Suresh Kumar Koushal and Ors. v. Naz Foundation (India) Trust and Ors., SLP (Civil) No. 15436 of 2009 and Ors.

Record of Proceedings in the Supreme Court of India

13 February – 27 March, 2012

13th February, 2012

The matter was listed before the Division Bench of Justice G.S. Singhvi and Justice S. J. Mukhopadhaya and came up almost at the end of the day at 3.50 pm. Justice G.S. Singhvi asked the Counsel for the Appellant, Mr. Suresh Kumar Koushal, Appellant in Special Leave Petition No. 15436 of 2009, to begin his arguments in the case. The Counsel, Mr. Praveen Agarwal, started to frame his arguments and he was heard for ten minutes. Then the Bench rose at 4.00 pm and asked him to continue on the next day.

15th February, 2012

Mr. Praveen Agarwal, on behalf of Mr. Suresh Kumar Koushal, Appellant

The matter was listed as item number 7 before the Bench of J. Singhvi and J. Mukhopadhaya and came up at 3.00 pm. Before the Appellant could start his arguments, Mr. Shyam Divan, the Counsel for the Respondent No. 11, *Voices Against 377*, submitted that the Supreme Court should first look into the issue of maintainability of all the SLPs filed against the Delhi High Court judgment in *Naz Foundation v. Government of NCT, Delhi and Ors*, since private individuals, who were not parties in the original case, had no standing to challenge the High Court decision. Neither the Union of India (UOI) nor the NCT of Delhi had appealed against the judgment. J. Singhvi said that this issue could be argued later, along with the Respondent's main arguments.

At the outset, Mr. Agarwal stated that the purpose of filing the writ petition by Respondent No. 1 [i.e., Naz Foundation (India) Trust as the original Petitioner] in the High Court was based on the public health argument that Men who have Sex with Men (hereinafter 'MSM'), who were highly vulnerable to HIV, would be

able to access health services and other HIV prevention services, if Section 377 was read down. Due to the fear of penal sanction under Section 377 or facing police harassment, MSM were not coming out in the open to access services. Thereafter, he went through several paragraphs of the High Court judgment and emphasized that the Naz Foundation's claim of how Section 377 was impeding HIV prevention efforts was supported by the affidavit filed by National AIDS Control Organisation (NACO)'s on behalf of Ministry of Health in the High Court.

However, the Ministry of Home Affairs (MHA) had argued for the retention of Section 377 in the High Court. The Appellant argued that the fact that the two Ministries of the Union of India had submitted affidavits that were contradictory to each other was unheard of and had happened for the first time. Then J. Singhvi asked Mr. Agarwal about his client's vocation. The Appellant replied that 'he was a socially spirited person, who had retired from the government service long time back and meanwhile, doing astrology to earn money.' J. Singhvi said that 'socially spirited person was a broad term, similar to a social worker' and also made remarks about the Appellant's present profession of astrology in the context of locus of the Appellant.

Mr. Agarwal then continued reading relevant paragraphs from the judgment, highlighting the holding of the Delhi High Court on the right to privacy, dignity, health, non-discrimination on ground of sexual orientation and equality under Articles 21, 15 and 14 of the Constitution respectively. He then submitted that Article 21, which included the right to privacy, could be curtailed for general public good, since no right was absolute or unrestricted under the Indian law. All rights could be curtailed for the general public welfare. The question was whether Section 377 imposed reasonable restrictions on Article 21 or not and

whether the continuance of Section 377 would serve the purpose of the statute or not. He further asked whether Section 377 was liable to be struck down just because MSM were vulnerable to HIV.

J. Singhvi then asked Mr. Agarwal to read out the text of Section 377. J. Mukhopadhaya questioned him about the scope of Section 377 and whether it was about homosexuality. The Bench said that they would first focus on the language of Section 377 itself and then would go into the arguments raised by the Appellant. J. Mukhopadhaya then commented that the term 'whoever' in Section 377 had no gender and applied to both men and women. He then asked whether it applied to transgender persons. Section 377 did not mention anything about children or minor. He further noted that the Section was broadly worded and did not mention particular sexual acts by individuals. The Bench then asked Mr. Agarwal to take more time to prepare his arguments, since he could not properly answer the specific queries posed by the Judges about Section 377.

Mr. Amarendra Saran, Senior Counsel on behalf of Delhi Commission for Protection of Child Rights, Appellant

Thereafter, the Counsel for the Delhi Commission for Protection of Child Rights (SLP No. 24334 of 2009), Mr. Amarendra Saran, was asked by the Court to begin his arguments. J. Mukhopadhaya enquired about the textual analysis of Section 377 and whether the phrases 'carnal intercourse' and 'against the order of nature' had been defined. Mr. Saran argued that one of the main reasons why Section 377 was read down was because of its impediment in HIV prevention efforts. J. Singhvi commented that HIV did not exist in 1860 when the Penal Code came into force.

Mr. Saran further argued that nature only recognised intercourse between man and woman but did not cover sex between men, or sex between women or bestiality. J. Mukhopadhaya then asked about the judicial interpretation given to the term 'carnal intercourse' and what kind of acts had been deemed to be carnal intercourse against the order of nature. He further asked whether it pertained to non-procreative sex or even procreative sex. One activity might be termed as carnal intercourse while another might not fall under the same category.

J. Singhvi then wanted to know about the precise issues raised by the Petitioner in the High Court and the relief sought in the High Court, though he commented that the Supreme Court was not bound by the formulation of prayer by the Petitioner in the High Court. The Apex Court would first properly analyse Section 377 itself and to what extent it could be retained in the modern context within the four corners of the Constitution. J. Mukhopadhaya also noted that the relief claimed in the petition was broad in nature and did not talk about particular acts under Section 377 and asked 'who was an expert to judge whether an act was against the order of nature or not'.

Mr. Saran argued that the term 'carnal intercourse' had been in usage since the last 100 years and had acquired a particular meaning. He was then asked by the Bench to cull out the meaning of carnal intercourse from different judicial decisions and apprise the Court of the same. He also said that what was natural was unchangeable and immutable and did not change with time. But the Judges disputed that contention and asked 'whether anybody heard about surrogacy 40 years back. It was considered unnatural then and now in the 21st century, it was considered natural'. The Bench then rose at 4pm and asked the Appellants how long each one of them would take in their arguments. The matter was then posted for the next day.

16th February 2012

Continuation of Mr. Amarendra Saran's Arguments

The matter was listed as item number 9 and came up for hearing at 2.30pm. Mr. Saran continued his arguments from the previous day and contended that Section 377 used the phrase 'carnal intercourse' while Section 375 (defining the offence of rape) used the expression 'sexual intercourse'. This indicated that carnal intercourse was different from sexual intercourse. Section 377 had two ingredients: first, 'carnal intercourse' with a man, woman or animal, and second, 'that intercourse was against the order of nature'. Mr. Saran then read out relevant paragraphs from 5-6 judgments of the High Court that had interpreted carnal intercourse under Section 377, starting from 1925. He further argued that unnatural sex was the method of having sex that did not result in procreation. J. Mukhopadhaya noted that there could be a difference between normal sex and abnormal sex but what was abnormal was not necessarily unnatural sex.

After the judgments were read out, J. Mukhopadhaya commented that various terminologies had been used in the decisions and different acts had been held to be within the purview of carnal intercourse but none of the judgments in fact defined what was against the order of nature. What was unnatural depended upon the specific facts and circumstances of the case. If an act was not carnal intercourse against the order of nature then Section 377 was not applicable. Mr. Saran contended that because of this precise reason, a limited prayer was made in the original petition in the High Court, since the Petitioner knew that what they were asking for was against the order of nature.

The Bench further referred to depictions of sexual acts on Khajuraho temples and other art and architecture of India and observed that society had changed with time and what was unnatural a few decades back, was no longer unnatural now.

Mr. Saran pointed out that paintings and sculptures did not determine what was socially acceptable at that time. J. Singhvi responded by stating, "we were not there… we don't know how the society felt about these things". The Bench also opined that this was not an offence in 1857 (during *Sepoy Mutiny*) or 1859 but from 1860 onwards, when the Penal Code was enforced.

Thereafter, J. Mukhopadhaya asked whether anybody could claim a fundamental right to have carnal intercourse against the order of nature. Mr. Saran replied that this was precisely what the Petitioner was claiming in the writ petition and it was granted by the High Court in its declaration of reading down Section 377. The Bench stated that neither the petition nor the High Court decision mentioned anything about carnal intercourse against the order of nature, since individual acts were not specified. J. Mukhopadhaya then observed that Section 377 was applicable not to a class of persons but pertained only to certain activities which could be deemed as carnal intercourse against the order of nature. Unless an act fell under that category, Section 377 could not apply. The question was whether any part of Section 377 offended any right under Article 21. He noted that Section 377 was a broad provision and had nothing to do with homosexuality or with gays and lesbians but was applicable to everybody. The Bench further referred to instances of surrogacy, live-in relations, single parents, non-procreative sexual relations, to emphasise the fact that societal norms did not remain static and what was considered natural has evolved with time and context. Whether homosexuality was natural or abnormal was an open question. Mr. Saran argued that homosexuality was unnatural, otherwise there was no reason to challenge Section 377.

J. Mukhopadhaya again reiterated that what was natural or unnatural or abnormal had nothing to do with a class of people, since homosexuality was a

wide term and not necessarily connected with carnal intercourse. There was no prohibition on homosexuality under Section 377; what Section 377 prohibited was certain types of activities. J. Mukhopadhaya stated that the contention of Petitioner was that Section 377 enacted in 1860 had become stale and obsolete in the present times. Mr. Saran said that, however, law of nature could never change, like the natural occurrence of Sun rising in the East and setting in the West. Thereafter, the Bench asked that if an act did not amount to carnal intercourse against the order of nature, thereby not attracting Section 377, then should the High Court had gone into the question of constitutionality of Section 377 and whether it violated Articles 14, 15, 19 and 21 of the Constitution.

The Bench then rose at 4pm and posted the matter for further hearing on 22nd February, 2012.

22nd February, 2012

Continuation of Mr. Amarendra Saran's Arguments

Mr. Saran, Counsel for the Delhi Commission for Protection of Child Rights, continued his arguments. He submitted that the Delhi High Court decision was based on wrong reasoning that would not withstand the scrutiny of this Court. While reading several excerpts from the judgment, relating to Articles 14 and 15 of the Constitution, he stated that the High Court had overlooked the importance of public morality in enacting legislations, since it was considered to be a reasonable restriction under Article 19(2) and Article 25(1). He further argued that there were a plethora of decisions that held that right to privacy was not an absolute right and could be curtailed on reasonable grounds and it did not give any right to commit an offence by consenting adults in private.

Mr. Saran then stated that the High Court's conclusion on Article 14 was erroneous, since Section 377 did not create any class and was applicable to both heterosexuals and homosexuals equally. It criminalised the act and not the person. If the High Court decision was correct, then any provision could be considered to violate Article 14, e.g., prohibition against dowry, offence of murder, etc.

He further submitted that Article 15 prohibited discrimination on the basis of gender and not on the ground of sexual orientation and cited D.D. Basu's *Commentary on the Constitution of India*. He also expressed doubts about the application of foreign decisions in India, since the Indian society was different from the Western nations and thus transplantation of western jurisprudence in to India would be problematic. He argued that the High Court's reliance on a South African decision that decriminalized sodomy in South Africa was incorrect, since the South African Constitution had expressly prohibited discrimination on the ground of sexual orientation, which was not the case in India.

While he was reading out other paragraphs from the Delhi High Court decision, J. Singhvi wanted to know whether the activity prohibited under Section 377 resulted in HIV/AIDS and whether any study was conducted by the State or the Petitioner. He also enquired whether 'procreation' was linked to the issue at hand. Mr. Saran replied that procreation had nothing to do with Section 377. J. Mukhopadhaya further noted that there had to be a complainant and accused, in order to constitute an offence and if a third party was a 'witness' to the offence, then whether it would still be considered as having committed in the 'private'. J. Singhvi enquired whether offences like obscenity (i.e., engaging in sexual acts in a public place) would be violative of Articles 14, 19 and 21. One had to be mindful of the impact of this judgment on other provisions of the IPC. J.

Mukhopadhaya also asked whether the acts would have any impact on the dignity of women, keeping in mind Article 51A (e) of the Constitution that imposed a fundamental duty to protect the dignity of women.

Mr. Saran then cited NACO's affidavit filed in the High Court to state that homosexual men constituted a high-risk group in the context of HIV/AIDS. The Judges asked whether it was relevant to Section 377. Agreeing, Mr. Saran responded that Section 377 was not related to HIV and Section 377 could be held ultra-vires only on the ground of being violative of fundamental rights or not been enacted by a competent authority. Thereafter, Mr. Saran argued that the High Court relied on a number of US decisions on its findings on the right to privacy and distinguished the Indian cases of *Gobind v. State of MP* [(1975) 2 SCC 148], since they were mostly on surveillance and domiciliary visits.

He also referred to the Yogyakarta principles relied on by the High Court and noted that most of High Court's reasoning was based on foreign cases, foreign authors, etc while Section 377 had stood the test of time in the last 150 years. J. Mukhopadhaya observed that Section 377 did not refer to any sexual orientation and did not make homosexuality an offence. Agreeing, Mr. Saran said that Section 377 did not criminalise a particular section of society but only a particular act and did not violate the right to privacy or the dignity of homosexual persons.

J. Mukhopadhaya asked whether the word 'sex' had been used in Section 377. Mr. Saran replied that Section 377 used the heading 'unnatural offences' while Section 375 used the phrase 'sexual offences' for rape. J. Singhvi then noted that the issue, whether an organisation could challenge the constitutionality of a statute, had come up again and again. He stated that there could be cases under Section 377 wherein privacy/dignity was infringed and that right to dignity was mentioned in the Preamble of the Constitution. J. Singhvi commented that a

parallel debate was going on in the media about this case but that should not influence the court proceedings. J. Mukhopadhaya again asked whether one had a fundamental right to commit an act, which was against the order of nature. J. Singhvi also asked for a list cases on Section 377 in post-independence era and stated that only few such cases had till now been cited. Even the High Court decision did not mention how many such cases were instituted, resulting in the harassment of certain sections of the society.

J. Singhvi then enquired whether a similar situation could arise in cases of Section 304B (dowry deaths), obscenity, for e.g., in certain countries, there was a practice of people streaking while watching football matches, wherein they would strip their clothes off and run naked on the field, could we allow such practices in India? The Judges wanted to be enlightened by both parties on these issues. J. Singhvi further asked that while Yogyakarta principles were arrived at by 25 experts from 25 countries, what about the opinion of the experts from other countries. These principles could be said to be individual opinions or personal views of these experts but the question was whether they could be considered as an authority on the subject, to be incorporated into the High Court decision. Apart from the foreign experts, J. Singhvi wanted to know about the opinion of Indian jurists like Professor Upendra Baxi. He also wanted to know about the situation in India pertaining to homosexuality before the British rule.

J. Mukhopadhaya asked about other laws like Hindu law, Mohammedan law and other religious laws that governed sexual relations between persons. Mr. Saran replied that religious organisations were part of the other Appellant parties who would enlighten the Court on these issues. Referring to Article 13, J. Mukhopadhaya noted that the definition of law included 'custom'. Mr. Saran

submitted that in case of uncodified law, religious/customary practices would prevail.

Thereafter, Mr. Saran reiterated that there was no fundamental right to commit an offence, even in private. J. Mukhopadhaya stated that only the Legislature could prescribe the penal offences, e.g., if there was a prohibition on having two wives at the same time, then one could not argue that one had a fundamental right to have two wives. The Judges then clarified that they were not concerned about morals but only with the Constitution. Mr. Saran further submitted that the concept of dignity did not govern the field of carnal intercourse against the order of nature. The Judges noted that the service rules too prohibited government employees from conducting second marriages but one could argue that his wife consented to the second marriage. In such cases of private consensual matters, they asked, why the law should intervene and why could one not have 5 wives. Mr. Saran noted that such conduct would be deleterious to the morals of the society.

J. Mukhopadhaya then asked how Articles 14 and 15 would be invoked, as Section 377 did not discriminate on the basis of race, colour, class or religion. J. Singhvi then pointed out that these questions were posed to both sides and could be misleading. He said that Section 377 could be construed as violative of the right to dignity, since the 'order of nature' had changed over the years, though nature itself had not changed, but the nature of human beings had. Mr. Saran quipped that it had not changed in the last 10,000 years. Disagreeing, J. Singhvi opined that society had undergone changes, for example, bigamy was not an offence before the Hindu Marriage Act, 1955. The process of procreation too had witnessed changes such as artificial insemination, sperm donation and cloning while other scientific developments in stem cell research, artificial limbs, organ

donation, etc. The Judges observed that the Petitioner might have foreseen the developments of the future and therefore had approached the Court on behalf of the homosexual persons. They asked why should others interfere by supporting Section 377. Mr. Saran submitted that it was the prerogative of the Legislature to amend laws and the only scope for judicial review was if Section 377 violated the fundamental rights or the Legislature lacked the competence to enact the law.

Mr. Saran further argued that the right to life and liberty was not absolute and could be restricted in accordance with the procedure established by law. In case of Section 377, the procedure was laid down in the Code of Criminal Procedure (CrPC) and no one had argued that the CrPC procedure was not fair or unreasonable. The Judges then discussed the meaning of dignity and J. Mukhopadhaya noted that dignity was a sense of pride in oneself and 'worthy of respect'. They then asked Mr. Saran to finish his arguments soon, since there were other counsels waiting to argue.

Mr. Saran then read a few paragraphs from the High Court decision and referred to *A.K. Gopalan v. State of Madras* (1950 SCR 88), which held that the right to life and liberty could be restricted by an appropriate procedure laid down by law. He then cited *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248], stressing the inter-relation between Articles 14, 19 and 21 and that the procedure established by law had to be fair, just and reasonable and one had look at the direct impact of the law on fundamental rights and not on incidental effects. Section 377 did not directly infringe Article 21 in any way.

The Bench then rose at 4pm and the matter was listed for the next day.

23rd February, 2012

Continuation of Mr. Amarendra Saran's Arguments

Mr. Saran continued his arguments in the morning session. The Judges asked how many countries had laws similar to Section 377. Mr. Saran replied that there were 76 countries, which had similar provisions, including 7 countries where homosexuality was punishable with death. J. Singhvi responded by stating that it was for the Legislature to decide whether to enact such laws or not. Mr. Saran further argued that there was a presumption in favour of the constitutionality of laws and the Legislature could create a reasonable classification if it had a rational nexus with the object of the law. But Section 377 did not create any class and therefore did not target a particular community. The High Court's conclusion that Section 377 violated Article 14, as it disproportionately targeted the homosexual class, was, therefore, not based on any empirical data and was without any basis. J. Singhvi asked whether the Petitioners in the High Court submitted any material on the homosexual community. Mr. Saran replied that a document was placed on record, which stated that there were 25 lakh MSM in India, but that assertion was not supported by any evidence.

J. Mukhopadhaya then asked why homosexual persons were being talked of, as if they were a separate community. They were part of the general society; only sexual preferences could differ amongst individuals. Mr. Saran argued that apart from one incident of harassment of a homosexual person, there were no other reported cases under Section 377. There was no evidence that there was a community of homosexual persons or that they were particularly targeted by Section 377.

In terms of Article 15, Mr. Saran differed from the High Court's finding that Article 15(1) prohibited discrimination on the ground of sexual orientation,

which was included in the term 'sex'. He submitted that the High Court had imported foreign jurisprudence into Article 15 and there was no evidence that homosexual persons were being discriminated in terms of access to public places. Article 15 prohibited discrimination only on the ground of gender and not on the ground of sexual orientation. This was evident from the fact that Article 15(3) provided for special provisions for women and children, thereby implying that Article 15 covered only women in its ambit.

Thereafter, Mr. Saran argued that the High Court's emphasis on constitutional morality, as opposed to public morality, was erroneous, since public morality constituted a reasonable ground of restriction in the Constitution. He then concluded his arguments and stated that other issues would be dealt with by the counsels of the other Appellants.

Mr. P.P. Malhotra, Additional Solicitor General of India (ASG) on behalf of the Ministry of Home Affairs, Union of India

J. Singhvi then asked Mr. P.P. Malhotra, ASG, to address the Bench on the Government's stand on the constitutionality of Section 377. Mr. H.P. Sharma, Counsel for Mr. B.P. Singhal, interjected and said that his client was one of the respondents in the High Court and should be heard before others and their arguments were not based on religious grounds. He was, however, asked to argue after Mr. Malhotra.

Mr. Malhotra, on behalf of the Ministry of Home Affairs, started his arguments and referred to several paragraphs from the judgment of the Delhi High Court. He then read out the affidavit filed in the High Court on behalf of the Home Ministry, wherein it had opposed the petition, on the grounds that it would open the floodgates for delinquent behaviour and that Section 377 was needed to fill in

the lacunae in rape laws and was used to address child sexual abuse cases. He cited the 42nd Law Commission Report that had recommended the retention of Section 377 on the ground that societal disapproval was sufficient reason to keep the law on the statute book. J. Singhvi asked who would decide what was moral and what was immoral. Mr. Malhotra replied that the Courts would decide.

J. Singhvi then asked why the Legislature had not dealt with this issue yet. Mr. Malhotra responded that the Government was following the Law Commission's recommendation on retention of Section 377, since homosexuality was immoral. Sexual organs like the penis were meant only for procreation and anal sex was highly unnatural. He further argued that homosexuality might be prevalent in other countries but not in India. J. Singhvi pointed out that different countries had different laws so considering them would not be of much help. J. Mukhopadhaya asked whether Section 377 was applicable all over India including Jammu & Kashmir which had its own penal code.

Thereafter, Mr. Malhotra discussed the HIV prevalence data of MSM populations. J. Singhvi asked how many people in general population were infected with HIV and how many amongst MSM. Mr. Malhotra replied that HIV prevalence amongst general population was less than 1% while it was 6% amongst MSM. J. Singhvi pointed out that this was the data in 2005 and asked about the current statistics. He then observed that there were many more non-MSM who were infected with HIV than MSM. Mr. Malhotra argued that homosexuality was the cause of HIV/AIDS and he would establish the link. J. Singhvi, disagreeing, responded that NACO should collect appropriate figures first, since there was no relation between HIV and homosexuality. J. Mukhopadhaya asked why one should talk only of MSM and not transgenders, who also engaged in such acts. J. Singhvi also commented that most HIV/AIDS

cases were due to sexual abuse of women and girls in states like Maharashtra, Andhra Pradesh, Karnataka and Tamil Nadu.

Mr. Malhotra then continued to read from the High Court judgment and contended that High Court had relied too heavily on foreign judgments, around 31 in total. J. Singhvi asked him whether he knew any homosexual person personally. Mr. Malhotra pleaded ignorance. He stated that every society had its own norms and values and the Indian society abhorred such practices. One could not engage in such practices openly. J. Singhvi opined that most sexual acts happened in private and with consent. No sexual acts, even between a married couple, were allowed in a public place.

Mr. Malhotra then argued that since MSM were a high risk group, Section 377 needed to be retained in order to protect public health, otherwise it would result in rapid spread of HIV epidemic. He also refuted the Petitioner's contention that police harassment was an impediment to HIV prevention efforts and submitted that hardship was no ground to invalidate a law. He further contended that public morality could be a ground to enact laws, since the Legislature was an embodiment of the majority opinion. Referring to the 172nd Report of the Law Commission that had recommended decriminalisation of homosexuality, he noted that the High Court had incorrectly interpreted the Law Commission's recommendation which had only asked for gender neutral laws in terms of Sections 375 and 376 (rape). J. Mukhopadhaya stated that Sections 375/376/376A pertained to non-consensual sex. After the High Court decision, one had to read the terms 'consent' and 'adult' in Section 377. Only the Parliament had the power to amend the laws.

J. Mukhopadhaya then asked about constitutional morality and whether there existed any penal code or civil code premised on constitutional morality. He

further asked if the Penal Code had a relation with morality or if it was independent of morality. And if there was a relation between criminal laws and morality. J. Singhvi enquired whether the British Colonial Government, while enacting the IPC, took into account the Indian morality or imposed British morality on the Indians. J. Mukhopadhaya noted that since Section 377 was a pre-constitutional law, its constitutionality could not be presumed and if violative of fundamental rights, then it would be void. He asked if there could be a 'savings clause' or 'reading down' clause.

Mr. Malhotra submitted that Section 377 had existed for the last 150 years because the society wanted its retention so the government kept it. The Judges opined that it was not for the government but for the Parliament to change the law. Mr. Malhotra responded that the Parliament in its wisdom had decided not to change the law. J. Singhvi then asked whether the Parliament had considered the recommendations of the 172nd Law Commission report while J. Mukhopadhaya enquired whether the Court could take into consideration such a report that the Parliament had not considered in deciding the issue of constitutionality.

The Judges then asked Mr. Malhotra to enlighten them about the HIV/AIDS statistics from different states of India. After reading out data from different states, Mr. Malhotra submitted that unprotected anal sex constituted the most important risk factor in the spread of HIV. The Judges stated that they were not interested to know how HIV was transmitted but about the details of the data, in terms of how many people were surveyed, whether they were surveyed only in the metros or in the rural areas too. They also asked about how many people suffered from HIV, without being tested or treated. When Mr. Malhotra began to read out figures of HIV prevalence amongst MSM from various states of India,

the Judges said that they were not interested in those figures. Mr. Malhotra tried to explain that he wanted to show that MSM practiced risky sexual practices by being with various partners and were at higher risk of HIV transmission.

Thereafter, Mr. Malhotra argued that the right to privacy under Article 21 was not an expressly guaranteed fundamental right and could be restricted. He cited *M.P. Sharma v. Satish Chandra* (1954 AIR SC 300) and *Gobind v. State of M.P.* (supra). The Judges referred to para 22 in *Gobind's* Case that related to privacy-dignity claims and held that privacy could be denied only when there was a compelling State interest. They asked Mr. Malhotra whether the test of compelling State interest was satisfied and whether enforcement of morality was a sufficient enough reason to restrict fundamental rights. Mr. Malhotra submitted that decency or morality constituted one of the grounds of reasonable restrictions on the freedom of speech and expression under Article 19(2). Section 292 of the IPC too sought to prohibit obscenity on the grounds of decency and morality. While citing *Ranjit D. Udeshi v. State of Maharashtra* (1965 (1) SCR 65), Mr. Malhotra submitted that Courts needed to balance between freedom of speech and public decency and morality.

Mr. Malhotra then referred to several laws including the Hindu Marriage Act (HMA), divorce laws, Section 376 of the IPC, Sections 10 and 12 of the Divorce Act, the Dissolution of Muslim Marriages Act and laws relating to gambling and organ transplant and how they would be impacted if Section 377 was changed. The Parliament should change the law only if there was a need to change it. He concluded that Section 377 did not harm anybody and should be retained.

Thereafter, Mr. Mohan Jain, Additional Solicitor General (ASG), representing the Union of India, addressed the Bench and said that the UOI had not filed an appeal. He had been instructed by the Attorney General of India to inform the

Court that the UOI had not taken a stand on this issue and had not file an appeal against the judgment, but would like to assist the Court. This position of the UOI was decided on 20th July, 2009 and the same had been conveyed to the Court. The Judges got very visibly upset with this development. While J. Singhvi stated that the Court would not allow the UOI to take such a stand, J. Mukhopadhaya noted that Mr. Jain could address the Bench on behalf of the Health Ministry and talk on issues of health, psychological aspect, etc. J. Singhvi further said that the Bench would refuse to take cognizance of the AG's instructions, since the UOI's stand had embarrassed both the Court and Mr. Malhotra and that the UOI should take this issue seriously and not in a casual manner. They further added that in any case, all the Counsels were assisting the Court, since no one had been personally aggrieved and Mr. Malhotra was also simply assisting the Bench.

28th February, 2012

Mr. Mohan Jain, Additional Solicitor General of India on behalf of Union of India

Mr. Mohan Jain, the Additional Solicitor General (ASG), continued to address the Bench and tried to sort out the submissions made by Mr. P.P. Malhotra, another ASG, on the previous day and which contradicted the stand taken by UOI. Mr. Jain submitted that the UOI had considered the High Court decision and found no legal error in it. The Bench then asked him whether he was representing the UOI or the Ministry of Health. They asked if the government could change its stand from the High Court to the Supreme Court. The Judges questioned Mr. Jain's contention, that the Government found no legal error in the High Court judgment and stated that the said decision was taken only by a Group of Ministers and not by the Council of Ministers, so it could not be called the

Government's decision. The Bench further stated that in a constitutional challenge case, the Government had to take a clear and official stand on the constitutionality of the statute in question. The Court was only concerned with the issue of validity of Section 377.

Mr. Jain then sought to focus on HIV/AIDS issues and how Section 377 was an impediment to HIV intervention programmes and made it hard to reach MSM populations. The Bench asked for exact data and affidavits on the subject and not just platitudes from the Government. J. Singhvi stated that if the government wanted, then it could have filed an affidavit in the Court highlighting its position on the issue and how the HIV prevention efforts were impacted after the judgment. He further stated that the Government should file all relevant information in the Court and make it available to the other side.

Though Mr. Jain reiterated the Government stand that there was no legal error in the judgment, the Bench wanted to know precisely whether Section 377 violated Articles 14, 15 and 21 of the Constitution and rejected the argument of MSM being a high risk group. J. Mukhopadhaya noted that the High Court decision was about adult consensual sex in private and on Articles 15, 14, 19 and 21, which were not related to HIV. Mr. Jain tried to emphasise on the high risk groups who were vulnerable to HIV transmission, having much higher HIV prevalence than amongst general population. He stated that MSM were a bridge population, since most of them were married and posed the risk of HIV transmission to their wives. Showing clear disinterest in the HIV/AIDS aspect, the Bench commented that they were not deciding on HIV but on the constitutional validity of Section 377.

In conclusion, Mr. Jain stressed that the Government did not oppose the High Court decision.

Mr. H.P. Sharma, Counsel on behalf of Mr. B.P. Singhal, Appellant

Mr. H.P. Sharma began his arguments by stating that he would focus on what was natural or unnatural and what was 'against the order of nature'. Nature had clearly laid down what was natural and what was unnatural, and that was reflected in the laws too, e.g., murder was an unnatural violence while justice was part of nature. He stated that fundamental rights could not be looked at in an isolated manner and had to be balanced with a person's fundamental duties and the Directive Principles of State Policy. If one's sexual orientation affected another person's life, then it would come in conflict with that person's fundamental rights.

He then dealt with the issue of the right to privacy and argued that the right to privacy did not extend to offences committed in the private, e.g., gambling, adultery, etc. If the question was whether an illegal act could be considered legal, if it violated the right to privacy, then the answer was that it could not be made legal. Thereafter, Mr. Sharma submitted excerpts from the Manusmriti, the Bible and the Quran to the Bench. J. Singhvi asked whether these materials were submitted in the High Court. Mr. Sharma said that they had not been placed before the High Court. J. Singhvi then asked about the author of Manusmriti and whether the original text was submitted. Mr. Sharma replied that he had downloaded the original text from the internet, which was admissible as evidence. Mr. Sharma also referred to Mahatma Gandhi's disapproval for 'unnatural vices' in 1929. J. Singhvi observed that Gandhi was against many things including alcohol.

Mr. Sharma further submitted that homosexual sex was unnatural and immoral and the Indian society abhorred such perverted practices. The current arguments

in the Court were like an academic exercise which focused only on a limited issue and did not factor in other critical aspects.

When the Court broke for lunch, the Bench informed Mr. Sharma and all other Appellants that they would receive only 30 minutes each to conclude their arguments.

In the post-lunch session, Mr. Sharma contended that there was no concept of sexual minorities in the Constitution of India. Further, a mere apprehension of violation of rights was no ground to declare a law void. He noted that consent was not material in this case, since one could not consent to commit a crime. Otherwise crimes like incest, adultery, prostitution, etc. would become meaningless. He referred to other sections in the IPC that use the term 'unnatural offences' like Section 100 (right of private defence) while Section 372 (selling minor for purposes of prostitution) mentioned about illicit intercourse. The Law had clearly laid down what was natural and not natural in accordance with the prudence of an ordinary man. He was then asked to conclude his arguments by the Bench.

Mr. Praveen Agarwal, on behalf of Mr. Suresh Kumar Koushal, Appellant

Mr. Agarwal, who was the first to address the Bench on behalf of the Appellant, Suresh Kumar Koushal and had been asked by the Judges to take more time to prepare, then started his arguments. He questioned the *locus standi* of the Petitioner, Naz Foundation (India) Trust, since it was a trust and not an aggrieved individual. Disagreeing, the Judges stated that the issue of *locus standi* could not be raised at this stage but should have been raised in the High Court. Mr. Agarwal further submitted that all fundamental rights were subject to reasonable restrictions, e.g., freedom of speech and expression was not absolute

and objectionable materials could be censored. Similarly, restrictions could be put on playing of loud music. Accordingly, Section 377 prohibited what was a social evil and could be covered under the rubric of reasonable restrictions. Higher prevalence of HIV amongst MSM showed that it was a high risk activity and ought to be curbed for the greater societal good. In terms of morality, he cited *Bachan Singh v. State of Punjab* (AIR 1980 SC 898), wherein the Court mentioned about the prevailing standards of decency.

J. Singhvi opined that morality was subjective and the perceptions of morality differed from person to person. Morality had changed with the time and according to the kind of society one lived in. What was immoral in earlier times could be perceived to be moral today, e.g., purdah system in some communities was considered as moral but not so in the other communities. The Judges also noted that the Court was not meant to always strike down a provision but to decide on the correctness of the High Court judgment.

Mr. Agarwal then argued that Section 377 did not create any distinction on the ground of male or female gender and was applicable to all persons. The Judges asked whether Section 377 created any particular class of people or whether it applied only to a particular gender. When they asked Mr. Agarwal about the meaning of order of nature, Mr. Agarwal gave the Judges' own example of surrogate mothers, which might be natural but against the order of nature. The Bench warned him that he should not rely on the observations made by the Judges or on the media reports on the Judges' observations.

Mr. Agarwal contended that Section 377 was also applicable to sex between a man and a woman and proscribed what was commonly accepted by the society as against the order of nature. The Bench again noted that acts considered natural by some people might be seen as unnatural by others but still might not

be against the order of nature, e.g., consumption of liquor. The Bench then asked whether Mr. Agarwal had any statistics from scientific surveys, though it had asked the Government to provide all the relevant data pertaining to HIV and MSM populations. Mr. Agarwal contended that Section 377 acted as a preventive measure against the spread of HIV and if it was removed, then there would be a huge spurt in the HIV epidemic. If Section 377 was struck down then similar demands would be made for striking down the *Immoral Traffic (Prevention) Act*, 1956 on the ground of violation of the right to privacy. Then the entire concept of morality would become meaningless. The Bench then asked him to finish his arguments.

Mr. Sushil Kumar Jain, Counsel on behalf of Krantikari Manuvadi Morcha, Appellant

Mr. Jain began his arguments by submitting that it was for the Parliament to decide what was moral and what was immoral and only the Parliament could make laws based on morality. When the law did not mention consent, the Court could not read in consent into the provision. Society, on its own, provided for penalising the acts which went against societal norms and decency. One had to live within the discipline of the society.

The Bench rose at the conclusion of the session and directed the ASG, Mr. Mohan Jain, to file an affidavit clarifying the position of the Union of India in the next 3 days.

29th February, 2012

Continuation of Mr. Sushil Kumar Jain's submissions

Mr. Jain continued his arguments from the previous day. He submitted that according to the decision of the Supreme Court in *Bachan Singh's* case, any curtailment of the right to life, guaranteed by Article 21 of the Constitution, might only be done by the procedure established by law. If a validly enacted law existed, no violation of Article 21 could be claimed. He submitted that in *Bachan Singh's* case, there was a challenge to the death penalty, as being in violation of the Constitution. The law was however, upheld.

Mr. Jain further submitted that, in his view, the Court was not the proper forum for the determination of this issue. Instead, the only forum competent to take a decision on the issue would be the Parliament. He continued by stating that, in society, the law laid down the acceptable conduct. It was the domain of the Parliament to decide what was acceptable and what was not. In this regard, the IPC was a law which represented what was acceptable and what was not.

He further argued that the issue that the law was a source of harassment for homosexual persons could not be a ground for striking down a statute. He submitted that the harassment alleged in the present case was merely the perception of the Respondents and a simple statement from the State. Further questioning the statement of the Health Ministry before the High Court, that Section 377 was indeed a source of harassment for homosexual men, Mr. Jain stated that "law and order" was a state subject and therefore, the Union Government was not competent to make such a statement. He submitted that if indeed there was harassment, it was because of a break down of the machinery of the State and not because of the law. Further, if this was the threshold on which a law was to be struck down, then the whole of the IPC should be stuck

down. He further submitted that harassment was repeatedly seen with anti-terrorism laws then by this logic, they should have also been struck down. Mr. Jain further submitted that the statement filed by the Government was inadequate and data should have been produced as evidence of the harassment.

Referring to the fact that the Government had decided not to file an appeal against the decision of the Delhi High Court, Mr. Jain submitted that in cases where the constitutional validity of a legislation was challenged, notice could be issued to the Attorney General. In that case, the legal aspects of the matter could be dealt with by the Attorney General and the dispute on facts could be addressed by the Government. Mr. Jain further submitted that there was a difference between the Central Government and the Union of India.

The Bench asked Mr. Jain what the difference was. J. Mukhopadhaya observed that there was no contradiction taken by the Ministry of Home and the Ministry of Health before the High Court. Mr. Jain replied, stating that the stance was strange and the Ministries should have backed their statements by data. The Bench observed that the stand was not strange, it was just a stand.

Mr. Jain then moved on to quote from *Bachan Singh* and argued that fundamental rights were not unlimited but were subject to restrictions. He also relied on *Mr. X v. Hospital Z* [(1998) 8 SCC 896], submitting that the right to privacy was not unlimited and could be curtailed.

Mr. Jain then argued that the judgment of the Delhi High Court amended the IPC, specifically Section 320, which provided for the definition of grievous hurt and read with other provisions of the IPC, provided that a person could not consent to grievous hurt. He submitted that the amendment of a statute by way of a judgment was impermissible in law.

Concluding his arguments, Mr. Jain further submitted that Section 377 was amended in 1953 when the term 'transportation for life' was replaced with 'life imprisonment'. This, he argued, was evidence of the fact that Parliament had applied its mind in the post-independence era and this law could not, therefore, be considered to be a pre-constitutional law.

Mr. K. Radhakrishnan, Senior Counsel, on behalf of Trust God Ministries, Interveners

Mr. K. Radhakrishnan then addressed the court on behalf of the Trust God Ministries. He began by giving a summary of the arguments that he would be making. He submitted that there was no link between HIV and Section 377. Further, Section 377 represented the will of the Legislature and had to be respected. He submitted that a minority could not dilute fundamental rights and legal requirements, so as to lead a criminal life. He further submitted that Section 377 was neither arbitrary nor discriminatory. There was no fundamental right to abuse one's right to privacy.

Mr. Radhakrishnan began his arguments by criticising the Naz Foundation in running a support group for homosexual men. He wondered how the Naz Foundation could encourage men to engage in such acts while using money from NACO. He submitted that NACO should instead have worked to rehabilitate homosexual men and integrate them into the mainstream society.

Mr. Radhakrishnan also criticized NACO for deviating from its mission. He submitted an extract from their website in the Court. He stated that NACO was supposed to motivate people towards responsible behaviour and not homosexual behaviour.

Mr. Radhakrishnan argued that criminal laws were necessary to prevent social degeneration. Every organ of the body had a designated function. The mouth, for example, was used for eating and making sound. The anus was used for excretion of waste. The functioning of the body required different organs to work in tandem, each organ performing the functions that had been pre-ordained by nature. Mr. Radhakrishnan submitted that for the sustenance of life, things must work according to their pre-ordained functions. If one used the anus or the mouth for sexual activity, it was an abuse of the human body and against the order of nature.

Analysing the terms under Section 377, Mr. Radhakrishnan submitted that the word "carnal" meant "*of the flesh*". It could cover sexual acts between men and men and woman and woman. He further submitted that the term "voluntarily" had been intentionally left undefined as there was a difference in the degree of the intention of the two persons engaging in sexual intercourse. The active agent knew what he was doing and caused harm to the passive agent. If there was consent between the two persons, then the passive agent should be considered an abettor.

Mr. Radhakrishnan submitted that the laws of the country protected Indian tradition. The concepts of family and marriage had been protected in the IPC as well.

Mr. Radhakrishnan submitted that Section 377 would bring homosexuality to the doorstep of minors. Minors, especially those just below the age of 18, were in any case exposed to lot of stuff these days. If a gay boy or girl was sent to school, he might be taken away from the mainstream society. Mr. Radhakrishnan asked what effect would this have on their parents and that one needed to take care of children till they were 18. He submitted that the Respondents were playing a

dangerous game. The Bench noted that the Juvenile Justice Act existed to take care of the children. Mr. Radhakrishnan responded that the Act would prove inadequate. He submitted that the Petitioners, Naz Foundation, were aware of the concerns regarding minors but they could not resist temptation.

Mr. Radhakrishnan contended that he doubted the *bonafides* of Naz Foundation. He submitted that they wanted to prevent the spread of HIV and they were only able to come to court with a prayer to decriminalise gay sex in India. He stated that it was very difficult to identify gay people, homosexuals and sex workers. He stated that what was really required was a rehabilitation programme like those for Malaria and Cholera. He observed that there were clinics for the prevention of smoking and other addiction. Naz Foundation and NACO were misdirected in their efforts.

Mr Radhakrishnan then referred to Section 269 and 270 of the IPC, which made the transmission of a disease unlawfully, negligently or malignantly an offence. He submitted that if LGBT persons transmitted HIV or another disease, then they could be punished under these Sections. Mr. Radhakrishnan further observed that Sections 292 to 294 dealt with obscene books, materials, objects, acts, songs, so such offences could be dealt with accordingly.

Mr. Radhakrishnan submitted three judgments, arguing that the right to life was not absolute and might be curtailed in the interest of morality. He further submitted that the Supreme Court had observed that India had its own customs and traditions. Those of western civilization did not have to be dumped on India.

Mr. Radhakrishnan concluding with the following quote:

> *"When men sink to their lowest, they clutch at the highest grammar of justice for excuse"*

Mr. V. Giri, Sr. Counsel on behalf of the Apostolic Churches Alliance and Utkal Christian Council, Appellants

Mr. Giri began by stating that the most discernible stand of reasoning in the judgment of the Delhi High Court was that, on a combined reason of Articles 14, 19 and 21, the sexual orientation and gender identity of a person was the priority and part of the right to life. He submitted that the judgment of the High Court relied on decisions of the US Supreme Court, and the higher courts of other Commonwealth countries.

He then argued that though the IPC was a law of the Parliament, however law and order was a state subject. Mr. Giri submitted that the states should have been parties to the matter, but they had not been made parties. J. Singhvi observed that there were two stands from the Central Government and asked if such a thing was possible. Mr. Giri replied, stating that this was possible and, in fact, there could be three or four stands from the Government.

Mr. Giri then read out Section 377. He observed that the Section did not make any classification and it applied to all persons. Further, it did not talk about sexual orientation, but a sexual act. J. Mukhopadhaya asked Mr. Giri whether sexual orientation was normal or natural. Mr. Giri replied that the term used was "against the order of nature" and not "natural". He stated that sexual orientation of a person seemed to be considered by the High Court as being immutable. To

this, J. Mukhopadhaya observed that if it was normal, then it would appear in all human beings. The Bench then rose for lunch.

In the post lunch session, Mr. Giri continued his submission and stated that it was wrong to assume that the sexuality of a person was fixed. He further submitted that the High Court incorrectly assumed that sexual orientation could be naturally demonstrated only in manners covered under Section 377. The High Court did not consider that such a sexual orientation was a disease or needed therapy. Mr. Giri argued that Section 377 criminalized an act, which prohibited heterosexual, bisexual and homosexual persons from indulging in, irrespective of their sexual orientation.

Mr. Giri further noted that the High Court decision was based on the fact that the Section 377 made criminal, consensual acts between adults. A limited declaration was granted, such that minors were still covered by Section 377 as they were considered incapable of giving consent.

J. Singhvi then asked Mr. Giri why his client was concerned with the judgment of the Delhi High Court, as there were different religions and different notions of morality as well as a large number of people who did not believe in religion. Mr. Giri stated that his client was concerned with the law relating to sex against the order of nature, which was immoral, detrimental to a person's health, and law and order. He stated that the agenda of Naz Foundation and others was to bring down an established system of the order of nature. J. Singhvi asked Mr. Giri if his clients were opposed to live-in relationships, abortion and adultery. Mr. Giri replied that his clients had a consistent view on issues and were opposed to all three of them.

The Bench then asked Mr. Giri what effect religious scriptures and morality had on offences and on criminal law. Mr. Giri submitted that religious scriptures had an impact on criminal law where sexual urges resulted in manifestation of acts against the order of nature.

J. Mukhopadhaya asked Mr. Giri to consider children, since they did not have sexual urges. He asked if this was something which developed early or later on in life. He further asked if a person's sexual orientation was an inherent phenomenon, then how was it possible that it differed from person to person. He also asked whether it was possible for sexual orientation to change because of where a person was born or any other factor. Mr. Giri submitted that these were bizarre situations which were put to him and were difficult to answer. J. Mukhopadhaya continued asking whether an adult could seduce a person into becoming gay. He observed, in this context, that this was important because each fundamental right had a corresponding fundamental duty, so that it did not interfere with the fundamental right of others. Mr. Giri responded that he could not give a response to this immediately.

J. Mukhopadhaya then asked whether sexual orientation was inherent in a child and whether it was present in a child at the age of six. Mr. Giri answered in the affirmative and said that Freud would say so. J. Mukhopadhaya asked that if that were the case, could sexual orientation change with time. He further asked what was to be considered 'natural'. If the order of nature started from a child's birth, there had to be some sort of behaviour change resulting in the development of a variation of a person's sexual orientation. Mr. Giri responded that minors had been excluded from the declaration of the High Court not because of a person's

sexual orientation was immutable but because minors were considered incapable of giving consent.

J. Mukhopadhaya further asked Mr. Giri to consider a situation where one adult person seduced another adult to be gay. In that situation, there was no element of consent. Mr. Giri submitted that merely because acts were consensual, did not mean that they were not crimes. For example, a person was not entitled to commit adultery, even consensually. He further submitted that the Supreme Court had upheld the constitutional validity of the offence of adultery in *Sowmithri Vishnu v. Union of India and Anr* [1985 SCC Supp. 137]. Attempt to commit suicide was also a crime, even though the act was committed by the person voluntarily. The Court had also upheld the validity of the offence of attempt to suicide in *Gian Kaur v. State of Punjab* [1996 SCC (2) 648].

Mr. Giri then criticised the conclusion of the High Court that Section 377 hindered HIV/AIDS prevention programmes. He submitted that there was no evidence for this except for two papers that were referred to in the judgment. Mr. Giri then submitted "Sameer Kumta et al., *Bisexuality, Sexual Risk Taking, and HIV Prevalence Among Men Who Have Sex with Men Accessing Voluntary Counselling and Testing Services in Mumbai, India*, JAIDS, 2010 February 1; 53(2): 227 - 233", arguing that that men who have sex with men were at high risk of contracting HIV. Many of them might marry and transmitted the virus to their wives as well.

The Court's reference was then drawn to the reliance of the High Court on a study of the US Centre for Disease Control (CDC) referred to in *Lawrence v. Texas*. Mr. Giri submitted that anus was vulnerable to being torn which increased the

chance of contracting HIV. He further referred to an article from the Journal of Homosexuality, listing a number of health problems resulting from anal sex, like diarrhea and "gay bowel syndrome". Mr. Giri then stated that sex in the manner proscribed by Section 377 was more harmful to the health of a person and to his partner, than penile-vaginal sex. He further submitted that all the materials relied on by the High Court were on specific sexual acts, that is, anal sex, and not on the sexual orientation of a person. He submitted that the conclusion of the Delhi High Court that Section 377 impeded HIV prevention programmes was contrary to the material placed by him on record.

Mr. Giri submitted that the High Court erred in placing reliance on the Yogyakarta Principles in reaching its conclusion. He submitted that the Yogyakarta Principles were formulated by persons who called themselves experts in the field. J. Singhvi asked Mr. Giri if the Yogyakarta Principles had been adopted by the United Nations (UN) or any other body, whether India had participated in the preparations of the Principles as a Country and whether they had the sanction of law in any country. Mr. Giri replied that the Principles were not adopted by the UN and did not have the force of law, instead, he submitted, they were subjective perceptions of the persons participating. He further submitted that the High Court relied on the Principles to conclude that sexual orientation was a part of the right to privacy and a part of human rights. He further submitted that the Principles also supported the idea that a family could be other than a man and a woman. If the High Court found the Principles relevant, it should have looked into the content as a whole. Making reference to the voluminous materials submitted to the Court, J. Singhvi joked that reading all the documents also required some privacy.

Mr. Giri then made a final submission, arguing that morality was not divorced from law. As an example, he submitted that sodomy was a ground for divorce in some laws. He further submitted that the Sikh Gurdwaras Act, 1925 for the first time made moral turpitude and character relevant considerations while appointing officials. J. Singhvi observed that people usually omitted the argument regarding morality. In 1921, under the British government, he observed, people who consumed liquor were considered immoral. By that standard, there would be no way of knowing how many people would be covered today. He stated that he was merely pointing out how such norms had changed over the years.

Mr. Huzefa A. Ahmadi, Counsel on behalf of All India Muslim Personal Law Board, Appellant

Mr. Ahmadi started by submitting that there was no right of a person to indulge in an activity, if that activity had the propensity to cause harm. He submitted that though the act was in private, it could become a right only if it did not cause any harm to the persons committing it or to third parties.

Mr. Ahmadi further stated that there were certain acts which were inherently risky. Anal intercourse between homosexual men was one such inherently risky activity which exposed the partners to HIV/AIDS. Those men who were bisexual posed a risk of transmitting HIV to their female partners. He submitted that there was no question of such an activity being a right, far from being a fundamental right.

He submitted, without prejudice to his submission above, that assuming there was a right, like that of privacy, sexual orientation or discrimination, such a right could be restricted on the grounds of morality and health. Mr. Ahmadi further

argued that where there were two views on whether a particular act was moral or immoral, in such a case, the view of the Legislature had to prevail. He submitted that the view of the Legislature was indicated by the enactment of Section 377.

The attack, Mr. Ahmadi submitted, had to be restricted only to the ground that Section 377 was not procedurally valid and that it could not be argued that the law was substantively not valid. He submitted that the concept of 'due process' as enunciated by the Supreme Court in *Maneka Gandhi's* case, was restricted to procedural due process and not substantive due process.

Mr. Ahmadi further submitted that the High Court had relied on the test of 'strict scrutiny', which was a legal doctrine which required certain laws, for example those which sought to restrict fundamental rights, to be srutinised through a higher standard of judicial review. He submitted that the doctrine, which originated from the decisions of the American Courts, could not be imported in India as they were principles which were used only where substantive due process was applicable and it was not the case in India.

Mr. Ahmadi continued that the expression 'sex' was gender specific and did not include 'sexual identity'. He referred to the Constituent Assembly Debates and submitted that such a reading was not considered or envisaged by the founding fathers.

He further submitted that if the argument, that acts which were consensual and private in nature could not be crimes were to be accepted, then this would open the door for allowing the offence of adultery to be challenged. Further, adult incest between different sexes, group sex between persons of the same sex or different sexes and other acts which were sexually immoral could be permissible.

He submitted that if this was the case, if the State criminalised the above mentioned acts through a law, such a law would be open to challenge. He stated that such a situation was not permissible and resulted in a right being too broadly defined.

He then contended that they were a large number of acts which would be considered sexually immoral and impermissible in India. He quoted from *Salmond on Jurisprudence* (12th Edition) and submitted that a man's interest may receive protection against himself like when drunkenness or suicide was made a crime. However, a man did not have a legal right against himself. For example, the duty to refrain from drunkenness was not conceived by the law as a duty owed by a man to himself but as one which was owed by him to the community at large.

Mr. Ahmadi then read from the dissent of J. Scalia in *Lawrence v. Texas*, submitting that it was his dissenting opinion that was in consonance with Indian Constitution rather than the majority opinion. J. Scalia held that it was a legitimate state interest to promote majoritarian sexual morality. He further held that social perceptions of sexual and other morality had changed over a period of time. Every group had a right to persuade its fellow citizens that their view was the best. But imposing one's view in the absence of democratic majority will was not something which was permissible. J. Scalia held what the state of Texas had chosen to do, that is, enacting an anti-sodomy law, was well within the "range of traditional democratic action". He further held that later generations could always change the laws, once it was thought necessary.

Mr. Ahmadi then submitted that the Koran, the Bible and the Arthashastra, all condemned homosexuality.

He then made a legal submission that criminal law, seeking to espouse social morality was valid as it furthered legitimate state interest and matters of policy as to whether an act was desirable. He relied on the following judgments in this regard:

a. *Sowmithri Vishnu v. Union of India* [AIR 1985 SC 1618] where the law criminalising adultery was held to be valid.
b. *Smt. Gian Kaur v. State of Punjab* [(1996) 2 SCC 648] where the law criminalising the attempt to suicide was found to be valid and the principle of the sanctity of life was treated as a facet of social morality
c. *State of Punjab v. Devans Modern Breweries Ltd*. (2004) 11 SCC 26 where the freedom of trade, commerce and intercourse under Article 301 of the Constitution was held not to be available to the liquor trade because liquor was a harmful substance
d. *X v. Hospital Z* (1998) 8 SCC 296, where it was held that the right to privacy was not absolute and was subject to such action as may be lawfully taken for the prevention of crime and disorder, protection of health and moral and the protection of rights and freedoms of others
e. *Javed v. State of Haryana* (2003) 8 SCC 369, which held that Fundamental Rights must be read with the Directive Principles on State Policy. Restrictions might be made on candidates contesting certain local elections having more than two children.

Mr. Ahmadi further submitted that the Law Commission in its 42nd Report had recommended the retention of Section 377. In its 172nd Report, however, it had recommended the deletion of the Section. He submitted, relying on *M/s. Jit Ram*

Shiv Kumar & Ors. v. State of Haryana and Ors. (1981) 1 SCC 11 42 and *Dalmia Cement (Bharat) Ltd. v. Union of India* (1996) 10 SCC 104, that the Legislature was the only one competent to undertake the task of legislating and it was the Parliament which was the appropriate forum for the determination of the issue, and not the courts.

He further submitted that Section 377 was gender neutral and covered voluntary acts of carnal intercourse against the order of nature. Mr. Ahmadi submitted that as the term "voluntarily" had been used, Section 377 would cover consensual sexual acts. He then referred to the decision of the Supreme Court in *Fazal Rab Chaudhary v. State of Bihar,* [(1982) 3 SCC9] and submitted that the Section was meant to cover all acts of sexual perversity. He also argued that if Section 377 was restricted only to penile-anal sex, other acts of sexual perversity would be left out. For example, in *Childline India Foundation v. Allan John Waters,* persons were convicted of acts of fellatio. He submitted that the expression 'order of nature' could not be differently interpreted in case of women or minors or Section 377 could not be given a restrictive interpretation, since it was meant to cover all acts of sexual perversity.

Mr. Ahmadi further argued that, *Maneka Gandhi's* case was only restricted to procedural reasonableness while *Ashok Kumar Thakur* had clarified that the rule of strict scrutiny was not applicable in India. J. Singhvi asked whether there was a case of an identified homosexual who was convicted under Section 377, since the list provided by the Petitioner contained mostly cases of non-consensual sex or those against minors.

Mr. Ahmadi, while concluding his arguments, submitted that the doctrine of severability, as argued by the Petitioner before the High Court, was not reflected in the five principles laid down by the Supreme Court in *RMDC* case, especially

the principle 2, as interpreted by jurist Mr. H.M. Seervai. This rule could not be relied upon in the current case. On the principle of reading down, he argued that one could not read down by doing violence to the language of the section. The legislative history of Section 377 itself indicated which acts were supposed to be covered by Section 377.

1st March, 2012

Mr. Mohan Jain, Additional Solicitor General, on behalf of Union of India

Mr. Mohan Jain, Additional Solicitor General, began to address the Court and sought to answer the questions put to him on the previous day regarding the number of HIV positive persons in the country. He submitted that in December 2009, it was estimated that 23.9 lakh people were HIV positive in India.

Referring to the data placed before the Bench, J. Singhvi asked Mr. Jain to explain the gap in the numbers between 2009 and 2010. J. Mukhopadhaya further asked whether the figure representing the HIV prevalence in the country, that is 0.31%, represented adults only or included children as well. The Bench further observed that as far as they could understand, the number of HIV positive persons had not increased since 2009.

Mr. Anand Grover, Senior Counsel, appearing on behalf of the Naz Foundation (India) Trust, Respondent No. 1, submitted that the figures were all estimates. J. Singhvi, however, indicated that it was the duty of Mr. Jain to explain the data.

Dr. Neeraj Dhingra, Deputy Director General (Targeted Interventions), NACO, sought to assist Mr. Jain and attempted to explain the data to the Bench. He

submitted that NACO conducted an Annual Sentinel Surveillance every year at selected project sites, these included interventions with people living with HIV, men who have sex with men, sex workers and injecting drug users. The data from the sites was collated and a figure of the national prevalence of HIV was arrived at.

Mr. Mohan Jain further stated that the numbers presented to the Court were estimates and the estimate for 2011 had not been done. The Bench sought further details regarding the figures that were presented to them. On not being provided satisfactory answers, J. Singhvi said that NACO should have done their homework properly and that was what they were paid to do. J. Singhvi said that they did not want their time to be wasted. Dr. Dhingra was asked to sit down and J. Singhvi observed that he had been of no help.

Mr. Jain stressed that NACO was completely controlled by the State. He clarified that NGOs were contracted through the State AIDS Control Societies (SACS) of each state. To this, J. Singhvi asked if that meant that NACO had no direct connection with NGOs. Mr. Jain clarified that indeed it meant that NACO had no contact with NGOs. He submitted that the SACS of each state was the body which had direct contacts with NGOs and it was the SACS who submitted the data to NACO.

J. Singhvi asked Mr. Jain for a further clarification regarding some of the data presented in the affidavit. Mr. Jain submitted that he was unable to answer the question. J. Singhvi asked him to obtain the information and present it to the Bench.

J. Mukhopadhaya asked if there was any data on the number of homosexuals in India and further if there were any statistics on women, men and transgenders. Mr. Jain mentioned that the only statistic that he had was that of NACO which had stated that 8% of MSM were HIV positive. When asked for further details as to how the 8% figure was reached, Mr. Mohan was unable to provide any additional information. J. Singhvi asked Mr. Mohan to ensure that proper data was filed with the court.

Mr. Ajay Kumar, Counsel on behalf of S.K. Tijarawala, Appellant

Mr. Ajay Kumar then addressed the Bench on behalf of Mr. S.K. Tijarawala. J. Singhvi asked Mr. Kumar if he was representing Baba Ramdev. He further observed that Mr. Tijarawala had many identities. Mr. Kumar stated that he was not representing Baba Ramdev, but the petition was filed by Baba Ramdev. J. Singhvi asked if they were a party to the dispute before the High Court. Mr. Kumar replied that they were not, as they were unaware of the case till 2009. J. Singhvi asked if Mr. Tijarawala did not read newspapers or watched TV. He stated that they should have assisted the High Court, instead of coming to the Supreme Court. He further observed that the filing of a special leave petition against the Delhi High Court judgment was a publicity gimmick and that Mr. Tijarawala only wanted to be on the TV channels. Mr. Kumar replied that they were not aware of the case previously. To this, J. Singhvi said that this was doubtful as Baba Ramdev himself owned part of a TV channel and must have known about it.

Mr. Ajay Kumar then began to address the court on the merits of the case. He submitted that men who have sex with men were those who were affected by

Section 377. Most of them were married to a woman and some of them had children. He said that these women and children had rights as well. To this J. Singhvi replied that the issue that was being raised by Mr. Kumar was not before this Court. He further asked Mr. Kumar whether there were any statistics on how many homosexual men were married. Mr. Kumar submitted that he did not have that data but he had come across an instance. He said that he could submit the reports. Mr. Kumar submitted that if one was talking of a specific community, when enjoying their way of life, then they should have a corresponding duty as well.

Mr. Kumar then read out from the High Court judgment. He asked the Bench whether one was to conclude that all sex between women was now legalized. J. Mukhopadhaya asked which law had declared it illegal in the first place. To which Mr. Kumar responded that Section 377 had done so. J. Mukhopadhaya responded and stated that there were certain provisions in the IPC which penalised such acts but they did not make them illegal. The High Court never stated that acts which were against the order of nature were now depenalised. He asked Mr. Kumar why he was reading something between the lines when it was not necessary.

Mr. Kumar submitted that if such acts were not penalised, sex with animals would also be legalized. To this J. Mukhopadhaya replied that the final decision of the High Court applied only to acts in private between two consenting adults. Mr. Kumar submitted that judgment said consensual sexual acts "by adults", not "between adults". J. Mukhopadhaya asked if it was possible for consensual sexual acts to take place with animals. There was laughter in the courtroom.

Mr. Ajay Kumar continued his arguments on the aspect of consent and submitted that consent could involve money, so if the judgment were to stand, commercial sex, group sex, oral sex and other forms of sex yet to be discovered would become permissible. Homosexuals could then get married. He submitted that the line had to be drawn somewhere. Culture, religion and languages differed, as did the morality in different places and countries. As a result, the court could not rely on the opinions of other countries.

Mr. Kumar further argued that though the High Court had held that social morality was different from constitutional morality, in his opinion it was the same. J. Singhvi asked Mr. Kumar what was meant by constitutional morality. Mr. Kumar replied that it was what the Parliament decided. In the instant case, Parliament had decided that Section 377 would remain on the statute book and therefore, citizens were precluded from saying that their rights had been infringed.

J. Singhvi observed that it was difficult for the Bench to see what was happening these days. If one was to go by the perception of morality, many young people in urban areas did not have any regard for what their parents said. He further said that they were not talking about social morality as that was dependent upon individual perceptions. He continued that every time the Bench saw that a Senior Counsel was not being offered a seat, they felt it was unethical. That however, he concluded, was just an individual perception.

J. Mukhopadhaya stated that what was moral or immoral was different from society to society, religion to religion. J. Singhvi further observed that in certain parts of the country, marriage had a different meaning compared to what it

meant in North India. He said that one could go and ask someone from Haryana. There was an altogether different thinking on the same subject. Sitting in Delhi, he said, we seek to condemn what was happening in other parts of the country.

J. Mukhopadhaya then asked Mr. Kumar about the background for enacting Sections 375 and 377. He observed that everybody was looking at the case from their own angle and not considering the background. Mr. Ajay Kumar wished to make additional submissions but J. Singhvi stated that the counsels before him had already advanced similar arguments.

Mr. Purushottaman Mulloli, Petitioner-in-Person, Joint Action Council, Kannur (JACK), Appellant

Mr. Purushottaman Mulloli began his arguments. He submitted that the decision of the Delhi High Court had nothing to do with gay rights or HIV/AIDS. There was a multi-billion dollar business behind the judgment. NACO was using manufactured and fraudulent data, which they had used before the High Court also. He contended that they had challenged NACO's data. When they did so, NACO reduced the numbers of HIV positive persons substantially. When they challenged NACO again, they reduced the numbers again. He said that he needed facilities for a PowerPoint presentation to illustrate his point. The Bench told Mr. Mulloli that he was entitled to present whatever materials and documents he wanted in the Court, but they had to be in printed form as there were no facilities for PowerPoint presentations.

Mr. Mulloli continued his submission on the point that NACO's data was unreliable. He submitted that nobody knew how many people had died of HIV

related illness. NACO had said that a certain number of people had died, but he had contested it and now the data was not on NACO's website anymore. In 1998, NACO said that 19% of the population was infected with HIV but later they showed that it was only 0.4%. He stated that every district had a different method to collect data and then NACO extrapolated the data to get the final figure which was inaccurate. NACO previously showed Manipur as the AIDS capital of the country. But this was incorrect as well.

Mr. Mulloli argued that NACO was very secretive and non-transparent in its functioning. One could get information from the FBI and CIA but not into NACO. They were a registered society and were not accountable for their operations.

Mr. Purushottaman Mulloli then proceeded to attack the classification of men who have sex with men as being a high risk group. He submitted that he never had a problem with homosexuals but there was no data to show that they were a high risk group. In reality, this was just fear mongering, so that the Government could pour in money into the Programme. The concept of a "high-risk group" was a Government theory. He further submitted that there was a study to be conducted by NACO, which was supposed to span 65 cities but it was only done in 16 cities. He submitted that tribals were not classified as a high-risk group, which they challenged as well. J. Singhvi asked Mr. Mulloli if he had any pubic documents to prove what he was saying. Mr. Mulloli stated that they were in Kerala and he could bring them.

Mr. Mulloli continued his submissions, stating that a DFID financed project for HIV/AIDS said that tribals, street children, homosexuals and prostitutes were

considered at high-risk of contracting HIV. He noted that when they asked for evidence and they were told that NACO had a study, but it would not be provided to them. The study was only done in 16 cities. In the High Court, NACO only read out a four-page statement which said that tribals were a high-risk group. They made this statement even though the study had not been validated. He further argued that the entire exercise was to create a psyche of fear, even though there was no data to support them.

J. Singhvi asked Mr. Mulloli if there was any data about homosexuals. Mr. Mulloli said that the data that NACO had submitted to the Supreme Court was the same that had been submitted to the High Court. Mr. Mulloli said the he had filed an RTI to get information and also sought to collect it from the NGOs. He submitted that it was the NGOs which promoted this AIDS industry. NACO used the data from the NGOs which was not scientific data.

Mr. Mulloli then questioned a statement of the then Health Minister, Mr. Ambumani Ramadoss, at an International AIDS Conference in Mexico in 2008, where he was reported to have said that Section 377 had to be removed. He wanted to know on what basis the statement was made. J. Singhvi asked if the statement had been published anywhere. He further observed that even if they were to assume that Mr. Ramadoss made the statement and it was correct, it had no relevance and could not be taken into account. Mr. Mulloli responded by stating that as a common man, he could only get information from newspapers. J. Singhvi reiterated that newspapers could not be relied upon at this time, as they could be manipulated.

Mr. Mulloli submitted that one of his friend's grandsons, who was in school, had asked him whether homosexuality had been legalised. He asked the Bench what he should tell him and other children like him. To this, J. Singhvi responded that they could not give the answer to that as the Court only spoke through orders and judgments. J. Mukhopadhaya observed that at least children had knowledge of the IPC because of the proceedings of the court.

Mr. Mulloli then read from the answers that were provided by the Health Minister to two questions in Parliament. He submitted that there was a great decrease in the number of persons living with HIV in India. He further referred to the 73rd Report of the Parliamentary Committee on Human Resource Development where a figure of persons living with HIV was given to be 8.35 million. Mr. Mulloli submitted that there was no basis for that figure.

J. Mukhopadhaya indicated to Mr. Mulloli that his time was up and said that he could file written submissions, presenting all the data to the Court.

The Bench then addressed Mr. Mohan Jain, Additional Solicitor General, who was present in Court. They referred to the apparent inaccuracies in the data presented by NACO at the beginning of the day and the discrepancies pointed out by Mr. Mulloli and asked Mr. Jain to verify the data and file an affidavit of the Secretary, Ministry of Health the next day.

The Bench also directed the Government of NCT of Delhi to place on record the file which contained the decision by the Delhi Government not to file a reply or appear before the High Court and adopt the stance of the Union Government.

With all the Appellants having completed their arguments, it was the turn of the Respondents and the interveners supporting the judgment to address the Court.

Mr. Fali S. Nariman, Senior Counsel on behalf of Minna Saran and Others, Interveners

Mr. Fali S. Nariman began his submissions. He stated that he appeared on behalf of parents of the LGBT persons. He submitted that the case raised an important question relating to the true interpretation of Section 377.

At this point, the Bench asked who was appearing for Respondent No. 1. Mr. Anand Grover mentioned that he was appearing on behalf Respondent No. 1 and had decided that it was only proper for Mr. Nariman to begin the arguments (considering his seniority).

Mr. Nariman stated that it was important to understand the background of the law and therefore he would be dealing with the historical perspective first and then make his legal submissions. He submitted that the origin of the law could be traced to the 17th Century England where sodomy was considered an abominable sin by the Christians. Mr. Nariman then referred to the Criminal Law Amendment Act, 1885 of England which made, an act of "gross indecency" between two men, an offence. He observed that some of the history of the sodomy law was traced in the dissenting opinion in the US Supreme Court case of *Bowers v. Hardwick*.

Mr. Nariman then addressed the Court on how sexual acts between men were treated during the Mughal rule in India. He submitted that sodomy and bestiality were categories amongst the discretionary punishments (*Tazeer*). Before

the IPC was enacted in 1860, there were three decisions of the *Nizamut Adawlut* in 1820, 1821 and 1851.

During the British Rule in India, Mr. Nariman noted, the first known statute concerning sodomy in British India was the *Act for Improving the Administration of Criminal Justice in the East Indies* of 25 July 1828. The Draft Penal Code of 1838, which was prepared by Macaulay, contained two offences which covered even touching a person to gratify unnatural lust. In the notes on clauses, the drafters stated that it was desirable to have as little said about these "*odious class of offences*" as possible and that they were unwilling to insert anything in the text of the Section or in the notes that would lead to public discussion on the subject.

He then stated that the placement of Section 377 in the scheme of the IPC was significant, as were the places where the Section could have been placed but was not. He took the Bench through the chapters of the IPC, illustrating how health, safety and morals were dealt with separately. He submitted that Section 294, which dealt with obscene acts, had a specific reference to a public place. The silence of the statute with respect to private places was significant.

He then focused on the chapter of the IPC which dealt with offences against the human body. Taking the Bench through the scheme of the Chapter, Mr. Nariman submitted that all the offences postulated harm or injury to the victim, except Section 377.

The Bench then rose for lunch.

Mr. Nariman continued his submissions when the hearing resumed post lunch. He argued that while interpreting the Section, the heading of the Section was helpful. Though the origin of the Section could be traced to the prevalent morals and religious beliefs, in India, it had been placed in the chapter which related to

offences against the human body. It had not been placed in the chapter which related to morals. The section was not meant to cover the moral good sense of the community at large.

Mr. Nariman argued that the fact that the Section used the term "carnal intercourse" as opposed to "sexual intercourse" was significant. The term 'carnal' had a connotation that there was a superior and an inferior party involved. The term made the concept of "perpetrator-victim" implicit. As a result, it postulated that there was no consent in the acts sought to be covered by the Section.

Relying on G.P. Singh's book on *'Principles of Statutory Interpretation'*, Mr. Nariman stated that a heading or a title was the key to interpreting a Section and was a broad indicator of the contents of the section therein, unless the wording was inconsistent with such interpretation of the section. He noted that Section 377 was an offence affecting the human body and not morals. The term "affecting" the human body could mean "concerning" the human body. He further argued that all sections from Section 292 onwards have an element of harm or injury caused. Reading Section 377 in the light of this scheme of "perpetrator-victim" would make it clear that the term "voluntarily" meant "with intent". He concluded that, therefore, there was no element of the victims consent. He further observed that the term "carnal" meant what was sensual, lustful and impure. It connoted something more than sex for pleasure. He submitted that this was essential to understand the import of the Section.

Mr. Nariman then cited a decision of the Supreme Court in *Fazal Rab Choudhary v. State of Bihar* where special leave was granted on the question of a sentence given to a person under Section 377. The Court held that the offence of Section 377 was one of sexual perversity. He argued that homosexuality was not sexual perversity but the Oxford Dictionary defined it as "sexual inversion".

He then submitted another decision of the Supreme Court, *Mubarak Ali v. State of Bombay* [1958 SCR 328], where it was held that the IPC had to be interpreted in the light of the current times. Mr. Nariman opined that it was not necessary to interpret the IPC from the lens that it was enacted, a hundred years earlier. The terms "carnal intercourse" and "order of nature" were archaic and not in use any more. Further, the term "order of nature" could be understood from the decision in *Khanu v. Emperor* [AIR 1925 Sind 286], where it was held that the "natural order" was where there was a possibility of conception from a sexual act. He noted that this was absurd in this day and age, considering that family planning had found a place in the Constitution in Item 28, List III of the VII Schedule, which would not be possible because of Section 377.

Mr. Nariman stated that Section 377 had not been amended since the time it had been enacted. He submitted that the Delhi High Court had relied on South African judgments and the judgments of other countries. However, it would be better to focus on the cases before this Court. He said that the Section had to be interpreted first and only then its constitutional validity to be tested. The Section itself was vague and would cover millions of persons. Even sexual intercourse between husband and wife who used contraceptives could be covered.

J. Mukhopadhaya observed that for an act to be an offence, it had to be alleged. If there was an allegation, then there could be no consent. On the other hand, he continued, if a third party alleged that an offence took place, then the act was not private. He felt that Mr. Nariman was concentrating on a specific act, even though Section 377 covered a wide variety of acts. He further stated that one might argue, in the case of a specific act, that it was not against the order of nature. But then the question would be which act was to be covered. He stated that the Court was not on this question, but on the question of whether the

Section was *ultra vires* the Constitution. J. Singhvi observed that to seek such a declaration, one had to be an individual, referring to the fact that the original Petitioner before the High Court was an organisation.

Mr. Nariman said that he agreed with the observations of the Bench. He said, however, the question of maintainability of the petition was not in question because in 2004, after the High Court had dismissed the writ petition, the Supreme Court referred it back to the High Court, with a finding that the matter ought to be decided on merits. He further submitted that the relief sought by the Petitioners before the High Court, that part of the Section be declared unconstitutional, was incorrect. To this, J. Singhvi agreed and stated that a prayer to declare that certain acts were not an offence was different from a prayer for a declaration that the Section itself was *ultra vires* the Constitution. He stated that the Delhi High Court had declared a part of the Section to be unconstitutional. Mr. Nariman requested the Bench not to read the judgment so strictly. He submitted that he would focus on the constitutional issues but before that, he would finish interpreting the Section. J. Mukhopadhaya observed that it was difficult to know how many acts were covered by Section 377.

Mr. Nariman submitted that it was not only when a person was prosecuted that he/she could challenge the law but one had to take into account that the law caused fear and apprehension of harassment. To this, J. Mukhopadhaya replied that this was the case with every human being. He asked Mr. Nariman how many judgments were there on Section 377. Mr. Nariman said that there were about 140 cases but they were not enlightening.

Mr. Nariman then referred to the dissenting opinion of J. Blackburn in *Bowers v. Hardwick*, where it was held that the question was not of one's right to have carnal intercourse, but it was about the right to be let alone. Mr. Nariman

submitted that such a right was also recognized by the Supreme Court in *Gobind's Case*. The Constitution stepped in where a person was in his own home and was not disturbing anyone. The liberty of a person, guaranteed under Article 21, could not be taken away.

Mr. Nariman submitted that the other side had argued that such acts were obnoxious to them. The answer to them, he contended, was that if it offended them, they shouldn't look. J. Mukhopadhaya asked Mr. Nariman whether Chapter 16 of the IPC, which used the phrase "affecting the human body", covered acts which caused disease, as disease was something that affected the human body. Mr. Nariman replied that the sections in that chapter meant adverse harm. To this, J. Singhvi stated that the debate in the High Court had been in abstract. J. Mukhopadhaya stated that according to the IPC, homosexuality was not an offence, only acts of a certain nature were made offences. Mr. Nariman replied that there was no clear understanding as to which acts were covered in Section 377. J. Mukhopadhaya asked how, in that case, could a declaration be sought if there was no clear definition of the acts that were covered. He read out a definition of carnal and said that it must be passionate, lustful and of the body. He asked Mr. Nariman where such acts would fall. Mr. Nariman responded that such acts would fall outside of Section 377. J. Mukhopadhaya said that some might fall within Section 377 while some might fall outside the scope of the Section.

Mr. Nariman then argued that Naz came up in appeal against the first dismissal order in the Delhi High Court and it was successful. J. Mukhopadhaya clarified that they would not be going into the question of whether the original Petitioners, that is, Naz Foundation had the *locus standi* to challenge the constitutional validity of a law. Mr. Nariman further stated that a declaration of

the Supreme Court had said that the case should be heard on its merits. He submitted that it would have been desirable for this case to have started like *Lawrence v. Texas,* where two persons were prosecuted under an anti-sodomy law. J. Mukhopadhaya stated that the Court was not on that point. Mr. Nariman replied that he knew the Court was not on that point, but he was. He noted that the relief given by the Delhi High Court been given on the basis of the imagination that there was a case where "Mr. Naz" had private sexual intercourse with another man.

Mr. Nariman then read from *Lawrence v. Texas* and highlighted portions of the judgment where the court held that the State could not intrude into certain spaces, of which intimate relationships was one such space. J. Mukhopadhaya said that the question before the Supreme Court was whether the Delhi High Court judgment was correct or not. Mr. Nariman said that he respectfully disagreed. He said that the question was the original question, which was whether Section 377 violated Articles 14, 15, 19 and 21 of the Constitution. J. Singhvi observed that the case before them was an imaginary equivalent of *Lawrence v. Texas*.

Mr. Nariman then relied on Bennion on *Statutory Interpretation*. He submitted that where archaic words had been used in a statute, they had to be given a clear meaning. It was incumbent upon the Courts to make sense of such words as they were intended, but that did not prevent them from reading the meaning of the Section in its ordinary sense. He asked the Bench who would use the term "order of nature" in this day and age. He submitted that if the lawmakers wanted to have an anti-sodomy statute, they should have used the 1841 law of the East Indies which had the words "sodomy and buggery" and the death penalty was provided for committing the felony of buggery. Those were more apt terms,

since the vague phrases "order of nature" and "carnal intercourse" had not been used. However, Section 377 was enacted in India.

J. Singhvi responded that the submission, that the Courts should interpret law in accordance with the changing times, was desirable but the Courts were not able to legislate.

Mr. Nariman submitted that there was confusion as to which case the State would prosecute; would it prosecute sexual acts between husband and wife or sexual acts where contraception was used? J. Mukhopadhaya observed that commercial sex also took place between consenting adults in private. Mr. Nariman noted that Section 377 had become very vague in what acts it sought to cover. If such was the difficulty in interpreting the Section, then it was void for vagueness.

J. Mukhopadhaya stated that in cases where a section was said to violate Article 14, usually a class was created. In this case, he said, referring to the fact that the Section was facially neutral and ostensibly applied to all persons, there was no class that was created. Rather, it was a class that was self created, referring to the claim that homosexual men were targeted as a result of the Section. He said that it would first have to be shown that Section 377 violated Article 14 and 15 and only then could one move on to the question whether Article 21 had been violated.

Mr. Nariman submitted that it was an established law that a statute would be void if it was vague as it would violate the Constitution. He relied on *State of M.P. v Baldeo Prasad* 1961 SCR (1) 970. He further stated that with Section 377, how would one judge an offence both, as to the persons and as to the acts that were covered. He asked what did carnal intercourse against the order of nature

mean and observed that perhaps in 1860, it had some meaning which could have a connotation of the "ordinance of the creator". He asked whether it was workable in this day and age, with family planning mentioned in the Constitution.

Mr. Nariman then submitted the decision of the Supreme Court in *K. A. Abbas v. Union of India* [(1970) 2 SCC 780]. If a law was vague or appeared vague, it would violate the Constitution. J. Singhvi observed that the facts of *Abbas' Case* were interesting. Mr. Nariman said that it was about a 16-minute documentary that highlighted the differences between the filthy rich and the poor. The film was not granted a U certification. Hethen read out from two English cases. In *Regina v. Rimmington,* a guiding principle was laid down that no one should be punished under a law unless it was sufficiently clear or certain what they were being punished for. If the Act was not clear, there could be no punishment.

Mr. Nariman submitted that the vagueness in the law was the term "against the order of nature" and the section could be struck down on this ground. J. Mukhopadhaya observed that what was vague to X might be very clear to Y. Mr. Nariman noted that his submission was confined to a court of law and not to a general opinion.

The Court rose for the day at 4.00 p.m.

13th March, 2012

Mr. Bhim Singh, Petitioner in Person

Mr. Bhim Singh, a Petitioner in person, sought to address the Court. He submitted that he had not been given an opportunity to be heard. J. Singhvi, denying his request, stated that the matter had been heard for three weeks and

Petitioner had missed his opportunity as the time for the Petitioners' side was over.

Continuation of Mr. Fali S. Nariman's submissions

Mr. Nariman then continued his submissions. He submitted that marriage was recognized in the Constitution. In that context, the term "whoever" used in Section 377 could not mean husband and wife. Further, family planning found a place in the Constitution, as a result Section 377 could not apply to those husbands and wives using contraceptives. Furthermore, cohabitation for pleasure could not be considered an anathema in our society. Yet, the width of the language used in Section 377 covered all these acts.

He then argued that under Section 10 of the IPC, a man was defined as a male human being and a woman was defined as a female human being. The Section had to be construed in light of the fact that it was not put in the chapter on public health but in a chapter which defined offences against the human body. In that light, 'carnal intercourse' suggested an act more in the nature of sexual assault rather than sexual cohabitation. Mr. Nariman cited the decision of the Supreme Court in *Mobarik Ali Ahmed's* Case which held that the IPC had to be interpreted in light of modern times.

Mr. Nariman submitted that the High Court should have focused on the width and meaning of the Section. Even the Home Ministry in its affidavit stated that the Section was not meant for the intrusion of privacy but was to be applied in cases of assault. J. Singhvi stated that the affidavit was only an understanding of a particular officer. Mr. Nariman, in reply, asked if the application of a law should be left to the interpretation of the individual officers. He argued that the Section had resulted in systematic harassment and there were documents which showed this and cited a study conducted by Human Rights Watch, titled

"Epidemic of Abuse", published in July 2002. He further noted that there were two affidavits on record which documented individual instances of torture, sexual abuse and harassment. The counter affidavit filed by the Home Ministry denied that Section 377 caused such harassment and did not deal with specific examples. Mr. Nariman then cited the judgment of the Madras High Court in *State of Madras v. Jayalakshmi* [2007 (4) MLJ 849], which was a case which dealt with the sexual abuse of a transgender person at a police station which resulted in her committing suicide. He then submitted that the Criminal Tribes Act, which criminalised certain tribes merely on the basis of their identity. The Act was repealed but the criminality still remained.

Mr. Nariman then argued that the submission that Section 377 prevented the spread of HIV, advanced by the Additional Solicitor General of India, before the Delhi High Court, was totally unfounded. He referred to *Toonen v. Australia* [Communication No. 488/1992] that found that a law similar to Section 377 did not prevent the spread of HIV. He further said that the Additional Solicitor General's submission that Section 377 was not prone to misuse was unfounded and contrary to the materials placed on record.

J. Mukhopadhaya asked whether there was a finding of the Court regarding harassment and misuse or whether it was the perception of an individual. He stated that Section 377 talked about particular acts and not about a community. He further stated that there were many provisions of law which were said to be misused, but the question was whether the Court could give a general declaration. Mr. Nariman submitted that the line had to be drawn some where and that a general declaration could be given.

J. Mukhopadhaya asked why Section 377 was visualized only with homosexuals. He observed that there would be a complaint, only if there was a victim. Mr.

Nariman responded that a complaint could be filed only by a busy body. The law allowed a person without any standing to make a complaint. He said that there was no Constitution in 1860 in light of which the law had to be read but now Section 377 had to be construed in light of the Constitution. The Section, as it stood, did apply to a husband and wife. It was open for a third person to complain about a married couple and such a situation would be monstrous, as it would call into question the conduct of a married couple within the privacy of their home.

Mr. Nariman submitted that there was a great discrepancy in the sentencing provided for under Section 377. Section 294 of the IPC, which related to obscenity, sought to punish acts in public places. Whoever committed an act that Section 377 prohibited in public, could be sentenced to 3 months under Section 294 but the same act in a private place could get 10 years or up to life sentence under Section 377. He noted that the IPC was a brilliant piece of workmanship, but it had undergone changes since the time it was enacted. For example, Section 303, which provided the mandatory death penalty if a person serving a life sentence was convicted of murder, was struck down as being unreasonable and unjust.

Mr. Nariman stated that Section 377 could not be restricted to either a public or private place. The Section had to be construed as covering cases of sexual assault. He also pointed out that the Protection of Children against Sexual Offences Bill was pending before Parliament. The Standing Committee had already given its report on the Bill

Mr. Nariman further argued that Section 377 violated Article 14. He referred to the case of *Mithu v State of Punjab [1983 SCR (2) 690],* where the Supreme Court struck down the mandatory death penalty provided for in Section 303 of the IPC.

He further referred to the Supreme Court decision in *I.R.Coelho v. State of Tamil Nadu & Ors* [(2007) 1 SCC 1], where it was held that fundamental rights had to be construed together. He submitted that fundamental rights enforced distinct rights and they were not limited or narrow and served as a control on legislative power. He cited *E.P. Royappa v. State of Tamil Nadu* [(1974) 4 SCC 3], where the Supreme Court held that equality and arbitrariness were sworn enemies. He argued that there was a fundamental right to equality before law. Judges must review law in order to determine whether it was "just fair and reasonable". What had evolved was a "judicial conscience test" as to whether some laws so offended the judicial conscience as not being right or proper in a democracy.

Mr. Nariman then set out the test of reasonable classification as laid down by the Supreme Court in *Dalmia Cement's Case*. He said that, in this case, the statute left it to the discretion of the government and no principle had been laid down to guide the administration of the law, which made the law itself inherently discriminatory.

Mr. Nariman asked why the term 'whoever' in 377 could not be applied to a husband and wife. He submitted that compulsory directions were necessary and the High Court could have given a direction to the Police not to apply the Section in a particular manner ,rather than the declaration that it gave.

Mr. Nariman then cited *Kharak Singh's Case* and *Gobind's Case* on the right to privacy. He submitted that the term 'personal liberty', used in Article 21, was a compendious term. The term 'life' in the U.S. Constitution was held to protect persons from the invasion of the sanctity of a person's home. The Preamble to the Indian Constitution protected the dignity of the individual. He further observed that the term 'liberty' in the Constitution was qualified by the word 'personal'

and this included protection from psychological restraints and freedom from encroachment upon private life.

Mr. Nariman then read passages from *Gobind's Case,* where the Supreme Court held that Article 21 included within its guarantee, the right to privacy, that is, the protection of a sphere where an individual was let alone and that the home was a sanctuary where individuals could drop his mask and desist for a while from projecting on the world, the image they wanted to be accepted as themselves, an image that "*may reflect the values of their peers rather than the realities of their natures*." To this, J. Singhvi observed, that all persons were something at home and different outside. Mr. Nariman agreed. He said there was an old joke which went *"When do you stop beating your wife?"* He then concluded his arguments.

Mr. Anand Grover, Senior Counsel, on behalf of Naz Foundation (India) Trust, Respondent No. 1,

Mr. Anand Grover started his arguments by stating that this case was about criminalisation of the acts covered under the expression 'carnal intercourse against the order of nature' in Section 377. This law was demeaning to a section of society and violative of Article 21, which had been interpreted to include substantive due process. Section 377 and the consequent criminalisation, hampered delivery of health services, of which HIV was a small part. Further, he stated that Section 377 was vague and did not serve any legitimate purpose and thus in violation of Article 14, while the word 'sex in Article 15 should be interpreted to mean 'sexual orientation' and therefore Article 15 prohibited discrimination on the ground of sexual orientation.

J. Singhvi then asked about the background of the Respondent, the original Petitioner in the High Court. Mr. Grover said that he was representing the Naz

Foundation, which had been working in the field of HIV prevention for many years. J. Mukhopadhaya pointed out that data on homosexuals in India given by NACO (an estimate of 25 lakh) was in relation to HIV. He asked how Section 377 was connected with HIV. Mr. Grover mentioned the three main modes of HIV transmission including unprotected sexual intercourse and how MSM constituted a 'hidden' population due to fear of prosecution under Section 377. J. Mukhopadhaya noted that anal sex had nothing to do with MSM specifically. One could not create a class within a class, he observed. Mr. Grover submitted that judicial interpretation by several High Courts over the years had shown that heterosexuals were not covered by Section 377. J. Mukhopadhaya then asked about the number of cases pertaining to heterosexuals and homosexuals under Section 377.

Thereafter, J. Singhvi asked about the constitution of the Naz Foundation (India) Trust and wanted to see the clause in the Trust deed that gave the power to the organisation to pursue litigation. Mr. Grover said that he would address this question during the course of his arguments. J. Singhvi also expressed doubts about the maintainability of a petition filed by a private organisation challenging the constitutional validity of a statute. J. Mukhopadhaya then asked whether homosexual acts were causing HIV or not. HIV could be caused because of sexual activity amongst heterosexual or homosexual persons. Mr. Grover replied that it was not heterosexual or homosexual sex but unprotected sex that could cause HIV. He submitted that the MSM group was one of the high risk groups, with an HIV prevalence of 7.3% (NACO data) while the prevalence amongst general population was 0.3%. MSM also constituted a bridge population, since many of them were married and thus posed a risk to their wives and partners. If one had HIV and engaged in anal sex then there were higher chances of

transmission. Because of the high risk, it was important that health services were delivered to them but Section 377 acted as an impediment in access to services.

J. Mukhopadhaya noted that similar situation existed in the case of sex workers. They also needed to access health services. Mr. Grover argued that in India, sex workers could be accessed, at least partially, in brothels or at other sex work sites and were not usually a hidden population. Most studies showed that Section 377 was a barrier to HIV intervention efforts. J. Mukhopadhaya asked to see any such study, which Mr. Grover submitted. But the Judges observed that this was not an expert study by someone who had knowledge of both criminal law and medical jurisprudence, instead it was an opinion of few individuals and could not be considered as an authority on the subject.

Thereafter, Mr. Grover referred to the judicial interpretation of Section 377 and argued that it had been varied and inconsistent over the years, leading to vagueness and arbitrariness. Section 377 had its origins in the common law offence of sodomy. While it did not include oral sex initially, oral sex was covered later on and courts had even included imitative sex in recent years. One never knew the exact ambit of Section 377. J. Singhvi opined that if one considered the interpretation that even the acts engaged in by husband-wife would be covered by Section 377, then nearly 50% of husband-wives would be prosecuted. He asked whether there was any study on the number of cases involving heterosexual married couples under Section 377. Mr. Grover then submitted a table containing the list of all cases on Section 377 to the Bench and referred to certain important judgments from the table to show how Section 377 was interpreted by the Courts. Accordingly, these cases showed that Section 377 primarily prohibited those acts that were engaged in by the homosexual men. He further argued that Section 377 could be interpreted in future to mean

penetration by objects too. He asked how could one say that penetration would only mean penetration by a human penis for all times to come. He also submitted that Section 377 was replicated in most Commonwealth countries and referred to similar sections in the penal laws of Malaysia and Saint Lucia.

In the post-lunch session, Mr. Grover continued his arguments on the judicial interpretation of Section 377. J. Mukhopadhaya noted that there were three elements in Section 377, i.e., 'carnal intercourse', 'penetration' and 'against the order of nature'. It was unnatural for both major and minor. Mere carnal intercourse would not be an offence under Section 377 but only if it was against the order of nature. Mr. Grover submitted that Section 377 covered all penile-non-vaginal sex including oral and anal sex. Homosexual men could not engage in any other penetrative sexual acts, except for penile-non-vaginal, thereby criminalising their core sexual personality under Section 377. The prohibition on penile-non-vaginal sex operated as a partial restriction for heterosexuals but a complete restriction on penetrative sex for male-male sexual relations.

He further stated that the issue of minors was different, since they could not engage in consensual sex and Section 377 should be used against child sexual abuse. J. Mukhopadhaya asked about the *Protection of Children from Sexual Offences Bill*, 2011 and whether it had deleted Section 377. Mr. Grover replied that it was pending in the Parliament. J. Singhvi then enquired about the status of 172nd Report of the Law Commission of India which had recommended decriminalising adult consensual same sex acts in private. J. Mukhopadhaya noted that the recommendations were not accepted by the Parliament.

Mr. Grover then argued on the impact of Section 377 on the lives and health of homosexual men. Section 377 was used by the law enforcement agencies to harass and abuse homosexual men and transgenders. Further, broader society

associated acts proscribed under Section 377 with the homosexual persons. He referred to *Queen v. Khairati* (1884 ILR 6 ALL 204) wherein a person was charged under Section 377 merely on the suspicion that he was a habitual catamite and convicted by the lower court, though later released by the High Court. J. Singhvi noted that abuse of law could not be a ground to strike down a law. If it was, then Section 498A, IPC should be repealed immediately, since many people were wrongly charged under Section 498A. Agreeing, J. Mukhopadhaya observed that harassment and wrongful conviction by the lower court constituted no basis to challenge the constitutional vires of a statute.

Mr. Grover submitted that the law was identified with a certain group of people by the general society. J. Mukhopadhaya, in response, stated that identification was a notion of society, which needed to be addressed by the social reformers, e.g., HIV was wrongly attributed to homosexual men, which demeaned their dignity. The gap was that Section 377 criminalised certain acts but did not criminalise an entire class of people. He further stated that if two men were kissing then it would not be an offence but if they were engaging in other sexual acts, which were prohibited under Section 377 then it would be an offence. Mr. Grover sought to clarify if J. Mukhopadhaya's example included two men kissing with the use of the tongue. J. Mukhopadhaya said that he was referring to a situation without the use of the tongue. He stated that two men kissing on the lips would not be covered by Section 377. Mr. Grover argued that this law was a colonial import by the British. Before 1860, India was a tolerant society and did not criminalise homosexual acts, as evident from the depiction of same sex acts on the temples of Konark, Khajuraho, etc. He further stated that Section 377 excluded heterosexual couples and referred to *Grace Jayamani v. E.P. Peter* (AIR 1982 Kar 46) wherein the Court held that a husband would not be guilty of committing sodomy against his wife, if she consented.

Mr. Grover contended that Section 377 was used primarily to target homosexual persons and referred to two reports, i.e., PUCL report on *Human Rights Violations against Sexual Minorities in India* (2001) and Human Rights Watch's report on *Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India* (2002) that had extensively documented the violations including police abuse, illegal detention, extortion, entrapment and the threat of outing the identity of homosexual person. He further cited two peer-reviewed studies ["*Structural Violence Against Kothi-Identified Men Who Have Sex With Men in Chennai, India*": A Qualitative Investigation, Venkatesh Chakrapani (2007), *A Survey of MSM HIV Prevention Outreach Workers in Chennai*, India, Steven A. Safren (2006)] that explored the relation between Section 377 and HIV prevention efforts and documented the violations faced by kothi outreach workers at the hands of police. J. Singhvi asked whether these studies were relying on NACO data or had their own independent data. Mr. Grover replied that they were based on the government data.

Mr. Grover then referred to the Lucknow incident of 2001 where four outreach workers were arrested under Section 377 and denied bail by the lower court, who remained in prison for 46 days and were finally granted bail by the High Court. He also cited cases of forced conversion therapies where homosexual persons were subject to forced medical therapies in order to change their sexual orientation and were even given electric shocks, as was cited in *Medical Response to Male Same–Sex Sexuality in Western India: An exploration of 'Conversion Treatments for Homosexuality* (2009). He referred to a case wherein a complaint made by a gay man against forced conversion therapy was not entertained by the National Human rights Commission (NHRC) due to the existence of Section 377.

J. Mukhopadhaya asked whether lesbians would be covered under Section 377 and whether the term 'homosexual person' included lesbians too. Mr. Grover replied that as per the current interpretation, there had to be penile penetration but in future, one could say that even non-penile (penetration by objects) penetration could be covered, then Section 377 could include lesbians too. J. Mukhopadhaya stated that penetration could be by any organ. Section 377 started with the term 'whoever', which was not gender specific so even women could be covered. The pertinent issue was whether a woman could commit sodomy. Mr. Grover then cited two recent cases of Delhi High Court which held that digital penetration was not covered under Section 377, thereby implying that only penile penetration was included.

Thereafter, J. Singhvi stated that Parliament was shunning questions of reform, since it was the domain of legislature to enact/amend laws. J. Mukhopadhaya further noted that harassment of homosexual persons was because of homophobia existing in the society and asked whether homophobia was a disease. Mr. Grover replied that neither homophobia nor homosexuality was a disease. Earlier, homosexuality was considered to be a medical disorder or a disease but the WHO in its ICD-10 guidelines (International Classification of Diseases) had removed homosexuality as a disorder in 1992. Current medical evidence suggested that homosexuality was not a medical condition but an alternative variant of human sexuality.

Mr. Grover then cited cases of employment discrimination where homosexual persons faced discrimination in or termination from services on account of their sexual orientation including, *Dr. Shrinivas Ramchandra Siras & Ors. v. The Aligarh Muslim University & Ors* (Civil Misc. Writ Petition No. 17549 of 2010, Allahabad High Court) and *Jamil Ahmed Qureshi v. Municipal Council Katangi & Ors* (1991

Supp (1) SCC 302). Referring to *Dr. Siras'* case, who was suspended by the University on the ground of misconduct, J. Singhvi asked how the case was related to Section 377. Mr. Grover stated that the fact that media persons barged into his house and the subsequent harassment that Dr. Siras faced from the University could be traced to Section 377. In *Jamil Ahmed's Case*, he was terminated from the employment because he had not disclosed his earlier conviction under Section 377 to his employers at the time of appointment. J. Singhvi stated that he was dismissed not because of Section 377 but because of concealment of the fact of conviction under Section 377, which could be a ground in any employment.

Mr. Grover further averred that Section 377 prevented dissemination of sexual and reproductive health information and education, as was evident in *Azadi Bachao Andolan Delhi Unit v. All India Radio & Ors.* (1997) wherein a radio programme on safer sex practices including male-male sex was stopped by a Magistrate's order, who took note of Section 377 and how giving information on safer same sex practices would be considered as encouraging homosexuality, which was prohibited by Section 377.

Thereafter, Mr. Grover began his arguments on how Section 377 was violative of fundamental rights of the Constitution. He stated that international law had been read into the interpretation of fundamental rights in India, especially in Articles 14, 19 and 21. He cited several articles of the *International Covenant on Civil and Political Rights* (ICCPR) and *International Covenant on Economic, Social and Cultural Rights* (ICESCR), since these two covenants had been incorporated in domestic law, by virtue of the *Protection of Human Rights Act*, 1991.

He further stated that there were four components of Article 21, i.e., right to privacy, substantive due process, right to dignity and right to health. Beginning

his arguments on Article 21, Mr. Grover submitted that under the right to privacy, the Constitution protected a zone of privacy wherein the State could not intrude into without a compelling interest of paramount importance. He then traced the development of the right to privacy jurisprudence that originated from the cases in United States.

The Bench then rose at 4pm and kept the matter listed for the next day.

14th March, 2012

Continuation of Mr. Grover's Arguments

Mr. Grover continued his arguments on the right to privacy under Article 21 and referred to US Supreme Court cases of *Griswold v. State of Connecticut* [381 US 479 (1965)] , *Eisenstadt v. Baird* [405 US 438 (1972)] and *Roe v. Wade* [410 US 113 (1975)] to elaborate on the right to privacy. He also cited Indian Supreme Court cases of *Kharak Singh v. State of Uttar Pradesh* (1964) 1 SCR 332 and *Gobind v. State of Madhya Pradesh* (1975) 2 SCC 148 to state that the right to privacy constituted an integral part of Article 21. He argued that the right to privacy included right to form intimate sexual relationships including same sex relations and any law prohibiting the same would be violative of the constitutional right to privacy [*Lawrence v. Texas* 539 US 558 (2003) and *Toonen v. Australia* (1994)].

Mr. Grover further stated that the State had failed to show any compelling interest, except when it contended in the High Court that Section 377 was used to deal with child sexual abuse and to fill in the lacuna in the rape laws. The State also admitted that Section 377 was not used against adult consensual acts by homosexual men, which showed that there was no compelling reason to retain it.

In contrast, NACO in its affidavit in the High Court had submitted that Section 377 was an impediment in the delivery of HIV prevention services.

J. Mukhopadhaya asked whether Mr. Grover could elaborate on the impact of Section 377 on HIV prevention. Mr. Grover replied that MSM did not come out in the open to access health services due to fear of prosecution under Section 377. J. Singhvi asked about the exact number of MSM in India. Mr. Grover stated that exact numbers of MSM were not available but there were estimates made by NACO ranging up to 25 lakh. Out of these, hardly 10% had access to health services. J. Singhvi then asked about the estimated number of MSM in the opinion of the Petitioner, since it was working in the field for long. Mr. Grover responded by stating that Naz too did not have the exact figure, since it catered only to those who would approach Naz and not to others. Most NGOs relied on the government data, since only the government had the wherewithal to do an estimation of HIV prevalence amongst MSM population in the whole country.

J. Mukhopadhaya stated that HIV was a disease and it was not connected with Section 377. Section 377 pertained to certain acts which would be considered an offence. In terms of health, the Government might ban certain acts due to its adverse health impact, wherein there would be no victim but only a patient. He asked how it would be related to an offence under Section 377. He further stated that MSM might be a bridge population or carriers of disease but there was no penalty for transmitting a disease. Despite extensive talk about HIV and numbers of MSM infected with HIV, the question was whether there was any nexus between HIV and Section 377.

In response, Mr. Grover stated that HIV was a sexually transmitted disease and highly prevalent amongst MSM, with a prevalence of 7.3% (2010 NACO data) while HIV prevalence amongst men remained at 1% and amongst general

population at 0.3%. This showed that MSM were at high risk of contracting HIV and Section 377 aggravated that risk. Further, penile-anal sex did pose higher risk than penile-vaginal sex. J. Mukhopadhaya noted that sexual intercourse was not an offence unless it amounted to rape, punishable under Section 376, IPC. MSM was not an offence under Section 377 but if they engaged in carnal intercourse against the order of nature, then it would be an offence under Section 377. If one argued that this was natural and not against the order of nature then it would be a different matter. Mr. Grover submitted that carnal intercourse against the order of nature included anal sex so it was deemed to be unnatural. J. Mukhopadhaya opined that Section 377 did not mention criminalisation of MSM but only criminalisation of certain acts. He asked where was the prohibition in Section 377. Mr. Grover replied that carnal intercourse against the order of nature included all forms of non-procreative sex, i.e., penile-non-vaginal sex that was prohibited under Section 377, by virtue of its historical underpinnings and judicial interpretation by several High Courts.

Stating that High Court judgments were not binding on the Supreme Court, J. Mukhopadhaya said that Section 377 had nothing to do with procreation, giving the example of an impotent man having sex, though not resulting in procreation, the act did not constitute an offence. Mr. Grover submitted that though High Court decisions were not binding, the Supreme Court decision in *Fazal Rab Choudhary's Case* was binding. J. Mukhopadhaya further asked if a mother breastfeeding a child would be considered as penetration under Section 377. Since Section 377 did not refer to any sexual organ, it could mean any organ of the human body. Respectfully disagreeing, Mr. Grover argued that it had to be penile-penetration, otherwise it would not be carnal or sexual intercourse. Either of the two sexual organs, i.e., penis or vagina, had to be involved in order to become carnal intercourse or sexual intercourse.

J. Mukhopadhaya noted that only carnal intercourse was not an offence under Section 377 but it had to be carnal intercourse against the order of nature, i.e., unnatural carnal intercourse involving penetration was covered under Section 377. Mr. Grover again reiterated that Section 377 was confined to penile-penetration, since the vagina had no penetrative quality about it. J. Mukhopadhaya asked whether penetration by nose was covered. Mr. Grover answered that no judicial decision referred to non-sexual organs. J. Mukhopadhaya further stated that Section 377 did not cover natural intercourse but only unnatural intercourse. So breastfeeding by a mother was outside the ambit of Section 377, since it was natural. What was natural remained constant and would be considered as natural for all times to come. Mr. Grover then mentioned the process of producing synthetic medicines from natural raw materials that would be considered as unnatural. He also stated that the term 'carnal' meant 'off the flesh' while the phrase 'against the order of nature' had religious origins, wherein any sex that did not result in procreation was considered to be sin. This was the earlier view but now 'carnal intercourse against the order of nature' had undergone wide interpretation and was open to any interpretation.

Thereafter, Mr. Grover went back to his arguments on the right to privacy and stated that the State had failed to show any compelling interest. The Government counsel, Mr. P.P. Malhotra, had argued that rights could be restricted on the ground of public morality. But this was not a question of public morality but that of private morality. He then referred to the *Wolfenden Committee Report* in UK (1957) that had recommended decriminalisation of homosexuality in England and had noted that it was not the role of criminal law to regulate the private morality of citizens. He also cited the recent Supreme Court decision in *S. Khushboo v. Kanniammal and Anr.* (2010) 5 SCC 600 to emphasise that notions of

morality were inherently subjective and criminal law should not be used to enforce morality. Mr. Grover further argued that the Union of India had not come in appeal against the High Court decision, since the State alone had the locus to defend a statute and to show compelling interest. J. Singhvi noted that the State did defend Section 377 in the High Court and an appeal from the State in the Supreme Court was not necessarily required.

Mr. Grover then argued on right to dignity under Article 21. He submitted that Section 377 violated the dignity of homosexual men by criminalising their core sexual expression. He cited *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 1 SCC 608, which held that the right to life under Article 21 guaranteed the right to live with human dignity. J. Mukhopadhaya asked how the dignity of a homosexual man could be affected, if he could not be identified. Harassment would happen only if a person was identified as a homosexual. Mr. Grover submitted that one could identify as a homosexual to oneself. J. Mukhopadhaya stated that this pertained to internal psychology of an individual which could differ from case to case and could not be said to apply to a class of persons.

J. Mukhopadhaya then read out the dictionary meaning of 'dignity' that spoke of two elements, i.e., respecting the dignity of an individual by society in general and what the individual thinks of himself/herself. The latter element would be variable, since one individual might suffer from depression while the other might not. Mr. Grover contended that the law had set out the normative paradigm of heterosexuality, by which the sexual expression of homosexuality was forbidden. J. Mukhopadhaya stated that the prohibition under Section 377 applied to all, including heterosexual persons. Mr. Grover submitted that though Section 377 applied to all, it, in effect, impacted mostly the homosexual men,

since the heterosexual persons had the option of engaging in penile-vaginal sex but that option was non-existent in case of homosexual men. J. Mukhopadhaya observed that a similar situation could arise if some one was attracted to animals, i.e., one could argue that it was natural to get attracted to animals.

J. Singhvi stated that Mr. Grover was making certain contradictory arguments on dignity. If one argued that dignity was qua society then dignity would not be compromised unless his/her identity was known. Mr. Grover submitted that dignity was compromised because one could not be open about one's sexuality and express herself freely in society. If one did come out, then there would be all kinds of societal discrimination. When this petition was being drafted, not a single gay man was found who agreed to file it in his name.

J. Mukhopadhaya asked whether any openly homosexual man was arrested under Section 377. Mr. Grover replied that they had to be caught in the sexual act and could not be arrested otherwise. Further, the society largely associated acts prohibited under Section 377 with homosexual men and considered them to be dirty and degrading. J. Mukhopadhaya stated that it was an issue of societal prejudice which could not be changed by law. Mr. Grover responded by saying that Section 377 sanctioned these societal biases by criminally proscribing sexual acts that constituted the core of homosexual personality.

Mr. Grover then read out certain paragraphs of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality & Ors. v. Minister of Justice & Ors* [(1999) 1 SA 6 (CC)] to reiterate his point on dignity. At that time, Mr. H.P. Sharma, counsel for the Respondent Mr. B.P. Singhal, interjected and said that this judgment was rejected by the Hon'ble Supreme Court in *Sakshi v. Union of India* (2004) 5 SCC 518. The Judges did not pay heed to Mr. Sharma, indicating to Mr. Grover to continue. J. Singhvi asked about the background of the case in

South Africa and whether the impugned provision was similar to Section 377. Mr. Grover replied that in South Africa, sodomy was prohibited, i.e., penile-anal sex, which was also prohibited under Section 377.

J. Singhvi then asked about the decision of the High Court. Mr. Grover said that the lower court decision was restricted to privacy but the Constitutional Court was not bound by the scope of the decision of the High Court and it held that the law violated the right to dignity as well and interpreted the rights in an expansive manner. J. Singhvi also noted that the equality provision in the South African constitution prohibited discrimination on the ground of sexual orientation, thereby to be treated differently than the Indian Constitution that had no such provision. J. Singhvi further enquired whether the concurring judge in this case was a homosexual person. Mr. Grover submitted that the concurring judge was Justice Sachs and not Justice Edwin Cameron, who was an openly gay man.

J. Mukhopadhaya again pointed out that dignity included concepts of quality of being, worthy of honour or respect in society and a sense of pride in oneself. If one could not be identified then these issues would not arise. Mr. Grover contended that law coupled with societal prejudices had made homosexual men invisible by criminalising those sexual acts which were inherent in their nature. J. Singhvi then asked whether one could engage in sexual acts in an open place. Replying in negative, Mr. Grover stated that the Constitution did not protect the right to engage in consensual sexual acts in a public place but protected the same right in a private sphere if there was no intention to harm/injure each other.

Mr. Grover then made submissions on the principle of substantive due process and how the Indian Courts had incorporated the concept of substantive due process within the realm of personal liberty under Article 21. He cited several

cases including *Smt. Selvi v. State of Karnataka* (2010) 7 SCC 263 to highlight that a law had to be substantively fair, just and reasonable, apart from being procedurally reasonable.

Thereafter, Mr. Grover succinctly discussed the right to health under Article 21 and how Section 377 violated the same. Since he had argued this issue at length, while making submissions on the impact of Section 377 on HIV intervention efforts, he confined his arguments on health to two points: firstly, Section 377 hampered homosexual men's access to health services and information and drove them underground, thereby aggravating the risk of contracting HIV through unprotected sex; and secondly, since they were a hidden population, the State had difficulties in delivering basic health services to them. He submitted a volume of studies and other reference documents on HIV stating that he had indicated the relevant paragraphs in the index.

After finishing his arguments under Article 21, Mr. Grover began his arguments under Article 14. He argued that the inconsistent judicial interpretation of Section 377 had already been highlighted. He further submitted that Section 377 was vague, since it did not clearly lay down which acts were proscribed and left it to the discretion of Judges. He noted that penal law had to be clear and precise in its prohibitions and thus Section 377 was violative of Article 14. He further argued that the object of Section 377, in its prohibition of non-procreative sex, was outdated and unreasonable and cited *Deepak Sibal v. Punjab University* (1989) 2 SCC 145. He stated that if the object of classification was unreasonable, then the classification itself between carnal intercourse against the order of nature and carnal intercourse within the order of nature was unreasonable.

He also submitted that the State itself was promoting birth control measures as part of family planning strategy thereby implying that prohibition on non-

procreative sex was no longer reasonable in present times. He cited *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1 where the Supreme Court upheld the right to use contraceptives as an element of personal liberty under Article 21. Mr. Grover further argued that though Section 377 might have served a legitimate purpose in 1860, it had become unreasonable with passage of time and cited *Satyawati Sharma v. Union of India* (2008) 5 SCC 287 in furtherance of his contention.

Mr. Grover then argued that Article 15 prohibited discrimination on the ground of 'sex' and sexual orientation should be read into the term 'sex'. J. Mukhopadhaya asked how Article 15 was invoked, since it prohibited discrimination only on the ground of 'sex' and not 'sexual orientation'. Sex could mean only gender but not sexual orientation. Section 377 did not discriminate on account of sexual orientation. Mr. Grover stated that Section 377 was premised on sex stereotypes and heterosexual norms, thereby discriminating against homosexual conduct. He cited *Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1 and *Toonen v. Australia* (1994) where the UN Human Rights Committee had observed that 'sex' included sexual orientation as part of prohibited grounds of discrimination in Article 26 of ICCPR.

Mr. Grover argued that since India had ratified the ICCPR and domesticated it under Protection of Human Rights Act, 1991, *Toonen's Case* held more than persuasive value. J. Singhvi asked about the background of the UN Human Rights Committee and noted that these decisions were binding only on those countries that had ratified the Optional Protocol to ICCPR. India had not ratified the same so this decision would not be binding on India. He also noted that Mr. Toonen was a gay man who had approached the Human Rights Committee in his individual capacity. In the present case, a NGO was claiming discrimination

on behalf of homosexual men. J. Mukhopadhaya asked whether a heterosexual couple could invoke Article 15 if Section 377 applied to them. Mr. Grover submitted that though applicable to all, Section 377 disproportionately affected homosexual men.

In conclusion, Mr. Grover showed the relevant clause in the trust deed of the Naz Foundation (India) Trust that authorized them to pursue litigation. On the issue of maintainability of writ petition filed by a NGO challenging the constitutional validity of a statute, he cited three cases wherein the Supreme Court had entertained such PILs on merits and did not go into the issue of maintainability of the writ petitions. J. Singhvi stated that there was also a decision of 3-Judges Bench of the Supreme Court on this issue. Mr. Grover submitted that he would refer to it in his written submissions.

Mr. Shyam Divan, Senior Counsel, on behalf of Voices Against 377, Respondent No. 11,

Mr. Shyam Divan began his arguments by laying down the contours of his submissions, which were as follows:

a. Sexual Rights were part of human rights under Article 21 of the Indian Constitution.

b. Men who have sex with men/women who have sex with women were not acting against the order of nature. It was a natural extension of their being.

c. One had to look into the legislative history and the judicial interpretation of Section 377. But essentially, two issues were involved:

i. The first involved the issue of identity and dignity of individuals. *"Do I have the full moral citizenship in this country? Or when I look into the mirror, do I see a criminal or a second class citizen? Am I entitled to intimate relationships? Can I cohabit with my partner? These are the concerns that form the core of my intimate relation and the greatest satisfaction is garnered from the development of deep human relationships."*

ii. The second issue was that of the role and jurisdiction of the Supreme Court of India. When groups approached the Court for protection of their rights, then what should the Court do? What would be the approach of this Constitutional Court - should it expand or restrict rights?

Mr. Divan then gave a brief introduction about Voices against 377 and mentioned in detail about each of the constituent organisations of Voices against 377. Thereafter, he read out affidavits of different members of the LGBT community which mentioned in detail the daily harassment and violence faced by them at the hands of police, non-state actors like goons, etc. All these affidavits were filed in the Delhi High Court. He then focused on five points relating to identity and dignity of homosexual persons.

a. Human beings developed sexual orientation as they grew up, between childhood and adolescence and much before attaining adulthood.

b. Most of the technical and medical literature showed that homosexuality was not a disease or a disorder. It was another expression of their sexuality. It was natural to a certain minority of people.

c. Sexual Orientation was innate and immutable. It was the core of one's personality that could not be altered. It was similar to race, being left handed or the colour of one's eyes.

d. Homosexuality had been observed in several species of nature.

e. Persons belonging to LGBT community might be a minority but their numbers were not small.

J. Singhvi then asked Mr. Divan about the exact number of homosexuals in India. Mr. Divan replied that there was no exact data but according to the government estimates, there were around 25 lakh gay people in India. He further mentioned that though homosexual persons might be invisible, he personally knew them as colleagues, friends and family. Article 21 provided for the protection of intimate relationships. He then read materials, including the Amicus Brief of American Psychiatric Association (APA) in *Lawrence v. Texas* on how sexual orientation was primarily about identity than about same sex desire.

15th March, 2012

Continuation of Mr. Shyam Divan's Arguments

Mr. Divan continued his arguments. While reading out from the APA's amicus brief in *Lawrence's* case, he reiterated that sexual orientation was formed in early childhood to middle adolescence and was an immutable aspect of one's personality. The brief also gave an idea about the estimates of the LGBT people in the United States, varying from 3% to 5% of the total population. It also mentioned about the impact of anti-sodomy statutes on the homosexual persons and how people would not report violations to the police due to fear of prosecution. It stated that contact between homosexual persons and mainstream

society was the best way to reduce prejudice, i.e., having a family member or a friend who was gay.

He also referred to a report on the impact assessment of Civil Partnership Act in UK, which again gave a range of 5-7% of the total population as the estimates of the LGBT population. Mr. Divan then read out from articles of various Indian jurists like Professor S.P. Sathe, Professor Upendra Baxi, etc as well from the UN High Commissioner on Human Rights' report on *Sexual Orientation and Gender Identity* (2011) to state that violations against LGBT people happened all across the world. He also referred to an article by Professor Ryan Goodman to stress on the struggle of the LGBT people for family approval and engagement with the civic community.

He further referred the passport form and UID form that now had 'other' column in the gender category, in order to emphasise the recognition of a sexual minority by the State. J. Mukhopadhaya asked whether MSM would fall in the 'other' category. He stated that only transgenders would be covered but not gays or lesbians, since transgender persons could not be equated with homosexual persons. Mr. Divan noted that as far as sexuality was concerned, there was a range of sexuality and one should not confine it to dominant sexuality only. The Government of India had given recognition to sexual minorities like Transgender and Hijra persons. J. Mukhopadhaya said that the government's sensitivity was one thing while Parliamentary sensitivity was another.

J. Mukhopadhaya also asked about the role of justice delivery system in changing societal prejudices. According to him, that would be the job of the social reformers and not that of the Courts. Mr. Divan then contended that the LGBT community did not seek social reform from the Court but was only reiterating the fundamental duty of the court, i.e., protecting the rights of the

sexual minorities. J. Mukhopadhaya observed that if there was a cause of action, then such a declaration could be given. He further stated that this Court was deciding on a question of law. Though people had a right to live with dignity and a right to sexual orientation, the question was in which manner. In a manner which was acceptable by the society under the law. If there was a law prohibiting right to sexual orientation and dignity then it could be said that it was violative of Article 21. But there was no such law.

Thereafter, J. Singhvi noted that the Respondent had placed various reports on record, stating that homosexuality was natural. He asked if it was natural, then where was the question of discrimination. Mr. Divan replied that if homosexuality was natural, then it was not against the order of nature. The High Court should have given a declaration that it was not against the order of nature. J. Mukhopadhaya then asked about the acts that would be considered natural and not against the order of nature. One was talking of homosexuality and not of certain acts. He asked if there was any specific pleading that this act was natural and not covered by Section 377. He asked about the acts for which the declaration was sought for.

Mr. Divan argued that the issue in this case pertained to the factual situation before the High Court. A large number of testimonies and reports were placed before the High Court that stated how Section 377 was misused and abused by the police against a particular section of population. This section (LGBT community) was a class in itself and had a sexual orientation which was in minority amongst general population. J. Singhvi noted that they were in minority because they were not discovered so far, since it was considered as a taboo. If people came out openly more, then their numbers might rise.

Mr. Divan further submitted that so long as the law was interpreted in a particular manner, this type of sexuality would be considered as against the order of nature. This petition was on a much broader and larger plane wherein it was about a community of individuals who could not attain full expression of their sexuality due to law and social perceptions. Accordingly, an appropriate declaration against Section 377 was sought. It was not about a particular type of the Act but the net of Section 377 was cast so wide that it was an agent of oppression for the whole community.

J. Mukhopadhaya noted that the High Court declaration was general in nature and did not mention specific acts. Section 377 did not cover all sexual acts; only certain sexual acts were excluded. He asked where was the question of a declaration, if an act was not covered by the law. He referred to *Brother John Anthony's* Case. He again asked about the specific acts for which the declaration was sought for and observed that those pleadings were not there. He further opined that Hijras would not be covered under Section 377 because they were always the recipient partner. The term 'whoever' in the provision referred to the person who was penetrating and thus the accused. Accordingly, Hijras were the victims. Thus, one had to specify the acts for which declaration was being asked for, and seeking a general declaration would be a problem.

Mr. Divan argued that the declaration was narrowly tailored and carefully drafted. There was a vast range of sexual activities that men engaged in and to enumerate them was not particularly beneficial. The issue at one level was also conceptual, having regard to privacy, dignity, autonomy, etc. The High Court declaration excluded the application of Section 377 to adult private consensual sexual acts of LGBT persons. In fact, the declaration extended to all including heterosexual couples engaging in adult consensual sex in private. J.

Mukhopadhaya asked who would know if it happened in private sphere. Would a person declare his/her sexual orientation? Mr. Divan contended that one should look at it from the perspective of a homosexual person, since coming to terms with sexual orientation that was different from the others constituted a huge psychological process.

J. Singhvi then stated that though the drafting of the petition was clear, the drafting of the prayer was narrowly confined. The High Court should have addressed it on a larger canvas. He referred to S.P. Sathe's comment that Parliament and Supreme Court were shying away from dealing with this issue because of public perception. The Government also was recognising the 'other' status. If the Government was alive to this problem, then what had been highlighted were just a few cases but there must be many more cases of this kind, wherein the individuals' rights were violated with impunity. Since there was a lack of a specific pleading, the issue could be canvassed at a broader level and both sides were entitled to argue whether the right to dignity enshrined in the Constitution extended beyond this declaration.

J. Mukhopadhaya further opined that there was no quarrel that any sexual orientation which was natural and not against the order of nature, was not covered under Section 377. The High Court had given a general declaration but there was a question as to what would happen when there was an injury. He further asked how the declaration was couched. Mr. Divan replied that it was tailored carefully and took into account the needs of the child rights groups. J. Mukhopadhaya said that there was no discussion by either party whether this was natural amongst married couples, i.e., engaging in oral and anal sex. He asked if there was any number/report stating that it was natural for all. He asked that if the acts were natural, why only homosexuality was being discussed. Were

these acts engaged in only by homosexual persons? He stated that one should not classify between heterosexuals and homosexuals.

J. Singhvi pointed out that if one considered the literal meaning of the terms 'against the order of nature' then 80% of husbands-wives would be behind the bars. This issue should have been addressed by another organ of the State (i.e. Parliament) long time ago. J. Mukhopadhaya observed that other factors like mental set up, public/private acts, psychological make up of the society, etc need to be involved. J. Singhvi again asked why homosexuals should be treated as a minority and not as part of the mainstream society. Agreeing, J. Mukhopadhaya asked why sexual minorities should be looked at differently. Why could they not feel the same honour like a husband-wife? The Courts could not give self-esteem or dignity to people, he observed.

In response, Mr. Divan stated that firstly, the LGBT community was part of the mainstream society and entitled to enjoy constitutional rights like other citizens. Secondly, the operation of Section 377 had shown that this community was singled out disproportionately and in so far as physical violence was concerned, Section 377 was used against LGBT. Thirdly, apart from actual violence, there was a huge psychological stigma. The existence of Section 377 without an appropriate declaration perpetuated the stigma, which operated in two ways: social and legal. This Court had been asked to erase the legal stigma. Fourthly, this statute had been wrongly interpreted and misused for years together. Cases like *Brother John Anthony* showed the manner in which Section 377 was applied and interpreted and how a particular segment of the society was stigmatised by the law. The Courts generally had understood this behaviour for decades together without the science. This legal stigmatization needed to be removed. Therefore, one needed a declaration. This case could not have waited till the

legislative amendments. The Court must read down the law, since it did not harm anyone while emancipating a whole section of the population. The Court must remove the offensive portion of the law.

J. Mukhopadhaya asked about the offensive portion in Section 377. If homosexuality was natural and thus not an offence under Section 377, then the question of offensive portion did not arise. Thereafter, Mr. Divan talked about the doctrine of severability or separability, i.e. the ability to 'separate' one part of an offending statute down as ultra vires of the Constitution, without striking down the entire law. The High Court had done that, which didn't harm anybody while benefiting an entire community.

Mr. Divan then questioned whether all married couples were treated like '*unapprehended felons*' and said that there was no social stigma or legal stigma of Section 377 attached to married couples. The High Court declaration was narrowly tailored, since Section 377 was also applicable in child sexual abuse cases. If there was a general declaration that a range of sexuality including homosexuality was natural, then Section 377 would not apply to adult consensual sexual acts of LGBT persons. J. Mukhopadhaya then noted that most of the reports placed before the Court pertained to a class of people but not about nature of human beings. One should look at human beings in general. If this sexual orientation was to be found in the majority population then it would be natural. He further stated that there were two types of MSM: one who were married and the other who were openly gay and one could be attracted to either of them.

Mr. Divan contended that sexual identity was independent of marital status. Section 377 might, in its archaic interpretation, apply to a range of conduct of heterosexual couples but there was no stigma attached to them. What had been

the impact of Section 377 on heterosexuals? J. Singhvi then made observations about the type of society one lived in where a man could have relations with several women but if a woman did the same, then she would be stigmatized and considered an outcast. For e.g., Draupadi in Mahabharata had five husbands. Some people might think that this was also natural. One might have legitimate arguments that the society was changing. What was perceived as unnatural years ago was no longer considered as unnatural. Technology has had a huge impact. He asked why any particular section of society should be treated in a minority way. The argument of dignity needed to be appreciated under Article 21. Apart from the Preamble, dignity was a constitutional right. It was a failure of the society that it had failed to ensure dignity to all individuals including those of different sexual orientation.

Mr. Divan further argued that sexual minorities were making an appeal on the basis of dignity. J. Singhvi asked why he was talking about minorities again. Mr. Divan replied that whether one was a minority or not was a question of fact. This group was a minority because the technical material showed a statistical range within which these people would fall. Within that class was a range of sexual expressions, wherein a majority would be heterosexual while a significant minority would be of homosexual orientation. J. Mukhopadhaya noted that the Court was not concerned with sexual orientation but only with sexual acts, since Section 377 proscribed certain sexual acts and not sexual orientation. If the act was natural for all, including heterosexuals, he asked why one was only talking of homosexual persons.

In the post-lunch session, Mr. Divan continued his arguments and stated that no special rights were being sought by the LGBT community but only those rights which were available to all citizens. He further reiterated that Section 377 on a

literal reading did target certain types of acts but in its operation targeted the whole LGBT community. The constitutionality of Section 377 ought to be judged on the impact/effect of Section 377 on the rights of people.

Thereafter, Mr. Divan referred to the doctrine of severability and elaborated the concept through the cases of *RMDC v. Union of India* (AIR 1957 SC 628), *Kedarnath v. State of Bihar* (AIR 1962 SC 955) and *Indra Das v. State of Assam* (2011) 3 SCC 380. He argued that severability included an application of separability in situations wherein the statutes were facially neutral and applicable to all but the Court removed the offending portion and kept the rest of the provision intact. Thus, the Supreme Court preferred a narrow interpretation by defining the scope of the application. A similar thing could be done in the *Naz's* Case. He then read out from Justice Connor's judgment in *Lawrence v. Texas* to emphasise the point that homosexual acts were closely related to their identity. J. Mukhopadhaya pointed out that *Lawrence* case was different since the Texas law applied only against homosexual men and not to everyone. He further stated that till discrimination was established, the question of severability would not arise. Unless it was shown that homosexuality was targeted, one could not argue that Section 377 was bad in law.

In response, Mr. Divan noted that there existed a wealth of materials that LGBT persons had been disproportionately targeted and the operation of Section 377 was not neutral, as was evident in the UN materials too. Law was only a part of this, as LGBTs were targeted by social mores, prejudices, too. By removing the law, one could alleviate the community from much of the physical violence and mental oppression. The Court could do this by saying that homosexuality was natural. On the issue of minors, J. Mukhopadhaya asked if Section 377 would apply in a case where a minor (17 years) had sex with a major of the same sex,

though both parties consented. He observed that only the major would be prosecuted since he would fall under 'whoever' i.e., the 'penetrating party'. Mr. Divan argued that Section 377 should be looked at beyond the acts but how it operated in the field to target a particular segment of society. It was also about dignity and psychological aspect of homosexuality. The present petition was not merely about interpretation of 377 but it was an emanicipatory petition.

J. Mukhopadhaya stated that Section 377 had been wrongly interpreted by the law enforcement agencies. He also stated that in terms of *kothi*, etc, they were not invisible and were, therefore, targeted. Should we say that only those people who were visible needed to be safe? Mr. Divan said that one might be invisible but if he cohabited with another man then he would become visible. J. Mukhopadhaya noted that before the Naz decision, not many people in the general society knew about Section 377. J. Singhvi wondered how many people would know about the Constitution and the IPC in India. The reality was that only poor people were targeted. One might not ask about the caste/sexual orientation of one's friend in the educated classes, since it was a personal matter. Social stigma was lessening with education but not completely. J. Mukhopadhaya then asked whether a judgment could ensure that no one targeted a class of persons. Courts had to be cautious in giving a declaration which would decriminalize criminal acts.

Thereafter, Mr. Divan read out the debates on equality from the Constituent Assembly Debates and also a note on the Criminal Tribes Act. He then referred to certain cases including *PUCL v. UOI* (2003) 4 SCC 399 and *Anuj Garg v. Hotel Association of India* to emphasise the trend of this Court to give content into the various fundamental rights. He submitted that under Article 15(1) of the Constitution, the term 'sex' should be read to include sexual orientation or sexual

orientation should be treated as a 'like basis' to sex. Article 15(1) should be given meaning along with Articles 14 or 21. He cited Collin's dictionary to state that the synonym for 'sex' included 'sexuality', which could be interpreted to mean 'sexual orientation'. He urged the Court to give a wider meaning to the term 'sex'. The High Court judgment on Article 15 was consistent with expansive interpretation of fundamental rights. J. Mukhopadhaya then asked whether Section 377 discriminated on the ground of sexuality or sexual orientation such that it violated Article 15. He observed that one could invoke Article 21 only with Article 14. Mr. Divan replied that though facially neutral, in its operation and implementation, Section 377 disproportionately targeted a particular section of society. One had to look at the real impact of the law on the fundamental rights of the people, in order to asses whether it was discriminatory or not.

20th March, 2012

Continuation of Mr. Shyam Divan's Arguments

Mr. Divan continued his arguments and read out excerpts from Granville Austin's book on the *Indian Constitution* to show how the constitution-makers had conceived Supreme Court to be the guardian of fundamental rights and to create a just and equal society. He then referred to a series of landmark judgments of the Supreme Court, where the Apex Court had expanded the meaning and interpretation of fundamental rights, starting from [*Romesh Thapar v. Union of India* (AIR 1950 SC 124) (freedom of expression under Article 19(1)(a)] to *Rameshbhai v. State of Gujarat* (2012) 3 SCC 400 (inheritance laws)]. The current case belonged to the same genre on expansion of fundamental rights. If Section 377 was read down then it would not harm anyone but would greatly benefit a significant section of society.

He further argued that while the Court should always strive to give an expansive interpretation to fundamental rights in order to protect the rights of disadvantaged and marginalised sections of the society, it should have a strict approach of *locus standi* when one approached the Courts to restrict the fundamental rights of others. No third party, other than the Union of India could maintain any appeal against the Delhi High Court judgment. Only the UOI could defend the constitutionality of a criminal law and referred to the Indian and foreign case laws.

J. Mukhopadhaya pointed out that the locus of the Petitioner itself was questioned, since the writ petitioner was not an aggrieved person. Mr. Divan submitted that in a PIL, *locus standi* must be given a broad interpretation. J. Mukhopadhaya said that human rights were not meant for individuals only but had to be looked at vis-à-vis human rights of others. J. Singhvi noted that on the one hand, one argued that the Supreme Court's jurisdiction was wide and *locus standi* should be expanded and on the other hand, the Supreme Court was asked to limit it to others. There was a contradiction in the argument.

Mr. Divan then emphasised that the spirit of the Constitution was premised on inclusiveness, which had been developed in the High Court judgment. Concepts of inclusiveness and respect for diversity formed the core values in a pluralistic society like India and it was inclusiveness that had been the mainstay of the success in the working of the Constitution in the last 60 years. Accordingly, the persons of different sexual orientation should not be excluded from mainstream society. Thereafter, Mr. Divan concluded his arguments.

Mr. Ashok Desai, Senior Counsel, on behalf of Mr. Shyam Benegal, Intervener

Mr. Desai began his arguments by saying that this case pertained to challenging the constitutional vires of Section 377. He noted that the pleadings in the writ petition were wide enough to cover heterosexual persons and not limited only to homosexual men. He submitted that Section 377 did not have a place amidst the Indian approach to sexuality, since it was a colonial import and should be read down. J. Singhvi asked why Parliament did not have the time to review such pre-constitutional laws in the last 60 years. J. Mukhopadhaya pointed out that Section 377 was amended in 1955 where 'transportation of life' was replaced with 'life imprisonment'. J. Singhvi further noted that this was a peculiar case on the part of Union of India which had contested the petition in the High Court but not appealed against the judgment in the Supreme Court. He observed that rarely had there been cases where the Government remained neutral in a constitutional challenge. J. Mukhopadhaya also wondered which position of the Government was to be believed, the High Court's adversarial one or the neutral one in the Apex Court. Mr. Desai contended that UOI could not be represented by two different Counsels. The fact that UOI had not appealed suggested that they had accepted the High Court verdict.

Moreover, J. Singhvi noted that contrary to the High Court's opinion, this Hon'ble Court found no contradiction between the two affidavits. Opining that the NACO affidavit reflected the view of one division of the Ministry of Health, that too only of the Under Secretary, J. Singhvi doubted whether it could be taken as the view of the entire Health Ministry. Agreeing, J. Mukhopadhaya said that NACO's affidavit did not reflect the Government's stand on the issue and only mentioned about the enforcement of Section 377 and nothing against

criminalisation. Mr. Desai argued that no government affidavit would admit that any law was unconstitutional.

Thereafter, Mr. Desai submitted that this law originated in the colonial era while before the British rule, Indian society had liberal sexual mores. The object of this law was to impose Judeo-Christian morality of prohibiting non-procreative sex. Noting that sexual orientation was part of the human condition, Mr. Desai argued that homosexual orientation was not unnatural lust and the duty to protect dignity vested with the Court. The issue pertained to adult human relationships and did not involve violence or child abuse. J. Singhvi asked what practices were prevalent before 1860 in India. Mr. Desai replied that there was a Muslim law disapproving homosexuality but nothing was found in Hindu law prohibiting homosexuality. In fact, Vatsayana in Kamasutra talked about same sex behaviour.

However, with the imposition of Judeo-Christian morality, all forms of non-procreative sex were proscribed. J. Mukhopadhaya observed that Section 377 did not mention that non-procreative sex was forbidden. Mr. Desai contended that judicial interpretation of Section 377 cases, over the last 150 years, had made it apparent that all sexual acts that did not result in procreation would be covered under Section 377. Accordingly, it applied to heterosexual couples too, whether married or unmarried. This approach was completely in contrast to the State's own policy of promoting family planning methods and contraceptives. The State had no business to regulate adult consensual sex in private and should not enter people's bedrooms.

J. Mukhopadhaya stated that Section 377 consisted of 3 elements: carnal intercourse, penetration and against the order of nature. Unless these elements existed, an act could not be said to be covered under Section 377. Merely carnal

intercourse with penetration but not against the order of nature would not fall under Section 377. Further, Section 377 had nothing to do with protection of minors or with dignity of homosexual men. Mr. Desai then submitted that the attempt was to show the huge width of Section 377 that sought to cover all non-procreative sexual acts, including oral sex amongst heterosexual couples. As a result, this Court had been asked to read down the impugned section.

The question was whether Section 377, as it applied to private, consensual sex, violated the principles of fraternity, privacy and dignity guaranteed by our Constitution. He stated that equality without fraternity could lead to inequality, since people were not equal by themselves but had to be treated equally. A particular segment of society could not be ill-treated. The concept of constitutional morality, espoused in the High Court judgment, was connected with the constitutional guarantees of equality and fraternity. While referring to Mr. Ambedkar's speech on fraternity in the Constituent Assembly debates, Mr. Desai said that 'fraternity' meant 'common brotherhood' and that everybody should be treated with respect. He mentioned that homosexual persons faced a lot of psychological trauma and mental anxiety and could not be open to their families, as was evident from the two affidavits filed in this Hon'ble Court.

J. Mukhopadhaya argued that Section 377 had taken away certain rights for all and not only for homosexual men, and it did not stop anyone from being a heterosexual or a homosexual. Disagreeing, Mr. Desai contended that there was a caveat, since if a homosexual man engaged in any penetrative sex which was natural to him, he would be a criminal under Section 377. Further, he said that they were called sexual minorities not in the numerical sense but because they were disadvantaged groups facing societal marginalisation.

J. Singhvi then stated that many acts could be considered immoral in different parts of India like drinking alcohol, eating non-vegetarian food, etc. When the Judges started hearing this case, they had no idea about homosexuality, since it was a personal matter of individuals. The question was whether Section 377 declared any act as an offence, without creating any class or stigmatising a particular section of population. If it was a matter of societal acceptance, then the judiciary had a limited role in such cases, e.g., single parenthood, etc. Mr. Desai submitted that there was no problem with societal disapproval of certain relations, say live-in relations but problems would arise if such relations were to be prohibited by law.

Thereafter, J. Mukhopadhaya commented that the argument of constitutional validity of Section 377 was not advanced before. Respectfully disagreeing, Mr. Desai contended that the writ petitioner had sought that in the prayer and the Respondents had argued against the constitutional vires of Section 377. But, if it was possible to read down the provision, it should be read down and not be made applicable to adult consensual acts in private. Talking about stigma, J. Singhvi asked whether Section 377 itself was stigmatising or it was a case of societal stigmatisation and disapproval. Mr. Desai argued that criminalisation contained in Section 377 further perpetuated the stigma and in fact gave legitimacy to the societal stigma. If Section 377 was removed, stigma would definitely diminish.

He then emphasised the importance of fundamental rights in the constitutional scheme of Indian legal system and that they were intended to protect the rights of minorities from the majoritarian values. Further, homosexuality was no longer a question of conduct that could be termed as a disorder or disease. It was a part of human condition and must not be regarded as a depravity or a crime. He then

read out excerpts from '*Same Sex Love in India*' to show how this had been part of Indian culture for centuries. He again referred to various cases on Section 377 in order to point out the arbitrariness in the judicial interpretation. The net had been cast so wide that this law was called a 'blackmailer's charge'.

J. Singhvi further asked that why the legislature had not amended the section despite the 172nd Report of the Law Commission and the High Court judgment. The Parliament was the best place to debate this issue and all materials and research should be placed before the legislators. Mr. Desai replied that this was a matter which required a clear, logical approach which only the Court could adopt. He also referred to an all-India survey carried out by the Outlook magazine on sexual habits of Indians that showed that around 46% of women surveyed had oral sex. Doubting the authenticity of the survey, J. Mukhopadhaya observed that this was a random survey done by a magazine and was not backed by scientific research.

J. Mukhopadhaya further stated that not all acts were covered by Section 377. Some acts were covered while others did not fall under the impugned Section. This was a matter to be argued in each case whether the concerned act could be considered as carnal intercourse against the order of nature or not. It was important to have an interpretation of Section 377 to conclude which type of acts would not be covered under Section 377. Mr. Desai submitted that that was not the sort of declaration that was being asked before the Court. Section 377 considered any non-procreative act to be unnatural and was wide enough to cover anything. One could not take the risk of leaving it to judicial interpretation and needed to be read down to exclude adult consensual sexual acts in private.

21st March, 2012

Mr. Goolam Vahanvati, Attorney General of India

Mr. Goolam Vahanvati, the Attorney General of India submitted that he had taken specific instructions and he could clarify that the Government had accepted the correctness of the decision of the Delhi High Court, in as much as it related to decriminalisation of consensual sex between adults. He stated that Section 377 was a pre-constitutional enactment and the basis of the Government's view was an expansive interpretation of Article 14 and 21. The Section violated Article 14 because it exposed a particular class of people to a kind of discrimination. This was the stand of the Ministry of Home Affairs. The brief was sent to the ASG but there was no communication between him and the MHA and the ASG argued the same position as was taken before the Delhi High Court. When the MHA came to know, they clarified that this was not the position. When asked how their position changed in the Supreme Court as compared to the Delhi High Court, Mr. Vahanvati said that the government also learnt and, after the judgment, there was subsequent enlightenment.

Continuation of Mr. Ashok Desai's Arguments

Mr. Ashok Desai then sought to continue his submissions from the previous day.

The Bench asked which acts were covered under Section 377 and how the Section violated Articles 14 and 21 when it was not applicable to homosexuals specifically. Mr. Desai stated that Section 377 had been cast in the widest possible terms. The language included within its ambit homosexuals and heterosexuals. The word "carnal intercourse" included all physical relationships that would result in pleasure. He further submitted that the word intercourse implied two bodies joining for pleasure and was not confined to anal sex but included oral sex, as well as sex with folded hands, as per the interpretation of the courts. The

phrase, "against the order of nature", included sex with the use of contraception as well as oral sex and anal sex within a marital relationship. Mr. Desai then referred to the Outlook Survey that he had submitted the day before, which found that 37% of the population had oral sex. The Bench stated that media reports and surveys could not be relied upon. Mr. Desai submitted that he was relying on the study only to evidence the existence of the acts so that one could not pretend otherwise.

Mr. Goolam Vahanvati, Attorney General of India

J. Singhvi, referring to the Attorney General, observed that if the position was that Section 377 was not applicable to consensual acts in private, then the question of its constitutional validity did not arise. Mr. Vahanvati replied that it was only because of the constitutional restraints that Section 377 could not apply to consensual acts in private. To this, J. Mukhopadhaya said that Section 377 did not talk about private acts, but applied to certain sexual acts, irrespective of where they were committed. Mr. Vahanvati clarified that he was not saying that Section 377 was not applicable to consensual private acts, in fact, as the Section stood before the High Court, it applied to such acts as well. J. Mukhopadhaya said that the State would be the complainant in such an instance and the person who had carnal intercourse would be the accused, the victim could be a man or a woman and privacy could not be looked into. J. Singhvi observed that the Section would cover consensual acts as well. Mr. Vahanvati submitted that there was a right to privacy of all persons. However, privacy was good only up to a point. Certain acts, though consensual, were also offences. For example, a person might consent to get maimed, however, in law it was still an offence.

J. Mukhopadhaya asked whether the declaration of the High Court, that consensual acts were not covered, was good. Mr. Vahanvati submitted that

decision of the High Court was agreeable but it was up to the Supreme Court to consider the matter. J. Mukhopadhaya observed that the law had to be read in a manner in which it did not violate the fundamental rights.

J. Mukhopadhaya further stated that homosexuality was prevalent in a minority. Section 377, however, did not talk about a minority and instead applied to all persons. He said that it appeared that Article 15 did not apply. Mr. Vahanvati agreed and said that the application of Article 15 to the case was doubtful.

Mr. Vahanvati concluded by reiterating that the State had accepted the judgment. However, that stand was not binding on the Supreme Court. He submitted that a number of persons had challenged the judgment and it was for the Court to take the final decision.

Mr. Vahanvati was asked to address the Court in the post lunch session in greater detail.

Continuation of Mr. Ashok Desai's arguments

Mr. Desai then continued his submissions. He submitted that the right to privacy was an important part of the right to life, guaranteed by Article 21 of the Constitution of India. The right to privacy had the effect of shutting out the State. Section 377, as it applied to private consensual acts between adults, violated the right to privacy, dignity and personal liberty. He argued that there had been echoes of *A.K. Gopalan's Case* from the other side, whereby a validly enacted law was sufficient to fulfill the requirements of Article 21. This was incorrect and the fundamental rights were no more considered islands in themselves. He submitted that *A.K. Gopalan* had been overruled by the Supreme Court in *S.R. Das* and *Maneka Gandhi*. The following principles could be derived from a combined reading of the cases:

1. Fundamental rights were not islands in themselves,
2. The procedure had to be fair from the stand point of other fundamental rights, and
3. Due process applied, both procedurally and substantively.

He submitted that the Courts had broadened the narrow language of the framers of the Constitution. In *Francis Coralie Mullin's Case*, the Supreme Court had held that fundamental rights were not to be interpreted in a narrow restricted sense but in a wide and expansive manner. He further relied on *Sucheta Srivastava*'s Case to state that rights had been interpreted in such way that there had been incremental additions, resulting in the expansion of the rights, keeping in mind the limitations of our country. The bar and the Bench participated in the same process of this learning,

Mr. Desai then moved on to his submissions regarding the right to privacy. Mr. Desai submitted that Section 377 curtailed a person's liberty to be himself. Article 21 included the freedom to form consensual relationships and the liberty to live in one's own country without fear of criminalisation. The right to privacy had undergone a case by case development. The right had expanded from the freedom from surveillance, as understood in *Kharak Singh* and *Gobind* and now was a part of personal liberty and included the freedom to be free from psychological restraint. The Courts had created a right to privacy and respect for personal autonomy.

Mr. Desai stated that the right to privacy had developed through a series of judgments in the United States and moved from *Griswold* which dealt with the right of married couples to use contraception to *Eisenstadt*, dealing with the right of unmarried couples to use contraception to *Roe v. Wade* dealing with the right

to abortion to *Planned Parenthood,* also dealing with right to abortion and *Lawrence v. Texas.*

Mr. Desai submitted that sexual identity and the right to form sexual relationships were an inalienable part of the right to privacy under Article 21. He relied on *Gobind* on the right to privacy; *R. Rajagopal v. State of Tamil Nadu* [(1994) 6 SCC 63] on the right to be let alone; *PUCL* on a right to intimacy and confidentiality and *Selvi* on the protection of the body and physical spaces.

Mr. Desai stated that the right to privacy and sexual preference was entrenched in the international law. He referred to Article 17 of the ICCPR and also referred to the decisions of the European Court of Human Rights in *Dudgeon* and *Norris* which held similar laws to violate Article 8 of the European Convention of Human Right which protected the right to a private life. Mr. Desai submitted that the broad legal position was that the international covenants and conventions were not automatically assimilated into Indian Law. However, our Constitution permitted reliance on these instruments for the purposes of interpreting the terms like "reasonable, just and fair."

Mr. Desai observed that this case would have been difficult to argue fifty years ago, but the society had changed since then. J. Mukhopadhaya responded that the times and mindset had changed but sexual orientation had not. He stated that Mr. Desai was reading between the lines of Section 377. The Section, permitted relationships between individuals of the same sex, only certain acts were not permitted. He stated that the term "whoever" meant that the Section covered all sexual acts. The grievance should have been for all persons and not just for men who have sex with men. Mr. Desai responded that the term "carnal intercourse" covered all sexual acts but the real problem was with the term "against the order of nature". He submitted that any act which was outside the

order of the nature would be covered by Section 377, irrespective of the fact that it was committed by a person who was married or not. Therefore, this law was also about marital relationships.

J. Singhvi stated that the Bench had struggled with the issue before them for three weeks. He had read one of the stories in the book *Same Sex Love,* which had been submitted the previous day. The story was about two women in Rajasthan. There were a variety of authors who showed that same sex attraction was natural. They did not talk about lust but of intimate relationships. Now it was purported that such relations were only about sexual intercourse. He noted that this was perverse. J. Singhvi further observed that someone thrust this provision on the Indian society and the Parliament has had no time to reconsider this issue. He said that Ayyappa was born to Shiva and Mohini, who was the female form of Vishnu. Karna was born to Kunti through her ear. There were stories such as these from all parts of India. It was only when the British denounced such acts, we also said that it was wrong. The British started an atmosphere of shame.

J. Mukhopadhaya further stated that Mr. Desai's arguments were confined to a class. A controversy was being made out about classes and minorities. Mr. Desai noted that the Naz Foundation's pleadings covered both homosexuals and heterosexuals. J. Mukhopadhaya stated that the Section started with the term "unnatural offence". Only if the act was unnatural, would it be an offence. Mr. Desai submitted that the Court would have to give some meaning to the term. J. Mukhopadhaya observed that there were two approaches; the first was to declare that the acts were not against the order of nature and the second was to declare the section did not apply to certain acts.

J. Mukhopadhaya further asked Mr. Desai who would be the victim and the accused in a transaction. If the act was in private, then there was no question of

evidence. If there was a complaint then that meant the act was not consensual. Mr. Desai submitted that the fact was that the Section allowed blackmail to take place. A person who consented to an act could later give evidence that the act was non-consensual. He noted that there were three possible remedies – the doctrine of severability could be applied and the offending part of the Section could be severed; a declaration could be given; or an injunction could be granted. J. Mukhopadhaya observed that he wondered how a declaration could be given, as the acts covered were so wide.

J. Singhvi observed that a number of foreign judgments had been read out but one did not have to go abroad as the jurisprudence in India was wide enough. Mr. Desai stated that they were being cited only as a matter of reference.

Mr. Desai said that, in sum, his submission on Article 21 was that the police had to stop at the bedroom door. J. Mukhopadhaya said that there was one argument, that NACO mentioned, that there was no proper space for men to engage in sexual acts so they would go to the railway stations to have sex. He asked Mr. Desai if a declaration to protect this was also sought. Mr. Desai noted that it was sad that our cities were not sensitive to intimate conduct.

Mr. Desai then made his submissions on Article 15. He argued that the term "sex" used in Article 15 should be read to include sexual orientation as well. J. Mukhopadhaya asked whether there was any discrimination on sexual orientation. Mr. Desai said that a question arose that if relations included marriage, then people were discriminated against for indulging in same sex activity. J. Mukhopadhaya said that the question of discrimination did not arise as the Section applied to all persons, whether homosexual or heterosexual. Mr. Desai submitted that non-procreative acts between husband and wife were covered as well. The question was also about sexual orientation. Mr. Desai

argued that sex had to be read to include sexual orientation to give effect to the intention of the framers of the Constitution. He cited two Canadian decisions where sex was held to be analogous to sexual orientation. He concluded that Section 377 discriminated solely on the ground of sexual orientation. In doing so, it penalised a class of people.

Mr. Desai stated that he was not going into the merits of the submission that Section 377 violated the freedom of speech and expression guaranteed under Article 19 of the Constitution.

Mr. Desai then moved on to his submission on Article 14. He submitted that arbitrariness was a ground to strike down a law. He relied on a number of decisions of the Supreme Court, including, *Jai Singhani, Anuj Garg, Lakshmanan* and *Malpe Viswanath Achatya*.

He reiterated that the type of relief that could be given was either an injunction, a declaration or the severing of the Section.

Mr. Desai concluded his submissions by with a quote, "*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, decriminalizing 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.*" He submitted that the fundamental right to privacy had to be applied for all persons and not just a minority.

Mr. Siddharth Luthra, Senior Counsel on behalf of Nivedita Menon and Others, Interveners

Mr. Luthra began his arguments by tracing the history of Section 377. He submitted that the Section could be traced to the offence of Buggery which was punishable under a law of 1533 in England. The offence had ecclesiastical origins. In 1533, Henry VIII revised the common law to introduce ecclesiastical crimes into the common law codes so as to sever the link between the English Church and Rome. The offence of buggery was punishable by death. Subsequently, Queen Mary I restored the jurisdiction of this offence to the Church and it was re-enacted by the British Parliament in 1563 as the Buggery Act, 1563, which was still in force 1861, when the IPC came into force. Mr. Luthra stated that in the early 1800s, an attempt was made to reform the criminal law both in England and in its colonies. Though this measure was considered unacceptable in England, five Codes were created for the colonies, one of which was Macaulay's Draft Penal Code. He then read out the notes on similar sections of the draft penal code where the draftsmen had noted that the sections related to an odious class of offences which had to be bereft of public discussion.

He submitted that in light of the historical context, it was very clear that the origin of the law was religious and there was no question of it surviving. Noting that where there was vagueness, one had to trace it back to the origin of the law so as to interpret the section, he cited the Supreme Court decision in *S.R. Bommai's Case* that held that secularism was a part of the basic structure of the Constitution and could be used to test whether a particular law was constitutional or not. He said that he was not anti-God or religion but if such a law was particular to one religion, then it should not apply as a secular law. He further relied on *State of Karnataka v. Praveen Bhai Togadia* where the Supreme

Court held that secularism was not to be confused with the religious concepts of a single group. The IPC was a criminal law and Section 377, having a religious origin, could not have any force, in light of the Constitution.

To this submission, J. Singhvi asked whether the whole of Section 377 was unconstitutional. J. Mukhopadhaya further asked about bestiality covered under Section 377, whether it also should be struck down because of its religious context. Mr. Luthra submitted that that the Section should be struck down in as much as it applied to men and women. J. Mukhopadhaya then asked about children, as they were considered not capable of giving consent. Mr. Luthra noted that the Section began with the words "whoever" which meant that there had to be an element of voluntariness to the act. J. Mukhopadhaya said that the term "whoever" referred to the accused.

Mr. Luthra stated that the term "against the order of nature" made it clear that the Section had a religious origin. The term "carnal intercourse" included "sexual intercourse" but only when it was against the order of nature, it became an offence.

Referring to the origin of the Section, J. Singhvi observed that there was evidence that it was always natural in India to have such relations. He asked why the Parliament and the Law Commission had not done anything to bring the law in line with the Indian ethos and culture.

The Attorney General, Mr. Vahanvati said that he had an answer. He was in Geneva to address the UN and was asked about India's position on homosexuality. He said that his research showed that England had become so regressive at that time that people would run away and come to India. They took positions in the army only because they had nowhere to go. Section 377 came

down as a puritanical law to bring everyone in line. The Section itself was badly drafted, he submitted. It was unthinkable for the British that men would have relationships with other men and women with other women. Only the traditional forms of intercourse were acceptable to them.

J. Singhvi said that it was sad that the debate in the High Court was only about sexual relations between two men. Mr. Vahanvati agreed. He submitted that the debate should have been multisectoral.

J. Mukhopadhaya stated that it was clear that the Section covered non-vaginal intercourse. He observed that the Constitution preserved pre-colonial law subject to Article 13(1). The question was that to what extent were laws like Section 377 void. He felt that the attitude of society was one that had changed over time, and now the society seemed to accept relationships that were earlier not accepted. Section 377 was imposed upon us and we were forced to change at that time, he concluded.

Mr. Vahanvati submitted that there was indeed a change in the attitude of the society. He said that the society now did accept such human relations. The High Court did not go into the perceptions of society. J. Mukhopadhaya asked Mr. Vahanvati why he was discussing the perceptions of society as the Section covered oral sex, the practice of which was not only limited to homosexual men. Mr. Vahanvati said that the society could change. J. Mukhopadhaya opined that the society had changed. One never used to discuss these issues earlier but now it was being openly discussed in the Court.

J. Singhvi said that sexual activity between two persons of the same sex were prevalent in the past since man became civilized or maybe even before that. It was prevalent now and likely to be so in almost every household and would

remain prevalent in the future as well. He asked how such a prevalent activity could be considered against the order of nature. Mr. Vahanvati submitted that such was the approach at that time. J. Singhvi further asked why the Legislature had not dealt with this law. He agreed that the Courts were bound to deal with the issue once it arose. He felt, however, that the debate should have taken place in a different form.

Mr. Vahanvati stated that he had three answers for this. First, many of the sections of the IPC had outlived their utility. For example, there were a large number of sections on coins, which were now irrelevant. Second, perhaps some sections of society were indeed opposed to the issue. People might not like to see gay men together in public. They had a right to their opinion. Third, there seemed to be an insufficient debate in society and not enough momentum for this issue to reach the Parliament. In response, J Singhvi observed that fashion parades had become very frequent in many parts of the country, much more than earlier. Coca Cola and Nestle Chocolates had become a part of the village life as well. J. Mukhopadhaya added that what might be a minority in the urban areas might well be a majority in the rural areas.

Mr. Vahanvati said that there should have been a discussion in the High Court as to what was against the order of nature. He noted that the Indian society was in the midst of change and there was no answer as to where that would lead. Mr. Vahanvati stated that this case had been decided on a question of fundamental rights which had made the task more difficult. The extension by the courts of the order of nature was strange, as inclusive of everything that did not lead to conception. J. Mukhopadhaya agreed and said that instead, there was no discussion about the order of nature at all. He asked about an impotent person, who could not procreate, and whether his participation in any sexual act was

against the order of nature. J. Singhvi also asked whether the use of contraceptives was against the order of nature.

J. Singhvi stated that there should have been a debate in an appropriate forum. Two Judges in the High Court and two Judges in the Supreme Court would decide for the entire society. Mr. Vahanvati agreed that it would be desirable to form one's viewpoint after a full debate. J. Mukhopadhaya gave another example, that of a mother breastfeeding her child. He asked whether it was a sexual act. J. Singhvi observed that people were very different in public than they were in private.

Mr. Vahanvati said that he would submit a note, placing on record materials that led to the enactment of Section 377. He submitted that the judgment was acceptable to the Government but that did not preclude the Supreme Court from hearing the matter.

J. Singhvi reiterated that a debate about such kinds of matters should be in the Parliament. He observed that people had fancy new cars these days and there were daily reports of people drinking and driving and killing people, sometimes such persons were not even charged with serious offences. Instead of the issue being considered by the Parliament, they were coming to Court. Mr. Vahanvati agreed that issues, such as the one highlighted by J. Singhvi, needed the active consideration of the Parliament.

J. Singhvi continued to state that everyday he read news reports quoting observations of the Judges out of context. He asked who was going to "*press the button on the press*". He wondered if the press knew the consequences of what they were reporting. Mr. Vahanvati agreed, stating that this too was an issue which needed consideration.

Mr. Luthra then continued his submissions.

He submitted that the judgment of the High Court read the law in such a way that it permitted consensual acts in private but left other acts as offences. He cited *'The Sodomy Offence: England's least Lovely Criminal Law Export?'* written by Justice Michael Kirby. Justice Kirby traced the origin of the offence to the Bible. He submitted that if the origin of any law was religious, it could not survive, as it violated the principle of secularism.

J. Mukhopadhaya asked how the principle of secularism should be used to test a law. He asked whether all laws of Parliament, which were religious in nature, had to be struck down. Mr. Luthra submitted that the purpose of the legislation was religious in this case. J. Mukhopadhaya asked whether the Section said anything about religion. In fact, the law was secular in its application. Agreeing that the application of the law was secular, Mr. Luthra however argued that the origin of the law was religious. J. Mukhopadhaya asked whether all laws passed by the British had to be struck down. He stated that the Court could test laws on the basis of the Constitution. Mr. Luthra stated that the secularism was a guarantee of the Constitution, which J. Mukhopadhaya found untenable.

Mr. Luthra submitted that the IPC contained a chapter on General Exceptions which applied to all offences in the IPC. Section 87, contained in the Chapter, provided that any act which was not intended to cause death or grievous hurt or not known to be likely to do was not an offence by reason of the harm it may cause to a person above the age of 18 who had consented to the harm. He noted that the answer was contained in Section 87. If Section 377 was to be read with Section 87 then it was very clear that the Section would not apply to consensual acts, even if harm was caused. He cited two cases, where persons willingly

taking part in fencing and wrestling respectively, had died. In both cases, it was held that no offence had been committed.

J. Mukhopadhaya stated that Section 377 could be read with Section 87 in individual cases, but no general declaration could be given to that effect.

Mr. Luthra then cited the *doctrine of desuetude*, by which laws which were obsolete became unenforceable because of a history of non-enforcement. He submitted that the extent of the application of Section 377 to consensual sexual acts had long been in question. The last reported cases in respect of consensual acts were over 80 years old. He said that the Section could no longer be enforced in public interest. He said that it must be considered whether a case was made out for decriminalization of consensual sexual acts between adults in private. J. Singhvi responded that there was nothing like "decriminalisation", the only thing which had to be considered was whether the law was constitutional or unconstitutional.

J. Singhvi then addressed all counsels appearing in the matter and stated that the Bench would like materials to be placed before them, which threw light on how different religions dealt with the subject. He submitted that they were not going to rely on religious text but would nonetheless like to know.

Mr. Dayan Krishnan, Counsel on behalf of Dr. Sekhar Seshadri and Others, Interveners

Mr. Dayan Krishnan submitted that he represented a group of mental health professionals. He was asked if he was a party before the High Court. He replied that he was not, but the Supreme Court had allowed him to intervene in the present matter. He would only take ten minutes of the Court's time and would only make two short points.

Mr. Krishnan noted that homosexuality was not considered a mental disease. J. Mukhopadhaya stated that the issue before the Court was not whether homosexuality was a disease or not. There were two guidelines, the Diagnostic and Statistical Manual of Mental Disorders – IV (DSM-IV) of the American Psychiatric Association (APA) and the International Statistical Classification of Diseases and Related Health Problems 9 and 10 (ICD 9 and ICD 10) of the WHO. The APA took the view in 1993 that homosexuality was not a disease but a natural variant of sexuality.

J. Mukhopadhaya asked if there were any sexologists amongst the doctors that Mr. Krishnan was representing. He stated that Section 377 was not about homosexuals and the Court was not deliberating on the mental element of homosexuality.

J. Singhvi asked if there was any study about mental illness in relation to the commission of acts covered by Section 377. Mr. Krishnan submitted that there were guidelines by the American Psychological Association which referred to LGBT persons. J. Mukhopadhaya asked which act was referred to in the guidelines. Mr. Krishnan observed that both the DSM and the ICD were accepted in India.

J. Singhvi observed that the number of homosexuals estimated to be in America were 15 million, about one third of the population. Fortunately, he said, the number as per NACO was only 22 lakhs in India. There had been a complete digression and the case had become about homosexuality.

Mr. Krishnan sought to draw the reference of the Court to the brief filed by the APA in *Lawrence v. Texas.*

J. Mukhopadhaya told Mr. Krishnan that his time was up and that he could file the written submissions with his arguments.

Ms. Meenakshi Arora, Counsel on behalf of Ratna Kapur and Others, Interveners

Ms. Meenakshi Arora stated that she was appearing on behalf of a number of law professors.

J. Singhvi stated that the Bench was not concerned with homosexuality as an issue and were only concerned as to the constitutionality of the Section. He requested Ms. Arora to confine her submissions to the constitutional grounds.

Ms. Arora submitted that she would. She stated that for this Section to have been enacted as part of a law, there had to be a compelling state interest. J. Singhvi asked whether the law professors had filed a PIL. Ms. Arora stated that they had not. J. Singhvi asked if they had written to Members of Parliament to change the law. Ms. Arora responded in the negative. J. Mukhopadhaya asked if they were teaching the law with the same understanding as they were arguing it.

Ms. Arora agreed that the professors should have given their research to the Members of Parliament. She submitted that she had placed their work before the Court. Further, she would place judgments which had recommended legislations relating to child sexual abuse and sexual harassment. However, even 13 to 14 years after these recommendations, no changes had been brought about.

Ms. Arora argued that in a matter like this, the Court could give a suitable relief by reading in, reading down or undertaking a purposive construction of the law.

J. Singhvi stated that the ratio of the population in urban and rural areas was about 30:70. He asked whether the researchers had interviewed anyone in the

villages. Ms. Arora admitted that most of the work was done in the urban areas. J. Singhvi observed that the rural India had a totally different set up as compared to the urban set up. J. Mukhopadhaya asked if there were more homosexual men in rural areas than in urban areas. Ms. Arora submitted that she was not placed to answer the query at that moment but would place information in that regard before the Court.

J. Singhvi asked Ms. Arora to assist the Court on constitutional issues. Ms. Arora submitted that a statute was a living document and had to be interpreted in the light of contemporary changes in the society. She urged the Bench to read Section 377 in present day times. She further submitted that a penal statute had to be strictly construed but Section 377 created ambiguity. The Section had to be clearly interpreted either by a process of reading in, reading down or purposive construction.

J. Mukhopadhaya asked Ms. Arora what the term "against the order of nature" meant, as one religion could consider something natural while another would not. Ms. Arora replied that Section 377 had to be construed in the context of the Constitution. She submitted that Section 377 was *de hors* religion and was a secular law. J. Singhvi stated that the Bench would stay clear of religion as they would be next asked what religion meant.

The Bench informed Ms. Arora that she would be given time to complete her submissions the next day, after Mr. Vahanvati completed his arguments.

22nd March, 2012

Mr. Goolam Vahanvati, Attorney General of India

The Bench had asked the Attorney General of India, Mr. Vahanvati, to address the Court, on the previous day, with more detailed submissions.

While talking about the conditions prevailing in India when the British enacted Section 377, Mr. Vahanvati read out excerpts from James Lawrence's book on British India (*Raj: The Making and Unmaking of British India*). He stated that while buggery was a capital crime in England till 1860, no such law existed in India. He argued that imposition of Section 377 was akin to sexual imperialism, since it stemmed from the outrage of the Christian missionaries in India regarding the sexual immorality of the 'natives'. Section 377 was brought in to deal with a situation that had arisen in the Victorian society and it was never meant to reflect the Indian laws, mores and traditions.

He then referred to similar laws on carnal intercourse against the order of nature in Malaysia and Singapore. Out of different approaches to the concept of 'against the order of nature', sexual conduct against the order of nature constituted just one aspect. The concept of 'against the order of nature' was rooted in the natural law. Activities which would be considered against the order of nature might include children born out of wedlock, children of single unwed mother, IVF, cloning, stem cell research, G.M. seeds, test-tube babies, etc.

J. Singhvi again enquired what practices were prevalent in India before 1860 and whether these practices were acceptable in the Indian society, e.g., group sex, buggery, etc. AG noted that the Indian society was relatively freer than the Victorian society in its attitude towards homosexuality, though even Indian society was essentially conservative in nature. J. Singhvi further asked whether it

was in consonance with the order of nature in Hindu society too, since even Hindus had practices considered to be immoral like brothers having a common wife, bigamous marriages, etc. The Bench wanted to know more about what existed in past cultures and traditions of India and would like to study materials on the same from different sources.

J. Mukhopadhaya also asked whether carnal intercourse was same as sexual intercourse, e.g., in rape too, there was no consent. AG argued that rape was penile vaginal while Section 377 related to penile-non-vaginal acts. Section 377 talked of acts against the order of nature while Section 376 was within the order of nature but without consent. J. Mukhopadhaya further noted that the draft IPC had provisions on 'unnatural lust' but Section 377 did not mention that. AG submitted that it was subsumed under the rubric of 'against the order of nature' and would cover any act that would be deemed as unnatural. Thereafter, J. Mukhopadhaya observed that Section 377 envisaged a victim and an accused, since if there was a complainant, it could not be said to be a private act.

Continuation of Ms. Meenakshi Arora's submissions

Ms. Arora continued her submissions from the previous day.

She said, in the context of the question put to her the previous day asking if any of the academics she represented had interviewed persons in rural areas for their research, four of the legal professors she represented worked in the rural areas - Babu Mathew, Ratna Kapur, Oishik Sarkar and Deepika Jain. Ms. Arora said that the Jindal Global Law School had recently released a report on the impact of the Delhi High Court decision and had found that it had a positive impact on many people.

She stated that she would first deal with the issue of whether there was a compelling state interest at the time of the enactment of the statute. She submitted that the climate in India was freer than in England. Many persons ran away from Britain to get away from the Victorian repression. In India, sex between persons of the same sex was never treated as immoral. The British through Section 377 imposed their cultural values on the native population.

J. Singhvi said that he had two questions. First, was there any material to show that sex between two men was not an offence or considered a sin prior to the enactment of IPC in the 1860. Second, how many Britishers were convicted under Section 377. He stated that Mr. Grover had furnished a list of 150 cases which covered the time of British rule as well. However, there was not a single case of a British man. Ms. Arora submitted that it was possible that the British men were not prosecuted. J. Singhvi said that sadly this still did happen. He said that he had seen a documentary where Andhra Pradesh was shown to be the capital of trafficking of young girls. Money was being offered to them from Europe and West Asia. The parents were often so poor that they were willing to sell off their girls. He said that the girls were mostly between the age of 4 – 17 years and hundreds of them had become victims of HIV/AIDS.

Ms. Arora replied that many sex workers from Andhra Pradesh were forcibly tested for HIV and detained against their will. She submitted that they had gone to Court against their detention. J. Mukhopadhaya stated that there were many prostitutes in India. Ms. Arora responded that she was referring to HIV, since there was a mindset earlier that sex workers were the cause of HIV. J. Mukhopadhaya then asked about sex tourism and stated that one did not want India to become a hub of sex tourism. Ms. Arora agreed that it would not be desirable for India to become like certain other South-East Asian Countries She

continued, on the point of HIV, that the when the UN came out with non-discrimination guidelines for HIV, it changed the perception of HIV.

She then submitted that human dignity had to be respected, irrespective of a person's sexual orientation. To discriminate on the basis of a person's sexual orientation would violate Articles 21 and 14. To this, J. Mukhopadhaya asked whose dignity was being violated by Section 377. Was it that of the accused? He observed that the majority, that is, heterosexuals, had dignity as well. If that was the case, he asked Ms. Arora why her submissions were to the effect that the dignity of those with a particular sexual orientation was violated. Ms. Arora argued that it was the homosexual men who had become the target of this Section. J. Mukhpadhaya asked on what basis she made this submission, as the Section itself made no distinction between heterosexual persons and homosexual persons. Ms. Arora agreed that though the Section made no distinction, there was a target group which was the homosexual men. J. Mukhopadhaya observed that the target group was not before the Court.

Ms. Arora further submitted that there was still a question of the applicability of the Section to the act of sodomy. J. Mukhopadhyay responded that a case of sodomy was not before the court. Ms. Arora contended that at the very least, the Section was ambiguous. In such a situation, a court may read into, read down or take a purposive interpretation and in doing so, make a declaration. J. Mukhopadhaya asked why Ms. Arora was talking about orientation when the case was about an act. He asked why her clients were conducting research on men who have sex with men and not, for example, lesbians or heterosexual couples. Ms. Arora stated that the matter was therefore about a particular sexual preference. Disagreeing, J. Mukhopadhaya stated that the case was about a

sexual act. Ms. Arora submitted that the term "sexual preference" would cover sexual acts as well.

Ms. Arora then noted that there was no debate when the IPC was framed. Any legislation must be drafted with public consultation. J. Singhvi stated that this was the case with the entire code and not just with Section 377. Ms. Arora responded that there had to be a compelling state interest for the statute to be valid. J. Singhvi observed that the principle of compelling state interest was not prevalent at the time of framing of the IPC. Ms. Arora submitted, however, that a law had to be the articulation of the common will of the people. J. Singhvi responded that this law represented the dominating will of the church which compelled the enactment of the law.

Continuing her submissions, Ms. Arora stated that in the background laid down by her, Section 377 was vague and violated the dignity of homosexual men. J. Mukhopadhyay asked how the section was vague. He reiterated that whatever was considered "natural acts" were known to the society. He further asked whose dignity was being violated and whether the accused under Section 377 formed a class of people. Ms. Arora submitted that she would not re-enter into these arguments, as much had been placed before the Court both by herself and the counsels arguing before her.

Ms. Arora then made submissions on the interpretation of Section 377. She submitted that in *State v. S.J.Choudhary* [(1996) 2 SCC 428], the Hon'ble Supreme Court held that statues had to be interpreted in contemporary times. She relied on Bennion on Interpretation of Statues and submitted that the law was always speaking and an Act was embedded in its own time. She submitted further that this law needed to change.

On the issue of morality, Ms. Arora argued that everything which was immoral was not necessarily illegal. A law that was made on the Victorian notions of sin needed to be interpreted by the court. She submitted that acts between consenting adults needed to be considered and this might be done by the Court by way of a purposive interpretation. The section had to be read in contemporary times. To this, J. Singhvi responded that in the context of what were now known as "emerging economies", there were two divergent views about economic development. The Court was not going to enter into that debate. Ms. Arora stated that the Court could interpret the Section considering the overall scenario in the country. J. Singhvi responded that the best tool of interpretation was common sense.

Concluding her arguments, Ms. Arora submitted that she had annexed the documents on which she relied, to the intervention application. She further stated that they had been considering placing on record the *Kamasutra* as it was a text from the third century, but decided against it. J. Singhvi responded that the Bench would not mind if the book was placed on record along with other references, which had now become voluminous. He stated, in jest, that there was a book about the Kings of Jaipur, where one of the kings was 4 times the size of Mr. Saran. Mr. Saran, continuing the joke, mentioned that he had been trying to reduce weight for a month. J. Singhvi responded that the king then must have been five times Mr. Saran's weight.

Mr. T.S. Doabia, Senior Advocate on behalf of the Government of the National Capital Territory of Delhi

Mr. Doabia submitted that the Delhi Government agreed with the affidavit filed by the Government of India. The decision was taken on Monday. J. Singhvi

asked him what he meant by stating the decision was taken on Monday. Was the Government sleeping till then, he enquired. J. Mukhopadhaya asked if the Government could at least make a statement or come up with an explanation. Mr. Doabia responded that the Govt. of NCT Delhi had chosen to go with the decision of the Central Government. J. Mukhopadhaya observed that in the same meeting, where the Government decided to go with the Central Government, they could have decided to amend the law so that at least in one state, the law could have been removed.

Rejoinder Arguments by the Appellants

Mr. Amarendra Saran on behalf of Delhi Commission for Protection of Child Rights

In his rejoinder, Mr. Saran made the following submissions:

1. Section 377 did not violate the privacy of individuals. Unlike search and seizures, domiciliary visits, etc that constituted direct violations of privacy, Section 377 resulted in incidental violation of privacy. Infringement had to be the direct and inevitable effect of law and not only an incidental effect.

2. No fundamental right was absolute and the State could impose reasonable restrictions on the same.

3. Irrespective of the Law Commission's recommendation of decriminalization or the fact that other countries had decriminalized homosexuality, it was for the Parliament to amend the law and not the Court's prerogative (*Gian Kaur's* case).

4. Only the Parliament could make laws. In fact, the Parliament had applied its mind and decided to retain the colonial law after the 1955 amendment. The Courts had limited powers in deciding the vires of a criminal offence, since it was for the Sovereign to prescribe offences. If a law did not violate Part III of the Constitution and offered a reasonable procedure then it ought to be upheld. This case was about the vires of Section 377 and not about reading down or interpretation of Section 377. J. Singhvi said that there was a plethora of judgments which had held that if two interpretations were possible, one that saved the constitutionality should be adopted.

5. Just because penile-non-vaginal sex was widely prevalent in society, it did not mean that it should be decriminalized. By that logic, even dowry, bribes, etc should not be offences. Further, different acts were prevalent in different times and the Parliament had to decide which acts would be made offences. One did not have to refer to ancient shastras and customs to see whether it was a crime or not at that time but needed to look at the law prevailing in the current times.

6. Mere misuse of law was not a ground for unconstitutionality. Like Section 377, many other laws were prone to misuse, like Section 498A. In fact, most laws were widely misused.

7. Section 377 was not vague. Petitioner had admitted that Section 377, IPC referred to penile-non-vaginal sex which was against the order of nature. Accordingly, there was no need to further delve into the meaning of the text of the law. Thus, vagueness could not be a ground for nullifying a law unless no meaning could be cited. J. Singhvi noted that by this logic, even penile non-vaginal sex between husband and wife would be covered.

Replying in affirmative, Mr. Saran said that penile non-vaginal sex between husband and wife too was covered and there had been cases also.

8. No due process clause existed in the Indian jurisprudence.

9. Regarding the contention that Section 377 impeded health services, it was argued that HIV prevalence amongst Injecting Drug Users (IDUs) was higher than HIV prevalence amongst MSM. So even the NDPS Act must be declared ultra-vires for hampering access to health services of IDUs.

10. Reading down Section 377 would be violative of the Constitution, since it would introduce a new element in the application of fundamental rights. Because all fundamental rights were age neutral, especially qua right to privacy and dignity, this would result in an anomaly, creating an unreasonable classification between adults and minors. J. Mukhopadhaya observed that certain rights were only given to adults like engaging in sexual acts, marriage, etc. Mr. Saran argued that minors too were entitled to the right to privacy and dignity and could not be deprived of the same.

11. There was no unanimous opinion whether homosexuality was natural or not. There existed inadequate date to conclude that there was a biological factor that produced a particular sexual orientation. The debate of 'nature v. nurture' still continued so the Courts could not come to a conclusion that it was natural. In fact, homosexuality could be treated and altered psychologically.

12. In conclusion, he summarized his arguments:

    a. Legal framework was extremely tenacious.

b. It was not the job of the Court but that of the Parliament to make or amend laws. Courts should refrain from making the law but only decide on merits.

c. The basic foundation of the Naz petition was erroneous.

d. Foreign judgments were not relevant in this regard. *Gian Kaur's* judgment had settled the issue.

e. Under Article 15, 'sex' only meant 'gender' and not 'sexual orientation'.

f. Article 14 was not violated as no class was created by Section 377.

g. Reading down could not be done.

h. What was prevailing before 1860 was not relevant.

Mr. H.P. Sharma, on behalf of Mr. B.P. Singhal

Mr. Sharma began his rebuttal arguments by referring to a Supreme Court case on the effect of State not filing an appeal in a given case. While noting the decision, he brought to the notice of the Bench the concept of 'societal pollutants'. He referred to another case of withdrawal of prosecution. J. Mukhopadhaya asked why the issue of locus was being raised at this stage. Mr. Sharma replied that the State had not appealed against the High Court judgment.

Mr. Sharma then cited a judgment of Justice Markandey Katju on the limits of judicial power and how the Courts could not take over legislative functions. J. Singhvi asked how was it beyond the powers of the Court in case of a constitutional challenge. Otherwise, who would decide? At best, one could

argue that High Court decision was erroneous. Mr. Sharma further submitted that Christianity had given dignity and respect to the Indians and the institution of Court. These were secular laws. J. Mukhopadhaya then asked Mr. Sharma to confine his arguments only on merits.

Mr. Sharma then contended that what was conceived as against the order of nature was what was immoral, illogical and irrational. Section 377 was clear and not vague in its proscription of carnal intercourse against the order of nature. Offences were meant for everybody, irrespective of adult or minors. Homosexual persons were not being discriminated in any field, including employment; instead they had even got societal recognition like Padmabhushan, etc. Further, he pointed out that the Attorney General had not placed any material on the impact of the decision on other laws. Also, morality was a paramount constitutional principle, whether religious or public morality. He offered to present materials from Manusmriti and said that laws prohibiting homosexuality existed in pre-British India too.

Mr. Praveen Agarwal on behalf of Suresh Kumar Koushal

His arguments were limited to countering Mr. Nariman's submissions on the interpretation of statutes in the context of the effect of the headings in a statute. Mr. Agarwal referred to two cases and argued that while one could consider headings in interpreting a particular provision, the headings could not give a different effect than what was explicitly stated in the words of the provision.

27th March, 2012

Mr. H. Ahmadi on behalf of All-India Muslim Personal Law Board

Mr. Ahmadi made the following submissions:

1. For an interest to be considered as a right, it was necessary that it should not cause any harm. In the present case, there was a propensity of harm, since anal sex was a high risk activity and was more at risk of HIV transmission. J. Singhvi asked whether any data was available that anal sex was a high risk activity. Mr. Ahmadi argued that the Petitioner itself had admitted that MSM were a high risk group, as mentioned in the NACO affidavit and the High Court judgment. J. Singhvi noted that these activities were recognized in India and were prevalent, much before the advent of the Constitution or even the British rule. If they were not prevalent, they would not have been depicted on the temples in Khajuraho, Konark, etc. Indian society after British rule had become a differently-moulded society and even 20-30 years back, it was a taboo, not the acts but to have any public discussion on the same.

2. J. Singhvi further observed that the same activities, which were considered as against the order of nature, were now being done through out the world. Nobody was being asked to do a survey. He referred to the word '*thekedar*' wherein few people had become the guardians of liberty while few others had become the guardians of religion and culture. While some could be touted as crusaders for liberty, others would become preservers of religion. However, 99% of people did not know about religion or culture. Nobody knew about '*dharma*'. If they knew, there was no reason for the current debate. The first point was about duty, nobody could live beyond duty. J. Mukhopadhaya noted that the basic point was that a class of people was

being harassed by a particular provision so a declaration was being asked for.

3. Mr. Ahmadi submitted that the High Court decision was based not on reliable facts, since the High Court did not clarify the foundational fact of the petition that Section 377 led to the persecution of homosexuals as a class. J. Singhvi commented that the petition was shabbily drafted and there was no foundation in facts. If the first order of the High Court did not exist, then this debate would not have been there. High Court did not check the facts because this Hon'ble Court had remanded the matter back to the High Court.

4. Mr. Ahmadi then argued that Section 377 was gender neutral and covered voluntary acts of carnal intercourse against the order of nature. He referred to *Fazal Rab Chaudhary's* case to state that consent was irrelevant in Section 377 and also noted that if Section 377 was restricted only to penile-anal sex, then other acts of sexual perversity would be left out (*Childline Foundation* case). Further, the expression 'order of nature' could not be differently interpreted in case of women or minors and Section 377 could not be given restrictive interpretation, since it was meant to cover all acts of sexual perversity.

5. If consensual acts could not be intruded into, then it would be a wide argument, thereby validating acts like group sex, incest, etc. He then referred to J. Scalia's dissenting opinion in *Lawrence v. Texas*. In terms of right to privacy, Mr. Ahmadi argued that both cases of *Kharak Singh* and *Gobind* said that every facet of privacy was not a fundamental right, since right to privacy was not a fundamental right. Even assuming there was a right to privacy, it could be restricted by reason of public morality. He then

referred to *Soumitri Vishnu* and *Gian Kaur* cases to argue the proposition that only the Parliament was entitled to amend the laws.

6. Mr. Ahmadi further argued that the High Court had wrongly applied the decisions of the foreign courts in the present case. The US decisions were based on the due process clause in the US Constitution while the South African Constitution had explicitly mentioned sexual orientation as a prohibited ground of discrimination. So the decisions of these Courts would not be applicable in India. Also, *Maneka Gandhi* case was only restricted to procedural reasonableness while *Ashok Kumar Thakur* had clarified that the rule of strict scrutiny was not applicable in India. J. Singhvi asked whether there was a case of an identified homosexual who was convicted under Section 377, since the list provided by the Petitioner contained mostly cases of non-consensual sex or those against minors.

7. Mr. Ahmadi then submitted that the doctrine of severability, as argued by the Petitioner, was not reflected in the five principles laid down in the *RMDC* case, especially the principle 2, as interpreted by jurist Mr. H. M. Seervai. This rule could not be relied upon in the current case. On the principle of reading down, he argued that one could not read down by doing violence to the language of the section. The legislative history of Section 377 itself indicated which acts were supposed to be covered by Section 377. He said that he would prepare a note in response to AG's submissions, since the latter was not based on reliable data but premised on the diary of one English soldier. As was well-known, the western writers had a tendency to 'puff' up the Indian mysticism and could not be relied upon.

8. Homosexuality was prohibited in Islam. Sharia prescribed death by stoning as punishment for sodomy. The Quran was explicit that it condemned homosexuality but there was some debate about the extent of punishment that was meted out.

At this time, Mr. Ram Murthy, Petitioner in person, interjected and said that he was not given an opportunity to address the Bench on this issue. Reprimanding him, J. Singhvi stated that everybody had been given a chance to speak and asked him to sit down.

Mr. K. Radhakrishnan, on behalf of Apostolic Churches Alliance, Kerala

Mr. Radhakrishnan made the following submissions:

1. The 'order of nature' was not elusive and had a definite meaning. It was not a vague phrase. Article 21 could not be stretched to any extent and one had to take into account the distinction between sexual offences and unnatural offences. Apart from Section 377, Sections 107 and 109 were important as they dealt with abetment of a crime.

2. Further, Section 377 came under Chapter XVI of IPC "Offences affecting Human Body". The word 'affecting' was important, since the human body was affected by HIV/AIDS. The Petitioner had claimed that they were being treated as second class citizens but a sound mind could exist only in a sound body.

3. Mr. Radhakrishnan submitted that Sections 269 and 270 of the IPC, which penalised transmission of life threatening infectious diseases, were not brought to the notice of the High Court. After the High Court judgment, if two persons were indulging in homosexual activity and if they transmit

HIV to either of them, then the offending party could not be prosecuted. J. Mukhopadhaya noted that the High Court judgment did not mention that Section 377 did not cover homosexual acts. Mr. Radhakrishnan argued that consenting adults in private included acts between two men too who could contract HIV. The Petitioner was a NGO, ostensibly working for the rights of homosexual men, but it was drifting away from its duty by organizing homosexual men. The High Court declaration was absurd, since it retained the offence but read it down by a process of legislation.

4. Mr. Radhakrishnan further argued that Section 377 did not have a theocratic origin. Prohibition on homosexuality was prevalent in B.C and in the first half of A.D. This was not transplanted from England and Macaulay, in the process of drafting IPC, had taken Indian conditions into account. In terms of sexual orientation, he submitted that sexual orientation could not be stretched to override Section 377. One had to be mindful of impact of the impugned judgment which would result in legalizing gay prostitution, gay marriages, rapid spread of HIV, etc. The High Court declaration was incorrect and ought to be overruled.

Mr. Purushottaman Mulloli, on behalf of JACK

He began his arguments by saying that he was standing before the Bench against the might of NGOs, who had the support of Bill Gates and Bill Clinton. The Petitioner claimed that it was working amongst MSM but if these acts were in private, the how did the NGO have a programme? How would the NGO know if these were consensual acts by adults in private?

He argued that this was a media-directed campaign and the relief that was asked in the petition was granted by the High Court. This petition was filed in the

Court with a planned approach in mind. When the High Court dismissed the petition in 2004, no media person asked for his reaction, though he was a party to the case. Further, the submissions made by the AG completely ignored the issue of HIV/AIDS while the petition was filed precisely for that reason. One was still looking for proper scientific evidence on the extent of HIV/AIDS in India. Neither the Ministry of Health nor the National AIDS Council had provided scientific evidence on the fact that MSM were a high risk group, despite repeated requests.

He then argued how HIV/AIDS was used as an excuse to get favourable judgments in other cases too; one was on medicines while the other was on blood banks, wherein professional donors were stopped from donating blood. He also stated that he had knowledge of secret information but he was being threatened and if he disclosed then his life would be in danger. The J. Singhvi asked him to confine his submissions to law and not make general statements in the Court.

Mr. Ram Murthy, Petitioner in Person

The Judges then allowed Mr. Ram Murthy to address the Court for few minutes. He began by asking a question "*If A rapes B, B complains, but then A says that this was private consensual sex, then who would be the accused*?" The High Court judgment would cause irreparable harm to the society. He also argued that Naz Foundation was not doing any HIV/AIDS prevention work and the High Court did not verify the claims of Naz Foundation. They had demolished all other fundamental rights, despite being a minuscule section of the entire population.

He further stated that heterosexual sex was normal and led to procreation while homosexual sex led to disease. Only natural law could exist in the private sphere. He was then asked to conclude his arguments.

The Bench then reserved the judgment. All parties were given two weeks to file their written submissions.
