

Notes on the Final Arguments in *Naz Foundation v Union of India*

Delhi High Court
Judges : S. Muralidhar and A.P. Shah

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

Day 1 (18.09.2008) Morning Session

Anand Grover argued for Naz Foundation.

Stresses that the prayer in the petition is talking about decriminalizing consensual sex between adults, and that the petitioners are very conscious about the fact that there is a vacuum when it comes to child sexual abuse cases.

He argued that since there are very few reported cases where 377 has actually been applied to consensual acts between adults, the government needs to show what the compelling state interest is in keeping this law in place.

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

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

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

Grover also pointed out that there are acts of child sexual abuse that are non penetrative and therefore section 377 could in any case not be effective in dealing with it.

Grover then explained how 377 was an impediment to propogate safe sexual practices. In response to Chief Justice Shah's query, he referred to the Lucknow arrests where employees of Bharosa Trust (an organization that worked on safe sex practices with the MSM community) were held in custody for 100 days, and accused of the local media of running 'Sex Clubs' etc. He pointed out that Naz Foundation's interventions were sanctioned by the Central Government, and that they had distributed 13 million condoms per month to sex workers besides condoms that are distributed to MSM communities.

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

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

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

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

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

Tihar Jail.

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

Justice Muralidhar also asked if the law applied to lesbians, and Grover said that technically it did not. Said Grover, “Recently we had a gay Pride in Mumbai. One of the policemen remarked that if the law was repealed they would not have to do this kind of work. I told him that we don’t want to do this sort of work”.

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

Day 1 (18.09.2008) Post-Lunch Session

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

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

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

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

Grover also argued that ‘private’ should not be restricted to mean special privacy and should be related to the intention, and should be left up to the interpretation of the court.

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

Day 2 (19.09.2008) Morning Session

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

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

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

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

Chief Justice Shah observed that reading down and seeking a declaration were two separate things. Both the judges asked for examples where the courts have read down a criminal statute – especially since the petitioners were not asking for the law to be struck down entirely.

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

Grover then cited the example of the Kharak Singh case where the court draws a line of demarcation. Grover then mentioned the Abbas case which dealt with censorship of cinema. He quoted from this case saying that of those who are deprived begin to see in these things more than the average person does, then it cannot be helped.

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

Justice Muralidhar then observed that saying that the legitimate aim of section 377 was to maintain ‘public safety’ was contraindicative. He suggested that the petitioners look at other statutes that overlap on issues related to public morality. He said that the petitioners could not only refer to the Wolfendon Committee Report and should contextualise Wolfendon in the context of Indian society and culture. Grover then referred to the Modinos case in Cyprus where the Cypriot government had argued before the European Commission of Human Rights that it should be able to retain the anti-sodomy law because culturally it was different from the rest of Europe.

Justice Muralidhar said that legitimate aim had to be seen in the context of our Constitution and that the government could argue that it was taking measures in the interests of morality and decency. Grover replied that we live in a democratic set up where the rights of minorities needed to be protected, and the state needed to show what the legitimate aim of the law was to enter the zone of privacy. Justice Muralidhar then pointed out that this argument would not be applicable to child pornography. Chief Justice Shah added, “ To say that public morality cannot be a source of criminal law is not correct. What about cases of child sexual abuse?” He said that ‘decency’ and ‘morality’ could be legitimate aims that can be used to enact criminal law even in the ‘private zone’.

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

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

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

Grover argues that under Article 19 (1)a every person had a right to receive and impart information, and that section 377 impeded this. He said that often homosexuals, who did not have adequate information, went to psychiatrists, where they are often administered shock treatment.

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

Chief Justice Shah asked the lawyer, “So you admit that there are people in this world with a different sexual orientation?”

To which H.P. Sharma said that it (retention of the law) was because of fun (that homosexuals had) and perversity. Chief Justice Shah, expressing his displeasure shook his head and said, “This kind of assistance will not take us anywhere.”

Grover said that if being harassed by the police was fun, then they were having a lot of fun.

Grover reiterated that Article 21 (the right to life) included the right to receive information. Justice Muralidhar pointed out that this had been held in the recent political antecedents case where the right to vote was held to be the right to express one’s opinion, and that the right to information was a part of 19 (1) a).

Justice Shah then mentioned a case (The Pune Cantonment case) he had dealt with where the Bombay Environmental Action Group (BEAG) had asked for information related to the Municipal Corporation of Pune.

Both judges then pointed out that the petitioners need to take into account Article 19(2) which provides exceptions to the right to freedoms based on public order, morality etc.

Grover replied that the government needed to discharge its burden to prove that there was a compelling state interest to legislate in this matter.

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

Chief Justice Shah addressing the JACK lawyer R.S. Kumar said, “Do you know what is happening in

Tamil Nadu. A widowed person living with HIV AIDS is denied all rights...We organized a programme as a part of the Tamil Nadu Legal Services Board for 600 widowed women, who were able to speak openly. This is because they are no longer regarded as sinners.

He went on to point out to JACK and B.P. Singhal that saying 'Indian culture was not the answer. "If you are under the impression that this happens only in the U.S you are mistaken", he said.

R.S. Kumar said that there was a false diagnosis when it came to HIV/AIDS.

Chief Justice Shah snapped, "People are dying. What are you saying? You are speaking with a moral attitude".

R.S. Kumar in response said that HIV was a propagated disease.

Day 2 (18.09.2008) Post-Lunch Session

Grover then talked in great detail about the *Modinos v Cyprus* case where the European Court of human rights struck down an anti-sodomy law in Cyprus. This was followed by the decision in the NCGLE decision in South Africa. He dealt in great detail with the judgements by both Justice Ackerman and Justice Sachs.

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

As Grover was reading from the South African decision, the visibly moved judges began conferring amongst themselves. They said this decision reminded them of Justice Hidayatullah's decisions. Chief Justice Shah, noticing that the Additional Solicitor General was not present in court, remarked, "I don't know what assistance we are going to get from the government. The ASG is not here".

He then compared discrimination based on sexual orientation to discrimination based on caste. "If you belong to the 'untouchable' category, you suffer a disadvantage in every aspect of life. The effect of criminalization (of homosexuality) is like treating you as a member of a scheduled caste", he said. Grover then cited from the NCGLE decision to point out that while the state is founded on a deep political morality, this does not mean that it can criminalise homosexual conduct.

The judges then mentioned Justice Scalia's dissent in the *Lawrence* case where he talks about preserving morality.

The judges asked Mr Diwan if it was possible to link the petitioners arguments to the constitutional provisions in Article 17 and 23 that deal with untouchability.

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

The Additional Solicitor General P.P. Malhotra then asked for more time to file a response. The judges

said they would not give the government more time. Pointing out that the report in the Hindustan Times front page which said that the High Court would not deliver a judgment till the government made its stand clear was inaccurate, the judges said that government had to make its submissions on September 25th.

Day 3 (25.09.2008) Morning Session

Arguments by Shyam Divan for Voices Against 377.

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

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

Divan said that he would demonstrate, through records of incidents from across the country, as well as personal affidavits, reports and orders, that the continuance of section 377 on the statute book operated to brutalise a vulnerable, minority segment of citizens for no fault of theirs. "A segment of society is criminalized and brutalized to a point where individuals are forced to deny the core of their identity and vital dimensions of their personality", he said.

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

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

Divan cited the Human Rights Watch Report report titled "Epidemic of Abuse: Police Harassment of HIV/AIDS social workers in India" which documented the harassment of HIV/AIDS workers in India. This report documents the police raid of the office of Bharosa Trust in Lucknow in June 2001, when the police arrested four health care workers and arrested them under section 377. They were charged

with possessing obscene material that was nothing but educational material. However, since 377 was a non bailable offence, the health care workers were jailed for 48 days.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Addressing the point on whether the morality argument could be used to curtail the right to life and liberty, Divan cited Justice Thomas, who even while dissenting in the Lawrence case, characterized the Texas legislation as "an uncommonly silly law".

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

Day 3 (25.09.2008) Post-Lunch Session

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

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

Chief Justice Shah pointed out that the recent submission Navneetan Pillai had raised, before the Human Rights Committee, the question of whether the term 'race' had to be understood only in its traditional sense. (This was in the context of the genocidal violence in Rwanda). Here, race was interpreted in a wider sense.

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

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

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

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

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

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

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

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

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

Divan concluded his argument with an impassioned plea for emancipation for a large segment of India's population. "At its root, this case is about the Emancipation of a large segment of our people. All of them Indian, all of them citizens. The Constitution of India in one of the great emancipatory charters, lifting as it does from the status of wretchedness and subordination -- communities, castes, tribes and women -- to full Citizenship. This case is about an invisible minority of Indians that seek to unlock the assured liberties enshrined in the Constitution, but denied to them in an aspect of life that matters most to them: their own identity; their own sexuality; their own self," he said.

Said Divan, "As Justice Kirby puts it, The question is bluntly posed: can laws criminalising sexual minorities be any longer justified? Can violence and discrimination against this minority be tolerated or should the law adopt a leadership and educative role? In pluralistic societies, is it fair and realistic to demand that members of sexual minorities change their orientation or live completely celibate lives? Is it in society's interests to protect supportive mutual relationships, given that sexual minorities exist, have always existed and will continue to exist, whatever the law and society say?"

"LGBT persons are a permanent minority in society and have suffered in the past from severe disadvantages. Their dignity has been and continues to be degraded, severely undermining their sense of self-worth. The criminalization of homosexuality condemns in perpetuity this sizeable section of society and forces them to lead their lives in the shadow of harassment, exploitation, humiliation and cruel and degrading treatment at the hands of the law enforcement machinery. The Government of India estimates the MSM number at around 25 lacs. The number of lesbians and transgenders would run into several lacs of persons as well. This vast section of our society comprises honourable citizens who lead wholesome lives but, in the language of the South African Constitutional Court, are denied full moral citizenship. The "moral" dimension of their citizenship is denied to them, not because of any harm that they have inflicted on any other person, but only because they seek to live lives and build relationships -- so essential for the realization and fulfillment of life's goals -- with others, based upon an inner aspect of their being."

"To blot, to taint, to stigmatize and to criminalize an individual for no fault of his or hers, is manifestly unjust. To be condemned to life long criminality shreds the fabric of our Constitution. For the male homosexual in particular and by its expanded application to lesbians and transgenders as well, Section 377 has worked to silence the promise of the Preamble and Part III of the Constitution. It is the case of the Petitioner and those who support the petition that it is the liberating, emancipatory spirit underlying the Fundamental Rights invoked in this case that must prevail. The Constitution of India recognizes, protects and celebrates diversity. LGBT persons are entitled to full moral citizenship.", he said. Divan then tendered a list of suggested operative directions for the court to consider while passing orders.

Chief Justice Shah asked the JACK lawyer R.S. Kumar what the gist of his arguments were. Unimpressed with the response, Chief Justice Sha said he wanted arguments related to the constitutionality of the provision, and not arguments related to locus of the petitioners etc. He asked the Additional Public Prosecutor to continue tomorrow remarking that he did not expect too much constructive assistance from the intervenors JACK or B.P. Singhal. Dismissing the JACK counsel's claim that NACO was being prompted to file their affidavit by the petitioners, Chief Justice Shah remarked that it was perfectly permissible for different sections of society to make all efforts to change the law, and in doing so to appeal to various bodies.

Day 4 (26.09.2008) Morning Session

Additional Solicitor General P P Malhotra begins arguments for The Central Government.

Day 4 of the proceedings in the Naz case began with the Additional Solicitor General P.P. Malhotra's arguments for the Central Government. He began by referring to Sakshi judgment and said that sexual offences constitute an "altogether different crime that are the result of a "perverse mind". The judges (Chief Justice A.P. Shah and Justice S. Muralidhar) reminded him that the Sakshi case dealt with the rape of a one and a half year old child.

Justice Muralidhar interrupted Mr. Malhotra, and asked him to make the Central Government's stand clear. "The government's stand is the same as in its affidavits."

Justice Mularidhar said that when two Ministries of the government were speaking in different voices, it is possible that the government chooses not to file a counter affidavit.

"What is the stand of the Central Government?" Chief Justice Shah asked once more.

"The stand of the government is that 377 is valid", replied Malhotra.

"Are you saying that 377 is valid as a whole, even for consenting adults" asked Chief Justice Shah. "That makes no difference", replied Malhotra, reminding the court about Justice Pasayat's observations in an Orissa High Court judgment.

"It is not their (the petitioners) case that this section won't apply to violent or non consensual acts.

Their arguments are related to consenting adults in private. If there is a Supreme Court judgment to this effect, then it is relevant," said Justice Muralidhar.

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

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

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

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

"This arguments is being raised because there are many people of 'that kind' in society, said Malhotra. "People are indulging in it, and they should be excused because they are consenting adults?" he asked.

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

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

“The judge was construing the section (377) as it is. This section is now being challenged,” said Chief Justice Shah.

“I am only pointing out that the courts have taken the view that this act is abhorrent to society. The Pasayat judgment says that even if consent is given, it is immaterial,” said Malhotra.

“You yourself know that these are observations of the court and are not the ratio of the case”, said Justice Muralidhar.

“I confine myself to the observations of the court. The view of the court is that it is abhorrent to society,” said Malhotra.

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

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

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

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

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

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

“Then argue that point. Don’t reduce this petition to one line. Take this issue seriously,” said Chief Justice Shah.

“I fully agree that this is a serious issue and requires serious consideration,” said Malhotra.

Malhotra argued that the rule of strict construction had to be applied to penal statutes. “No person can license another to commit a crime, if the act has a tendency to effect breach of peace,” said Malhotra. Chief Justice Shah said “So your arguments are that 1) it may create breach of peace and 2) it affects public morals.

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

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

Malhotra then referred to a Full Bench decision of the A.P. High Court.

"That was a case of taking consent for mandatory testing", said Chief Justice Shah. "There is still no bar on males having sexual intercourse with females," he said.

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

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

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

"Criminalization carries with it stigma", interjected Chief Justice Shah.

"In the understanding of the Central Government, is there a category of MSM. Has this population grown in the last few years? Does NACO have this data?", asked Justice Muralidhar. "Factually, is the government of India aware of the MSM population in the country?"

"NACO has surveyed it", replied Malhotra.

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

"I will read from the judgment.." said Malhotra.

"We are on facts", pointed out Chief Justice Shah.

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

"How does this lead to a breach of peace?", asked Shah.

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

"There is data", said Shah.

"The date is on what is happening in America. We are not concerned with that," said Malhotra.

Chief Justice Shah then pointed out that the government's affidavit dealt with deletion of 377 while the petitioner's prayer was only reading down.

“If this permitted in the case of consenting adults, it is arbitrary again. It is discriminatory. Giving this kind of permission will cause great harm and prejudice to society,” said Malhotra. “They have not shown one case where there has been a prosecution under 377,” he said.

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

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

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

“If the court gives this kind of interpretation that it is permissible, it will create havoc in society,” said Malhotra. He talked about reasonable restrictions in the constitution. Malhotra referred to the decision in *Lucy v State of Goa* but was told by the judges that this judgment had been criticized widely.

Justice Muralidhar then asked the Additional Solicitor General about the NACO affidavit, which categorically states that criminalizing homosexuality will affect access to treatment.

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

“People are afraid of reporting that they are HIV positive because of the law”, said Justice Muralidhar. “We have opened many centers for this purpose”, said Malhotra.

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

Malhotra then relied on the 42nd and 156th Law Commission Reports, to show that section 377 should be retained as Indian society by and large disapproves of homosexuality.

The judges pointed out that the 172nd Law Commission Report (the latest on the subject) recommends that the government enact a separate legislation to deal with child sexual abuse and delete section 377.

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

Malhotra argued that criminal law has to address public morality and issues of harm to society. He said the legal concept of crime depends on moral and political considerations, and that criminal law reflected shifts and changes in morality. He said that since the IPC had been enacted, crimes like child marriage, dowry and widow remarriage had been brought under the scope of criminal law. Justice Muralidhar pointed out that widow remarriage was not a crime. He berated the government for submitting the affidavit with this line. “If we don’t react strongly, everything will be tolerated. The whole paragraph is about morality. It just shows how serious the gentleman (from the government) is in answering a notice from the High Court on such a serious issue,” he remarked.

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

"The court can't be oblivious to natural phenomena and natural facts", said Malhotra.

Chief Justice Shah, referring to the NACO affidavit said that the government's own affidavit said that people living with HIV/AIDS would be pushed underground.

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

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

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

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

"Male to male (sex) is neither known to nature, nor known to law," said Malhotra. He pointed out that the incidence of HIV/AIDS is 8 per cent in the MSM population as compared to less than 1 per cent among heterosexuals. "What the petitioner is saying is, permit this 8 per cent to grow", said Malhotra. "The NACO affidavit says 377 has an adverse impact on safe sex programmes," pointed out Chief Justice Shah.

"The state cannot be told not to take any action," said Malhotra. They can be advised, "Kindly consider how dangerous it is".

"Please read the whole affidavit," said Chief Justice Shah. "There is no averment that deletion of 377 would spread HIV/AIDS".

"The National Sentinel Survey data shows that 6 per cent of the MSM population are already covered by the government's programmes. That leaves 2 per cent. They can also be covered through education etc. That would be the proper direction, rather than to say this should be permitted."

Malhotra then read out the contents of section 377. He then explained what 'against the order of nature' meant, "...for intercourse, nature has specified a place. That place is scientifically designed by nature. If it is done at that place, probably there is no injury, or if there is an injury, it is of minor nature." He said that the emphasis was on the act. "...This should be done at a place, at a point designed by nature for that purpose, and if you do it otherwise, it is treated as an offence," he said.

Malhotra then referred to an AP high Court judgment delivered by Justice Sinha, when asked by Chief Justice Shah on the relevance of this decision, Malhotra said, "AIDS spreads through homosexuals.

This is a recognized fact.”

Justice Muralidhar said,” There are several major routes of infection”.

“Does it (the AP judgment) say Section 377 should be retained?”, asked Chief Justice Shah.

“Portions of the judgment say how AIDS is spreading”, said Malhotra. He said that the first case HIV was reported in 1986 in India and extra marital sex was the primary mode through which is spread. “This could be man to man or man to woman”, said Chief Justice Shah.

Normal sex is from man to woman and not man-to-man said Malhotra.

Malhotra then referred to Article 21 and reasonable restrictions on freedom. He referred to the M.P Sharma case, which talked about search and seizure provisions and Article 20. He said that the powers of search and seizure are the over riding powers of the State and the Constitution makers chose not to submit this to limitations. He argued that the right to privacy is not implicit in Article 21.

Malhotra referred to the Kharak Singh decision. “The argument is that they are scared to go there etc. They are free to go anywhere. No one is stopping them. It is mere personal sensitiveness. If a man needs to go the doctor who is stopping him?”, said Malhotra.

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

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

The Government of India will resume its arguments on Monday the 29th of September 2008.

Day 5 (29.09.2008)

ASG Malhotra continues arguments for the Central Government.

The matter came up only twenty minutes before the Court was due to rise. In the short time the Mr. P.P. Malhotra, (Additonal Solicitor General) made the following submissions for the Union of India Firstly, that the 172 Law Commission Report recommended certain changes in rape law and it was only if these changes could be effectuated that Sec 377 could be deleted. He was questioned by the judges as to whether his position was that the Court was bound to follow the recommendations of the Law Commission. Justice Shah noted that the Law Commission’s opinion had changed since its earlier Reports and that the Court was not bound by the law commissions recommendations and can still examine the Constitutionality of a statute regardless of what the Law Commission held. The Law Commission’s recommendations was one of the factors which the Court would consider but was not a determining factor.

Secondly, the ASG by reference to three Supreme Court judgements made the point that the Court cannot speak for parliament and can only hold what parliament has already stated.. No act of parliament can be struck down because of a misunderstanding of the statute by the Court.. Judges cannot make law but only interpret it. The law is clear, the will of parliament is the will of the people.

Thirdly, the ASG made submission related to the affidavits filed by NACO. His point was that NACO might say or anybody might say that there are 25 lakh people(MSM), but the Court was not bound by statements by any party be it NACO or anybody else. The Court's role was to interpret the Constitutional validity of the statute and the affidavit was of no value in this regard. J. Shah's response was to say that while he appreciated the point of the role of the Court being to adjudicate Constitutional validity, but the Court could not make up its mind in the abstract. The determination of Constitutional validity had to be based on some material. For example to decide if Sec 377 violates the right to health implicit in Art 21 the Court will have to examine if criminalization of homosexuality results in a denial of the right to health.

The ASG countered by saying that the right to health of a few cannot mean that you make society unhealthy as others too have a right to a live a healthy life. J. Shah responded by saying that the state will have to show material to make the point that criminalization protects health. If the health of other parts of society was affected then the Court may have to balance interests.

J.Shah then referred to the minority opinion in Lawrence v. Texas and noted that the minorities viewpoint on whether the Texas statute should be struck down was that it was not necessary to read the Wolfenden Report.....

Before J. Shah could finish, the ASG interjected to say that the social circumstances, moral standards were very different here and the Court would have to consider that. The ASG further argued that people from the West came to India for our high moral standards. The matter was then posted for tomorrow morning when the ASG would continue his arguments.

Day 6 (30.09.08)

The ASG, PP Malhotra continued his submissions on behalf of the Union of India by stating that as per NACO's affidavit 8% of the MSM population was infected by HIV, whereas HIV prevalence among the general population was only 1%. Presently 6% of the infected population of MSM is being covered by NACO interventions. The ASG read this out to make the point that the main cause for the disease was homosexuality.

To which J. Shah asked if it was his submission that the removal of Sec 377 would create a health hazard.

The ASG responded by saying that if homosexuality was decriminalized it would result in a health hazard to society.

Moving on the ASG referred to two judgements on privacy (Kharak Singh and Govind) to make the point that the right to privacy was not absolute and could be restricted by any valid law. His point was that the right to privacy under Art 21 could not be invoked as long as there was a valid law.

J. Shah asked the ASG if this position (that one cannot question constitutionality of a statute as long as the legislature had validly enacted it) was valid as the law had changed post the decision in Menaka Gandhi?

The ASG contended that the decision in Menaka Gandhi related to a passport issue and sought to distinguish it on facts.

He went on to state that the question was about the extent of the right to privacy and whether a man had a right to do any act, which is an offence.

He went on to read Govind v. State to make the point that if regulations are framed in accordance with law, as it was in the case of Govind it will be upheld.. Validly enacted law (Police regulations authorizing surveillance in the case of Govind) will be upheld as it will not be violative of Art 21. The ASG then went on to reiterate his point that when there is an ‘apparent conflict between the right to privacy of the person and the interest of general public and society that this disease is not spread. Homosexuality is one of the causes, which affects this disease. If this is allowed what will happen ? There will be more sex and the disease will be spreading. He noted that he no objection to condoms being supplied as that was a precaution, but it must not be made legal. The law is clear and need not be read down.’

When the ASG was asked by the Bench as to whether the right to health was a part of the right to life under Art 21 he stated that yes , but not only the right to health of those affected but also society. Finally the ASG conceded that the right to health was included under Art 21. However he continued to stress that the right to health also included the right to health of others as well.

J. Shah posed the hypothetical question as to whether a law which discriminated against HIV positive people by denying them employment and isolating them would be valid ?

The ASG’s response was that no law is abstract and this right cannot be absolute. One has to see if other person’s rights are affected. He went on to note that the Supreme Court had said that it was a moral perversity. Tomorrow you will say that you have a right and exercise it in the road. We have to see limits, see other men’s rights as well and balance rights.

Speaking particularly of Lucy v. State of Bombay,(1990). Shah noted that the judgement (which upheld the validity of a Goa law allowing for isolation of HIV/AIDS patients) was, though not over ruled, outdated. He noted that Indian Law Institute had a seminar in 1994 after the judgement which was attended by numerous experts. Following this one can say that the law was never implemented inspite of eleven years having passed.

The ASG speculated that perhaps at that time one was not aware that this disease spread through blood, sex etc..

J.Shah noted that the ASG was relying on these judgements to show that AID’s was transmitted through homosexual sex. “However on affidavit you are silent on whether non-criminalization would lead to spread of HIV/AIDS. There is not a word on this. In fact the NACO affidavit says the exact opposite. Where do you get this point that de-criminalization would result in the spread of HIV/AID's. Show us

some study, research on this point, surely we can't rely on your word alone. In fact the consensus around the world is that criminalization will drive HIV underground....The judgement you rely on (Vijaya v. Chairman SCCL) AIR 2001 AP 502, upholds the validity of mandatory testing in the case of HIV/AIDS , but the Union of India has inspite of the judgement not made testing mandatory...You have to place some material to show that criminalization will stop HIV. In fact what flows from your argument is that we should not have HIV at all because we have Sec 377”.

The ASG went on to read some more judgements to make the point that the right to privacy was not absolute. He then went on to refer to the Gian Kaur judgment in which the Supreme Court held that the right to life did not include the right to die. He referenced some quotations from the judgment to make the point that global debates and Law Commission India recommendations will be insufficient to strike down a law.

The ASG was repeatedly asked by J. Shah as to whether that was the sum and substance of his Art 21 arguments. Whether he would make an argument on public morality as a justification for limiting Art 21 rights and also whether he would address the question of dignity. J. Muralidhar made the point that the other party had made a very strong oral submission as well as written submission that Sec 377 violated the right to life with dignity and the ASG had not addressed that limb of the Art 21 question. Dignity formed a part of the Preamble as well as UDHR. The ASG was also asked to address the Court on the question of whether sex in Art 15 and Art 16 included sexual orientation.

The ASG while assuring the Court that he would address the Court on those points went on to make submissions on the interpretation of Sec 377. He said the question under this provision was not whether intercourse was with consent or not but was whether it was against the order of nature. ‘He said that nature had devised scientific methods. You breath through your nose, eat through your mouth. Similarly order of nature would mean that intercourse should be in the place specified by nature in all human relationships even among animals. The phrase order of nature means that if a man wants to have intercourse with a woman, the place is specified.’

J. Shah asked the ASG to please address the Court on the Constitutionality of Sec 377 and to leave aside the question of interpretation of the meaning of Sec 377 as that question was not before the Court.

The Court rose and J. Shah proposed that if tomorrow was a holiday , the Court could sit the whole day and finish hearing the matter or if it was not a holiday could be heard for half a day.

The ASG made the cryptic suggestion that ‘man was a social animal’ and that he would prefer not to sit on a holiday. J. Shah noted that there was a perception that the Court had many holidays and if the ASG did not wish to sit, and tomorrow was a holiday, then the Court would recommence hearing on Friday. Otherwise the Court will continue hearing the matter tomorrow morning.

Day 7 (1.10.2008)

The ASG continued his arguments on behalf of the Union of India by citing Maneka Gandhi's case for the proposition that the only requirement for a law to be valid under Art 21 is that the procedure prescribed by the law must be just, fair and reasonable. He argued that the Court cannot go into the

substantive content of the law, but can only test the procedure prescribed under Sec 377. J. Shah noted that the key point of Maneka Gandhi was the relationship between Art 14, 19 and 21 and the fact that a law tested under Art 21 must also fulfil the requirements of reasonableness under Art 14 as well as Art 19. Further the test under Maneka Gandhi according to J. Shah was that both the substantive content of the law as well as its procedure could be examined.

J. Shah asked the ASG to read Francis Coralie Mullen's case where it was clearly laid down that the law restricting the right of detenus to have interviews with lawyers, could be tested on not just its procedure but its substantive content as well.

J. Muralidhar made the point that the test under Art 21 had evolved since Kharak Singh, and in Francis Coralie Mullen it was clear that the law restricting the right of prisoners to have interviews with their lawyers in its substantive content violated Art 21.

The ASG finally conceded the point that the Court under Art 21 had the power to test the validity of the substantive content of the law as well.

When questioned about the contention that Sec 377 violated the right to live with dignity, the ASG maintained that he conceded that everyone had the right to live with dignity, only 'dignity does not mean that you permit all this'...

The ASG then read from the petition to make the point that Naz foundation concedes that MSM and gay men are susceptible to homosexuality. J. Shah said that there was no question of concession as the point was not in dispute as all.

The ASG then went on to read from the written submissions of the petitioner to make the following counter assertions

That the petitioner uses the term sexual minorities and that there is no such thing as sexual minorities in the Constitution. J. Shah noted that the petitioners were not praying for inclusion as minority in a Constitutional sense but using the term to indicate a small number of people. J. Shah asked the ASG to respond to the contention that the word sex included sexual orientation.

The ASG responded by saying that the term 'sexual orientation is taken from South African law. The South African Constitution guarantees sexual orientation. If one is used to that kind of sex, that will be preserved if a man is indulging in that kind of activity.. no such thing in India.'

J. Shah made the point that the word sex included sexual orientation came from the Toonen decision and was it the contention of the ASG that international law treaties which India has ratified could not be used to interpret Constitutional guarantees?

The ASG then went on to say that he was not contending that there was no right to privacy, but was rather making the point on what was the nature of that right. 'You do in private what your mind says you do, eat sleep, lie naked in your house One cannot compare our society to America, Britain because our mindset is different.'

J. Muralidhar asked the ASG what was his response to three issues raised, health, privacy and dignity ?

On privacy the ASG noted that he had read the same judgements as the petitioners, Kharak Singh, Govind and Rajgopal. He did not agree with the foreign decisions referred to by the petitioner on privacy.

J. Shah pointed out the Griswold, Roe and others were not anti sodomy law decisions but rather decisions on the scope of the right to privacy and were all referred to by the Supreme Court in Govind and subsequent decisions.

The ASG noted that nobody interferes with private affairs in anybody's house. One can do anything one wants in the privacy of one's home. J. Muralidhar then made the point that in that case the ASG had to show compelling state interest in prosecuting consensual sexual activity in private.

The ASG noted that the law was there since 1860 and it was up to parliament to change the law. Law visualizes all sections of society not just a small section of society. Law should cater to the needs of entire society. The will of the parliament is clear, debates can go on in society. Though other provisions of IPC and CrP.C have been amended, this section has not been changed. It cannot be said that the right to privacy will extend to such an extent and such absurd levels.

He said that law cannot be made invalid because of hardship to a section of society. One can however remedy the hardship. The Wolfenden Committee was applicable in a different context and we need not look at that.

With reference to Toonen's case, the standards of thought, morality in those countries are different, theirs is a permissive society and our society has not adopted those standards.

There is no such thing as consent in Sec 377, the concept of Sec 377 is a kind of a force, which is not natural, consent has no meaning in this context.

Sec 377 according to the ASG deals with a kind of situation where so called intercourse is against the order of nature, harm or no harm. It is necessary to protect the human race itself. We need Sec 377 because man to man sex is against the order of nature. Scientifically everything God has made, eat from the mouth, etc is disturbed if this is allowed.

'Does the right to dignity imply this kind of right? Question according to the ASG was not against dignity to punish what was against the order of nature. There is however no controversy about dignity. 'Who is saying that they should be unfairly treated? Nobody is saying that. They should be treated fairly. The point is made that they are marginalized, ignored, who is doing that? They are entitled to treatment. Nobody is saying treat like a second class citizen, if a man is suffering from something, he needs treatment.'

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

J. Shah made the point that if we educate people that going to prostitutes is wrong whether then people will stop going to prostitutes

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

The ASG said , 'In our culture and tradition men have sex only with their women.'

The ASG went on to say, It is wrong to say that access to health care is impeded as if a man goes to a doctor and asks for treatment he will be provided. Where is the fear ? It is incorrect to say that the statute is arbitrary because one cant get treatment.

J. Shah said that on the ground , if a person had a sexually transmitted disease and was a MSM, he would be fearful of going to the doctor knowing that the sexual act he had done was punishable even up to life. He knows that the behaviour is criminalized and knows that he is liable to punishment. It remains a stigma as he cannot tell the doctor that what he indulged in was an offence. Can you brush aside NACO's affidavit by saying that person is feeling shy about going to the doctor ?

J. Shah went on to note that MSM are subject to various indignities which might hinder actual treatment. The only question the ASG had to answer is if there was no prosecution for sex in private (hardly any) why then should the provision remain? What is the compelling public interest served by a law that is rarely used? In the affidavit read out by Mr. Divan, there is a situation which all of us know of -making fun, ridiculing, heaping indignities only because of the nature of sex. When you are not serious about prosecution, why should this provision remain on the statute book ?

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

J. Shah went on to note, that the stand of the government in most of the cases where the law was challenged , Dudgeon, Modinos, Hong Kong, South Africa it was conceded by the Government that the law was rarely used. It was only used for harassment. If the Government was not serious about enforcement, why should it be there ? J. Shah then summarized the arguments of the ASG as:

1) The removal of the law would lead to the spread of HIV/AIDS. However there was no study submitted by the ASG on this point.

2) It would lead to a loss of morality as our culture is different. There is however different thinking within the Government on this very important issue. In effect your stand would tell an entire section of the population that they are law breakers and send a message to society.

In the Modinos case for example it was held that even in an orthodox Christian country like Cyprus , the majority view and public morals alone were insufficient for continued criminalization.

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

J. Shah then went on to say that since Mr Grover was present it would be right to mention the case in

the Bombay High Court which related to the termination of employment of a person who was HIV positive and how in that case all parties agreed to cooperate to find a solution and did not see it as an adversarial litigation.

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

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

J. Shah also noted that the State of TN notification on aravanis was telling in terms of thinking which recognized their rights.

The Court rose and the next date of hearing was fixed for post the vacation on Oct 15. J. Shah asked the ASG how much more time he needed and then fixed a half day session on Oct 15 a full day on Oct 16 (afternoon was fixed for intervenors) and Oct 17 half day.

Day 8 (15.10.2008)

The ASG submitted some additional material to the Court based on which he made the following submissions :

The ASG continued his submissions by making the point that HIV transmission was through sexual contact and as per the study of sexual behavior in the US , over 89% of the transmission was due to homosexual behaviour.

J. Shah asked a question about the validity of the article relied upon by the ASG and made the point that the author of the piece was a Minister in the Catholic Church. Justice Muralidhar noted that on page six of the article submitted by the ASG the entire discussion was based on the Bible. J. Shah went on to read from the article that 'AIDS was a judgment of God' and noted the the article seemed to be complete propaganda.

The ASG retorted by saying how come anything on the other side is accepted and anything on this side is seen as propaganda.

J. Shah noted that the ASG should refer to the NACO affidavit on the point.

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

- A.Levels of promiscuity
- B.Physicalhealth
- C.Mentalhealth
- D.Lifespan
- E. Definition of "monogamy"

THE ASG went on to read from the article to make the points that there was a high level of promiscuity among gay men with 75% of male homosexuals having more than 100 partners. This

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

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

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

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

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

J. Shah asked by everything on the internet was to be taken as gospel: He noted that they were not taking it and that they were going by the Governments own affidavit.

The ASG said that AID's is causing havoc in society.

J, Shah noted that the NACO Report had to be countered by scientific material by bodies such as the WHO and not religious bodies. He asked the ASG to get material on what the position of bodies such as the WHO were?

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

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

The ASG noted that the figures were based on research by a research scholar.

J. Shah said that there were doctors among religious bodies as well and anyway what does the WHO say?

J. Shah noted that the key issue was how far can the government intervene in the privacy of a person and whether the state's intervention was correct?

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

THE ASG then went on to cite another report which had the figures:
HIV is 6 times higher in white men
15 times higher in white women
Blacks account for 46% of all infection
Blacks are 12% but account for a major part of the infection.

J., Shah strongly objected to the study and said that this study seemed to target the black community as spreading HIV/AIDS.

J. Muralidhar asked the ASG to show some statistics relevant to India. He went on to ask if the ASG could produce any study to show that this activity increases risk to such an extent that it needs to be criminalized? "There are two arguments which you have put forward. One is on public morality and the other is on public health and safety. All literature including the NACO affidavit points to the contrary of what you are suggesting in terms of the second argument. NACO is telling us that continued criminalization will result in denial of the right to health of this group."

The ASG replied by saying that they are entitled to all health benefits.

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

The ASG asked whether in the garb of this right whether one can deny the right to health of the rest of society?

On being asked to produce statistics from India the ASG noted that the other side went to the US and other places but he was being asked to keep to India?

J. Muralidhar noted that for facts and statistics we must first and foremost, go to expert bodies in India,. But law and judgments could go to other jurisdictions.

J. Shah asked the ASG to show some scientific material that retaining criminalization would work as a deterrent .

The ASG noted that 'this kind of activity, by a man and a woman it spreads. In normal sex, man is required by law to have sex with one person. Now if they are having sex with 100s of persons, 200 , 500 even more, its more likely to transmit disease.

Counsel for Naz Foundation intervened by citing a UN AID's policy brief on HIV and Sex between

men , which noted that the criminalization and stigmatization of MSM impeded HIV prevention work. J. Shah noted that ' you want to disown the NACO affidavit and say that criminalization is a must. We are trying to say that its not only NACO but UNAIDs as well which is a UN body which is arguing for respecting rights of MSM.

J. Muralidhar said that another argument the ASG could make would be to show that decriminalization had led to the spread of HIV/AIDs .

J. Shah noted that in both the Dudgeon and the Modinos case the same arguments were advanced. The Court did not see any merit in them. Even within the UN the consensus seems to be that discrimination and stigmatization has not helped.

The ASG took the judges to a compilation which showed in which countries homosexuality was decriminalized and in which countries it continued to be an offence.

J. Shah noted that the point one could get from the compilation was that all democratic countries are in favour of decriminalization.

The ASG then cited from an article titled , 'Why gay marriage is not only wrong but socially destructive.', to make the point that after gay marriage was made legal in the Netherlands, HIV/ STD rates were soaring.

J. Shah noted that marriage was a very different issue which was not being discussed here. Then the ASG read an article titled homosexuality and religion with its source being the wikipedia. At which point consul for the petitioners submitted that wikepedia was an unreliable source as anybody could modify the article.

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

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

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

Day 9 (16.10.2008)

The ASG continued his submissions with reference to the written arguments of the petitioner by noting that there is a distinction between sexual intercourse and carnal intercourse and it cannot be said that homosexuality is natural intercourse. 'The natural law is very clear, when it is between a husband and his wife , if it is unnatural it is an offence. Sec 377 applies to all citizens who are doing an unnatural act and hence does not violate Art 14.'

J. Shah made the point that the Section does not make an distinction between consensual and non consensual , public and private and hence whether the Section was over inclusive as submitted by the petitioners ?

The ASG responded by saying that consent will not 'make an offence not an offence'. If you look at Sec 375 sixthly, a man is said to commit rape if he has sexual intercourse with a girl who is under the age of sixteen with or without consent.

J. Shah noted that why consent was not material for an offence under Sec 375 sixthly was because it was an act of sexual intercourse with a minor girl.

The ASG noted that there were other conditions such as unsoundness of mind, intoxication all of which indicated that there was no question of consent. If Sec 377 was to be read to exclude consenting acts as was urged by the petitioners, then the language of the provision would have to be changed to record the above mentioned conditions.

J. Shah noted that consent meant only valid consent.

The ASG then said that the South African Constitution cannot be used to interpret our Constitution and that Sec 377 laid down a valid classification which was not hit by Art 14. With respect to the fact that Sec 377 applied to acts done both in private as well as in public he noted that an offence is something which is punishable under the IPC and that the behaviour under Sec 377 was an offence. He went on to submit that Art 14 is very clear as it applies uniformly to all persons who indulge in unnatural acts as prohibited by law- consent by one or two parties will not make the offence arbitrary.

On the question of whether Sec 377 disproportionately affects sexuality minorities as was made out by the petitioner the ASG noted that the word sexual minority had no place in the Constitutional scheme. The word minority is defined and that there is no such thing as a sexual minority in the Constitution. 'Any group of 100 or 1000 people can start claiming that they are a minority and the Court will be sitting on this only'.

J. Shah responded by saying that the word minority was only used to indicate that it was a small group. Would you say that that the statement that 'those affected by tuberculosis or leprosy are vulnerable minorities is then a wrong statement?' The phrase sexual minority means that some two lakh people for example have a different sexual orientation.

The ASG responded by saying that the word sexual orientation comes from South Africa and our Constitution does not say that. One is dividing the nation by recognizing that.

J. Shah then asked if the law said that the disabled should be treated separately, are we then dividing the nation ?

The ASG responded by saying that if there are 1,00,000 etc people who start claiming that we are entitled as a matter of right not to be prosecuted then every 1000 people will assemble and start saying that this is our right.

J. Muralidhar then asked if MSM as a term was a fiction or a reality ?

The ASG responded by saying that it is a perversity.

J. Muralidhar then asked regardless of your moral opinion, the question is does the Government recognize that they exist ?

The ASG then conceded that they exist and asked how is it possible to have' a grouping of such persons when our Constitution does not say this ?'

J. Shah asked the ASG to keep his value judgments aside as the Court was discussing questions of law.

The ASG responded by saying that as far as Art 14 was concerned this was the law. He said that 'they needed treatment, education, employment and that they should be treated well.

J. Muralidhar then asked how then according to the ASG a person who was committing a crime was being given employment ?

The ASG responded that it was a 'reformatory society' and that they be given employment but not government employment.

J. Shah asked whether a person who declared his status as gay would be entitled to employment ?

J. Muralidhar wanted to know how the stance of them being entitled to employment was consistent with your position that they are persons without rights ?

The ASG 's response was to say that ' should such a course of conduct be read down ?'

J. Muralidhar noted that should it be criminalized in private and public according to you, it will be an offence ?

The ASG noted that 'by their conduct, this kind of activity is a great health hazard and it enhances the chance of spreading disease.'

J. Shah responded by saying that not every HIV infected person is a homosexual.

J. Muralidhar said that even among the sources you have read to us , you have said that homosexual sex is only one of the sources of transmission.

The ASG responded by asking whether the Court should encourage such sources ?

J. Muralidhar objected to the ASGs' remarks by saying that 'you say that we are dividing the country'. J. Shah interjected to say that 'these are not arguments but comments against us.'.

The ASG then went on to reiterate his point that Sec 377 is neutral, and what it prohibits is unknown to law and that the law lays down social standards.

The ASG then began to read and rebut the written submission of Respondent 8, Voices Against Sec 377 on Art 14. He disagreed with the Voices argument that the provision was never intended to protect women and children and asserted that it meant to protect others including women and children. He asserted that there was no question of reading down Sec 377 and the language was clear. He noted that

if Sec 377 hampered HIV/AIDs' interventions , they just had to come forward and the Government would help them. With respect to the submission that Sec 377 conferred unguided discretion upon the police which power was used by the police to blackmail and abuse the ASG asserted that the power was guided as all kinds of activity was barred under Sec 377. The ASG dismissed the reference to Sandra Day O Connor's concurring opinion in Lawrence v. Texas, which was making the point that if a certain kind of expression closely associated with a group is targeted (anal sex), in effect the group is targeted by remarking that 'our laws are different.'. He said that he would read the National Coalition judgement on which he was asked by J. Shah to refer the judgment with respect to all aspects.

The ASG then went on to address arguments under Art 15 by referring to the Anuj Garg decision. He was guided by J. Shah to the part of the judgment relied upon by both the petitioner , Naz Foundation and Voices Against Sec 377 which sought to make the point that under Art 15 discrimination was barred on the basis of 'sex, race, caste or any other like basis.'

J. Shah inquired whether the phrase like basis could include sexual orientation ?

The ASG responded that the word sexual orientation came from the South African Constitution and proceeded to read out Sec 9(3) in which sexual orientation was a prohibited marker of discrimination.

J. Shah responded by saying that, 'we don't have the word pregnancy in our constitution and whether we should not refer to pregnancy as a marker of non discrimination because the word is not mentioned in the Constitution ? Could we justify special legislation for pregnant women on the basis of Art 15 protections ? If in the American Constitution , Fijian Constitution the word sexual orientation was not mentioned , did it preclude any argument based on sexual orientation being advanced ?

The ASG conceded that women have a right of employment and a right to equality.

The ASG then went on to cite (2005) 6 SCC 281 , to make the point that it was well settled that the mere possibility of abuse of law did not make the provision unconstitutional. The mere possibility of abuse of power will not make it ultra vires and only the action and not the section will be vulnerable. The Court only interprets the law and the Court cannot legislate and if the law was misused it was up to the legislature. The ASG then handed over to the Court four decisions which made the point that the presumption of constitutionality was in favour of the legislation.

The ASG then noted that he would like to read an important case, Sakshi v. Union of India (2004) 5 SCC 518. The ASG was asked to read the relevant part of the judgment which noted that a radically enlarged meaning of sexual intercourse under Sec 376 may violate Art 20 (1) (no person can be charged retroactively for an offence).

J. Shah wanted to know what the submission of the ASG was on the point as the Sakshi judgment was on the point of broadening the section to create new offences ?

The ASG submitted that the question was whether the provision should be interpreted in this manner. It was the same argument in this matter as the question was one of interpretation.

J. Shah responded that the ASG should please try to understand that the question before the Court here

was whether the provision was void vis a vis consenting adults.

The ASG went on to read the assertions of the ASG in the Sakshi case to make the point that no Court can strike down a provision on the basis of an international treaty.

J. Muralidhar made the point that what the ASG was quoting was merely the arguments before the Court, the Court in the Sakshi matter never pronounced on the matter cited by the ASG.

J. Muralidhar observed that if there was a gap in the enacted law, international law can be used as interpretative tool to expand the scope of rights. He pointed out to Francis Coralie Mullin, where J. Bhagwati referred to and drew inspiration from the judgement of the US Supreme Court in *Munn. V. State of Illinois*.

J., Shah agreed with the ASG's assertion that international law cannot be used to strike down a domestic law. And went on to observe that international treaties, can be relied upon as tools to interpret provisions in the Constitution.

The ASG asserted that the Court cannot make laws but only interpret it. He then went on to repeat his reading of *Kharak Singh* where the judges had noted that the harm complained of had to be tangible and not mere personal sensitivities.

The ASG then referred to the judgment of *Javed v. State* (2003) 8 SCC 369 , in which the Court had upheld the law limiting the number of children any person elected to the Panchayat could have and had observed that Art 21 did not encompass the right to 'procreate as many children as one pleases'. That the right was to be read in the context of the 'menace of growing population which was judicially noticed.

The ASG then referred to (2008) 2 SCC 254, to make the point that the the rule which should guide the Court is that one should always presume in favour of constitutionality. To doubt constitutional validity of a law is to resolve it in terms of its validity. The Court is not concerned with the wisdom or unwisdom, justice or injustice of law.

J. Shah observed that the decision related to a law which does not violate fundamental rights and if it does not violate the fundamental rights , then the Court cannot strike it down on the grounds that it is unjust.

The ASG noted that the 'the fact that the legislation could be better was not material for the purposes of interpretation. It happened in South Africa, Hong Kong is not relevant. Whether the law causes hardship cannot be a basis of its challenge.

J. Shah asked if when the right to health was violated, whether that could be dismissed on the ground of mere hardship ?

The ASG replied that you 'cant infringe others fundamental rights to fulfil your rights. Society has a right to good health as well'.

J. Shah noted that the Court was not going to rely upon the material the ASG produced and the Court

had asked the ASG to produce WHO Reports etc. He noted that whether criminalization would stop HIV or not, there was no material before the Court in terms of scientific evidence.

The ASG urged the Court to ‘think further, if one of the sources which causes HIV/AIDS – would it not be increasing if every man on the street thinks its permissible lets do it ?’

J. Shah asked if that was the case , why did the Government in its own affidavit make the point that Sec 377 had ‘rarely been used against homosexual activities.’

The ASG replied that if a provision was there in the statute books and not used for 150 years , should it be struck down ? He said that there is no fear of prosecution, they have not been harmed. They have gone astray, they must be protected, should be educated.

J. Shah observed that there were fifteen incidents which were brought before the Court.

The ASG observed that ‘their hardship is no ground to violate the law’. He went on to note that the IPC is divided into various Chapters and sexual offence come in the Sec 376 to Sec 377. The scheme of the Act had to be taken into account. The scheme of the Act is serious about punishing unnatural offences. If there is a change in Sec 377 many other laws would have to change, for example the Hindu Marriage Act.

The Court rose with J. Shah pointing out that the matter could be resumed in the afternoon.

The ASG submitted that he was busy and had many other matters and could not continue in the afternoon. The Counsel for BP Singhal was not present and expressed through JACK’s Counsel , his inability to make his submissions in the afternoon. The Counsel for JACK on being asked if he would be prepared to make his submissions said that he would prefer to follow the ASG.

The Court then asked the ASG as to let the Court know how much time he wanted. The ASG said that he wanted at least two days. The Court requested him to try and finish by tomorrow and to take a bit of time on Monday. The Court proposed to hear both the intervenors on Monday as well as the rejoinder so that the hearings could be completed. The next date of hearing was fixed for 17.10.08

Day 10 (20.10.2008)

Just as the ASG began to continue his submissions , consul for the petitioners asked the Court as how much longer the arguments would continue. J. Shah said that they hoped the ASG would finish today and that on two other days , Nov 6 and Nov 7, 2008 the other respondents JACK and BP Singhal would address their arguments and the petitioner could do the rejoinder. With that the hearings would be completed.

The ASG continued by saying that for AIDS to spread there were three causes, man to man , man to woman and through blood and that man to woman sex can never be stopped. Only thing is that we have to educate persons who are indulging in unprotected sex, be it man to man or man to woman.

J. Shah responded by asking if the ASG meant that education about safer sex was required ?

The ASG responded by saying that ‘permitting it would mean giving sanction to it, people would freely indulge in it.’ Between man and wife its one person one partner in normal circumstances. Those who indulge in abnormal sex have a larger number of partners. Their partners keep changing and each subsequent act increases the chances of it. By all canons, disastrous diseases should be prevented. Consent has no meaning. These are the consequences. Just because a person has consented to die is no ground.

The ASG then referred to Art 15 and began to read it. J. Shah said that Art 15 cannot be invoked unless we accept the word sex includes sexual orientation.

The ASG submitted that ‘our constitution does not talk about sexual orientation’. Large number of people are doing these things and Art 15 does not help in anyway.

The ASG then proceeded to read Art 19 and the written submission of the petitioner. He contended that the arguments of the petitioner that Sec 377 violated the right to freedom of expression was not right. The ASG noted that freedom of expression means that they are able to express their views. That is permitted. It does not mean that act become legal. They can canvass their opinion before parliament, just as opposing parties are also canvassing their opinions. The ASG contended that it is wrong to say that the Section produces a culture of silence around these issues as ‘they are expressing it here and can express elsewhere’. ‘One can certainly argue against this section, and it is permitted through the mode of speech. They have had conferences, processions, meetings, parades- does this violate fundamental rights ? Is there a fundamental right to indulge in these kinds of activities?’ The ASG then proceeded to cite , (1992) 3 SCC 637 and (1995) 2 SCC 161 and said that these judgments are about the freedom of speech and expression and how it includes the right to receive information and how they have no relevance at all to Sec 377.

The ASG repeated that ‘you can express your views. There is no controversy. You are permitted to say that Sec 377 should be deleted. How is it hit by Art 19(1)?

J. Shah noted that these judgments were well known judgements and were relied upon for the limited purpose of showing the extent and scope of Art 19(1) and that he had nothing further to say if the ASG insisted on reading them.

Referring to the second judgment (1995) 2 SCC 162 , the Cricket Association of Bengal case, the ASG noted that in that case the Court had to balance the rights of broadcasters versus the rights of citizens. Similarly in this case the Court would have to balance the rights. When as per NACO affidavit more than ‘99.7 % do not indulge , and they are not suffering, they have a right to be informed. Inform them that this has bad effects, leads to death etc’

J. Shah responded by saying that as per the WHO homosexuality was not a disease.

ASG replied that , while homosexuality was not a disease it was a main cause of disease. What is required is education, treatment for them. They cannot claim that a law is unconstitutional merely because they suffer some hardship.

J. Shah said that the argument was not about hardship, it was about how the law was used by the police to harass.

The ASG responded by saying that the answer lies in the Union of India's affidavit.

J. Shah said that we drew your attention to it, and why is the law required when nobody has been prosecuted ?

The ASG responded by saying that 'if the law goes, everybody on the street will be doing it and it will spread like anything. If permitted it will have disastrous effects.'

The ASG proceeded to conclude that the arguments of the petitioner under Art 19 did not advance the cause of the petitioner any further.

The ASG then proceeded to read the arguments of the respondent Voices Against Sec 377 on freedom of expression, that Sec 377 connoted a structural limitation to the free exercise of ones opinions in a meaningful manner. He also read , that freedom of expression was important for self fulfilment and free conscience. He further read that, 'Sec 377 IPC by criminalizing homosexual acts has a chilling effect on the free speech and expression of LGBT persons. The shadow of criminality cast by Section 377 curtails a free and frank discussion on issues of sexuality, which enables people to publicly own their identity. Whereas, wearing religious symbols or other markers of one's identity is a public expression something that is essential to one's identity and is protected by the law, section 377 does not allow sexual minorities to openly express their sexuality, an aspect that is intrinsic to whom they are, and is hence in violation of their right to expression.

The real test for Freedom of Speech and Expression lies in its ability to enable speech that may challenge popular opinions. Section 377 serves to criminalise expression of minorities which may challenge dominant opinions. Section 377 prevent sexual minorities to effectively take part in any democratic society that is based on equality and social justice.;

The ASG contended that 'expression of ones opinions is one thing, but to say that the commission of these acts is hit by Art 19 is wrong. Expression of opinion is not an offence, only commission of an act is an offence'.

The ASG went on to note that 'law is what society feels to be immoral. Public opinion is the law. Three law Commission Reports have held that Sec 377 is to be retained.

J. Shah interjected to say that the LCI report in 2000 suggests that Sec 376 be reformulated and that Sec 377 be deleted.

The ASG responded and said that he will read the LCI Report of 2000.

J. Shah responded that we have read it and that 'we will not ask you a single question, please proceed to read it.'

The ASG then proceeded to refer to Bowers and Lawrence's case and said that in both cases there were strong divergent opinions. There is also a lot of difference between our Constitution and the American Constitution. He began to read J. Scalias dissenting judgment and then said that it was a long judgement and based on a suggestion by J. Shah agreed to mark relevant parts and place it before the Court.

The ASG then submitted that under The VII schedule of the Constitution, criminal law including the IPC was in the concurrent list. Since the various states which had made many amendments to the criminal laws had not amended Sec 377 and Sec 377 remained a statutory provision on the books. Since 1860 even after the coming into force of the Constitution, no state has thought of amending it because it affects public morality and health. States know the needs of the people and none so far as amended Sec 377. 'It leads to perverse thought, perverse ideas and it is a perversity.'

The ASG then contended that we have to 'think more of the other sections, marriage laws will have to be amended'. Sec 13(i) on grounds of divorce will have to be changed.

J. Shah wanted to know since the ASG submitted that 'you cant stop relations between a man and a woman' how decriminalizing sex between consenting adults would have the effect of changing the law of divorce. He observed that this was not relevant and even assuming it was, decriminalisation would have no effect on the divorce laws.

The ASG then noted that consent with respect to transfer of organs under the Tranfer of Organs Act was prohibited. One cannot willingly give kidneys to another person.

J. Shah observed that was a different situation at which point the ASG said that 'if it did not find favour with his Lordship' he would not continue with that submission.

Referring to notions of decency and morality the ASG noted that , ' in our country it is immoral on the face of it. Society has a fundamental right to save itself from AID's. This right is far greater than any right of the less than 1% who are in this programme. The health of society should be considered and it is the greatest health hazard for this country. If permitted it is bound to have enormous impact on society as young people will then say that the High Court has permitted it.'

J. Shah observed that 'we are still hearing the matter and are yet to decide the matter and you are speaking like we have already decided'

The ASG then apologized if he had given that impression and proceeded to read a judgment on the minimum wages legislation to make the point that consent was not always relevant particularly when it came to a question of workers agreeing to take wages lesser than the prescribed minimum wage, as maintenance of health and decency guided the Court decision.

The ASG then repeated his submission that hardship cannot be a ground of decrminalization. He then repeated his submissions on how AID's would spread with decriminalisation. The ASG then proceeded to give a compilation of material to the Court and proceeded to read from it.

He relied upon the material which included a UNAID's 2008 Report on the Global AID's epidemic and a study of HIV and AIDs by Vinod Sharma and quoted from it extensively to make the point that homosexual sex in the primary driver of the AID's epidemic. The ASG noted that anal sex has the highest risk for the receptive partner. He said that 'in sex with a male, chances of blood oozing out from the anus are higher as nature has defined the vagina and the rectum diffeently.' He said that the rate of partner change will mean that the disease will spread more.

The ASG then read statistics from around the world from the UNAIDS Report to make the case that though HIV spread through MSM, IDU and Sexworkers the major mode of spread was MSM. He referred to figures from Mexico, Caribbean, Peru, Eastern Europe, America and Germany. When he referred to Egypt as well in the same light, J. Shah interrupted to note that the figures from Egypt was in spite of the country having some very strict laws .

J. Shah noted that these figures were seen by the Court and indicated that the ASG should move on.

When the ASG insisted on continuing to read, J. Shah requested him to read a specific part of the Report which made the point that, among the factors for the spread of HIV was unprotected sex, multiple sex partners, injecting drug users and factors which aided the spread included lack of knowledge, societal factors such as human rights violations and sociocultural norms. Sociocultural norms stigmatised certain populations and limited their ability to access HIV prevention.

The ASG responded by saying that ‘every citizen was not aware of this and persons should know that he will suffer if he has sex with him. Prevention is better than cure.’

The ASG was then asked to read the portion from the Report which made the point that the global HIV epidemic cannot be reversed unless a majority of MSM’s, IDU’s are reached. He was also asked to read the part which made the point that, prevention programmes will not be effective unless supported by programmes which address social factors and the marginalization of people most at risk. MSM face a disproportionate risk in diverse settings and yet they are seriously underserved by HIV services.

Counsel for the petitioners interjected to state that an important part of the Report was the commitments undertaken by each country in the UN General Assembly Special Session (UNGASS) on HIV/ AIDs. Counsel stressed that these were commitments undertaken by each country, not externally imposed which made the point that countries recognized that laws targeting MSM’s prevented programmes on HIV/Aids from being successful.

Counsel for the petitioners went on to point out that the study also referred to the Sonagachi model or the community empowerment model as key to fighting HIV/AIDS.

When the ASG was asked by J. Shah if he was done with the compilation, he said that he would like to read from the annexures. He read figures on death from AID’s in India, no of people who were HIV positive , number of orphans due to AIDs. The response of the Bench to each of these submissions was a laconic yes.

The ASG then went on to state that it had taken him six days to come to the conclusion that MSM sex causes AID’s. He said that society should be educated and they have a right to save themselves. There is the right of 99.7% to have a healthy life. You cannot have a right over another persons right to life with dignity. You have a right to live away from disease. The ASG then concluded his submissions.

J. Shah summarized the ASG’s submissions as covering the grounds that there was no right of privacy in the Indian Constitution and if there was a right to privacy it can be curtailed on the grounds of a larger morality or the rights of society. Art 14 is applicable to all and does not target a particular class, Art 15 the word sex does not include sexual orientation. If the bar on consensual sex between same sex adults is lifted, even if the provision is not used, it is a moral code. It creates fear in the minds of people

which will go if removed. If the provision goes then this conduct will spread and this will lead to more spread of diseases. Right to health as a part of Art 21 should also consider the health of society.

Counsel for BP Singhal , R- 7, Mr. H.P. Sharma then began his submissions.

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

J. Muralidhar then asked counsel who he was representing.

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

J. Muralidhar then asked , who was BP Singhal.

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

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

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

Counsel for the petitioner submitted that Dr. Diggs was a part of a religious network called the Traditional Values Foundation.

When counsel for R-6 sought to rely upon another Dr. Lepak, J. Shah asked the question of whether this was research and that counsel could rely upon a government source, UN body, but not rely upon these materials.

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

J. Shah asked counsel to address arguments on constitutional grounds like Art 14, 19 or 21.

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

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

J. Shah interjected to say that ‘you are missing the point, it is not about the lawfulness of marriage.’

Counsel for R7 submitted that he was on morality, the joint family structure and that we must not import evils from the west. We have traditional values and we must go by that. It would affect the institution of marriage and if women get doubt about what their husbands are doing, there will be a flood of cases of divorce.

He then read the Sakshi case to contend that you cannot judicially interpret a statute to include all forms of penetration and further the Sakshi judgment had laid down that the South African judgment could not be used.

J. Shah noted that the judgment was a different one from what was relied upon by the petitioners and asked counsel if he was contending that no foreign judgement could be relied upon ?

Counsel contended that that was his submission.

J. Shah noted that there were hundreds of judgments of the Supreme Court which had cited authorities from other countries. He also noted that Sakshi was about adding words to the statute, not deleting words.

Counsel for R 6 submitted that 'if you cant add , you cant delete.' He went on to add that Sec 498 A was challenged , Sec 302 was challenged and all these provisions were still on the statute book.

He then went on the read from 2004 Cri.L.J 310 , to make the point that we should not blindly follow British parliament and the Wolfenden Committee Report. The judgment referred to HLA Hart's , Law liberty and Morals and J. Shah asked Counsel to produce the same.

He went on to submit that the test was what an ordinary man would have done under criminal law. It is a common sense test. He drew an analogy to Sec 40 of Cr.P.C which referred to unnatural death to make the point that it means irrational, illogical and therefore Sec 377 referred to sex which was irrational and illogical.

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

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

Counsel for R-7 submitted that it was a social evil. One should worship girls. No sensible person can kill a child. Abortion should not be allowed. The social evil is that a girl is an unwanted child. He further added that it was poverty, which resulted in this social evil.

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

Counsel for R-7 submitted that socio-economic factors, dowry, illegitimate children, very unpius sex outside marriage is a ground.

J. Shah asked Counsel for R-7 to restrict his arguments to law and asked him to refrain from political arguments.

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

Day 11 (6.11.2008)

Counsel for BP Singhal , H.P Sharma, continued his submissions by reading from his written submissions. He stated that Sec 377 is a cognisable offence and has inbuilt safeguards as no arrest can be made without a warrant from the Magistrate and sought to rely on a commentary for the same. J. Shah asked counsel to produce the amended version itself.

Counsel then addressed the Lucknow arrests in 2001 in great detail and made the point that when the arrests happened it led to the recovery of magazines containing nude pictures of men and women, safe guide to gay sex, video containing sexually explicit scenes having a nude male on the cover, artificial penis, and two pamphlets which when translated from Hindi ' It does not make a difference how you do sex, or who you do it with , it does not make a difference if it is safe wrong , or right, natural or natural , moral or immoral. . Why do you argue so much, we only have one slogan, destroy AID's.' He cited this to make the point that 'I don't know what organizations are doing, the credibility is doubtful and whether these organizations have come to court with clean hands is doubtful.' He said that the pamphlet indicated that 'The Center was being used to train people in homosexuality by abandoning all morals and safety precautions'. He further submitted that 'if one wants to do sex one should do it in a civilized manner and not have sex as in the stone age'.

J. Shah inquired if NACO programmes were like this?

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

Mr . Sharma then referred to *R. v. Brown* to make the point that 'homosexuals enjoy group sex and even enjoy committing violence. This is sexual perversity and when they were consenting adults, criminal acts warranting prosecution were committed in the course of such perversity. He said that 'it was disconcerting to see tendency of homosexuals to indulge in group sex'.

J. Shah noted that 'when the *R.v. Brown* judgment was delivered , sodomy was not a crime in the UK. So even if section 377 is read down and homosexual acts between consenting adults does not amount to an offence under Sec 377, it would still be an offence if grievous hurt is inflicted on the passive partner even if partner has consented to it'.J. Shah wanted to know about the relevance of the judgment. Mr.,Sharma responded that 'anus is not designed by nature for any intercourse and if the penis enters the rectum, victim is found to get injury'. The activity itself causes bodily harm.

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

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

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

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

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

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

Mr Sharma then submitted that fundamental rights must be subjected to the Directive Principles such as Art 47 (improve public health) and should also be read with Fundamental Duties ('preserve our heritage of a composite culture'.

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

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

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

Mr,. Sharma then went on to state that there are a number of offences which are done voluntarily by consenting adults such as gambling, adultery, are sought to be eradicated in the interests of public order or morality.

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

J,. Shah noted that the prayer was that the section should be declared invalid so far as applicable to consenting adults and that the prayer was that the provision be declared invalid as applicable to consenting adults. This was not the same as rewriting the provision. The argument is not open to the petitioners to say that the provisions should be read in a particular way.

There was a discussion on the role of international law in interpreting domestic law , which J. Shah assuring Mr. Sharma that the 'Court cannot set aside a provision based only on international law, but

that the Court had to come to a conclusion that the provision violates Fundamental Rights.'

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

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

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

J. Shah interjected to say that he wished Indian families were like this and we could see this in our life. Mr. Sharma submitted that 'no wife wants to share her husband. If a son is homosexual, you cant prohibit a father from beating him, disqualify him from inheriting property and domestic violence between man and man will increase.' You cant coexist within the family because of ideological differences and this will affect the family system and affect public morals'. He further submitted that there would be nobody to protect homosexuals when they grew old. 'They will say they want to adopt a child born out of heterosexuality. If this is permitted then they will live a miserable life, when they are old they will have no relationship even if they have multiple partners now. The removal of the section is not in their interest.'

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

Counsel for JACK began its submissions.

Jack's counsel submitted that there was no scientific evidence that HIV causes AID's, that a change in this provision would mean that all marriage laws would have to be changed, and that under Sec 269 and 277 of the IPC anyway any intentional spreading of an infectious disease would be an offence. J. Shah noted that , Sec 269 and 277 applied to both homosexuals and heterosexuals and it was wrong to say that the mere commission of sexual acts without knowledge would be prosecutable under the provisions. Further not all homosexuals had AID's. It was also wrong to assert that marriage laws would have to change as the ground of divorce which was sex outside marriage applied to both homosexual and heterosexual sex.

JACK's counsel then asserted that Naz did not come to Court with clean hands and was part of an international network which was using HIV to push an agenda.

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

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

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

Rejoinder on behalf of Naz Foundation by Anand Grover.

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

J. Shah wanted to know whether decriminalization did lead to a higher risk for HIV which was the argument.

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

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

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

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

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

Day 12 (7.11.2008)

Mr B.P Singhal, began by producing some newspaper reports from the Hindustan Times and Pioneer and said he strongly objected to the reporting. His contention was that the papers misreported that the 'Court had pulled up Mr. Singhal'. He contended that 'it was gross contempt my Lord, the press has become the High Court and it was going beyond all limits. He observed that,'trespass was the order of the day and it was time for the Court to take action'. He also observed that,'the mother of all harms to the human body comes from homosexuality'.

J. Shah expressed surprise at the reporting and said the Court would look into it.

Mr Grover continued with his rejoinder by stating that in India the HIV epidemic is caused by different actors and that in India MSM were not fuelling the epidemic but rather it was female sex workers. As per the 2007 NACO study, there is an over all decline in infections in south and Northeast India. The decline in the south is because of interventions among FSW's. He submitted that you couldn't

distribute condoms to MSM's , as then one will become abettors to the offence.

The ASG intervened to say that nobody was saying that and that we are prepared to provide condoms to all.

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

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

With respect to the question of child sexual abuse and non consensual sex, the prayer was clear, since there is no law on child sexual abuse, the section as only been sought to be read down and not struck down.

To the contention that there was no such thing as a minority, Mr Grover submitted that Art 14 was not restricted to the grounds enumerated under Art 15 and Art 16.

With respect to the *Sakshi* judgment, he distinguished it as asking for an expansion of the meaning of sexual intercourse where as the prayer here was for a restricted reading.

With respect to application of international law, he noted that the very incorporation of the dignity under Art 21 came via US law i.e. *Munn. V. Illinois*.

There will be no effect on marriage laws if this prayer is granted and the introduction of consent based distinction is already there in Sec 375 and will not create any difficult problems.

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

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

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

Mr Grover noted that pre Cooper there was a compartmentalized view and now you cant take that view. You cant just say morality, but rather show that morality is a compelling state interest, On the point he read from an additional written submission, using quotations from *Dudgeon, Norris, Leung*.

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

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

Mr Shyam Divan for Voices Against 377.

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

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

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

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

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