Notes of meeting to revive discussions on the pending cases related to Section 377
Hosted by Lawyers Collective

Venue: Indian Social Institute, New Delhi
Date: 4 February 2017
Participants: AS, RW, RJ; SA (Naz Foundation India Trust); WA & YZ (Harmless Hugs); KC (Nirantar); WS, NJ, YF; LN & WZ & XO (ICJ); VD (Gaylaxy); BQ (Nazariya); SH & WM (Alliance India); JS (Sangini); WT, HD, KI, HST (SAATHII); YS; LA; FR (CFAR); QE; SW; RR & CF (PLD); GK & MR & S (CREA); LW (TARSHI); MT (Adhikaar); PF& A (Saheli); SJ, CK; XTZ (Humsafar Trust); TO (Gay Bombay); ON (LABIA); NM (via Skype); DQ (Muskaan, Sangli); MTD (Zehen Collective), SB, PA, HD; K (Sappho for Equality); EK (via Skype), DE (DMSC – Anandam), BF (Amitie Trust), RJK & BI (ALF), UC (Ondede & Swatantra), FM& R (Sangama), PN (CLPR), S & HA (Swatantra), SD (Nirangal), QM (Queerala), LF (Saksham Trust), NW, LB; MK, VP, ZZ, PI, MS, HT & RK (Lawyers Collective), EC

EC started the meeting by welcoming all the participants on behalf of the Lawyers Collective (LC), and thanking them for making the effort to attend this meeting, meant to reinvigorate the process of community consultations on the Naz India and related cases seeking the striking down of Section 377, IPC that had occurred in the 2000s. He recognized the limitations in relation to funding and language barriers that the meeting was constrained by, and requested participants to help each other with translation. He also acknowledged that among the many strategies being used to strive for queer empowerment and emancipation, legal/ judicial redress was only one, which this meeting was focused on. He noted that the judicial process has demonstrated unpredictability in dealing with the 377 cases, and therefore there isn't certainty on the legal strategies that may be available for us, the meeting is an attempt to get an idea of this, while also not intending to determine what they should be. Several senior lawyers involved in the case have an expertise, which will inform these decisions. Yet, a consultation like this is important for the community to get an idea of the options that may lie ahead, discuss how queer empowerment is being impacted, and also to share its perspectives on the case going forward. He observed that although participants come from increasingly diverse points of views, and have always have had differences, the court case to rid India of S377 brought us together over the last several years. He provided an overview of the day's agenda, including discussions on the current status of the court cases, possibilities and risks involved with the legal strategy and what could be done to bolster the case. He then read out the a message that he received from IJK, a Kolkata-based queer activist who was unable to attend the meeting, as a note of inspiration and commitment to the cause. After the participants observed a minute of silence for lives lost in queer struggles, a round of introduction of participants took place (including those who joined by Skype).

Discussions on the status of the court cases then ensued. MK thanked EC for taking the initiative in kick-starting the idea for, and planning the meeting. He then candidly explained that experienced lawyers may also not be in a position to anticipate what the Supreme Court (SC) may do or how things will pan out in court. Retreading the key timeline of the case, he pointed out that besides other legal grounds, the curative petition filed by Naz India emphasizes one legal development i.e. the amendment in

the rape law in March 2013. Originally, rape law u/S375, IPC only punished non-consensual penile-vaginal sex. In March 2013, this was changed to criminalize all non-consensual sex, whether penile-vaginal, penile-oral, penile-anal or digital, between a man and a woman. In other words, a man and a woman can engage in consensual non-penile vaginal sex, but the same remains punishable between a man and another man under S377. In the *Koushal* judgment, the SC notices this change but does not note its impact, that is, the discriminatory effect on homosexuals.

Explaining the journey of the case since December 2013, MK pointed out that Naz India filed a review in January 2014, which was dismissed. Thereafter, it filed a curative petition, in accordance with the law laid down in *Rupa Ashok Hurra's* case. He observed that prior to the curative remedy being available, litigants aggrieved by a final judgment of the SC would file fresh petitions under Article 32 of the Constitution, agitating the same issue/case. This was called a 'collateral challenge', but the SC disallowed this practice in *Hurra's* case and evolved a new remedy called the 'curative petition', which is relatively new, used sparingly and still evolving. The *Hurra* judgment lays down that the curative remedy can be resorted to in order to prevent perpetuation of injustice, which is the basis that has been used in the Naz India case.

MK explained that broadly speaking, *Hurra* contemplates two main grounds of which one is centred on the principles of natural justice – has the aggrieved party been heard on the issue? Naz India is claiming that that the SC did not hear us on the question of change in the law on rape and how it impacts us. The other broad ground is miscarriage of justice, for which there is no other remedy except the SC 'curing' the wrong perpetuated by its own judgment.

He opined that repeal of S377 by Parliament does not appear to be a real option as evidenced from the fate of Shashi Tharoor's attempt.

MK then read aloud the SC's order dated 2 February 2016 to refresh memories. He emphasized the SC's statement "that we understand that the petitions raise issues of considerable importance and public interest including the scope of a curative petition itself, so we are minded to refer the matter to a 5-judges bench." Therefore, the SC has opened the door for a full-scale hearing on the constitutionality of S377 before a 5-judge bench, while also allowing opponents to limit the hearing to curative/*Hurra* grounds. In essence, although the S377 cases have a foot in the door, it is not certain that they will receive a full hearing.

MK explained that the Chief Justice of India (CJI) has the prerogative to constitute the bench by picking the 5 judges, which may or may not include the CJI himself. It will not be the usual curative bench, which comprises 3 senior most judges plus the 2 judges who passed the judgment under challenge (since the latter two have retired. MK opined that much depends on the constitution of the bench, which will hear the case. He also noted that after the SC order dated 2 February 2016, some writ petitions challenging S377 were filed under Article 32, which have been tagged with the curative petitions.

MK also pointed out that recently in another matter before him, the CJI said that the constitution bench will be set up to hear cases in the May vacation. It is unclear

whether the S377 cases we will be on that list for May 2017. He pointed out that it would be valuable to get the views of other senior counsel in the case on how they see the next few months unfolding and the likely reception of the S377 cases by a constitution bench.

LN raised the challenge of how to articulate the conflict between S375 and S377 when there is lack of clarity on the scope of the latter provision. MK pointed out that jurisprudence is well-settled that penal law has to be clear, and the lack of such certainty, which impinges on personal liberty is impermissible in law. RR observed that on account of the exemption for marital rape, married women cannot take action against their husbands under S375, and therefore file complaints under S377. MK also noted that S375 only covers non-consensual acts between a man and woman; yet, even if we are wrong in our interpretation that consensual sex between heterosexuals is no longer a punishable offence, the court has not heard us on this, which it ought to have. MM further observed that this makes a powerful case on discrimination against homosexuals, which should be brought to the fore in advocacy.

PN then explained the Article 32 petition filed by UC, IE and W after the 2 February 2016 order. She expressed her view that as this order was positive in that the Court agreed to hear the issue in a full-fledged manner, UC and others felt that transgender issues should also be heard by the SC. Their petition therefore argues that S377 violates fundamental rights of the transgender petitioners. PN noted that his petition happened to coincide with the other Article 32 petition filed by 'eminent' queer persons, which PN, UC and others were not aware of. When the transgender persons' petition came up in the SC, the bench said it should be left to the CJI to decide what is to be done procedurally. PN observed that she was unaware whether their case will come up separately or together with the curative petitions. ZZ clarified that the Article 32 petitions have been tagged to the curative petitions by an order of the SC, passed on the administrative side.

UC then described the perspective from which the transgender persons' petition was filed. They approached the SC to draw attention to the marginalization of transgender persons – they were being evicted from their homes in Bangalore, being accused by police of being child kidnappers, and were subject to raids on their homes, rape and being dumped in beggars' areas. UC spoke of am incident in Mysore when a transgender person was accused of killing a man, and therefore arrested and thrown in the male cell of the jail. Ondede met the judge in Mysore (who had been part of a judicial colloquium on transgender rights and the law organized by NALSA in 2011) who was sympathetic. Thereafter, Ondede brought out a report on violence against transgender persons. Its advocacy includes approaching religious bodies, including churches, to seek their position on S377. UC noted in distress that some transgender friends have asked her why Ondede has taken up the S377 issue. She explained that although the *NALSA* judgment is very positive in recognizing the rights and welfare of transgender people, S377 continues to violate numerous rights including the right to privacy. PN pointed out that one of the grounds in the transgender persons' petition is that S377 is incompatible with the *NALSA* judgment.

MT said that it is important to note what the real impact on the ground is since the *Koushal* judgment. He opined that since the curative petitions are pending in the SC, the matter is sub-judice. Due to this, there is some relief for people on the ground. For

instance, in a blackmail case in Mumbai the police helped the gay man and acted against the blackmailer. The matter is hanging in the SC so it can always be explained to the authorities that the highest court is looking into S377 and therefore they cannot violate queer people's rights. This is a narrow window of protection. On the other hand, ideally the matter will be heard and finally decided in our favour. A balance needs to be found in this situation. Noting that LC has played the leadership role in the S377 case in the higher courts, at a micro level the community needs support i.e. before the police and magistracy. NALSA and other organisations like Human Rights Law Network (HRLN) are helping with this, and LC should reach out to them. MT added that the political situation should also be assessed. The *Naz India* case had a big political impact with the Congress and left parties coming around to support the repeal of S377. But right-wing parties are still against us. State-level amendments to S377 need to be advocated, which the *Koushal* judgment also points towards.

BF sought clarification on how transgender persons are subject to penalty under S377, if as per the rape law amendment, consensual sex between a man and a woman is not an offence, and the NALSA judgment says transgender people have the right to be recognized as male, female or third gender? PN explained that the transgender community is affected in a different way – if a biological male identifies as a woman but has not undergone sex reassignment surgery, then the sexual acts between her and her male partner will still be covered under S377. MT pointed out that S375 covers females as victims, not third gender identifying people. Also, the *NALSA* judgment does not uphold sexual rights of transgender people. MK opined that the *NALSA* judgment had gone beyond S377 and *Koushal*; whether man and woman under S375 only means 'biological' male and female is an open question. Also, it is unclear what happens to transgender persons who identify as a third gender. The situation is fluid, yet the *NALSA* judgment helps the S377 case. WT noted that there is confusion in the law vis-à-vis transgender persons – one the one hand the *NALSA* judgment recognizes equal rights of transgender persons, on the other hand rape law is limited in only recognizing the male and female. Further, the *NALSA* judgment says one need not undergo sex reassignment surgery, and transgender people can identify either within the binary or not. Legal frameworks fail to address issues of marriage and rape vis-à-vis transgender persons, and it is unclear whether transgender people can file cases in cases of such violations.

RW sought clarity on how many other Article 32 petitions have been filed. He observed that the constitution bench of the SC will likely not just examine S377, but also delve into larger issues of constitutionalism, including rights of minorities subject to majoritarian rule/ law. Further, given these times of Hindutva and 'Moditva', where not just LGBT rights but larger issues are at stake, do we have the capacity to take on this constitutionalism debate in the court?

FM revisited the issue of state-level legislative efforts, including those of the erstwhile Congress government in Kerala moving amendments to S377, which they held back, despite Shashi Tharoor, MP from Kerala trying to impress upon his own party. Pointing out that Shashi Tharoor's was a private member's bill in the Lok Sabha, RS said that political parties are not bold enough to take up legislative steps to repeal S377, though they may have openly criticised the *Koushal* judgment. He added that data he is aware of describes the impact of S377 on people's lives in numerous instances, including sexual minorities being picked up by the police while asleep at

home. In relation the use of S377, BI pointed out the need to look at developments in related legal contexts e.g. the Juvenile Justice (Care and Protection of Children) Act (JJA) Amendments of 2015, wherein 16-18 year olds can be tried as adults for serious offences, which may include S377. Also, the Protection of Children from Sexual Offences Act, 2012 (POCSO) already criminalizes adolescent sexuality and sexual expression. Child rights group are collecting data on how amendments to the JJA are affecting children. It was also pointed out that a public interest litigation (PIL) pending in the SC, *Prajwala v Union of India*, seeks directions for the creation of a sex offenders' registry. Some action has already been taken by Haryana in this regard. What are the implications of this in the context of S377?

YF asked whether there was an element that was special to the S377case, that it would be treated differently from other curative petitions. He opined that on the whole the SC has given people little room to be happy or optimistic.

QM spoke on the issue of legislative developments in Kerala – that a recent national conference of youth leaders of left parties raised a demand for S377 amendments in Kerala, and also discussed the proposed state transgender policy. He spoke of an incident in June 2016 when local activists intervened when transgender persons were picked up by the police for doing sex work and kept in detention for 2 nights. He opined that there is potential in Kerala for state level amendments.

TO noting that none of the petitioners in the curative petitions being queer, asked whether the fact that the Article 32 petitions have been filed by queer folks make a difference.

By way of clarification, EC pointed out that LC had invited the lawyers handling the 'eminent' person's Article 32 petition, and one of the petitioners too. Two of the lawyers expressed their inability to attend, and one did not respond. Also, LC had invited HRLN to the meeting but did not get a response. MK responded to some of the aforementioned queries. To RW's query, he clarified that there were two writ petitions tagged with the curatives – one by transgender persons and the other by 'eminent' persons. Further, he opined that the SC will not get entangled in debates/ arguments around larger themes of shrinking of democratic spaces, neo-fascism etc. if and when it deliberates on S377. He noted (to TO's question) that these are useful cases to have given that the petitioners in them are queer people. He agreed that state–level amendments to S377 are positive developments. To YF's question he replied that the specialness of the S377 case is reflected in the order of 2 February 2016 ("considerable importance and public interest"). Further, that many of the senior most lawyers at the bar are appearing on our side helps.

WS agreed that the senior bar was on our side and this would help. While these senior lawyers have sharpened our arguments, we have educated them about ourselves. He emphasized that the opportunity for the curative petition is to enter through the very small window provided by the *Hurra* judgment. Although we could be rejected on maintainability (whether the curative petition is at all worthy of being heard based on the *Hurra* judgment), this will not be as bad as a full-fledged bad judgment if and after the court hears the case on merits. In his view, after the NJAC judgment (on judicial appointments), another ground ("baneful effect on society") exists for revisiting a judgment. He also observed how there need to be efforts parallel to the

goings-on in court, such as the effective work of LC in the late 1990s and 2000s in sensitizing issues of law, HIV and sexuality with the judiciary. It is worth considering how to do this now.

LN raised the issue of the actual use of S377. He pointed out that RTI applications he was involved in to identify FIRs lodged under S377 show that there is not one case of consensual sex. Therefore, as a strategy before the court, prosecution of queer persons may not be a strong argument. He noted that National Crime Records Bureau (NCRB) data on the use of S377 is more detailed, and shows that the majority of the cases are related to child sexual abuse, and of the remaining, there is ambiguity on who the parties (victim and perpetrator) are. This data may be of some use. He pointed out that in the RTIs, information was also sought on the number and nature of cases filed under S389, IPC, which penalizes blackmail. It revealed no cases, which suggests that there may be a lack of access to justice here, whereby people are reluctant to file complaints as such.

PN observed that although the curative petition window was small, the Article 32 petitions will allow the Court to fully hear the issues on merits.

SW asked if more petitions under Article 32 could be submitted, especially in light of the observation on "miniscule fraction" in the *Koushal* judgment. It could put pressure on the SC. Alternatively, it may be worth waiting to see if the curative petitions are thrown out, and if so filing a large number of writ petitions challenging S377 promptly could be a strategy. MT opined that people could be mobilized speedily to file Article 32 petitions, including in relation to issues such as transgender marriage.

NW felt that it was important to maintain momentum, and keep moving; to convey that queer people are not going to be defeated, though they may be constantly encounter difficult challenges. BF agreed with this, and felt that constant efforts needed to be made, not just in relation to the curative petition, but also actions that indirectly influence S377 in the SC.

Revisiting earlier discussions, MK observed that the *NALSA* case was being argued at a time when the *Koushal* judgment had not been pronounced. So, the idea was to use it to advance the *Naz India* judgment. Now we are trying to use the *NALSA* judgment to defeat the *Koushal* judgment. The *NALSA* judgment is only one tool in our armoury. It does not get into rape law, or criminal law for that matter. It just lays the ground for transgender rights. So the issue of rape law and transgender persons was still open. MK also observed that the constitution bench that will hear S377, can potentially not only impact minority rights but an entire jurisprudence on Articles 14, 15, 19 and 21 of the Constitution.

MK opined that constitutional issues in relation to S377 have been raised in the curative petitions, and by virtue of the 2 February 2016 order; if the curative petitions are thrown out, the Article 32 petitions will also go as they are tagged on, and there is no scope for collateral proceedings through the present Article 32 petitions. He also felt that filing a slew of Article 32 petitions was not advisable – keeping some issues in reserve may be better, to raise new issues later, in case the pending cases are defeated. He suggested that advocacy, e.g. online social media petitions demanding repeal of S377 with millions of signatures can be activated, which could be directed

towards Parliament, which has a 'Petitions Committee'. He explained how LC was involved in a similar effort many years prior in relation to conditions of workplace parity for airhostesses.

SJ enquired whether a case originating in an FIR would be helpful, since courts are more careful in dealing with the rights of accused persons. He felt that this may be a worthwhile strategy especially since the *Koushal* judgment itself says that whether S377 applies to consensual adults is to be decided by the concerned criminal court. LB mentioned that the case that HRLN was handling of consenting adults arose out of an FIR, which is now with the curative petition before the SC.

WS emphasized that in the *Naz India* case there is a great High Court (HC) judgment, followed by a poorly reasoned SC judgment in *Koushal* – this is the foundation on the basis of which to proceed. He expressed nervousness about cases involving FIRs against consenting adults, given that the SC is not at its best while dealing with criminal law matters.

QE reminded the meeting to be cautious and consider what there is at stake in the curative petition; after the *Koushal* ruling many young people were traumatized and went into depression – is the community ready to provide the kind of support that people may need if we lose? Whereas the current state of pendency of the case in the SC allows for optimism, which political movements need and thrive on. If we lose in the curative, we risk to will lose that. He added that we should remember that to engage with the law should not confine us to think within the legalistic framework that the law foists. Further, we should avoid thinking in terms of numbers (in the context of "miniscule fraction" and the pressure to demonstrate how many queers actually exist). QE also reminded the meeting of the transphobia that exists within the queer community, and in the room, and since the *NALSA* judgment a bureaucratic machinery has come to be to decide who is transgender and who is not. He felt that in the *NALSA* case the SC failed to address 'gender' within the notion of transgender. This needs to be changed. And, change can happen if we begin to frame things in the context of personhood and not identity, sexuality not sexual acts, and gender instead of transgender. TO asked whether this was the right time to raise S377 in the SC.

VD pointed out that many corporate houses are looking at devising LGBT policies. This could be an opportunity, if it is considered worthwhile to ask them to support the S377 cases, especially since they have LGBT employees as well as business interests.

HT described some of the work LC is handling, including a couple of blackmail cases in Mumbai on behalf of gay men, referred to us by the Humsafar Trust. Initially, there were three cases, of which only 1 survives as 2 clients backed out. Based on this experience it appears that the police do not understand S389 at all. In blackmail cases, they register FIRs on charges of robbery or even kidnapping. LC worked with the police and later the prosecution and got the Magistrate to frame an additional charge under S389. The section talks of "fear of accusation of an offence u/s377". Since being gay is not an offence, in the context of blackmail, the threshold for charge-framing is a bit higher. The accused (blackmailer) had challenged the framing of the charge under S389 before the Sessions Court, which ruled in our favour. The case is now before the Bombay HC. S389 is a direct import from English law. Its scope is discussed in the Wolfenden report, which notes that since gay men are criminalized

under sodomy laws, they are vulnerable to blackmail. In all three cases, the clients met to have sex but did not actually have sex. In other cases, where the client did engage in sex, it is risky because the police want to do a preliminary medical examination, which the client does not want to undergo.

Questions were raised about when the case could likely come up so that the lawyers and the community are prepared, and whether the fate of the curative petitions is tied to the Article 32 petitions. In relation to the former, PN felt that it depended on the composition and timing of the 5-judges bench, which was in the hands of the CJI. On the legal strategy to be followed she opined that certain decisions will be taken independently, which is unavoidable. Yet, attempts should be made to have a broadly cohesive strategy so that the petitions do not undercut each other. She felt that the Article 32 petitions will not be thrown out along with the curative petitions if that is fate of the latter, since the writ petitions challenge S377, not the *Koushal* judgment. Therefore, the chance of a hearing on merits is available in the Article 32 writ petitions.

XTZ pointed out that Humsafar Trust as part of its advocacy has sent letters to all the Members of Parliament (MPs) along with a docket of cases on the impact of criminalization under S377. So far, only three of 544 MPs have responded. He also explained that Humsafar Trust is devising FAQs on queer issues and rights for the media, and has developed a manual for media interaction, and people are being trained in Mumbai to respond to media queries. Acknowledging the diversity of voices, he felt that on such efforts a unified response would be beneficial.

WS explained that the timing of the hearing is not in our hands. We can move to fast-track the hearing but maybe, now is not the time. He reminded the meeting of the vital efforts by LC with Justices Kirby and Cameron to educate and sensitize judges on HIV and the law, and urged that as a community, we need to engage with judges on issues of privacy, equality and others that affect us. This can also be done through models like people's tribunals or public hearings with retired judges. This work should be ongoing.

EC asked participants about what data has been gathered on the impact of S377 on people's lives. This information could assist in the court case, and should be compiled properly. He noted that to his knowledge, NA from Samapathik in Pune was considering an intervention in the SC demonstrating such impact since the *Koushal* judgment. MT felt that cases of violations can be brought to NHRC.

MK felt that it would be possible to discuss with other senior lawyers about whether and when to bring the S377 cases up, which he was willing to do and report back to the community. He opined that if the case was listed to come up in the May vacation, it may be possible to have it deferred due to non-availability of senior counsel; such an option was available for matters listed in Court vacations.

LA opined that when the Article 32 petitions came up in the SC, the bench rejected the plea of the petitioners that they be heard independently of the curative petitions. It simply ordered them to be placed before the CJI, who then directed them to be tagged with the curative petitions. So the fate of the Article 32 petitions would be the same as the fate of the curative petitions. As to hearings before the vacation bench, he said that

it was entirely the petitioner's prerogative whether the case should be taken up then or not; therefore the option to delay also existed.

RW asked if there was an option to withdraw the S377 cases. A question was also posed as to whether a favourable judgment can be reversed or stalled in some way by the government.

MT opined that the recent Jallikatu case was pertinent in this regard, where the state government brought an ordinance to reverse the SC judgment. But the Jallikatu decision of the SC was not based on fundamental rights, whereas the S377 decision will be. Therefore, legislation to reverse a favourable SC decision will be difficult. MK stated that the Jallikatu issue was first dealt with in the *Nagaraja* judgment, and was a matter where fundamental rights were considered. In his view, an SC judgment on constitutionality cannot be undone unless the legislature overcomes the unconstitutionality in the original law.

WS explained that although technically the S377cases can be withdrawn, it would not make sense to do so at all.

KI asked whether state-level amendments to S377 will be difficult to pursue. LN observed whether technically speaking the issue could be considered sub-judice. Also, attempts at state level amendments to S377 could be on similar lines to those made in the Criminal Procedure Code, 1973 on anticipatory bail.

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EC resumed discussions after lunch by focusing on the issue of data on S377 cases and the impact of the *Koushal* judgment on people. He pointed out that some queer activists have been discussing this and the possibility of bringing the material together in one attempt at documentation. This should be done irrespective of the case coming up in the SC in the short, medium or long term.

LN said it would be useful to view data and evidence gathering through four observations made by the SC in *Koushal*: (i) in 150 yrs there has hardly been any prosecution under S377, (ii) HIV has nothing to do with S377, (iii) S377 neither mandates nor condones any persecution, discrimination or harassment of any person or community and, (iv) the meaning of 'carnal intercourse against the order of nature'. It would be best to gather data/materials in support of our cases in countering these observations. He added that actual number of consensual cases being prosecuted under S377 appears to be negligible, and he was not an expert to comment on the health/HIV aspect. On harassment, however, a case on access to justice can be made out, based on the data on harassment, intimidation and discrimination experienced by community members.

EC asked participants to consider how to argue, articulate and demonstrate that S377 is the source of violence, discrimination and harassment, even if it is not used directly in cases of consensual sex between adults. He noted that the Pehchan project had documented instances of this; he proposed that this and other information should compiled for advocacy, but also to be used in court to support the S377 cases.

LN spoke of the RTIs he was involved in filing on the use of S377 by police, but the responses received were not uniform, and the data was not obtained in the format that was desired. Therefore, police stations were asked for FIRs. Haryana gave all the FIRs but there was not a single case of consensual sex. In one case, the FIR was recorded, including a parent stating that "*mere bête ne galat kaam kiya"*. This begs the question whether there may be an element of consent in some cases. But the records do not reveal that. In terms of prosecution, details are not our friend. So, it may be better to rely on NCRB data. He also observed that blackmail cases appear to be coming up more in Mumbai, and not in Delhi; it could be that people are getting picked up under Police Acts and not S377. MT pointed out that FIRs may give us only half-truths. In the first Lucknow incident involving staff of Bharosa/ Naz Foundation International, the complainant was a person with whom there was consensual sex in a commercial context but when one read the FIR, it appeared to be a non-consensual case. The narrative was such that consensual was presented as non-consensual.

HD explained that activists in West Bengal have some RTI data, based on queries sent to the police, Magistrates and Sessions Courts, and the Calcutta HC for data between 1996 and 2014. The responses were similar to what LN shared. The police replied that they have over a 100 cases under S377 but the courts said that they have none before them. So, it seems that cases under S377 have been registered by the police but none have made it to the criminal courts. He added that some amount of HIV data is with the Pehchan project. It is mostly grey literature but can be analysed. It would be helpful if the lawyers could tell us what documentation they expect of CBOs and what sort of data would advance legal arguments.

BI described work at ALF, which is handling a 377 case where the police actively advised the complainant to say that it was non-consensual. This could be perhaps because the police is used to recording complaints under S375 and for them every sexual offence case is about lack of consent. FM spoke of a case where a transgender person married a man and the police threatened to use S377.

RW pointed out that the case data may not be accurate. For instance, official data on child marriages mostly concerns cases of inter-caste elopement of young people. It is difficult to find that one story; sometimes we create a fiction of the social life of the law and its impact on queer people. Moreover, he felt that data is not just required for the court cases. The question should be, what is the impact of the *Koushal* judgment on people's lives? He ventured that not much difference is going to be revealed; criminal law is always used against marginalized people, whichever provision of the law that may be.

SJ said that S377 is increasingly being used in matrimonial cases – when one of the partners is known to be having sex outside marriage, the other partner complains of an offence being committed under S377. This has increased post- *Koushal.*

LN pointed out that Jindal Law School has done study on the impact of S377, which is available on their website.

SD spoke of her work with Nirangal, which works with queer and sex worker communities. This work has evidenced a lot of cases of extortion post-*Koushal*,

especially against well-off gay men. The extortionists blatantly state, *"*we are not worried, you are the criminal.*"* But gay men do not want to file a complaint. None of these cases have gone to the police or been recorded as an FIR. But they have been documented by Nirangal. After *Koushal*, perpetrators have become emboldened.

ON observed that NCRB data reveals POCSO and S377 being invoked against the same person in the same case. This is a misuse of S377. Another wrong use is relying on S377 in marital contexts, when marital rape is exempt from punishment. She felt we need to start highlighting these issues as a campaign strategy; S377 is not just about queer people, it affects everyone.

XTZ said that Humsafar Trust is seeing a qualitative difference in the phone calls that it receives on the counselling helpline. After 2009, people came out to their friends and families. Now, we receive calls from parents and siblings asking if their child/sibling/friend can be arrested for being gay. So we have developed a manual for parents of LGBT persons.

VP gave an overview of some cases pending before different courts in the country, which involve the interpretation of S377.

- The Delhi HC is hearing a case that has questioned the inconsistency between S375 and S377, to the extent that the former contains an exemption for marital rape including for penile-non-vaginal sexual acts whereas the latter criminalizes the same, notwithstanding the marital status of the parties. The outcome of this case may indicate if in light of the amended S375, heterosexual persons will be outside the purview of S377.
- Another case decided by the Bombay HC concerned a relationship that was consensual but later, one of the persons lodged a complaint against the ex-partner under S377. The parties then compromised and the accused person moved the HC for quashing the FIR. He also moved an application to challenge the validity of S377 on fresh grounds, which had not been urged before the SC in *Koushal,* presumably that of consent. The HC declined, saying that *Koushal* is binding. They also rejected the prayer to quash criminal proceedings as the offence in question is a 'serious one' and therefore, no compromise/settlement between the accused and the complainant could be accepted.
- There have been at least two cases of complaints being filed against e-commerce companies for selling sex toys, as this allegedly amounts to aiding and abetting an offence under S377.
- In another case, the Madras HC was dealing with divorce proceedings where one of the parties was gay. The court, on its own, issued notice to the Ministry of Law and Justice as well as the Ministry of Health (of the Central Government) seeking their reply on the decriminalization of same sex relations under S377.
- Another important case pending in the SC is in connection with a Gujarati film on homosexuality, which, though eligible, was denied tax exemption on account of its theme/subject matter. The Gujarat HC passed a well-reasoned judgment in favour of the film, but the State of Gujarat has appealed, on various grounds including S377.

MK added that the Gujarati film case, which LC is handling, revealed the views of some of the SC judges on the issue. There is a possibility of mentioning this case before the CJI, in order to test the waters.

PA said he was reminded of the Desmond Hope case in Goa (2007), where the text of the FIR read that the accused had sex with an underage boy. But in reality, it was consensual and the 'boy' was 20 years old. Justice Britto's order recorded this. He echoed LN's view that details are not our friend. YF recalled a 2008 case in Chengalpet, Karnataka where a foreign national was arrested; his Indian partner was 20 years old. But the allegation was that he was 'lured' by the foreigner. He opined that in cases where one of the parties is a foreigner, there is a certain way that the police go about the FIR.

LN pointed out two live cases in Bangalore: one is of a doctor case who complained of extortion, but was himself apprehended by the police under S377. Charges have been framed in this case. The other case was of a wife who had filmed the husband having sex with another man.

FM spoke of a case in Hassan, Karnataka, which occurred a few days before the *Koushal* judgment was pronounced – 13 men were arrested under S377, of which six were sexually assaulted in jail. The case is still pending but the persons accused are out on bail. Charges have been framed under S377. One of the men who was arrested committed suicide. He was Muslim, had a wife and faced enormous stigma on account of the arrest.

SJ mentioned a case in Delhi where the wife of a doctor in AIIMS committed suicide after finding out that the husband was involved with other men. The husband was arrested for abetment of suicide and under S377.

EK through Skype questioned whether there are any cases of family violence and S377, and how the community should proceed with documentation and use of S377 as a 'proxy'.

LN mentioned a report by PUCL-Karnataka being in the offing, which was what EC had mentioned earlier as an ongoing documentation effort. He also mentioned a project being undertaken on discrimination faced by queer people in multiple contexts, supported by Ford Foundation.

TO pointed out that anecdotally, it is known that the threat of S377 is used by family members who are hostile and unaccepting. However, can these cases be used, where there is no formal action under the law? Also, it would be useful to consider how we can help people in such situations. He encouraged everyone to listen to the debates in the Singapore case challenging its S377A (available on youtube). The substance of the Singapore government's argument has been that we allow gay people to live, work and generate revenue but not ask for any rights. He felt that the Indian state is no different, and it wants queer people to always be potential criminals, unapprehended felons who can be prosecuted whenever they dare to stand up and claim their rights.

RW clarified LN's comment on the Ford Foundation project. It is an engagement in empirical research on discrimination related to non-normative gender and sexuality, access to health, mental health, political formation, education and accommodation. So far, S377 has not emerged as something relevant, except in the context of political formation, where it features as a point of demand/manifesto. ON spoke of researching the access to education part of this project particularly in higher education contexts. The narratives are of queer people's journeys from school to college. She noted that something was emerging on S377 with respect to decriminalization and re-criminalization, but it was too early to get a full sense of it. It was pointed out that conversations in universities are happening around extending sexual harassment reporting and remedies to same-sex/gender contexts, and recognizing the presence of multiple genders on campuses, and the official language is shifting to embrace a broader paradigm.

BI shared that men's advocacy groups undercut the effectiveness of S498A, IPC (cruelty by husband or his relatives) by saying that it's used as 'proxy', and what the wife really wants is property. Therefore, the 'proxy' line of argument is avoidable in the context of S377.

…

EC then requested participants to share the advocacy they are doing in relation to re-criminalization, and the impact of the *Koushal* ruling.

ON explained work with educational institutions in trying to use the Sexual Harassment of Women at Workplace Act, 2013 with the University Grants Commission (UGC) guidelines to expand protection to all genders and all sexualities. She noted that queer campus groups and queer collectives have taken shape over the last few years, and some of them are even recognized by their universities; the rhetoric in queer campus spaces is that one can say one is gay but can't talk about having sex. Nascent debates are ongoing within these spaces, and activists are working with such queer collectives. Harassment occurs due to non-conformity of gender and sexuality.

[Note: many queer campus groups were invited for the meeting, but most did not respond to the email invitations.]

K from Sappho for Equality spoke of also working in educational systems since 2012. She observed that after the 2009 judgment, lesbians and trans men came out. But after the 2013 *Koushal* decision, people have become scared, and justifiably since there have been many reports of violence and violations. She added that Sappho's work includes doing programmes with the police who occasionally call on Sappho to counsel parents of girls who are facing harassment from their families on account of their gender or sexuality. She noted that trans men face a lot of harassment and have little support. Yet, Sappho's efforts are bearing small but significant positive difference.

QM described the work of Queerala in Kerala. He spoke of the academic community being quite supportive, and a recent state level meeting on queer issues. In response to an announcement to publish a queer anthology of writing, it received 150 research

papers on SOGI inclusion issues, of which twenty were selected and published in a journal. This effort has also helped in fostering discussions with academia to encourage research on LGBT lives, as part of an inclusive approach.

QM explained that the focus in Kerala re advocacy is currently on academic institutions. The government has shown receptivity on queer issues. The state transgender welfare board has approached educational institutions seeking reservation for transgender students or proposing an alternative higher education system for transgender students. Attempts are also being made with the social welfare and justice department of the state government to consider a department for transgender studies. Encouragingly, three universities in Kerala now have a compulsory course on gender, and transgender issues are part of these courses. The aim is to expand this to include other queer (LGB) issues too. To address the harassment faced by gender non-conforming students from government appointed counselors, a proposal was submitted to the government to train the counselors on LGBT issues. However, violence faced by queer people is not being systematically documented in Kerala.

BF stated that in West Bengal too, the transgender welfare board is asking for transgender issues be included in the academic curriculum. She pointed out that the nature of violence faced by LGBT persons has change: prior to 2009, community members reported physical violence, but after 2013, it is more of psycho-social violence. People who came out had to go back into the closet. They are unaware of what will happen in the court, and are losing faith in the community. She believed that a national strategy/framework to address this is required. BF also noted that Sappho had developed good-practice guidelines for sex reassignment surgeries, which can be used widely by others.

SD spoke of Nirangal's work with stakeholders and allies – teachers, the women's movement, the Dalit movement. This begins with talking about gender, then gender non-conformity and then criminalization under S377. She observed that violence against transgender persons is visible but the violence faced by gay and lesbian persons remains hidden.

HST spoke of SAATHII's work in advancing issues of sexuality and gender rights in Manipur and Orissa with the community, mental health professionals, health care providers, legal service providers (state and district legal services authority), including at the taluk level. He noted that the *NALSA* judgment had provided a platform on the basis of which this work has become possible. He talked of efforts to push for the creation of transgender welfare boards in these states, and also encouraging community members to seek access to identity cards that record their transgender status. Where there has been little progress on these issues (in Meghalaya and Nagaland) community members are picked up and booked under local police Acts.

MT opined that there are reasons to be optimistic with the way in which queer organizing, support and activism are happening at the local level, and the S377 litigation has brought about unity from an acrimonious past. He acknowledged the leadership roles played by MK and SA in this effort. He felt that the present government is opposed to LGBT rights, because they are opposed to human rights more generally.

ZZ pointed out that after the *Koushal* ruling, a large number of legal advice cases at LC have pertained to extortion and complaints from ex-partners. Further, there have been many cases where wives of gay men, after having found out about the husband's sexual orientation, have wanted to make criminal complaints under S377. Also, lesbians have felt threatened by S377, especially when their parents turn hostile – the fear of S377 is omnipresent. She noted that in government corridors, ministers and bureaucrats are willing to talk about transgender people's issues but not about S377 or the gay community; the excuse that is often given is that the matter is sub-judice.

VP observed that after the *Koushal* judgment, there has been a clear sense of a lack of equal protection of the law for queer persons. In 2010, LC was able to provide some relief to the late Professor Siras by approaching the Allahabad HC, because the threat of S377 did not exist. But that changed after 2013. Today, a gay person who has been wronged is likely to be told that he is the one who is wrong in the eyes of the law. And, in these circumstances the justice system is not seen as available to provide protection. She added that this should also be viewed in the larger context in which basic freedoms appear to be at stake, not just sexuality. And, outside India homo-nationalism is used to claim civilizational superiority, which should be guarded against here.

MK felt that this meeting was another turning point in the road leading away from the oppression of S377. He encouraged the community that although these may be difficult times, it is also the very time to make a breach, in resistance to such times, but in a strategic manner. He felt that the focus should now be to collect the data on the impact of the *Koushal* decision and re-criminalization on people's lives, and be ready to present the same any time in court in the event that it hears the curative petitions and the related cases. He buoyed the meeting to channelize energy towards positive action, and view the journey ahead with optimism. He felt that it was inaccurate to paint the ruling establishment with one brush on the issue of S377 and queer people. There were multiple views within it, as befitting a democracy. He felt that while work on strengthening the court case should be a focus, work on moving for state-level legislative action to amend S377 should also be pursued.

PF concurred with MK and also emphasized that although when a good time to move a particular strategy will never have a certain answer, whichever rights can be wrested for and by queer communities should be; this will also help to others to advance the causes and rights of their movements against marginalization.

In recapitulating EC noted that the sense at the meeting was to not take steps to activate the case, but for the community and lawyers to be ready in the event it was listed for hearing by the SC. He suggested that one near-term first step would be for EC to talk to senior lawyers in the case to get an idea of their views, and LC would share this with participants.

To MT's question to TO about the role of the media, TO responded that the media was generally strongly on the side of the queer community because of groundwork and outreach done over the years, and in multiple languages. He pointed out that orinam.net was a very good media resource. SW added that media PR and outreach was crucial. Electronic media mainly covers events and not much else; it is the print

media that does the sustained and serious stuff, which we will need. She asked the community to think about how outreach could be done in every state. FR agreed that there was strong support in the newsroom for LGBT issues, and that there was a need to expand the outreach to media while also ensuring the coverage of 'feel good' news and narratives.

In response to earlier comments, RW clarified that their position was neither pessimism nor inaction, but about questioning the larger-than-life role given to law and litigation, whereby broader and complex gender and sexuality issues have been reduced to a narrow question of law, and the gusto around litigation can take away from the other dialogues that are going on at other levels. FR urged a re-imagination of the place of the law in queer movements. He added that political action was not about talking to politicians, and observed that many people were being left behind in the Hindutva imagination of the state.

PA spoke of how the *Koushal* decision had crushed him, and recalled how he had interned at LC because he wanted to work on S377, and then went to law school and became a lawyer for the same reason. After the 2013 ruling he never thought he would attend a gay rights meeting, but was glad to be at this one, even though he wished it would have happened a few years ago, and so many years would not have been lost.

NJ recalled some of the earlier debates in case's journey, including 'public' vs. 'private' debate and how the arguments around privacy were shaped. He felt that the data collection could examine and analyze this dimension to the incidents that are documented. He observed that the *NALSA* judgment's opening paragraph spoke of both transgender issues and untouchability, which have made him wonder what inspired the judges to frame this section as such – was this how the issue was framed by the lawyers or was it the judges own thinking? Or was it simply a means to justify the portion of the judgment on reservation? In this context, he reflected on how over the years he has looked at intersectionality and how human rights work turns broad ideas into concrete legal understandings of an issue.

EC concluded the meeting by confirming that minutes would be shared with all invitees, and re-emphasized the need to be on guard and be prepared in the event that the cases were listed by the SC. He noted that while it was reassuring to know that participants had found it to be a necessary and useful gathering that had contributed to re-energisation around the case, the question of meeting again would be left open. He thanked all for a very productive and positive exercise.

Meeting concluded.