Notes of Proceedings in
Suresh Kumar Kaushal v. Naz Foundation

February 23 to March 27, 2012
Supreme Court of India

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CHRONOLOGY OF DATES

1994	ABVA (Aids Bedhbav Virodhi Andolan) files a petition in the Delhi High Court challenging the constitutional validity of Section 377
Jan 2001	Petition dismissed as ABVA as a group becomes defunct and does not appear in the matter
December, 2001	Naz Foundation files a petition challenging Section 377 in Delhi High Court.
2002	JACK filed an intervention in the Delhi High Court, on the ground that s377 was required to prevent HIV from spreading.
2003	The Government of India (Home Ministry) filed an affidavit in the Delhi High Court supporting the retention of s377, on the grounds that criminal law must reflect public morality and that Indian society disapproved of homosexuality.
2004	The Delhi High Court dismissed the Naz petition, on the ground that the petitioner, the Naz Foundation, was not affected by Sec 377 and hence had no 'locus standi' to challenge the law.
2004	The Delhi High Court rejected a review petition filed which challenged the above-mentioned order.
2006	On an appeal filed by Naz Foundation, the Supreme Court passed an order remanding the case back to the Delhi High Court so the matter could be heard on its merits.
2006	The National Aids Control Organization (NACO) filed an affidavit in the Delhi High Court, stating that the enforcement of Sec 377 is a hindrance to HIV prevention efforts.
2006	An intervention was filed by B.P. Singhal in the Delhi High Court, stating that homosexuality is against Indian culture and that the law needs to be retained.
2006	An intervention was filed by Voices Against 377, supporting the petitioner and stating that Sec 377 is violative of the fundamental rights of LGBT persons.
18.09.08	The matter was posted for final arguments before Shah CJ and Muralidhar J of the Delhi High Court.
7.11.08	The matter was reserved for judgment, after 12 days of hearing in the Delhi High Court.
2.07.09	Delhi High Court judgment in Naz Foundation v. NCR Delhi delivered.
7.07.09	First SLP filed in the Supreme Court by Suresh Kumar Koushal challenging the Naz Foundation judgment.

2009	Fifteen other SLPs challenging the Naz Foundation judgment were filed by the following: • the Apostolic Churches Alliance, tr its Bishop; • SK Tizarawala; • Bhim Singh; • B. Krishna Bhat; • B.P. Singhal; • S.D. Pratinidhi Sabha & Anr; • the Delhi Commission for Protection of Child Rights; • Ram Murti; • the Krantikari Manuvadi Morcha Party; • Raza Academy; • the Tamil Nadu Muslim Munnetra Kazhagam; • the Utkal Christian Council; • Joint Action Kannur; • the All India Muslim Personal Law Board; • Trust Gods Ministry.
2009-11	Interventions supporting the Naz judgment were filed by the following: • Minna Saran and 18 other parents of LGBT persons; • Sekhar Seshadri and12 other mental health professionals; • Nivedita Menon and fifteen other academics; • Shyam Benegal; • Ratna Kapur, Babu Matthew and other law academics.
13.02.2012	Final arguments before the Supreme Court commenced.
27.03.2012	The matter was reserved for judgment by the Supreme Court, after 15 days of arguments over 6 weeks.

LIST OF ADVOCATES ARGUING THE CASE

For the petitioners:
Mr Amarinder Sharan, Senior Advocate, representing the Delhi Commission Protection Child Rights (DCPCR).
Mr Praveen Agrawal, representing Suresh Kumar Koushal (astrologer).
Mr Sushil Kumar Jain, Senior Advocate, representing Krantikari Manuvadi Morcha.
Mr K. Radhakrishnan, Senior Advocate, representing Trust Gods Ministry.
Mr H. P. Sharma, representing BP Singhal.
Mr V. Giri, Senior Advocate, representing the Apostolic Churches Alliance and Utkal Christian Foundation.
Mr Huzefa Ahmadi, representing the All India Muslim Personal Law Board (AIMPLB).
Mr Ajay Kumar, representing SK Tizarawala (a representative of Baba Ramdev).
Mr Purshottaman Mulloli, petitioner in person, from Joint Action Council, Kannur (JACK).
Mr Ram Murti, petitioner in person.

For the respondents:
Mr Fali Nariman, Senior Advocate, representing parents of LGBT persons.
Mr Anand Grover, Senior Advocate, representing the Naz Foundation.
Mr Shyam Divan, Senior Advocate, representing Voices Against 377.
Mr Ashok Desai, Senior Advocate, representing Shyam Benegal.
Mr Siddharth Luthra, Senior Advocate, representing Nivedita Menon and other academics.
Mr Dayan Krishnan, representing Shekhar Seshadri and other mental health professionals.
Ms Meenakshi Arora, representing Ratna Kapur and other law academics.

For the Government:
Mr Goolam E. Vahanvati, Attorney-General, representing the Union of India.
Mr P.P. Malhotra, Additional Solicitor General, representing the Union of India, Home Ministry.
Mr Mohan Jain, Additional Solicitor General, representing the Union of India, Health Ministry.
Mr T.S. Doabia, Senior Advocate, representing the State of Delhi.

COURT PROCEEDINGS

*The final arguments in the case were heard by a Division Bench comprising Justice **G.S. Singhvi** and Justice **Sudhansu Jyoti Mukhopadhaya** over a period extending from 13 February 2012 to 27 March 2012.*

13 February 2012 - Mr. Praveen Agarwal

Praveen Agrawal, the lawyer for Mr Suresh Kumar Kaushal (the petitioner, an astrologer), began his arguments.

Mr Agrawal argued that law has to be constituted with regard to the views of all sections of society. He raised the question of how homosexuality could be decriminalised only in Delhi and not in the rest of the country – citing the inconsistency inherent in not enforcing sections of the criminal law in only one part of the country. He said that Indian society does not reside in the state of Delhi, and that there were vast differences between the standards of living prevailing in various other states. The Bench responded by asking Mr Agrawal to get to the substance of his arguments.

Mr Agrawal told the Bench that the petitioner was an astrologer, and a resident of Delhi. He went on to argue that personal liberty could be unrestricted and uncontrolled. He said that, presuming that the (sexual) act in question was consensual, there was no question of complaints being filed. He said that the criminal machinery will be triggered only when the sexual acts concerned are non-consensual.

Mr Agrawal argued that the High Court's legalisation of homosexuality would lead to certain undesirable situations: "Suppose today a lady enters into such a profession [presumably sexwork], she is hit by a statute – but if a man goes to a gay parlour there is no legislation."

The Bench said that the matter would be taken up the next day for further arguments.

15 February 2012 - Mr. Praveen Agarwal and Mr. Amarinder Sharan

Counsel for Voices Against 377 raised the preliminary argument that private individuals could not challenge the High Court's declaration. The Bench replied that they would hear these arguments later.

Praveen Agrawal, counsel for Suresh Koushal, continued with his arguments. He extensively quoted large sections of the High Court judgment in *Naz*.

Mr Agrawal read out para 6 of the High Court judgment (concerning section 377's severe impairment of HIV/AIDS prevention efforts). He stated that this averment found support through the affidavit filed by the Ministry of Health, a 3-page document (referred to in detail).

Justice Singhvi asked Mr Agrawal what his client did; Mr Agrawal replied that he was a socially-spirited citizen, that his client had retired, and that he earned money through astrology. Justice Singhvi replied that 'socially-spirited citizen' was a broad term, and that almost all human beings were social workers. Justice Singhvi asked Mr Agrawal if his client predicted the future of people, and said that usually astrologers did not know their own fate. Justice Singhvi remarked that there was nothing certain in life, except that one has to go back from where one comes.

Mr Agrawal noted that there were two affidavits in the High Court, one by the Home Ministry and the other from the Ministry of Health. He reiterated that the counter affidavit filed by the Ministry of Health stated that retaining 377 would have an impact on the discharge of their duty.

Mr Agrawal read out para 15 of the High Court *Naz* judgment, in which the judges referred to the NACO affidavit (which stated that groups at a higher risk of acquiring and transmitting HIV infection included female sexworkers, MSM and drug users, all identified as high risk groups). Mr Agrawal referred to the High Court judgment's reference to privacy and whether or not in the disguise of privacy 'such unnatural' activity can be permitted. He said that the HC judgment referred to the right to privacy, as defined in both Indian (*Kharak Singh*, *Govind* and *Rajagopal*) and foreign judgments. Mr Agrawal said that the High Court concluded that adult males having consensual sex will not fall prey to section 377.

Mr Agrawal said that the High Court relied upon the WHO and APA Guidelines, which showed that there was almost unanimous medical and psychiatric opinion that homosexuality was not a mental disease, and that homosexuality was removed from the DSM and APA guidelines.

Mr Agrawal stated that, in any case, such behaviour was not considered immoral. He quoted the High Court's observations that morality could not be a restriction on fundamental rights, unless there was a compelling state interest. Mr Agrawal went on to quote para 17 of the High Court judgment, in which the distinction between popular morality and constitutional morality, and the inability of popular morality to serve as a valid justification to restrict

fundamental rights, are stressed.

Mr Agrawal said that, according to the High Court, there was nothing immoral about sexual behaviour or men having sex with men or women having sex with women. Mr Agrawal said that the High Court relied heavily on the 172nd Law Commission Report, which had recommended the deletion of section 377. He further stated that the High Court, while dealing with Article 14 of the Constitution concluded that there was no nexus between section 377 and the purpose of section 377, which was to protect the morals of children and women.

Mr Agrawal then said that this meant that the High Court had concluded that there was no nexus between HIV prevention and the retention of section 377. Mr Agrawal then read para 117 of the High Court's judgment, dealing with the test of reasonable classification. He then read para 123 of the judgment, in which the High Court stated that the two constitutional rights relied upon in the case – right to personal liberty and right to equality – were fundamental human rights, enjoyed by all persons simply by virtue of their humanity. He then read the concluding part of the High Court judgment (para 129), in which the High Court referred to Nehru's Objectives Resolution, noting that the House needs to look at the Spirit behind the resolution and not construe it narrowly. He also read out the declaratory part of the judgment, in which the presiding judges read down the law.

Mr Agrawal argued that there could be no difference in opinion as to whether the rights conferred under Art 21, including the right to privacy, could be curtailed for the general public good. He said that the question was as to whether these were *reasonable* restrictions. He read out from the NACO affidavit (filed in the High Court): "By virtue of this unnatural behaviour, such persons are high risk to HIV/AIDS."

Mr Agrawal asked if section 377 was liable to be struck down because 'such people' through their sexual acts were contracting HIV/AIDS and had to go to hospital and receive treatment. He cited the Supreme Court's judgment in *Kishan Chandra v State of MP* (1963) 1 SCR 765.

Justice Mukhopadhaya: "What is 377? Does it take care of homosexuality?' What are the subjects therein? In one case it could be construed as an offence, in others it may not. Is it justified to strike it down?"

The judge asked Mr Agrawal to read out the section. Mr Agrawal said the section has two parts: 1) unnatural offence, and 2) an explanation concerning penetration. He said that the section does not talk of a particular act by the individual. Justice Mukhopadhaya asked Mr Agrawal which portion of the law was read down as ultra vires. He said that the declaration in the High Court's judgment does not talk of 'unnatural sex'.

Justice Singhvi then asked Mr Agrawal to take more time to formulate his arguments properly. **He asked Mr Amarendra Sharan, the counsel for the Delhi Commission for Protection of Child Rights to argue.**

Justice Mukhopadhaya asked Mr Sharan whether carnal intercourse could be considered unnatural. Justice Mukhopadhaya asked if a person who showed that his acts were natural could escape from being prosecuted under the section. The judges said that in 1860 medical science did not talk of homosexuality, Mr Sharan replied that it was a discovery, not an invention, and that this was like asking a young boy how he survived before oxygen was discovered.

Justice Singhvi asked Mr Sharan what the meaning of "against the order of nature" was. Mr Sharan replied that nature recognised only carnal intercourse between man and woman and did not recognize carnal intercourse between men and men, women and women, and with animals. The judges wanted to know why animals were covered under this section; Mr Sharan replied that bestiality, homosexuality and lesbianism were all considered unnatural.

Justice Mukhopadhaya then asked Mr Sharan what the meaning of homosexuality was. Mr Sharan replied that it was sex between two men. Justice Mukhopadhaya asked if carnal referred to something specific, and wanted case law on this. Mr Sharan said that as far as the opinion of society was concerned there was no doubt that homosexuality was against nature. Justice Mukhopadhaya asked: "What is carnal intercourse? What is unnatural?"

Justice Singhvi said: "At times when we start discussions, we go to certain conclusions without examining relevant provisions." The judges wanted to know whether carnal intercourse had anything to do with procreation and non-procreation. Mr Sharan replied that it would include both procreation and non-procreation. Mr Sharan prepared to refer to the dictionary meaning of 'carnal', but the judges insisted that they wanted the legal meaning of the term.

Justice Mukhopadhaya said that there were activities, even amongst gays, that might or might not attract 377. He said that there was no discussion in the High Court on what constitutes carnal intercourse.

The judges asked Mr Sharan: "What was the relief sought for in the High Court, what is the exact meaning? What word needs to be deleted from the declaration to declare it intra vires?" They said that they would properly analyse 377 and decide, in the modern context, to what extent it can be treated as against the Constitution. Justice Mukhopadhaya said that if the act was against nature it would be against both minors and majors, while the prayer in the HC case was limited to sexual acts between consenting adults in private.

The judges wanted more information on section 377. They asked Mr Sharan to counsel his colleagues and then argue. Mr Sharan replied that this was one of the rare instances where all the legal luminaries were on the other side. He said that he faced more interference from his side than the other side. Justice Singhvi said that Mr Sharan's side were the legal luminaries of the future. He said that the judges wanted to hear more about the ingredients of section 377.

Mr Sharan argued that Article 21 provided that the right to life and liberty was subject to procedure prescribed by law. He quoted *Gopalan*, *RC Cooper* and *Maneka Gandhi*. He said that *Gopalan* had not been overruled, and that a law that curtailed life and liberty could be upheld.

Justice Mukhopadhaya asked who can tell what the 'order of nature' was. Sharan replied that it had acquired a traditional meaning. The judges asked him to establish down the meaning from Indian and foreign case law.

Justice Singhvi said that the meaning of words had have never been constant. He noted that we have traversed a period of 60 years, and even constitutional interpretations have changed. Mr Sharan said the meaning of 'natural' was something that would not change. The judges observed that there are now test tube babies and surrogate mothers – and asked how these would fit into the categories of 'order of nature', 'natural' and 'carnal intercourse'.

Sharan replied that "'order of nature' is something that is immutable, and does not change with time."

The judges then asked the parties how long they would take for arguments. They said that they would hear the matter, as much as possible, on a continuous basis. They said that all parties that came to court would be given a chance to be heard.

The government was represented by the Additional Solicitor General (ASG) Mr P.P. Malhotra and the Additional Solicitor General (ASG) Mr Mohan Jain, who said he was representing the Union Health Ministry. The judges listed the matter for the next day.

16 February 2012 - Mr. Amarinder Sharan

The final hearings of the Naz Foundation case in the Supreme Court continued today before Justices Singhvi and Mukhopadhaya.

Mr Sharan, arguing for the Delhi Commission for the Protection of Child Rights, continued his arguments. He said that the word used in section 375 of the IPC (that defines rape) is 'sexual intercourse', whereas in section 377 the expression is 'carnal intercourse'. Mr Sharan read from various judgments that have examined the phrase 'carnal intercourse against the order of nature'. He argued that the *Khanu* case determined that 'natural intercourse' was sex that has the possibility of conception. He quoted from the case to state that the metaphor 'intercourse' refers to sexual relations between persons of different sexes where the 'visiting member' has to be enveloped by the recipient organization. Quoting from the case, he said that carnal intercourse was criminalized because such acts have the tendency to lead to unmanliness and lead to persons not being useful in society. He said that there was a danger that young persons might be indoctrinated into committing this offence.

Justice Mukhopadhaya asked Mr Sharan if there was a difference between 'unnatural sex' and 'abnormal sex'.

Justice Mukhopadhaya: "Sex can be abnormal, but unnatural is related to 'order of nature'."

Mr Sharan said that what 'against the order of nature' is partially explained by a Lahore judgment of 1934. He said that the facts of the case related to a man having sex with a bullock through the nose, and the question was whether this could be punished under section 377. The court held that this act does fall under the definition of section 377.

Mr Sharan then quoted a Gujarat High Court case, dealing with an attempt to put a male organ in the mouth of a boy. It was argued that there was no offence under section 377, as there was no penetration and no carnal intercourse. The Court determined that there need not be seminal discharge to constitute carnal intercourse, and that it could be said that an attempt to put an orifice in the mouth was against the order of nature.

Justice Mukhopadhaya observed that the terminology and interpretation used to refer to 'order of nature' differed between various judgments. Mr Sharan replied that 'order of nature' was normal sexual intercourse that has the possibility of procreation.

Justice Mukhopadhaya said Mr Sharan was adding the term 'sexual penetration', which was not present in section 377. Mr Sharan replied: "Any penetration of the sexual organ will be against the order of nature."

Justice Mukhopadhaya said: "Don't use the word sexual when it is not there." Mr Sharan replied: "The word used is 'carnal'." He said that he read section

375 of the IPC to distinguish sexual intercourse from carnal intercourse.

Justice Mukhopadhaya said that all abnormal acts were not unnatural sex. It would depend on each and every type of fact. Mr Sharan replied: “That’s why there is a limited prayer. They know that this is against the order of nature.”

Mr Sharan then referred to a Madras High Court judgment, which referred to sodomy as non-coital carnal copulation with the same sex or a different sex and included anal sex, oral sex, tribadism, sadism, madochism, fetishism and exhibitionism. He quoted from the judgment to say that section 377 had been invoked in cases where persons are accused of having sex with others of the same sex when it was against the order of nature. The judgment interpreted the term ‘voluntary’ in section 377 to refer to a situation where a person had reason to believe that they would indulge in, amongst other acts, coitus, incomplete coitus, coitus reservatus (contraception), inability to ejaculate, and coitus from behind.

Mr Sharan then referred to the definition of ‘penetration’ as implying force, effort to gain access, to permeate, to gain access or entrance, to gain intellectual access, find out, discover etc.

Mr Sharan then quoted a 1969 case that said that carnal intercourse referred to ‘the temporary visitation of an organization, where the primary object was to obtain euphoria, and where the visiting member was partially enveloped by the organization.’ He said that the case he was referring to dealt with a situation where the male organ was inserted between the thighs. There was no penetration but it was construed as an unnatural offence.

The judges then conferred amongst themselves for a while.

Mr Sharan continued his argument, saying that section 377 covered situations where the male organ of the petitioner was held tight in the hand, imitating an orifice.

Mr Sharan quoted from dictionary sources referring to the definition of’ intercourse’. He also referred to the definition of ‘penetration’ and ‘carnal’ (pertaining to the body and its appetite; fleshy). He said that any insertion into the body with the aim of satisfying unnatural lust would constitute carnal intercourse. He said that section 377 referred to a carnal connection between a man and man, woman and woman or a man/woman and an animal.

Mr Sharan said that section 377 drew from the English law of sodomy.

The judges conferred amongst themselves once more.

Justice Mukhopadhaya asked Mr Sharan: “Do you find anything with respect to the word ‘against the order of nature’? There are various examples apart from old temple sculptures. If a gynecologist inserts a hand inside to find out if a baby is alright, is it against the ‘order of nature’?”

Mr Sharan replied that in such a situation, “there is no element of carnal, no sexual satisfaction”

Justice Mukhopadhaya said that it would satisfy the definition of carnal intercourse. Mr Sharan disagreed, saying it would not constitute carnal intercourse.

The judges then asked Mr Sharan to read the explanation to section 377: “Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in the section.”

Justice Mukhopadhaya then asked if insertion into the nose (referring to the *Khandu* case) would constitute carnal intercourse. Mr Sharan replied that carnal intercourse had to be the primary ingredient.

Justice Mukhopadhaya said that carnal intercourse did not mean sexual intercourse. Mr Sharan said that ‘carnal’ was related to sensuous and gratifying sexual relations.

The judges asked Mr Sharan to read the section again. Justice Singhvi said that from the explanation it seemed that penetration by itself constituted carnal intercourse. Mr Sharan replied that such penetration had to be against the order of nature.

Justice Mukhopadhaya said that the Indian Penal Code was enacted in 1860. There were sculptures in Khajuraho that existed long before that. Mr Sharan said that paintings and sculptures did not determine what was socially accepted.

The judges stated that it was unknown how society felt about this. It was stated that actions considered immoral 20 years ago would not be considered immoral now.

Justice Mukhopadhaya said that in 1857 during the Sepoy mutiny, carnal intercourse was not an offence; in 1859 it was not an offence; it was only in 1860 that the law was introduced.

Justice Mukhopadhaya said that, in light of the Delhi High Court judgment, they were considering 377 to see if it was ultra vires any part of the Constitution, particularly Part III (the Fundamental Rights). He asked if anyone would say that they would be going in for carnal intercourse against the order of nature. He said that, even within homosexuality, certain acts may be against the order of nature, and certain acts may not. Justice Mukhopadhaya asked: “Can anybody claim a fundamental right to have carnal intercourse against the order of nature?”

Justice Singhvi remarked that no one was claiming this. He asked Mr Sharan to read the contents of the petition carefully.

Justice Mukhopadhaya said, “The activity described in the High Court

judgment with regard to homosexual, gay etc, the individual acts are not described. Two persons may have abnormal behaviour, but may not be unnatural." Mr Sharan said that such a declaratory decree (in the High Court) could not have been granted if these acts were not against the order of nature.

Justice Mukhopadhaya asked, "Where is the pleading that even against the order of nature we have a right under article 21 (right to life and liberty)?" Mr Sharan argued that the petitioners in the High Court, by arguing for the curtailment of section 377, had implicitly accepted that it was against the order of nature.

The judges remarked that 377 was not applicable to a class of persons, and was applicable to anyone who commits acts against the order of nature. "We are looking into if any part of 377 offends any part of the Constitution."

Mr Sharan then read from the High Court pleadings, where it was argued that the definition of carnal intercourse was based on intent to procreate, and that section 377 would apply to couples who did not have children too. It was argued in the High Court that section 377 was outdated and had no place in modern society.

Justice Mukhopadhaya said that the behaviour in question had nothing to do with gays.

Justice Singhvi asked what the definition of "gay" was. He wanted to know if homosexuals constituted a class.

Mr Sharan asserted that section 377 as it stood today had the full force of law and did not require any reading down.

Justice Mukhopadhaya asked what a bisexual was. Mr Sharan said that a bisexual was a person who had sexual relations of both kinds: homosexual and heterosexual.

Justice Mukhopadhaya stated bisexuals were not a "class".

Justice Mukhopadhaya asked if the term 'order of nature' could be put within four corners. Mr Sharan replied that "order of nature" referred to sex with no likelihood of procreation.

Justice Singhvi said that such a definition might bring a husband and wife within the scope of section 377. "That tendency is increasing – not to have a child, but have sex without penetration of organ. What about live-in relationships?" What about single parents and surrogacy? The husband and wife engage a surrogate mother. There could be a case where one person is unmarried and wants to become a father, and engages a surrogate mother to get a child."

Mr Sharan replied that surrogacy does not involve carnal intercourse.

The judges said that 20-30 years ago surrogacy would have been considered to be against the order of nature. “Today it is a thriving business.”

Justice Mukhopadhaya observed that there was a link between sin and carnal intercourse – the Biblical account of Sodom and Gomorrah referred to ‘sin’. He said that ‘unnatural’ and ‘abnormal’ are different.

Justice Singhvi said homosexuality may or may not be abnormal. “We can’t say, only persons with experience could say so”. This remark resulted in laughter in the court.

Mr Sharan said that penetration of any orifice not used for procreation is against the order of nature.

The judges wanted more explanation of the terms ‘natural’, ‘against the order of nature’ and ‘abnormal’.

Mr Sharan said “Where is the question of curtaining 377 if it was not within natural intercourse? There is no need to challenge the law. Anybody prosecuted under 377 could defend himself. If the prayer is that section 377, to the extent that it applied to consenting adults, is illegal, it is admitted by writ petitioners that it is against the order of nature.”

Justice Mukhopadhaya said, “Why do you talk of sexual activities? ‘Natural’, ‘unnatural’, ‘normal’, ‘abnormal’ have nothing to do with a class of people.”

Justice Mukhopadhaya asked if there was an express prohibition against homosexuality under the penal law. Mr Sharan said that the Hindu Marriage Act mentioned sodomy as a ground of divorce. He said that, in the penal law, it was section 377 that covered acts of homosexuality.

Justice Mukhopadhaya said, “What if a boy inserts his tongue into another’s mouth? What if a father inserted his tongue while kissing his child?” Mr Sharan said this would not be covered by the term ‘against the order of nature’.

The judges said that homosexuality was not only male-male. Mr Sharan replied that it could be female-female also.

The judges said that homosexuality was a wide term, and some homosexual acts may be against the order of nature, but not necessarily connected with carnal intercourse. Mr Sharan replied: “Why consider it unconstitutional if then? They have conceded that it is against the order of nature. Otherwise why are they seeking this declaration?”

The judges remarked that there was no part of the claim where they [the petitioners in the High Court] has referred to ‘against the order of nature’.
The judges observed that the provision impugned was an 1860 law; would what is ‘unnatural’ be the same, even now?

Mr Sharan replied: “The sun rises in the east and will be in the east. The law of nature does not change.”
The judges asked, “Who says so?” Mr Sharan replied, “My Lord, I say so.” This was met with laughter in the court.

Justice Singhvi said, “We appreciate that at 4 pm you made us laugh.” Mr Sharan replied, “It can’t be a serious discussion all the time. We need some interludes like this.”

The judges said, “If the act of intercourse of male and male or female and female and other acts which do not amount to carnal intercourse against the order of nature, then section 377 is not attracted and there would be no occasion for us to examine the constitutionality of the provision under sections 14, 19 or 21.”

The judges said they would continue the next day. Mr Mr Desai said the next working day was Wednesday. Justice Singhvi said that he meant Wednesday. “When we start hearing such a matter we forget these things.”

The judges asked Mr Sharan to submit a note based on their submissions. They said that the question that will arise is whether the court is required to decide anything related to homosexuality in this case.

22 February 2012 – Mr. Amarinder Sharan

Mr Sharan, representing the Delhi Commission for Protection of Child Rights, continued his arguments before the Supreme Court bench of Justices Singhvi and Mukhopadhaya.

Mr Sharan submitted a list of propositions to the court. Mr Sharan said that, in these propositions, "I will show how each of the findings of the High Court are against the law and that the reasoning of the High Court will not withstand the scrutiny of the law that has been held by Your Lordships."

Mr Sharan went on to read from the Delhi High Court's judgment in the *Naz* case. He read from para 98 (which referred to Art 14 of the Constitution) and para 99 (which referred to Art 15 of the Constitution). He said that public morality was important in framing the law, as it is included as an exception in Articles 19 and 25(1).

Mr Sharan argued that there were a catena of cases that held that the right to privacy was not an absolute right, and did not confer immunity to crimes committed by consenting adults in private.

Mr Sharan argues that the High Court's findings on Article 14 were erroneous, as section 377 did not create a class; it applied to both men and women if they indulged in carnal intercourse against the order of nature. He said that what was criminalized was the act, and not the person himself.

Mr Sharan argued that, if the High Court decision was taken to its logical conclusion, any provision could be declared to be violative of Art 14 – for instance, dowry seekers could claim they are being discriminated against. In an extreme case murderers could claim that they are being discriminated against.

Mr Sharan said that Art 15 prohibited discrimination on the basis of gender, not on the basis of sexual orientation. He referred to DD Basu's commentary on the Constitution.

Mr Sharan said that the High Court relied on foreign decisions, articles and foreign law to hold that section 377 was not valid. He said that there was a vast cultural difference when it came to Indian society. "I have grave doubts about transplanting Western jurisprudence into our country," he said.

Justice Singhvi, referring to the journalists seated behind, said, "There are some youngsters behind taking notes of your arguments. Please give a copy to them. Sometimes their reporting results in comedy."

Mr Sharan argued that the Delhi High Court relied heavily on a South African case, but the South African situation was different – given that their constitution expressly prohibited discrimination based on sexual orientation.

Mr Sharan then read from paras 6, 7 and 8 of the Delhi High Court judgment

Justice Singhvi said, “We would like to more thoroughly appreciate – does this kind of activity lead to HIV/AIDS. Is there a scoping study conducted by the petitioner, or the state?”

The judges wanted to know the term ‘procreation’ was linked to this discussion. Mr Sharan said that there was no relevance whatsoever.

Justice Mukhopadhaya said that, in order to constitute an offence, you needed a complainant and an accused. He asked whether, if there was a third party who witnessed the offence, it would still be considered ‘in private’.

Justice Singhvi said, “We would like you to delve into this matter further. There are other sections like obscenity – the provision that makes sexual acts done in public an offence. Would this be in violation of Arts 14, 19 and 21? The verdict in this decision will have an impact on other provisions of the IPC. Keep in mind the entire gamut of laws that would be impacted.”

Justice Mukhopadhaya then referred to Art 51A (e), the fundamental duty to renounce practices that are derogatory to the dignity of women. He asked if there were any acts under discussion that would impact the dignity of women.

Mr Sharan read from para 9 of the judgment (concerning the legislative object of section 377) and from para 24 of the judgment. Mr Sharan read from paras 15 and 16 of the Delhi High Court judgment and referred to the NACO affidavit filed in the High Court. Mr Sharan stressed that homosexuals were a high-risk group.

The judges asked how this was relevant to section 377. Mr Sharan said that this was not related and that the only reasons to hold section 377 ultra vires would be if it was not enacted by a competent authority or if the law violated Part III of the Constitution (fundamental rights).

Mr Sharan read from para 25 of the High Court judgment (which refers to the Supreme Court’s decision in *Maneka Gandhi* (1978) 1 SCC 248). He said that the High Court had not correctly applied this case.

Mr Sharan read para 26 of the High Court judgment (concerning the right to dignity) and paras 29 to 39, which extensively discuss the right to privacy. He said that the High Court had relied on a large number of US decisions, despite the existence of voluminous case law in India. He said that the circumstances prevailing in the case of *Gobind* v *State of MP* (1975) 2 SCC 148 were coloured by completely different circumstances, given that the case related to surveillance. Mr Sharan read para 40 of the judgment (concerning the link between privacy and dignity).

Mr Sharan gave the court a copy of the non-discrimination clause in the South African constitution (Art 9). He emphasized that the term ‘sexual orientation’ was specifically mentioned. He hence observed, “That is why it is really dangerous to rely on foreign judgments when our courts have covered this field and laid down the law”.

Mr Sharan then read para 42 of the High Court judgment (sexuality and identity), and paras 43 and 44 (reference to the Yogyakarta Principles). He continued reading paras 45-47 (discussion on privacy).

Mr Sharan said, “The reasoning of the High Court is fallacious. With due respect, the Court has reposed confidence in foreign authors about homosexuality.” Mr Sharan said that the law had stood the test of time and stood for more than 150 years.

Justice Mukhopadhaya, referring to the definition of ‘sexual orientation’, said that the meaning itself did not constitute an offence.

Mr Sharan said that section 377 did not penalize a section of society and only penalized a particular act. He referred to para 48 of the High Court judgment (which refers to the right to live with dignity and the right to privacy), and said that there was absolutely no basis for the high court to talk about personhood, or dignity of homosexuals.

Mr Sharan said that the findings of the High Court were not supported by materials or reasoning, and asked the court how the right to live with dignity and the right to privacy could include the right to have carnal intercourse against the order of nature.

Justice Mukhopadhaya asked, “Is the word ‘sex’ used in section 377?”

Mr Sharan replied, “No, it has never been used.” He said that the term used is ‘sexual offences’ for rape, and ‘unnatural offences’ in section 377.

Justice Singhvi said, “This issue has cropped up and will crop us again – whether a provision of the Constitution or a law enacted by a legislature can be questioned by an organization or a group of people?” He asked if these views would represent the 120 crore people living in India.

Justice Singhvi said that there may be cases registered where this type of law would violate the right to privacy. He said that the Preamble of the Constitution did mention the term ‘dignity’.

Justice Singhvi: “It is a regular phenomenon that a parallel debate goes on – one inside and one outside the court and sometimes it happens that our system falls prey to this alternative debate.”
Mr Sharan: “That’s why the lawyers in this case should not talk the media.”
Justice Singhvi: “We are not concerned with lawyers talking to the media. It is the fundamental right to speech. But this parallel debate should not influence our proceedings.”

Justice Mukhopadhaya said, “Does a person have a fundamental right to do an act which is against the order of nature?”

Justice Singhvi said: “Have you got figures of offences under section 377 post

independence? You have cited six cases in a given fact situation. The High Court judgment so far does not indicate how many such cases were instituted resulting in harassment to a particular section of society."

Justice Singhvi said: "What happens if one section is challenged today and others followed?" Section 304 B IPC [dealing with dowry death] could be challenged and it could be argued that the demand for dowry is my private right, and that the state cannot prosecute me. Would it be open to an organisation to say that section 304B is ultra vires the constitution?"

One more example could be offences related to obscenity in public spaces. In other countries there is a practice in football and cricket matches of people going nude. Can youngsters in our country say that it is their basic right to remain naked?"

"Or their natural right," joked Justice Mukhopadhaya.

The judges enquired in what circumstances a law could be challenged, and said that this verdict would impact other legislation.

"Does a person have a fundamental right to act against the order of nature?" asked Justice Mukhopadhaya. "Does Article 21 empower someone to act against the order of nature? E.g. with animals. No one can say this. Which act is against the order of nature is also individual."

The judges said that they would like to be enlightened by both sides on both these questions. "This judgment is an illuminating one. There are a large number of authors [and] material related to international law used."

Justice Singhvi said, "We were wondering Mr Sharan, how many countries are there in the world?" He said that the judgment quoted 25 experts who framed the Yogyakarta Principles. "What about the other countries?", he asked. "There are views expressed by various individuals. Some are researchers who arrive at analytical opinions. Somebody has their own view which is absolutely personal. Can this be relied upon in the judgment?", he asked.. "All these years we have Prof so and so from Harvard, Yale, Oxford... We are yet to find Prof Upendra Baxi, or constitutional law and jurisprudence from this country."

"What was the situation in our own country before the British took over administration?" asked Justice Singhvi.

Justice Mukhopadhaya said, "What about other laws? Hindu Law, Mohamedan law, other religious law which governs sexual relations between persons."

Justice Singhvi said, "We are asking all these questions to enlighten us – that's all."

"There are Christian, Muslim and Hindu organisations who are represented

here and will speak about this," replied Mr Sharan.

"We want a more research based submission," said Justice Singhvi.

Justice Mukhopadhaya referred to Art 13 of the Constitution, and said that the definition of law included custom, etc.

Mr Sharan said that where the law was not the codified religious law of marriage, inheritance would apply.

Mr Sharan said that the conclusions of the High Court were not supported by any reasoning. The court had not shown how section 377 was an impediment to the right to full personhood or took away somebody's dignity. He said that the right to privacy does not include a right to commit a crime in private.

Justice Mukhopadhaya said, "Legislation decides what is crime. What is crime? For example, there may be a prohibition against marrying two persons in one religion. How can a person say I have a fundamental right to have two wives?"

"The law talks of unnatural offence. One may this is not at all unnatural. Can one say I have a fundamental right to commit an offence?" asked Justice Mukhopadhaya.

"Or that it includes the right to privacy," said Mr Sharan

"We are not going on morals, we are going on the Constitution," said Justice Mukhopadhaya.

"The Constitution itself says public morality in Articles 19, 25," said Mr Sharan.

"It also talks of dignity of others," replied Justice Mukhopadhaya

Mr Sharan said, "The concept of dignity. How does it govern the field of carnal intercourse against the order of nature? It appears that the Hon'ble High Court has missed the tree for the woods."
The judges asked, "Employees of an organisation can also file a case when there are service rules prohibiting a second marriage. My wife does not complain and consents. I could say – no, the time has come to recognize the right to privacy. You can marry even three wives if you can afford it. Why impose a restriction? Who is the police? What is society? Why should they object to this right? Why should the law punish me? It is my private matter."

Mr Sharan said, "Such incidents will multiply and this will be deleterious to morals."

The judges asked Mr Sharan to clarify. "Orderly conduct will be impeded. Among two people, if one agrees to be murdered, there will be no offence", said Mr Sharan.

“Many patients want their families to do this,” said Justice Mukhopadhaya.

“Why should it not be treated as a part of the right to privacy?” asked Justice Singhvi.

“If such a provision is there that treats it as a misconduct, why should it not be struck down or read down?” asked the judges.

Justice Singhvi said, “If I can keep 5 cars, why can’t I keep five wives?”

Mr Sharan said, “I can keep 5 women, not 5 wives as it is against the laws of marriage.“

Justice Singhvi said, “There are communities that believe we should maintain purity over race and so marriage is held within families, in violation of the Hindu Marriage Act. Doctors may say that it is bad. They might say that we have the belief. There is a new concept, we hear about it – exchange of wives – they say that this is private and consensual and why do you make it an offence?”

“It is not an offence today” said Mr Sharan

“If they make it offence, then what happens? The worst extreme must be considered to test the vires of a statute,” said the judges

Justice Mukhopadhaya said “The statute does not look into a class of persons, a group – race, class, colour, religion etc. Therefore under 377 everyone has been equally treated irrespective of sex, class, creed, religion. How will Articles 14 and 15 be attracted?” he asked.

“We don’t have to remind you all. These questions could be misleading. These questions are for both the sides”, said Justice Singhvi.

“I have been in courts for a long time to know the import. You are trying to elicit the best performance from the lawyers”, said Mr Sharan. “You have more than 75 years of experience,” he said.
“Don’t make us that old, Mr Sharan”, joked Justice Singhvi.

“The section could certainly be construed as a violation of the right to dignity,” said Justice Singhvi

“The offence would be against dignity”, said Mr Sharan.

“The order of nature would keep changing, not with reference to nature at all but to the ‘nature of humans’ said Justice Singhvi.

“This has not changed for the last 10,000 years,” said Mr Sharan.

“Society has undergone changes. Bigamy was not an offence under the old Hindu law,” said Justice Singhvi.

“The nature of procreation and sexual urges have not changed,” said Mr Sharan.

“It has changed,” said Justice Singhvi. The judges asked Mr Sharan about artificial eggs, sperm, cloning artificial limbs, stem cell theory and other scientific developments.

“Science only harnesses what is natural,” said Mr Sharan

“What about artificial blood?” asked Justice Singhvi. “We are pointing out that science is bringing out fast changes.”

Justice Mukhopadhaya said, “Some animals are created without using sperm.”

“Forty years ago very few people donated organs in India. Now it is common in many cases”, said Justice Singhvi.

“The petitioner is perhaps trying to foresee what is to come and represent a cause of a part of society who they call homosexuals or gays,” said the judges. “Why should you interfere by supporting 377?” they asked Mr Sharan.

Mr Sharan said, “It is for the legislature to decide. The only scope for judicial action is if 377 violates fundamental rights or the body creating it does not have a power to do so. There is no cause for interference as far as 377 is concerned.”

Mr Sharan argued that the right to life and liberty can be curtailed by law which prescribes appropriate procedures. He argued that the procedure in this case was the Code of Criminal Procedure (CrPC,) and that it had not been argued that the CrPC does not lay down a fair and reasonable procedure.

Mr Sharan argued that the right to privacy did not extend to committing a crime in private, and that the Supreme Court had held that privacy was not a fundamental right and was subject to reasonable restrictions.
The judges talked about the meaning of dignity. “Dignity is a sense of pride in oneself, and ‘worthy of respect’”, said Justice Mukhopadhaya.

The judges said that they were keen to hear the other parties and asked Mr Sharan to finish by the end of the day. They said they would restrict their queries for the next day.

Mr Sharan then read from Paras 94 and 98 of the High Court judgment (section 377 as facially neutral) and para 104 (the declaration).

Mr Sharan then referred to *A.K. Gopalan* (1966) 2 SCR 427, regarding preventive detention. The case talks of how the right to life and liberty can be taken away by procedure established by law. Mr Sharan referred to *Maneka Gandhi* (1978) 1 SCC 248, which refers to the interrelation between Articles

14, 19 and 21. “The entire discussion in this case centered around procedure – it has been held that procedure prescribed by law which curtails the right to life and liberty must be fair and reasonable and follow principles of natural justice. The fundamental rights must be directly infringed,” he said. Mr Sharan said that section 377 did not directly breach Art 21.

Mr Sharan was scheduled to continue his arguments on the next day of hearings. The matter was listed for Thursday.

23 February 2012 - Mr. Amarinder Sharan, Mr. PP Malhotra and Mr. Mohan Jain

Mr Sharan, appearing for the Delhi Commission for the Protection of Child Rights, continued his arguments. The judges asked Mr Sharan how many countries had laws like section 377. He said that there were 76 countries of which 7 were punishable with death. Justice Singhvi said that it was up to their legislatures to decide whether to enact laws like these.

Mr Sharan then argued that the right to privacy was not absolute, and that for the right the privacy to be invoked there must be a violation by a statute that was direct, and not remote. He said that section 377 was not intended to invade privacy, and did not breach privacy directly. He argued that neither the dignity nor privacy of the individual was affected by the provision, and therefore a challenge under Art 21 would fail.

Mr Sharan argued that there was a presumption of the constitutionality of the law, and that Indian case law had held that it was open to a legislature to make laws directed against a class. “If the classification is intelligible and there is a nexus between the object of the law and classification, then that classification has been upheld,” he said.

Mr Sharan argued that there was no class targeted by section 377 that no classification had been made, and therefore the finding of the High Court that this law offended Art 14 as it targets a particular community known as homosexuals or gays was without any basis. He argued that there was no empirical data to show that there is a homosexual community and that there was nothing to show that they constitute a class.

Justice Singhvi asked if there was any material placed by the petitioners before the High Court. Sharan said that there was a statement placed before the court that there were 25 lakh MSM persons in India, but no evidence to support this.

“Why do we talk of community? There is no commune. They are part of a general community. The only difference is that the sexual preference of particular individuals is different. They are part of society,” said Justice Mukhopadhaya.
Justice Singhvi said, “There was a peculiar incident in Punjab. Three ladies were frequent pickpockets. One Robin Hood SP got hold of them and got the persons engraved with tattoos on their forehead to mark them as pickpockets. They had to move in society with all that engraved on their foreheads. The courts then found a solution through plastic surgery…”

“Except one solitary case of harassment under section 377 there is no other evidence”, said Mr Sharan.

“It is quite possible that some people in society could harass these people. E.g in Mangalore. Two years ago, there was an incident on Valentine’s Day,”

said Justice Singhvi.

Mr Sharan said, “There is no group, no community…”

“It is individual behaviour. Different persons in society may be varying,” said Justice Mukhopadhaya.

“The basic substance of the argument is that there is a community of homosexuals and the law targets them,” said Mr Sharan.

Referring to the High Court’s ruling on Article 15 of the Constitution, Mr Sharan said, “The judges have a great penchant for citing foreign judgments, using foreign examples, and foreign concepts when there is already a huge mass of case law available on every issue in our country”. Referring to the Supreme Court case *Jagmohan Singh* v *State of U.P*. (1973) 1 SCC 20 at 28 (paras 13 and 14), Mr Sharan quoted the court saying that there was already a large volume of material on capital punishment in the West, and that the court had grave doubts as to the valency of the western experience in our country where the social conditions are different.

Mr Sharan argued that there was nothing to show that the law offended Art 15(2) of the Constitution. He said that there were no cases before the court with respect to access to public space. He said that there was no general problem that persons of certain sexual orientation should not enter a cinema hall or any public space.

“Article 15(2), My Lord, has been re-written by the Hon’ble High Court”, said Mr Sharan.

Mr Sharan: “The Hon’ble High Court feels that Art 15 which bans discrimination based on sex includes a ban on discrimination based on sexual orientation. That would, my lord, be a case of rewriting the constitution. The words expressly used in Article 15 is confined to gender.”

Mr Sharan cited DD Basu, an eminent Indian jurist, to observe that the Indian Constitution specifically bans discrimination on the basis of sex. ‘The fact that Art 15(3) mentions that special provisions can be made in favour of women means that the provision is restricted to gender, and not to sexual orientation,” he said.
Mr Sharan argued that the right to privacy was not uncontrolled, and to say that it was absolute as far as consenting acts between adults were concerned was completely fallacious.

Mr Sharan argued that the High Court mentions constitutional morality as opposed to public morality. He said the High Court was not correct and that there was a curb on morality in Arts 19(2), 25(1) and 26. He cited a 1998 Supreme Court judgment that said that the right to privacy could be curtailed on moral grounds.

“I have made my submissions on legal grounds, and my learned friends here

will take on other issues," said Mr Sharan (referring to the lawyers for the other petitioners).

Justice Singhvi then asked the Additional Solicitor General P.P. Malhotra, representing the Union Home Ministry, to begin his submissions.

Mr Sharma, counsel for B.P. Singhal, interjected saying he represented one of the parties in the High Court. He said his arguments were not religious, and that he had done research on every aspect of the term 'order of nature'.

Mr P.P. Malhotra, Additional Solicitor General, representing the Union Home Ministry began his arguments. He guided the judges through large parts of the Delhi High Court's judgment – paras 11, 12, 13 and 14. He read from the Home Ministry's affidavit, filed in the High Court, where the Home Ministry had opposed the decriminalization of homosexuality as it would open the floodgates of delinquent behaviour. The Home Ministry had then argued that section 377 was needed as there was a lacuna in laws criminalising rape, and that the section was used to address the abuse of children.

Mr Malhotra referred to the 42nd Law Commission Report, which recommended retaining section 377 on the basis that societal disapproval was strong enough to retain the law.

"The High Court relied on South African law where moral values and culture are different and the constitution is different," said Mr Malhotra.

"Who will ultimately decide what is moral and immoral?" asked Justice Singhvi.

"The court will," replied Mr Malhotra.

"No" said Justice Singhvi.

"Why has the legislature not considered this as yet?" asked Justice Singhvi.

"The Law Commission has said don't decriminalize. How can one tolerate this? It is highly immoral," said Mr Malhotra.

"What is immoral?" asked Justice Singhvi.
Mr Malhotra said, "Nature has made man and woman. His penis can be inserted into female organ because it is constructed for that. It is natural. Now if it is put in the back of a man where human waste goes out, the chances of spreading disease is high. There are UN studies to show this."

Justice Mukhopadhaya: What about animals ?
Mr. Malhotra: "Yes, animals are covered as well. Three year old goats and two year old goats…'

Mr Malhotra began talking about how the public in the U.S. and UK had

shown increasing tolerance to this new sexual behaviour.

“Laws of other countries may not be of great help. If we start making research on that count, there will be some countries that have and some that don’t,” said Justice Singhvi.

“Is there a part of the country where this is not applicable?” asked Justice Mukhopadhaya. He asked about Jammu and Kashmir, which possess a separate penal code; the relevant section [of that code] has not been declared ultra vires by the Delhi High Court.

“Better come to the arguments. Mr Sharan has read the judgment in great detail yesterday,” said Justice Singhvi.

“If every lawyer does that, we will remember every line of the judgment,” said Justice Mukhopadhaya.

Mr Malhotra discussed statistics relating to HIV prevalence among MSM populations.

“How many persons are suffering from HIV/AIDS in the country and how many of them are MSM?” asked Justice Singhvi.

“HIV prevalence among the general population is less than 1%, while among MSMs it is 6%,” replied Mr Malhotra.

“This was stated in 2005. What is the position today?” asked Justice Singhvi. Justice Singhvi made a rough calculation. He said they were talking of a much larger figure of non-homosexuals suffering from HIV/AIDS.

“I will show that HIV/AIDS is the cause of [is caused by] homosexuality,’ said Mr Malhotra.

“That is not necessary. Ask your department to collect appropriate figures. HIV/AIDS may have nothing to do with homosexuality,” said Justice Singhvi.

“Why call it MSM? Why not transgenders? If you go for a particular act, that is with transgenders also. Why confine particular acts to MSM? What you are saying is not limited to a class of persons. Why should we take figures of MSM only?” asked Justice Mukhopadhaya.

“Who goes and complains? Find out from appropriate sources how many female children become victims of HIV/AIDS because of sexual abuse. This has nothing to do with homosexuality. Andhra Pradesh, Karnataka and Maharashtra are states where you will find children suffering from HIV/AIDS. This has nothing to do with homosexuality, transgenderism and lesbianism. They are simply victims of sexual abuse by monsters in the form of humans,” said Justice Singhvi. “The modus operandi is that one girl is sold by the family because of poverty, and suffers from sexual abuse. She is brainwashed and sent to the village where it will attract others who see her as relatively affluent.

Human trafficking is the main source of HIV/AIDS, yet the affidavit places much emphasis on 8% of MSM," said Justice Singhvi.

Mr Malhotra then proceeded to read from his written arguments. He emphasized that the Delhi High Court should not have relied so heavily on foreign judgments. Referring to a U.S. judgment that the court had cited, he said, "U.S. society is different. Children at 13 and 14, even girls, leave their homes", he said.

"I have counted at least 31 foreign judgments that the High Court cites," said Mr Malhotra.

Mr Malhotra continued to read from his written submissions.

"Mr Malhotra, by the way, nothing to do with the case, but do you know any person who is homosexual?" asked Justice Singhvi.

Mr Malhotra continued to read from the written submissions

"You are avoiding our question," said Justice Singhvi. "You don't know anybody?" he asked.

"I must confess my ignorance about modern society," said Mr Malhotra.

"We appreciate your ignorance," joked Justice Singhvi.

"Those arguing that they belong to a particular class – there is no classification as such," said Justice Mukhopadhaya.

"Every society has a different way of life, different standards, different thoughts. In our society this is not proper. This kind of conduct in the open is not permissible," said Mr Malhotra.

"Nobody has said that it cannot be in the open," said Justice Singhvi.

"Who is aggrieved?" asked Mr Malhotra.

Justice Singhvi: "Ordinarily, all sexual acts are done in private and with consent. We are proceeding on hypothesis and assumption. If you do it in public, even if they are married, they may face prosecution under other provisions, even if they are adults and consulting."

"I don't know why this petition was filed at all," said Mr Malhotra.

"To give you an opportunity to argue the case," joked Justice Singhvi.

"The issue of sex in Indian society has so far remained a private matter," said Justice Singhvi.

"For the last two days the arguments have gone on in public, and we have

seen that the temperature (in Delhi) has also gone up," joked Justice Mukhopadhaya.

Mr Malhotra argued that global trends were irrelevant. "They are adopting a story of sexual orientation that is not relevant," he said.

Referring to the Home Ministry's affidavit in the High Court, Mr Malhotra said, "If one of them is suffering, the recipient is the person who is doing it, it will be transmitted to another. That is the question of public health. MSM are high-risk groups. If this is legalized it will lead to a public health issue."

Mr Malhotra argued that the High Court's reading of the NACO affidavit was completely wrong. "Where is the fear of law enforcement?" he asked.

Mr Malhotra argued that unprotected anal sex among MSM (Men who have sex with Men) was a significant factor of HIV/AIDS transmission.

Referring to argument of police harassment leading to obstructing HIV/AIDS prevention efforts, Mr Malhotra said, "Hardship is no ground to invalidate a law. Law cannot please everybody."

Referring to the High Court's ruling that popular morality or public disapproval not being a ground for criminalization, Mr Malhotra said, "Law is based on what popular morality says. What is the view of the public, the legislature decided", he said.

Mr Malhotra referred to the 172nd Law Commission report, which had recommended sections 375 and 376 (rape) be changed to gender-neutral laws. "The Delhi High Court does not say this. The court half reads the report," said Mr Malhotra

Justice Mukhopadhaya said that sections 375, 376 376A referred to different provisions on consent. "Who has decided that 'with' or 'without' consent in the provision? Now we have to read 'without consent' and 'adult man/adult woman' into 377", he said. "Post the High Court judgment we have to read the section in that fashion," he said.

"Who can do this rewriting? The power lies with Parliament," said Justice Mukhopadhaya.

Malhotra referred to the para 125 of the Delhi High Court (*Naz*) judgment in which the High Court explains the role of the judiciary and the rationale behind intervening to read down the law.
"The court has reiterated what is known. At times, the court does this," said Justice Singhvi.

Justice Mukhopadhaya referred to the High Court's distinction between constitutional morality and public morality. "Public morality is based on which morality? Constitutional morality or public morality? Is there any penal code or civil code based on constitutional morality?" Does the Penal Code reflect

some kind of public morality or not? Does it have a nexus with morality or not? Is there a nexus with vices or not? Has that been discussed or not? Is there a nexus between offences in the IPC and morality in society? Otherwise an act will not become an offence," said Justice Mukhopadhaya.

Justice Singhvi asked who enacted the IPC.

"You need to see when the government of the British took over power from the Company. The first act with respect to Indian territory, did it look into the morality of India or the British?"

"We continued it," said Mr Malhotra.

Justice Singhvi: "In the context of public morality, we are asking you if the law was enacted by British Parliament or a confederation of states – which morality?"

"Did they move towards the position of India or towards the British public for enacting the IPC? Was there a code to punish foreigners and excepting locals? Those are questions for the purpose of looking at if public morality was there or not there," said Justice Mukhopadhaya.

"Article 372 and Article 13 if attracted, that portion is void, otherwise the provision continues. Any provision violative of fundamental rights would be void," said Justice Mukhopadhaya.

"One will have to come back to Article 21", said Mr Malhotra

"After the enactment of the Constitution in 1950, law that is pre-constitutional can be declared void. Would it be void or not? Can there be a 'reading clause' or 'savings clause'?" asked Justice Mukhopadhaya.

"The law has been on the statute book from 1950 to 2012. More than 60 years later – now at this stage – a long period of time. Society has felt that this law should be there. Government has changed," said Mr Malhotra.

"The government changing is not relevant. The Parliament has to frame the law," said the judges.

"Parliament has not thought it fit to change the law," said Mr Malhotra.

"The 172nd Law Commission Report was in 2000. The report is available with you. The Parliament from 2000-2009 did not consider it proper to make amendments to sections 375, 376 and to delete 377," said Justice Singhvi.

"There is nothing like a presumption that Parliament has not applied its mind to the 172nd Law Commission Report. Parliament functions in many ways that we do not know. Reports are considered by committees and debates take place. It is not easy to say that Parliament did not have the time to take time to take this up."

“Can a court of law take into consideration these reports not accepted by Parliament to decide constitutionality?” asked Justice Mukhopadhaya.

Justice Mukhopadhaya said, “Does a law depend on a particular nature of a disease?” Different types of infection will come. One today, one tomorrow. How does disease have a nexus to whether law is ultra vires or not?”

Mr Malhotra handed over his written submissions.

“We would be more enlightened if you can give statistics carried out by the government or government appointed institutions. The rest are theoretical debates,” said Justice Singhvi.

Mr Malhotra read out figures for various states in India of HIV prevalence among MSM community. He said that unprotected anal sex was the most important risk factor for the spread of HIV.

Justice Singhvi said, “We are not at all called upon to decide how AIDS or HIV spreads.”

“Only to show homosexuality is a major cause,” said Mr Malhotra.

“We want to know about India,” said Justice Singhvi. “Out of the surveyed men, what percentage were surveyed? These reports are difficult to rely upon like when a survey is conducted in the metros. When a survey is carried by a TV channel, people believe this. Is there a survey conducted in all parts of the country?” he asked.

“Do you know how many people suffer from HIV without testing? What about persons who may not have gone to hospitals? The effect of infection may start 12 years later.”

Mr Malhotra read out figures of HIV/AIDS prevalence among the MSM community for various states in the country.

“For what purpose are you producing these figures? Are we doing research on HIV?” asked Justice Mukhopadhaya.

“I am only saying it is one of the modes of transmission”, said Mr Malhotra.
“One of the recognised modes is sexual intercourse. If one person is infected, the other person may or may not get it,” said Justice Mukhopadhaya.

“MSM try different partners, so more chances of transmission,” said Mr Malhotra.

“HIV is transmitted because of injection, through pregnancy and sexual intercourse. Why MSM?” asked Justice Mukhopadhaya.

“The petitioner claims that they are at risk. This is in response to their

petition," said Mr Malhotra.

Mr Malhotra mentioned a 7-judge bench Supreme Court decision (*MP Sharma* v *Satish Chandra* 1954 SCR 1077). He said the power of search and seizure and the discussion on the right to privacy was not analogous to the 4th Amendment in the USA, and there was no justification to import it into Indian Law.

Referring to *Kharak Singh* (1964) 1 SCR 332, Mr Malhotra said section 377 was different from the UP Regulation that was struck down in the case. He said that the right to privacy is not a fundamental right granted expressly under Art 21.

Mr Malhotra referred to *Gobind v State of MP* to state that fundamental rights can always be subject to restrictions. "Nobody's privacy is being disturbed. Whose privacy is being disturbed?" asked Mr Malhotra.

The judges then referred to para 22 of the *Gobind* case. "What about the privacy-dignity claim, which can be denied only when a countervailing interest is shown to be superior", asked Justice Mukhopadhaya. The judges pointed out that *Gobind* refers to a 'compelling state interest' that has to be satisfied to curb fundamental rights on the basis of morality. They asked if the enforcement of morality was sufficient to deny fundamental rights.

"The test related to the fundamental right to privacy is that of "compelling and permissible state interest". Show us that this test is satisfied," said Justice Mukhopadhaya.

Mr Malhotra referred to the Supreme Court case of *Sharada* v *Dharampal* 2003 (4) SCC 493, to say that Art 21 could not be treated as an absolute right. "You can't say that the right to privacy is not absolute," said Justice Mukhopadhaya. "Can you enlighten us on the morality and state interest test?"

Mr Malhotra then referred to the restriction on the fundamental right to freedom of speech and expression emphasizing the exception based on 'decency or morality'. He referred to section 292 of the IPC (obscenity), which he said seeks to protect public decency and morality. He read from a 1965 Supreme Court judgment, which talks of how contemporary standards must be taken into account and the influence of the book in question in that case on those susceptible to the material must be taken into account. He said that the courts need to maintain a balance between the freedom of speech and public decency and morality.

Mr Malhotra referred to three cases – *Ramesh Yeshwant Prabhu* (1996) 1 SCC 130, *Fazal Rab Chaudhury* (1982) 3 SCC 9, and *K.K. Gopal* v *State of Karnataka* (where the court says that perversion may result in homosexuality or the commission of rape).

Mr Malhotra argued that a number of laws like divorce laws, the Hindu

Marriage Act, section 376 of the IPC, sections 10 and 12 of the Divorce Act, the Parsi Divorce Law, the Dissolution of Muslim Marriages Act, and laws related to gambling and organ transplant would be affected if section 377 is changed. He said that the Parliament must change the law if there was a need to change it.

Mr Malhotra summarized his arguments saying that said that 377 does not affect anybody. He concluded that it was not necessary to declare the law unconstitutional.

Mr Mohan Jain, Additional Solicitor General, on behalf of the Union Government addressed the court saying that the Union of India had not filed an appeal. He said that the Attorney General had instructed him to tell the court that the Union Of India would not take any stance and would assist the court. He said this was conveyed to the court on 20 July 2009. The media had also been reporting on the stand taken by the Union of India.

Justice Singhvi said, “We will not allow you to take this stand.”

Justice Mukhopadhaya said that Mr Jain could represent the Union Health Ministry. “You can address us on behalf of the Union of India on health, mental health, psychiatric behaviour.”

“If you want to assist us, it is your choice. We are only concerned if 377 suffers from unconstitutionality,” said Justice Mukhopadhaya.

Justice Singhvi said that the Bench would not take cognizance of the Attorney General’s instructions.

“I will file an affidavit related to health,” said Mr Jain.

“We don’t require any further affidavits,” said Justice Singhvi. He said that it was too late, as the arguments had started.

Justice Singhvi then warned Mr Jain never to do this again. He said that his actions had embarrassed the court and Mr Malhotra. He said that the Union should treat this issue as a serious matter. He also requested the media not to carry reports of this part of the proceedings as it would embarrass the parties concerned.

28 February 2012 - Mr. Mohan Jain, Mr H.P Sharma, Mr Praveen Agarwal and Mr. Sushil Kumar Jain

The day's hearings began with the government trying to rectify the confusion created by Additional Solicitor General (ASG) Malhotra's intervention. Mr. Mohan Jain, ASG, stated that the Ministries of Home, Law & Justice and Health were concerned with the Delhi High Court judgment, but felt there was no legal error in it.

Bench: "Are you party through the Govt. of India? Are you party through the Ministry of Health? In what capacity are you a party? Can you change your stand from court to court? Can pleadings in the first court change in the appellate court? Under what provision can arguments in pleading be changed? You are stating things that are not part of our papers."

Mr Jain tried to repeat his point about the Ministries feeling the judgment had no error, but the Bench retorted: "It is not a decision by the Government. It is only a group of Ministers. If it is said by the Council of Ministers, then it is a decision of the Govt."

Mr Jain noted that there had been two different government viewpoints in the Delhi High Court (from the Ministries of Home and Health) but that this had come in for sharp comments from the Bench. The Bench asked how the government could change its stand from court to court, and whether its arguments in the first court (Delhi High Court in this case) could change in the appellate court (Supreme Court)?

The Bench: "We are hearing the constitutional validity of this law – ultra vires/ intra vires? It is a straight question. You file an affidavit taking your stand. It has to be an official stand. If you want to say Sec. 377 is partly / wholly unconstitutional, say so. If you want to say that the court can say whatever it wants to say – you don't need to say that." This remark was met with laughter. "The only question is whether 377 is valid. We will be confined to 377 and not go beyond."

Mr Jain tried to bring the focus to the HIV/AIDS arguments for reading down 377 – on how the law made it hard to reach out to the MSM population. The Bench, however, sought data and affidavits, rather than mere statements, from the Government.

Justice Singhvi: "The judgment was in 2009. After that, if the Govt. wanted to stop the spread of AIDS, they could have educated the public or done something else about it. It wouldn't have taken much time. It is over 2 years now – to be precise, 2 years and 6 months. You should have filed an affidavit. Sorry, we don't like to work like this. You cannot have a hidden agenda. Your papers should be available to the other side also and they should be able to respond. Whatever paper you have must be filed…"

Mr Jain reiterated that the Government's position was that there was no error

in the judgment, but the Bench wanted something more precise: “Is it violative of Art. 14 [Equality before the law], 15 [Prevention of Discrimination], 19 [Freedom of Speech], 21 [Protection of life and personal liberty]?”

In relation to Mr Jain’s reference to the Government’s position, the Bench asked: “Which Government?”
Mr Jain: “Union of India.”
Bench: “There are 3 Union of Indias. Which one is saying this?”
Mr Jain: “Ministry of Law and Justice…”
Bench: “No, no, which Union of India is saying this?” At this, the judges laughed. “How many Union of Indias are there? 4? So out of 4 how many are part of this? I can’t see all 4 in it, so how many are part of this? I can understand Health etc…but which Union of India has argued?”

Mr Jain established with a definite date, saying that on 28 July 2009, the Ministry of Health and Law and Justice took a joint decision, and he went on to talk about how MSM were a high risk group for HIV – how they are often married, and hence may pass on HIV to their spouses.

Justice Mukhopadhaya : “The judgment does not have anything to do with MSM, HIV – it is about adults. Art. 14, 15, 19, 21…which of these in itself address HIV?”
Mr Jain: “There are certain high risk groups because of their risky sexual behavior like MSM, female sex workers, injecting drug users… All are at high risk of getting HIV/ AIDS. NACO says that HIV is higher amongst them. HIV amongst general population is much less. The estimated number of MSM in 2009 was 12.4 lakhs… Since MSM also marry women, they pass it on to women. It is a risky behavior also because of the hidden nature of these groups.”

But the Bench were not interested in the HIV aspect at that moment. The bench asked a perfunctory question about the institutional status of NACO, but also stated firmly: “We are not deciding HIV/AIDS. We are deciding whether 377 of IPC in HC judgment is ultra vires or not.”

Mr Jain said that the government of India does not oppose the High Court judgment, and then sat down.

Next to address the Court was Mr H. P. Sharma, counsel for B. P. Singhal.

Mr Sharma made clear that his argument was to be about what is natural and unnatural: “Under the law there is something natural and something unnatural. In different statutes these words come many times… Murder is an unnatural violence and so is homicide. Natural Justice – nature requires man to speak the truth. Justice is part of nature. It is natural. Injustice is unnatural. Unnatural offence is considered unnatural in a very popular sense. Fundamental Rights (FR) cannot be stretched too far. Court has to also look at Fundamental Duties (FD) and Directive Principles (DP). If someone’s sexual orientation affects someone else’s life, then it conflicts with Fundamental Rights. What

materials should the court look at to see if it is ultra vires or not? Court should look at FR, FD and DP."

Mr Sharma then addressed arguments surrounding the Right to Privacy. This, he submitted, is limited: "Right to Privacy will not be available if the act is not a lawful act – adultery, gambling etc. If a person does not commit breach of law, he can enjoy privacy. The crux of the matter is, can an illegal act be made legal if it violates Right to Privacy? Certainly not."

Mr Sharma then referred to the Manusmriti, the Bible and the Koran. In response, Justice Singhvi asked: "Were these – Manusmriti, the Bible and the Koran – also placed before the HC?"
Mr Sharma replied in the negative. In response, the Bench asked: "Who has authored Manusmriti?"
Mr Sharma: "This is the original text. I have downloaded it from the internet. Anything downloaded from the internet is admissible as evidence…"
Bench: "So this is by which author? If the original is available with you, please give, we will consider..."

Mr Sharma noted that Gandhi condemned 'unnatural vice' in 1929. Justice Singhvi observed that Gandhi disapproved of many things, including alcohol.

Mr Sharma continued with his submissions (not responding to the Bench's comments), until finally Justice Singhvi remarked: "You are paid to appear in court. Are you also paid to hear?"

Mr Sharma continued: "There is something called unnatural and immoral. Irrational is immoral and therefore illogical. Society is ruled by logic. Society is ruled by logic. It cannot allow perverted act of sex between 2 parties – this particular kind of sex is perverted sex. This is like an academic exercise where we are arguing the validity of a small part and completely ignoring certain other important aspects."

Mr Sharma halted for the lunch break. The Bench warned Mr Sharma and all the other petitioners that they would only receive half an hour to argue in the afternoon.

After lunch, Mr Sharma stated that: "There is nothing like sexual minority under the constitution. On the mere apprehension that rights can be violated, the court cannot be moved. Incest marriage is also carried out with consent, but it is unnatural and so criminalised. Just saying that the police have special powers because of 377 is not right. Under IPC unnatural is not only in 377. It is also in Sec 100 (right of private defence) where it talks about unnatural lust. In Sec 372 (selling minor for purposes of prostitution), illicit intercourse is also included. Law has taken care of what is natural and what is unnatural – what a man of ordinary prudence can do and cannot do."

Mr Sharma was asked to conclude.

Subsequently, Mr Praveen Agrawal, the counsel for Suresh Koushal,

was called to address the Court. As the advocate representing Suresh Kumar Kaushal, the first person to file an appeal in the Supreme Court, he had commenced arguments, but had been told by the Bench to further prepare his arguments and speak later.

Mr Agrawal began by questioning what locus standi (what involvement or right to be involved) *Naz* had to file the case, given that it was a trust, not an individual. His submissions were rejected by the Bench: "Issue of locus should have been examined in the HC, not here."

Mr. Agrawal focused upon 'reasonable restrictions': "All Fundamental Rights operate in a square of reasonable restrictions. There is censorship in case of Freedom of Speech and Expression. Playing something at a high volume at night might trouble another person, so a restriction on that is within the purview of reasonable restrictions. What is covered by 377 is a social evil, therefore it can be curbed by reasonable restriction. High percentage of AIDS amongst homosexuals shows that it is a social evil, and so the restriction on it is reasonable. What is morality? In *Bachhan Singh v State of Punjab*, the court talks about prevailing standards of human decency…"

Justice Singhvi: "Morality has different dimensions, different meanings. Even brothers living in the same house may have different standards of morality. Perception of morality pertaining to an act depends on the kind of society. What wasn't moral before may be moral today. Perceptions are fast changing. Purdah system is moral in certain communities, and moral in some. Even among certain Hindu communities, like in Rajasthan, there is the system of ghunghat Some will say that it is part of culture, some people will say why can't those living in ghunghat have their basic rights?"

Mr Agrawal hence suggested that the court should not just consider morality in the metros, but the whole of India. The Bench, however, were discouraging: "Morality differs from person to person, profession to profession. The court is not here to strike down a provision. There is a lot of misconception even among learned people about the role of the Supreme Court – we can only approve or disapprove the position taken by the High Court."

Mr Agrawal notes that 377 does not create any distinction between genders. The section says "whoever" – "so it can be male, female, all…"

The Bench: "We are asking for assistance to know if it talks of any class of persons? Does it say anything about the offender's gender? What is against the order of nature?"
Mr Agrawal attempted to answer by using the Bench's own example of surrogate mothers as something that might be natural, but against the order of nature. The Bench cautioned him: "Don't go by our observations. You don't know where you go." This was met with laughter in the Court. "Don't say what the media reports say we have said…"
Mr Agrawal: "Even if a man is having sex with a woman, 377 may be attracted. It includes whatever is commonly accepted by society as going against the order of nature."

The Bench: “Many acts, natural for us, may be unnatural for others – other communities, countries, religions – but it may not be against the order of nature.”

The Bench: “On the issue of consumption of liquor, for example, people’s opinion will be divided. If you have statistics from a scientific survey, you can use it to assist us - or else leave it. We have asked Malhotra how many HIV+ people are identified as gays, homosexuals, MSM. NACO has provided some statistics.”

Mr Agrawal suggested that section 377 prevents the spread of AIDS, and that if 377 goes then the consequences may be unknown: “If 377 is struck down, Immoral Traffic Prevention Act (ITPA) may also be struck down – privacy will also enter there. Today it is 377, tomorrow it will be ITPA – the concept of morality has to go then…”

The Bench asked Mr Agrawal to conclude. **With just a few minutes to go, the next counsel was Mr Sushil Kumar Jain, the counsel for Krantikari Manuvadi Morcha.**

Mr Jain suggested the inappropriateness of adjudicating the validity of section 377 in a judicial setting:“It is for the Parliament to decide what is moral and what is immoral. Consent cannot be incorporated in a section when it is not provided there. Wherever the consent is valid, the statute includes it. Some acts the society takes care of and penalizes it – individuals not living within the discipline of the society are to be punished. To check anarchy, society takes care of a situation.”

The session was called to a close. The Bench directed the ASG, Mr Mohan Jain to file an affidavit clarifying the Ministries’ positions in 3 days.

29 February 2012 - Mr. Sushil Kumar Jain, Mr. Radhakrishnan, Mr. V. Giri, Mr Huzefa Ahmadi

Mr Sushil Kumar Jain, the counsel for the Krantikari Manuvadi Morcha, was first to address the Court. On the previous day he had only had a few minutes in which to speak, in which he had made the point that the case should not be before the Court at all – because it was the duty of Parliament, not the judiciary, to decide these matters.

Mr Jain: "Civil society cannot function if there is absolute freedom … The IPC contains restrictions that are acceptable to society. Chapter 14 is on offences affecting public health… Parliament has agreed on this. Parliament has to see what is correct or not for society." He said that the fact that a law could be abused was not grounds for abolishing it.

The Bench asked what about harassment by the police – what if the law was abused by those in charge of upholding it? Mr Jain suggested this was only an urban concern: "Ultimately it is the government or parliament that decides. This could antagonize the villages."

The Bench reminded him that someone has spoken for the government, and reminded him again about reports of police harassment. Mr Jain: "It is a failure of the machinery, the police, not the law." He also objected on federal grounds - noting that it was the state governments that implemented the law, meaning that someone from the central government could not speak on the matter.

The Bench: "Who? Which department?"

Mr Jain: "Everybody. On which basis are they making a statement?"

The Bench: Each case of constitutional validity relates to states vs. parliament. Is about the legal aspect or…?"

Mr Jain said that this only concerned the legal aspect. The law could only be amended by the parliament.

The Bench: "What is the difference between the central government and the Union of India?"
Mr Jain: "It is a strange stance that the government of India is taking."

The Bench: "Nothing is strange. They have taken a particular stance. That is all."

Mr Jain stated that the rights to privacy and to life are not absolute: "The right of privacy cannot be used as a justification for committing an offence."

The Bench asked Mr Jain to finish and file supplementary submissions if he had more to say.

Next to address the Court was Mr K. Radhakrishnan, Senior Advocate and counsel for Trust God Ministries, a Kerala-based evangelical group.

Mr Radhakrishnan began by dismissing any idea of the HIV/AIDS being involved with section 377, which he argued was created by the legislature to preserve peace in India and protect morals and values over here.

Mr Radhakrishnan then went on to criticise Naz Foundation specifically for setting up a NGO to support gay men who were suffering from discrimination. Speaking on behalf of Trust God Ministries, he stated: "Instead they should have worked to integrate them into the mainstream society and rehabilitate them. They are an NGO. This is expected of them."

He then went on to criticize the National Aids Control Organisation for deviating from its stated mission, reading from its website: "NACO envisions an India where every person living HIV/AIDS has access to quality care and dignity … which is only possible in an environment where the human rights of people are respected … without stigma or discrimination… by fostering close collaboration with NGOs." Mr Radhakrishnan stated that this meant that NACO was supposed to motivate people towards responsible behaviour, not homosexual behaviour. Their aim is should be to "save their life", not "safe sex."

Mr Radhakrishnan addressed the role of children under section 377: "377 is limited to consenting adults. So are persons under 18 not covered by Article 21? What is an offence or not when a child under 7 is concerned? Children between 7 and 18 are still under the purview of 377. But 377 does not have any age regulation or concept of consent."

The Bench noted that the Juvenile Justice Act exists to take care of children. Mr Radhakrishnan observed that this would prove inadequate: "The petitioners are aware of the concerns regarding minors but they cannot resist temptation."

Mr Radhakrishnan: "It is very difficult to identify gay people, homosexuals, sex workers. Like for Malaria, Cholera … we need a rehabilitation program. This will spread the disease otherwise. For the prevention of smoking and addictions there already are clinics. NACO as well as Naz are misdirecting themselves."

Mr Radhakrishnan then read out parts of Section 269 of the IPC: "Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six month, or with fine, or with both." If LGBT people are negligent in doing so, they would fall under the purview of Section 269. He also observed that Section 270 says whoever "malignantly" does this is also punished, while Sections 292, 293, 294 deal with obscene books, materials, objects, acts, songs and so on.

Mr Radhakrishnan then moved on to rape, under section 375 of the IPC: “375 deals with sexual offences. 377 deals with unnatural offences. Every organ in the human body has a designated function assigned by nature. The organs work in tandem and are not expected to be abused. Exactly that happens here: there is abuse, orally and anally. Those organs are not expected for sexual use. If it is abused, it goes against nature: “carnal intercourse against the order of nature”. In 375, only sexual organs are involved. In 377, people can be of same or opposite sex, and penetration is necessary, but the other’s sexual organ is not. Consent is not defined. “Voluntarily” is defined… Consent is distinctively absent from 377. Passive agent can also be booked as offender [unlike under 375].”

Mr Radhakrishnan concluded by speculating as to the possible results of decriminalisation: “We are getting more exposure in the media to this judgment, and minors do also. Say there is a gay boy or girl going to school. What will be the situation of the family? They have to take care of them until they are 18. This is dangerous of these NGOs, because they are advancing this case.” He also notes that since these NGOs are funded by NACO, the state is also party to this irresponsibility: “The state is involved, but there can only be one stand, the law of the parliament!”

Mr V. Giri, Senior Advocate and counsel for both the Apostolic Churches Alliance and Utkal Christian Council, was next to address the Court.

Mr Giri began by reading from the High Court judgment (where the impossibility of criminalizing natural urges, and the existence of different conceptions of morality, were stressed).

Mr Giri: “I am asking you that whenever there is a challenge to a law on constitutionality, you do not look at this law as apart from the rest of the constitution.”

The Bench: “Can there be several stands from the government?”

Mr Giri: “Yes. The Health Ministry said that 377 actually stands in the way of HIV/AIDS prevention as an unintended consequence, in addition to violating Article 21.”

Mr Giri read out Section 377 and continued, arguing that it does not describe a sexuality, just a sex act: “It does not classify people into groups, it only describes an offence. But it has found favour in the High Court. According to the High Court, sexual orientation is held to be part of Article 21. Where does 377 speak of sexual orientation?”

The Bench: “Is it a normal or natural sexual orientation?”

Mr Giri: “It says “order of nature”, not natural.”

The Bench: “Normal and natural will come in all human beings.”

After the lunch break, Mr Giri continued on the point that it is wrong to assume that sexuality is something of a fixed and unchangeable kind as described in the High Court verdict.

Mr Giri: "What is criminalized is an act. The rest is a matter of interpretation of what is against the order of nature… The error committed by the High Court is that the sexual orientation of a person seems to be immutable. There is no place for such a conclusion… The High Court made two assumptions: one, that sexual orientation is immutable and two, that sexual orientation can be naturally demonstrated only in a way as contemplated in 377. It is not considered that such a sexual orientation is a disease or needs therapy. What is criminalized is just the act, independent of the sex of people or sexual orientation."

Mr Giri went on to note that the High Court verdict was limited to adults. Though the Bench sought further arguments on this point, Mr Giri declined. He attempted to give a broader base to his argument by reference to single parents, abortions and other forms of 'immorality'. This led to the following exchange:

The Bench: "There are different religions. Where is your role in this case? Do we only have one concept of morality? A large number of people do not believe in religion in this world. How is it related to laws in countries with a different context?"

Mr Giri: "The role is wherever there is a manifestation of a sexual urge that is considered illegal."

The Bench: "Can there be a different sexual orientation in a child? Parents may be worried: why has the sexual urge not come? Sexual urge is an inherent phenomenon in human beings. How does it have to do with sexual orientation? … Can sexual orientation change because of any factor? What is natural?"

Mr Giri: "This is a bizarre question. It is difficult to answer."

The Bench: "A fundamental right should have a corresponding fundamental duty so it does not interfere with the fundamental right of others."

Mr Giri: "I cannot give a response to this immediately."

The Bench: "Does sexual orientation change at different ages? Can it be there at age six?"

Mr Giri: "Freud would say so."

The Bench: "Therefore we are talking about the order of nature. That is why we are talking about this. Can it change?"

Mr Giri then focused on the issue of whether anything consensual should be

allowed: “Minors have been excluded not because of immutability but because of consent. It cannot be accepted that anything with consent has to be legalized. An act of adultery has the consent of two parties but is still illegal. So is attempted suicide. Whether proper reasoning has led to these provisions is irrelevant. Consent is not sufficient.”

Mr Giri attacked the High Court’s argument that section 377 helps with HIV/AIDS prevention: “There is not sufficient evidence for this. Only two papers are referred to. One is a scientific study by the National Institute of Health on behavioural patterns and AIDS. It also makes reference to the fact that HIV/AIDS is higher among MSM. It refers to the fact that it is not about sexual orientation: many of them are married, so they are not incapable of having sex with their wives. They also cause infections to them.” He then referred to the High Court’s reference to *Lawrence vs Texas* and a study from the US Center for Disease Control.

Mr Giri: “Anal sex is one reason for a higher infection risk… The anus is vulnerable to tears due to anal sex which influences the likelihood of getting AIDS.” He refers 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: “Same-sex sex is more harmful to public health than opposite-sex sex. What is pointed out are sexual acts, not sexual orientation in any of these materials. Therefore the High Court judgment that 377 is in the way of HIV/AIDS prevention contradicts these materials, including materials by NACO.”

Mr Giri then criticised the influence of international bodies such as the International Commission of Jurists, which in 2006 formulated the Yogyakarta Principles (which formed a basis for the international application of human rights to LGBT) issues), and the United Nations Human Rights Commission, that in 2007 adopted the Yogyakarta Principles as a global charter for gay rights.

Mr Giri attacked the High Court’s use of the Yogyakarta Principles: “These principles were formulated by people who call themselves experts on this matter… Sexual orientation and gender identity are defined by the High Court in references to the Yogyakarta Principles. It was an international panel of experts on international human rights law.”

The Bench: “Have the Yogyakarta Principles been adopted by the UN or another body?”

Mr Giri: “No, they are not part of any covenant or resolution. According to me, these are subjective perceptions.”

The Bench: “Are they sanctioned by law in any country?”

Mr Giri said no: “I would not refer to it but because it was referred to by the

High Court… The intention is that sexual orientation is upheld as part of privacy and that it is part of human rights. It also supports the idea that the family could be other than a man and a woman. The Yogyakarta Principles have this in mind. The High Court should have looked into the content. If the Yogyakarta Principles are relevant, please look into the document in its entirety."

The Bench: "Reading this also requires some privacy."

Mr Giri: "I have one more submission: that morality is not kept separate from legislative provisions."

Justice Singhvi: "Usually people will omit this: in 1921, under the British government, people who consumed liquor were seen as immoral. So if you go by that, then you know how many people would fall into this category today?" This was met with laughter from the court. "I am just pointing out how much things have changed."

The Court then heard from Mr Huzefa Ahmadi, counsel for the All India Muslim Personal Law Board.

Mr Ahmadi: "The right to sexual orientation can always be restricted by principles of morality and health. The principle of strict scrutiny is imported from foreign decisions, and is not a principle which can be used in our constitutional law. Therefore, the expression 'sex' in Art 15 is only gender specific and does not include sexual orientation. To support this proposition I refer to constitutional assembly debates on Art 15 to show that this was not contemplated by the Founding Fathers. If you interpret privacy broadly, then the adultery provision could also be challenged; a lot of activities that are perceived as sexually immoral will also come under attack (e.g. incest is condemned by most religions). If a legislature enacts related to group sex (for same sex or different sexes) can this be challenged? Going by the analogy of the High Court decision, you cannot pass such a law."

Mr Ahmadi then read from Justice Scalia's dissent in *Lawrence v Texas*, saying that the passages in the dissent are more in tune with the Indian Constitution than the majority decision. He stressed on Justice Scalia's ruling that the promotion of majoritarian sexual morality was a legitimate state interest. The law against public nudity, for example, needs a rational basis, and why it is targeted against nudity is clear. The moral disapproval of same sex couples was no different form this law. He stated that the courts in the U.S. have taken sides in the 'homosexual agenda', where courts have decriminalized homosexuality without persuading a majority of their fellow citizens and without a democratic majority. What the state of Texas had chosen to do (enact anti-sodomy laws) was well within traditional democratic action. Later generations could always repeal these laws.

Mr Ahmadi also read from Justice Thomas' dissent in the *Lawrence* case, and he then brought up religious arguments. He said that homosexuality was condemned by the Bible, Arthashastra, Manusmriti and Quran. He quoted the

following cases: (1996) 2 SCC 648 (the ‘right to suicide’ case where sanctity of life was held to be a moral that could be protected through legislation); (2004) 11 SCC 26 (a case where the state could use disincentives promote family planning); the case of *X v Y* (a case which pitted the right to privacy of persons living with HIV/AIDS against public health concerns) and the case where the prohibition of adultery was upheld. He cited the 42nd Law Commission report to the effect that the prohibition on homosexual acts should not be repealed.

Mr Ahmadi stressed that courts, by their very nature, should not undertake the task of legislating. He said the Delhi High Court was not clear if it was severing the law, or reading it down. He said that if the language of the section was plain, there was no possibility of severing or reading it down. He said that, irrespective of the Union Government’s stand, so long as the law stands on the statute book, there was a constitutional presumption in its favour. He said there was not even a single Indian judgment to support the contention that Art 15 includes non-discrimination based on sexual orientation

The Bench reminded Mr Mohan Jain, the ASG, that they had asked for statistics on people with HIV/AIDS.

1 March 2012 - Mr. Ajay Kumar, Mr. Purushottam Mulloli, Mr. Fali Nariman

The hearing was again the first item, and began at around 10.40am. The judges first asked the Additional Solicitor General, Mr Mohan Jain, to present the HIV/AIDS statistics that they had asked for on the previous day.

Mr. Mohan Jain read out several statistics relating to HIV/AIDS. He stated that, in December 2009, it is estimated that 23.9 lakh people were HIV positive in India.

Justice Singhvi: "What about the gap between 2009 and 2010?"

Justice Mukhopadhaya: "What is this number of 0.31% of HIV positive people referring to? 0.31% of whom? Adult population or also children?"

A NACO official rose to explain the numbers, but could not answer this question.

Justice Mukhopadhaya: "Why is there this number of 0.31% in 2009 – why not in 2010 or 2011? And 0.31% of whom? These numbers mean that there has been no increase."

Mr. Mohan Jain: "The numbers are estimates. 2011 is not done yet."

Justice Singhvi: "The English in the first line is also bad. '[T]he estimate ... is estimated to be'. You should have done your homework. You are paid to do that. Don't waste our time. Tell your officer to sit down at the back. He is of no use to us."

Mr. Mohan Jain continued to read out statistics. He stressed that NACO is completely controlled by the state.

Justice Singhvi: "So you have no direct connection with NGOs?"

Mr. Mohan Jain: "None. It is a state department. They sent us this data…"

Justice Singhvi again asked for a breakdown of several of the numbers featured.
Mr. Mohan Jain: "I don't know."

Justice Singhvi: "Get this information please."

Justice Mukhopadhaya: "How about the number of homosexuals? And there are statistics on women and men, but what about transgenders?"

Mr. Mohan Jain repeated the statistic that 8% of MSM are HIV positive. The judges again asked for a breakdown of this statistic; Mr. Mohan Jain was unable to produce such.

Justice Singhvi: “Thank you. Ask your officers to produce a proper chart for these figures.”

Mr Ajay Kumar, counsel for S.K. Tizarawala, (who is a representative of Baba Ramdev) began his arguments.

Justice Singhvi: “You may have many identities. Are you not representing Ramdev?”

Mr. Ajay Kumar: “No, but the petition was filed by Ramdev.”

Justice Singhvi: “You are a party?”

Mr. Ajay Kumar: “No, I did not know about the proceedings before 2009.”

Justice Singhvi: “No? So you didn’t hear about this judgment in 2009?”

Mr. Ajay Kumar: “No.”

Justice Singhvi: “You don’t read newspapers, watch TV?”

Ajay Kumar: Response was inaudible.

Justice Singhvi asked Ajay Kumar’s age. His response was inaudible.

Justice Singhvi: “You should have assisted the High Court. This is a publicity gimmick. Your client only wants to be on TV channels. This is nothing except publicity. Don’t disguise it.”

Mr. Ajay Kumar: “We were not aware of it then.”

Justice Singhvi: “Who is going to believe you? ... This man (referring to Baba Ramdev) owns part of a TV channel. How could you not have known about this?”

Mr. Ajay Kumar began his argument.

Mr. Ajay Kumar: “Who are the people who are truly affected? Those engaged in MSM activities. Most of them have been married to a woman. Some have kids. What about them, their rights?”

Justice Singhvi: “We are not talking about this.”

Mr. Ajay Kumar: “But there is this man, he is a married man... Some of these gays are married and they have kids also.”

Justice Singhvi: “Is there any lesson from what you’re saying? Do you have statistics on this? How many gays are married?”

Mr. Ajay Kumar: “I don’t have statistics ... Some are married. We have come across one such case.”

Justice Singhvi: “Do you have any reports on this?”

Mr. Ajay Kumar: “We can submit the reports... If you are talking about a specific community, then they should have a duty also when enjoying their way of life...” He proceeded to read from High Court judgment. He said: “Are we saying that to legalize sex between all women...?” The remainder of his question was unclear.

Justice Mukhopadhaya: “Which law has declared it illegal?”

Mr. Ajay Kumar: “377.”

Justice Mukhopadhaya: “You are talking about legalizing. Yes, there are certain provisions in the IPC. But there are no provisions illegalizing it, only penalizing. ... The High Court has never stated that even if it is against the order of nature it is depenalized. ... Why are you reading something in between?”

Mr. Ajay Kumar continued to read out section 377.

Justice Mukhopadhaya: “The final decision talks of adults – consenting adults in private.”

Mr. Ajay Kumar: “If we don’t penalize, what will happen? Sex with animals will also be legalized.”

Justice Mukhopadhaya: “The High Court has stated that whatever is against the order of nature has been excluded in accordance with the law.”

Mr. Ajay Kumar: “It says consensual sexual acts by adults, not between adults.”

Justice Mukhopadhaya: “So consensual sexual acts can happen with animals?” This was met with laughter.

Mr. Ajay Kumar: “Consent can involve money, so commercial sex. Group sex, oral sex, there are other forms of sex yet to be discovered. What will happen? Homosexuals can get married. In these circumstances, the legislation has far-reaching consequences. It opens the floodgate to other litigation. Commercial sex will also come in. Somewhere we have to draw a line... Culture, religion, languages differ. The morality of different areas is different. So we cannot rely on the opinions of other countries. There is social and constitutional morality, but I think it is the same.”

Justice Singhvi: “What is constitutional morality?”

Mr. Ajay Kumar: “What the parliament decides. It can be like in this case....

The rights of the citizens cannot be infringed."

Justice Singhvi: "It is difficult for us to see what is happening here. If we go by the perception of morality: a lot of young, urban people do not care about what their parents say... So we are not talking about social morality. It is about individual perceptions. Every time we see that a Senior Counsel does not get offered a seat here, we think that is unethical. But that is just an individual perception."

Justice Mukhopadhaya: "What is moral or immoral? It is different from society to society, religion to religion."

Justice Singhvi: "In certain parts of the country, marriage has a different meaning compared to Northern India. Go and ask somebody from Haryana." This was met with laughter. "There is altogether different thinking on the same subject. Sitting in Delhi, we condemn what is happening in other parts of the state."

Justice Mukhopadhaya: "What was the background for enacting 375 and 377? Everybody is looking at this from their own angle and not considering the background."

Mr Nariman stood up, and said that he would talk about that and give a background to the law.

Ajay Kumar wished to continue talking about morality, but was interrupted.

Justice Singhvi: "The same argument has been made by three counsels already."

Mr. Purushottaman Mulloli, petitioner-in-person, addressed the Court on behalf of the Joint Action Council, Kannur (JACK).

Mr. Purushottaman Mulloli: "The High Court judgment has nothing to do with HIV/AIDS. This law had to go because there is a multi-billion dollar business behind it. NACO is using manufactured fraud data, which they also did in the High Court. We have challenged their numbers. So they went down with their numbers. We challenged them again. They went down with the numbers again. It is manufactured data. I need facilities to do a PowerPoint presentation to show this data."

Justice Singhvi: "Whatever materials you want to present, you are entitled to do so. Whatever documents you want to show us, please do so."

Mr. Purushottaman Mulloli: "I want to show that this is manufactured fraud data..."

Mr. Purushottaman Mulloli stressed that the numbers used by NACO were contradictory. "How many people have died? We don't know..."

Justice Mukhopadhaya: “A PowerPoint presentation can also be printed. You can print it and give it to us.”

Mr. Purushottaman Mulloli continued his argument. “NACO has said that a certain number of people have died.... We fought it. Now that data is not on their website anymore. In 1998, they said that 19% of the population is infected. We proved that it was only 0.4%. You can get into the FBI, CIA, but not into NACO. They are a registered society... I have talked to them and they have said that they are running a deficit... Every district they look at has a different method to collect data and then they extrapolate to get final data.”

He stressed again the presence of inaccuracies and fraud. “NACO says that Manipur is the AIDS capital of the world.”

Mr. Purushottaman Mulloli: “We never said that we have a problem with homosexuals. They are not a high-risk group. I can prove it. There is just fear being created, so that money can be poured in by the government. ‘High-risk group’ is a government concept, a government theory. There was a 65 cities study by NACO, but it was only completed for 16 cities. You do not find tribals as a high-risk group. We challenged this...”

Justice Singhvi: “Do you have a document on this?”

Mr. Purushottaman Mulloli: “It’s in Kerala. I can bring it.”

Justice Singhvi: “You need to have public documents to support this.”

Mr. Purushottaman Mulloli: “In Kerala, there is a group called ODI.” He briefly discussed DFID financing for HIV/AIDS projects. “They said that tribals, street children, homosexuals and prostitutes are high-risk. We asked for evidence. They said NACO has a study, but they cannot give it to you... The study was only done in 16 cities. In the High Court, they only read a four-page statement that said that tribals are a high-risk group. But the study is still not validated... There is no data when we ask, but it is reported in the newspapers. Everyday it is “this happened, that happened”. It’s a fear psyche.”

Justice Singhvi: “Is there any data on homosexuals?”

Mr. Purushottaman Mulloli: “The same as they submitted to the High Court. We filed an RTI. We got data from NGOs. They promote the industry. They asked for NGOs to give them data. NACO then used this data. It is not scientific data. In the last phase of the case, NACO put out a note that MSM are high-risk and go underground. But we have no evidence of this. We don’t know how they came to conclude that homosexuals are high-risk and that therefore 377 has to go. I want to know from the Health Ministry. Ramadoss stated himself that 377 has to go at an AIDS conference.” Mr Mulloli then read out Ramadoss’s statement.

Justice Singhvi: “This is something that is published somewhere? Even if we assume that he made this statement and it is correct, it has no relevance. No

court will take note of such a statement."

Mr. Purushottaman Mulloli: "As a common man, we get information from newspapers."

Justice Singhvi: "Again, this is in newspapers, so we cannot take it into account. It can be manipulated."

Mr. Purushottaman Mulloli: "But kids in school are also asking me whether homosexuals are legalized. What do I tell them?"

Justice Singhvi: "We can't tell you now. We can't say. The Court only speaks through orders and judgments."

Mr. Purushottaman Mulloli: "A little boy, a friends' grandson told me about this."

Justice Mukhopadhaya: "Well, at least children now have knowledge of IPC provisions because of the proceedings in court." This was met with laughter.

Purushottaman Mulloli: "The Secretary General of the UN made a statement about how India will be a sick nation, with 8.3 million HIV positive people. Where this 8.3 million comes from, we don't know. There are too many inaccuracies... We have collected our own data."

Justice Mukhopadhaya: "You can file a written submission and get time to present the data."

The judges then summoned Mr Jain to address the Court.

Justice Singhvi: "Please verify the data you presented. We will not rely on data by NACO. We will ask the Health Ministry to file an affidavit in person."

Senior Advocate Mr Fali Nariman began his arguments on behalf of the parents of LGBT persons.

Mr Nariman: "I represent IA no 8, Minna Saran, and others who are the parents of Lesbian, Gay, Bisexual and Transgender persons. It is essential to have a background to this law. So I will give a historical perspective first and the arguments later. First, only the origins of the law, which starts in the 17th century in Britain... In 1669, there was a chapter on sodomy, defined as an "abominable sin" among Christians." He stressed the importance of this reference to Christianity.

Mr Nariman: "In 1885, the law was about "outrageous indecency", referring to any male person committing any act of gross indecency with another male person. Under this provision, Oscar Wilde was tried and convicted... During the British rule in India, it appeared first in 1828, referring to any person committing "the crime of buggery with humanity or animals". In 1837, "unnatural offences" and "unnatural lust" first appear, in a draft of the Penal

Code. But Lord Macaulay said that he was “unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.” Subsequently, Section 377 was added to the IPC.

Mr Nariman: “Where Section 377 has appeared in the IPC is significant and also where it has not appeared... For example in Section 294, which deals with obscene acts and songs, it is stated specifically that this should be punished if “in a public place”. Public place is significant... The silence of the statute with regards to private places is significant... Now look at Chapter XVI of the IPC, which is divided into 8 parts and deals with “Offences affecting the Human Body”. The 8 parts are “Offences Affecting Life” (Sections 299 to 311), “Causing of Miscarriage and Injuries to Unborn Children” (Sections 312 to 318), “Hurt” (Sections 319 to 338), “Wrongful Restraint and Wrongful Confinement” (Sections 339 to 348), “Criminal Force and Assault” (Sections 349 to 358), “Kidnapping, Abduction, Slavery and Forced Labour” (Sections 359 to 374), “Sexual Offences” (Sections 375 to 376), which was entitled “Rape” before the amendment”, and “Unnatural Offences” (Section 377). The pattern of this is that all of these 8 parts, except for the last one, postulate harm or injury to victims, including through rape, which is the nearest to the last part (i.e. to Section 377)."

The Court broke for lunch at 1pm.

After lunch, Mr Nariman continued to address the Court.

Mr Nariman: “Neither morals nor decency are advanced [in Chapter 16 of the IPC]. They do not figure in Chapter 16, only in Chapter 14.”

Mr Nariman: Indian law deliberately puts Section 377 “under a heading “offences affecting the human body.” It is not in any section that would signal a general provision in order to safeguard morals of the community at large. This is alien to its conception.”

Mr Nariman: “Sec 377 is about individual actions. It does not generally concern itself with the moral good sense of the community at large. Its location is important, My Lords. This importance is twofold. The heading and location of the Section, and its use of carnal intercourse rather than sexual intercourse. “carnal is of the flesh, not spiritual”. There is opprobrium to it. The section does not connote that there should be a victim.”

Mr Nariman: “Yet all the other sections in this heading, from 292 onwards, indicate harm. Force, harm, or deprivation of some kind. Therefore, it postulates no consent. There are not innocent acts. Now I am coming to the scope of the law.”

Mr Nariman: “Where the public morality is mentioned – in obscenity, in

Section 292 – it is within the chapter on morals. There is a distinct mention of annoyance in public. There is no annoyance in private unless you are looking through the peephole."

Mr Nariman: "It is important that the word used is "carnal" and not sexual intercourse as it is used in rape law. I asked myself why this is so – carnal is of the flesh. There is a concept of a perpetrator and a victim that is emphasized in this heading."

Mr Nariman then read from G.P. Singh's Statutory Interpretation of Statues (13th edition) on principles of statutory interpretation: "Views are not settled that the section headings of the IPC can be referred to as an interpretation of the intention of the legislature. The heading is like a preamble."

Mr Nariman then read sections of G. P. Singh that argued that headings and titles were "broad general indicators of the nature of subject matter therein".

Mr Nariman then said that conflicting views had been placed on this but the "more realistic take" was that printed law was a reflection of the legislative process. Though the heading did not have the same weight as the sections, headings should be read to indicate the intention of the law. He said that cross-headings are not just used for the resolution of ambiguity.

- He read case law to support the use in statutory construction of Headings under which a section was placed (1969 3 AIR 1640).
- The case concerned the UP Tenancy Act and a finding that a petitioner could be ejected from land that he had possession on. The verdict relied upon the argument that the "heading under which the relevant section that been placed" referred to the ejection of persons from land, and therefore headings had been used in previous case law.

Mr Nariman emphasized through the session that all the judgments he was reading were "our judgments", or "Indian case law".

Mr Nariman then cited three more cases in which headings have been used to give meaning to Sections within them – as per page 168 of G.P. Singh, Principles of Statutory Interpretation, 13th Ed.

Mr Nariman: "My Lord, headings are certainly helpful in knowing the drift of the section. The drift of Sec 377 is in affecting the human body, not in morality."

Justice Mukhopadhaya: "'Affecting' means 'concerned with'. Therefore, spreading of disease could be 'affecting' the human body."

Mr Nariman: "'Affecting' could be seen as just 'concerned with' but all the other sections in the heading indicate that "affecting" is closer to meaning 'some harm or some injury'."

Mr Nariman: "377, read in context, implies a perpetrator and a victim. Particularly through its use of 'voluntary', it is talking about not the victim's

action but the agent's. This way is also showing harm or injury to another. Consent is outside this. The words 'carnal intercourse' have something more than sexual." He stressed that the context meant there must be some opprobrium to it; these are not innocent acts carried out by private parties in a private place.

Mr Nariman: "Webster's Dictionary definition of carnal is something pertaining to the body, sexual, lustful – something more than just sexual encounters for pleasure. That is why they use carnal intercourse in Sec 377 but sexual intercourse in 375. These are just indicators, My Lord, I am not being dogmatic about them but they help us understand the drift of the section."

Mr Nariman: "My submissions then, My Lord, are that Sec 377 is not placed in the chapter on morality but in the chapter on affecting the human body and that all sections in this chapter are about adverse effects on the body."

Mr Nariman then read from *Fazal Rab Chauhdary*, a judgement in AIR 1983 SCC (of Justice Desai). He described the case and said that the man had been convicted for 377, had appealed, and lost in review as well. "The Review bench had said "offence is one under Sec 377 which implies sexual perversity." Homosexuality is not sexual perversity. The judge said perversity. The definition is sexual inversion, according to Oxford Dictionary."

Mr Nariman then proceeded to the *Mubarak Ali* Case, about "how to construe the penal code in the light of changing circumstance."

Mr Nariman: Construction must not be based on the ordinary meaning of words. It is not necessary to construe IPC in order of the notions of when it was enacted. "Notions [which] pervaded at the time might have changed. It is important to reference it to modern needs."

Mr Nariman: "'Carnal intercourse', 'the ordinance of the creator' – these are quaint and archaic words, My Lords. Quaint because they are not used anywhere else but in this section." Who uses words like this anymore, my lord?'

Mr Nariman then read Sec 377.

Mr Nariman: "It traces its origin perhaps to the idea of the "ordinance of the creator'. How do we read "order of nature"? The *Khanu* judgement in AIR 1925 Sind is the only judgment we have that explains these words under Sec 377. It says that sec 377 punishes carnal intercourse against the order of nature inter alia with a human being. Is carnal intercourse committed here? The judgment says clearly because "the natural object of carnal intercourse is the possibility of procreation"."

Mr Nariman: "Here, my lords, we can read "natural object" and "object of nature" together. This is now an archaic concept. Family planning has entered our own Constitution – population control and family planning. Some of my learned friends were moralizing about this. 377 would make it

impossible to have family planning!"

Mr Nariman: "Can we be headed this way? Intercourse for pleasure is an offence. Use of contraceptives is an even bigger offence. This was all very well in 1860, in Victorian times. We have to move with the times. The Section has always been speaking since that time. It has not been amended – I accept that. The Delhi High Court has gone on South African judgments, American judgments, many judgments… Let us come back to our own case. We must first know what Section 377 is. Of course we must read it in the spirit of the constitution but first we must know how to interpret it."

Mr Nariman: "There is the context of its location – not with chapters on morality or decency."

Mr Nariman: "Many people regard this as indecent. That is all right. That is a difference of views. We cannot restrict ourselves to what people thought in that day. Macaulay did not even want to talk about it!"

Mr Nariman: "The section is hopelessly vague. It has no meaning. Its meaning of origin will affect and include millions. Husband and wife even… I am not saying, My Lords, that it has been used against them but the possibility is always there."

Justice Mukhopadhaya: "In the absence of FIR – how do we proceed? Someone has to allege an offence. If this party alleges, then it is not in private. So where is the offence? You are also concentrating on one specific act. One may argue that in the case of a specific act that it is not against the order of nature. But which act? But we are not on this question, we are on the question of whether the section is ultra vires the constitution."

Justice Singhvi: "For the declaration that is sought, you must be a human being."

Mr Nariman: "I agree, but the handicap here is that the Delhi High Court, perhaps justifiably, argued this very thing…"

Justice Singhvi: "Initially they did."

Mr Nariman: "The petition is maintainable, My Lord. It was for your Lordships to say – go out, you cannot say this, you have no complainant…"

Justice Singhvi: "The declaration is not about what constitutes an offence or not. It was about the constitutionality. It has been declared so."

Mr Nariman: "Respectfully, My Lord, I would ask that you not read the judgment so strictly… Let us concentrate on only the Constitution, if that is all right… Could we not? But interpreting the section is of the utmost importance before we get to the constitutional question."

Justice Singhvi: "Once the High Court has made a declaration, this issue can

only be raised by an individual who is prosecuted – he can say that his act is not an offence, or he can say that his rights have been violated and then we can again travel to this point."

Justice Mukhopadhaya: "We don't know what type of acts are there - which are an offence and which not."

Mr Nariman: "The purpose of the law is harassment – harassment faced by some people."

Justice Singhvi: "We asked the ASG about this."

Justice Mukhopadhaya: "How many judgments are there?"

Mr Nariman: "140 or so, My Lord, but they are not enlightening. It is not that you have to wait to be prosecuted before you can ask for your rights. There is fear and apprehension."

Justice Mukhopadhaya: "That fear everyone has."

Mr Nariman: "Let me refer to the dissenting opinion by Justice Scalia in *Lawrence v. Texas* that my learned friend Ahmadi read yesterday. I would like to read the dissent from an earlier judgment, Bowers v. Hardwick, where Justice Blackmun argues that "this case is not about the fundamental right to commit homosexual sodomy. It is about that most comprehensive right – the right to be let alone." Our court has also said this in *Govind.* The constitution steps in and says this is your personal liberty. Yes, public interest can override but your home is your castle. Then how is there somebody who can enter into it and say no? In the privacy of your own home, how have you disturbed anyone else?"

Mr Nariman: "There are two questions at hand, My Lord. One is the interpretation of the section itself, and the other is its constitutionality."

Mr Nariman: "Section 21 comprehends that – the personal liberty is of a person. That liberty is not taken away by sexual intercourse between consenting adults."

Mr Nariman: "The other side has argued that this is obnoxious to us. The answer to that is: if it offends you, don't look!" This was met with laughter by the court.

Justice Mukhopadhaya: "But if Chapter 16 says "affecting the human body" then what if that effect is through disease – mental or physical?"

Mr Nariman: "The sections in that chapter mean adverse harm. This cannot be a debate in the abstract. The matter has been permitted, My Lord."

Justice Mukhopadhaya: "We are also permitting it here. Homosexuality is not an offence, it is acts of a certain nature…"

Mr Nariman: “But there is no understanding under Sec 377 has to which acts these are.”

Justice Mukhopadhaya: “How can a declaration be sought if there is no clear definition of the act? This line in the definition of carnal between passionate, lustful and of the body – where will it fall?”

Mr Nariman said that it will fall outside section 377.

Justice Mukhopadhaya: “Some may fall, some may not fall.”

Mr Nariman: “*Naz* came up in appeal against the first dismissal in the Delhi high court. It succeeded.”

Justice Mukhopadhaya: “We are not going on that question.”

Mr Nariman: “A declaration of the Supreme Court says that the case should be heard on its merits. This case should have started like *Lawrence vs Texas*. Lawrence is the inverse of the case. The Delhi High Court judgment gave a declaration without a case – you could have said, ‘dismiss this!’ – but the Supreme Court did not.”

Mukhopadhaya J: “We are not on that.”

Mr Nariman: “I know you are not, but I am!”

Mr Nariman: “Relief has been given on the basis of a imagination that there was a case – that there was a Mr Naz who had private sexual intercourse with another woman or a another man. Just as Lawrence dealt with it.”

Mr Nariman then read from *Lawrence vs Texas* in detail to say that state cannot enter into the home – that there are spaces where the state cannot intrude, including the right to intimate conduct. He then read from the case to the effect that that criminalizing the same sexual act for one type of person and not another is against the doctrine of equal protection of the laws.

Mr Nariman: “This case is just like Lawrence – both adults, both consenting, in private.”

Mr Nariman: “The Delhi High Court judgment has said that, if this was the case before them, they would acquit. The Court did not dismiss the case – what it did was decide on merit without the facts. *Lawrence* is precisely the reverse of the Delhi High Court judgment – no child, no other adult…”

Justice Mukhopadhaya: “The question before is whether the Delhi High Court judgment is correct or not…”

Mr Nariman: “Respectfully, no, my Lords, that is not the question. The primary question is the one in the petition…”

Justice Mukhopadhaya: “Can you formulate what that is?”

Mr Nariman: “Whether 377, properly constituted and interpreted, violates articles 14, 15, 21.” This should be considered afresh. The judges in the high court could have been wrong, or right – you have to consider that afresh. The Delhi High Court judgment is not the basis of consideration by your Lordships.”

Mr Nariman: “It all depends on the interpretation of the section – whether the Delhi Hight Court judgment did it or not doesn’t matter. We can assume that the Delhi High Court is wrong and take it afresh. They put the case in reverse.”

Justice Singhvi: “There is an imaginary *Lawrence*.”

Mr Nariman: “We are between two schools of thought, My Lords. *Naz* would have had a case if they had waited for one. But Supreme Court told the Delhi High Court to go into the matter — how else could they go into the merits?”

Mr Nariman: “Start afresh. Sec 377 must be truly interpreted. You first interpret the law – then you may uphold it, or not.”

Mr Nariman: “I want to go on one line here, My Lords… on archaic words.”

Mr Nariman read from Benion on the interpretation of statutes. He argued that rarely can the legislature use archaic words, and if it does, they have to be given meaning. It is incumbent to make sense of them as they were intended, but this does not prevent reading the meaning in its ordinary meaning as understood.

Mr Nariman then gave examples from civil and contract law about archaic words:

- “Trafficking in goods” – where it is less and less clear what the sin of trafficking actually represents;
- The *Civil Evidence Act* uses the idea of a subject that cannot be brought to court because he is “beyond the seas”. The cited judgment argues that this idea of “beyond the seas” evokes Elizabethan ships and journeys and holds no modern relevance.

Mr Nariman: “Who in today’s time would say “order of nature”, my lord?”

Mr Nariman: “If the lawmakers actually wanted to have a sodomy statute, my Lord, they should have used the earlier version – 1841, laws of the East Indies. It has the words “sodomy and buggery” and the death penality for committing the felony of buggery.”

Mr Nariman: “This is perfect. No order of nature, no carnal intercourse. It is simple. Instead, we have Sec 377…”

Justice Singhvi: “This argument you are making is quite attractive to use, Mr Nariman… that “1860-2012”. Das said it has been 100 years – another 50 years has been added here. We find ourselves, however, in a situation where for reasons with which we are concerned with a reduced level of legislative drafting - from when you were younger 60 years ago - there is a difference in the level of 1860 -2012. This is very attractive to use that the Courts should interpret the statutes to give them meaning relevant to today. The task is huge. We are not saying that the court will shirk its responsibility. We understand that this is one case. But how far can we go?”

Mr Nariman: “You are right, My Lord.”

Justice Singhvi: “Things have changed drastically. We could never imagine – even our childhood books have vanished!”

Mr Nariman: “It’s true, My Lords – the more laws there are, the worse it becomes, not better…”

Justice Singhvi: “The *Information Technology Act*... It has been almost 10 years…”

Mr Nariman: “Yes. Let me get to the constitutional aspect now, My Lords.”

Mr Nariman: “Sec 377 has become very vague. It is very vague in understanding how and where an offence can occur. Between husband and wife? With contraception? By someone who does something some consider unnatural?”

Mr Nariman: “Is it worthwhile to add to the already large number of prosecutions in the courts? This question has to be decided – there is no going back. We have to decide on merits. If you find difficulty in interpreting the section – then there is vagueness in its meaning. Our own Indian case law has three cases on this…”

Justice Mukhopadhaya: “How does Article 14, 15 apply? We want this to be addressed also. Article 21 there has been an argument – but how does Article 14, 15 apply?”

Mr Nariman then cited three cases on vagueness, including the *Goonda Act* case (*State of MP v Baldeo Prasad*) (which establishes that the court cannot satisfy itself on what a goonda actually is, since there is no test or way of determining. This opens up the possibility of “unguided and unfettered authorities to treat any citizen as a goonda.”)

Mr Nariman: “With 377, how are we to judge an offence? As to person? Nature of offence itself? What is carnal intercourse against the order of nature? Perhaps in 1860 it had some meaning – meaning coming from the “ordinance of the creator”. Can that be worked out today?”

Mr Nariman: “Anything vague in a criminal matter is itself arbitrary.” To

support this, he cited the *K.A. Abbas* decision.

Mr Nariman: “The real rule is that if a law is vague or appears vague, then the court must construe the intent of the legislature. Where the law does not allow such construction – where there is a “boundless sea of uncertainty” – it is held to offend the constitution. Invalidity emerges from the probability of the misuse of the law.”

Justice Singhvi: “This case on the facts itself is interesting, Mr Nariman. It was about a 16-minute documentary that showed the difference between the filthy rich and the poor. They said they would not grant it a U certificate.”

Mr Nariman: “Yes, Mr Abbas was a reputed filmmaker.”

Mr Nariman reads from *Regina v. Rimmington* – which refers to ‘dog-made law’ at page 482. He noted the two principles laid down in the case.

Mr Nariman: “There is a guiding principle: no one should be punished under a law unless it is sufficiently clear or certain what they are being punished for. If the *Act* is not clear, there can be no punishment.”

Mr Nariman: “My submission, My Lords, [concerns the] vagueness of the law. Carnal intercourse against the order of nature can be a whole host of things – it is not defined. The explanation in the section is only penetration. What is carnal intercourse against the order of nature? Perhaps we knew in 1860…”

Justice Mukhopadhaya: “What is vague to X may be very clear to Y.”

Mr Nariman: “I am talking about vague in a court of law, My Lord, not in general opinion. After all, we don’t know the limits of people’s comprehension and capacity. Some pick up quickly and others take a lot of time. People sometimes don’t understand section 300 of the IPC. We can’t say it is invalid.”

13 March 2012 – Mr. Fali Nariman and Mr. Anand Grover

Senior Advocate Fali Nariman, representing a group of parents of LGBT persons, continued his oral arguments.

Petitioner in person Mr Bhim Singh requested the judges to hear him.

Justice Singhvi: "Sorry. You have missed the bus. You cannot come and say that you have to be heard. We have heard the matter for three weeks."

Mr Nariman: "For the first part of my argument the proper construction of the section (377) is of vital significance. This will lapse with time and must be inspired by provisions of the Constitution. The Constitution recognizes marriage and could not have contemplated that it [section 377] would apply to husband and wife. There has to be some answer given – it would be totally unreasonable to apply the term 'whoever' in the section to husband and wife. Husband and wife using contraceptives cannot be contrary to the section, [given that] family planning is part of our constitutional framework. Cohabitation between a man and a woman for pleasure cannot be anathema to the constitution – and yet the section expressly covers all these classes of people because of the width of the language of the section. The words 'man' and 'woman' are defined in the IPC as 'male human being' and 'female human being'. When the section is applied today it has to be construed in the light of fundamental rights guaranteed in the Constitution. The law has nothing to do with public health. It is in the chapter on "Offences against the Human Body". The term 'carnal intercourse against the order of nature' is suggestive more in the nature of sexual assault than sexual cohabitation. Therefore in the first place the argument is whether it is void. Even if it does not violate Arts 14, 21 etc, it cannot be left in the statute books as it has to be interpreted in the light of modern circumstances."

Mr Nariman referred to the *Mubarak Ali* case with respect to the fact that the Indian Penal Code should be interpreted in the context of changing times

Mr Nariman said that the High Court ought to have concentrated on the meaning of the provision. He noted, in light of the government's submissions, that the section is not meant for invasion of people's homes (by reference to para 9 of the Home Ministry's affidavit).

Mr Nariman read averments of systematic abuse faced by LGBT persons. He read from the *Human Rights Watch* Report (July 2002) "Epidemic of Abuse – Harassment of HIV/AIDS workers". Mr Nariman stressed that the report documents instances of harassment. He referred to the affidavits on record and individual instances of torture, harassment and sexual abuse. All these were recorded in the counter affidavit of Voices Against 377 (Respondent 11).

Mr Nariman argued that there were no further affidavits filed by the government to contradict the *Human Rights Watch* Report. He read from the case of *Jayalakshmi*, recorded by the Tamil Nadu High Court, where a person had committed suicide because of sexual abuse in the police station.

Mr Nariman argued that the existence of the law leads to an 'association of criminality', where the law fosters a climate of violation. He says that Resp 8 (Voices against 377) has placed on record material (in the form of affidavits, FIRs, and judgments on record) to this effect. He mentioned an incident in Lucknow, where section 377 was used to arrest four HIV/AIDS outreach workers.

The judges asked if that case was still pending.

Mr Nariman mentioned incidents where section 377 had been used to harass a lesbian couple who want to live together, hijras and a gay man.

Mr Nariman argued that the Commissioner of Police and the Delhi State AIDS Control Society did not file affidavits (and therefore by implication did not contest the arguments of the petitioner in the Delhi High Court).

Mr Nariman argued that there are studies to show that section 377, by criminalizing same sex conduct, leads to harassment, torture and blackmail. He said that these testify to the widespread use of 377.

Mr Nariman referred to the *Criminal Tribes Act*, enacted in the colonial period, which functioned on the assumption that persons were deemed criminal by their identity. He noted Nehru's speech, where the Prime Minister talked of how the *Criminal Tribes Act* led to the attachment of criminality to an entire community.

Mr Nariman then referred to the written submissions of the Additional Solicitor General, PP Malhotra. He said that the ASG's claim that section 377 helps to slow the spread of HIV/AIDS is totally unfounded.

Mr Nariman referred to the case of *Toonen v Australia,* to assert that criminalization cannot be a reasonable means of preventing the spread of HIV/AIDS. He argued that the law would only drive people underground.

Mr Nariman referred to para 74 of the ASG's submissions. In response, he said: "377 is not generally prone to misuse. Generally. What does this mean?" He said that the section will give authorities uncontrolled discretion. He said that the documents, affidavits and reports already on record show the widespread abuse of section 377.

Justice Mukhopadhaya: "Is this the finding of the High Court or the perception of individuals? 377 talks of an offence, not a community. There are various provisions of the law like section 498A, 302 of the IPC that are misused. Can a general declaration be given?"

Mr Nariman: "Our submission is yes – just as you would not say that it is reasonable for section 377 to be applied to husband and wife. Where do we draw the line?"

Justice Mukhopadhaya: “When would you say it obviously does not apply to husband and wife? Can there be 377 without a complaint?”

Mr Nariman: “Yes, by a busybody.”

Justice Mukhopadhaya: “Not by the victim. Even today, anybody can be a complainant.”

Mr Nariman: “That’s my point.”

Justice Mukhopadhaya: “Do you say only the victim should be the complainant?”

Mr Nariman: “I did not say that. The law is that anyone who files an FIR is a complainant. The law does not say that you need a victim. That is when the harassment comes in.”

Mr Nariman: “You must interpret the section in the light of the provisions of the Constitution. In 1860 there was no Constitution. Now there is a document to construe. So construed, you have to say it could be applied to a married husband and wife. The same busybody could file a complaint. If [so,] the court would have to construe whether the law was intended for husband and wife. That would be quite monstrous – what they do in their privacy of their home. *Kharak Singh* says “A man’s home is his castle”. Section 294 of the IPC applies to public places. Whoever commits an act that 377 prohibits in public can be sentenced to 3 months under section 294 but this act in a private place could get 10 years, up to life under 377.”

Mr Nariman: “The IPC is a brilliant piece of workmanship, but it has been changed. Section 303 was struck down on the ground that when a lifer was convicted the terms ‘shall be sentenced to death” in the section was held to be unreasonable and unjust.”

Mr Nariman: “377 cannot be restricted to a public/private place, but should this be the way to construe the section. Construe it as cases of sexual assault – construe it in this manner. i.e. harm to the body. Then there is no need for a declaration, [as] you cannot apply the section to consensual acts.”

Mr Nariman mentioned that *Protection of Children against Sexual Offences Bill* is pending before Parliament.

Mr Nariman argued that section 377 is in violation of Art 14. He referred to the case of *Mithu v State of Punjab,* wherein section 303 was struck down since it was held to be totally unjust. He referred to *Coelho* 2007 (1) SCC 1 paras 56-60, where it was held that fundamental rights had to be construed together. He quoted Justice Subba Rao, who said that fundamental rights do not come in isolated pockets. He argued that fundamental rights enforce distinct rights; they were not limited or narrow and serve as a control on legislative power. He cited *Royappa*, which held that equality and arbitrariness were sworn enemies.

Mr Nariman cited the following cases: *Maneka Gandhi*, *AK Gopalan*, *Anwar Ali Sarkar*, and *Kathi Rani Rawat*.

Mr Nariman said that it was a fallacy to see fundamental rights as a gift from the state to its citizens (as held in *ADM Jabalpur*). Mr Nariman then stressed that the ADM Jabalpur judgment now stood without any friends.

Mr Nariman referred to *Anwar Ali Sarkar* – and Justice Vivian Bose's opinion therein. He said that Justice Vivian Bose was one of our finest judges and was ignored for a long time and now undergoing a revival. He went on to quote from *R. Gandhi*, where the judges cite Justice Vivian Bose as to whether "*the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be."* Mr. Nariman observed that it was up to the Courts to create a test of whether some laws so offended the judicial conscience as not being right or proper in a democracy.

Mr Nariman asked the question: 'Why can't the court intervene?"

Mr Nariman referred to the traditional test of 'reasonable classification' set out in *Dalmia*. He said that, in this case, the statute leaves it to the discretion of the government (the police officer); that there was no principle to guide the legislation being enforced; and that there was discrimination inherent in the statute itself.

Mr Nariman asked why the term 'whoever' in 377 cannot be applied to a husband and wife. He suggested compulsory directions are necessary, not just a declaration that would say that the law does not apply.

Mr Nariman read from the *Kharak Singh* and *Gobind* cases to scope out the width, scope and extent of Art 21. He said personal liberty is a compendious term; the term 'life' in the U.S. Constitution was held to protect persons from the invasion of the sanctity of their home.

Mr Nariman noted that the Preamble to the Indian Constitution protects the dignity of the individual.

Mr Nariman observed that the term 'liberty' in the constitution is qualified by the word 'personal'. He quoted from Dicey to the effect that liberty includes protection from psychological restraints – freedom from encroachment upon private life.

Mr Nariman quoted from paras 20 and 27 in *Gobind,* which talk of Art 21 protecting a sphere where an individual should be let alone.

Mr Nariman argued that enforcement of morality should not be a function of the state. He quoted from *Gobind*:

> "There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might engaging in such activities that such 'harm' is not constitutionally protectible by the state. The second is that individual needs a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that *may, reflect the values of their peers rather than the realities of their natures*."(para 27)

Justice Singhvi: "All are something at home and different outside."

Mr Nariman: "Definitely."

Mr Nariman then referred to the doctrine of severability.

Justice Singhvi addressed Mr Mohan Jain, representing the Union of India "The Cabinet does not say that they are accepting the decision of the High Court. The Attorney General is always available for advice, what is special? The impression you are trying to convey is that you are supporting the High Court decision."

Mr Jain referred to the decision of the Group of Ministers.

Justice Singhvi: "The Group of Ministers can only recommend – they cannot decide. Mr Malhotra was just projecting his point of view, that's all. There is a totally wrong impression being conveyed by your statement."

Mr Jain pointed out that the government's position was that there was no legal error in the High Court's decision.

Justice Singhvi: "This is only a recommendation of the Group of Ministers."

Justice Mukhopadhaya: "You never wanted to assist. The affidavit is from the Health Secretary. In our opinion, the Ministry of Health is not directly related to the enactment of the law."

Mr Anand Grover, Senior Advocate, representing the Naz Foundation, began his arguments:

Mr Grover: "This case has to do with the criminalization of acts covered by the term 'carnal intercourse against the order of nature". The result of this section is demeaning to a section of society. It is violative of Art 21 for which we have now adopted the test of substantive due process."

Mr Grover: "HIV is a small part of the argument. Criminalization actually impedes delivery of health services."

Mr Grover: "The section is vague, and it does not serve a legitimate purpose."

Mr Grover: “Article 15 includes non-discrimination based on sex, and the term ‘sex’ includes sexual orientation. Section 377 also violates Art 19, the right to the freedom of speech and expression.”

Justice Mukhopadhaya: “Who are you?”

Mr Grover explained that he was representing the Naz Foundation, and that the organization has many years of experience in this field.

Justice Mukhopadhaya: “The data on HIV is vis a vis homosexuals. What is the correlation with HIV? By what means is transmission?”

Mr Grover explained how HIV is transmitted through various methods, that MSM constitute a ‘hidden population’.

Justice Mukhopadhaya: “377 applies to all acts. Anal sex has nothing to do with MSM specifically?”

Mr Grover: “The interpretation of 377 by various High Courts is that heterosexuals are not covered.”

Justice Mukhopadhaya: “How many case laws are there vis a vis heterosexuals and homosexuals?”

Justice Singhvi referred to the constitution of the Naz Foundation. “Which is the clause referring to ‘litigation’? We have doubts about the maintainability of this petition by a private organization.”

Justice Mukhopadhaya: “Is such a type of act causing HIV?”

Mr Grover: “Neither heterosexual nor homosexual activity by itself can cause HIV. If a person has unprotected sex, it can cause HIV.”

Justice Mukhopadhaya: “How are you concerned?”

Mr Grover: “The MSM community has high seroprevalence of 7-8%. This figure is around 0.3 % for the general population. There is a bridge population, since some MSM are also married. Health services need to be delivered to these people. If I engage in anal sex with another person, and if I have HIV, there are high chances of transmission. In the case of gay men, this becomes a problem, since no one wants to come out to say they are homosexual.”

Justice Mukhopadhaya: “This is the same with prostitution.”
Mr Grover: “As far as sexworkers are concerned, some are in brothels – they are not hidden and are available in a site.”

Justice Mukhopadhaya: “Similar claims can be made for sexworkers. In India commercial sexworkers can be accessed.”

Mr Grover: “Studies show that in India 377 is an impediment to HIV/AIDS prevention efforts.”

Mr Grover: “The interpretation of 377 over a period of time has included imitative sex.”

Justice Singhvi: “We are examining the interpretation. Best example is that of husband and wife. If 377 is interpreted to include them, then 17-20% will be behind bars. Apart from the persons you are assisting, are there studies on cases involving husband and wife?”

Mr Grover then gave the court a summary/table of all the reported judgments on 377. He referred to various decisions from the table: *Bapoji Bhat,* where 377 is interpreted to include anything but vaginal sex; *Lohana,* which established the “imitative test”; *Fazl Rab Chaudhury*, which referred to acts covered by 377 as being the result of perversity and sexual deprivation. Mr Grover stressed that these cases showed that the logic of the section was clearly to target those identified as homosexual.

Mr Grover: “What prevents 377 from covering objects too? This section has been replicated all over the Commonwealth including the Malaysian statute (377A and 377D) and the West Indian statute (132(4)).”

Justice Mukhopadhaya: “How are the terms ‘penetration’ and ‘carnal intercourse’ used in 377?”

Mr Grover: “377 includes non-penile vaginal sex, like anal sex and oral sex. This type of sex is a manifestation of the core of sexual personality for homosexuals.”

Mr Grover referred to the *Khairati* case.

Justice Singhvi: “What about section 498A? People are wrongly accused and acquitted.”

Mr Grover: “The law is identified with a group of people, since homosexuals engage in the act.”

Justice Mukhopadhaya: “Identification is a notion of society. Social reformers can erase this perception, e.g. there is a wrong notion related to HIV, and this demeans and impairs dignity.”

Justice Mukhopadhaya: “The gap is that criminalization related to an act, but for a class of people we do not know if the law impacts. Criminalisation is of an act. If one man kissed another man, it is not an offence, but another act is an offence.”

Mr Grover: “A man kissing another man with tongue?”

Justice Mukhopadhaya: “No tongue.”

Mr Grover: “Kissing with lips? Even homosexuals engage in lip to lip kissing, tongue in mouth. This law was imported by the British. We were always a tolerant and pluralistic society. 377 covers acts giving sexual gratification. It is not applicable to heterosexuals in a marital setting.” He referred to *Grace Jayamani* AIR 1982 Kar 46.

Mr Grover: “In *Lohana*, it was held that, when oral sex is a prelude to intercourse, it is not covered by 377.”

Mr Grover then submitted that the law is applied to target homosexuals. He quoted relevant passages from the High Court judgment. He quoted from the People Union for Civil Liberties (Karnataka) report on abuse of sexual minorities.

Mr Grover stressed that the impact of the law was seen in harassment by police, illegal detention and abuse, and the threat of outing. He said that the law impacts the manner in which an individual sees himself/herself and on self esteem.

Mr Grover quoted from the *Human Rights Watch* Report, “Epidemic of Abuse” (2002). He also referred to a peer reviewed study by Venkatesh Chakrapani on violence experienced by the kothi community from the police and the extreme vulnerability that they face. This article also focused on the interrelationship between HIV, MSMs and 377. Mr Grover also submitted another article to the Court on barriers to HIV prevention, based on data from Chennai.

Mr Grover referred to the Lucknow incident relating to the arrest of HIV/AIDS outreach workers under 377. He said that gay men were subjected to therapy by the medical profession, by professionals trying to ‘cure’ them. He referred to a case before the National Human Rights Commission, where the Commission refused to investigate a case of shock therapy that a gay man faced, citing the existence of 377 as a barrier.

Justice Mukhopadhaya: “What about lesbians?”

Mr Grover: “If it were to be interpreted in the future that non vaginal (objects) were covered under 377, then the section could cover lesbian sex.”

Justice Mukhopadhaya: “Penetration could be of any organ.”

Justice Singhvi: “Enactment is a domain of the legislature.”

Justice Mukhopadhaya referred to shock therapy. “This is a mindset of a class of people. Are they suffering from homophobia? Is that a disease?”

Mr Grover: “Neither homosexual nor homophobic persons are diseased.”

Justice Mukhopadhaya: “If you say women are not covered, then why does

the section open with the term 'whoever'? Can a woman commit sodomy? Who will be the offender?"

Mr Grover: "The traditional view is that homosexuality was a disease, now the ICD-10 Guidelines lay down that homosexuality is not a disease."

Mr Grover began to detail the facts of the Professor Siras case.
Justice Singhvi: "What does this have to do with homosexuality?"

Mr Grover referred to *Jamil Ahmad Qureshi* 1991 (Supp 1) SCC 302, a case involving a charge of moral turpitude.
Justice Singhvi: "This case involves concealment of information. For any concealment, conviction is enough."

Mr Grover referred to a Magistrate's order, which referred to a prosecution based on same-sex messages.

Mr Grover referred to an earlier petition filed by the AIDS Bedhbhav Virodh Andolan, preceding the Naz case. This case dealt with condom promotion in Tihar Jail.

Mr Grover: "International law has an impact on the interpretation of Arts 14, 19 and 21." He referred to Arts 17 and 26 of the International Covenant on Civil and Political Rights and Art 12 of the International Covenant on Economic Social and Cultural Rights. Mr Grover said that the principles in these covenants were incorporated in the Protection of Human Rights Act in India.

Mr Grover said that the Art 21 arguments had four parts: 377 as a violation of the zone of privacy; violation of substantive due process; violation of the right to dignity; and the right to the protection of health.

Mr Grover referred to the US case of *Griswold* 381 US 479 at 484.

14 March 2012 - Mr. Anand Grover and Mr. Shyam Divan

Senior Advocate Anand Grover, representing the Naz Foundation, continued his arguments.

Mr Grover: “Article 21, as I was saying yesterday, creates a zone of privacy. There has to be a compelling state interest in violating that. I am referring to a set of judgments here that I will not read, My Lords.”

Mr Grover cited the US judgments *Griswold* and *Eisenstadt*, and the Indian judgments *Kharak Singh* and *Govind.* From here, he proceeded to cite *Lawrence v Texas* and *Toonen v Australia.*

Mr Grover: “In the Delhi High Court, the state did not show this compelling interest. They said the law is only used for child sexual abuse, that it is needed to fill lacunae in rape laws and that it is not used against consensual sexual acts between persons of the same-sex. NACO then said in the Delhi High Court that if we remove Section 377 it will help in facilitating health services – that 377 impedes in their delivery.”

Justice Singhvi: “Can you elaborate on this impact on HIV?”

Mr Grover: “MSM do not come out, My Lord. They cannot access services, they have no information – they are a hidden group…”

Justice Singhvi: “How many people are there?”

Mr Grover: “There are certain estimates - the NACO ones say 28 lakhs. Some studies say that hardly 10% of these access services.”

Justice Singhvi: “That’s right. What is the government data for access?”

Mr Grover: “The government does not have particular data on access, but marks this low percentage of care seeking.”

Justice Singhvi: “How many people do you think there are? You represent a petitioner that has been working in this field for a long time – how many?”

Mr Grover: “I will be candid, My Lord – it is very hard to tell. We can only measure who has come to us, not who has not come. Many of our clients we meet in public parks. We accept the figures of the government – to the extent that they are somewhat reliable. No NGO can have national figures like those.”

Justice Mukhopadhaya: “HIV is a disease. What does this have to do with victims? Or with offence?”

Mr Grover: “You have been asking this question all along. I agree, I have to answer it. I—“

Justice Mukhopadhaya: “For the purposes of health, government may have a policy. They may ban certain things. There is no victim, there is a patient. You say HIV all the time – how is it to do with Sec 377?”

Mr Grover: “Only marginally, my lord, only marginally.”

Justice Mukhopadhaya: “They may be carriers. A bridge, like diphtheria. A cat is a carrier…”

Mr Grover: “HIV is a sexually transmitted disease.”

Justice Mukhopadhaya: “There are others also – syphilis. There is no punishment for transmitting a disease. All the time there is this talk of HIV and HIV data – but where is the nexus between this and the offence?”

Justice Singhvi: “Take some more time to answer this.”

Mr Grover: “HIV is sexually transmitted…”

Justice Mukhopadhaya: “Yes, but there is safe sex also. What is the offence here?”

Mr Grover: “You are asking for the rationality of the nexus, yes. There are three modes of HIV transmission: mother-child, intravenous and sexual transmission. It is more prevalent among homosexuals. 7-8% of MSM are infected, as opposed to 1% of all men and less than 0.2% of the general population. So there is a high prevalence, a high risk category. In penile-anal contact, there is a higher rate…”

Justice Mukhopadhaya: “You are using generic terminology in advancing your argument… read the section again.”

Mr Grover: “Yes, it’s facially neutral.”

Justice Mukhopadhaya: “See 377. Sexual intercourse is not an offence. Only rape is. The men who have sex with men have not been shown as an offence under section 377. Do you say that MSM who are against the order of nature is a fundamental right? If you are saying that it is not against the order of nature then that is one thing.”

Mr Grover: “The judicial interpretation of carnal intercourse against the order of nature includes anal sex.”

Justice Mukhopadhaya: “If it’s not against the order of nature, then somebody can show.”

Mr Grover: “This is the view of the draftsperson of the law, My Lord.”

Justice Mukhopadhaya: “You say that there is criminalisation of MSM, but where is the prohibition? The section does not say.”

Mr Grover: “It criminalises, my lord. It says carnal intercourse against the order of nature…”

Justice Mukhopadhaya: “Yes, but not just carnal intercourse…”

Mr Grover: “But against the order of nature means penile penetration – not for procreation. That is how it has been read.”

Justice Mukhopadhaya: “That is the perspective of a high court judgment. Don’t say that is binding on us.”

Mr Grover: “I am not saying that, My Lord. I—“

Justice Mukhopadhaya: “An impotent person has sex without procreation – is that an offence?”

Mr Grover: “Generally characterized, My Lords...”

Justice Mukhopadhaya: “It is nowhere stated under the act that it is about procreation.”

Mr Grover: “We are bound by various judgments, my lords. We have to go by them.”

Justice Mukhopadhaya: “These judgments are not binding on us…”

Mr Grover: “Except *Fazal Rab Choudhary*, which is a Supreme Court judgment.”

Justice Mukhopadhaya: “That is another thing. Can you say make an argument about what is the offence?”

Mr Grover: “My submission is that sec 377 is about non-penile-vaginal penetration. It has to be penile…”

Justice Mukhopadhaya: “When you talk of non-procreation… A mother puts her fist in the mouth of her child – Is that penetration? Cannot say. Do not say sexual organ – the section doesn’t organ. What has procreation or no-procreation go to do with 377?”

Mr Grover: “Penetration is involved, my lord. Let us take it step by step. Question is: penetration of what? My submission is that it has been confined to penile – otherwise it is not carnal or sexual. Either the penis or vagina has to be involved – sexual organs are only two.”

Justice Mukhopadhaya: “Something is natural… Carnal intercourse may be natural even if penetration is involved – that would not be an offence. Only ‘unnatural’ is an offence under sec377. You talk of article 14 and 19 – can you say that unnatural carnal intercourse is a right?

Mr Grover: “Let us go stepwise, my lord – one by one. First, there has to be penetration to be carnal or sexual. It has to involve the penis. The vagina has no penetrative quality about it.”

Justice Mukhopadhaya: “What about the nose?”

Mr Grover: “There is no judgment on 377 that does not have sexual organs, my lord.”

Justice Mukhopadhaya: “What is natural is not included under the section. What about the breast of a mother and the child? Anything that is natural cannot change. Behaviour might change. But you cannot say, ‘this is nature, it is constant.’”

Mr Grover: “Take synthetic medicines, my lord. They use natural materials, but we can make them synthetically now. These are man-made.”

Justice Mukhopadhaya: “What is the meaning of nature here? The breast is not a sexual organ in that sense. Many examples of acts may be cited. Those that are natural will not attract 377.”

Mr Grover: “Let’s do that. Let’s define. Carnal has to do with flesh – with lust. It cannot be otherwise. The question is: what is against the order of nature? It can be read as many things but the original meaning is sexual intercourse with penetration that is not for procreation – that is the religious root. It was a sin. Even today some groups believe this. The extent of it today though is completely open…”

Mr Grover: “Let me return to my argument, my lord, about privacy. The state has not shown compelling interest. Mr Malhotra said morality – but this is not about public morality! It is an issue of private morality. That law has been repealed in the UK after the Wolfenden Committee Report. My Lord, the law should not interfere with the private morality of the bedroom.”

Mr Grover: *Khusboo’s* case, My Lord.” He read from the judgment. “Where the Court ruled that the notion of social morality is inherently subjective and criminal law cannot be used to enforce morality… morality and criminality do not coincide…”

Mr Grover: Also, My Lord, the Union did not appeal – something that is a point of note and importance. We argue that it is the duty of the state alone to defend and show that they are advocating the state interest…”

Justice Singhvi: “Did the government not defend 377 in the Delhi High Court?”

Mr Grover: “They did, my lord – then. But now…”

Justice Singhvi: “But an appeal from them is not necessary.”

Mr Grover: “I know, My Lord. You know, my Lord, as lawyers we put all our arguments forward. It was for you to see what you want to keep….”

Mr Grover: “Now to dignity, My Lords…”

Mr Grover read from *Francis Coralie Mullen.*

Mr Grover: “Criminalisation of these acts that are the core of the sexual personality of homosexuals violates their right to dignity.”

Justice Mukhopadhaya: “Can they be identified?”

Mr Grover: “No.”

Justice Mukhopadhaya: “Then how is dignity affected? Harassment can happen only if a person can be identified…”

Mr Grover: “For a person, my lord, they can identify themselves at puberty…”

Justice Mukhopadhaya: “The psychology of an individual is one thing – each individual will have different experiences. That is not relevant for a class of persons.”

Mr Grover: “May I develop this argument, my lord? If you will give me a minute. Yes, the state can’t identify a homosexual…”

Justice Mukhopadhaya read from a dictionary to say: “Dignity has society in general and then separately, what an individual thinks about himself. The second factor is variable. One person may be depressed, another may not be…”

Mr Grover: “May I take a moment? Think of a homosexual, my lord – 12-13 years old –who has just realized he is attracted to someone of the same sex. He doesn’t know what is happening. The norm is heterosexual. Can he express his sexual personality? No. Not under the law. Where is his freedom of sexual expression? It is prohibited under the law.”

Justice Mukhopadhaya: “That is for all under this law.”

Mr Grover: “But for others, my lord, there is also penile-vaginal sex. Heterosexuals can express the core of their personality with penile-vaginal. Homosexuals cannot do that.”

Justice Mukhopadhaya: “But then does your argument not extend to someone attracted to animals only?”

Mr Grover: “It is different, my lord. We are not on that…”

Justice Mukhopadhaya: “Someone will say I am attracted to animals only…”

Justice Singhvi: “You are making arguments on dignity that are slightly contradictory, Mr Grover. Dignity is qua society – the personal aspect is not an aspect of law. How can dignity be compromised if identity is not known?”

Mr Grover: “The norm is such that I can’t come out, My Lord – be open.”

Justice Singhvi: “You can, provided you have access to media – you will be glorified!”

Justice Mukhopadhaya: “Who says I am a heterosexual?”
Mr Grover: “These are our brothers and sisters, My Lord, citizens. It is important.”

Justice Singhvi: “Dignity can be compromised only if identity is revealed, Mr Grover.”

Mr Grover: “If a person comes out, they will face all kinds. When we began this process, my lord, we wanted gay people to file it – no one would do it! No one could. When Mr Divan filed, we thought finally there are some people who can do it…”

Justice Mukhopadhaya: “Those that came out? Where they taken in custody?”

Mr Grover: “They have to be found in the act, my lord!”

Justice Mukhopadhaya: “Say I am a homosexual. No attraction to the 377 – no offence…”

Mr Grover: “But the normative paradigm of the law makes it so. Society says it is dirty, degrading…”

Justice Mukhopadhaya: “Then that society can change its mind. But that is the social reformer’s job.”

Mr Grover: “But criminal law sanctions are there. That is what this is about – a sense of self that is degraded, and criminal law sanctions it…”

Mr Grover then read from the South Africa *National Coalition* judgment – regarding how sodomy laws offend dignity.

Justice Singhvi: “What is the background of the challenge?”

Mr Grover: “Challenged the sodomy law, my lord.”

Justice Mukhopadhaya: “But this is about sodomy…”

Mr Grover: “Yes, my lord – it is penile-anal sex. 100% included in Sec 377 – there is no doubt about it. It is included in carnal intercourse against the order of nature.”

Justice Singhvi: “What did the South African high court say?”

Mr Grover: “Same ruling, my lord, but restricted to privacy. The constitutional court read dignity and read it more widely.”

Justice Singhvi: “In this court didn’t the concurring judge say he was homosexual?”

Mr Grover: “No, that is Sachs. He was the judge. The homosexual judge in the South African court is Cameron—he was not on this case. Interesting angle to think – would there be bias? Can a heterosexual judge be said to have bias? It could be.”

Justice Singhvi: “It could be. In India, we don’t analyse judgment against judges – we would find bias in 50% of our judgments. All of us have certain notions. You can call them prejudices.”
Mr Grover: “They may be legitimate biases…”

Justice Singhvi: “You have no choice but to say they are legitimate.” (smiles)

Justice Mukhopadhaya: “You were on dignity. Dictionary says quality of living, worthy of honour. A sense of pride in self. Here, in your argument, the first is missing – you cannot be identified.”

Mr Grover: “Law makes me invisible, my lord. If society and the law are against, then it makes me invisible. Law itself criminalizes those acts inherent to the nature of…”

Justice Mukhopadhaya: “What is natural is not an offence…”

Mr Grover: “If I am a homosexual, penile vaginal is not in my character. Penile anal is criminalized – it is defined as against the order of nature. Query is: can I exercise dignity?”

Justice Singhvi: “Extend your argument. I am attracted to the same sex. Now, I have a tendency to sex in open place…”

Mr Grover: “It cannot be.”

Justice Singhvi: “Why not?”

Mr Grover: “Constitution does not protect it. It protects privacy.”

Justice Singhvi: “The section does not say private.”

Mr Grover: “Can you say you have a right to sex in public? That is not the query before us – it is restricted to the private space. I may want to, but the constitution will not protect me. When it is consensual, no harm, and adults – no business of the state.

Mr. Grover proceeded to read from a series of judgments, including Anuj Garg and Toonen v Tasmania.

Justice Singhvi: “The Toonen decision is by a Human Rights Committee. It is not a judgment.”

Section of transcript missing.

Post-Lunch Session:

Shyam Divan, Senior Advocate representing Voices Against 377, began his arguments.

Mr Divan: “I represent Respondent 11, My Lords, and we were Respondent 8 in the Delhi High Court.”

Mr Divan: “Before I tell you who we are, let me just state our position:

- Sexual rights are part of the human rights in article 21;
- According to us, persons – either men who have sex with men or women who have sex with women – are not acting against the order of nature. Material on record will show that this conduct is natural, that it has been verified in study after study. This material is on record in the Delhi High Court, and there is nothing to contravene it. There is no second opinion on the fact that homosexuals (MSM or WSW) … it is a natural extension of their being. We will hold and show that such conduct is not against the order of nature.”

Mr Divan: “The case may also have to do with the question of interpretation, with legal history, and with the position of the court. But fundamentally it is about two real issues:

- “The first real issue is one of identity and dignity. A significant number of Indian citizens who are before this court look in the mirror and say: Am I a full fledged citizen? Or a second class citizen? Do I have full moral citizenship? Or does a statute from an old time tell me that I am not a full fledged citizen?

  If we believe there is a right to life, then it is a right to intimate relationships. Core aspects of our person. Can these persons develop relationships? Can they be open about it? Can they cohabit? We may be many things in our lives – professionals, lawyers or judges, but often the greatest satisfaction we get is from intimate human bonds and human relationships…

  We hold that with this law, without an appropriate declaration, one cannot be one’s self, be open and develop relationships.”

- “The second real issue before us is: what is the jurisdiction of this court? When the court is approached by a minority that comes to say – interpret the law in a manner that is consistent with our rights – what does the court do? What has it done historically? What does the

constitution do? Does it expand rights or contract them? The Delhi High Court – a great constitutional court – expanded rights. What will another great constitutional court – the Supreme Court – do? In our preamble we said that we will give dignity to all citizens – fraternity and dignity. The ringing language is *all* citizens and dignity."

Mr Divan: "Who am I as a petitioner? We are Voices against 377." Mr Divan then read the names of all of the members of Voices against 377, and a brief line about what they do. The judges followed, and underlined as well as they read along.

Mr Divan: "We have, if you want them, all the registrations and constitutions of the members."

Justice Singhvi: "That will not be necessary."

Mr Divan then took the Court through the table of contents, telling them what each section was: Voices' arguments in the High Court; affidavits of LGBT persons; a note on constituent assembly debates and equality; a note on the doctrine of severability; and a note on the *Criminal Tribes Act and the Constitution,* all of which were on the record before the Delhi High Court.

Mr Divan: "Now, to authenticate harassment by the LGBT community, I will go quickly…"
Justice Singhvi: "Don't worry about time, Mr Divan."

Mr Divan: "Then read the following affidavits. Please see written submissions for details."

Mr Divan read several paras, each in significant detail:
- The affidavit of Kokila (regarding the custodial rape of hijra);
- Delhi incident of X, picked up in Mahipalpur;
- The affidavit of Gautam Bhan (on the feeling of being a second class citizen).

Justice Singhvi: "Did Kokila lodge a complaint?"

Mr Divan: "We'll check. You want to see if there is contemporaneous evidence of the event…"

Justice Singhvi: "Just for information."

Mr Divan read from further affidavits:
- Human Rights Watch report, with details of an incident in Lucknow;
- Madras High Court judgment, on the suicide of Pandian, a eunuch;
- The affidavit of Madhumita (on kothi harassment and custodial torture).
    - When Mr Divan said kothi, he explained, "A kothi is an effeminate gay man. I have an entire glossary for you that I will hand over."
- Further readings from Gautam Bhan's affidavit on dignity.

This reading took nearly 20 minutes.

Mr Divan then handed over the list of eminent persons.

Mr Divan: “There are people who are open about their sexuality. They are prime ministers, civil rights activists, judges, activists, and business leaders like the CEO of Apple. This list is to show and project that there are contributing citizens entitled to dignity in its complete form.”

Mr Divan: “All the affidavits mentioned here are before the Delhi High Court – filed with them and referred to in the judgment.”

Mr Divan: “We have five major points to take you through on sexuality and identity and we will show this with materials on record.”

1. “Human beings develop a sexual orientation and this is natural to growing up. An individual’s sexual orientation forms or is determined between middle childhood and adolescence well before attaining adulthood in terms of the *Indian Majority Act*, 1875. While most humans are heterosexual, a significant minority are homosexual. This is important. This happens to us as children, before majority, while growing up. Science says middle childhood and early adolescence.”
2. “The overwhelming technical and medical literature on the record shows that homosexuality is not a disorder or a disease, but is another expression of sexuality, i.e. natural to a certain narrow minority in society.”
3. “A person’s sexual orientation is innate to him or her. It is a core of his or her being and identity. It is a vital dimension of a person’s character and personality that cannot be altered. It is like race, like being left handed, like the colour of one’s eyes. Sexual orientation cannot be changed at will. Sexual orientation is innate and immutable. Science says so. We will show this.”
4. “Same sex attraction has been observed across several species in nature.”
5. “Persons belonging to the LGBT community have been seen across communities and time. Though the estimates vary, the number of such individuals in India is much larger.”

Justice Singhvi: “How many homosexuals do you think there are?”

Mr Divan: “I will not hazard a guess. The documents the government has filed say 25 lakhs – we will accept it. We are satisfied with that.”

Mr Divan: “But I will say, more than numbers, since you asked Mr Malhotra the other day if he knew homosexuals. I would like to answer it. Gay people are my colleagues. They are in my inner circle. They are in my family. They are my friends. They are normal, citizens deserving of full dignity.”

Mr Divan: “Are they invisible? Yes but also no. They are not invisible in the sense of article 21. Article 21 allows the flowering of intimate relationships. If

they cohabit, they will be identified. Neighbours will know, the police station will know. The constitution allows the protection of intimate relationships…"

Mr Divan: "Sexuality is connected to identity. Who am I? That is the question. You can have many answers – for gender, you may say male or female – but there are others. Now even on the passport form, or UID form, which we will place on record, there is the "other" and "transgender" category – these are about identity and its recognition."

Mr Divan planned to read materials in support of his 5 points on identity. He read from two sources before the end of day:

1. KK Gulia and Mullick, "Homosexuality: a Dilemma in Discourse", *Indian Journal of Psychology and Pharmacology* (concerning how sexual orientation is an identity above and beyond sexual desire);
2. The American Psychiatric Association amicus brief (in *Lawrence v Texas*), which was filed in the Delhi High Court as well. He read from internal pages 4, 12, 19 to talk again about identity.

15 March 2012 – Mr. Shyam Divan

Shyam Divan, Senior Advocate, representing Voices against 377, continued his arguments throughout the day.

Mr Divan: "My Lords, you had asked if there was any contemporaneous evidence in support of Kokila's affidavit. This is a press release on 26th June 2004. There was a huge public protest and campaign protesting her rape. The demand is at the end – to hold the police officers immediately accountable."

Mr Divan then read from a series of documents:

- *Amicus brief of organizations, including the American Psychiatric Association, in Lawrence vs Texas, on mental health and sodomy laws:*
    - Mr Divan: The brief "presents the state of the art understanding of science on homosexuality at the time. It is dated January, 2003."
    - Mr Divan: "Homosexuality is a normal form of human sexuality."
        - forms in early childhood-middle adolescence
        - core of human experience
        - people "perceive little or no choice" in the matter
        - oral and anal sex are not deviate sexual conduct for mental health
        - the Texas law condones violence
        - prejudice causes distress
        - law makes disclosure of sexuality difficult.
        - Most effective way to reduce prejudice is for non-homosexuals to meet homosexual persons – law makes this difficult

Mr Divan: "The Court has asked numerous times how many LGBT people there are. This study present some numbers – they are surveys in the US, and not directly translatable, but they are an indication. There is a variation – 2% - 5%."

Justice Singhvi: "So even in that country, there is no sureness of the data?"

Mr Divan: "Yes, My lord, because the question asked also varies. There is also inhibition in all societies about this matter – lordships are sensitive to this. For something that develops in childhood, great dilemma for a person – it is a huge problem as you realize that you are different. Who do you talk to? In our societies, sexuality is not talked about, especially if it is different. There is a second phase then when you reconcile your sexuality for yourself. Even then, who do you share with? There is a need for interpersonal relationships – one feels isolated…"

Mr Divan: "There is no consensus in science, but current science overwhelmingly suggests that core feelings emerge in early childhood to middle adolesence 'without any prior sexual experience'. People experience "little or no choice" in the matter. This is the considered opinion of a leading body. Mental health practice suggests to make a person comfortable with their

sexual orientation, not try to change them."

Mr Divan: "The amicus brief also talks about the role of anti-sodomy statutes in a climate of intolerance. Contact, they say, is the best way to reduce prejudice – people with a family member or friend who is gay."
Mr Divan: "Also, people must be able to report violations against them. They cannot, in the presence of sodomy laws, go to the police. Previous counsel argued about sodomy laws and access to health – this is also about access to law enforcement."

- *Regulatory impact assessment report of civil partnership act in the UK*
    - Mr Divan: "This study assesses who will be affected if a civil partnership act was to be implemented – as it was – in the UK. It also helps us get some indication of the numbers."
        - 5-7% range
    - Mr Divan: "This is another indicator, a further measure of numbers. It depends on how the question is asked but it gives us a sense of the range…"

Mr Divan: "Now, my lords, I want to turn to the state of Indian legal scholarship and what it says about this issue. Please see the article by SP Sathe – noted jurist. This is a posthumous publication in 2008 – Prof Sathe passed away in 2006. The article is called 'Sexuality, Freedom and the Law' (in Archana Parashar and Amita Danda, *Rethinking Family Law*)

Mr Divan reads several passages from Sathe, with reference to:

- sexual rights as human rights;
- right to difference is right to life with dignity;
- explicit discussion on 377, stating that "377 makes homosexuality a crime";
- potential abuse by police;
- "Parliament and the Supreme Court are fighting shy in taking a stance on this important issue because of the fear of negative public opinion… It is unpopular choices that need the protection of the court"

Mr Divan concluded the Sathe article by reading the conclusion: that 'the courts as sentinels of constitutional values have to guard against the infringement of these values at all sites. It is those who make unpopular choices that require the protection of rights and courts. Conformity to the populist is obtained by social sanctions and the numerical force of the majority. Judges do not need to add to their numbers.'

Mr Divan: "I will now read Prof Baxi, My Lords. It is after the judgment but why deny us the importance of his opinion? We have also placed before the Court an article by Prof Baxi from before the judgment, where his opinion is entirely consistent with what I am about to read which he wrote after."

Mr Divan read from Baxi's piece "Dignity in Naz", from *Law Like Love* (Yoda Press). He observed that:

- the justices in the Delhi High Court listened to the voices of stigmatized

persons, and responded to their call;
- *Naz* is the new *Kesavanada Bharti*; it is "dignity-plus" and has many multiplier effects.

Mr Divan: "Now, my Lord, I wish to state: what is the world view on these subjects? What is the state of the art global understanding? We have seen that in the UK and the US LGBT people are in a sense a "perpetual minority", in that they have stable numbers over time. The United Nations position – this is now 17th November 2011, as contemporary as we can get. This is a report made to the general assembly by the UN High Commissioner for Human Rights. Now the General Assembly can accept or reject this report, it is true – but we include it because it is from the UN Special Rapporteur on Human Rights, who considers sexual rights to be part of his mandate. This is an expert authoritative view."

Mr Divan read many sections of the UN report concerning sexual rights as human rights and documentations of widespread violence, to make the point that there is a global pattern of discrimination against LGBT persons.

Justice Singhvi objected to a footnote in the Report, which quotes a BBC Report, "Haryana widows battered to death". He said that it is wrong to say that widows in Haryana are battered to death.

Mr Divan then handed over a map, showing countries in 2009 (marked in red) that explicitly criminalized same-sex relations, and then a 2011 version of the Map (with India no longer red.) These were based on the ILGA maps.

Mr Divan: "I would like to now read from an article by Prof Ryan Goodman, my lords."

Justice Singhvi: "As a side note, Mr Divan, we must tell you that the registry told us that someone has sent a box to all judges with materials for this case. We have told the SC registry not to accept anything in our name so haven't seen it, but it was accepted and circulated…"

Justice Mukhopadhaya: "Knowledge was supplied."

Justice Singhvi: "Some Indian professor in the US…"

Justice Mukhopadhaya: "Now American."

Mr Divan joked: "Well, I can tell you that it wasn't Prof Ryan Goodman that I am about to read." (laughter in court)

Mr Divan read Goodman article to make the point of going "beyond the enforcement principle" – that is to say, even when not applied, sodomy laws impact self perception and cause self censorship in LGBT people.

Mr Divan then pointed out the passport form and UID forms with "Transgender" categories. Mr Divan: "Surely a recognition of sexual minority

by the state shows an arc of recognition. It is a small step to the fullness of citizenship. The court must extend this step."

Justice Mukhopadhaya: "How is "others" in this form about homosexuality? Homosexuality is not transgender. It only is that gender is not the same."

Mr Divan: "Yes, my lord, but gender difference…"

Justice Mukhopadhaya: "Homosexuality is man-man, woman-woman, it cannot be transgender-transgender."

Mr Divan: "It can, my lord."

Justice Mukhopadhaya disputed this.

Mr Divan: "Science is clear and unequivocal, my lords. There is no report on the other side to say otherwise. There is a range of natural sexualities…"

Justice Mukhopadhaya: "Male/female/transgender – in all there are different acts. Here, Government of India is not recognizing homosexuals but transgender…"

Mr Divan: "Our affidavits show how 377 impacts transgenders. They can move the court. They have come to this court against prejudice."

Justice Mukhopadhaya: "What is the role of the delivery of justice? How the court can change notions about transgenders?"

Mr Divan: "We don't seek social transformation from the Court – the court's role is to protect minorities. You protect my dignity…"

Justice Mukhopadhaya: "In such case for this declaration on dignity, you need a class of persons who wants protection on a factual basis."

Mr Divan: "The affidavits are our facts."

Justice Mukhopadhaya: "What is the declaration of the Delhi High Court? You have already highlighted right to dignity [and] right to own sexual orientation – that is all right, said it is natural. I don't think the opposition is opposed to this. But in which manner is it natural? In which manner can it be accepted by society?"

Justice Mukhopadhaya: "Is it the law that is preventing that right? Please highlight on this argument."

Mr Divan: "May I respond?"

Justice Singhvi: "One more thing, Mr Divan, the language of the reports you cite are about the person – attraction between the person. It is quite natural – for some, if not for all. Where is this discussion in the Delhi High Court's

declaration?

Mr Divan: “Therefore, I would once again submit that the Delhi High Court could have gone further. You could go further. You could declare that the facts and studies show that no doubt that this is natural and not against the order of nature.”

Justice Mukhopadhaya: “But which act? What is that pleading? You say homosexuals are not – but not which acts. What about hugging? Male/female, male/male hugging is not a taboo. Some acts may attract attention of 377, some may not. Which act is in your pleading? Are we being clear to you?”

Mr Divan: “May I stand back and reply – the issue here is different. The documentation is overwhelming. Let me go back: what was the factual situation before the Delhi High Court?”

Justice Singhvi: “Yes, right.”

Mr Divan: “Large number of testimonies and reports showing that use of 377 in such a harsh manner—“

Justice Singhvi: “It is misused, yes.”

Mr Divan: “Enough to prick the conscience of the High Court…”

Justice Singhvi: “Misused against a particular section.”

Mr Divan: “This section is a class of people. I am calling them the LGBT community. It has a minority sexual orientation. They are widespread – everywhere. Analogy of being left handed holds – you can’t do anything about it…”

Justice Singhvi: “You’re right.”

Mr Divan: “Factual law. So long as the law was interpreted in a particular manner, this type of sexuality is read as against the order of nature and victimized. Is this petition about sexual acts? The answer is that you must take note of it on a broader and larger plane. This is about a community who can’t attain full expression of their sexuality because of the law and social norms. We don’t seek to change social norms here, but [instead seek] a suitable declaration of the court that takes the offensive portion away. Then I can express my sexuality fully, outside of the shadow of 377, away from the police…”

Justice Mukhopadhaya: “The declaration of the high court is about sexual acts. It may cover many such acts. Line is not specific. Some acts are covered, some not by 377. What is the specific pleading for which acts to be covered or not covered? Do one or the other act need a declaration? These pleadings are not there. When you talk of a general declaration, how many acts will it cover? For eg. hijras are always recipients. They may not be

covered under 377 – they are victims. Very difficult to give a general declaration."

Mr Divan: "The Delhi High Court declaration is narrowly tailored. I would say carefully tailored. It covers a vast range of sexual activity. To enumerate individual acts may not be to our advantages. The issue is at a certain level conceptual. The declaration, in spirit, essentially says that people of different sexual orientation are to be targeted under sec 377. At the end of the day 377 targets a class of people who are LGBT. It says to them that the law will not extend to you now – go out, you are a citizen."

Justice Mukhopadhaya: "What about other citizens?"

Mr Divan: "It is for all. All are equal. The Delhi High Court judgment extends to all adults…"

Justice Mukhopadhaya: "If something is in private, who knows – will you declare?"

Mr Divan: "Let me answer that – let me digress for a moment. To the point of view of a person who is a sexual minority – how does he or she see the world? At the first development of attraction, there is an uncertainty. You feel society won't accept you. Then there is a slow process/period of self-realization. After you realize who you are, which is an enormous process of coming to terms, then there is a third level of telling your immediate family. During this exploration, you don't know who to talk to. It is a lonely personal journey into adulthood. Then the law tells you that what you aspire to do sexually is against the order of nature. That it is not allowed. There is low self esteem, denial, silence. You are a criminal just by being yourself. This is the stigma. We are asking you to remove this stigma. Doing so will not harm anyone else. Remove the applicability of this section from those to whom it should not apply – what is against the order of nature. Science says it is natural. This is a provision capable of misuse…"

Justice Singhvi: "You are right in what you are saying. But in formulating this into a prayer clause in the writ petition – that it was confined to acts? Perhaps not necessary to confine it.. Natural expression of sexual orientation has, according to you, been shown in science – so now there is no need at all. Consenting adults are not covered in 377. You are also right that now you need to go beyond – you want a declaration on the provision of dignity in the constitution."

Mr Divan: "There is more than one approach to the same end. Yes, you can declare that sexual orientation is not against the order of nature. That would lead us to the same ends. You could say this and the High Court declaration together – your lordship has put his finger on it."
Justice Singhvi: "We will not comment on our conclusion as we are still hearing. We feel however that the issue in the Delhi High Court judgment should have been addressed on this larger canvas on which you are talking."

Mr Divan: “Yes.”

Justice Singhvi: “You rightly read Prof Sathe – he may be right. The Parliament and the Supreme Court are fighting shy of talking on this issue because of common perception. It is quite interesting – you shared the passport form – if the government is alive to this problem. And you have highlighted incidents; there will be thousands more such incidents everyday in our police stations. Not only this – lakhs! Rights of the common man are violated with impunity. For ordinary citizens, the Constitution means nothing. What we feel is that the lack of a specific pleading but an issue can be taken on a larger plane. You are entitled to argue the right to dignity, [which] extends beyond this declaration of the High Court.”

Mr Divan: “Your lordships may consider issuing such a broader declaration, my lords.”

Justice Mukhopadhaya: “But if it is natural, then it does not apply in any case to 377.”

Mr Divan: “Is this to be decided case by case? Or to decided at this point when material has been placed before the court? It is the duty of the constitutional court…”

Justice Mukhopadhaya: “But how can it be a general declaration? What about if there is injury? Bodily harm? You understand the difficulty in issuing a general declaration? How is it to be constructed?”

Mr Divan: “Very important issue. Let me tell you why the Delhi High Court tailored its declaration so carefully. We represent groups representing children and…”

Justice Mukhopadhaya: “For example, there is no discussion on how many such acts happen with husband and wife? Are there studies? What percentages? Are these acts natural for all? Why are you making homosexuals a minority by themselves – are these acts only among a minority?”

Justice Singhvi: “Perhaps they are a small group within society so that is how you mean minority.”

Mr Divan: “Yes.”

Justice Singhvi: “As much a citizen as anyone.”

Justice Mukhopadhaya: “But these acts can also be done with husband and wife.”

Justice Singhvi: “If we go literally on these acts – like Mr Nariman said – 80% of husband and wives would be in bars…”

Mr Divan: “If we go by the archaic meaning…”

Justice Singhvi: “Yes, the archaic. You are right – this should have been addressed long ago by the other organ of the state. We don’t normally comment on these matters, but it needs debates. These matters need debate and time. We didn’t mention earlier. Our understanding from our childhood is from our elders, from scriptures – those also change depending on where you read them. Ramayan in the north, south, east, west is very different. There also, there is no modern explanation – for Dasrath’s children for example – how were they born? There is no modern explanation… As things go, you are right. The issue needs context of studies in the world… but why treat as a sexual minority? What not treat them as a mainstream?”

Mr Divan: “They are mainstream, my lord – but are they in the eyes of the law? When fundamental rights are infringed, you must not wait...”

Justice Singhvi: “Perfectly right. But why pose difference? Let those who oppose – let them ask about the husband and wife and what they do…”

Justice Mukhopadhaya: “How can a court order be given on this?”

Mr Divan: “Let me respond to that. First, LGBT community is part of the mainstream. They are entitled to all the protections – as part of a class of citizens. They are like all citizens and should have all rights. Don’t deprive them of those rights.”

Mr Divan: “Second, however, the manner in which one provision has been interpreted has been worked operationally, has disproportionately singled out and targeted this community. It is different for them – and this is not just physical violence …”

Mr Divan: “We need not go to actually physical violence – the psychological stigma alone is enough. This applies to the role of the court as long as the statute remains on the books. The stigma is societal and legal. We are asking you today to rub out the legal – erase the legal part of this stigma.”

Mr Divan: “The question you are asking me is if it is natural then why stigma? Statute has been wrongly interpreted and been misused for years. It illustrates the point. It is the manner in which the law works. A segment of society is being stigmatized and the statute is integral to that stigmatization. Application of the law is one argument. I am saying interpretation. The legal part of the stigma needs to be erased – that is the need for a declaration. It may come through legislation – but we cannot wait until that time. The court must read down the law. This is an emancipation petition.”

Mr Divan: “The declaration in general has to be about the range of human sexuality – extending the Delhi High Court declaration to the next step.”
Justice Mukhopadhaya: “All reports are about class of persons – not about human beings or nature.”

Mr Divan: “Yes, but persons who are heterosexual – their conduct is not being targeted.”

Justice Singhvi: “Slight digression. What kind of society do we live in? The man can have in many cases more than one wife or another relation outside marriage without stigma – but a woman who has another partner outside marriage –is outcaste – she is stigmatized.”

Mr Divan: “That is a very sensitive observation by the court.”

Justice Singhvi: “How can we think of these things? Draupadi had 5 husbands – is it acceptable? Those who speak of so-called moral values – how do they justify? We read scriptures, full of examples. You may be right in arguing that society has changed – technology. This change will go from big city to small town to village. Mobile has already reached there…”

Justice Singhvi: “With so much change: why should any part of the citizenry be treated as a minority? We appreciate your argument of dignity is applicable also. Preamble has it directly – you don’t need even article 21 to derive it from. You can argue that this is a failure of society to ensure dignity, irrespective of sexual orientation.”

Mr Divan: “I must respond to this. Why I paint myself into a corner of minority if I am in the mainstream?”

Justice Mukhopadhaya: “You are already in society. In the family.”

Mr Divan: “Whether minority or not is also a question of fact. The court understands linguistic minorities also for its purpose. The point, my lords, is that there is a rainbow of sexual orientation – most are heterosexual but a significant minority are homosexual.”

Justice Mukhopadhaya: “Yes, but we are talking about sexual acts – those are not in the minority or majority.”

Post-Lunch Session:

Mr Divan: “I want to make two points, My Lords. One, we are not seeking any special rights for the LGBT community. We want the laws and rights equally as available to all citizens – not additional rights because we are different. We want not to be denied the rights available to all.”

Mr Divan: “Two, Sec 377 on its literal reading may be facially neutral, but in its working, its operation, it targets a segment of our society – the LGBT community. Its operational impact is such – constitutionality must be judged on the operational impact.”

Mr Divan then made a legal case for severability, or separability, i.e. the ability to ‘separate” one part of an offending statute down as ultra vires of the constitution but not necessary strike the entire statute. He used three cases:

Chamarbaughwalla, *Kedarnath* and *Indira Das* to show that a law on lottery and a sedition law had been limited in their application. He then went on to suggest that the court do the same with 377 and restrict its application.

Mr Divan then read from Justice O'Connor's judgment in *Lawrence v Texas* to argue that though the Texas sodomy statute was about acts, an "Act closely associated with a group or identity", when criminalized, makes the identity itself criminal.

Justice Mukhopadhaya: "Severability cannot be discussed until we say there is targeting of a class of persons of homosexuals. Conduct may be common of all – can you highlight on that?"

Mr Divan: "Let me say this. There is a wealth of material on record that shows, unequivocally points to, the targeting of the LGBT community, in the operations [and] working of the law. See the affidavits, the UN reports. The problem is in India and in the world – why? The law cannot fix it alone – yes, but it *can* do one part. It can remove the operation of the law for physical violence and mental oppression. You can do this by saying sexual orientation is natural…"

Justice Mukhopadhaya: "What about with a minor?"

Mr Divan: "That is clear in the judgment. For us, the provision must govern minors. It applies in all its force and all its vigour without the slightest doubt…"

Justice Mukhopadhaya: "If there is a major and a minor? Both will be accused? Who is accused?"

Mr Divan: "The judgment is only about adult consensual acts in private…

Justice Mukhopadhaya: 377 – Are both accused? Both parties? That is the question. The section says "whoever" that is doing the action – who is "Accused"? Is it single or plural? Is it the one doing the intercourse?"

Mr Divan: "There are many possible scenarios. One possible scenario is that both are accused…"

Justice Mukhopadhaya: "Keep this in mind. You could even say article 14 here. Two are consenting, only one is accused…"

Mr Divan: "We must, my lordship, think of this as more than acts. This is not isolated. This is broadly about our society – about dignity of the individual…"

Justice Mukhopadhaya: "This you have emphasized. But take a kanti – no, kothi. Kothi has a feministic way of talking – not invisible, seen. Also being targeted. So do we only need to protect people who are visible?"

Mr Divan: "Invisibility – am I invisible? Not just dressing in a particular manner, in cohabitation…"

Justice Mukhopadhaya: “You are visible in your own society, yes. In society in general, Mr Divan, how many people know about this law? It is discrimination if you know it is there, like untouchability.”

Justice Singhvi: “Mr Divan, someday, not now, but someday, you do a survey about how many people know what the constitution is. Someone did a study – in villages, 2%, and among CEOs, 4% had heard of the Constitution of India…”

Mr Divan: “Still it impacts their lives, everyday…”

Justice Singhvi: “In India, targeting happens to people who don’t have power – otherwise, it doesn’t. This is the harsh reality of our times.”

Mr Divan: “Don’t consider targeting just as physical…”

Justice Singhvi: “No, no, not at all.”

Mr Divan: “Targeting the spirit can be more demeaning.”

Justice Singhvi: “We can share. When you are educated, a lawyer, you don’t want to know the caste of your friend, [or] his sexual orientation. It is a personal matter. Social stigma lessens with education.”

Justice Mukhopadhaya: “How far can a judgment go to ensure that no one targets a class of persons?”

Mr Divan: “A declaration will go a long way. It has already gone a long way with the High Court judgment…”

Justice Mukhopadhaya: “The court must be cautious that, in decriminalizing one thing, some criminal acts might also be decriminalised.”

Mr Divan then read from Constituent Assembly Debates on equality, as cited in the Delhi High Court judgment, and from the note on the *Criminal Tribes Act* and the Constituent Assembly Debates.

Mr Divan: “377 renders LGBT as criminals. They are “unapprehended felons”.”

Mr Divan then read from *Anuj Garg* — about sexual stereotypes that prevented female bartenders from being employed after a certain time period, and ruled that such laws were violative of Article 15 prohibition against non-discrimination. He said that, in that case, ruling was through article 15 – no discrimination on the basis of “sex” or “like basis”.

Mr Divan: “It is our submission that you can read sexual orientation either into sex or as “any like basis” under article 15. In its standard meaning, sex is said to include sexuality.”

Mr Divan gave a copy of Collin's Thesaurus to judges, which has "Sexuality" as a synonym for "Sex."

Mr Divan: "Sexuality is wide, and has in it more than just gender. Give this expression a wider import. Read it broadly. Don't confine "sex" to mean just "gender"."

Justice Mukhopadhaya: "Where is this discussion in 377? On its plain reading, where is this discussion? Where is discrimination?"

Mr Divan: "On a literal reading, it doesn't. But it is like in *Chamarbaughwalla.* The statute was facially neutral, but the court read two classes within it. Also with *Kedarnath*, the court called out two classes from a statute that was facially neutral. In its operations, 377 targets a section – you can carve that out."

20 March 2012 - Mr. Shyam Divan, Mr. Ashok Desai

The hearing began with Senior Advocate Mr Shyam Divan, appearing for Voices Against 377, concluding his submission by making two major points.

First, he summarised the effect of the High Court judgment, distinguishing those acts that continue to be criminal from those acts that stand decriminalised. In Mr Divan's submission, all cases involving non-consensual sexual acts between adults, as well as all sex acts with children with or without consent, continue to be criminal offences under Section 377, while all sexual acts between adult males, adult females and adult transgenders stand decriminalised

Mr Divan submitted a note on additional remedies that the Court could consider, which was to interpret 'carnal intercourse against the order of nature' in such a way as to exclude consenting sex between adults from its ambit.

Mr Divan proceeded to outline a long history of progressive Supreme Court judgments, since May 1950 to 2011, which have successively expanded the scope of the fundamental right of citizens. The chain of progressive cases in the sixty years of the Indian Constitution included those related to rights of hawkers to trade, of government employees to strike, of prisoners' right to legal assistance, of under-trials rights to dignity and against handcuffing, of right to divorce and maintenance for Muslim women, of right of sexual harassment free workplace for women, of illegitimate children, of sewage manhole workers, among others...

Mr Divan placed this list within the canvas sketched by Granville Austin in *"The Indian Constitution"* reading that, "The judiciary was to be the arm of the social revolution, upholding the equality that Indians had longed for during colonial days, but had not gained – not simply because the regime was colonial, and perforce repressive, but largely because the British had feared that social change would endanger their rule."

Mr Divan argued that this present case belongs to this shelf of progressive and historical Supreme Court judgments in the six decades since independence. He made the case that it is in the jurisdiction of the Supreme Court, that it is its duty and obligation to deepen the meaning of fundamental rights of citizens and that its history had been one of doing precisely this in 'an almost unbroken chain of judgments'. This function should now be extended to a 'significant segment of our population' to give them 'a full moral citizenship' in the 'march of law' in expanding the width and reach of fundamental rights to all.

Mr Divan made a case for varying application of the idea of locus standi, when it comes to groups who want to restrict rights of a minority; such groups should not be allowed to misuse the wide scope of locus standi to restrict or narrow rights.

Justice Mukhopadhaya: “Any party has the right to come to us and say 'that they do not want to see obscene', that they 'do not want to live in a negative environment', that they 'do not want to hear bad words'.”

Justice Singhvi: “If we apply the same reasoning to you, what is your locus to file before the High Court?”

Mr Divan: “In the case of these Special Leave Petitions which seek to restrict the Fundamental Rights of citizens, the parameters of locus standi should be very strict and narrow.” None of these SLPs, he argued, are from personally aggrieved parties. Alternately, in cases that seek to expand the FRs of citizens, the parameters should be as wide as possible.

Mr Divan: “I will not press that argument.”

Mr Divan: “Do not exclude sexual minorities from the mainstream.”

Justice Mukhopadhaya: “Are they a minority in terms of the Constitution? Constitution recognises linguistic and religious minorities only. Section 377 makes no mention of a group, it does not classify, it applies to a generic 'whoever'**”.**

Mr Divan submitted a compilation of literature that “lends to the issue a degree of sensitivity which does not come out in technical literature'”. This compiliation included extracts from Leela Seth's biography *On Balance*, fiction from Maya Sharma, Because I Have a Voice, Whistling in the Dark etc.

Next to appear before the court was the former Attorney General and Senior Advocate Ashok Desai, representing the film maker Shyam Benegal.

Mr Desai began his argument by reading from the NACO affidavit.

Justice Singhvi: “The affidavit talks of sex in railway stations, I think railway stations are places to go on a journey not to have sex.”

Mr Desai pointed out that finding private spaces in India for intimacy is always a problem

Justice Singhvi: “The affidavit by NACO is only one government department. It is nothing more than the personal opinion of a under secretary. In a matter as serious as the constitutionality of a law, a more high-ranking official should have given his affidavit. We will come down heavily on the Government on this point.”

Mr Desai: “My lord, I am being put in the dock for something which I have not done.”

Justice Singhvi: “We are just asking you because of your experience. Please continue.”

Mr Desai: “The law is used to harass a section of the population.”

Justice Mukhopadhaya: “Is there one reported case of consenting sex between adults in private? If in private, who is the complainant?”

Post-Lunch Session:

Mr Desai: “Your lordship asked for cases. I am submitting two cases. *Minwalla* and *Nowshirwan*, both in Sind of 1935. I will not read them but just give you the citation of cases of adults in private.”

Justice Singhvi: “Mr Desai, what is the secret of your art of persuading the bench without ever raising your pitch? This is an art which is vanishing.”

Mr Desai: “In pre-colonial India there was a 'liberal environment' in India regarding 'sexual practices'. The morality that punishes acts of sodomy has a distinctly Christian history as against a Greek or the Saracen (Turks, Arabs, Muslim) history.”

Mr Desai: “The morality of Section 377, that is, the morality of Macaulay, is in the legacy of the Christian beliefs in sin, of its stinginess with the body which it considered as a seat of sins,” as against “the Indian pre-colonial past which had a more open engagement with the body, evidenced in its scriptural texts, its treatises and its temples.”

Mr Desai: “Not only in Konark or Khujarao, but in different ordinary temples of ancient India, the 'frieze of life' would depict all the four ends of life, dharma, artha, moksha and kama. Each of these aspects of life were important in 'the Indian past' and that each of them had treatises written about them (Dharmashastra, Arthashastra, Kamasutra etc]). Only asatya (untruth) and himsa (violence) were considered forbidden.”

Mr Desai: “I am submitting Ruth Vanita's and Saleem Kidwai's Penguin publications book 'Same Sex Love: Readings from Literature and History' to the bench.” Reading out from the index, he argued that all this material, from ancient, medieval and modern times, is of different perspectives (not all of it is celebratory) but that it incontrovertibly establishes the existence of same sex love and that too in so many different languages, a long list of which he read out.

Mr Desai: “Sec 377 applies to any non-procreative sex, so its 'net is thrown so wide'. That it is 'absurd'. A sixty year old couple who cannot procreate when it has sex, a post-vasectomy couple, or anyone basically having oral sex, each of these would be criminalized by this section, which is why a reading down or a declaration, or a injunction, call it what you will is merited.”

Mr Desai: “We need to look beyond Equality and Liberty to the question of Fraternity – not just as a trinity of rights, but as a union in which one does not work without the other two.” He cited Ambedkar on 'equality without fraternity

is no deeper than a coat of paint', and that currently an entire community were being excluded from accessing their rights because of prejudice etc. "'The doors to the Ritz are always open', but everyone can't walk through." He extended this concept to the notion of family, etc, who also get impacted by the prejudice directed towards gay people.

Mr Desai then read an affidavit by Vijaylakshmi Rai Chaudhary on her experience and acceptance of having a gay son.

Justice Mukhopadhaya interrupted the reading and asked questions of acts covered under Section 377.

While Justice Mukhopadhaya was asking questions to Mr Desai, Justice Singhvi continued reading. After finishing his reading, Justice Singhvi commented that he had never met a gay person, and that he had learnt a lot through the course of this hearing.

Justice Singhvi: "Why, in the sixty years of the legislature, and with the recommendations of the Law Commission, has the Parliament not thought it wise to change its stance on 377? The recent Cabinet decision to support the judgment was not that, but only a 'consideration', not an acceptance of the approach whereby the Union of India does not find any 'legal error' in the Delhi High Court judgment. NACO is not the ministry of health, only a department within. The officer has signed his submission to court 'in his capacity as' not 'on behalf of'. How can the home secretary sign on behalf of a Cabinet meeting that he clearly was not present at?"

Mr Desai then gently suggests that the judges summon the Attorney General to clarify the government's position.

Justice Singhvi: "Such a decision of 377 should happen in the Parliament, which has elected law makers of all hues and colours and from all parts of India. 'The best institution,' they said, 'to debate this issue is the Parliament**'.** Your client Shyam Benegal was a Member of Parliament, has he moved a Private Member's Bill on this point?"

Mr Desai continued reading from his written submissions, to make the point of the discriminatory impact of the law.

Justice Mukhopadhaya: "How is the law discriminatory? It prohibits certain forms of sex for everybody. If homosexuals can't have a certain form of sex they can turn to heterosexual sex. Heterosexuals have a right to live in a positive social atmosphere too."

Mr Desai: "My Lord, the answer cannot be that a law takes away everyone's right to have a form of sex."

Mr Desai submitted a print media survey to establish the existence of oral sex, of different sex practices rather than just procreative sex.

Justice Mukhopadhaya: “This is a media survey. We can’t take it seriously. They do election surveys and never get it right.”

Justice Singhvi: “Every year *India Today* does a sex survey where it uses saucy pictures on its cover. You should look at it.”

Mr Desai: “My purpose in using this survey is not to suggest that 40% or 30% engage in oral sex – it’s not the percentage that matters – but merely to suggest that this is a practice which exists in India and that you cannot wish it away.”

Justice Mukhopadhaya: “You see, Mr Desai, for instance this survey you submitted claims that extra marital relations have been increasing by 15% every year – so when it becomes 50%, will we legalize it?”

Justice Mukhopadhaya: “Instead of giving percentages or lessons from history, let us focus on whether it is unnatural or natural. If natural, then which acts? If unnatural, then for whom?”

21 March 2012 - Mr. Goolam Vahanvati, Mr. Ashok Desai, Mr. Siddharth Luthra, Mr. Dayan Krishnan, Ms Meenakshi Arora

Attorney General (Mr Goolam E. Vahanvati) – "I have taken specific instructions and can clarify the position of the government. The Government accepts the correctness of the decision as far as the decriminalisation of consenting sex between adults is concerned. Section 377 is a pre-constitutional enactment and the basis of the view is an expansive view of Article 14 and 21. It violates Article 14 because it exposes a particular class of people to a kind of discrimination. We do not challenge that part of the order that decriminalizes private sexual acts between adults in private. This is the stand of the Ministry of Home Affairs. The brief was sent to the ASG; there was no communication between him and the MHA. He 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 as to how had their position changed in the Supreme Court as compared to the Delhi High Court, the Attorney General said that the government also learns and, after the judgment, there was subsequent enlightenment.

Senior Advocate Ashok Desai representing Shyam Benegal continued his arguments.

There were more questions from the Bench about what were the sexual acts covered by Section 377 and how was it violative of Article 14 and 21, especially when it was not applicable to homosexuals.

Mr Desai: "Section 377 is cast in the widest possible terms the language is whoever and includes homosexuals and heterosexuals. The word carnal intercourse includes all physical relationships that result in pleasure. The word intercourse implies two bodies joining for pleasure. It is not confined to anal sex – it also includes oral sex, as well as sex using the hand as per interpretations of the courts. The phrase 'against the order of nature' includes contraception as well as oral sex and anal sex within the marital relationship.

Mr Desai read out an *Outlook* survey, which communicates that oral sex is practiced by 37 % of the population.

The Bench: "We do not go by media reports and media surveys."
Ashok Desai: "The purpose is not to assert that there are 37% - the numbers may vary – but just to say that this is a practice which we cannot pretend does not exist."

Justice Mukhopadhaya asked the Attorney-General: "What is the sexual act under Section 377? Who is the accused and who is the complainant if the act happens in private? Who is the victim?"

Attorney-General: “State can view certain actions as illegal and offensive. Privacy is good up to a point. The High Court judgment is a development of the law.”

Bench: “How is homosexuality a minority? Section 377 has nothing to do with a minority.”

Attorney-General: “The stand of the Union of India is clear: there is no appeal. We accept the reason of the High Court that consenting sex between adults in private is not an offence.”

Mr Desai continued: “As long as the law applies to same sex relationships in private it violates privacy, dignity. The older view of the Supreme Court was that procedure established by law had to be tested only on Article 21 and Article 21 was an island by itself. This has been cited by the other side. Further, a procedure prescribed was enough. However, this is not the correct position. If the law of Henry VIII prescribes punishment by putting a person in boiling oil that would be valid as a procedure is prescribed. This was the view taken by the Court prior to *Maneka Gandhi*.”

As put by Mr Desai, the three parts of *Gopalan* were knocked out by *Maneka Gandhi*:

1. Article of Fundamental rights are not islands by themselves;
2. Procedure has to be a fair procedure;
3. Due process concept was added and the judges transformed what was intended by the Constituent Assembly.

Mr Desai argued that Section 377 “violates dignity, privacy and personal liberty. It is clear that any infraction must be tested on all aspects. A law affecting personal liberty must be tested on 14 and 19 as well. No article in the constitution is an island by itself. As *Maneka Gandhi* notes, courts must expand the reach and ambit of Fundamental rights and not attenuate their meaning. From *Maneka Gandhi* to *Sucheta Srivastsva* [right of disabled person to choose to procreate or not to procreate], we have seen an incremental expansion of rights in this area. We are also on an educational curve. The bar and the bench participate in the same process of learning. Section 377 curtails a person’s liberty to be himself. Article 21 includes the freedom to form consensual relationships and the liberty to live in one's own country without fear of criminalisation.”

Mr Desai: “The right to privacy has been extended from freedom from surveillance visits. In Kharak Singh, Subbarao J. said privacy is part of personal liberty and includes the freedom to be free from psychological restraint. It is the creation of conditions for freedom. A person’s home is his castle.”

Mr Desai: “Both Mathew J. in Gobind and Subbarao J. in Kharak Singh expanded our own understanding of personal liberty to not only what has been to what may be. Our judges have created a right to privacy and respect

for personal autonomy."

Mr Desai noted that the right to privacy has been elaborated in a series of US decisions:

- *Griswold*: right of married couples to use contraception;
- *Eisenstadt*: right of unmarried couples to use contraception;
- *Roe v. Wade*: right to abortion
- *Planned Parenthood*: right to abortion
- *Lawrence v. Texas*

Mr Desai argued that sexual identity and the right to form sexual relationships form an inalienable part of Article 21. To this extent, he cited *Gobind* (right to privacy and intimacy) and *PUCL* and *Selvi* (which elaborate the notion of privacy of the body).

Mr Desai noted that the right to privacy is entrenched in international law (Article 17 of the ICCPR). He also referred to the decision in *Dudgeon.*

Mr Desai noted that this case would have been difficult to argue fifty years ago; however, society has changed since then.

Bench: "Society was different even before 1860 if one looks at the temples etc in India. Why go outside India? The judgment of the Delhi High Court is about same sex relationships but the law is about acts."

Mr Desai: "This law is also about marital relationships."

Justice Singhvi: "We have struggled with this for three weeks. I read one story (a Rajasthani folktale, Vijay Dan Detha, A double life, which is a love story between two women, Beeja and Teeja from *Same Sex Love in India*). There are a variety of authors/poets who show that same sex attraction was natural. Relationships /intimate relationships/physical relationships, all within our country. Now we see it only as sexual intercourse. This is a perversion. Somebody thrust this provision on Indian society. Parliament has had no time to reconsider this issue. Do you know the story of Karna and how he was born and how was Ayyappa was born? In mythology in Urdu/Sanskrit these stories continue. It was denounced by the British. It is only after the British that we say it is wrong."

Justice Singhvi: "We don't need to go abroad [referring to the *National Coalition* judgment]; our jurisprudence is wide enough."

Mr Desai: "The pleadings are wide enough to encompass both homosexuals and heterosexuals… If I have to sum up my pleadings in a sutra it would be that the police must stop at the bedroom door."

Mr Desai then argued with reference to Article 15 and Article 14.

He ended by quoting Pratap Bhanu Mehta: "There come moments in the life of a nation when it has to confront its deepest prejudices and fears in the

mirror of its constitutional morality. The Delhi high court's judgment in *Naz Foundation*, 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."

Mr Siddharth Lutra, Senior Advocate, addressed the Court, on behalf of Nivedita Menon and other academics.

Siddharth Luthra: "The origins of Section 377 can be traced back to a notion of sin which is linked to one religious tradition. This notion of sin becomes a part of the secular law in England. This same notion becomes a part of the Indian law through the Code of Macaulay. Criminal law is part of a state's decision to ensure order in society. The proscription of an act is the highest expression of the law. Can you impose this viewpoint from a religious framework on our society? My argument is not against any one religion but a more general point that the imposition of the viewpoint of a religion on all through criminal law would be against secularism (*S.R. Bommai's case*)."

Mr. Luthra cited the Constituent Assembly Debates. With respect to secularism, Sh. K.M. Munshi stated that: "Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation." [Cited in Bommai, para 304].

He argued that, as secularism is a part of the basic structure of the Constitution, the issue is whether a law which is religious in character without any independent secular purpose can be permitted to exist.

Mr. Luthra argued that the history of Section 377 IPC can be traced to the vice of buggery, punished under a law enacted in 1533. The offence of sodomy/buggery had ecclesiastical origins. In 1533, Henry VIII - to break the link between the English Church and Rome - revised the common law to introduce these ecclesiastical crimes into the common law codes. The Statute of 1533 punished the "Vice of Buggery". The offence was punishable by death. After Queen Mary the Ist restored the jurisdiction of this offence to the Church, it was reenacted by the British Parliament in 1563 as the Buggery Act of 1563. This offence remained on the statute books in England till 1861.

Mr. Luthra stated that in the early 1800s, an attempt was made to reform the criminal law both in England and its colonies. Although this was not accepted in England itself, five Codes were created which were applied to various colonies. This included Macaulay's Draft Penal Code, which became the Indian Penal Code. Same-sex activity, being morally unacceptable to the rulers, was punishable in all the colonies. The Macaulay Code thus remains a legacy in a number of countries, including India. In England, the Sexual Offences Act, 1967 has decriminalized private same-sex relations.

Mr. Luthra referred to an article by Michael Kirby titled “The Sodomy Offence: England’s Least Lovely Criminal Law Export” [2011] JCCL 23. The article traces the history of the offence and its impact on Britain’s erstwhile empire. He said that on a reading of the law in the context of India, it shows that Section 377 was introduced in India not to achieve a social purpose or protect all individuals from harm, but was focused on the protection to Europeans and Englishmen.

Mr Luthra said that the question is, therefore, whether such a law - which is purely religious in origin, connotation and interpretation - can be permitted to survive once secularism is recognized as part of the basic structure of the Constitution. He said that In *Bijoe Emmanuel v. State of Kerala*, (1986) 3 SCC 615, it was observed that: “We only wish to add: our tradition teaches tolerance; our philosophy preaches tolerance; our constitution practices tolerance; let us not dilute it.”

Mr. Luthra argued that, though Section 377 IPC does not distinguish between consensual and non-consensual sexual acts between two individuals, Section 87 IPC, which falls within the Chapter on General Exceptions, carves out an exception for acts causing harm which are not offences on account of consent between parties to take the risk of that harm. Reading Section 6 of the IPC, it is clear that, if Section 87 IPC were conjointly read with Section 377 IPC, acts of sex between men and/or women falling under the provision, if consensual and if the individuals involved are above the age of 18 years, cannot be proscribed or subject to punishment.

Mr. Luthra concluded his arguments by invoking the doctrine of desuetude. He said that a doubt has repeatedly been expressed as to the extent of the application of Section 377 IPC to consensual sexual acts by enforcement agencies due to the absence of official statistics in this regard. The last reported cases in respect of consensual acts are over 80 years old. In these circumstances, a question which confronts us is whether a case is made out for decriminalization of consensual sexual acts between adults in private.

Justice Singhvi: “Over centuries one kind of affection has been the accepted norm in society in the east, west, north and south.”

Attorney-General: “In Geneva I was asked by the Scandanavian countries as to what is your approach to the question of homosexuality. I did some research and found out that in England in the 19 century there was a repression of sexual mores. Oscar Wilde is the best example. People ran away from England and took up positions in the army. To protect their own soldiers the British enacted Section 377 In a puritanical England it was unthinkable that men have relationships with men, that women with women. Affection between the sexes was unthinkable. Any intercourse other than peno vaginal was unthinkable.”

Bench: “After 1950 Article 372 allowed pre colonial laws to continue subject to Article 13(1). So the question is to what extent they will become void? Societal attitude changes, society accepts relationships not traditionally

accepted. Section 377 was imposed upon us. We did not have this notion."

Attorney-General: "There is an attitudinal change in society. It accepts human relationships not just sexual relationships. The question is whether society is ready. The offence reflects society."

Justice Mukhopadhaya: "We never used to discuss this, now we are openly discussing in court."

Justice Singhvi: "There was this sexual activity, even before 1860, maybe since man became civilized or maybe even before that. If for centuries this kind of activity has been happening, how can it be against the order of nature as thought of by the church of England. Since Parliament is the voice of the people, why has it not sought fit to reform the law?"

Attorney-General: "I have three answers:

1. Some IPC provisions may have outlived their utility. eg. Offences against coins not relevant now;
2. A section in society opposes this. They don't like to see gays in streets. They have a right to their opinion;
3. There is no momentum for parties to take up this matter."

Justice Singhvi: "Parades – there are fashion parades now. Not more than ten years ago they began. Fashion parades, like Coca Cola, will become a part of even village life."

Justice Mukhopadhaya: "They may be marching in urban areas but may be a majority in rural areas."

Attorney-General: "Our own society is in the throes of change. It has opened up. Where it will take us, there is no answer. This case has been decided on a question of Fundamental rights. The task is more difficult. The extension by the courts of the order of nature is strange as being everything which does not lead to conception."

Justice Singhvi: "There should be a debate in an appropriate forum. In the High Court two judges decide – here again two judges will decide. How can two people decide what would affect the entire society."

Attorney-General: "Your Lordship means that one takes a viewpoint without full debate."

Justice Mukhopadhaya: "Would breast feeding come within the meaning of carnal intercourse, what is carnal intercourse?"

Siddharth Luthra continues, citing an article by Kirby J. "The anti sodomy laws were the least lovely colonial export and Section 377 travels to all the colonies."

Mr Dayan Krishnan appeared, representing the Mental Health Professionals.

Bench: “Were you a party before the High Court?”

Mr Krishnan: “No, but your Lordship has allowed the intervention. I want to make two points – take only ten minutes. Homosexuality, as per current medical opinion DSM IV and ICD 10, is not a disease and hence a normal variant of sexuality.”

Bench: “We do not want to know if this is or not a disease. Are there sexologists among your doctors?”

Mr Krishnan: “The APA takes the position that homosexuality is not a disease.”

Bench: “Section 377 is not about homosexuals. This is to misunderstand the issue.”

Mr Krishnan: “There are guidelines by the American Psychological Association which refer to Lesbian, gay and bisexual persons.”

Bench: “Same sex, same sex, same sex… what about heterosexuals?”

Bench: “The number of homosexuals in America are… one third of the population is gay. And the number is rising. Fortunately the number as per NACO is only 22 lakhs in India.”

Meenakshi Arora, representing Ratna Kapur and a group of legal academics, began her arguments. The judges said she could continue the next day after they heard the Attorney General.

22 March 2012 – Mr. Goolam Vahanvati, Ms Meenakshi Arora and Mr.

Doabia. Rejoinders by Mr.Amarinder Sharan, Mr. Praveen Agrawal and Mr. Huzefa Ahmadi

The Attorney General Mr Goolam E Vahanvati began his submissions: "It is submitted that the government does not find any legal error in the judgment of the High Court and accepts the correctness of the same. In furtherance of the request of the Cabinet to the Attorney General to assist the Court, the following submissions are made."

Attorney-General: "Section 377 after the High Court judgment would read like there was a proviso stating that nothing contained hereinabove shall apply to any sexual activity between two consenting adults in private. However post the High Court judgment what is still not clear is whether these consenting sexual acts between adults amount to 'carnal intercourse against the order of nature'. Does the decision make these acts within the order of nature or outside it? The important aspect is what is the meaning of the order of nature. Is it not conceivable that what was perceived to be against the order of nature in 1860 may not subsequently be perceived to be against the order of nature particularly in view of a change in society's understanding/tolerance of that thing?"

Attorney-General: "It is important to understand the social background in which Section 377 came to be enacted. The respondents have highlighted the legislative history behind the enactment of Section 377 as well as the history of the sodomy laws in Britain."

Attorney-General: "In his book "Raj: The making and unmaking of British India", Mr Lawrence James documents the contrast between the treatment of homosexuals in India and Britain in 1861, and states that 'homosexuals were also free to satisfy their fancies in India, whereas in Britain they were widely despised and buggery was a capital crime until 1861." In Britain, "between 1800 and 1835 fifty men were hanged for sodomy".

The Attorney-General also noted that homosexuals were pilloried; that is to say, they were torn apart. Thus, many homosexuals sought to escape the Victorian sexual repression and found in India an air of sexual freedom. What subsequently occurred was 'sexual imperialism': the British forced their sexual mores on Indians.

The Attorney-General quoted from James: 'for many British onlookers, Indian erotic art was a revelation of practices which were all but unheard of in their homeland, or condemned as deviant and depraved. There was group sex, oral sex, sex in every conceivable position, buggery and masturbation." "Whilst the homosexual in India had greater opportunity than in Britain he could not rid himself of his countrymen's aversion to his conduct, nor their laws against it."

The Attorney-General concluded that: 'Indian society prevalent before the enactment of the IPC had a much greater tolerance for homosexuality than its

British counterpart, which at that time was under the influence of Victorian morality and values in regard to family and the procreative nature of sex. It would appear that the introduction of Section 377 in India was not a reflection of existing Indian values and traditions. Rather it was imposed upon Indian society due to the moral views of the colonizers."

The Attorney-General cited Douglas Sanders, "Section 377 and the Unnatural Afterlife of British Colonialism in Asia", 4 Asian J. Comp L (2009), to make the point that "the IPC was not a document that reflected existing Indian laws and customs".

Attorney-General: "Three conclusions can be drawn: Section 377 was brought in to deal with a situation which arose due to regiments in India; Section 377 was not meant to reflect Indian society, laws or customs; and that, in its words, the section is loose and unclear."

Attorney-General: Two countries which previously possessed Section 377 have deleted it now; both Singapore and Malaysia now have Section 377A which is the only attempt to define carnal intercourse against the order of nature. It is 'any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature'. The punishment is imprisonment for twenty years and whipping.

Attorney-General: There are different approaches to the concept of order of nature. Sexual activity against the order of nature is only one aspect. Natural law is its root. Children out of wedlock at one time would have been against the order of nature; today there are changes with single parents being accepted. There are many aspects of modern life which by reason of technological, scientific and medical advances have already drastically altered the view as to what constitutes the order of nature. For instance IVF, cloning, genetic modification of seeds, stem cell research etc.

Justice Singhvi: "What is against the order of nature? If nobody talked about homosexuals or gays and today we have imported the word homosexual and gay from the west."

Attorney-General: "They are referred to by the word queer, which is a shameful way of referring to them."

Justice Mukhopadhaya: "The Draft Penal Code uses the term intends to gratify unnatural lust. What is the word gratify? Why was that language dropped in Section 377 What is a sexual intercourse in Sec 375 – how is it different from carnal intercourse?"

Attorney-General: "It was probably dropped because it was too broad. Sexual intercourse in Section 375 is penile vaginal intercourse and Section 377 is much broader in scope. The High Court has merely grafted an exception to the criminality and not interpreted the word against the order of nature."

Justice Mukhopadhaya: “Who is punished under Section 377? The penetrator or the one being penetrated? Is one the victim? If there is a sexual act in private with consent where is the question of complaint?”

Attorney-General: “Both will be punished under Section 377. Anybody can complain. It is the case that the police should stop at the bedroom door.”

Justice Singhvi: “The HC did not view the issue in the right perspective. There is nothing about the meaning of the expression 'against the order of nature' in the background of the enactment. In a case of this nature the interest is publicity. We need to study material based by both sides. We also would like both sides to place material, including the scriptures, which sheds light on the situation in India before the British came in. Also: is there any evidence to show that the British soldiers were prosecuted under this law? How much time do both sides need to place material?”

After discussion both sides were given two weeks to place any additional material.

Meenakshi Arora, arguing for a group of Legal Academics supporting the Naz decision, continued.

Meenakshi Arora said that four of the legal professors she represented worked in the rural context, in response to the judges remarking on the previous day that most studies related to homosexuality presented to them were urban-centric.

Meenakshi Arora mentioned Babu Mathew, who teaches at the National Law University Delhi; Ratna Kapur, visiting Professor at Jindal Global Law School, and Oishik Sarkar and Deepika Jain; from the Jindal Global Law School. 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.

Meenakshi Arora argued that a “compelling state interest” was needed to frame the law, and that the historical background of the law showed that the British were, through enacting section 377, imposing their cultural values on the native population. She said that historically in India, particular forms of sexual orientation were never seen as a sin or as immoral. She said that one of the reasons for enacting the law was to prevent the British population from mingling with the native population.

Justice Singhvi: “Is there any material to show what Indian society felt before the British colonial rule? Is there a single instance of British being convicted? Of the 150 cases presented to the court, none were related to British persons being prosecuted.”

Meenakshi Arora agreed with the judges’ observations.

Justice Singhvi: “Even now it happens. In Andhra Pradesh, parts of

Maharashtra and Karnataka, there is a “sex trade”. Money is offered by people from Europe and West Asia. Parents are so poor that they will sell off their young girls. After 4-5 years they become addicted to this lifestyle. When they are sent back to the village, they induce other children. I have seen this with my own eyes. Between the age of 4- 17 years, hundreds of girls become victims of HIV/AIDS.”

Justice Mukhopadhaya: “What about sex tourism? India should not become a place of ‘sex tourism’.”

Meenakshi Arora: “The issue of HIV had a particular mindset in the 80s. People were picked up and discriminated against based on being HIV positive. Subsequently attitudes changed and guidelines have been enacted to protect them. Human dignity is an essential factor. Irrespective of sexual orientation, we need to allow people to live with human dignity.”

Justice Mukhopadhaya: “These arguments have been advanced.”

Meenakshi Arora: “Given that this is an aspect, the court needs to read down the law.”

Justice Mukhopadhaya: “We pose the same question to you. Whose dignity are we talking about? How are the accused under section 377 a class of people?”

Meenakshi Arora: “The sexual acts that heterosexuals choose to indulge in, in most circumstances are not taboo under the purview of section 377. The target group is one segment.”

Justice Mukhopadhaya: “The target group is not before us. Sodomy is not the language used in 377. What you are talking of again is sexual orientation. It is a sexual act, not confined to a particular sexual orientation. The law is not confined to one or the other group. The research is confined to a miniscule group of MSM, not even lesbians.”

Meenakshi Arora: “The term ‘sexual preference’ would cover acts as well.”

Justice Singhvi: “The entire IPC is framed without consulting the Indian population. There was no idea of compelling state interest at the time the IPC was framed. It was the dominating position of the church that compelled them to enact these laws.”
Justice Mukhopadhaya: “Why is the law vague? Whatever is natural is known to everybody in society. We are asking the same question. Dignity of who? Are the accused under 377 a class of people?”

Meenakshi Arora: “According to Bennion’s Interpretation of Statutes, everything that is immoral is not necessarily illegal. A law that is based on the principle of sin in Victorian society requires interpretation by this Hon’ble Court.”

Justice Singhvi: “The best criteria of interpretation is the common law principle and common sense.”

Meenakshi Arora: “We have material from the Kamasutra but you may not want us to submit that.” This was met with laughter in the court.

Justice Singhvi: “We don’t mind it.” This was met with more laughter.

Justice Mukhopadhaya: “When pathologists go for tests, they don’t mind what they are testing.”

Justice Singhvi: “There have been so many commentaries on the Kamasutra. People have been defining it differently. There was a novel about maharajahs (*All the Maharajahs*), where one of the Kings of Jaipur, four times the size of Mr Sharan.”

Mr Sharan: ”This novel is displayed in Jaipur. I have been trying to reduce for one month.”

Justice Singhvi: “Then five times the size of Mr Sharan.”

Mr T.S. Doabia, Senior Advocate, representing the NCT Delhi, spoke next.

Mr Doabia: “We go by the affidavit filed by the Government of India. This decision was taken on Monday.”

Justice Singhvi: “What do you mean this decision was taken on Monday. Were they sleeping until then?”

Justice Mukhopadhaya: “Can’t you make a statement and come up with an explanation?”

Mr Doabia: “We have chosen to go with the central government’s stand.”

Justice Mukhopadhaya: “In the same meeting, you could have decided an amendment. At least in one state, this law could be removed.”

Mr Sharan, Senior Advocate and counsel for the Delhi Commission on Protection of Child Rights, began the round of rejoinders:

Mr Sharan: “My submissions are legal submissions, not based on psychiatry, history, archaeology. Except astrology, all other submissions have been made by the other side.”

Mr Sharan: “Section 377 does not directly affect the right to privacy. Unlike provisions relating to search and seizure, domiciliary visits of police or phone tapping, the breach of privacy is incidental and remote. No fundamental right is absolute and the right to privacy can be curtailed by fair procedure established by law. In this instance, the procedure is contained in the Code of

Criminal Procedure. Similar grounds were raised in the Gian Kaur case (death penalty), where there were Law Commission recommendations and international case law, but the court rejected each of these arguments. Accepting the submissions made would be going against this logic."

Mr Sharan: "Our constitutional set up requires making of laws by Parliament. The provisions of section 377 IPC have Parliamentary sanction, and cannot be treated as pre-constitutional law in as much as the amendment of 1956 by the Parliament. Courts have limited power in deciding the vires of a criminal law as far as criminalizing a particular conduct is concerned. It is primarily for the Parliament to declare an act as a crime or decriminalize the same."

Mr Sharan: "It was argued that non-vaginal intercourse is prevalent in society and therefore it should be decriminalized. An act, merely because it is prevalent in society, does not make out a case for decriminalization – for example dowry and corruption."

Mr Sharan: "It has also been argued by the respondents that section 377 is prone to misuse by police. Mere possibility of misuse of a statutory provision will not make the provision itself bad. There are enough administrative and judicial safeguards available to citizens against the misuse of the provision. Section 498A and the Arms Act have both been misused."

Mr Sharan: "It was submitted that there was no definite meaning that can be given to section 377. Neither the case of the writ petitioner not the decision of the High Court is premised on the section being vague. In fact, it was the case in the Delhi High Court, that section 377 criminalises carnal intercourse against the order of nature. This phrase has been consistently interpreted by various courts to mean any carnal intercourse which is 'non-peno-vaginal'. There is a particular meaning given to the section over 150 years, and it cannot be declared to be vague without attempting to construe the same in a meaningful manner. In the *Sakshi* case, the Supreme Court held that the meaning of the provisions of section 375 could not be altered to include all forms of penetration, despite Law Commission recommendations. The section uses expressions like unnatural, carnal intercourse, voluntary, against the order of nature. None of these can be called completely useless."

Justice Singhvi: "What is 'against the order of nature'? Some of the judgments are quite strange."
Mr Sharan: "'Non-penovaginal intercourse' is treated as 'carnal intercourse against the order of nature'. This case was about challenging the vires of the Act, and was never about the interpretation."

Mr Sharan: "The argument advanced by the respondents is that section 377 directly impedes access to health service. As is evident from the NACO affidavit, the percentage of HIV/AIDS is higher among narcotic drug abusers. If the argument of the respondents is accepted then even drug addicts will use the same arguments to get the narcotics law (NDPS act) declared ultra vires."

Mr Sharan: "The distinction between minors and majors is not rational. We

can't say minors don't have rights related to privacy and dignity. Reading down will create a separate class as far as minors are concerned and denude them of their fundamental rights. The distinction based on the right to privacy and dignity is illogical, irrational, and includes a concept alien to the fundamental rights chapter."

Justice Mukhopadhaya: "There are certain rights that minors are not granted, like the right to marry."

Mr Sharan: "It is qua dignity and privacy that they cannot be classified separately."

Mr Sharan: "The state is violating its constitutional morality. The court should impose a cost on the Union. It is duty bound to implement the law but does not. In *Julius v Bishop of Oxford*, the court held that when there is a discretionary power, the power becomes a duty, and it is not open to the Union of India not to defend the law."

Bench: "Is the government bound to say that the judgment is wrong? You have been on this side also [referring to Mr Sharan's stint at ASG]. You know that there are knee jerk reactions and it happens."

Mr Sharan: "None of these factors, historic, archeological, etc can be relied upon while deciding the constitutional validity of a law made by Parliament to meet exigencies."

Justice Mukhopadhaya: "What about section 39(f) of the Constitution, that deals with children's rights?"

Justice Singhvi: "Social morality has no fixed meaning. Constitutional morality can be found in the Preamble. It will not vary. If someone were to say, 'India has given up the idea of a socialist state', that is against the Preamble."

Justice Singhvi: "We have considered other jurisdictions as persuasive value."

Mr Sharan: "We are a sovereign country. No laws made by other countries can decide."
Justice Mukhopadhaya: "You are talking about the Union of India, and asking that we impose a cost on the Union. The Union and NCT are saying the High Court judgment is correct. Other states may not."

Mr Sharan: "It is not important to look at the historical background of the law."
Judges: "What is the meaning of 'order of nature'?"

Mr Sharan: "Intercourse outside of Penile-vaginal intercourse."

Justice Mukhopadhaya: "That is sexual intercourse. Does that mean all other forms can be prosecuted?" [Including between husband and wife.]

Mr Sharan: "Yes. In fact I know of a case where this has been done."

Justice Singhvi: “On the complaint made by the wife?”

Mr Sharan: “Yes, that she was forced to do it.”

Justice Singhvi: “Voluntarily is used in the section.”

Mr Sharan: “It is about vires, not about interpretation.”

Justice Singhvi: “There will be a plethora of cases where statutes on various interpretations can be held to be ultra vires.”

Mr Sharan: “I leave it to your Lordship.”

Justice Singhvi: “At the end of the day, it is left to us”

Mr Sharan: “This is a fit case for Parliament.”

Justice Singhvi: “We have not reached a stage where mandamus can be issued to the government.”

Justice Singhvi: “After the Attorney General’s statement, the executive cannot say that the courts are encroaching on their function. This is a peculiar case, where the Executive has candidly asked the court to perform a duty which the constitution has imposed and entrusted with the parliament.”

Mr Sharan: “Your Lordship must refer the matter. It is not open to the legislature to delegate this power to court. No organ of the state can delegate power to another – that is why I am questioning the constitutional morality of the government.”

Mr Sharan: “The papers presented here should be presented before all the MPs – they want the law to be read down, but are afraid of public opinion, so get it through in a different way. This is a violation of basic structure. This can have unforeseen consequences.”

Justice Mukhopadhaya: “Your mind is also fixed in one way. This is not about a class of persons. It relates to the entire population.”

Mr Sharan: “Then let them debate it. Why throw the burden on the court?”
Justice Mukhopadhaya: “The High Court has already decided.”

Mr Sharan: “I have already shown that the judgment is fallacious.”

Justice Singhvi: “Have you got the first order passed by the High Court? What were the reasons for dismissal?”

Mr Sharan: “Because it was an academic discussion.”

Mr Sharan: “The respondents have relied on selective material.” He referred

to the article by Gulia and Mallick presented by Mr Diwan. He read the last portion, titled “Future Trends”. “This article says that the debate is still inconclusive.” He also reads from Kazdin’s “Encyclopedia of Psychiatry”- and pointed to a portion that says that there is less research on statistics on this area and that sources of gender atypical behaviour are unknown.

Mr Sharan: “Nothing is concrete. Data is inadequate. There is not enough to show that biological factors produce sexual orientation. It is not possible for the court to conclude that there is a definite biological reason for sexual orientation and that it is natural.”

Mr Sharan: “Sexual orientation can be treated.”

Justice Mukhopadhaya: “Why psychotherapy? Psychologists do not say so. Is it irreversible or a fascination?”

Mr Sharan: “It could be a fascination or a fashion..The material is inadequate to come to a conclusion.”

Mr Sharan referred to the List of Well Known LGBT persons presented to the court. He noted that Oscar Wilde’s literary merit was despite his sexual orientation, not because of it. He argued that there is no causal connection between greatness and homosexuality.

Justice Mukhopadhaya: “Do they live with dignity?”

Mr Sharan: “They do.”

Justice Singhvi asked for the List of LGBT persons. “Is there a nexus between sexual orientation and their being accomplished? Have any of the persons on this list faced adverse consequences from the police?” He read all the Indian names on the list – an illustrative list submitted by Mr Divan to give the courts an idea of well known persons who are openly homosexual/transgender from various professions/streams of life.

Justice Singhvi: “But for this list we would not have known that Vikram Seth was homosexual. I enjoy his work but did not realize he was of different orientation. Ismail Merchant, nobody would know about.”

Justice Singhvi then noted the others on the list – persons from across the world – and mentions Martina Navratilova as a person who has won the Wimbledon the maximum times and the tennis player Billie Jean King.

He also looked at the various categories of persons, and remarked that Mr Divan had left out lawyers and judges. At this point, Mr Grover intervenes to say that both Justice Kirby and Justice Cameron featured on the list.

Mr Sharan: “The basic foundation of the High Court judgment is erroneous. *Gian Kaur* (the death penalty case) settles the issue.”

Justice Singhvi: “You might be right in an aversion to foreign judgments – but keep in mind that this law was a colonial law.”

Mr Sharan: “But through amendments it has been approved by Parliament.”

Mr Sharan: “Article 15 has been erroneously invoked. In the Indian context, sex means gender and not sexual orientation. There is no basis to invoke Art 14. It makes no sense to say that it is accepted in 128 countries – we are sovereign. Our Parliament will decide. We cannot leave it to others.”

Mr Sharan: “I submit that the appeal deserves to be allowed. I am sure that your lordship will not decide on the merits of the lawyers involved – as if this is the case, we will not be able to compete.”

Justice Singhvi: “The merits of lawyers or the merits of arguments – since when has this been a criteria? In any case, we don’t think you are entitled to make this submission, Mr Sharan.

Mr Desai pointed out to the court that the amendments to section 377, relating to transportation to life, were not specific to the section, and therefore did not show any application of mind.

Mr Sharan replied that section 377 was specifically referred to while the amendments were made.

Mr H.P. Sharma, representing B.P. Singhal, then began his rejoinder.

Mr Sharma referred to a case [(1980) 3 SCC 141, para 1, para 13] that talks about the effect when a state does not file an appeal (Justice Krishna Iyer). He referred to another case [(1987) 1 SCC 288] which dealt with withdrawal of prosecution.

Justice Mukhopadhaya: “This case has nothing to so with locus.”

Justice Singhvi: “Even they have not questioned your locus.”
Mr Sharma: “Mr Divan did.”

Justice Singhvi: “But this contention was withdrawn.”

Mr Sharma then referred to the *Sakshi* case. He also referred to a judgment by Justice Katju, which refers to separation of powers, and said that in the name of judicial activism the court cannot take over the powers of the legislative organ of the state.

Justice Singhvi: “How is this beyond the function of the court? Who will decide if a section is ultra vires? At the best you can say that the High Court judgment is erroneous. This judgment has nothing to so with that.”

Mr Sharma then referred to a judgment [(2001) 1 SCC 6]. He said that Christianity is what has given India the right to dignity and the judiciary. Even

a British judge, while trying Mahatma Gandhi in court, stood up with respect. These are secular laws now.

Justice Mukhopadhaya: “You are arguing that Christianity has given us the law and the Constitution.”

Mr Sharma joked, “I am the only heavyweight counsel on this side. I represent the former DGP Mr B.P. Singhal.”

Mr Sharma said: “An offense is an offense, whoever commits it. The Attorney General has not placed material on the impact of the law.

Mr Sharma then joked: “When I was traveling I recently heard a song- bhabhi, bhabha, had died. So it will change.”

Mr Sharma: “Why are we taking up this particular case? There should have been a Committee to look into this. There are so many cases of misuse of the law. Are we going to revisit the law in all these cases?”

Mr Sharma: “Homosexuality was proscribed before the British. It was proscribed, is proscribed and will be proscribed.”

Mr Praveen Agrawal, representing Kaushal, then began his rejoinder:

Mr Nariman referred to Chapter 14 of the IPC and the note in chapter 16, Referr to AIR 1947 2 ALL ER 276 at 278 and 279. While the court is entitled to look at headings, the headings can’t give a different effect.
1998 (8) SCC p. 577 at 580 and 581

In 1964 (1) SCR 765, similar arguments raised with respect of gambling were rejected.

Mr Huzefa Ahmadi, representing the All India Muslim Personal Law Board, began his rejoinder:

Mr Ahmadi: “The arguments are based on the presumption that the act should not cause harm. Here there is a propensity of harm because of the propensity of HIV/AIDS.”

Mr Ahmadi was asked to continue his rejoinder on the next date of hearing.

27 March 2012 - Rejoinders by Mr. Huzefa Ahmadi, Mr. Ram Murty, Mr. Radhakrishnan, Mr. Purushottam Mulloli

Huzefa Ahmadi continued for the All India Muslim Personal Law Board.

Mr Ahmadi: “Anal intercourse between homosexuals is a high risk activity which has the propensity for causing harm to both the partners who indulge in it.”

Justice Singhvi: “Are there any statistics available that it is a high risk activity?”

Mr Ahmadi referred to para 62 of the impugned judgment and read from there: “the situation is aggravated by the strong tendencies created within the community who deny MSM behaviour itself. Since many MSM are married or have sex with women, their female partners are consequently also at risk for HIV/infection...”

Justice Singhvi: “Show us from the NACO affidavit?”

Mr Ahmadi read from para 4 from the affidavit: 'there are 1,46,397 MSM (6%)” [infected], who are being covered through 30 targeted interventions.

Justice Singhvi: “That is only the number reached through interventions.”

Justice Mukhopadhaya: “What about others who are not affected by HIV?”

Mr Ahmadi: “The High Court proceeds on a premise...”

Justice Mukhopadhaya: “They [the respondents] are not attacking Section 377. The alternative argument is to interpret Section 377 in such a manner that some activities are not against the order of nature.”

Justice Singhvi: “Section 377 is then out of the attack of Articles 14, 19, 15 and 21.”

Mr Ahmadi: “If it is a high risk activity I have tried to show that it can only be an interest and cannot become a right.” To this end, Mr Ahmadi cited Salmond on Jurisprudence.

Justice Singhvi. “These activities were recognised in India before the advent of the British. It was widely prevalent and hence depicted in caves and temples.”

Mr Ahmadi: “There is only one depiction…”

Justice Singhvi: “Not one, several. Konark is in…the south eastern part of India. Similarly there are depictions in the south and the north as well as the west and the east. It was the British who wanted to mould the society

according to their will who introduced this. What was considered taboo 30 years ago was not the act but the discussion about the act. The same activity was done and will continue to be done till humans exist. If somebody conducts a survey, they will find that the activity perceived as being against the order of nature is routine throughout the world."

Justice Singhvi: "There is a word in Hindi as well as Urdu: Thekedar. To be the champion of liberty as well as of religion and the value system in society is the preserve of few people in society. They say that we are liberal or not liberal, what is going on inside nobody knows. Someone might feel that these observations are harsh but it only depicts the truth. One person says that they are liberal and crusaders of liberty. Others say that we don't want this liberty, we only want to preserve our religion, liberty and culture. 99.99% do not know what is religion and culture. Nobody knows what is dharma. If people knew, this debate would not be there. The first thing is duty; nobody can live beyond duty."

Justice Mukhopadhaya: "Starting point is a class of people saying that we are harassed. If harassment is alleged, it is the starting point, therefore the declaration."

Justice Singhvi: "It was wonderful to see the most powerful instrument of communication, the electronic media, being used to project a particular point of view. Even if we say that Courts are not influenced, the harsh reality is that unless we stop watching TV, some element in the back of the mind comes in. The thought process is also influenced."

Justice Singhvi: "Both sides attempt to send any type of literature to the judges. Most go straight to the dustbin."

Justice Mukhopadhaya: "80 to 90% of people do not bother with what is going on."

Justice Singhvi: "Out of 1,00,000 people only few know where the Supreme Court is... This [debate] has been going on and this is all right."

Mr Ahmadi: "The foundational facts on which the HC has based its decision are not based on reliable data. One can't say that Section 377 led to persecution as a class."

Justice Singhvi: "Yes. The petition is shabbily drafted and there is no foundation in facts. The SC remanded the matter to the High Court to decide."

Mr Ahmadi: "The HC could have come to a finding that there were no foundational facts for it to come to a decision."

Justice Singhvi: "That would have required the courage of Sabyasachi Mukerjee J. of the Calcutta High Court. That is rare today."

Mr Ahmadi argued that Section 377 is gender neutral. He cited *Fazal Rab*

Choudary for the proposition that consent is irrelevant to Section 377. He also cited *Childline Foundation* for the proposition that a wide variety of acts are covered by Section 377 which otherwise could not be prosecuted under law. “Section 377 is therefore not limited to anal sex...The expression is wider. The expression 'against the order of nature' cannot be interpreted differently in case of men and children. The purpose of the law is to cover these acts of sexual perversity.”

Mr Ahmadi: “The other argument from the other side is that the police should stop at the bedroom door because it is consenting activity. The width of the argument is very wide. If we go by consensual nature then it can be used to validate group sex and incest.”

Mr Ahmadi: “The argument on privacy – *Kharak Singh* and *Gobind v State of Madhya Pradesh* were cited – but every facet of privacy is not an aspect of fundamental rights. Even if there is a right to privacy, it can be restricted on grounds of morality, decency and health. I have referred to Scalia J’s dissent in *Lawrence v. Texas.*

Mr Ahmadi cited *Soumitra Vishnu* and *Gian Kaur* (upholding validity of the attempt to suicide provision) for the proposition that it is for the legislature to amend laws.

Mr Ahmadi: “*Maneka Gandhi* is restricted to procedure, and strict scrutiny does not apply due to *Ashok Thakur*. Further, you cannot question constitutionality of law through a PIL. The fact that legislation is abused cannot be a ground for invalidation.” He cited a line of authorities for that proposition.

Justice Singhvi: “Any case where a person identifies as a homosexual and convicted? In the table of 140 cases, 80 cases are about children. Any cases using these two words, homosexual and convicted?”

Mr Ahmadi: “The doctrine of severability of enforcement spelled out by the other side is not borne out by principle 2 in the five principles in *Chamarbaugwala*.”

Mr Ahmadi: “I will produce a note on the Attorney-General’s submissions. For the fact that homosexuality was accepted in pre-colonial India, the source is the diary of a English officer. Western writers puff up the mysticism of the east.”

Justice Singhvi: “One western author wrote something about our cricket team. He tried to belittle the nation through that. What he wrote should be thrown in the dustbin. It is not even worth making paper bags out of. Belittling a group of people is an act of perversity.”

Justice Mukhopadhaya: “It is a racial inferiority complex.”

Mr Ahmadi: “I agree, my lord. During the Mughul period there were two

schools of thought on the treatment of sodomy. In one school it was dealt with very severely and the punishment was death by stoning. The Quran is explicit that it condemns homosexuality even though there are debates on what should the punishment be. One view is that instead of a harsh punishment one should first try and attempt reform. I refer to one prophet, Lut, who sought to reform them and after his attempt was not successful they tried to kill him. Then they were punished."

Justice Singhvi: "Prophet Lut was which period?"

Mr Ahmadi: "It was a pre-Islamic period. I would also refer to the prohibition of homosexuality in the Arthashastra."

Justice Singhvi: "Have you seen *Yaadon ki Baraat*? Going by this, the prophet (Lut) would not have died, would not have died…"

Justice Singhvi: "Do you also not refer to the principles of economics of this."

Mr Ahmadi: "Economics has been left to NACO."

Justice Singhvi: "Your friend [referring to JACK] tried to argue that funds are being siphoned off in the name of HIV/AIDS."

Mr Ahmadi: "This might be possible."

Justice Singhvi: "The time in which we are living nothing is impossible. People used to have information hearsay, now it is open."

Mr Ram Murti (petitioner in person) interrupted: "Excuse me, Sir, I am petitioner in person, petitioner No. 5."

Justice Singhvi: "Who are you?"

Ram Murti: "Petitioner in person. I was not given a chance to speak."

Justice Singhvi: "Don't raise your voice in court. Everyone here has been given an opportunity to speak. Yes, Mr Radhakrishnan."

Mr K. Radhakrishnan, Senior Advocate, appearing for Apostolic Churches Alliance, Kerala, began his Rejoinder.

Mr Radhakrishnan referred to Black's Law Dictionary to say that 'order of nature' has been defined as something pure, as distinguished from artificial and contrived. He argued that the basic feature of nature involved organs, each of which had an appropriate place. The code of nature is inviolable. Sex and food are regulated in society. What is pre-ordained by nature has to be protected, and man has an obligation to nature. He quoted a Sanskrit phrase which translated to "you are dust and go back to dust".

He went on to quote from the Vedas and Sruthis: "When you pretend you do

not know the goal, He is far away when you are aware, He is within."

Mr Radhakrishnan: "The order of nature is not elusive or vague. . It is within every man. The other side will pretend that the term is vague. It is a 'pretend sleep'. If somebody sleeps, we can wake them up. If it is pretend sleep we cannot. This is like what Mrs Gandhi said about Nixon."

Mr Radhakrishnan continued, noting that "there is a limit to [how far] Art 21 can be extended."

Mr Radhakrishnan: "In the Mahabhagvatham, there is a story- the curse of Durvasa. The devas and asuras unite and churn the sea. What came out was a venom which was then swallowed by Shiva. This gives him the name Neelakanta. This is like you are churning out Article 21 beyond its elasticity. The venom is there. The venom will descend on this world and destroy this world."

Mr Radhakrishnan then read out a list of offences prohibited by section 377. He starts with peno-vaginal sex.

Justice Mukhopadhaya: "Is penile vaginal penetration against the order of nature?"

Mr Radhakrishnan: "I should not have included that."

Justice Mukhopadhaya: "Section 377 dealt with animals. But in your written submissions and the previous one, there is no mention of animals."
Mr Radhakrishnan: "From a constitutional perspective…"
Justice Mukhopadhaya: "This is looking at the section from a microscopic angle."
Mr Radhkrishnan: "Animals should be accommodated. We should take care of animals."
Justice Singhvi joked, "Animals are consumed, and therefore not accommodated."

Mr Radhakrishnan: "Chapter 16 of the IPC deals with Offences against the Body. 377 is correctly put in this chapter. There is a transmission of diseases, emanating from the same mind. They are claiming they are second class citizens. A sound mind can exist only in a sound body."

Justice Mukhopadhaya: "377 does not talk of homosexuals. It covers everybody."

Mr Radhakrishnan: "This can occur in different permutations and combinations. They are organizing homosexuals and drifting away from duty. The declaration of the High Court is absurd, because 377 was retained, but read down through process of legislation. 377 does not have a theocratic origin. It is not transplanted from the British. Macaulay must have taken prevailing conditions in Indian society into account."

Mr Radhakrishnan: “The fall out of the impugned judgment can be summarized as follows:

- the family system, the foundation and bulwark of Indian social structure right from Rig Vedic age will be in shambles
- the institution of marriage will be detrimentally affected
- Indian society will be polluted and destabilized
- Rampant homosexual activities for money will tempt and corrupt young Indians into this trade
- HIV/AIDS will spread rapidly in India
- India will lose its nobility, character and virtuousness
- The state will be compelled to enact more than one statute similar tp the Immoral Traffic (Prevention) Act

Mr Radhakrishnan: “Four questions were posed to Yudhishtira by Yaksha, and the answers are extracted below:

> Q: What is more nobly sustaining than the earth?
> A: The mother who brings up the children she has borne is nobler and more sustaining than the earth.
> Q. What is higher than the sky?
> A. The father.
> Q. What is Happiness?
> A: Happiness is the result of good conduct
> Q: What is that – by giving up which, a man becomes rich?
> A: Desire – getting rid of it, man becomes wealthy
>
> This cherished concept of Father, Mother, Happiness and Wealth, will receive a lethal blow from homosexuality and gay marriage. Thus, this ancient land will lose its nobility and rightful and honoured place in the world.

Justice Mukhopadhaya: “Where is the fifth question?”

Mr Radhakrishnan: “These cherished concepts go back 5000 years.”

Mr Radhakrishnan referred to a map from the LA Times website depicting various states in the US where same sex marriage is legal.

Mr Mr Desai then pointed out that this map dealt with same sex marriage.

Mr Radhakrishnan: “Yes, this declaration will lead to gay marriage. That is why the case has been planted.”

Mr Radhakrishnan then pointed to statistics which showed that India’s fertility rates had come down drastically in the last 50 years. He said that India’s population was diminishing, and that this was an assault on the Indian social fabric.

Mr Purshothaman Mulloli (dressed in ochre clothes), appearing in person, and representing the Joint Action Council, Kannur, rose for Rejoinder.

Mr Purushothaman Mulloli: “I am standing as a symbol of the Constitution. The might of an NGO on the other side – Bill Clinton, Bill Gates, they have their support. Their massive organization and strength, I can’t withstand.”

Mr Purushothaman Mulloli: “This NGO says they are working among HIV positive persons, but if this act is in private, how does this NGO have a programme? I have asked a police station, they say – they have no idea. How does an NGO get to know about these acts occurring in private?”

Mr Purushothaman Mulloli: “They are betraying homosexuals, This is a media directed campaign. They are talking everything about HIV/AIDS and their prayer is about consensual sex in private. They asked for it in the High Court and got it exactly. There is something wrong here.” “Najma Heptullah, President of the Interparliamentary Council conference in Delhi amongst other things listed reform of criminal law provisions like 377…”

Mr Purushothaman Mulloli: “This petition comes with massive backing. If Macaulay were alive, he would have committed suicide many times over. “

Mr Purushotham: “I have information that cannot be submitted here”

Justice Singhvi: “Why is that?”

Mr Purushothaman Mulloli: “There are security reasons. I can submit to your Lordship in private”

Justice Singhvi: “This is an open court. Please say what you have to.”

Mr Purushothaman Mulloli: “This is a media directed case. When the case was dismissed by the High Court in 2004, there was no media coverage. My lawyer contacted the press and we were told we are not listed as parties.”

Mr Purushothaman Mulloli: “Naz Foundation went to court in 2000 as a registered society. Why did NACO file a contravening affidavit? something is seriously wrong. Even the Attorney General has ignored the HIV/AIDS angle – this is a case where cylinders have been fired over the shoulder of HIV/AIDS.”

Mr Purushothaman Mulloli: “We wrote to the Law Minister Veerappa Moily in 2009 telling him that his statement on 377 was unfortunate. When Ramadoss was making noises, we had written to him to ask for the evidence based on which he was saying that MSM were high risk, at a conference in Mexico. The PM of India is the Chairperson of the National AIDS Council. We have written 3 open letters saying that there was no scientific evidence that MSM were high risk.”

Mr Purushothaman Mulloli: “The government is abdicating responsibility that it has no choice post the High Court judgment. It is destroying the independence of the judiciary. There is a nexus between the government, judiciary etc.”

Mr Purushothaman Mulloli: “I enjoyed the proceedings in the last few days and learnt a lot. I am educated more on the subject. But the discussions went only one way. There was no discussion on HIV/AIDS.”

Mr Purushothaman Mulloli: “HIV/AIDS was used to get favourable judgments – in cases involving a bloodbank and medicines in this court . I impleaded in one of these cases. It is a very sad situation.”

Justice Singhvi: “You can make legal submissions but are not entitled to use this kind of language in the court. you can use this language outside

Mr Purushothaman Mulloli: “I am not professionally trained.”

Justice Singhvi: You have appeared enough in the Courts and know the process.

Mr Mulloli then referred to two judgments relating to blood banks.

Justice Singhvi: “There is no judgment in this compilation.”

Mr Purushothaman Mulloli quoted a study related to bloodbanks. “The professional donors were not high risk, they systematically stopped normal blood supply. We went to the High Court and got a judgment in our favour.”

The judges asked Mr Ram Murti, Petitioner in Person, to speak.

Ram Murti: “I will pose a situation to the respondents – A rapes B, B complains, A says this is consensual sex in private. How can there be a culprit?”

Justice Singhvi: “That’s all?”

Ram Murti: “Does this not decide the issue? Is it true?”

Justice Singhvi: “Nobody will answer now.”

Justice Mukhopadhaya: “The legal system works differently. We ask the questions and you reply.”

Ram Murti: “The population of these people is 0.2% and 99.8%, the entire nation gets affected. If their claim is not verified, this is a serious problem for our culture and core values. Shall I give you a situation where my claim is not verified? They have demolished all other fundamental rights.”

Justice Singhvi: “That’s all?”

Ram Murti: “I initially made a very voluminous petition, but the lady at the window said that I should make it brief.”

Justice Singhvi: “If you want, you can add.”

Ram Murti: “I have more to say, crucial points.”

Justice Mukhopadhaya: “Argue, except do not ask any questions.”

Ram Murti: “In normal sex, condoms prevent birth. In this sex, condoms prevent disease. In privacy, only natural law exists.”

Justice Singhvi: “You have spoken very well. Judgment reserved. Parties and Intervenors have 2 weeks to file written submissions.”

Mr Ram Jethmalani, due to appear in the next case (on the death penalty) that the judges were taking up, requested the judges to hear him briefly on 377. The judges refused, saying they were treating him like they would treat anyone else.