprus) and *Norris* (Republic of Ireland). He pointed out that in these cases there was a similar concern that homosexuality should not be decriminalized because of the fear that some sections of society may draw misguided inferences, but the European Court of Human Rights had struck down this law anyway.

Chief Justice Shah addressing the JACK lawyer Mr. R.S. Kumar said, "Do you know what is happening in Tamil Nadu? A widowed person living with HIV AIDS is denied all rights... We organised a programme as a part of the Tamil Nadu Legal Services Board for 600 widowed women, who were able to speak openly. This is because they are no longer regarded as sinners". He went on to point out to JACK and B.P. Singhal that saying 'Indian culture' was not the answer. "If you are under the impression that this happens only in the US you are mistaken", he said.

Mr. R.S. Kumar said that there was a false diagnosis when it came to HIV/AIDS. Chief Justice Shah snapped, “People are dying. What are you saying? You are speaking with a moral attitude.” Mr. R.S. Kumar in response said that HIV was a propagated disease.

Day 2 Post Lunch Session

Mr. Grover then talked in great detail about the *Modinos v Cyprus* case where the European Court of human rights struck down an anti-sodomy law in Cyprus. This was followed by the decision in the *National Coalition for Gay and Lesbian Equality (NCGLE)* decision in South Africa. He dealt in great detail with the judgments by both Justice Ackerman and Justice Sachs striking down the anti-sodomy law.

When Mr. Grover was referring to the stigma that the law attaches to a significant section of the population, Chief Justice Shah compared this to the stigma attached to ‘criminal tribes’ who were branded by the Criminal Tribes Act in India.

As Mr. Grover was reading from the South African decision, the visibly moved judges began conferring amongst themselves. They said this decision reminded them of Justice Hidayatullah’s decisions. Chief Justice Shah, noticing that the Additional Solicitor General was not present in court, remarked, “I don’t know what assistance we are going to get from the government. The ASG is not here. He should have been here to listen to this.” He then compared discrimination based on sexual orientation to discrimination based on caste. “If you belong to the ‘untouchable’ category, you suffer a disadvantage in every aspect of life. The effect of criminalisation (of homosexuality) is like treating you as a member of a scheduled caste”, he said.

Mr. Grover then cited from the NCGLE decision to point out that while the state is founded on a deep political morality, this does not mean that it can criminalise homosexual conduct.

The Judges then mentioned Justice Scalia’s dissent in the *Lawrence* case where he talks about preserving morality. The judges asked Mr. Divan if it was possible to link the petitioners’ arguments to the constitutional provisions in Article 17 and 23 that deal with untouchability.

Contesting JACK's position that contests the links between HIV and AIDS, Chief Justice Shah said, "In Bombay someone filed a Public Interest Litigation saying that all HIV prevention efforts should be stopped as this was a case where God was punishing immorality...Everyone has their own views".

The Additional Solicitor General P.P. Malhotra then asked for more time to file a response. The Judges said they would not give the government more time. Pointing out that the report in the Hindustan Times front page which said that the High Court would not deliver a judgment till the government made its stand clear was inaccurate, the Judges said that government had to make its submissions on September 25th.

Day 3 (25.09.08) Morning sessions

Arguments by Mr. Shyam Divan for Voices Against 377.

Chief Justice A.P. Shah and Justice S. Muralidhar heard arguments from the interveners in the case, Voices Against 377, a coalition of human rights, child rights, women's rights and LGBT rights groups that had intervened in support of the petitioners Naz Foundation. Mr. Shyam Divan, the lawyer for the petitioners said that a wide group of persons from diverse backgrounds were supporting this petition.

Mr. Divan began his arguments by outlining the impact of criminalisation on homosexuals. "This provision subjects male and female homosexuals as well as transgenders to repressive, cruel and disparaging treatment that destroys their sense of self esteem, inflicts grave physical and psychological harm on members of the LGBT community, inhibits the personal growth of these persons and prevents them from attaining fulfilment in personal, professional, economic and other spheres of life", he said, "Section 377 degrades such individuals into sub-human, second-class citizens, vulnerable to continuous exploitation and harassment".

Mr. Divan said that he would demonstrate, through records of incidents from across the country, as well as personal affidavits, reports and orders, that the continuance of section 377 on the statute book operated to brutalise a vulnerable, minority segment of citizens for no fault of theirs. "A segment of society is criminalised and brutalised

to a point where individuals are forced to deny the core of their identity and vital dimensions of their personality”, he said.

Referring to Professor Ryan Goodman’s study on the impact of sodomy laws on LGBT persons in South Africa, Mr. Divan emphasised that condemnation expressed through law shapes an individual’s identity and self-esteem. “They produce regimes of surveillance that serve to operate in a dispersed manner, and such laws serve to embed illegality within the identity of homosexuals.”

He argued that section 377 was a direct violation of the identity, dignity, and freedom of the individual, and that it fostered widespread violence, including rape and torture of LGBT persons, at the hands of the police and society. “Section 377 allows for the legal and extra-legal harassment, blackmail, extortion and discrimination against LGBT persons”. “The harm inflicted by section 377 radiates out and affects the very identity of LGBT persons. Sexuality is a central aspect of human personality, and in a climate of fear created by section 377 it becomes impossible to own and express one’s sexuality, thereby silencing a core part of one’s identity. It directly affects the sense of dignity, psychological well-being and self-esteem of LGBT persons”, he said.

Mr. Divan cited the Human Rights Watch Report report titled ‘Epidemic of Abuse: Police Harassment of HIV/AIDS social workers in India’ which documented the harassment of HIV/AIDS workers in India. This report documents the police raid of the office of Bharosa Trust in Lucknow in June 2001, when the police arrested four health care workers and arrested them under section 377. They were charged with possessing obscene material that was nothing but educational material. However, since 377 was a non-bailable offence, the health care workers were jailed for 48 days.

Referring to the Judges’ observations related to the Criminal Tribes Act in the last hearing, Mr. Divan said that during the colonial period hijras were criminalized on the basis of their identity, and in 1897, the criminal Tribes Act was amended to include eunuchs. “While this act has been repealed, the attachment of stigma continues”, he said.

Mr. Divan then narrated another incident (which occurred in April 2006) which was that of two adult lesbian women in Delhi who were in a relationship. The father of one of the women ‘X’ filed a complaint stating that she was abducted by her partner ‘Y’. Y was arrested and brought before the police. X wanted to file a statement under section 164 of the Criminal Procedure Code saying that she had left her parental home of her own free will. However her application was refused, and the Magistrate, in his order recorded that it “appeared prima facie that under the guise of the section there were hidden allegations of an offence under section 377 as well. Mr. Divan pointed out that to constitute an offence under section 377 there needs to be penetration, and thereby the section could not be applied in this case. However, since section 377 served to criminalise all homosexuality, and not merely certain sexual acts, it applied to lesbians as well.

Mr. Divan then referred to an incident in Bangalore in 2004, which involved the rape of Kokila, a hijra who was a community mobiliser for Sangama, an organisation that worked on the human rights of sexual minorities in Bangalore. Kokila was raped by ten goondas, and the police instead of helping her, tortured her in the police station. Mr. Divan stressed that this incident happened because she was a transgender person.

Justice Muralidhar asked Mr. Divan what recourse could be taken for the offences committed against Kokila. Mr. Divan said that this would be an instance where 377 could be used. He said that for non-consensual acts and sex with minors, Section 377 should be retained in the statute book.

Mr. Divan also referred to the *Jayalakshmi* case that was decided by Chief Justice Shah in which the petitioner’s sister, who was a hijra, committed suicide after being tortured and sexually assaulted by the police.

He talked about was the arrest of four gay men in Lucknow in 2006, for allegedly indulging in sex in a picnic spot. Reports by both Human Rights Watch and the National Coalition for Sexual Rights that this incident was actually a case of police entrapment, and that none of the men arrested were having sex in public.

Finally, Mr. Divan referred to the complaint filed by the Inspector of Police, Bangalore on September 11, 2006, where he states that he raided Cubbon Park and found 12 'Khojas' who with "an intention to engage in unprotected, unnatural sex, were standing in the shade of trees and soliciting passers by. He said that by such unsafe, immoral, sexual acts, they may spread immoral diseases like AIDS, which may cause severe harm to the general public and thereby are likely to affect public health." Mr. Divan said that the affidavit of Madhumita, one of the persons arrested in the case showed that the police version was false. Madhumita states that she was standing at a bus stand when she was surrounded 5 constables, and arrested without giving any reason. She said that she was targeted by the police because she chose to dress as a woman, and that section 377 branded her as criminal and made her vulnerable to harassment and persecution from the police.

After the narration of these incidents, Mr. Divan talked about the recently framed Yogyakarta Principles on sexual orientation and gender identity to clarify what exactly was meant by these terms.

The right to dignity, said Mr. Divan, would be violated by section 377. Drawing from the South African Constitutional Court decision in the NCGLE case, Divan said, "Gay men are at risk of arrest, prosecution, and conviction simply because they seek to engage in sexual conduct which is part of their experience of being human. The homosexuality offence builds insecurity and vulnerability in the daily life of gay men. Such a law degrades and devalues gay men in the eyes of society. Such a provision invades and erodes the dignity of homosexuals."

Emphasizing that the assault on dignity takes on various forms, Mr. Divan quoted Professor Goodman to argue that sodomy laws reinforce public abhorrence of lesbians and gays resulting in an erosion of self-esteem and self-worth in various ways. These included self-reflection, reflection of self through family, verbal harassment and dispute, residential zones and migrations, restricted public spaces, restricted movement and gestures, and conflict with law enforcement agencies. "Virtually every dimension of the lives of gay men have been affected", said Mr. Divan.

“Homosexuals suffer tremendous psychological harm. Fear of discrimination leads to a concealment of true identity...in the case of homosexuals it is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self worth of a group”, he said.

Arguing that homosexuals have the right to privacy, Mr. Divan quoted from Justice Kennedy’s decision in *Lawrence v Texas*. “Matters involving the most intimate and personal choices that a person may make are central to the personal dignity and autonomy of the individual and are protected from unwarranted intrusion. At the heart of personal liberty is the right to seek and develop personal relationships of an intimate character.”

Mr. Divan argued that the notion of autonomy extended beyond the spatial dimension. “It projects beyond the home or the closet, since individuals to attain growth and fulfilment cannot be confined to such spaces”, he said.

Mr. Divan then outlined the global trends with respect to laws relating to homosexuality including the Yogyakarta Principles, the decision of the South African Constitutional Court, the Fijian High Court, the High Court of Hong Kong, the European Court of Human Rights, the Nepalese Supreme Court, and the UN Human Rights Committee.

He said that these judgements showed that moral disapproval could not be adequate rationale to keep 377 on the statute book. Chief Justice Shah then pointed out that the Indian Constitution provided that public morality could be a ground for restricting fundamental rights. Mr. Divan responded with an impassioned argument. “If it is a law which impinges on the dignity of an individual, not in a nebulous sense, but affecting the core of the identity of a person. Sexual orientation and gender identity are part of the core of the identity of LGBT persons. You cannot take this away...” He said, “Morality is insufficient reason in a case like this where you are criminalizing a category and affecting a person in all aspects of their lives, from the time the person wakes up to the time they sleep”. He said that NACO

figures estimated that there were 25 lakh MSM in India, which is a minimum figure that we are talking about.

Mr. Divan said that if the court did not declare its relief limiting the scope of section 377, it would cast a doubt on whether LGBT persons enjoyed ‘full moral citizenship’ of this country. “A moral argument cannot snuff out the right to life and personal liberty (of LGBT persons).” ‘This is a law that affects what a person considers himself to be while facing the mirror’, he said.

Addressing the point on whether the morality argument could be used to curtail the right to life and liberty, Mr. Divan cited Justice Thomas, who even while dissenting in the *Lawrence case* (U.S.), characterised the Texas legislation as ‘an uncommonly silly law’.

Chief Justice Shah asked if one could argue that section 377 would lead to disqualifications when it came to elections, employment, etc.

Day 3: Post Lunch Session

Mr. Divan cited the decision of the Fiji High Court where the Fijian Court, faced with a similar dilemma as the Delhi High Court, had invalidated the relevant section to the extent that it declared inconsistent that part of the section that criminalised private consensual acts between adults. “This is what we recommend that the court does. The section should be interpreted in a manner in which the constitutionality is preserved, not struck down”, he said.

Arguing that the grounds of discrimination in Article 15 and 16 of the Indian Constitution should be read to include discrimination based on sexual orientation, Mr. Divan cited the *Toonen* case (Australia) where the term ‘other status’ in the International Covenant of Civil and Political Rights was interpreted by the U.N. Human Rights Committee to include ‘sexual orientation’. He relied on the Canadian Supreme Court decision in *Vriend v Alberta* and the Indian Supreme Court decision in *Anuj Garg* to argue that ‘sexual orientation’ should be read into ‘other status’ or the term ‘sex’ that already exists in Article 15. The Canadian Supreme Court held that despite the term ‘sexual orientation’ not being specifically mentioned in the Canadian Charter,

on the basis of historic social discrimination based on sexual orientation, it was declared an analogous ground of discrimination.

In order to show that there was increasing realization in India of the rights of LGBT persons, Mr. Divan pointed out that the Tamil Nadu government had initiated policy measures for the welfare of aravanis (hijras), and that the Election Commission had provided a column for persons of the 'third gender'.

Agreeing with Mr. Divan, Chief Justice Shah said, "This is also reflected in the statements made by the Health Minister and the Prime Minister".

Mr. Divan said that the estimated figure of the number of homosexuals was around 5-7 percent of any given population. He said that homosexuality was no longer a disease and had been removed from the list of disorders by the American Psychiatric Association. The amicus brief in the *Lawrence case* showed that the core basis of adult sexual attraction arose in adolescence, which most people had no choice over.

Quoting from the affidavit filed by Gautam Bhan, Mr. Divan showed that the legal repercussions of Section 377 hindered the lives of homosexuals even though society and family could be supportive of the issue. In his affidavit, Bhan states that he felt like a second-class citizen in his own country because of 377.

Argued Mr. Divan, "Section 377 operated to criminalise and stigmatise people for being themselves. There is no justification for such a law".

Mr. Divan elaborated on the importance of the notion of identity. "We were discussing the issue of caste. In parts of India, men identify themselves by their caste. Women often identify by gender. For some, religious identity is paramount. When you are enumerating identity, a heterosexual person may not consider sexual orientation as important, but for a homosexual, sexual identity may be paramount. Sexual orientation is often the first thing that governs a person's life. As we saw in Gautam Bhan's affidavit, he asks why, though he is equal to persons in all other aspects, he still suffers from the stigma of section 377".

Mr. Divan said that he wanted to underscore the need for appropriate directions where persons of the LGBT community are alleged to have committed offences other than Section 377. “It is a widespread experience that law enforcement officials policing against obscene acts in the public etc., proceed against LGBT persons not as they would in respect to heterosexuals but under Section 377 as well. This amounts to a particularly invidious discrimination inasmuch as an offence under Section 377 is non-bailable and is punishable with a sentence up to life imprisonment. In contrast, a heterosexual person is generally booked under Section 294 of the IPC which carries a relatively lighter sentence of three months imprisonment and is a bailable offence”, he said.

Said Mr. Divan, “It is submitted that the constitutionality of a provision must be judged keeping in view the changed situation with the passage of time. A law that is constitutional at a certain point of time may with the passage of time be held to be unconstitutional. (*Anuj Garg*). In matters impacting human rights, a progressive interpretation of the law is necessary (*M. C. Mehta vs. Union of India*). In a distinct context the Supreme Court has observed ‘it is not necessary and indeed not permissible to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the code was enacted. The notions...have considerably changed then and now during nearly a century that has elapsed. It is legitimate to construe the code with reference to the modern needs, whenever this is permissible, unless there is anything in the code or in any particular section to indicate the contrary”.

He said that the interpretation with respect to Section 377 urged by Voices Against 377 was in keeping with contemporary understanding of sexual orientation and gender identity. “It is consistent with Indian constitutional values; it is consistent with international human rights standards; it is consistent with the developments in this field of the law worldwide as reflected from legislative changes and decisions of the superior courts in countries across the world”, he said.

“To blot, to taint, to stigmatise and to criminalise an individual for no fault of his or hers, is manifestly unjust. To be condemned to life

long criminality shreds the fabric of our Constitution. For the male homosexual in particular and by its expanded application to lesbians and transgenders as well, Section 377 has worked to silence the promise of the Preamble and Part III of the Constitution. It is the case of the Petitioner and those who support the petition that it is the liberating, emancipatory spirit underlying the Fundamental Rights invoked in this case that must prevail. The Constitution of India recognizes, protects and celebrates diversity. LGBT persons are entitled to full moral citizenship”, he said.

Mr. Divan then tendered a list of suggested operative directions for the Court to consider while passing orders.

Day 4 (26.08.08) Morning sessions

Additional Solicitor General (ASG) Mr. P P Malhotra begins arguments for The Union of India

Mr. Malhotra began by referring to the *Sakshi Judgment* and said that sexual offences constitute an “altogether different crime that are the result of a “perverse mind”. The Judges (Chief Justice A.P. Shah and Justice S. Muralidhar) reminded Mr. Malhotra that the *Sakshi* case dealt with the rape of a one-and-a-half year old child.

Justice Muralidhar interrupted Mr. Malhotra, and asked him to make the Central Government’s stand clear. “The government’s stand is the same as in its affidavits.” Justice Muralidhar said that when two Ministries of the government were speaking in different voices, it is possible that the government chooses not to file a counter affidavit. “What is the stand of the Central Government?” Chief Justice Shah asked once more. “The stand of the government is that 377 is valid”, replied Mr. Malhotra.

“Are you saying that 377 is valid as a whole, even for consenting adults”, asked Chief Justice Shah.

“That makes no difference”, replied Mr. Malhotra. “It is not their (the petitioners) case that this section won’t apply to violent or non-consensual acts. Their arguments are related to consenting adults in private. If there is a Supreme Court judgment to this effect, then it is relevant”, said Justice Muralidhar.

“The Supreme Court has said that it is a perversity of mind. Justice Pasayat, while he was in the Orissa High Court (*Mibir v State of Orissa*) has said that consent or no consent, it did not matter,” replied Mr. Malhotra. He then read from the text of the judgment. “The offence is one under section 377 of the IPC, which implies sexual perversity. No force appears to have been used...neither notions of a permissive society nor the fact that in some countries homosexuality has ceased to be an offence, has influenced our thinking”.

“This case deals with a young boy, where there is no consent”, pointed out Chief Justice Shah.

“The question is whether this section makes it an offence irrespective of age”, said Mr. Malhotra.

“Then you are saying that this line throws out the entire question of constitutional validity,” asked Chief Justice Shah. “I’m sorry. This section applies to consenting adults, and there are a number of arguments that this is in violation of Article 21 etc.”, he said.

“This argument is being raised because there are many people of ‘that kind’ in society,” said Mr. Malhotra, “People are indulging in it, and they should be excused because they are consenting adults?” he asked.

“There is no question of being excused”, Chief Justice Shah remarked sharply. “The argument is that Article 21 is being violated”.

Mr. Malhotra then again referred to *Mibir v State of Orissa* (Justice Pasayat’s decision). “.Unnatural carnal intercourse is abhorrent to civilised society. It is recognised as a crime and punishable with a strict sentence. Unlike rape under section 376, consent of the victim is immaterial.” “Age is also immaterial”, added Mr. Malhotra.

“The judge was construing the section (377) as it is. This section is now being challenged”, said Chief Justice Shah. “I am only pointing out that the courts have taken the view that this act is abhorrent to society. The Pasayat judgment says that even if consent is given, it is immaterial”, repeated Mr. Malhotra.

“You yourself know that these are observations of the court and are not the ratio of the case”, said Justice Muralidhar. “I confine myself to the observations of the court. The view of the court is that it is abhorrent to society”, said Mr. Malhotra.

“This is a 1983 decision. Much water has flown since then”, remarked Chief Justice Shah.

“My lord, nothing has flown in India since then”, quipped Mr. Malhotra.

“Look at both your affidavits”, said Chief Justice Shah.

“The Ministry of Health’s concern is about the health of the person. The Home Ministry’s concern is law and order. I am not saying that the states should be made party, but law and order is a state subject”, said Mr. Malhotra.

“This is about the right to live with dignity”, remarked Chief Justice Shah

“The dignity of society needs to be seen too”, replied Mr. Malhotra.

“Then argue that point. Don’t reduce this petition to one line. Take this issue seriously”, said Chief Justice Shah. “I fully agree that this is a serious issue and requires serious consideration”, said Mr. Malhotra. Mr. Malhotra then argued that the rule of strict construction had to be applied to penal statutes. “No person can license another to commit a crime, if the act has a tendency to effect breach of peace”, said Mr. Malhotra.

Chief Justice Shah said “So your arguments are that 1) it (unnatural sex) may create breach of peace and 2) it affects public morals”.

“I will show that this (reading down 377) will increase the chances of evil sought to be avoided. i.e., the evil of HIV/AIDS. There will be more people of this nature in society”, said Mr. Malhotra. “This will lead to harm in society.”

Chief Justice Shah summed up Mr. Malhotra’s arguments again: 1) It will degrade moral values 2) It will cause a health hazard to society 3) It will be a detriment to the health of subjects.

Mr. Malhotra then referred to a Full Bench decision of the A.P. High Court (*Vijaya vs. Chairman SCCL*, AIR 2001 AP 502) “That was a case of taking consent for mandatory testing”, said Chief Justice Shah. “There is still no bar on males having sexual intercourse with females”, he said.

“That is because our moral values require one man and one woman, his wife”, said Mr. Malhotra.

“If a man contracts HIV and goes to 5 men and 5 women, he will spread it”, said Chief Justice Shah. “What is material is for you to show that the existence of section 377 will act as a deterrent to such a man”, he said.

“If there is no prosecution for consensual homosexual sex, why should it be read down?”, asked Mr. Malhotra.

“Criminalisation carries with it stigma”, interjected Chief Justice Shah. “In the understanding of the Central Government, is there a category of MSM. Has this population grown in the last few years? Does NACO have this data?”, asked Justice Muralidhar. “Factually, is the government of India aware of the MSM population in the country?”

“NACO has surveyed it”, replied Mr. Malhotra.

“You are saying non-criminalisation of homosexuality could lead to encouraging homosexuality and consequently increasing incidence of HIV/AIDS. For that, do you have any data?”, asked Chief Justice Shah.

“I will read from the judgment”, said Mr. Malhotra.

“We are on facts”, pointed out Chief Justice Shah.

“If a man is having sex with one woman, it is confined there. It can’t be transmitted to others”, said Malhotra. “We need to stop this vehicle (homosexual sex)”, he said.

“How does this lead to a breach of peace?”, asked Chief Justice Shah.

“The police can’t be in the house of everybody. The so-called consenting adult may be bold etc., but isn’t this more painful? There is no data on this”, said Mr. Malhotra.

“There is data”, said Chief Justice Shah

“The data is on what is happening in America. We are not concerned with that”, said Mr. Malhotra.

Chief Justice Shah then pointed out that the government’s affidavit dealt with deletion of 377 while the petitioner’s prayer was only reading down. “If this permitted in the case of consenting adults, it is arbitrary again. It is discriminatory. Giving this kind of permission will cause great harm and prejudice to society”, said Mr. Malhotra. “They have not shown one case where there has been a prosecution under 377”, he said.

“Mostly they are not prosecuted”, remarked Chief Justice Shah.

“377 is not violative of Article 14 or 15 of the Constitution. 377 is primarily used to prosecute child sexual abuse, and is used to bridge the lacunae in rape laws, and is not used to prosecute homosexuality”, said Mr. Malhotra.

“This is also their argument. They are also making the distinction between acts without consent and child sexual abuse and consenting adults”, pointed out Justice Muralidhar.

“If the court gives this kind of interpretation that it is permissible, it will create havoc in society”, said Mr. Malhotra. He talked about reasonable restrictions in the constitution. Justice Muralidhar then asked Mr. Malhotra about the NACO affidavit which categorically states that criminalising homosexuality will affect access to treatment.

“The numbers will increase. Will multiply. When there is law there will be fear, otherwise there will be no fear at all”, said Mr. Malhotra.

“People are afraid of reporting that they are HIV positive because of the law”, said Justice Muralidhar.

“We have opened many centres for this purpose”, replied Mr. Malhotra.

“The Health Ministry’s (NACO) affidavit is very clear”, said Chief Justice Shah.

Mr. Malhotra then relied on the 42nd and 156th Law Commission Reports, to show that section 377 should be retained as Indian society by and large disapproves of homosexuality. The Judges pointed out that the 172nd Law Commission Report (the latest on the subject) recommends that the government enact a separate legislation to deal with child sexual abuse and delete section 377.

“One may be willing to commit any crime. One may call a person to one’s house, beat him, or commit murder and say it was with consent and in private. An offence is an offence. Consent is immaterial”, said Mr. Malhotra.

Mr. Malhotra argued that criminal law has to address public morality and issues of harm to society. He said the legal concept of crime depends on moral and political considerations, and that criminal law reflected shifts and changes in morality. He said that since the Indian Penal Code had been enacted, crimes like child marriage, dowry and widow remarriage had been brought under the scope of criminal law.

Justice Muralidhar pointed out that widow remarriage was not a crime. He berated the government for submitting the affidavit with this line. “If we don’t react strongly, everything will be tolerated. The whole paragraph is about morality. It just shows how serious the gentleman (from the government) is in answering a notice from the High Court on such a serious issue”, he remarked.

Justice Muralidhar asked if the government’s affidavit actually said that incidence of HIV/AIDS would increase if 377 is read down, or if it was only in the government’s oral submissions. “The affidavit of the Central government has not said that there will be a greater risk in spreading HIV/AIDS”, said Justice Muralidhar.

“The court can’t be oblivious to natural phenomena and natural facts”, said Mr. Malhotra.

Chief Justice Shah, referring to the NACO affidavit, said that the government’s own affidavit said that people living with HIV/AIDS would be pushed underground. Mr. Malhotra pointed to a different

paragraph in the affidavit that referred to the need for a change in lifestyle, avoiding multiple sexual partners to reduce risk of HIV/AIDS.

Chief Justice Shah said, “Do you stand by para 5 (which stated that people living with HIV/AIDS would be pushed underground because of 377) of the affidavit?”

“It is a government affidavit. I can’t say I don’t stand by it”, replied Mr. Malhotra. He said that the affidavit says there is a need to prevent AIDS, encourage education programmes and motivate safer sex, i.e. sex with one partner.

“Partner could mean male or female”, said Chief Justice Shah.

“Male to male (sex) is neither known to nature, nor known to law”, said Mr. Malhotra. He pointed out that the incidence of HIV/AIDS is 8 per cent in the MSM population as compared to less than 1 per cent among heterosexuals. “What the petitioner is saying is, permit this 8 per cent to grow”, he said.

“The NACO affidavit says 377 has an adverse impact on safe sex programmes”, pointed out Chief Justice Shah. “Please read the whole affidavit”, he said. “There is no averment that deletion of 377 would spread HIV/AIDS.”

“The National Sentinel Survey data shows that 6 per cent of the MSM population are already covered by the government’s programmes. That leaves 2 per cent. They can also be covered through education etc. That would be the proper direction, rather than to say this should be permitted.” Mr. Malhotra then read out the contents of section 377. He then explained what ‘against the order of nature’ meant, “...for intercourse, nature has specified a place. That place is scientifically designed by nature. If it is done at that place, probably there is no injury, or if there is an injury, it is of minor nature”. He said that the emphasis was on the act. “..This should be done at a place, at a point designed by nature for that purpose, and if you do it otherwise, it is treated as an offence”, he said.

Mr. Malhotra then referred to an Andhra Pradesh High Court judgment delivered by Justice Sinha. When asked by Chief Justice

Shah on the relevance of this decision, Mr. Malhotra said, “AIDS spreads through homosexuals. This is a recognised fact”. Justice Muralidhar said, “There are several major routes of infection”. “Does it (the AP judgment) say Section 377 should be retained?” asked Chief Justice Shah. “Portions of the judgment say how AIDS is spreading”, said Mr. Malhotra. He said that the first case HIV was reported in 1986 in India and extra-marital sex was the primary mode through which is spread.

“This could be man to man or man to woman”, said Chief Justice Shah. Normal sex is from man to woman and not man-to-man said Mr. Malhotra.

“The Petitioners case is backed by substantial material”, said Chief Justice Shah.

Mr. Malhotra said, “They are arguing – it is a stigma on me, I can’t go anywhere. How would a man get this infection? I am condemning the man. But there is no need to be sensitive to this. They can go to the doctor. The law cannot be read down or declared invalid because they are sensitive. There is no doubt about the plight of these people, but to say that the law should be declared invalid is not enough. The effect of the law has to be direct and tangible and mere sensitivity is not enough”.

Day 4 (29.08.08) Afternoon Session

The Government of India resumes its arguments.

Mr. Malhotra then went on to reiterate his point that when there is an ‘apparent conflict’ between the right to privacy of the person and the interest of general public and society that this disease is not spread. Homosexuality is one of the causes, which affects this disease. If this is allowed what will happen? There will be more sex and the disease will be spreading. He noted that he had no objection to condoms being supplied as that was a precaution, but it must not be made legal. The law is clear and need not be read down.

When Mr. Malhotra was asked by the Judges as to whether the right to health was a part of the right to life under Article 21 he stated that yes, but not only the right to health of those affected but also society.

Finally Mr. Malhotra conceded that the right to health was included under Article 21. However he continued to stress that the right to health also included the right to health of others as well.

Chief Justice Shah posed the hypothetical question as to whether a law which discriminated against HIV positive people by denying them employment and isolating them would be valid. Mr. Malhotra's response was that no law is abstract and this right cannot be absolute. One has to see if other person's rights are affected. He went on to note that the Supreme Court had said that it was a moral perversity. Tomorrow you will say that you have a right and exercise it in the road. We have to see limits, see other men's rights as well and balance rights.

Chief Justice Shah noted that Mr. Malhotra was relying on these judgements to show that AIDS was transmitted through homosexual sex. "However on affidavit you are silent on whether non-criminalisation would lead to spread of HIV/AIDS. There is not a word on this. In fact the NACO affidavit says the exact opposite. Where do you get this point that de-criminalisation would result in the spread of HIV/AIDS. Show us some study, research on this point, surely we can't rely on your word alone. In fact the consensus around the world is that criminalisation will drive HIV underground....The judgement you rely on (*Vijaya v. Chairman SCCL* AIR 2001 AP 502), upholds the validity of mandatory testing in the case of HIV/AIDS, but the Union of India has in spite of the judgement not made testing mandatory...You have to place some material to show that criminalisation will stop HIV. In fact what flows from your argument is that we should not have HIV at all because we have Section 377."

Mr. Malhotra was repeatedly asked by Chief Justice Shah as to what was the sum and substance of his Article 21 arguments, whether he would make an argument on public morality as a justification for limiting Article 21 rights and also whether he would address the question of dignity. Justice Muralidhar made the point that the other party had made a very strong oral submission as well as written submission that Section 377 violated the right to life with dignity and Mr. Malhotra had not addressed that limb of the Article 21 question. Dignity formed a part of the Preamble as well as Universal Declaration

of Human Rights. Mr. Malhotra was also asked to address the Court on the question of whether sex in Article 15 and Article 16 included sexual orientation.

Mr. Malhotra while assuring the Court that he would address the Court on those points went on to make submissions on the interpretation of Section 377. He said the question under this provision was not whether intercourse was with consent or not but was whether it was against the order of nature. He said that nature had devised scientific methods. “You breathe through your nose, eat through your mouth. Similarly order of nature would mean that intercourse should be in the place specified by nature in all human relationships even among animals. The phrase ‘order of nature’ means that if a man wants to have intercourse with a woman, the place is specified.” Chief Justice Shah asked Mr. Malhotra to please address the Court on the Constitutionality of Section 377 and to leave aside the question of interpretation of the meaning of Section 377 as that question was not before the Court.

Day five (29.09.08)

(Mr. Malhotra continues his arguments on behalf of the Union of India).

Day Six (30.09.08)

(Mr. Malhotra continues his arguments on behalf of the Union of India).

Day Seven (1.10.09)

(Mr. Malhotra continued his arguments on behalf of the Union of India).

When questioned about the contention that Section 377 violated the right to live with dignity, Mr. Malhotra maintained that he conceded that everyone had the right to live with dignity, only ‘dignity does not mean that you permit all this...’

Mr. Malhotra then read from the petition to make the point that Naz Foundation concedes that MSM and gay men are susceptible to HIV.

Chief Justice Shah said that there was no question of concession as the point was not in dispute as all.

Mr. Malhotra then went on to read from the written submissions of the petitioner to make the following counter assertions; that the petitioner uses the term sexual minorities and that there is no such thing as sexual minorities in the Constitution.

Chief Justice Shah noted that the petitioners were not praying for inclusion as minority in a Constitutional sense but using the term to indicate a small number of people.

Chief Justice Shah asked Mr. Malhotra to respond to the contention that the word sex included sexual orientation. Mr. Malhotra responded by saying that the term 'sexual orientation' is taken from South African law. The South African Constitution guarantees sexual orientation. "If one is used to that kind of sex, that will be preserved if a man is indulging in that kind of activity... no such thing in India." Chief Justice Shah made the point that the word sex included sexual orientation came from the *Toonen* decision and was it the contention of Mr. Malhotra that international law treaties which India has ratified could not be used to interpret Constitutional guarantees?

Justice Muralidhar asked Mr. Malhotra what was his response to three issues raised: health, privacy and dignity? On privacy Mr. Malhotra noted that he had read the same judgements as the petitioners, *Kharak Singh*, *Govind* and *Rajgopal*. He did not agree with the foreign decisions referred to by the petitioner on privacy. Chief Justice Shah pointed out that *Griswold*, *Roe* and others were not anti-sodomy law decisions but rather decisions on the scope of the right to privacy and were all referred to by the Supreme Court in *Govind* and subsequent decisions. Mr. Malhotra noted that nobody interferes with private affairs in anybody's house. One can do anything one wants in the privacy of one's home.

Justice Muralidhar then made the point that in that case the ASG had to show compelling state interest in prosecuting consensual sexual activity in private.

Mr. Malhotra noted that the law was there since 1860 and it was up to parliament to change the law. Law visualizes all sections of society not just a small section of society. Law should cater to the needs of entire society. The will of the parliament is clear; debates can go on in society. Though other provisions of the Indian Penal Code and Cr.P.C have been amended, this section has not been changed. It cannot be said that the right to privacy will extend to such an extent and such absurd levels. He said that law cannot be made invalid because of hardship to a section of society. One can however remedy the hardship. The Wolfenden Committee was applicable in a different context and we need not look at that. With reference to *Toonen's* case, the standards of thought, morality in those countries are different, theirs is a permissive society and our society has not adopted those standards.

There is no such thing as consent in Section 377, the concept of Section 377 is a kind of a force, which is not natural, and consent has no meaning in this context. Section 377 according to Mr. Malhotra deals with a kind of situation where so called intercourse is against the order of nature, harm or no harm. It is necessary to protect the human race itself. We need Section 377 because man to man sex is against the order of nature. Scientifically everything God has made, eat from the mouth, etc., is disturbed if this is allowed.

“Does the right to dignity imply this kind of right?” The question according to Mr. Malhotra was whether it was against dignity to punish what was against the order of nature. There is however no controversy about dignity. “Who is saying that they should be unfairly treated? Nobody is saying that. They should be treated fairly. The point is made that they are marginalized, ignored, who is doing that? They are entitled to treatment. Nobody is saying treat like a second-class citizen, if a man is suffering from something, he needs treatment.”

Mr. Malhotra noted that the Government of India was committed to addressing the needs of those at great risk. They say that Section 377 prevents the collection of data. However we need to educate people, this not good for you and for the other person.

Chief Justice Shah made the point that if we educate people that going to prostitutes is wrong then will people stop going to prostitutes?

Obviously the NACO affidavit was on the point that education by itself was not enough.

Mr. Malhotra said, “In our culture and tradition men have sex only with their women”. Mr. Malhotra went on to say, it is wrong to say that access to health care is impeded as if a man goes to a doctor and asks for treatment he will be provided. Where is the fear? It is incorrect to say that the statute is arbitrary because one can’t get treatment.

Chief Justice Shah said that on the ground, if a person had a sexually transmitted disease and was a MSM, he would be fearful of going to the doctor knowing that the sexual act he had done was punishable even up to life. He knows that the behaviour is criminalised and knows that he is liable to punishment. It remains a stigma as he cannot tell the doctor that what he indulged in was an offence. Can you brush aside NACO’s affidavit by saying that person is feeling shy about going to the doctor? Chief Justice Shah went on to note that MSM are subject to various indignities which might hinder actual treatment. The only question Mr. Malhotra had to answer is if there was no prosecution for sex in private (hardly any) why then should the provision remain? What is the compelling public interest served by a law that is rarely used? In the affidavit read out by Mr. Divan, there is a situation which all of us know of -making fun, ridiculing, heaping indignities only because of the nature of sex. When you are not serious about prosecution, why should this provision remain on the statute book?

Justice Muralidhar asked Mr. Malhotra to think about this point, “that if the Union of India viewed this as being against the order of nature how it would impact on the notion of an inclusive society? We have an obligation to educate our people on how to exist with people who are not like you? You need to ask the question on how to help communities to coexist. What impact will this have on the argument of compelling state interest?”

Chief Justice Shah went on to note, that the stand of the government in most of the cases where the law was challenged, *Dudgeon*, *Modinos*, Hong Kong, South Africa it was conceded by the Government that the law was rarely used. It was only used for harassment. If the

Government was not serious about enforcement, why should it be there?

Chief Justice Shah then summarized the arguments of Mr. Malhotra as:

- 1) The removal of the law would lead to the spread of HIV/AIDS. However there was no study submitted by Mr. Malhotra on this point.
- 2) It would lead to a loss of morality as our culture is different. There is however different thinking within the Government on this very important issue. In effect your stand would tell an entire section of the population that they are law breakers and send a message to society. In the *Modinos* case for example it was held that even in an orthodox Christian country like Cyprus, the majority view and public morals alone were insufficient for continued criminalisation.

Justice Muralidhar then made the point that a public interest litigation was not to be viewed as an adversarial litigation; it is not dispute resolution but problem solving. Certain elements of the case before us should be viewed in a constructive manner.

Chief Justice Shah then went on to say that since Mr. Grover was present it would be right to mention the case in the Bombay High Court which related to the termination of employment of a person who was HIV positive and how in that case all parties agreed to cooperate to find a solution and did not see it as a adversarial litigation.

Chief Justice Shah then referred to the NACO affidavit and said that there were real difficulties faced by an organ of government.

Justice Muralidhar then made the point that the Government itself was not able to intervene but rather depended upon NGO's for HIV interventions.

Justice Shah also noted that the State of Tamil Nadu's notification on aravanis was telling in terms of thinking which recognised their rights.

The Court rose and the next date of hearing was fixed for post the vacation on Oct 15. Chief Justice Shah asked Mr. Malhotra how much

more time he needed and then fixed a half day session on October 15 a full day on Oct 16 (afternoon was fixed for interveners) and a half day on October 17.

Day 8, (15.10.09) Morning Session

Additional Solicitor General P P Malhotra continues with his arguments.

Mr. Malhotra submitted some additional material to the Court. He continued his submissions by making the point that HIV transmission was through sexual contact and as per the study of sexual behaviour in the U.S., over 89% of the transmission was due to homosexual behaviour.

Chief Justice Shah asked a question about the validity of the article relied upon by Mr. Malhotra and made the point that the author of the piece was a Minister in the Catholic Church. Justice Muralidhar noted that on page six of the article submitted by Mr. Malhotra the entire discussion was based on the Bible. Chief Justice Shah went on to read from the article that “AIDS was a judgment of God” and noted the article seemed to be complete propaganda. Mr. Malhotra retorted by saying how come anything on the other side is accepted and anything on this side is seen as propaganda.

Chief Justice Shah noted that Mr. Malhotra should refer to the NACO affidavit on the point.

Mr. Malhotra went on to read from the article titled, ‘The health risks of gay sex’ by Dr John Diggs to say, that there were five distinctions between gay and heterosexual relationships. Those differences include:

- A. Levels of promiscuity
- B. Physical health
- C. Mental health
- D. Lifespan
- E. Definition of monogamy

Mr. Malhotra went on to read from the article to make the points that there was a high level of promiscuity among gay men with 75%

of male homosexuals having more than 100 partners. This according to Mr. Malhotra would mean that HIV would spread like wildfire. The medical consequence would be the spread of HIV, syphilis etc. He also noted that lesbians are 3-4 times more likely to have risky sex. There was a high incidence of psychological abuse among gay and lesbian people. There was also a high rate of intravenous drug use among lesbian, gay and bisexual people. Long term sexual fidelity is rare in gay relationships.

Chief Justice Shah responded by asking who was Dr. John Diggs, the author of the article? He made the point that he was a practicing internist and not a doctor. He noted that the Court was interested in scientific opinions not the opinions of religious bodies. He noted that a view of a religious body which viewed them as sinners could not be taken notice of by the Court.

Mr. Malhotra responded by saying that Dr. John Diggs has produced statistics on the serious health consequences of engaging in homosexual sodomy. Homosexual sodomy is an efficient transmitter of STD/HIV and anal intercourse is a serious health hazard.

Chief Justice Shah replied by asking who were the traditional values coalition on whose website, the John Diggs article was hosted. He said, “what are his credentials and how do we accept it? On one hand we have NACO and on the other we have Dr. Diggs from America?”

Mr. Malhotra said that the only reason he cited the study was to show that homosexuality caused a very serious health problem. He went on to read from the study to say that, the sexual activity enjoyed by homosexuals results in bacterial infections, and even cancer. There are activities like golden showers, and insertion of objects into the rectum which cause oral and anal cancer. A study of homosexual practices shows 37% enjoyed sodomitical activities and 23% enjoyed water sports.

Chief Justice Shah asked whether everything on the internet was to be taken as gospel. He noted that they were not taking it and that they were going by the Government’s own affidavit.

Mr. Malhotra said that AIDS is causing havoc in society. Chief Justice Shah noted that the NACO Report had to be countered by scientific material by bodies such as the WHO and not religious bodies. He asked Mr. Malhotra to get material on what the position of bodies such as the WHO was?

Mr. Malhotra went on to cite another study which also noted the high levels of promiscuity and unhealthy behaviour among the homosexual community. He noted that 29% of homosexuals had 300 partners in a lifetime and 8% had over 300 partners. In New York and San Francisco where gays were concentrated one report suggests that they had even 1000 partners.

Chief Justice Shah interjected to say that going by Mr. Malhotra's argument should we then put 20 lakh homosexuals behind bars? He went on to quote from the study by saying that 'homosexuality is death' is really a one-sided view of religious bodies.

Mr. Malhotra noted that the figures were based on research by a research scholar.

Chief Justice Shah said that there were doctors among religious bodies as well and anyway what does the WHO say? He noted that the key issue was how far can the government intervene in the privacy of a person and whether the state's intervention was correct?

Mr. Malhotra made another submission about the spread of HIV through homosexual sex to which Chief Justice Shah noted that he recently addressed a gathering of 600 widows whose husbands had died of HIV. So it was not only gay partners who suffered from HIV/AIDS.

Justice Muralidhar asked Mr. Malhotra to show some statistics relevant to India. He went on to ask if Mr. Malhotra could produce any study to show that this activity increases risk to such an extent that it needs to be criminalised. "There are two arguments which you have put forward. One is on public morality and the other is on public health and safety. All literature including the NACO affidavit points to the contrary of what you are suggesting in terms of the second argument.

NACO is telling us that continued criminalisation will result in denial of the right to health of this group.”

Mr. Malhotra replied by saying that they are entitled to all health benefits.

Justice Muralidhar responded by saying that they are not entitled but have a right to health and continued criminalisation prevents their exercising this right. This is the argument of the other side, whether Section 377 prevents a person from exercising his right?

Mr. Malhotra asked if in the garb of this right one can deny the right to health of the rest of society?

On being asked to produce statistics from India Mr. Malhotra noted that the other side went to the U.S. and other places but he was being asked to keep to India. Justice Muralidhar noted that for facts and statistics we must first and foremost, go to expert bodies in India. But law and judgments could go to other jurisdictions. Chief Justice Shah asked Mr. Malhotra to show some scientific material that retaining criminalisation would work as a deterrent.

Mr. Malhotra noted that, “this kind of activity, by a man and a woman it spreads. In normal sex, man is required by law to have sex with one person. Now if they are having sex with 100s of persons, 200, 500 even more, it’s more likely to transmit disease”. Counsel for Naz Foundation intervened by citing a UNAIDS policy brief on HIV and Sex between men, which noted that the criminalisation and stigmatisation of MSM impeded HIV prevention work. Chief Justice Shah noted that “you want to disown the NACO affidavit and say that criminalisation is a must. We are trying to say that it’s not only NACO but UNAIDS as well which is a U.N. body which is arguing for respecting rights of MSM.”

Justice Muralidhar said that another argument Mr. Malhotra could make would be to show that decriminalisation had led to the spread of HIV/AIDS. Chief Justice Shah noted that in both the *Dudgeon* and the *Modinos* case the same arguments were advanced. The Court did not see any merit in them. Even within the U.N. the consensus seems to be that discrimination and stigmatisation has not helped.

Mr. Malhotra took the judges to a compilation which showed in which countries homosexuality was decriminalised and in which countries it continued to be an offence. Chief Justice Shah noted that the point one could get from the compilation was that all democratic countries are in favour of decriminalisation. Mr. Malhotra then cited from an article titled, 'Why gay marriage is not only wrong but socially destructive', to make the point that after gay marriage was made legal in the Netherlands, HIV/ STD rates were soaring. Chief Justice Shah noted that marriage was a very different issue which was not being discussed here.

Then Mr. Malhotra read an article titled homosexuality and religion with its source being the wikipedia. At which point counsel for the petitioners submitted that wikipedia was an unreliable source as anybody could modify the article.

Mr. Malhotra then went on to read and respond to the written arguments of the petitioners. He noted that with respect to Article 14, Section 377 did not violate the provision as the law applied to all persons equally. It did not single out certain persons. It applied equally to all classes of persons – whether female or male, with this kind of unnatural thing being prohibited by law. It does not for example state that the provision applies only to women, men above 50 etc. It applies to every citizen uniformly.

Chief Justice Shah noted that the argument of the petitioners was the over inclusivity of the provision.

The Court then rose with the next hearing fixed for the next day, 16.10.08.

Day Nine (16.10.08)

(Mr. Malhotra continued his submissions on behalf of the Union of India).

Day Ten (20.10.09)

Mr. Malhotra continued his submissions.

Chief Justice Shah summarised Mr. Malhotra's submissions as covering the grounds that there was no right of privacy in the Indian

Constitution and if there was a right to privacy it can be curtailed on the grounds of a larger morality or the rights of society. Article 14 is applicable to all and does not target a particular class. In Article 15 the word sex does not include sexual orientation. If the bar on consensual sex between same sex adults is lifted, even if the provision is not used, it is a moral code. It creates fear in the minds of people which will go if removed. If the provision goes then this conduct will spread and this will lead to more spread of diseases. Right to health as a part of Article 21 should also consider the health of society.

Counsel for B.P. Singhal, Respondent No. 7, Mr. H.P. Sharma then began his submissions.

Mr. Sharma began by saying that the word carnal referred to flesh and what it meant when used in the Indian Penal Code was fleshy intercourse be it oral or anal or whatever.

Justice Muralidhar then asked counsel who he was representing

Mr Sharma said that he was representing B.P. Singhal.

Justice Muralidhar then asked who B.P. Singhal was.

Mr Sharma replied that he was a social worker and he was representing the matter so that the majority view could be there.

Mr. Sharma continued his submissions by stating that against nature meant that it was unnatural, immoral and irrational. When it is a social evil then there is no question of consent. He then referred to an article by Dr. Diggs on how sex between men was linked to HIV.

Chief Justice Shah responded by saying that place anything before us but not Dr Diggs.

Mr. Sharma submitted that Dr. Diggs was a part of a religious network called the Traditional Values Foundation.

Mr. Sharma sought to rely upon another Dr. Lepak. Chief Justice Shah asked the question of whether this was research and that counsel could rely upon a government source, U.N. body, but not rely upon these materials.

Mr. Sharma then proceeded to read the NACO affidavit to make the point that only 36% of MSM used condoms and that 64% did not use condoms. Further they did it at public places, had multiple partners and were not faithful.

Chief Justice Shah asked counsel to address arguments on constitutional grounds like Articles 14, 19 or 21.

Mr. Sharma continued his submissions to note that on a reading of the NACO affidavit, HIV is one part and homosexuality is another part. If Homosexuality was allowed, there was a chance of epidemic of HIV. If 64% do not use condoms and surrender to the disease then they can't come to court and say legalise it.

He went on to submit that he would like to support the affidavit of the Ministry of Home Affairs. If man is married and wife is sitting at home, then what will happen to her? If you allow this on grounds of two consenting adults then, brother-sister marriage should be allowed. Gambling, adultery should be allowed.

Chief Justice Shah interjected to say that “you are missing the point, it is not about the lawfulness of marriage”.

Mr. Sharma submitted that he was on morality, the joint family structure and that we must not import evils from the west. We have traditional values and we must go by that. It would affect the institution of marriage and if women get doubt about what their husbands are doing, there will be a flood of cases of divorce.

He went on to note that what would happen to the country in 2100 if there was this indulging in homosexuality as the sex ratio would change.

Chief Justice Shah asked according to your Hindu orthodox opinion what was the reason for the sex ratio being skewed in favour of men.

Mr. Sharma submitted that female foeticide it was a social evil. One should worship girls. No sensible person can kill a child. Abortion should not be allowed. The social evil is that a girl is an unwanted child. He further added that it was poverty, which resulted in this social evil.

Chief Justice Shah pointed out that even in well off families there are studies, which show that there is 100% termination of foetuses when parents come to know that it is a girl child.

Chief Justice Shah asked Mr. Sharma to restrict his arguments to law and asked him to refrain from political arguments.

The Court rose and the matter was posted for the 6th and 7th November, 2008.

Day Eleven (6.11.08) Morning Session

Counsel for B.P. Singhal, H.P Sharma, continued his submissions by reading from his written submissions.

Mr. Sharma addressed the Lucknow arrests in 2001 in great detail and made the point that when the arrests happened it led to the recovery of magazines containing nude pictures of men and women, safe guide to gay sex, video containing sexually explicit scenes having a nude male on the cover, artificial penis, and two pamphlets which when translated from Hindi read, “It does not make a difference how you do sex, or who you do it with, it does not make a difference if it is safe wrong, or right, natural or natural, moral or immoral. Why do you argue so much, we only have one slogan, destroy AIDS”.

He cited this to make the point that “I don’t know what organisations are doing, the credibility is doubtful and whether these organisations have come to court with clean hands is doubtful”. He said that the pamphlet indicated that “The Centre was being used to train people in homosexuality by abandoning all morals and safety precautions”. He further submitted that “if one wants to do sex one should do it in a civilised manner and not have sex as in the Stone Age”.

Chief Justice Shah inquired if NACO programmes were like this?

Mr. Sharma went on to say that NACO affidavit says that over 60% do not use condoms and such persons do ‘not deserve sympathy or mercy’.

Mr. Sharma then referred to *R. v. Brown* to make the point that “homosexuals enjoy group sex and even enjoy committing violence. This is sexual perversity and when they were consenting adults,

criminal acts warranting prosecution were committed in the course of such perversity”. He said that “it was disconcerting to see tendency of homosexuals to indulge in group sex”.

Chief Justice Shah noted that “when the *R.v. Brown* judgment was delivered, sodomy was not a crime in the U.K. So even if Section 377 is read down and homosexual acts between consenting adults does not amount to an offence under Section 377, it would still be an offence if grievous hurt is inflicted on the passive partner even if partner has consented to it”.

Chief Justice Shah wanted to know about the relevance of the judgment.

Mr. Sharma responded that “anus is not designed by nature for any intercourse and if the penis enters the rectum, victim is found to get injury”. The activity itself causes bodily harm.

Chief Justice Shah asked whether the submission that this act itself causes injury, because it is unnatural or is likely to cause injury had been argued before. Whether in any culture, western, oriental, in several countries where ban is lifted, in WHO Reports, has anyone argued that act itself causes injury? Can you force *Brown* to the logical conclusion that sex between two males itself is a cause of injury? This submission has never been raised before any Court till now? Why is that?

Mr. Sharma continued to read from *Brown* to make the point that “drink and drugs are employed to obtain consent and increase enthusiasm, there is genital torture on anus, testis, blood letting. Burning of penis..”

Mr. Anand Grover intervened to say that *Brown* was to do with violence and dealt with a fact situation not contemplated by Wolfenden and that this was recognized by the judgment itself.

Chief Justice Shah referred to communities in India who inflict violence on themselves so that they are closer to God.

Mr. Sharma interjected to say that it was not relevant and if Muslims cause injury to themselves during Muharam it should not be allowed as well...

Mr. Sharma continued to read from *Brown* to again emphasize that homosexuals indulge in group sex. Chief Justice Shah interjected to ask if “it was based on personal knowledge that Mr. Sharma knows that homosexuals enjoy group sex?”

Mr. Sharma then observed that “since it was a perverted kind of sex...in the name of thrill, enjoyment and fun the young shall walk into the trap of homosexual addiction. The tragic aspect of this is that alcohol, drug and disease are the natural concomitants of homosexual activity”.

He further noted that there was a stigma around homosexuality not because of the law, but because it was immoral and against the order of nature. He asserted that petitioners had produced no evidence that homosexuality in India is not considered a social evil. He noted that the “law had a deterrent effect without which there would be male brothels and group sex”.

He went on to submit that, it was stigma not fear of the law, which drives MSM to lead a secluded existence. “Had section 377 been really so fear inspiring, we would not have been seeing people participating in gay demonstrations, proclaiming openly that they are homosexuals, or brazenly canvassing for MSM”.

Mr. Sharma then submitted that the court should not intervene in a policy matter and that it had no power to rewrite, recast or redesign the section.

Mr. Sharma then referred to his written compilation to make the point that the “physiology of every organ has a special purpose and that the anus was only for excretion, and no other purpose. The ‘ejaculatory ducts were meant for the carrying of semen and that there were no such muscles in the anus. In the science of sexual physiology and anatomy, it is completely logical that intercourse is heterosexual and any other way of releasing semen is unnatural”.

Mr. Sharma then observed that, if the consenting adults doctrine was allowed then one would have to allow gambling, adultery, selling and buying kidneys, prostitution, smoking, incest marriage. Further all Indian laws with respect to marriage would have to be amended.

He then submitted that if this was allowed it would “shatter every member of the family and all relations. It would be devastating to wife and children. The Indian family system is about love and dedication to our parents and grand parents”.

Chief Justice Shah interjected to say that he wished Indian families were like this and we could see this in our life.

Mr. Sharma submitted that “no wife wants to share her husband. If a son is homosexual, you can’t prohibit a father from beating him, disqualify him from inheriting property and domestic violence between man and man will increase. You can’t co-exist within the family because of ideological differences and this will affect the family system and affect public morals”. He further submitted that, “there would be nobody to protect homosexuals when they grew old. They will say the want to adopt a child born out of heterosexuality. If this is permitted then they will live a miserable life, when they are old they will have no relationship even if they have multiple partners now. The removal of the section is not in their interest”.

He also submitted that with respect to sex being driven underground and the need to negotiate safer sex, it was still being done in public places and it was wrong to say that homosexual sex was driven underground. There was no bar on buying a condom as nobody asked you if you were heterosexual or homosexual.

Submissions by Mr. Ravi Shankar Kumar on behalf of Joint Action Council Kannur (JACK).

Mr. Kumar submitted that there was no scientific evidence that HIV causes AIDS, that a change in this provision would mean that all marriage laws would have to be changed, and that under Sections 269 and 277 of the Indian Penal Code anyway, any intentional spreading of an infectious disease would be an offence.

Chief Justice Shah noted that Sections 269 and 277 applied to both homosexuals and heterosexuals and it was wrong to say that the mere commission of sexual acts without knowledge would be prosecutable under the provisions. Further not all homosexuals had AIDS. It was also wrong to assert that marriage laws would have to change as the ground of divorce which was sex outside marriage applied to both homosexual and heterosexual sex.

Mr. Kumar then asserted that Naz Foundation did not come to Court with clean hands and was part of an international network which was using HIV to push an agenda.

Anand Grover objected strenuously and said that the complaints filed by JACK against all counsels who had appeared in the Naz case, Mr. Divan, Ms. Jaisingh, Mr. Sorabjee was meant to intimidate.

Mr. Kumar then noted that an earlier petition filed on the same matter was dismissed, that the Lucknow arrests were about running a gay club which charged Rs. 1000 per day, that the petitioners were not a lawful trust etc.

Chief Justice Shah observed that he had never seen such low level of submissions and that Counsel should make submissions on Constitutionality of the provision.

Rejoinder on behalf of Naz Foundation by Anand Grover

Mr. Grover submitted two studies by universities based in Australia on the consequences of the decriminalisation of homosexuality. He used the studies to make the point that post decriminalisation there were no negative consequences and they provided a complete answer to the facile propositions made. There was no change in the impact on minors, the use of force, private homosexual behaviour and in fact had a positive impact on problems of public homosexual behaviour. It also allowed the police to divert resources to serious crime.

Chief Justice Shah wanted to know whether decriminalisation did lead to a higher risk for HIV which was the argument.

Mr. Grover noted that the studies pointed out that there was no increase in STDs which is a marker for HIV.

Chief Justice Shah then raised the question whether there was any analogy between prostitution and MSM in terms of HIV prevention.

Justice Muralidhar observed that the success of HIV programmes among sex workers was possibly because they were ghettoised and in one space while MSM were still underground.

Mr. Grover observed that the only way forward was to push condoms in a big way.

The Court then rose and the matter was scheduled to be completed tomorrow on 7.11.08.

Day Twelve 7.11.08 (Final Day of Naz hearings)

Mr. Grover continued with his rejoinder by stating that in India the HIV epidemic is caused by different actors and that in India MSM were not fuelling the epidemic but rather it was female sex workers.

As per the 2007 NACO study, there is an overall decline in infections in south and Northeast India. The decline in the south is because of interventions among Female Sex Workers. He submitted that you couldn't distribute condoms to MSM's, as then one will become abettors to the offence.

Mr. Malhotra intervened to say that nobody was saying that and that we are prepared to provide condoms to all.

Mr. Grover noted that it was not enough to say that they can come and get condoms but the state had to be proactive. He noted that the state has an obligation to treat everyone and the importance of condom provision was proved as incidence of new infections among female sex workers had come down. He submitted that if HIV spreads through homosexuality alone, it would have remained confined to homosexual population. But since this group was also having sex with the general population HIV spread to the general population. Hence if you scale up interventions with MSM, it will have a positive impact on the health of the wider society as well.

He then submitted that under Article 21 the state had a burden to discharge, i.e. that there was a compelling state interest to intrude into the right of privacy. There was no such data by the state and in

fact the state was divided in its opinion. With respect to the question of child sexual abuse and non consensual sex, the prayer was clear, since there is no law on child sexual abuse, the section as only been sought to be read down and not struck down. There will be no effect on marriage laws if this prayer is granted and the introduction of consent based distinction is already there in Section 375 and will not create any difficult problems.

Mr. Grover noted that with respect to the main contention of morality, he noted that while morality is a valid ground under Article 19(2) it cannot be literally imported into Article 21 as a restriction. The state would have to show more than just morality, to restrict rights under Article 21. The understanding of *Maneka Gandhi* can't be that, we limit Article 21, but rather that we expand Article 21.

Justice Muralidhar gave the example of two statutes, one restricts a gay parade and another restricts a gay person's right to dress in a particular way, saying he should wear suits only etc. Can morality be a ground for restricting expression and right to profession as well? For example if an MSM is an advocate and a Bar Council Rule prohibits him, clearly public decency and morality cant be ground for restricting the right to practice any profession.

Chief Justice Shah observed that if the state deprived a person of the right to health, could the state invoke morality as a ground and were the restrictions under Article 19 relevant at all?

Mr. Grover noted that pre-*Cooper* there was a compartmentalised view but now you can't take that view. You can't just say morality, but rather must show that morality is a compelling state interest.

Chief Justice Shah then asked whether if one imagined that HIV was not there and the petitioner comes before the Court, the argument would not just be about the right to health and dignity would be central issue.

Mr. Grover agreed with the Bench and noted that if as a heterosexual person he walked in the park, it was unlikely that he would be arrested under Section 377.

Mr. Shyam Divan for Voices Against 377

Mr. Divan submitted a note to the Court on the doctrine of severability, making the point that the doctrine of severability of enforcement would be of relevance the Court. This might be done by granting a perpetual injunction restraining enforcement of the law on the forbidden field.

The principle derived from *Chamarbaugwala's* case and cited by HM Seervai in his *Constitutional Law of India*, is that by applying the rule of 'severability in application', the Court may restrain the enforcement of a law or statutory provision in respect of that class of subjects of which the law is invalid. Here, Section 377 is invalid insofar as it covers consensual same sex acts between adults.

Mr. Divan then submitted another note, which was a brief response to the oral submissions by the contending respondents. The Judges perused the note and then Mr. Divan briefly made an oral submission on only one point – the question of public morality.

“The right to live with dignity is guaranteed to all persons. The declaration is necessary because it will enable LGBT persons to live with dignity and express a vital dimension of their identity. If identity and self-worth are important, if full moral citizenship is important, then public morality cannot be allowed to trump it. The activity with respect to which the declaration is sought does not cause harm to any third party. Public morality is not a valid or sufficient justification to deny a person his dignity, particularly where the morality is not in itself a discernible constitutional value or morality. Indeed, in this context, it is the fundamental rights enshrined to protect minorities including sexual minorities that ought to prevail. Morality by itself, in the absence of any other harm cannot be a ground to restrict the right to live with dignity.”

The Union of India and other intervener respondents were given till Monday to file their written submissions and the matter was posted for final orders.



On Freedom's Avenue*Gautam Bhan*

The historic judgment reading down Section 377 in the Delhi High Court on Thursday chose its words very carefully. It turned for help to an older moment, a moment of origin. Citing the constitutional debates of 1946, it reminded us of another India. An India that was being imagined just as it was coming to freedom. Nehru urged, in those debates, that we see the Constitution in its spirit rather than in any narrow legal wording. On Thursday, Judges Shah and Muralidhar sought to unearth that spirit. “If there is one constitutional tenet,” they argued, “that can be said to be the underlying theme of the Indian Constitution, it is that of ‘inclusiveness’. This Court believes that the Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations.” A few lines later, they argued further: “Indian constitutional law does not permit criminal law to be held captive by popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is the antitheses of equality and that it is the recognition of equality which will foster the dignity of every individual.

Court one, item one on the Delhi High Court's cause list. Ten thirty in the morning on the 2nd of July. A high court pass secured by a few dozen activists each of whom was remembering moments from the last decade of fighting Sec 377. It is these simple words and an electronic pass receipt that a movement lasting decades and a legal battle lasting eight years came down to. In the end, it was enough. When the judgment was read, you could feel the emotion in the room. Our tears flowed not just because we had "won". They came for the judgment that had set us free. This judgment is a judgment about dignity. It is about an India that Nehru imagined — an India that would open its arms and embrace all who lived within it. It is about the words equality, dignity and rights finding roots in the lives of millions of queer Indians who today can feel their feet on the ground of their own country.

This judgment is a return to Ambedkar. The judges reminded us of the Ambedkar who so passionately fought for the constitution of his imagination. In Ambedkar's India, he wrote fervently that the courts of law of our land must be ruled by a 'constitutional morality' and not a public morality. State interest, he argued, cannot be governed by public morality but by the spirit of the Constitution. In the days to come, as morality debates will no doubt flood our media and public spaces, we must keep this other morality equally in mind. A morality that we share as citizens, not just as individuals.

This judgment is about equality. Citing Article 15 of our Constitution, the judges ruled that 'sex' as commonly used in non-discrimination statutes must also include 'sexual orientation'. Non-discrimination legislation based on gender/ sex now can be read to include sexual orientation. Reading Article 15 into the judgment, the judges have reminded us decriminalising queer people also means simultaneously treating them with equal respect in jobs, in hospitals, in our homes and in our public places.

Yet how do we read this judgment not just as queer people but also as Indians no matter our sexuality, gender, religion, caste, language or region? Movements across this country have and continue to struggle for their rights. Frustrations with the government and the 'system' are commonplace. Many have argued that change is not possible in

India and even less in the new India, which in its shine has separated from the Bharat that so many inhabit. This judgment is a renewal of faith in the system so many of us — this writer included — find so easy to almost lose faith in. It is a reminder that the Constitution is still alive, and that movements and fights sometimes end in days of victory. All Indians must celebrate that — it is not just queer rights that were protected today, but all the rights of all Indians.

We will remember tomorrow to be more cautious. The queer movement has long said that the fight for the dignity of queer people will not be won just in the courtroom. Our fights are in the spaces where homophobia impacts people's lives: families, clinics, police stations, offices and the streets of our cities. The law will not change these spaces overnight. Our fights are far from over. This judgment, however, has untied our hands. Our debates now to change public opinion will be played on level playing fields amongst citizens as equals. We have the words of this judgment and the chance to make them come alive outside the courtroom.

The biggest change, however, will be within the hearts and minds of queer people. The process of accepting ourselves, of not being ashamed, of believing in our right to have rights is a long and lonely one. The process of thinking of ourselves as equal citizens takes even longer. This judgment will change what a young queer woman sees when she's in the mirror. There are no words to explain what that means or how valuable it is.

For the government of India and its ministers, who recently have spoken about Section 377, they should read this judgment closely as they come to their 'consensus'. They should ask themselves which of the tenets of this judgment they wish to consider and reconsider. They should remember that Ambedkar and Nehru imagined statesmen and women in their assemblies. The day has come for them to return, along with the rest of us, to that imagined assembly.

Inclusiveness, values, tolerance, constitutional morality, equality. In the older imagination of India, these words would not be just about queer people or homosexuality. Today, these have taken the first step to become Indian words again. The judges have reminded us that these are the ingrained values of Indian culture that so many are

trying to “defend”. This judgment should be seen by all of us, gay or straight, no matter what we think of sexuality and homosexuality, as a victory for a secular, democratic, constitutional and free India. We should all be proud. Today, queer people are finally, proudly, happily also just everyday Indians — free, equal, and breathing deeply the air of a day that feels like no other.

Today, queer people are fellow citizens. Today, queer people will finally feel the ground below their feet.

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Reforming Macaulay*Kajal Bhardwaj*

“Madam, card dikhaye...” This was the fourth time I was stopped for “checking” on my way into the Delhi high court the morning of July 2. Not that one can blame the security personnel. There was a media circus outside the court compound. Satellite-topped OB vans took up the better part of Sher Shah Road and reporters with cameras and microphones in hand were starting to flood the footpath.

Clearly they too had got the previous night’s exciting news — the judgment on Indian Penal Code’s (IPC) Section 377 was to be delivered.

It is a case that, like so many others, my colleagues and I have followed with great interest. The 377 case, filed way back in 2001, was about gay rights, yes, but also about the broader notions of equality, dignity, “minority” rights and of womens’ rights in challenging legal and social norms that impose a single understanding of sexuality. So July 2 was indeed judgment day.

I sighed and showed my Bar Council card yet again and pushed the door into Court No.1. It was 10.30 am and the room was packed. Gay rights activists, lawyers, several petitioners of the case, reporters and spectators packed the room waiting for the judgment that could change many lives. As judgments in other cases were read out, the rising nervousness was palpable.

The group looked up expectedly as the Bench that had heard the case — Chief Justice A.P. Shah and Justice S. Muralidhar — walked in. In keeping with court tradition, the room rose and bowed to the judges in respect and sat down, this time on the edge of their seats. The judges, perhaps keenly aware of the path-breaking judgment they were about to deliver, kept a studiously straight face.

Chief Justice Shah looked out at the packed courtroom and said, almost grimly, that he would read out the conclusion. The front row comprising the lawyers for both sides — Naz Foundation, Voices Against 377, the Government of India, Joint Action Committee, Kunnur (Jack) and B.P. Singhal, the Bharatiya Janata Party’s former Rajya Sabha MP, stood at attention to hear the verdict. Three sentences

into the Chief Justice's reading and, like a wave sweeping a football stadium, one row after the other rose in attention —holding hands, straining to catch every word.

It was expected. Yet when these words were read out, “We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution”, an audible gasp went around the room. By the time the Chief Justice had finished reading the conclusion of the judgment, people were openly weeping and there were handshakes and hugs all around.

Watching the spectators collapse on each other, overcome by emotion, the guards charged with maintaining decorum in the court room quickly ushered the group out. Out of the court room and down three floors, most walked in a daze, looking around at their friends and colleagues wondering if they had actually heard what they had been waiting to hear for so long. Other lawyers in the Delhi high court gaped at the big troop descending the stairs, one wondering out aloud with unintentional accuracy, “Kahan se release hoke aayen hain ye sab? (Where have all these people been released from?)”

There was little time for the news to really sink in, to truly appreciate the enormity of the moment. As they all stepped out into a beautiful Delhi day, the activists and lawyers were mobbed by the television media asking their favourite and most inane question — “How do you feel?” As one activist put it later in the day, “How can you explain what freedom feels like?”

One-hundred-and-five pages long, the judgment was almost immediately available on the Delhi high court website. The conclusion, having been read out in court, was being quoted in all the news reports. But as a lawyer I couldn't wait to read the “meat” of the judgment — the reasoning, the leap in our understanding of the law and the Indian Constitution, of the rights of privacy, equality, dignity that the judgment no doubt held.

The judges had a difficult job with this case. Not only were they being asked to determine if the gay community enjoyed the rights of privacy, liberty, health, equality and whether Section 377 in its

disproportionate impact on the gay community violated these constitutional principles, they were also confronted with a provision that they could not repeal completely. Something even the petitions did not ask for.

Section 377 is a colonial relic. A provision of the IPC authored by Lord Macaulay, it reflected the most conservative in Victorian values by prohibiting all sexual acts, consensual or not, that did not lead to procreation and punishing “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal.” This included consensual oral and anal sex, making straight people criminals under this law as much as gay people but the force of the law weighed squarely against the latter. What complicates matters is the emphasis in the IPC on male to female penile-vaginal rape as the primary form of sexual assault; so other forms of non-consensual sexual acts including child sexual abuse against boys that are not covered by a specific provision in the IPC are covered by Section 377.

The judgment grapples with these diverse and complex issues with finesse and inspirational legal acumen. It is first and foremost an equality judgment articulating in unambiguous terms the impact of criminalization and discrimination — from the inability to access government HIV programmes to extreme harassment and violence. It recognizes that discrimination based on sexual orientation is prohibited by the Indian Constitution. It asserts a “constitutional morality” rather than a popular morality as the basis for law and government policy. And on all these counts, the judgment finds that Section 377 fails, insofar as it applies to adult, consensual, private sex.

As requested by the organizations that filed the case, Section 377 continues to be in force for cases of non-consensual sex and sexual abuse of children. In doing so it still requires the attention of Parliament to reform this centuries-old law which, with its limited understanding of sexual violence, denies many full protection of the law.

The 377 judgment has given voice to the ultimate vision of India — a society based on inclusiveness. To quote from the judgment, “Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination.” Captured in

this one statement is the idea of a country that accords dignity and equal rights to all — regardless of religion, race, caste, sex, place of birth and, now, sexual orientation; indeed of any status or identity that becomes a basis for exclusion or ostracisation. It is a call, finally, for an anti-discrimination law that will ensure that government and private actors alike are bound by constitutional morality.

And it is, ultimately, a judgment that has served as a great reminder of why, sometimes, we do in fact, love the law.

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[http://www.asianage.com/presentation/leftnavigation/opinion/op-ed/
reforming-macaulay.aspx](http://www.asianage.com/presentation/leftnavigation/opinion/op-ed/reforming-macaulay.aspx)



**India: From 'perversion'
to right to life with dignity***Kalpana Kannabiran*

The Delhi High Court judgment makes the articulation of LGBT rights a torchbearer for a more general understanding of discrimination, oppression, social exclusion and the denial of liberty, on the one hand, and the meaning of freedom and dignity, on the other.

“Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it.” — B.R. Ambedkar quoted in para 79 of the *Naz Foundation Judgment*.

The recent judgment of the Delhi High Court in the *Naz Foundation versus Government of NCT of Delhi and Others* is a milestone in the jurisprudence on diversity and pluralism in India. Importantly, it also inaugurates intersectional jurisprudence that examines questions of constitutionalism in relational terms that underscore inclusiveness. By this token then, it is not merely a judgment that bears significance for the rights of lesbian, gay, bisexual and transgender peoples (LGBT). It makes the articulation of LGBT rights a torchbearer for a more general understanding of discrimination, oppression, social exclusion and the denial of liberty, on the one hand, and the meaning of freedom and dignity, on the other.

The Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity launched on March 26, 2007 were drafted by experts from 25 countries representative of all regions of the world. These principles delineate in painstaking detail the obligation of states to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity. On December 18, 2008, the United Nations General Assembly was presented with a statement endorsed by 66 states from around the world reaffirming in substance the Yogyakarta principles. It is these international efforts along with the movement for LGBT rights within India that provided the context and arguments for the decriminalization of homosexuality.

Drawing on Dr. Ambedkar, the court rejected the argument that homosexuality was contrary to public and popular morality in India,

upholding constitutional morality instead, the diffusion of which was contingent on Dr. Ambedkar's ideas of notional change, as evident in the lines quoted above. To quote from the judgment: "The Constitution of India recognizes, protects and celebrates diversity. To stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality" (para 80). Linked to this is the observation of the Court on the question of the horizontal application of rights, with specific reference to Article 15(2), a barely remembered but critical part of Article 15: No citizen shall obstruct another from access to public places on grounds of caste, sex and other specified grounds (para 104). This purposive and intersectional reading of Article 15(2), hitherto restricted largely to practices of untouchability vis-a-vis Dalits, opens out an important strategy in constitutional interpretation.

Applying the U.N. Human Rights framework to an understanding of sexual orientation and gender identity, the judgment sets out three categories: (a) non-discrimination; (b) protection of private rights; and (c) the ensuring of special general human rights protection to all, regardless of sexual orientation or gender identity.

Perhaps the most important issue the judgment addresses is the meaning of "sex" in Article 15(1) of the Constitution of India: "The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." Does the term "sex" in this context refer to attribute or performance? Is sex to be applied in a restricted fashion to gender or can the multiple resonances of its common usage be taken into account, so that sex is both gender (attribute) and sexual orientation (performance)? This is particularly significant because, as the judgment demonstrates through an extensive review of case law and principles from different parts of the world, gender and sexual orientation are an intrinsic and inalienable part of every human being; they are constituents of a person's identity. In the words of Justice Sachs of South Africa, the constitution "acknowledges that people live in their bodies, their communities, their cultures, their places and their times" (Sachs J. in *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*). It is this composite identity of every person that is affirmed through a nuanced reading of "sex" in Article 15(1): "We hold that

sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15 (Para 104).”

Justice P.N. Bhagwati’s delineation of the right to dignity in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others*, 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, ... expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings,” provides the starting point for the discussion on the importance of self-respect, self-worth and privacy to human social life, recognised nationally and internationally. And privacy is particularly important in the area of sexual relationship where the thumb rule is simply that “[i]f, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy” (*Paris Adult Theatre I v. Slaton*, (413 US 49 (1973), page 63).

The criminalization of homosexuality, the judgment says, by condemning in perpetuity an entire class of people, forcing them to “live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery” denies them ‘moral full citizenship’ (para 52). Because Section 377 is aimed at criminalizing private conduct of consenting adults, the court held that it comes within the meaning of discrimination, which “severely affects the rights and interests of homosexuals and deeply impairs their dignity” (para 93). It is “unfair and unreasonable and, therefore, in breach of Article 14 of the Constitution of India” (para 98).

The right to public health is another aspect of human rights that is seriously undermined through the criminalization of same sex behaviour. There are two parts to this right, both of which lead back to the fundamental right to life under Article 21. The first is the right to be healthy. In this context, the concerns of the National AIDS Control Organization (NACO) are pertinent. Fear of the law-enforcement agencies obstructs disclosure, which in turn impedes HIV/AIDS prevention programmes and increases the risk of infection in high-risk groups.

The second part of the right to health is more expansive and includes the right to control one's health and body, the right to sexual and reproductive freedom, the right against forced medical treatment and the right to a system of health that offers equality of opportunity in attaining the highest standard of health. While several documented testimonies of LGBT persons speak of the treatment of their sexual orientation as a psychiatric/mental disorder, the judgment importantly affirms the findings worldwide that sexual orientation is an expression of human sexuality — whether homosexual, heterosexual or bisexual. “Compelling state interest,” instead of focusing on public morality, the judgment says, “demands that public health measures are strengthened by de-criminalization of such activity, so that they can be identified and better focused upon” (para 86).

Asserting that there is no presumption of constitutionality where a colonial legislation is concerned, the judgment holds that Section 377 fails the test of “strict scrutiny” which would require proportionality between the means used and the aim pursued. And when it is a question of “matters of ‘high constitutional importance’” like the rights of LGBT persons, the courts are obliged to discharge their sovereign jurisdiction, in this case, reading Section 377 down to apply only to child sexual abuse.

It is pertinent to point out here that the Andhra Pradesh (Telangana Areas) Eunuchs Act specifically targets Eunuchs and Hijras in far more direct ways than Section 377 does. We hope that the momentum of the movement for LGBT rights will turn its full force on obsolete legislation like this as well, so that transgender communities in areas where such laws are in force begin to enjoy the fullest freedoms and life with dignity.

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<http://www.sacw.net/article992.html>



Who's afraid of homosexuality?*Ram Jethmalani*

The legal philosopher and reformer Jeremy Bentham produced *The Theory of Legislation* in the first half of the 19th century. It propounded the great principle of utility, a veritable working manual for lawmakers all over the world: "The public good ought to be the object of the Legislator, general utility ought to be the foundation of his reasonings. To know the true good of the community is what constitutes the science of legislation; the art consists in finding the means to realize that good."

The lesson was simple yet profound. He propounded that nature has placed man under the realm of pleasure and pain. To these man owes his ideas, judgments and determination of his life. Evil is pain or the cause of pain. Good is pleasure or productive of pleasure. Criminal law prescribes a series of punishments for different acts and omissions. Every punishment produces pain at least to him on whom it is inflicted. Punishment, therefore, is an evil. Its only justification is that it prevents a greater evil or produces in some other or others or the general public much more pleasure. From these two principles he had no difficulty in formulating the principles on which a rational penal code should be constructed.

The Delhi High Court recently produced a memorable judgment declaring Section 377 of the Indian penal code constitutionally invalid. Lord Macaulay and his fellow commissioners who framed that code had presumably not taken Bentham's teachings seriously, at least when they introduced their notion of Victorian morality into this section.

Voluntarily having intercourse against the order of nature with any man, woman or animal is declared a serious crime for which the punishment may well extend to 10 years and fine or both. As judicially interpreted and noticed by the Delhi High Court, sexual activities hit are the following:

1. Intercourse by a man with a woman other than vaginal; such as involving the anus, mouth or any other orifice in the human body;
2. Intercourse with any male involving the anus or any other orifice;

3. Act commonly known as practice of bestiality.

Section 377 by its marginal note classifies all three as ‘unnatural offences. Macaulay did not know that the fish, iguana lizards, roosters, dogs, cats, horses, rabbits, lions and many other species mount others of the same sex. Homosexual behaviour is so rampant in non-human species that it is difficult to justify the epithet unnatural for this behaviour.

Neither Bentham nor any other rational person would see in these actions any element of producing the evil of pain. Of course my assumption is that intercourse is by free consent and does not involve minors who are incapable of consenting to remain untouched by the section.

The Delhi High Court judgment is full of learning and references to literature on psychiatry, genetics, religion and judgments delivered in other jurisdictions, particularly the US and Canada. It refers to the report of the British Wolfenden Committee and the Sexual Offences Act, 1967, by which English law de-criminalised homosexuality. It fortifies its conclusions by the 172nd report of the Law Commission which also took the same view: ‘Section 377 in its present form has to go’.

The Delhi High Court judgment is substantially based upon the citizen’s right to privacy and a life of dignity. The court correctly concluded that these rights can only be subordinated to some overriding public interest. Counsel for the Union of India could not point out any and the court rightly rejected his feeble argument that the law in some remote way promotes public health. The submission was in the teeth of the view of the American Psychiatric Association presented to the United States Supreme Court in 2002 in the case of *Lawrence v. Texas*:

“According to current scientific and professional understanding, however, the core feelings and attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence. Moreover, these patterns of sexual attraction generally arise without any prior sexual experience.

Thus, homosexuality is not a disease or mental illness that needs to be, or can be, ‘cured’ or ‘altered’, it is just another expression of human sexuality.”

Now the view for which the additional solicitor general canvassed was the view of the home ministry with which the health ministry did not agree. To the best of my knowledge it has never happened that two government departments made conflicting and irreconcilable submissions in a public hearing before a high court. I hope that the government puts its house in order before the Supreme Court.

What further surprises me, is that the most effective 8th respondent, namely the National Aid Control Organization (NACO) did not use Bentham’s powerful argument which any court should normally consider almost conclusive.

The Delhi Judgment does not recommend homosexuality or even approve of it. But it is obnoxious arrogance to claim that my conduct is natural while others violate nature. The constitution of India does not tolerate such tyranny. No legislator or ruler can tell those who obey his laws “I am one of the elect, and God takes care to enlighten the elect as to what is good and what is evil. He reveals himself to me and speaks by my mouth. All you who are in doubt, come and receive the Oracle of God;” thus wrote Bentham.

A short reference to the history of homosexuality is called for. During the Greco Roman period, there is ample evidence to show that homosexual behaviour between men as well as between women was common — and within clear conventional limits — approved. Judeo-Christian literature, however, reflects a general aversion to homosexual behaviour which was seen as an emblem of decadent paganism — godless, debauched, and heretical. For both Jews and early Christians, the Old Testament story of the destruction of Sodom became the foundation text of homophobia, even though neither Jews nor early Christians, including Christ himself, unanimously interpreted it as a text condemning homosexual behaviour.

During the next thousand years between the fall of Rome and the beginning of the Renaissance, the Roman Catholic Church condemned any non-procreative act between persons of either sex.

Pope Gregory IX called sodomites ‘abominable persons — despised by the world and dreaded by the council of heaven’. In the late 13th century the first case of a homosexual being burnt at the stake came to be staged. Protestantism was equally rigorous in its condemnation.

In the 19th century, homophobia turned into hysteria. Lord Macaulay imported it into India. Homophobia is thus a western product which was unknown to sexually free India. The Delhi High Court can take credit through its judgment that India is going back to its enlightened roots. Oscar Wilde and his lover Alfred Douglas had already shocked Victorian England, initiating the end of homophobia.

Our earth is a crowded planet and cannot sustain more humans. Semitic religions condemn pederasty because it does not add to the population. Malthusian wisdom, which I endorse fully, is a credit item in the balance sheet of homosexuality.

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[http://www.indianexpress.com/news/whos-afraid-of-homosexuality/
492537/0](http://www.indianexpress.com/news/whos-afraid-of-homosexuality/492537/0)



Striving for Magic in the City of Words

Lawrence Liang and Siddharth Narrain

After agitating for many years against the existence of Sec. 377 of the Indian Penal Code which decriminalized homosexuality in India, it is understandable that the Delhi High Court decision in the *Navtej Singh Johar v. State of India* case, decriminalising homosexuality, has been welcomed and celebrated by the LGBT community. But to see it as a victory of the LGBT community alone would be to do injustice to the Delhi High Court's remarkably progressive and well reasoned decision and the immense potential the judgement has for changing the course of equality jurisprudence in the country.

It would also display a very narrow understanding of the relationship between constitutional change and social movements striving for a more just and democratic society. Like *Roe v. Wade* which legalised abortions in the United States, or *Brown v. Board of Education*, which ended racial segregation in public educational institutions, the *Navtej Singh Johar* decision has the potential of being a case whose name conjures up the history of a particular struggle, celebrates the victory of a moment and inaugurates new hopes for the future. The victory is also highly significant because it inaugurates a radical politics of impossibility. By overturning what would have been impossible to imagine, the decision does not merely change the conditions of the group whose rights and demands are in question, but changes the horizon of possibility for the law and for constitutional interpretation itself.

In this article we shall be looking at two dimensions of the high court decision, first, what it means within the realm of constitutional imagination, as well as what its immediate impact on the everyday life of queer community has been.

Constitutions are not merely Charters of governance, they are also ethical documents which lay down a collective commitment that members of a community make, to a set of principles, as well as to each other, about the kind of life they wish to pursue. Thus the political form that we choose to govern our societies is not separable from the way that we choose to govern ourselves as individuals, and our relation

to others. Who or how I choose to love is then both an individual choice, as well as a question of political form and expression.

Following Nehru's quote in the decision, of words being magical things, one way of reading the constitution is to see it as a city of words built on the foundational promise made in its preamble – towards securing for its citizens justice, liberty, equality and fraternity – and recall that these are virtues that justify why we give unto ourselves a constitution, or why we agree to be 'constituted' within a collective. The perfection of the city of words presumes a coherent 'we'ness' that already exists. But we also know that it would be naïve to believe that the city of words finds its perfect reflection in reality, and more often than not the real world is always an imperfect one in which promises remain unfulfilled, and in the memorable words of Langston Hughes, dreams are deferred. This is certainly true for the constitutional underclass, for whom, the city of words remain just that: words, and who remain unconstituted by virtue of their class, caste or sexual orientation. But isn't it also the case that the constant striving for the perfect community and the attempts at bridging the distance between the city of words and the imperfect city is precisely what we name as politics. It is in the distance that is traversed between the two cities, that struggles reside. And finally it is only through politics and struggles that rights are created. Only in the mist covered regions of legal theory would we imagine that rights are the product of judicial authorship, and this is a point acknowledged in the *Nazk* decision, when in a Baxi moment, they acknowledge that a constitution does not create rights, it merely confirms their existence.

It would equally be a mistake to think of the Constitution as the perfect embodiment of values which do not change, even as we strive towards them. Constitutions provide a basis of radical change only in so far as they are willing to be changed themselves – not just through executive fiat or judicial interpretation – but through an understanding of the history of struggles, and through an incorporation of the concrete practices of equality and liberty in various forms of life.

Stanley Cavell in his book about remarriage comedies, *The Pursuit of Happiness* (itself a reference to the commitments made in the Declaration of Independence) argues that the constitutional promise

about life, liberty, and the pursuit of happiness has a public face to it, and this generally translates into what it is to claim these in law. But there is equally the private face of these claims, and these can only be located in “little communities of love”, and the question that brings the public and private realms together consists of asking what it means to ask human society to create the condition for these small communities to be built.

What after all is the *Naz Foundation* decision if not the affirmation of such a community’s right to assert their love, and to do it with autonomy and dignity. But what is involved in the legitimization of the love that dare not speak its name, is the emergence of what Laurence Tribe (a renowned scholar of constitutional law at Harvard Law School) would call a right that dares to speak its name. In other words, our understanding of, and our commitment to ideas of equality, dignity and justice are not just products of abstract philosophical values and political will, but also of our ethical imagination. Cavell says that one cannot base the little community of love only on an appeal to the law, nor on an approach of feeling alone. It is an emblem of the promise that human society contains room for both, but you cannot wait for the perfected community to be formed before you form the little community. In the years leading up to the *Naz Foundation* decision, the LGBT community had already redefined what it means to make a commitment to an ideal, through a commitment to a form of love. By locating this commitment in the language of Personhood and personal autonomy, the High Court renders the constitution vulnerable - in the best way possible – to a redefinition of the values of equality and dignity, a move which is vital if we are bring our imperfect world closer to the city of words.

But, as Nehru’s quote in the judgment reminds us that even the ‘magic of words sometimes cannot convey the magic of the human spirit and a nation’s passion’, and we who strive towards the city of words forget sometimes that that the magic of the human spirit does not necessarily proclaim itself as a scream. Tracy Chapman once wrote of a talking about a revolution, and how it sounds like a whisper. It is said that a prisoner once weathered down a thick prison wall by whispering stories into its walls over a number of years. The *Naz Foundation* case is a good instance of how the stubborn and formidable

walls of prejudice that inform most public institutions can be broken down, and the next barrier is to spread the whisper around a bit. And by outing sexuality into public discourse in a manner never done before, the *Naz Foundation* decision is already talking about a revolution.

One good indication of this is the media coverage and national debate on homosexuality that the judgement has sparked off in very diverse social and political spaces. This 105 page document has in a sense outed an issue that has only been talked about in hushed and embarrassed tones in most households. The public debate about the decision in the media has made possible conversations in homes, offices and schools about homosexuality and the impact of the section 377. “My father called and congratulated me when he heard about the judgement”, said a gay friend, ecstatically. Though out to his parents, he has struggled to talk about his sexual orientation. “After the judgement, we have talked about homosexuality at home almost every second day because of some aspect or the other that has been discussed in the media”, he said.

The judgement has meant a newfound respectability and legitimacy for the issue. A few days after the judgement, we were asked by a High School in Bangalore to talk to their Std XI and XII students about the case. While this was probably something that should have happened long ago, the interest generated by the *Naz* case has meant invitations to speak at a wide variety of forums – schools, colleges, media organisations, NGO’s and funders. As lawyers, we found that the judgement provided leverage in interactions with the police. In the first ‘377 incident’ we dealt with post the judgement, we handled the case of a 26 year old gay man whose laptop, mobile phones and other valuables were stolen by a man who he had invited home to spend the night. The police were helpful at first, but change their attitude when they discovered that our client was gay. The sub-inspector refused to give our client the belongings he had recovered and threatened our client with section 377 unless he paid him Rs. 30,000. We had to talk to a superior police officer and recover the laptop. After we did this, we talked to the police officer about the judgement and the fact that it represented changing views in Indian society. The police officer reluctantly agreed that what homosexuals did inside their homes was none of his business.

While it is technically a decision only to decriminalize homosexuality, arguments around equality, and the judges' reading of gender and sexuality have meant a far wider impact. Even those fighting the case were taken aback when the Times of India reported couples across India getting married and citing the judgement as proof that they could do so. This has now sparked off a Special Leave Petition before the Supreme Court filed by an astrologer, who says that this judgement, amongst other catastrophes, will lead to LGBT persons demanding, marriage, inheritance etc. Thankfully we are spared of assertions like the one made by Nero who claimed that homosexuality caused earthquakes. Moral turpitude is somehow a little easier to deal with than earthquakes, even if many of us may believe the decision may have seismic effects.

In another remarkable incident, a client approached a lawyer we know for a matrimonial case. She was perplexed when she was told that she was not legally entitled to half the property. "But what about the case?" she asked hopefully? "What case?", said the lawyer, who was puzzled. "The Delhi High Court case. Doesn't it mean that we are all entitled to equal rights now?", she asked.

While this may sound far fetched, it's not that far from the truth. Several legal commentators have already pointed out that the Delhi High Court's interpretation of the anti discrimination provisions Article 15, where it has read 'sex' to mean 'sexual orientation' could potentially benefit other minorities.¹ The Court has said that forcing someone to behave in accordance with predefined notions of what is means to be a "man" or a "woman" can be considered discrimination based on sex, in violation of Article 15 of the Constitution. The court says:

"The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning "normal" or "natural" gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex." (p99).

¹ See Tarunabh Khaitan, "Good for all minorities" in this volume.

The Court's reading of the 'strict scrutiny' test and its horizontal application of rights (where citizens are guaranteed rights vis a vis one another in public spaces) has meant that it will make it much more difficult for discrimination against vulnerable minorities like disabled persons, women and ironically, even religious minorities who have so far ranged from being ambivalent to opposing the judgement. The *Naz* judgement's potential for minority rights has further been strengthened by the judges discussion on Constitutional morality where they make it clear that public morality and majoritarian opinion has to be subservient to constitutional morality and protection of fundamental rights.

The Court's interpretation of 'privacy' to mean much more than spatial privacy or privacy in the home to a much broader notion of autonomy and personhood has meant that 377 cannot be applied in public spaces where much of same sex intimacy takes place. This expansive interpretation of privacy has tremendous potential, in other spheres like women's reproductive rights.

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http://www.himalmag.com/Magic-in-the-city-of-words-_nw3197.html



It's about all of us*Pratap Bhanu Mehta*

There come moments in the life of a nation when it has to confront its deepest prejudices and fears in the mirror of its constitutional morality. The Delhi High Court's judgment in *Naz Foundation vs. Union of India*, decriminalising private, adult, consensual homosexual acts, does just that. The judgment is a powerful example of judicial craftsmanship. It is, unusually amongst recent judgments that are constitutionally significant, clear and precise. It embodies the right combination of technical rigour in thinking about the law, with a persuasive vision of the deepest values those laws embody.

There will be an appropriate time for a detailed legal analysis of the judgment. Many will, doubtless, latch on to the judgment as offending something called our tradition or our values. But to interpret it this way would be a mistake. What the court says is this. Under our constitutional scheme, no person ought to be targeted or discriminated against for simply being who they are. If we give up this value, we give up everything all of us cherish: both our liberty and our right to be treated equally. This judgment is defending our values. Simply put, the judgment says that the state has no presumptive right to regulate private acts between consenting adults. It protects privacy. That is our value. The judgment says that individuals should not feel so stigmatized that they are unable to seek medical help. That is our value.

The judgment is first and foremost a defence of liberty, equality, privacy and a presumptive check on state power. It is a feature of these values that they are secure only when they are enjoyed by all. Privacy cannot be genuinely protected if the state is given arbitrary power over some groups; equality cannot be realised if invidious distinctions between citizens persist; rights of liberty cannot be genuine if they apply only to all those who are alike. The essence of toleration is that each one of us can be safe from the fear of stigma, discrimination, persecution, only when all of us are safe; otherwise what we get is a counterfeit toleration. So let it be clear: this judgment is not about a minority, not about valorising a lifestyle, it is about the values that made us who we are as a nation. Neither the detractors of this judgment, nor its defenders for that matter, should forget the

fact that it is in the name of a genuine common morality that this decision can be defended.

We should not minimize the fact that social change in matters as delicate as sexuality is difficult to negotiate in any society. The judgment is admirably tactful in pointing out simply one fact: the state has not been able to prove that it can demonstrate that serious harms result as a consequence of these private acts. Claims of such harm are often causally unfounded, based on prejudice and often even less plausible than harms that result from many of the practices we do tolerate. At least on this much there is a consensus amongst the 126 nations who have decriminalized this practice before India. Even for those, otherwise uncomfortable, at least this much should be enough to ground the basic legal claim the court has made. There ought to be at least overlapping consensus on this point.

The discourse on toleration this has generated is revealing. There is the usual assortment of religious leaders who are appealing to their traditions. One thing should be clear: a claim can have no standing simply because it is made on the grounds of religion or, as in the case of the VHP, tradition. Without saying so, the court has made this abundantly clear. And it will be interesting if this secular logic is now followed through in all cases pertaining to equality and liberty. The court has fore-grounded personal autonomy as a constitutional value, and potentially set the stage for questioning community practices that impede this value.

The second strand of discomfort with the case is more interesting and could potentially be a resource in sustaining the social legitimacy of the judgment. This strand is not so much intolerant, but is simply uncomfortable at having to take a position on the issue. Its mode of tolerance is a kind of benign neglect, “Don’t ask, don’t tell.” This may not be a perfect normative position. Nor may it be an option in modern society. What they are resenting is not so much the decriminalization, as much as the need to discuss and take a stand. They do not want to discriminate or stigmatize; what they would like is, to use an old-fashioned phrase, a certain modesty in sexual matters of any kind. This anxiety is in a more general sense inescapable. Our society will have to find intelligent ways of dealing with it. But it

would be a mistake to necessarily brand this anxiety as a form of intolerance. In its own ways, this discourse of modesty might sustain the kind of tolerance that simply says, “Let it be.”

But now that the court has given a judgment, this very same diffident group would rather not have another polarizing debate. Politicians rushing to overturn this judgment might as well take into account the fact that some seeming discomfort may not reflect genuine sentiment against decriminalization. If you want a “traditional” argument you could say this. In India, tolerance, when it worked, was a product of a kind of benign neglect: to each its own. It is a colonial law that, by bringing the state in, went against the possibility. The court certainly has a vision of an equal and inclusive society, and it may be too far-fetched to say that all of us are ready for it. But at the very least, by getting the state out of private consensual adult relations, the court allows for this more modest, but not insignificant, kind of toleration to take place.

There will be other interesting technical implications of the arguments the court has used. Some will see in the court’s emphasis on non-discrimination grounds for greater state intervention in regulating relations amongst private parties. Others might argue that the court’s application of the “strict scrutiny” test potentially protects private parties from easy state intervention. But these are matters for the Supreme Court to resolve in different cases. But for now, we should be thankful that the court has shown great legal and moral clarity. There will be opposition from self-appointed custodians of tradition. But the least we can do is say: accept the judgment and move on

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<http://www.indianexpress.com/news/its-about-all-of-us/484966/4>



Good for all Minorities*Tarunabh Khaitan*

Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion.

(Jawaharlal Nehru, quoted in the *Naz Foundation* case, paragraph 129)

The brouhaha over it notwithstanding, the least surprising thing about the Delhi High Court's verdict in *Naz Foundation vs. Union of India* is the result of the case: that law has no business in the bedroom of consenting adults engaging in an activity that harms no one. Even the mere words of Article 14 (right to equality) and Article 21 (right to life and liberty) of the Constitution and existing jurisprudence under these Articles would have sufficed to reach this result. When faced with this issue in the last couple of decades, constitutional courts worldwide have almost invariably given the same answer. Given the liberal, secular and egalitarian Constitution of India, it is the opposite result that would have surprised constitutional lawyers. The magic of the human spirit and of a nation's passion lie not so much in the result of the judgment as in its progressive reinterpretation of certain constitutional provisions, especially that of Article 15, even though it was not strictly necessary to reach this result.

Article 15 prohibits discrimination on grounds such as religion, race, caste and sex. Until recently, it had remained a largely sterile provision, subsumed entirely by the general guarantee of equality under Article 14 and rarely given the distinct importance that it deserves. Four key innovations under Article 15 in this judgment have given it a new lease of life. If confirmed by the Supreme Court, these innovations will provide unprecedented constitutional protection from discrimination to all vulnerable minorities — including Muslims, Christians, women, tribals, Dalits, gays and disabled persons. It is odd, then, that some of those who are likely to be the biggest beneficiaries of this interpretation are also the ones who most vociferously want to see it overturned.

The high court has held that “personal autonomy is inherent in the grounds mentioned in Article 15”. It is autonomy that allows us to

form relationships and pursue the projects that give our lives meaning. Systematic discrimination diminishes the quality of all our lives by denying us access to an adequate range of valuable options, in all the things that matter most in our lives: housing, jobs and partners. Thus, the first important innovation in the case was to include those grounds “that are not specified in Article 15 but are analogous to those specified therein ... those which have the potential to impair the personal autonomy of an individual”. Therefore, even though grounds such as disability and pregnancy are not specified in Article 15, they now have its protection. Notice that the high court had already held that “sex”, a specified ground, includes “sexual orientation”. Therefore, opening up the scope of Article 15 to other analogous grounds like disability was not crucial for the result of the case. Yet, given this ruling, all autonomy-related grounds can now claim the special protection of Article 15.

The second innovation under Article 15 is the incorporation of “strict scrutiny” as the appropriate standard of review. Until recently, all that the State needed to prove is that the challenged measure is “reasonable”. This is a deferential, rather than a strict, standard of review. But the high court has now read seemingly conflicting Supreme Court precedents harmoniously to clarify that although “the principle of strict scrutiny would not apply to affirmative action under Article 15(5) ... a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny”. In simpler terms, it will be much harder to justify discrimination against a vulnerable minority (Dalits, Muslims, women, and so on) protected by Article 15 than used to be the case. Again, the discussion on strict scrutiny was not important for the result in this case. The high court was clear that “a provision of law branding one section of people as criminal based wholly on the State’s moral disapproval of that class goes counter to the equality guaranteed under Articles 14 and 15 under any standard of review.” The main benefit of this higher standard of review will be reaped in future cases by all vulnerable minorities.

The third important constitutional innovation under Article 15 is the pronouncement by the high court that it provides protection from discrimination perpetuated not only by the State (‘vertical’ protection)

but also by a private individual ('horizontal' protection): "In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces." Again, given that a central law was in question, this case was concerned only with vertical discrimination. But by stating that the protection of Article 15 is horizontally applicable as well, the high court has widened the scope of an earlier Supreme Court judgment, which granted horizontal protection only to women (*Vishaka vs. State of Rajasthan*, 1997). Now, every Muslim or Dalit citizen who is denied housing by a landlord on the ground of his or her religion has a constitutionally enforceable claim against the landlord. Recently, the Centre for the Study of Social Exclusion, Bangalore, in an open letter to the minister of minority affairs, demanded an effective equal opportunities commission to combat discrimination in the private sector. The *Naz Foundation* judgment makes that demand a constitutional imperative.

Finally, the judgment recognizes that discrimination includes not just direct discrimination, but also indirect discrimination and harassment. This is another key demand in the CSSE open letter. Indirect discrimination occurs when a superficially non-discriminatory measure has a disproportionate impact on a vulnerable group. A housing society that only lets to vegetarians has a disproportionate impact on certain religious and caste groups. Under this interpretation, such indirect discrimination is prohibited by Article 15.

These constitutional innovations make no difference to the actual result in the *Naz* case. The judges could have reached the same result by a sterile ruling that relied solely on the words of the Constitution. However, they chose to invoke its spirit and have crafted a remarkably progressive jurisprudence on anti-discrimination law. If these interpretations are accepted by the Supreme Court, Article 15 is set to become one of the key constitutional guarantors of personal autonomy for vulnerable minorities.

It may seem that this judgment does not obviously benefit Hemanshu, who is Hindu, English-educated, male, able-bodied, north Indian, straight, Hindi-speaking and upper-caste. But should Hemanshu lose his legs in an accident, or get posted in a non-Hindi speaking or non-Hindu-majority area, he too will be protected. The court has

recognized that pluralist societies rarely have permanent majorities or minorities. The Constitution stands for the principle of minority protection, whoever they might happen to be. This should be noted by the *ulema* and the archbishops who seem to have failed to envision a fellowship of the disenfranchised in their response to the court's judgment.

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The Telegraph

July 9, 2009

[http://www.telegraphindia.com/1090709/jsp/opinion/
story_11202656.jsp](http://www.telegraphindia.com/1090709/jsp/opinion/story_11202656.jsp)



Navigating the Noteworthy and Nebulous in Naz Foundation

Vikram Raghavan

There have been few, if any, cases whose proceedings have been closely followed and judgment keenly awaited as *Naz Foundation*. The verdict was eagerly anticipated, not just by lawyers and court watchers, but also by activists and a broad cross-section of ordinary people. Acutely aware of their role in contemporary history, the judges on the *Naz Foundation* bench did not disappoint. Their conclusion that Section 377 is unconstitutional vis-à-vis consensual adult sex is set in the elegant tapestry of a carefully spun decision embroidered with copious citations. The judges display great courage and craftsmanship in fashioning a historic decision heard loud and clear, not only in India, but across the world.

I, for one, first got word about the decision from a friend in Dhaka who e-mailed her South Asian friends about the breaking news. It helped that the Delhi High Court immediately made the decision available on its website, and the BBC promptly posted a link spurring downloads across the globe. A friend called me from New York to say that he could not retrieve the judgment because the high court's server was clearly overloaded. Over the weekend, the New York Times' story on Naz Foundation was among the top ten most popular stories on the newspaper's website. Naz Foundation is likely to rival the mango this summer as India's top export! I don't know of any other Indian case that has enjoyed this much fame.

The beauty of *Naz Foundation* is that it skilfully mixes originalism (rarely used by Indian judges anymore) with pragmatism in constitutional interpretation. It is a product of considerable strategizing, deep thinking, and extensive research. At the same time, the judges display great humanism, sensitivity, and empathy — qualities rarely displayed in most Blackstonian judicial monasteries. The decision's artful prose, which sounds almost poetic in several places, is tempered by humility and modesty. Its cadences have the unmistakable stamp of Chinnappa Reddy's compassion and Bhagwati's forensic reasoning without the distraction of Krishna Iyer's bombast.

Symbolically as well as substantively, *Naz Foundation* marks a radical change in our Republic's constitutional jurisprudence. It fundamentally

alters the relationship between a large disenfranchised, yet mostly silent and dispersed, minority and the hegemonic Indian state. For that reason, I believe it genuinely qualifies for that often gratuitously misused epithet of legal writing: “a landmark judgment.” Yet, like all landmark judgments, *Naz Foundation* has its strengths, weaknesses, and penchant for controversy. To crudely adopt local imagery, the decision has the grandeur of the Red Fort’s majestic ramparts as well as the confusion of Old Delhi’s maze of bazaars, crowded streets, and alleys. In assessing this bewildering landscape, I’ll celebrate today the judgment’s impressive monuments that display great judicial architecture and craftsmanship. In tomorrow’s post, I will deal with *Naz Foundation*’s not-so-glamorous dimensions.

1. At its core, *Naz Foundation* is an emphatic reiteration of the vision of our Republic’s Founders to establish a just, inclusive, and tolerant India. Mindful of the bitter and shameful legacies of our history, our Founders were especially unwilling to countenance any form of social exclusion. This is evident in, among other things, Article 17’s unprecedented constitutional prohibition on “untouchability” — a term deliberately left undefined in the Constitution. *Naz Foundation* extends the command of Article 17 to abolish new avatars of disability based on sexual identity or orientation. The decision is also a reminder (not so much to India, but other less-enthusiastic jurisdictions) that a constitution is a living document, and its protections must be dynamically interpreted to apply to new situations and challenges.
2. In affirming privacy as a fundamental right under Article 21 (the Constitution’s guarantee of life and personal liberty) and invoking it to partially invalidate Section 377, *Naz Foundation* constitutes a bold revival of substantive due process reasoning that has been rarely used by Indian courts. Perhaps, in this respect, *Naz* is the Son or Daughter of *Menaka* because the former is an unmistakable progeny of the latter. (A better child than Varun Gandhi at any rate). For it was in *Menaka Gandhi* that the Supreme Court, fighting the real and imagined ghosts of Gopalan, endorsed the use of substantive due process to embellish the Constitution’s fundamental rights and freedoms.

In the thirty-two years since *Menaka Gandhi* was handed down, the Supreme Court has expanded the scope of Article 21 to discover a whole host of new rights, such as education, health, and shelter, in cases such as *Unnikrishnan*. However, most of those “new” rights are socio-economic in nature and are recognized in the Constitution’s Directive Principles. Moreover, the underlying cases (with the exception of *Unnikrishnan*) in which these rights were “discovered” did not require the courts to set aside or invalidate any central or state statutes.

If *Naz Foundation* remains undisturbed or is affirmed by the Supreme Court, it will be only third time — by my reckoning — that an Indian court has used substantive due process to discover a new civil and political right (privacy) and invalidate a statute for transgressing that right. The only other decisions to use substantive due process in this manner are *Mithu*, where the Supreme Court struck down Section 303 of the Penal Code, which prescribed a mandatory death sentence for a life convict who commits murder and *Canara Bank*, where the Court invalidated an Andhra Pradesh revenue state that compromised confidential banking information. *Rathinam*, in which the Court invalidated criminal sanctions under Section 309 of the Penal Code for suicide attempts, also used substantive due process reasoning. But, as we all know, *Rathinam* was subsequently overruled by a constitution bench in *Gian Kaur*.

3. *Naz Foundation* abandons the Supreme Court’s reticence about privacy in *Kharak Singh*, *Gobind*, and *Rajagopal* and forcefully asserts that there is such a right in Article 21’s guarantee of life and liberty. While that itself is a noteworthy constitutional milestone, the Delhi High Court has gone even further by arguing that privacy concerns focus on “persons” rather than places. In so doing, the High Court articulates a unique non-spatial and portable understanding of privacy. This understanding seeks to liberate privacy from its traditional focus on protecting the sanctity of the home, bedroom, (or, perhaps, in this case, the closet). This subtle, but skilfully reasoned, aspect of *Naz Foundation* is its most attractive constitutional feature. I suspect that it is this feature that will ensure the case is cited for many

years to come in courts and classrooms. I should say, however, that tomorrow I will quarrel with the high court's reasoning and actual conclusion on this issue. So, this is only qualified praise.

4. I am especially struck by *Naz Foundation's* insistence on a strictly secular approach in adjudicating constitutional claims. It wisely avoids any reference to religious or moral dimensions, even though petitioners explicitly touched upon them in oral and written submissions (they argued that Section 377 was based on "Judeo-Christian" values). In this respect, *Naz Foundation* is strikingly different from other substantive due-process cases, such as *Rathinam*, its closest relative in some respects. In his rambling opinion in *Rathinam*, Justice Hansaria quoted extensively from religious and spiritual sources to support his thesis that the Constitution protects a right to die. By contrast, *Naz Foundation* is content with citing only the secular icons of our past, Nehru and Ambedkar. Their personal views on homosexuality remain publicly unknown, but their political philosophy would appear to tolerate it.
5. Unlike any other decision before it, *Naz Foundation* has the unique potential to diminish popular, but irrational, moral condemnation of stigmatized groups. Witness the headlines in the Indian press reporting the decision "It is ok to be Gay," "Sexual Equality," "Gay and Finally Legal," and "Sexual revolution in India." It is for this reason, perhaps, that my good friend, Lawrence Liang argues that *Naz Foundation* is India's *Roe* moment. Indeed, the mass publicity and fanfare heralding the decision presents a rare opportunity for activists to reshape public opinion and influence a wider social debate about gay rights. This is especially important, as in the long run, gays and other disaffected groups cannot only rely on courts to advance their civil rights agenda. They must build new political coalitions and engage the legislative process.
6. *Naz Foundation* gives new meaning to identity politics in India. Dominant political and legal conceptions of identity focus on groups traditionally knitted together by religious, caste, or linguistic ties. By acknowledging the distinct status of persons,

whose only common bond is sexual orientation, and addressing them as a collective (actually using the phrase “LGBT”), *Naz Foundation* recognizes the emergence of new social identities while carefully sidestepping lingering concerns about their elite roots and urban biases.

7. Finally, the decision bolsters the Delhi High Court’s reputation for being India’s most important constitutional court apart from the Supreme Court. In recent years, the High Court has produced some innovative decisions that push the boundaries of our constitutional jurisprudence. Two notable gems are *Maqbool Fida Hussain v Raj Kumar Pandey*, 2008 (6) Del. 533 (decrying misuse of obscenity prosecutions) *Justice and Parents Forum for Meaningful Education v. Union of India*, A.I.R. 2001 Del. 212 (affirming constitutional rights of children and outlawing corporal punishment in Delhi schools). *Naz Foundation* is the latest milestone in the Delhi High Court’s impressive track record, and a demonstration that one does not always need to depend on the Supreme Court for constitutional salvation.

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<http://lawandotherthings.blogspot.com/>*

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Keep religion out of the gay debate*Sidharth Bhatia*

Homosexuality has done what wise men through the ages have not managed to do — it has brought the worthies of all religions together. Christian priests, Muslim mullahs and sundry Hindu swamis are all in high dudgeon over the ruling of the Delhi High Court that effectively decriminalizes homosexual behaviour. Against the law of God and nature, says one; un-Islamic, says another, while the third brings up the trump card — it is against Indian culture.

When was the last time one heard all the religions speak in one voice? Gays should be proud of themselves.

But while these high-minded people spew fire and brimstone and talk about the end of civilization being round the corner, we have to stop and ask — is this judgment about religion or about the laws of a sovereign nation?

India does not work according to religious laws but according to the Constitution. The honourable judges, who have come up with one of the most brilliant and nuanced judgments in recent years, have made it abundantly clear that the writers of that wonderful document had spoken of equality under the law. They have quoted Jawaharlal Nehru to remind everyone that he wanted that spirit of equality to be universally applicable — homosexuals as citizens of India deserve that equality.

The judgment has not thrown in any dollops of Indian culture or religion. Yet, all the major objectors so far have been from the religion/culture sector. Murli Manohar Joshi, who despite being a physics professor keeps science firmly out of his thinking, has said that a “couple of judges cannot be above Parliament or the people”. He has not so far invoked God, but give him time.

To be sure, no society can function without its culture and traditions, and judges, like everyone else, work within that environment, from which social mores are drawn. The Chinese, who are anti-religion and atheistic, are steeped in Confucianism which has Buddhist connections. The French, despite their abhorrence for religion, cannot

escape their Christian past. And Hinduism in its various forms has played a big role in what we are today.

But the prevailing attitudes of an era and of its ruling classes also put their stamp on our norms. Section 377, which expressly calls all forms of unnatural sex criminal, was the brainchild of TB Macaulay and his Victorian mind.

The Victorians were not without their perversions, but functioned within repressive social conventions. Those Victorian values — and, therefore, laws — have influenced generations of Indians, as Macaulay predicted. Our police force today is still run by the mentality of looking at fellow citizens as seditious criminals. Successive governments of independent India, whether by lethargy or design, have chosen not to amend many archaic laws. Considering that homosexuality is hardly a priority and it fitted well with cultural mindsets, there was no compulsion to apply any thinking to it.

But the world has moved on. Discriminatory laws are being amended. By section 377 of the Indian Penal Code; all these years a gay person could be thrown into jail for his sexual preference. It has taken over a decade of hard work and lobbying to get gays out of its ambit, though the section can still be used against paedophiles and rapists.

The courts have once again shown that they lead the way in virtually imposing progressive legislation on our hide-bound society. Now that the gays have crossed the first big hurdle, they have to take the next steps carefully. Celebrating with song, dance, and outrageously camp behaviour is all very well, but any strategy to fight off challenges to this ruling cannot fall into the trap set by the religion- and culture-wallahs.

I remember, when a bunch of violent loonies went on the rampage against the screening of Deepa Mehta's film *Fire* a decade and a half ago, lesbian groups hit back by declaring that homosexuality was "very much part of Indian culture". That is totally the wrong way to go about it.

Any number of examples of references to homosexuality can be dug up in Indian mythology or, for that matter, from other religions. But

that is a reductionist idea that immediately allows the religious groups to shift the battle to their chosen arena. It is a no-win situation — the other side will always win. Moreover, the scriptures and our myth and lore have many references to incest or sati; should we just accept them blindly?

Most important, invoking culture and tradition will deeply offend a vast majority of Indians, who are still ambivalent, even hostile, to homosexuality. The gay community needs their support.

No, the battle has to be fought and won on legal grounds. In any democratic republic, with a functioning Constitution and a strong legal system, the law is the best weapon and can be used as a brahmastra. The political classes have largely welcomed the judgment; those parties which are unsure have wisely chosen to keep quiet. The prime minister is taking an interest. Signs of major changes are in the air.

The priest, the mullah, and the swami must be told that they have a right to hold and express views, but their writ does not run in this country. We have allowed these elements to get away with a lot in recent times and they have become emboldened. Now they must be shown their place.

One day, perhaps, the fires of hell will consume all sinners, but for the moment we must live by the laws of the land.

DNA India
July 4, 2009

http://www.dnaindia.com/opinion/column_keep-religion-out-of-the-gay-debate_1271112



The aftermath of the Naz judgment was a deluge of publicity. Many nationwide news channels gave live coverage of the decision's release. Within hours, news of the judgment was being carried by international news sites like CNN¹, BBC², and the New York Times³. Reactions came swiftly from across the political and cultural spectrum. Various human rights organizations, including UNAIDS, welcomed the judgment as a crucial step in ensuring the dignity of millions of individuals throughout India⁴. Activists and commentators lauded

¹ CNN International, "Indian Court: gay sex is legal," 2 July 2009: http://edition.cnn.com/2009/WORLD/asiapcf/07/02/india.sex.ruling/index.html?eref=edition_world

² BBC News, "Gay sex decriminalized in India," 2 July 2009: http://news.bbc.co.uk/2/hi/south_asia/8129836.stm; BBC News, "Gay sex ruling: views from India," 2 July 2009: http://news.bbc.co.uk/2/hi/south_asia/8130737.stm

³ N.Y. Times, "Indian Court overturns gay sex ban," 2 July 2009: <http://www.nytimes.com/2009/07/03/world/asia/03india.html>

⁴ The Hindu, "Judgment on Section 377 welcomed" 03 July 2009: <http://www.hindu.com/2009/07/03/stories/2009070361381800.htm>

the High Court justices for producing a clearly reasoned and humane opinion⁵. The Union Law Minister indicated that the government would have to consider the judgment in more detail before reaching a position⁶. He later met with the Home Minister and Health Minister to prepare a report for submission to the Prime Minister⁷.

However, not all reactions to the High Court's decision were positive. A small number of religious leaders were vocal in their opposition to the judgment. In a supremely ironic gesture of ecumenism, the president of Jamaat-e-Islami Hind called for leaders of all religious traditions to set aside their differences and join in condemning the decriminalisation of homosexual acts⁸. Even some staunchly conservative politicians entered the debate to voice their displeasure with the judgment's apparent acceptance of homosexuals in society⁹.

Yet, in spite of this noise and bluster it must be noted that the National Council for Churches in India (NCCI) issued a document urging its member Churches to "accompany the People with Different Sexual Orientation (PDSO) in their journey." It urged the Churches to create forums to discuss human sexuality and proposed to re-read and re-interpret Scriptures from the PDSO perspective.¹⁰ Similarly the two major political parties did not express any opinion on the judgment, with the Communist Parties as well as the Nationalist Congress Party welcoming the judgment. In spite of the portrayal by a few religious voices who took up inordinate air-time, religious opinion in not

⁵ The Hindu, "Admirable judgment: Vikram Seth," 3 July 2009: <http://www.hindu.com/2009/07/03/stories/2009070361472000.htm>

⁶ The Hindu, "We need to examine the details of the verdict, says Moily," 3 July 2009. <http://www.hindu.com/2009/07/03/stories/2009070361391800.htm>

⁷ NDTV, "Govt divided on section 377?", 4 July 2009: http://www.ndtv.com/news/india/govt_divided_on_section_377.php

⁸ The Hindu, "Muslim clerics feel family system will be destroyed," 3 July 2009: <http://www.hindu.com/2009/07/03/stories/2009070361341800.htm>

⁹ DNA India, "'Decriminalising homosexuality will send the wrong signals'," 8 July 2009: http://www.dnaindia.com/bangalore/interview_decriminalising-homosexuality-will-send-wrong-signals_1272161

¹⁰ <http://www.indiancatholic.in/news/storydetails.php/12908-1-6-Protestant-leaders:-Churches-need-to-rethink-stance-on-homosexuality>

uniformly opposed to the decriminalisation of homosexuality. Political opinion is similarly divided.

However, the more conservative voices filed special leave petitions in the Supreme Court praying for an interim stay of the judgment pending an appeal. Among them was Baba Ramdev, who expressed concern that decriminalising homosexual relationships would lead to the spread of homosexuality and thus negatively impact India's population growth. He also claimed homosexuality was a curable disease that could be treated through proper yoga and meditation techniques¹¹. (This prompted Manvendra Singh Gohil, the gay prince of the former state of Rajpipla, to point out that ten years of practicing yoga had simply made him a more confident homosexual.)¹²

At a hearing on July 9, the Supreme Court heard arguments from another petitioner, Suresh Kumar (reportedly an astrologer). Mr. Kumar argued that the decision had led to a spate of gay marriages across the country, and that the Supreme Court must act immediately to preserve the institution of marriage. He also made the 'this is against Indian culture' argument, even though that argument had already been thoroughly addressed in the High Court. According to the petition: "The High Court completely lost sight of the fact that the Indian society still remains, by and large, a conservative and primitive society and shining nature of Indian societies found in metros (which is less than 6 to 7 per cent) cannot represent the whole Indian society for understanding the social and cultural Indian net"¹³. Apparently, primitive is preferable to shining.

The Supreme Court refused to decide on the request for an interim order staying the judgment, until the Union of India had made clear its stand. The Chief Justice further pointed that a few overenthusiastic

¹¹ The Hindu, "Baba Ramdev to challenge Court verdict on gay sex," 7 July 2009: <http://www.hindu.com/thehindu/holnus/002200907072033.htm>

¹² DNA India, "Homosexual prince dares yogis to 'cure' him," 31 July 2009: http://www.dnaindia.com/india/report_homosexual-prince-dares-yogis-to-cure-him_1278869

¹³ The Hindu, "Section 377: Centre may seek more time to file response," 20 July 2009: <http://www.hindu.com/2009/07/20/stories/2009072060031000.htm>

homosexuals trying to get married was not a good reason to stay the judgment, but merely a reason to educate the public about what the judgment actually said¹⁴ (the judgment did not deal in any way with marriage laws). Yet the Court did grant the astrologer standing to appeal the case, even though he had not been a party to the original proceedings in the High Court. Accordingly, the Court issued notices to the Centre and the Naz Foundation that the appeal had been taken, requesting that they file their responses within ten days¹⁵.

Then, after a hearing on July 20 involving lawyers from all parties, the Court refused to grant the astrologer's requests for an interim stay of the judgment, largely because the Union of India did not support such a move. Chief Justice Balakrishnan gave the Centre ten weeks to formulate and file its final position on the judgment. The Law Ministry is to prepare a detailed analysis of the judgment, which it will submit to a panel of three ministers (Home, Health, and Law). This panel will then send the report with its recommendations for a vote before the entire cabinet¹⁶.

There is cause for cautious and guarded optimism about the outcome of the Supreme Court appeal. Though the Centre has been characteristically non committal in its response to the judgment, there are signals that the government will not take a firm stand against the High Court's ruling¹⁷. In a particularly promising development, the Union law minister Veerappa Moily recently called the High Court's judgment "well-researched, well-documented, [and] well-argued," and acknowledged that Section 377 has served as an instrument of

¹⁴ The Hindu, "Supreme Court takes up petition against gay sex," 10 July 2009: <http://www.hindu.com/2009/07/10/stories/2009071054981000.htm>

¹⁵ DNA India, "Centre relieved as SC issues notice on gay ruling," 9 July 2009: http://www.dnaindia.com/india/report_centre-relieved-as-sc-issues-notice-on-gay-ruling_1272497

¹⁶ Times of India, "Section 377: Cabinet to take final call on govt stand," 29 July 2009: <http://timesofindia.indiatimes.com/NEWS/India/Section-377-Cabinet-to-take-final-call-on-govt-stand-/articleshow/4832153.cms>

¹⁷ DNA India, "Government unlikely to oppose Delhi HC gay verdict," 29 July 2009: http://www.dnaindia.com/india/report_government-unlikely-to-oppose-delhi-hc-gay-verdict_1278029

exploitation in the past. He also said that certain colonial-era laws are not compatible with the Constitution, and the courts have the power to decide the law when such conflicts arise¹⁸.

Until such time as the Supreme Court finally decides the case arriving at a different conclusion from the *Naz* judgment or another High Court comes up with a different interpretation of the constitutionality of Section 377, LGBT persons are full citizens of India.



¹⁸ DNA India, “Anti-gay law was an instrument of exploitation, says Moily,” 2 August 2009: http://www.dnaindia.com/india/report_anti-gay-law-was-an-instrument-of-exploitation-says-moily_1279130



