

**Meeting on issues around Section 377, IPC including writ petition filed in Delhi High Court by Naz Foundation (India) Trust**

Venue: YWCA, Fort/Colaba, Mumbai

Date: 10 March 2004

Participants: AX, ZA, G (Sangama, Bangalore); NA (Samapathik Trust, Pune); KL (ALF, Bangalore); XTZ, OM (Humsafar Trust, Mumbai); D (Humjinsi, Mumbai); NT (Aanchal Trust, Mumbai); PA; RW; MK, EC, MG (Lawyers Collective HIV/AIDS Unit, Mumbai/ New Delhi).

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**MINUTES**

INTRODUCTION: EC thanked the participants for coming at such short notice, and explained that others (particularly from Bangalore and Kolkata) would have wanted to be present but were unable to due to short notice. A brief introduction and background of the meeting was given, including a run-through of the agenda (attached). EC acknowledged that there was a controversy around the filing of the S.377 petition (Naz petition) in Delhi High Court. However, the present meeting was not to discuss those issues but to see how things could be moved forward – in the context of the petition and also in the context of a larger movement/campaign against S.377. He explained that the idea of the present meeting germinated from a meeting of MSM/Queer/L/G/B/T groups and individuals in Delhi called by some of them who were there to attend the Lawyers Collective HIV/AIDS Unit (LCHAU) workshop on the Draft Legislation on HIV/AIDS in September 2003. At that meeting discussions regarding activism around LGBT issues, including the 377 petition took place. Among other things, participants there asked and discussed how they could be of assistance in the process of the petition. Some of the issues that emerged from the meeting included:

1. individuals/organisations could intervene as parties in the petition, and
2. affidavits of people affected by S.377 and expert opinions could be collected , and that these affidavits could be filed in support of the petition

EC explained that since then LCHAU and Naz had discussed these ideas and were appreciative of the interest expressed by persons present on supporting the petition. Also, after interactions with some other MSM/Queer/L/G/B/T groups and individuals it was felt that such a process of documentation and collection of testimonies would be useful in supporting a larger LGBT movement/ campaign as well. Pursuant to this LCHAU and Naz sent out an email explaining this sequence of events and ideas to approximately 39 MSM/Queer/L/G/B/T groups and individuals seeking feedback on whether such a process would be one which they saw themselves participating in and contributing to. Feedback was received from mostly those present at the present meeting (and some others who could not make it). It was felt that the best way to proceed further was to organise a meeting which led to the present meeting being held – to look at issues around the petition, but also to see how it may be an opportunity to support efforts in a larger LGBT movement/ campaign. The aim of the meeting was to discuss this and related issues further, how best to work with others who would like to assist in the petition, take

the issues forward, shoulder certain responsibilities, coordinate a proper effort etc. It was explained that although an agenda was circulated for the present meeting, the endeavor should be to facilitate flexibility so that related issues not envisaged in the agenda are also covered and an open discussion is encouraged.

UPDATE ON NAZ PETITION: It was explained that the case was coming up for hearing next on 17 March 2004 but it was unlikely that the matter would go on as the National AIDS Control Organisation (NACO) had not yet filed its reply. Although it was impossible to ascertain when the petition would be finally decided, hope was expressed that it would be within the next year. AX asked for clarifications on the ABVA petition. MK explained that apart from Naz India being in Delhi and working there where the effect of the law was felt, an added reason for Delhi High Court being the venue for filing the case was because LCHAU was informed that the ABVA petition was still pending before that court and filing it in another court would have meant that the Supreme Court would have the authority to take up the cases directly. However, after filing the case it was found that the ABVA petition had been dismissed on grounds of non-prosecution. NA asked if it was possible to expedite the court process. MK said that NACO was still to file its affidavit in the case and this would have to be awaited. A letter had been written to them already but no response had been received. He added that NACO's policy and statements made by it have recognised the need to promote the rights of MSM and law reform to decriminalise their lives.

AX then asked about the possibility and impact of a state legislature amending S.377, IPC – was this possible through lobbying and if so, what impact would such a change have at the state level. MK replied that such an amendment was possible with Presidential assent being obtained and that this could definitely impact other states.

INTERVENTIONS: Some discussion then took place on the possibility of others intervening in the 377 petition. NA began by asking about the argument raised by the government on *locus standi* against Naz India. MK explained that there were several decisions of the Supreme Court on this issue which make it clear that an entity like Naz could file a PIL since even individuals espousing public causes could file such cases. Also Naz's work was directly affected by the law so they are an affected party entitled to challenge the law. KL then asked whether an individual from the LGBT community could file an intervention. MK said that this was definitely possible. He added that LCHAU had discussed the possibility of PX of Naz being added as Petitioner who had agreed to this if the same was felt necessary. However, even others from the LGBT community could intervene in the petition. AX asked whether those from other movements like child rights, women's groups etc. could intervene to which MK said this too was possible but it would be better for them to intervene rather than become petitioners. AX suggested that PUCL/ Rajinder Sacchar could be contacted. Some other names were discussed including those who would be willing to act as lawyers (Sanjay Parikh), children's groups (Haq), and PRISM. EC mentioned that at the September 2003 discussion in Delhi, MT had talked of intervening on behalf of Naz International/Bharosa. AX highlighted that there was a need for broad and multiple strategies and coordination to move things forward. NT provided the idea of CREA being

a possible intervenor. NA asked what were the pros & cons of a person/group intervening to which MK replied that if the intervention was allowed by the Court, the intervenor would have a right to be heard in the case. A concern was raised about the possibility of a group/person intervening in opposition to the petition. EC explained that this had already happened through JACK (Joint Action Council Kannur), an AIDS-denier group in Kerala who opposed the petition.

A brief discussion was then held on the possible opposition to LGBT rights for e.g. the experience with Amod Kant, former policeman in Delhi. MK explained that the LCHAU had tried to fix appointments to meet with him but to no avail and that there was a need to at least attempt a dialogue with such folk and even with those within the government for lobbying purposes. Possible stands of political parties were also discussed e.g. BJP, CPI, Congress. NT raised the issue of lobbying with the NHRC. EC explained that the NHRC had recommended the reform and review of S.377 in the context of HIV/AIDS in its National Conference on Human Rights and HIV/AIDS in 2000. Some discussion was held on the possibility that as individuals, members of the NHRC may support the issue but officially it would be hard to say (MK). NT also pointed out that Poornima Advani, Chairperson of the NCW had expressed support for LGBT rights/issues and that Aanchal had got a response to that effect from her.

AFFIDAVITS: The discussion then shifted to the agenda for the day, particularly the 3 kinds of affidavits/statements/testimonies envisaged and identified as helpful for the petition and as important documentation for an LGBT movement/campaign: 1. From the LGBT community – those affected by the criminal sanction of the law, 2. From experts like historians, psychiatrists, sociologists, anthropologists etc. and 3. From people in public life/celebrities. EC mentioned that this was suggested in the first letter that kicked off this process, together with some names that came to mind particularly in the last 2 categories. He added that clear, powerful statements from within the community and experts may prove beneficial to the petition. They could demonstrate the highly negative impact of S.377 and its outdatedness. Also, even if several such affidavits are obtained it may not be useful to file each and every one in court. Instead filing just a few very eloquent ones would likely have more of an impact. However, the others could be published in the form of an advocacy document and used for a broader campaign/movement on LGBT rights. It would be necessary, however, to contact a number of people and begin collecting statements. Some responses/suggestions to LCHAU/Naz's email were made, which were summarised and circulated at the meeting.

Suggestions were then made based on the idea of collecting affidavits – AX mentioned NIMHANS. MK felt it was possible to make them parties or ask for individual doctors or the institution to file an affidavit. EC mentioned that LCHAU has already been in dialogue with Dr. Shekhar Seshadri of NIMHANS in this regard. Also, in a meeting with Dr. Bharat Shah, psychiatrist at Leelavati Hospital, Mumbai he expressed interest in trying to identify other doctors and support efforts in the case. NA pointed out that all psychiatrists may not support the case. MK explained that it will be necessary to approach them tactfully. At the first instance it would be important to sound them out, see their opinions, and if they are against the case then their affidavits need not be sought. He

suggested that it would be preferable to get affidavits from within the LGBT community from Delhi, since it would be best to demonstrate the impact of the law in that city to its High Court. However, expert testimonies need not necessarily be from Delhi. EC added that LCHAU had already begun formulating 5-6 affidavits of people working for Naz as outreach workers etc.

XTZ suggested further names – Dr. Prakash Kothari, Dr. Mahendra Vatsa, Childline. NT suggested that it would be useful to talk to the Indian Psychiatrist Association. NA mentioned Dr. Chandorkar, Pune Psychiatric Association. RW asked whether the affidavits, would be confined to the petition or outside concerns as well. He cautioned that as we are bringing in views from different fields there is a need to evaluate the opposition – they may also bring in the affidavits to counter ours. It was felt broadly that affidavits would be required to be drafted in context of the petition but that those that may not be filed in the court/ used in the case could address broader concerns as well. MK felt that it would be important to be able to counter government affidavits in opposition to the ones in our support. He also pointed out that the government reply is quite limited and that the court is bound to look at the statements of psychiatrists who don't think that same-sex attraction is a disease etc. XTZ pointed out that the government has also brought in the issue of child sexual abuse, and it is important to address those areas. He added that Hindustan Latex, a government company, makes condoms for anal sex. Can we get them to say in affidavit that they manufacture condoms for anal sex? EC suggested that this need not necessarily even be an affidavit but just a letter recording this.

EC added that LCHAU was in the process of developing prototypes of the kind of affidavits that would be required from people affected and experts. These would have to be modified regarding specifics that each testimony would contain but the general framework would be the same. (A broad framework was circulated in a chart form at the meeting - attached). He added that the prototypes would also be circulated to those who feel they can collect affidavits. XTZ suggested that affidavits have been given in the past to individuals seeking asylum on grounds of persecution because of sexuality. They could be used for guidance. MK felt that we should be wary of using something like that. NA said that he had already been in touch with the National AIDS Research Institute (NARI) in Pune. He felt that if they were forced to take a stand they would in favour of the case, but if asked just for an affidavit, they may not. EC asked what the contents of a statement from NARI would be to which NA replied that they could explain how their clients are affected mentally because of persecutions faced for being MSM etc. MK pointed out that NARI would be represented by a government lawyer since they are a government organization and expressed doubts about whether NARI could take a useful stand.

NT pointed out that it is important to look at affidavits from LGBT groups first. The question arose as to how do we approach people from the community in taking affidavits. EC pointed out that there would be a justifiable concern that if we file affidavits, names will become public knowledge, but it was possible to take permission from the court to use pseudonyms. LCHAU was proposing to devise proper consent forms and guarantees of confidentiality for those wanting to remain anonymous while providing affidavits.

However, the most powerful affidavits would be those that talk about incidents, which demonstrate how S.377 impacts the individual's life deleteriously.

MK raised the concern that the incidents spoken of have to be provable, that the statements might not be too useful if there was no proof that the incident(s) occurred. However, they need not be directly related to S.377 but if a link can be demonstrated then it could be useful. NA asked how proof can be obtained because in most cases either a non-formal process is launched by the police or people from the community who are harassed etc cannot complain.

KL pointed out that AX knows of a lot of cases where S.377 has been used. Even the press has reported them. AX added that there are cases in Bangalore where the police has directly used S.377 as a threat. MK suggested the possibility of asking the police officer from Kolkata who could be of help in getting data. AX pointed out that even in Bangalore, there is a police commissioner who is ready to come on TV and say that homosexuality is a private business.

MK also suggested that it may be useful to try to find out how the police view S.377. If we can demonstrate that the police see S.377 as a way to harassing people from the community (e.g. 2 men together in a park holding hands is considered obscene etc. because S.377 says that two men having sex is unnatural). It is not obscene in itself but because S.377 makes it so, if we can bring out that link then it is useful. KL said that on an NDTV show a police commissioner said that if an act is an offence he would arrest irrespective of the circumstances.

AX pointed out that for kothis, because of S.377 they cannot complain about rape. Police would not treat such cases of sexual violence as such but as a crime under S.377. There is much violence against sexuality minorities but because of S.377 nothing can be done. KL raised the issue of harassment etc. and the question of a direct link with S.377 – there is always a link but it may not be so direct. Yet, if the link can be demonstrated it would be useful. PA pointed out that 'Crime & Detective' magazine keeps reporting stories involving S.377 – important to try and get hold of this sort of documentation. MK suggested that it would useful to undertake a study on S.377 cases and police use of S.377. XTZ suggested that ORG-Marg was doing a baseline study for NACO. They could be asked by letter to include a question on S.377 for cops on how they look at it.

PA pointed out that a lot of people are harassed but they won't be able to identify the link with law or even know that a law exists. MK said that the harassment may not be because of any law but if we can show that it was because the police knew that the victim was MSM/L/G/B/T and therefore harassed him, it should be useful. XTZ pointed out an instance where two individuals were booked for ticketless travel because police knew they were gay. PA mentioned the 2<sup>nd</sup> PUCL report – which detailed instances of hijras being harassed and subject to sexual violence because of S.377. KL said that they are recognising the link in retrospect

XTZ said that if affidavits were to be obtained a format would need to be provided. EC agreed that LCHAU would be able to provide the same to all who need it. PA asked if affidavits in vernacular languages could be obtained. MK said that would be no problem.

NA asked that there may be people not directly affected by S.377 but still want to contribute to this process. MK explained that if it can be shown that S.377 irrespective of arrest does affect people, it will be useful. PA said that it would be important to show that S.377 impedes so many aspects of life.

D asked what the expectations would be from people giving affidavits vis-à-vis time, presence, resources etc. EC said they would have to interact with lawyers drafting the affidavit etc. MK explained that people giving affidavits need not appear in the court. No oral evidence required from them. Notarisation of the affidavits would be enough. NA asked what would be the consequences if people want to withdraw later on. MK explained that once affidavit was filed, it cannot be taken back. They become part of the case records.

ZA said that in Bangalore of late there has been considerable awareness about S.377 among sexuality minority communities. It would be possible to collect affidavits from them, especially in context of police harassment. He added that in Bangalore, the Upparpet police station has been uncontrollable and harassment has been severe in this area. G said that hijra awareness was not much and there was a need to increase awareness about S.377. Most hijras also engage in sex work, but when arrested they are always threatened with S.377, although it is not clear if bookings take place under the law.

PA said that if we find direct links to S.377 being used then so much the better but we should also look at other indirect links. It appeared that no one in the meeting could think of any instance where S.377 had been directly used to launch criminal proceedings against an individual. AX said that talking in terms of the petition was only one part of the picture but S.377 is a larger issue so it is important to look beyond the case. The case and other mobilisation will impact each other. In Bangalore, there have been interactions with the police on S.377 who say that if the law exists they are bound to implement it. However, it is important to take up advocacy with civil society and existing networks. PA suggested that undertaking studies to demonstrate the impact of S.377 would be a good starting point. Sociological studies etc. e.g. – if INFOSEM/South India Coalition/Manas approaches TISS with resources/individuals and works on a joint study with expertise from both entities. PA said it would be good to see how such studies will impact law. MK said that the court will look at such issues. But such studies will be better if we can bring all components together - most studies of TISS do not have law component – a multi-centered, scientific study would be useful, particularly in the long term. AX asked of the consequences if LCHAU undertakes such studies. EC replied that it could affect the credibility in court, because it could be suggested that we are using these studies to justify our stand. PA pointed out that there are lots of small studies done by NGOs, which need to be collected and examined.

RESPONSIBILITIES: NA agreed to take responsibility for Pune, particularly following up with the Pune Psychiatric Association. PA suggested a core group to coordinate the process. EC said that in Bombay and Delhi LCHAU could take share of the responsibilities but others will have to also put in their share. AX said that the South India Coalition will be meeting soon when the present meeting would be discussed and felt that the coalition could look after working on this process in the South. KL said that ALF could help with affidavits. EC asked if it were possible for studies etc to be undertaken by the South Coalition. AX replied that there are core group members who will have to be briefed after which a response could be given, however, it would be keen to assist in undertaking this too.

PA sought clarification whether this planning of affidavits, studies etc. was for the petition or beyond. KL felt that it should be for both. EC agreed but said that since the petition was pending it would be important to look at timelines in that context without losing sight of the larger process of an emerging campaign/movement. He asked about possibility of INFOSEM being part of this process. NT said that this should not be a problem but it would be necessary to work out what is expected of it. NA suggested that it would be good if we could come back in some time to a follow-up meeting after working on what we have to do.

EXPERT AFFIDAVITS: EC pointed out that it would be important to get some of these in order to refute some of the points made by the government in its reply. NT said she could speak to the Indian Psychiatric Association. PA mentioned the Center of Historical Studies in JNU, where a friend studies and that he would follow up with him. He also suggested identifying historians who have written in the vernacular. AX suggested a Sanskrit historian from Karnataka. MK suggested that historians from abroad could be considered. PA responded that it would be better to stick to historians from within India.

Various names were suggested (not attached but will be circulated shortly).

EC suggested that it may be useful to get people in public life in support and issue an advert with their names signed on in support of LGBT rights. This would require contacting and should be timed well. He raised the issue of a doctor who says he does not have a problem with homosexuals but gives them electric shock if they ask for it. NA agreed that there are such cases where doctors say they do what the patient wants. PA said that we would have to get doctors who will say they are against ego-dystonic and ego-syntonic homosexuality. He also pointed out that doctors will say WHO is outdated. KL suggested that we focus on the fact that homosexuality is not a pathological condition anymore and also look at how we can deal with the ego-dystonic issue.

EC raised the issue of how to go about the drafting of affidavits. MK suggested that it would be best to first talk to the experts and find out their opinions/views. Don't ask for an affidavit initially or mention the context of the petition. If we find that they will say things beyond what we want then we won't ask for their affidavit. Don't talk about the case unless we are sure they will support us. Doctors should include not just psychiatrists but also psychologists, sexologists etc. PA asked how we use this in the larger context.

EC suggested that this material could be collated into to a very useful advocacy tool. XTZ felt that statements from people in public life should not be for the petition but for larger movement/campaign, which was agreed to by others. EC said that LCHAU was planning to work on a draft letter that it proposed to send out to people in public life, urging support of LGBT issues. LCHAU would share the draft with others to get feedback before sending out.

TIMELINE AND TASKS: MK felt that by the end of March we should have some work done – identifying persons willing to share personal experiences around S.377, violence, harassment etc., identify experts, institutions etc. KL/AX said that the South Coalition will be meeting and will be able to revert in 10 days with a plan. NA agreed that he would try and report back with information by end-March. NT said that she could try and work on the Indian Psychiatric Association and others and have something to report on in a week.

KL said that there was need to do more research on issue of medicalisation of homosexuality. NA asked whether the petition dealt with intersexed persons. AX felt that it there was a need to recognise that most discussions around LGBT issues exclude hijras and the intersexed. And this process will also hopefully to rectify this failure.

D and PA agreed to work on resources already available – compilation of news clippings/collection of stories reported in media etc., which demonstrate the marginalisation of LGBT individuals due to social disapproval and criminal sanction etc.

EC suggested the idea of a signature campaign against S.377 as part of larger campaign efforts. XTZ said that first it was necessary to mobilise and sensitise before going on a signature campaign. AX felt signature campaign would have very limited impact.

PA agreed to work on a short note on S.377 and its impact, as an explanatory document to circulate to those willing to seek affidavits from within the community that will give a context to the law's impact, both direct and indirect. This document should explain the nexus between S.377 and marginalisation so that those who affidavits are sought from are explained the kind of information which is sought from them. For instance the link between lesbian suicides and criminalised lives/ S.377. D said it is important to look at private/domestic spaces as well. PA said that personal experiences outside violence/harassment/police abuse are also important to bring out and have expressed to demonstrate how oppressive norms impact LGBT folk negatively.

KL said that the transparency of this process should not be lost in any future action and the openness of this process should be maintained so that at a later stage others can join. AX felt there was a need for all groups to come together to discuss all issues, not only S.377. D felt that although that was desirable a certain level of focus was still needed and suggested that it would be useful to use the petition as a focus and go beyond it. KL felt that the petition was a good platform to bring different voices together and the opportunity should be used. He also suggested the idea of a national level meeting. D asked whether the present group could call for a larger meeting. AX felt not. D felt it

would be best to start at smaller levels and move ahead as a natural progression. AX felt regional meetings would be possible at the first instance. PA suggested that there was likely to be a meeting in Bangalore in June on Masculinities (9-12 June), which could be a good time to follow up the present meeting. This was generally agreed to. EC said that resources for next meeting i.e. travel costs etc. may be possible for LCHAU to bear, but no guarantees. EC volunteered on behalf of LCHAU to be the mailbox for the process until the next meeting and coordinate work around the outcomes of the meeting (e.g. possibility of talking to LGBT groups in Kolkata/ Manas Bengal on a visit there in late March). This was agreed to.

D felt that in all this it is important to look at the repeal of S.377. XTZ responded that earlier some felt that S.377 was of no concern to them, but S.377 can never be looked at in isolation from other issues. NT said she was not happy with broader meeting – it would best to confine to this group at present. AX felt that an attempt must be to look at a broader meeting. MK agreed that a broader meeting will also look repeal of S.377 so there is no conflict.

KL/AX will look at the possibilities of intervention – PUCL, PUDR etc. MK felt this was a priority. AX asked about women's groups. D pointed out that a national network of women groups still exists – will contact them/find out about them. But unclear of the need for this. MG explained that the government in its reply has said lacuna in rape and child sexual abuse laws, therefore S.377 needs to exist. Idea would be to involve women/children's groups to say that S.377 is not the appropriate law for these issues, has to go, and women and children's issues need an altogether new law. D suggested involving more broad-based organisations. KL said that it would be useful to talk to them and if they want to be involved well and good. Let them decide for themselves. EC closed the meeting hoping that those who could not make it for the present meeting will be there in June and would be welcome to do so. Also assured contact with those who had volunteered to take on responsibilities and move the process forward including sending out of minutes (!).

#### SUMMARY:

1. Interventions by individuals or groups were possible in the petition (PUCL/PUDR – ALF/Sangama).
2. Sensitizing government/ establishment entities wherever possible and desirable should be pursued with reference to petition and larger LGBT issues and concerns.
3. Need to identify persons directly impacted by the law.
4. However, demonstrating indirect impact (through other laws, social oppression etc.) will also serve as strong affidavits.
5. Need to identify individuals willing to provide their experiences in the form of affidavits.
6. Groups/ individuals will help in identifying those willing to provide affidavits (South India Coalition, INFOSEM)
7. Drafting of affidavits (LCHAU, ALF)
8. Note on impact of S.377 (PA)

9. Not all affidavits may be filed in court – most could be used for purposes of a larger campaign/ advocacy document.
10. Prototypes of affidavits would be provided (LCHAU).
11. Consent forms and confidentiality guarantees will be formulated (LCHAU)
12. Expert institutions will be approached for support (NIMHANS, Pune/Indian Psychiatric Association, Hindustan Latex etc. - Humsafar, Sangama, Aanchal)
13. Expert individuals will be approached for support (Prakash Kothari, Romila Thapar, JNU, Dr Vatsa, Shekhar Seshadri etc. – Humsafar, Sangama, LCHAU, PA)
14. Circumspection and tact in approaching experts.
15. Conduct a study/research and document how police perceive S.377 (ORG-Marg survey)
16. Conduct a study of the use of S.377 in certain police precincts/ lower courts
17. Conduct studies (sociological etc.) in tie-up with a research institute that demonstrate the impact of criminal legal regimes on LGBT folk. (e.g. with TISS)
18. Survey of press reports that demonstrate impact of marginalisation and criminalisation on LGBT folk – through English language and vernacular papers and magazines (D, PA)
19. Contact other more broad-based networks willing to support petition/campaign/LGBT rights – e.g. women’s networks (D)
20. Draft letter to people in public life seeking support on LGBT issues/ decriminalisation (LCHAU)
21. Research on issues around medicalisation of homosexuality
22. Process should be transparent, inclusive, look at violence within domestic spaces, support natural progression toward a possible campaign/movement, recognise and involve issues of hijras and intersexed persons. Should use petition as a focus to feed into a broader campaign/movement.
23. Possible signature campaign in support of LGBT issues
24. Suggestion of national level meeting at later date
25. Timeline – review and assess progress by end-March
26. Follow-up meeting in Bangalore (around Masculinities meeting in mid-June, possibly 13 June, Sunday) – LCHAU with Bangalore groups
27. LCHAU to be mailbox/ coordinator till next meeting – will try and discuss this in Kolkata in end-March
28. LCHAU will try and support costs of travel and stay in Bangalore for those not attending Masculinities meeting but requiring support – to be confirmed.

Meeting concluded.