

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

Venue: West End Hotel, Mumbai

Date: 9 January 2005

Participants: KP (SAPPHO, Kolkata); RA (Samskar Alliance Project, Nizamabad, AP); PM (Darpan Foundation, Hyderabad); K (Friends, Hyderabad); CC (THAA, Chennai); AN (Snegyitham, Trichy, TN); KZ, CG, EF (Other Forum, Kolkata); SF (Coimbatore District Aravani Welfare Trust, TN); NS (Sahodaran, Pondicherry); PP (Suraksha, Hyderabad); Ch. Q (Prayatha, Nizamabad, AP); FA, MN, BB, Z, JK (SIAAP, Chennai); BQ, P (Sahodaran, Chennai); JRW (WINS, Tirupati, AP); FR (NIMSW/PLUS, Kolkata); PS (Mithrudu, Hyderabad); KB, NL (Humsaaya Welfare Sanstha, Mumbai); HD (SAATHII, Kolkata); ND (Manas Bengal, Kolkata); PVZ (NIPASHA+, Guntur); NF (SWAM, Chennai); EM (Spandhana, Mysore); RD (Gelaaya, Mysore); ON (LABIA, Mumbai); BD (Lakshya, Baroda); F, Dr. G (Udaan Trust, Mumbai); TH (PLUS, Kolkata); TC (Bandhan, Kolkata); BA (DMSC, Kolkata); MT (Naz Foundation International, Delhi) XTZ, OM, DU (Humsafar Trust, Mumbai); PX, SA (Naz Foundation India, Delhi); LA (New Delhi); M (Sangama, Bangalore); NSG, QP (FIRM, Kerala); VY (Mumbai); TO, XB (Gaybombay, Mumbai); NT (Aanchal Trust, Mumbai); MM (Voices against 377, Delhi); NA (Samapathik Trust, Pune); EC, MK and VB (Lawyers Collective HIV/AIDS Unit, Mumbai).

EC started the meeting by welcoming all the participants and explained the material that had been handed out to them, which included minutes of the previous such meetings, a copy of the Delhi High Court (DHC) Order of September 2004 dismissing the petition challenging S.377, IPC and an agenda for the present meeting. Thereafter there was a round of introductions. EC then explained limitations for Lawyers Collective HIV/AIDS Unit (LCHAU) to conduct the meeting, which restricted the number of participants and then ran through the agenda.

EC explained that the idea of the meeting was to take forward the agenda and process, which began with a meeting in Mumbai in March 2004 and was followed by meetings in Kolkata (March 2004), Bangalore (June 2004) and again in Mumbai (October 2004) at which many of the present participants were present. The initial meeting discussed what to do about the petition and see how it falls into larger concerns and strategies for the removal of S.377, IPC and emancipation of the LGBT community. These meetings also discussed how to mobilize persons who were sympathetic to the cause of the LGBT community including mental health professionals, public figures, etc. to support the petition and a campaign against S.377. Some persons we contacted and were helpful and willing to provide support. Later meetings continued this discussion, as was reflected in minutes that were distributed to all participants and put up on the lgbt-india listserve. Since then other events had transpired. EC noted that decisions at these meetings were taken in a collective manner including how a campaign could be taken forward and that presently the meetings should be restricted to the LGBT community with an attempt to broadbase it in the future.

A brief history of the filing of the petition was then given. The petition was filed by LCHAU on behalf of Naz Foundation (India) Trust in the DHC in October 2001. The Respondents to the petition were then explained – the Union of India (UOI – representing the state), the Government of Delhi, Delhi Police and National AIDS Control Organisation (NACO). It was expected that Respondents file a response (by way of a sworn statement or affidavit) stating their point of view. After all parties file their responses and counter-responses, the court hears arguments and thereafter is expected to decide the case. What happened in the present instance was that for almost two years, the UOI did not file its reply, until it finally did in September 2003. The court directed the Attorney General to appear before it since this was a matter of constitutional importance. The Attorney General failed to appear. NACO, Delhi Police and the Delhi government did not file their replies. In September 2003, LCHAU received the UOI's affidavit opposing the petition. The case was adjourned again. In September 2004, when the case came up for hearing, the DHC decided that it could not hear the case as Naz did not have the right to come to court since it was not directly affected by the law i.e. that S.377 had not been used to arrest Naz. Therefore, the standing of Naz to approach the court and challenge the constitutional validity of the section did not exist and the case was dismissed. It was explained that public interest litigation (PIL) was a form of approaching court to seek justice on behalf of group of disempowered persons. The court failed to recognise the nature of the petition as a PIL and sought a wrong argument of standing to dismiss the case, which according to LCHAU, was a wrong decision.

Options were available after this dismissal by the court: to go in review before the same court to set aside its own order, to file a special leave petition (SLP) in the Supreme Court (SC) seeking a direction to the DHC that it should hear the petition or to do nothing. This was discussed with Naz and at a meeting of LGBT community members in October 2004 in Mumbai. It was decided to file a review, since this would do no further harm to the status quo even if the review failed. It was also decided that the other options should be put before the LGBT community before deciding a course of action, in the event that the review failed. The review was heard on 3 November 2004, and was dismissed by the court.

EC explained that presently there was no matter pending before the court. At this point he clarified, based particularly on queries from the LGBT community, that there was conscious decision on part of LCHAU, as lawyers, not to interact with the media. However, as there was no case before the courts presently it was not necessary to have such reservations anymore.

The present options were then explained: (1) to not proceed with this case any longer and adopt other strategies; (2) to go to the SC in appeal (SLP) against the order, seeking that on the narrow point of 'standing', the DHC be set aside and the case sent back to be heard by the DHC. In case of an SLP, the arguments would be the same as in the review i.e. that the petition was a PIL and therefore the judgment was a wrong judgment, since a PIL did not require that one had to be directly affected by a law in order to challenge it. If the SLP succeeded the SC would direct the DHC to re-hear the matter. It was important

to note that the SLP would not seek that the SC decides on the constitutionality of S.377, IPC. It would only ask the SC to decide on the narrow point of *locus standi* or standing of Naz to file the PIL. However, it was to be noted that there was a fear that the SC might pass a judgment on S. 377, even though this issue was not brought before the court in the SLP. If the SC did decide on the merits of the case i.e. constitutional validity of S.377, its judgment would become the law for the country. Although it is not often that the SC does take up a matter in such a manner, this did happen in the case where it decided that HIV+ persons do not have the right to marry, although it was not meant to. However, although one could not be certain of how the court would behave, this is something the SC does rarely. Also, if the SC decides to send the case back to the DHC, it is likely that the case would go back to the same judges. Effectively, the case would end up at where it started. (3) Filing a petition challenging S.377 in another High Court. For instance the Bombay High Court (BHC) has historically been the liberal court in the country. But it was impossible to predict if it would look at such a challenge in a friendly manner. It was hard to predict the prejudices that may prevail in a particular judge's mind.

A discussion on the pros and cons of the options then ensued. On a query from NT, MK explained that the petition was filed in the DHC because Naz Foundation was based in Delhi and there was a petition on the same issue pending before it (ABVA petition). This fact turned out to be incorrect and appeared not to be in the knowledge of the petitioners in that case too. In reality the ABVA petition had been dismissed by the court for want of prosecution, which came to light only when the Naz petition came up before the court early on during the challenge. It was explained that if the case had been filed in another court, the government could have requested that as 2 cases on the same issue (ABVA and Naz) were pending before two different courts, the matter should be taken up directly by the SC under its constitutional authority. This would have been a negative development as a prior forum (the High Court) would have been lost. MK also pointed out that JACK, an NGO, had intervened in the case and had pro-actively opposed the maintainability of the petition in a homophobic and hostile manner.

MT suggested that option (1) of not doing anything with the present case but starting a similar campaign to the right to marry campaign should be started, protesting the decision of the DHC as the judgment takes away right to PIL based on the homophobia of the judges. He suggested that LCHAU should take lead on this.

NA pointed out that if a similar case were filed in the BHC, it is possible that the BHC would refer to the DHC decision. NT requested that some discussion about the ABVA petition take place. EC explained that ABVA (one of the first groups doing HIV/AIDS work in India) filed its petition challenging S.377 in 1994 in the DHC. ABVA claimed that condoms were not being distributed in Tihar jail to inmates there and the excuse given was that S.377 did not permit such an initiative from being undertaken as it would aid in the crime of homosexual sex under the section. ABVA argued that this impacted the right to life and health of the inmates and the law should therefore be declared unconstitutional. The case was admitted by the DHC but not heard by it. A copy of the ABVA petition was published in 'Humjinsi'. To the best of LCHAU (and apparently ABVA's) knowledge, the case was pending in the DHC. At the time of the Naz petition

coming before the DHC, the court asked for records of the ABVA case and found that it was removed from the court for want of prosecution.

JRW then stated that NACO should be forced to make a statement about its MSM interventions and own moral responsibility for the same and explain to the court that S.377 was at odds with its essential health and HIV/AIDS programmes. EC pointed out that NACO has been completely spineless and by its own officially published material it admitted to funding 27 MSM interventions.

JK asked whether it was possible that the issue of PILs and standing is taken up before the SC separately and in the meanwhile a campaign should go on simultaneously.

MM asked if in terms of the review petition, was there some way in which judges could be pressured by public opinion. Also, did a review petition always go back to the same judges? EC clarified that a review inevitably went before the same judges as a matter of legal procedure. Also, pressure could be brought to bear on the Attorney General and judges through letter writing. MK however pointed out that pressuring judges in this manner could backfire especially when a matter was pending before them. Also, there was a danger in writing letters as judges could take the letters as a PIL.

XTZ mentioned that LCHAU had taken initiatives to sensitise various policymakers including the NHRC. However, he felt although there have been efforts by various groups on different fronts, it hasn't been ongoing and should be more sustained e.g. with the State HRCs, bureaucracy etc. MK also explained that LCHAU had been sensitizing judges on HIV and related issues with the help of Justices Michael Kirby and Edwin Cameron over the last many years.

VY pointed out a book published by the American Civil Liberties Union, which outlined a structure for making a case for civil rights of LGBT.

MK said that if an SLP were to be filed it had to be done within 90 days of rejection of the review order (i.e. approximately 10 February). He added that if the decision was to file the S.377 challenge in another court, organizations/individuals would have to come forward as petitioners. He questioned whether the present meeting was to decide the option to be followed by consensus (SLP in SC, filing in another High Court, not pursuing the Naz petition further) and if there was no consensus, then what was to be done. He felt that if Naz India instructed LCHAU to file an SLP then LCHAU would be bound to follow those instructions.

MT responded that one of the reasons the present process was started was to make the issue more inclusive for the LGBT community, which it was not initially. However, if MK says that LCHAU will be bound by client instructions to file an SLP then the meeting was pointless. Instead LCHAU should convince the client if there is a genuine risk of an adverse order in the SC. MK agreed with MT's sentiments and said that LCHAU would advise the client accordingly.

CC stated that 2 transgender people (MW and LY) were directly affected by S.377 at Coimbatore the previous week and had presently been remanded. A surety of Rs.30,000 had been asked for. She expressed concerns that gender reassignment surgery (GRS) was not legalized and if transgender people want to marry they can be penalized. They also cannot continue higher education because of non-legalization. EC pointed out that LCHAU had been coming across instances of people seeking GRS and its research suggested that there was some legal recognition of GRS, as reflected in some government documents.

MK then explained that the SC had the plenary power to hear the merits of the petition although it normally did not exercise such power. But there was always some danger that the SC may do so. He opined that it was a calculated risk to be taken.

TO queried whether if the Naz petition is not pursued, would not a fresh case against section 377 have to be filed – was there such a case and is there a party willing to file it? NT pointed out that Humsafar had cases of prosecution under S.377 and asked whether the same case as that filed in the DHC will be filed in the event that another High Court is chosen in which to file it. TO asked whether in the Humsafar instances FIRs had been filed.

ON asked if there was any idea how long an SLP would take to be heard. MK said that it was difficult to say how much time it would take but he estimated 6-12 months. ON asked if it would be better to file a petition in another HC. Secondly, is an appeal against the order on the right to file a PIL not possible to file in another manner. Thirdly, maybe there is another approach by which to challenge S.377 e.g. using the support of women and children's groups to attack S.377. MK agreed that the issue of a right to file a PIL should not be left unchallenged, although he expressed uncertainty about how this could be done in another manner. He explained that if an SLP is filed challenging this narrow point of the DHC order and it appeared that the SC was going to support the view of the DHC then the case could be withdrawn. Secondly, if it was decided that S.377 be challenged in another HC, it could well be another different petition is filed based on a different approach e.g. the HIV argument may not be taken. Thirdly, as regards women and children's groups, the question would be whether we put these views in one petition, in different HCs?

MN asked that if it appeared, as seemed to be the case, that the DHC was not willing to hear the matter, what other strategies were possible? He suggested that if 2 men wanted to marry, could S.377 be challenged in that context as it was a hurdle for the 2 men to get married. Secondly, HIV/AIDS interventions across the country were being supported with government funding. Did this not imply that government is supporting MSM activities? JK added that there are ancient scriptures and sculptures, which depict same sex erotica. Could we not use this in support of the case? Also, could we file at different HCs at different points of time and simultaneously encourage public debate and rake up the issue. As CC said, we could try and ask MW and LY to join this effort. MT said that it would be necessary to first have a look at the FIR / chargesheet in the case of MW and LY.

XTZ stated that if S.377 transgressed human rights, we have to fight against it. Secondly, he pointed out that MSM work impacts directly on women, and it has taken 4 years to put this on NACO's agenda. He said that any attempts against S.377 have to go on parallel tracks and be multi-pronged, including possibly going to different HCs, (e.g. Madras HC has recognised marriage between a man and a hijra for inheritance rights). He explained that Humsafar and Aanchal had approached the Bombay Psychiatric Association and TISS have responded favourably. He pointed out that Hindustan Latex was making jelly for anal intercourse. Can we ask for sales figures from HLL? HD responded to XTZ by saying that at these high-powered meetings it would be important that people from the community attend these meetings and use them as opportunities of pressure-building if possible.

NT said that Aanchal had written a letter to NACO asking that it support the petition but had received no response. PX explained that someone from Sadhana Rout's (NACO) division called and informed Naz of the letter and said that they wanted to work further with the community. They asked us for a resource packet, which was sent, but beyond that there was no other follow-up on NACO's part.

MT said that with reference to NACO there had been a perceptible change. NACO's functioning under the earlier Project Director was sloppy and not pro-active. Now, there was a difference and NACO was not trying to shy away from issues.

XTZ said that over the last 4 years there had been a slow and steady change in NACO's views on LGBT issues. But it was important that bisexual and lesbian groups also write to them to put pressure. The demand should be to direct Project Directors in State AIDS Control Societies to talk to commissioners of police and sensitise them.

MT suggested that it was possible to challenge the DHC judgment by way of a writ and ask for constitution of a larger bench of judges. Even if this is thrown out, it is preferable that S.377 is not used and filed by another group. MK felt filing by way of a writ was a slightly circuitous route, which would make it will be difficult to revive the petition. A fresh petition would have to be filed. But if the DHC order was not challenged, it would become final.

MK said that there are 2 ways of removing S.377: (1) go to Parliament (repeal or amend). For this we need to discuss the workings of Parliament. (2) Court can be asked to read down S.377 as in the Naz case. About marriage and S.377, he added that technically marriage was not an issue here. For instance, though similar provisions have been struck down in the US, LGBT still find it difficult to marry there. Therefore, that will require another battle to be fought. He felt that as NACO had been irresponsible, one of the things possible was for groups to call for a meeting with NACO. To the option of filing simultaneously in different HCs, he reiterated that the SC had the power to withdraw all these similar cases to itself and the government too could seek that the SC do the same.

TO felt that there was no point in forcing NACO and HLL to take a stand. NACO has made it quite clear through their actions so far that they were willing provide material support, but not support the LGBT community on record with reference to the case. He recalled that Alka Gogate (Mumbai District AIDS Control Society) after the Bharosa Lucknow incident, said that she could not sign a letter protesting the incident. The question was whether we wanted to accept this as the reality or continue to work on pressuring these state agencies. He added that we keep hearing of judges who support the issue e.g. Justice Leela Seth has expressed some kind of support in her autobiography. Therefore, can we get retired judges to appear in the courts on our behalf? MK explained that LCHAU has been trying to enlist retired judges' support, but very few judges are willing to openly express support. Also, a retired HC judge cannot appear in a HC, but can in the SC. However, such supportive personalities can be useful for campaigns. He felt that there has been a change of guard in NACO recently, which could be friendlier on the issue and we should try and use this opportunity.

MM asked for a clarification on the number of Respondents in the PIL and suggested that it would be useful to put the strength of the LGBT community behind pressuring the different Respondents.

EC then recapped on several of the suggestions made: accountability and answerability of NACO; broadbasing a campaign and strategies to include women's groups, child rights groups, retired judges and other public personalities etc. he then requested the participants to focus on the legal options (SLP in SC, approach a different HC and not pursue the Naz petition any further).

MT, speaking for Naz Foundation International, said that most partners of Naz International were present at a meeting where legal options were discussed and there was an almost unanimous view that we should not go to the SC because of concerns around the SC's prior conduct in the 'Right to Marry'. He felt that it was necessary to discuss other strategies instead including filing a case through another group in the DHC or try filing a petition in other HCs.

JK felt that it may be worth trying to file similar cases in a couple of HCs on different issues, with individuals filing a challenge claiming their fundamental rights.

TO asked whether it was possible to build up a body of cases on related issues (marriage, censorship etc.) challenging S.377 on those grounds, apart from HIV. He felt that it was important to proceed with an SLP in the SC and expressed concern that any queer organisation could potentially approach the SC on its own irrespective of the views around the table.

MM said that at Voices against 377 it was discussed whether we should continue with a litigation strategy or should we do activism first and then go to court? Voices also felt that broadbasing the coalition was important as they had been doing in Delhi.

NT stated that it was important to come to a kind of consensus on the SLP and other options and requested MK to enlighten the meeting on TO's point of someone else approaching the court on the same issue. She also asked Naz to clarify its position on the issue. PX explained that Naz would go with what emerged from this meeting, which is why the meeting was called for. MK said that TO had rightly pointed out that someone else could go to the SC and there was no stopping that.

ON expressed concern of the risk in the SC overstepping its bounds and going into the merits of the case instead of confining itself only to the narrow issue of PIL and standing. She also said that even if the SLP succeeded, the case being returned to the DHC may also be risky. She suggested that we should include other groups as part of the legal action. A lot of women have been asking for same sex marriages and asking for legalisation. Therefore, one could make a case on this issue: that the presence of S.377 does not allow them to have a social, let alone, a legal recognition. Maybe separate petitions on these issues are possible. She was not aware if child rights groups could come forward, but women's groups could.

BQ said that one of the suggestions of KL (ALF, Bangalore) at a previous meeting was that we should use the lack of legal protection against child sexual abuse as a basis on which to go against S.377.

LA said that if we shut out the SLP option, the judgment of the DHC assumes finality. Then we would have little recourse left. The decision on this should be taken at the meeting.

JRW suggested that since the PIL looks at 'reading down' rather than repeal, maybe we should go to Parliament as an alternative. CC suggested that all NGOs/CBOs should conduct a national-level campaign and then the issue should be taken to Parliament.

MN asked if it would have a better impact if more NGOs/CBOs were also listed as petitioners in the case. MK explained that this was possible but the meeting had to strategically decide whether the SC was the forum to approach through an SLP. If other groups filed intervention applications to be made petitioners in the case, then it is possible that the SC will say that since it is an important issue, it will hear the case. PX asked in a HC case, if groups from all over the country could become petitioners. MK said that this kind of intervention was not possible.

M pointed out that after the Bangalore meeting it was obvious that a campaign has to go on including sensitizing the police, judiciary, MPs, a series of public protests, regional meetings and then a national meeting in Delhi.

JK asked whether if the SLP route were taken, suppose SC said that the case was not worth hearing, would the issue be closed. LA opined that there was such an inherent risk and the ground of HIV/AIDS as a challenge would be closed.

MT clarified that the DHC judgment affects the right to PIL in Delhi in a petition filed by Naz on S.377 and not the issue of S.377 per se. If the judgment is challenged, the SC may not confine itself solely to the issue of right to PIL but could also go into the issue of S.377. Can we go to the SC without bringing up the issue of S.377? ON felt that the right to PIL should be taken on as part of our strategy.

MK explained that the SC has held that a general PIL can be filed by anyone but for a PIL concerning the validity of a law/statute, Justice Sinha of the SC, in a one-line decision, which has been at odds with previous views, has held that ordinarily a PIL cannot challenge a statute.

TO felt that the chances of others filing a challenge to S.377 are very high and this meeting should consider this possibility while deciding on the pros and cons of an SLP strategy. He said that there may even be aggrieved parties, who will directly approach the court. He asked whether we were overstating the danger of the SC going against us and added that the *Bowers* decision of the US SC did not stop the gay movement in the US. EC said that a lot of what the lawyers at the meeting were saying was intuitive, although based on experience. One should assume that the SC was a forum with some sense of responsibility.

MT said that when *Bowers* was decided, the gay movement continued and for 14 years the law continued in place. The balancing act was for LCHAU to see how law could be interpreted in a positive way without getting an adverse decision. Ultimately, the lawyers were responsible.

LA said that in going to the SC, what would be relevant is how the matter is presented, who appears etc. Some personalities can address issues vehemently. Anil Divan would be a good person to ask and consult. MK said that in the SC, if the court is inclined to send the case back to the DHC, we could ask that the case be sent back to a different bench. Sometimes, the SC judges may take note if a senior lawyer mentions it. PX asked what the process was of asking for another bench to hear the case. MK said that there is no process as such, but the SC, when sending back the case to the DHC, has to be asked to reassign it to other judges, but chances were slim.

NT asked what were the options if the SC sent the case back to the DHC (same bench) and we got an adverse judgment. MK explained that it was then possible to go back to the SC in appeal on the merits of the case, which was a decision for the community to take. At that point, it would be important for other groups to intervene in the SC appeal. If the decision was not to go to the SC on merits then alternatively a challenge could be made in another HC e.g. Bombay HC. JK expressed concern that if the Naz case went back before the same judges, their egos may influence an adverse decision.

MT pointed out that in case we lose the case before the SC it could be a problem. But an adverse judgment of the DHC may help us to coalesce together. We can always go to the various HCs. That risk can be taken.

After lunch EC recapped the concerns regarding filing the SLP and the ramifications of such a step. He requested everyone to opine and share their views on such a strategy so that a clear picture could emerge on the course of action that participants felt should be undertaken.

XTZ felt that we should take the risk of going to the SC. It was important to challenge the issue of right to file PIL and keep S.377 in the background. He felt that the legal challenge should continue in this form. In the meantime, mobilisation was necessary and a petition in a progressive HC would also be worthwhile. EC asked what if the SC decided to hear the case on merits and not just to right to PIL to which XTZ proposed that at that point we withdraw the case. He felt that it was necessary to take a chance in order to progress the agenda and gain something.

FA pointed out that at a meeting in Bangalore in December 2004 a view was expressed that it might be hasty to go to the SC and there were courts, which might give a different judgment. Therefore simultaneous petitions could be filed in a few months, which will also give time for social mobilization.

XTZ felt that the right to file a PIL must be reclaimed. JK concurred that the issue of a right to file a PIL should be taken up to the SC, while not raking up issue of S.377. MT expressed concern that the court would nonetheless end up raising it. He then raised the option that another group could challenge the order of the DHC on right to PIL, get a favourable judgment after which the S.377 case could be reinstated. MK said that even if another group e.g. child rights did go to the SC challenging the DHC order, we will have to file a fresh petition.

P pointed out that logistically if an SLP were filed, the court will admit it and issue notice and it will take at least 3-4 months before it went into the matter and heard arguments on the right to PIL. In the meantime, we can start off agitation on a nation-wide basis. MT pointed out that on the contrary in the right to marry case, the SC dismissed the petition in the first instance and then suddenly passed the judgment. P felt that this was a very rare instance.

TO felt that ultimately, the case would end up at the SC and the restricted challenge on the right to PIL gave us more options and should be pursued. XTZ said that there was and should continue to be a parallel strategy of community mobilization.

ON said that we should look at other HCs with a slightly different approach, including changing the petitions slightly. For instance in an approach similar to the *Vishaka* case of using the opportunity to say that S.377 has problems and therefore seeking guidelines from the courts could be a strategy. MK opined that the strategy adopted in the *Vishaka* case was fortuitous and in the *Sakshi* case although the Law Commission did give its recommendations they were not acted upon. Therefore the question was whether we should go by uncharted waters or follow a more regular course where we get an order either upholding the DHC order or setting it aside. He felt it would be best to file an SLP

and if we are thrown out by the SC then we can file a case in another HC challenging S.377 on other grounds, not necessarily pegged on HIV/AIDS.

NA felt that with the kind of risks involved he was not in favour of filing an SLP. M asked that if we end up with a negative judgment from the SC, what would be the point of all the mobilization. JK expressed concern that although the challenge will be on the right to PIL it could end up that the SC will look at the S.377 as the issue.

P felt that if the SC dismissed the SLP, it would be splashed all over the media and this could be to our advantage in terms of spurring a national debate on the issue.

RD felt that if we take the case to another HC, we could get one more chance of an SLP later and therefore we should take a chance with another HC.

TO felt that there could be costs involved in any decision taken at the meeting, but we would lose momentum of this process if we did not pursue the SLP route. Also, if we were contemplating a case in another HC questions such as names of those who will be willing to petitioners in such a case and who will be the lawyer etc. will have to be answered now.

MT felt that if ultimately we agreed to file an SLP, certain checks and balances needed to be in place. For instance groups working on health issues and MSM interventions need to consider that they will be affected in the event of an adverse judgment. Therefore it was necessary to engage with NACO and the Ministry of Health & Family Welfare to get a commitment that an adverse judgment will not affect the MSM interventions and groups doing this work. We also need to strategise the presentation of the case and be alert to the fact that if the case is going the wrong way and then to withdraw it at the right juncture. TO felt relatively optimistic that an adverse judgment will not affect HIV interventions and that the DHC order should be challenged through an SLP in the SC.

NT said that as somebody who had been part of the process since the beginning, she had been surprised at the lack of mobilization within the community and agreed with TO that concrete alternatives should be given before deciding to jettison the SLP option.

MN pointed out that on the issue of marriage, in Tamil Nadu, a couple of marriages have been conducted. If this is taken to the Registrar for recognition and registration is denied it was possible to take this denial as a violation of a right to the state HC. MK said that similar matters have gone to court in other countries but the first hurdle is S.377.

EC asked what the participants who had not expressed themselves felt about the options.

TO pointed out that we do not represent all LGBT groups so we cannot vote. Based on the feedback at the meeting it is then it is up to Naz to decide what to do. NT and MT did not agree with this view.

MK felt that both Naz and LCHAU would like an indication of the strategy to be adopted. Based on the discussions today his view was that it would be worth going to the SC in an SLP and as suggested also pressure NACO.

FA agreed. She asked of the consequences of a situation where if she filed a case in Madras HC saying that MSM interventions have to be stopped since they contravene S.377. MK pointed out that this has happened in Nepal recently and the ABVA petition was with reference to a similar situation. But it would depend on the judge and there was no gainsaying if a judge threw a spanner in the works.

The participants then began expressing their views on the options available:

PS felt that we should explore the options of going to a HC and we should continue with the Naz case in the SC.

NS was concerned about the consequences of an adverse judgment on many of the MSM groups and felt that we should not go to SC.

PP felt we should proceed with the SLP.

LA felt that we should file the SLP but prepare for the eventual dismissal of the SLP.

MM said that it took her the meeting discussions to understand the nuances of the situation. As a representative of Voices Against 377, she explained that the coalition felt that more mobilization and advocacy should take place before pursuing any further litigation strategy. But as an individual, although the deadline was a little uncomfortable, we should file the SLP.

MT said he had already expressed his concerns about going to the SC, but if it had to be field as per the view of the meeting then it should and concerns can be addressed. He emphasised that in the SC, the issue should be confined to right to file a PIL.

BQ said that although he was confused, he felt that after the discussions we should go in SLP to the SC.

ND supported MM's discomfort about the deadline but supported going ahead with the SLP.

KP said that although she was initially not in favour of the SC option, now she supported the option as compared to other strategies.

ON felt that she did not see the deadline of filing the SLP as one beyond which we had no option. She felt we should go to other courts with different approaches.

HD said that he was against going to the SC.

BD felt that we should go ahead with an SLP to the SC.

M expressed fear about the worst-case scenario and felt that the litigation strategy should be part of a larger process.

PVZ felt we should file an SLP.

NT felt that although she had come with the idea that we should not go with the SLP route, after discussions it seemed to be an option worth taking and wished good luck.

XTZ felt there was a momentum right now and said we should go ahead with SLP in the SC but also think of other creative methods.

OM felt that we should go ahead with the SLP.

JRW felt that the SLP was the right thing to do.

RD advised that we go ahead with the SLP and withdraw it if felt that the SC was going against us.

EM felt we should go ahead with SLP.

CC felt that the Coimbatore incident showed that there was persecution and therefore the SLP should be filed.

SF felt that an SLP should be filed.

NSG felt that the SLP should be filed and said that FIRM was thinking of filing similar cases in Kerala.

QP felt that the SLP should be filed challenging the DHC judgment.

SA felt an SLP should be filed.

KB felt that we should proceed to the SC.

NL said we should file an SLP.

Z felt that an SLP should be filed and even if it failed, we are aware of the risks and it should be supported by community mobilisation.

JK said that an SLP should be filed with care taken to focus on the issue of right to PIL only.

Ch. Q felt an SLP should be filed in the SC.

TC said we should file an SLP.

TO said we should go ahead with an SLP.

PM felt we should go to the SC in an SLP and his group will also support the campaign.

RA felt we should go to the SC.

MN said we should go ahead with an SLP.

K said we should go ahead with SLP on the issue of PIL and also challenge S.377 in other HCs at the same time. We should also pressure NACO and HLL etc. If the Coimbatore arrests can be confirmed, these developments should also be used.

AN said he would support the option of filing an SLP and any other venture.

P felt it was important to be positive and pursue the SLP option. He suggested that in the month available we should try and get an environmental group to file an SLP on the right to PIL.

NA said he was opposed to filing an SLP.

VY felt that we did not have another solution and therefore we should pursue an SLP.

BB felt we should go ahead with an SLP. He added that if something went wrong, his group would raise protests and were also willing to walk naked on the street for that purpose.

BA felt we should ahead and file an SLP.

EF we should file an SLP.

F felt we should file an SLP.

Dr. G said we should go to the SC.

FR said he was supportive of filing an SLP.

TH felt we should go to the SC.

CG said we should file an SLP.

KZ said we should file an SLP.

NF felt we go ahead with an SLP.

PX said he was still a little confused and although he felt that it was probably a good idea to go ahead with an SLP, he had an apprehension that the SC will take up the S.377 issue. In that case the strategy should be decided.

DU said that although he came late for the meeting and missed the discussion he agreed with the SLP option. He explained that his group had been working with NACO, which stated that MSM, hijra, sex workers interventions were priorities. He felt that there should be no fear that these will be affected even if there was an adverse judgment.

XB supported the filing of an SLP.

EC said that he was concerned about going to the SC and still unsure whether this was a good idea but would go with the larger consensus. However, he asked that if the SLP is filed, and the SC decided to hear the case on merits, will other groups be ready to join and support the case as intervenors. MT said that if opportunity arose, we would be ready.

EC then sought clarification from MK that if an SLP were filed should other petitions be filed in different HCs as seemed to be the suggestion of some participants. MK opined that strategically this should not be done pending the SLP and we should take a step at a time. He added that it was important to plan on how to engage with NACO, law officers, and law ministry and said he did not fear the right to marry case scenario. He suggested community activists approaching Sonia Gandhi, the Solicitor General etc. and to be optimistic. Assuming the case is sent back to the DHC we have to try and get affidavits of psychiatrists, mental health experts' etc. which Humsafar and Aanchal have already been helping us with. He felt it was important to explore strategies, as ON said and before we take a next step after approaching the SC, we should have a meeting and in the meantime build a momentum.

HD queried regarding NACO that if SC gave an adverse judgment, would funding be hampered. XTZ said this was not likely and that NACO's programmes were with women, children, etc. too and not just restricted to MSM so we should dialogue with those groups.

EC said that since it appeared that broadly the view was that we should go in SLP to the SC, there was no need to discuss the HC option today. He then requested M to give a background on the Bangalore meeting of 13 December 2004 in order to spend some time discussing non-legal strategies.

M explained that in a 2-day meeting in Bangalore (12-13 December) discussions were held on S.377 vis-à-vis women and children's rights and strategies of a campaign. A clear need for a coordinated effort emerged and a coordination committee was set up with representation from each State present at the meeting. On 8 January 2005 a follow-up meeting was held in Mumbai. There several strategies were decided upon: public meetings, rallies, advocacy with police, MPs, similar to DMSC melas, film festivals, development of campaign material and roping in other human rights groups, etc. The 8 Jan meeting felt that groups would decide on what they would do in their local areas, which were identified. However, no one from North India was present at the 8 Jan meeting. It is hoped that by end of February, local meetings would have happened. By end-April/ early-May regional meetings will have been held in Bangalore, Hyderabad, Mumbai, Kolkata etc. By July a national meeting will be held in Delhi. People will go by buses to Delhi. Sangama had some funding for this process although we need to discuss

budgetary issues. The campaign name is the National Campaign for Sexuality Rights (NCSR) for which coordinators have been identified.

P asked to what extent the campaign was involving local councilors etc and whether it was forming a database to get them involved. M replied that the campaign envisaged working with MLAs.

EC said that since the minutes of the Bangalore meeting were not yet circulated, clarification was required on the coordination mechanisms for the campaign. M said that it will be largely through email. Regional coordinators will communicate with locals by phone etc. NT asked why a lot of persons were not informed of the 8 Jan meeting and asked why. M said that people who came for the Bangalore meeting were invited and Sangama did not have everyone's address. It was explained that a committee had been formed in Bangalore and the meeting was for that committee. EC suggested that in the future all persons should be invited irrespective of the fact that they were present at a previous meeting.

MT said that concerns about communication are also present in the running of a campaign e.g. often email IDs are of individuals and not of organizations and it should be that person's duty to inform the organization. Also, although the organiser should make utmost efforts, individuals should also keep themselves informed.

JK said that the National Committee formation was based on presence and that the NCSR was for all NGOs to work. RD differed and said that venue was to be decided although the date was decided.

M clarified that on occasion some emails come back and the committee is an executive committee, not a final decision-making committee. EC pointed out that we have so far confined the meetings to LGBT groups. What about getting other allies in the campaign? He asked if participants felt that they wished to broad-base this and subsequent meetings. MT and M felt that the attempt should be to rope in more and more people.

ON felt that the moment you say that it is a national campaign, it includes everyone. S. 377 affects LGBT most but we should emphasise not only about LGBT but everyone else.

EC asked for suggestions about funding for subsequent meetings after the SLP is filed. He suggested that those working in MSM interventions should hereafter put in a component of funding for attending processes such as this in their project proposals. FA suggested that if we can piggyback on other meetings costs could be reduced e.g. clubbing with regional NCSR meetings.

MK wished to highlight some points. He felt that the focus on S.377 should not be lost in the campaign. And it would be preferable that before we file an SLP, a strong message should go out from NCSR. He also felt that there should be a link between the campaign and the legal strategy. He felt that after the SLP was filed we could have another meeting

but we should work out the means and methods of how to hold another meeting. He also suggested that before the SLP was filed lawyers in the group, or at least those in Delhi, could meet to discuss the draft SLP. MT felt that a pre-SLP-filing meeting should be held in Delhi so that last-minute concerns are thrashed out. Maybe people only with legal background should be asked to be at this meeting. He suggested that the meeting could be at the Naz office in Delhi.

EC then recapped with certain action points: (1) Meeting prior to filing SLP with lawyers in Delhi; (2) Message by NCSR prior to filing SLP; (3) Ongoing formal structure of linkages between the case and NCSR.

ON felt that that the message against S.377 should come out from a broad-based coalition of all progressive groups, and not just LGBT groups.

MN pointed out that at the 8 Jan NCSR Mumbai meeting we did not discuss what are the issues to be taken up by campaign and what will be the effect of any media initiative on judges.

NT mentioned that her group will be having a conference soon and all those interested can join. PX agreed that since we were now talking of a campaign, the content of what we say to media has to be clearly defined. He added that we should be clear that campaign should work locally and regionally and need not rely on a central decision. He asked if it would be okay for LCHAU to draft a media communication on the SLP. EC said LCHAU could do this. MM said that the Voices Against 377 coalition launched the Million Voices Campaign and some of the tools of this could be used for advocacy. Also Voices had a note that it had written that could be of help.

FA pointed out that if individual groups were able to work with local MLAs, then the coordination group should target MPs. There should be a common set of material to be developed and even if it was in English, we can translate it.

FA asked if a website on S.377 could be worth starting or a campaign website. TO felt that logically it would be better for Naz to do this. EC said it could also be the NCSR. TO said that a one-page message should be carefully formulated. XB volunteered to do the writing for the website.

FA said it was very important for different groups to take responsibility for different things in the campaign to engender ownership and expertise. CC said that her organisation would want to take a role in the campaign.

HD said that his organisation had been doing a couple of programmes including film festivals and intend to continue including S.377 as an issue as a contribution to the campaign. He said that some money could also be contributed by SAATHII although if external funding could be organized, it would be better. TO spoke about the film festivals being organised by his network including the screening of the Sangama film, which has raised awareness about the issues. He also pointed out that many people have been

interacting with the English media who are now reasonably sensitized to the issue. But with the exception of Kerala and West Bengal, there seems to be no interaction with vernacular media, which is vital.

MK said that if we have another meeting after the SLP is filed, the way LCHAU envisages it is that it will come up within 15 days of filing i.e. 3rd week of February. A participant suggested that if the case is dismissed at the first instance then a meeting should be held in March. M said that Sangama was thinking of a meeting in early March in Kolkata (around 1-2 March).

To a question as to when can expect the press release be expected to be ready EC said LCHAU will try and put it out by Thursday (13 January).

Meeting concluded.