

MENTAL HEALTH PROFESSIONALS – WRITTEN SUBMISSIONS

(Dr. SHEKHA SESHADRI AND OTHERS)

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INTRODUCTION

“In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group” (Sachs, J., National Coalition of Gay and Lesbian Equality v. Minister of Justice, South Africa¹, Para 127)

1. The Delhi High Court in *Naz Foundation* judgment² (the impugned judgment) dated 2 July 2009, held that section 377 of the Indian Penal Code in so far as it criminalises consensual sex between adults in private is violative of Articles 14, 15 and 21 of the Constitution. Section 377 is a remnant of Victorian morality, introduced by the British colonial administration to criminalise ‘carnal intercourse against the order of nature’.³ This law has been used to harass, blackmail, and arrest Lesbian Gay Bisexual Transgender (LGBT) persons in the country.⁴ This provision subjects LGBT persons to repressive, cruel and disparaging treatment that destroys their sense of self esteem, inflicts grave physical and psychological harm on members of the LGBT community, inhibits the personal growth of these persons and prevents them from attaining fulfillment in personal, professional, economic and other spheres of life.⁵ Section 377 degrades such individuals into sub-human, second-class citizens, vulnerable to continuous exploitation and harassment.⁶
2. The reading down of Section 377 by the Delhi High Court was widely welcomed by large sections of Indian civil society as protecting the human rights of a vulnerable minority.⁷

¹ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 6 BHRC 127 (CC, 1998), 1998 (12) BCLR 1517 (CC).

² *Naz Foundation v. Government of New Capital Territory Delhi and Ors*, Delhi Law Times, Vol. 160 (2009) 277.

³ *Ibid* at Para 92. For a more detailed explanation see Paras 21-24 below.

⁴ *Ibid* at Para 50.

⁵ *Ibid* at Para 97.

⁶ *Ibid* at Para 22 and Para 66.

⁷ Pratap Bhanu Mehta, “Its About All of Us”, *The Indian Express*, 2 July, 2009 available at <http://www.indianexpress.com/news/its-about-all-of-us/484966/4> See also Ram Jethmalani, “Who’s Afraid of Homosexuality?”, *The Indian Express*, 22 July 2009, available at <http://www.indianexpress.com/news/whos-afraid-of-homosexuality/492537/0>. Also See Kalpana

3. From July 2009, Special Leave Petitions have been filed in the Supreme Court challenging the decision of the Delhi High Court. The petitioners have put forward the following arguments before this Hon'ble Court:
 - ≡ Homosexuality is akin to a mental illness
 - ≡ Homosexuality is a perversion
 - ≡ Homosexuality is not genetic or inborn
 - ≡ Homosexuality is immoral and unnatural
 - ≡ Homosexuality is against Indian culture, values and religion
 - ≡ Decriminalisation of homosexuality will lead to value disorientation among children
 - ≡ Decriminalisation of homosexuality will lead to instances of child sexual abuse
 - ≡ Homosexuality will lead to the spread of HIV/AIDS, prejudicing public health

BACKGROUND OF INTERVENTION

4. The Intervenors are a group of renowned and highly qualified mental health professionals from across the country. Of the 13 mental health professionals, 10 are practicing psychiatrists. The Intervenors, in the course of their professional lives, have interacted with hundreds of LGBT persons across the country. The Intervenors would like to use their scientific expertise to bring a rational and scientific temper to the arguments before this Hon'ble Court.
5. The Intervenors have through their years of experience with counseling LGBT persons realized what an arbitrary and harmful legislation 377 is and wish to use their expertise and experience to help emphasise the importance of the Naz judgment. The Intervenors feel that the impugned judgment of the Delhi High Court removed a major source of stigma and discrimination faced by LGBT persons in India and was rooted in a concrete understanding of the mental and psychological harm that section 377 inflicts on LGBT persons.
6. The Intervenors wish to counter the unscientific and unsubstantiated claims made in the Special Leave Petitions that are opposing the Delhi High Court's decision. The Intervenors feel that irrationality and prejudice are at odds with the

Kannabiran, "India: From 'Perversion' to Right to Life with Dignity", *The Hindu*, 6 July 2009 available at <http://www.sacw.net/article992.html>. See Also Sidharth Bhatia, "Keep Religion out of the Gay Debate", DNA India, 4 July 2009, available at http://www.dnaindia.com/opinion_column_keep-religion-out-of-the-gay-debate_1271112.

Fundamental Duty of every citizen of India under Article 51A (h) of the Constitution of India which is to develop a scientific temper, humanism and the spirit of inquiry and reform. If accepted, the unscientific claims made in the Special Leave Petitions, will lead to irreparable psychological and mental harm to LGBT persons.

7. The Intervenor No. 1 is a reputed Professor of Psychiatry at the National Institute of Mental Health And Neuro Sciences (NIMHANS) Bangalore, a deemed University that functions under the authority of the Ministry of Health and Family Welfare, Government of India. The Intervenor No. 1 has been a faculty member at NIMHANS in the Department of Psychiatry for twenty-five years. The Intervenor No 1 is a highly qualified and well-recognised professional in his field. The Intervenor No. 1's qualifications include an MBBS from the Maulana Azad Medical College, University of Delhi, MD in Psychological Medicine and Diploma in Psychological Medicine from NIMHANS. Bangalore University.
8. The Intervenor No. 1 has published widely in a range of professional journals of internationals standing in the field of psychiatry. The Intervenor No. 1 has in the course of his professional career has presented and participated in numerous professional conferences.
9. As part of his clinical practice the Intervenor No. 1 is providing professional assistance to numerous clients including clients who happen to be Lesbian, Gay, Bisexual and Transgender (hereinafter referred to as LGBT) who approach the Department of Psychiatry. In addition, the Intervenor No. 1 has provided consultations to referrals from other units of NIMHANS. The Intervenor No. 1 has also provided numerous professional consultations with family members of LGBT persons. The Intervenor No. 1 is also currently the Guide of a doctoral dissertation on establishing the legitimacy of homosexuality and addressing egodystonicity as internalised homophobia, the protocol of which has been cleared by NIMHAN's Ethics Committee.
10. The Intervenor No. 2 is a senior psychiatrist, practicing in New Delhi for the last twenty-four years, and currently heads the psychiatric services at the Sitaram Bhartia Institute of Science and Research, New Delhi, a leading multispeciality hospital in New Delhi. Intervenor No. 2 has been involved in clinical practice, research and teaching for the last two decades, and is today regarded as one of the leading psychiatrists of the city.
11. The Intervenor No. 2's qualifications include an MBBS, and an MD in Psychiatry, from the All India Institute of Medical Sciences, New Delhi. Intervenor No. 2 is a Fellow of the Indian Psychiatric Society, a member of the Indian Medical Association, the World Psychiatric Association, the Indian Association of Private Psychiatry, the Indian Association of Biological Psychiatry, the Indian Association of Social Psychiatry, a corresponding member of the American

Psychiatric Association and the International Board Member of the World Association of Psychosocial Rehabilitation.

12. The Intervenor No. 2 has published a number of research papers, has spoken at many conferences, and has organised many continuing medical education programmes. The Intervenor No. 2 is the listowner, and moderator of the mailing list Indian_Psychiatry@yahoogroups.com, an Internet discussion group for psychiatrists. This group, started in 2001, is India's first psychiatry e-group, and is very active till today. The Intervenor No. 2, in his practice, has dealt with many LGBT persons and has helped LGBT persons become more comfortable with their sexuality.
13. The Intervenor No. 3 is a reputed psychiatrist, presently a consultant at Ruby Hall Clinic, Pune. The Intervenor No.3's professional qualifications include M. R. C. Psych, Royal College of Psychiatrists, London, M.D. (Psychiatry), University of Mumbai (Gold Medalist), Diploma in Psychological Medicine, University of Mumbai and M.B.B.S., Seth G.S. Medical College and K.E.M. Hospital, Mumbai.
14. The Intervenor No. 3 is a consultant to the Department of Mental Health and Substance Dependence, World Health Organisation, Geneva. The Intervenor No. 3 has been a Consultant Psychiatrist (May 1999 - April 2000) to the Maharashtra Institute Mental Health, Sasson Hospital Campus, Pune which is the Maharashtra Government's state level apex mental health institute. The Intervenor No. 3 is a member of the Royal College of Psychiatrists, UK and registered with the Maharashtra Medical Council, Mumbai, India. The Intervenor No. 3 is on the International Advisory Board, International Journal of Social Psychiatry since January 2002. The Journal is a premier international peer reviewed publication in the field of social psychiatry, published quarterly by SAGE Publications, London. The Intervenor No. 3 has also been the Co-Editor, Journal of Mental Health, a multidisciplinary peer reviewed journal dealing with Mental Health (October 1997 to April 1999).
15. The Intervenor No.3 has taught undergraduate medical students as well as postgraduate psychiatry residents at the Maharashtra Institute of Mental Health, Pune. The Intervenor No.3 works with patients who are distressed by their homosexuality by helping him/her accept their sexuality The Intervenor No. 3 has a vast number of research publications.
16. The Intervenor No. 4 is an internationally renowned psychiatrist with a special interest in global mental health. The Intervenor No. 4 is currently an International Professor in Global Mental Health, and Senior Clinical Research Fellow in Tropical Medicine at the Centre for Global Mental Health, London School of Hygiene and Tropical Medicine, which focuses on research, teaching and training in policy, prevention, treatment and care in issues related to mental health.

17. The Intervenor No. 4 has made significant contributions to the field of mental health. The Intervenor No. 4 co-founded an NGO that works on mental health issues in Goa called Sangath that won the Macarthur Foundation's International Prize in 2008. The Intervenor No. 4 is an editor of the influential Lancet series on Global Health (2007). The Intervenor No. 4 has been a leader in setting up a new movement for global mental health.
18. The Intervenor No. 4 is the author of the book, "Where There is No Psychiatrist", a mental health care manual for non specialist health care workers, which is widely used in developing countries. The Intervenor No. 4 is involve with research related to social and cultural determinants, epidemiology, and treatment of mental disorders in community and primary health care settings in India and other developing countries.
19. The Intervenor No. 5 is the head of Department, Department of Psychiatry at the Kamala Nehru Hospital, Pune Municipal Corporation, Pune. The Intervenor is a well-recognised psychiatrist and the Member Secretary, CPS (College of Physicians and Surgeons of Bombay) Selection Committee, Pune Municipal Corporation. The Intervenor No.5 is the former President of the Indian Medical Association, Maharashtra state and the former President of the Pune Psychiatric Association. The Intervenor No.5 is a highly qualified and experienced psychiatrist holding a MBBS, DPM, DPH, and LGS and has 25 years of experience in the field. The Intervenor No.5 has professionally assisted individuals of homosexual orientation in coming to terms with their sexuality and helping them become comfortable with it.
20. The Intervenor No.6 is a highly qualified psychiatrist with 14 years of professional experience, and is attached with to the K.E.M. Hospital, Pune. The Intervenor No.6 is an elected member of the Indian Psychiatric Society and is a former Executive Member of the Pune Psychiatrists Association. The Intervenor No.7 is a reputed psychiatrist and a former Lecturer in Psychiatry at the Maharashtra Institute of Mental Health, Pune. The Intervenor No.8 is a Consultant Psychiatrist with Inlaks and Budhrani Hospital, Pune and a Visiting Consultant Psychiatrist at Joshi Hospital and Ratna Hospital, Pune. The Intervenor No.8 is an Associate Member of the Indian Psychiatry Society and a Life Member of the Bombay Psychiatry Society. The Intervenor No.9 is an experienced psychiatrist and psychotherapist with over 20 years experience. The Intervenor No.10 is a reputed psychiatrist based with the Institute of Psychiatry, Kolkata. The Intervenor No. 11 is a psychiatrist with a private practice in Kolkata and is a consultant to a number of organisations that work on mental health issues in Kolkata. The Intervenor No. 12 is a counselor and is the Honorary Secretary of Ishwar Sankalpa, a non-profit organization in Kolkata founded by professionals from the field of psychological well being. The Intervenor No. 13 is a psychotherapist with over 30 years experience associated with Samikshani, a Kolkata based NGO dealing with mental health. A table containing the details of the professional qualifications and experience of

Intervenors Nos. 6-13 in dealing with LGBT issues is produced herewith as **Annexure I**.

LEGISLATIVE HISTORY

21. Section 377's predecessors in the first draft of the Indian Penal Code Lord Thomas Macaulay (Chairperson of the first Indian Law Commission established in 1834), were sections 361 and 362 pertaining to "Unnatural Offences" which defined a severe punishment for touching a person for the purpose of "unnatural lust".⁸ The origin of the "Unnatural Offences" clause can be traced to the Ecclesiastical law of buggery, which then became a standard non-religious law in most of Europe.⁹ The two clauses pertained to "Unnatural Offences," distinguished by the element of consent were:

Cl. 361 Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment ... for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.

Cl. 362 Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment ... for a term which may extend to life and must not be less than seven years, and shall also be liable to fine.

22. Macaulay's Introductory Report on The Indian Penal Code was published in 1837. In his Notes that are published along with the Report, Macaulay refers to the reason why sections 361 and 362 were introduced, which is related to the morality of the British colonisers.

*Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said. We leave, without comment to the judgment of his Lordship in Council the two clauses which we have provided for these offences. We are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this **revolting subject**; as we are*

⁸ Lord Macaulay, "Report on the Indian Penal Code", Kessinger Publishing, La Vergne, USA, 2011, p. 351. Relevant extracts from this document are produced as **Annexure II**. See also Human Rights Watch, "This Alien Legacy: Origins of "Sodomy" Laws in British Colonialism", New York, 2008 pp 16-18.

⁹ Douglas E. Sanders, "377 and the Unnatural Afterlife of British Colonialism in India", *Asian Journal of Comparative Law*, Vol. 4, Issue 1, 2009, p. 8.

*decidedly of opinion that the injury which would be done to the **morals of the community** by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision¹⁰. (emphasis added)*

23. The final version of the Indian Penal Code enacted in 1860 removed the element of consent altogether and read:

Section 377: Unnatural offences – Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment ... for a term which may extend to 10 years, and shall be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.

24. Provisions that criminalise “unnatural offences”, sodomy, and ‘gross indecency between male persons’ still exist in most countries of the Commonwealth even though the sodomy law has been repealed in the United Kingdom following the recommendations of the Wolfenden Committee Report in 1957.¹¹
25. It is submitted that in India, section 377 has been interpreted to include all non penile-vaginal sex. There is substantial documentation to show that section 377, not though its actual use and through the threat of its use, has been used by the police and by goondas to harass, blackmail, torture and arrest LGBT persons.¹²

¹⁰ “Penal Code prepared by Indian Law Commissioners”, The Lawbook Exchange Ltd., New Jersey, p. 47. Relevant extracts of this document is produced as **Annexure III**.

¹¹ Michael Kirby, “Legal Discrimination against Homosexuals- A Blind Spot of the Commonwealth of Nations?”, *European Human Rights Law Review*, No.1, 2009, pp. 1-33. Relevant extracts of this document are produced as **Annexure IV**.

¹² Alok Gupta, “Section 377 and the Dignity of Indian Homosexuals”, *Economic and Political Weekly*, November 18, 2006, pp. 4185-4823. Also People’s Union for Civil Liberties (Karnataka) Report, “Human Rights Violations against the Transgender Community”, 2nd Edn., Bangalore, 2005, pp. 60-63.

ARGUMENT

I. SECTION 377 IS PRIMA FACIE ARBITRARY AND A VIOLATION OF THE MANDATE OF EQUALITY IN ART 14 .

A. Homosexuality is a Natural Variant of Human Sexuality

26. It is submitted that scientific evidence shows that homosexuality, defined as erotic, emotional and romantic attraction principally to one's own sex, is a natural variant of human sexuality and is not a mental disorder or disease. It is submitted that homosexuality is innate and intrinsic to human sexuality. There is a strong evidence to suggest a genetic link to homosexuality¹³, The latest scientific data which have been peer-reviewed and approved by scientists across the world support the notion that homosexuality is caused by a combination of genetic and prenatal environmental factors¹⁴, and thus cannot 'spread' from one to another. These studies conclude that there is a heritable (and hence genetic, DNA-based) component to homosexual behaviour. Homosexuality is a characteristic of an individual mostly caused by 'innate' factors beyond the control of that individual.
27. It is submitted that homosexuality is not unnatural. The animal kingdom is replete with examples of homosexual behaviour and has been recorded in more around 500 species including birds and mammals, in many instances caught on camera.¹⁵ There is extensive scientific documentation of homosexual behaviour among flour beetles¹⁶, rams¹⁷, and even bonobos¹⁸, which are close relatives of humans. Bonobos exhibit homosexual behaviour among males and females.

¹³ For example, a genome-wide scan as reported in Brian S Mustanski et al (2005), "A Genomewide Scan of Male Sexual Orientation", *Hum Genet* (2005) 116: 272–278. These findings are supported by the largest Scandinavian twin-study by Niklas Langstroem et al (2010), "Genetic and Environmental Factor on Same Sex Sexual Behaviour: A Population Study of Twins in Sweden", *Arch Sex Behav* (2010) 39:75–80 and family-tree analysis in Francesca Lemmola and Andria Camperio Ciani, "New Evidence of Genetic Factors Influencing Sexual Orientation in Men: Female Fecundity Increase in the Maternal Line", *Arch Sex Behav* (2009) 38:393–399.

¹⁴ Anthony F. Bogaert, "Biological and Non-Biological Older Brothers and Men's Sexual Orientation", *PNAS*, 11 July 2006 Vol. 103 No. 28, pp. 10771-10774. See also William H James, "Biological and Psychosocial Determinants of Male and Female Human Sexual Orientation", *J. biosoc. Sci.* (2005) 37, 555–567.

¹⁵ Alison Abbott, "Snapshot: But is it Natural?", *NATURE*, Vol. 443, 26 October 2006, p. 895. See also Marlene Zuk, "Family Values in Black and White", *NATURE*, Vol. 438, 23 February, 2006, p. 917.

¹⁶ K. A. Levan, T.Y. Fedina and S.M. Lewis, "Testing Multiple Hypotheses for the Maintenance of Male Homosexual Copulatory Behaviour among Flour Beetles", *J. EVOL. BIOL.* 22 (2009) 60-70).

The diversity of erotic contact in bonobos includes sporadic oral sex, massage of another individual's genitals and intense tongue-kissing.¹⁹ The scientific evidence suggesting a wide prevalence of homosexuality in animals shows a clear association between homosexuality and inherited DNA and environmental factors before birth

B. The Distribution of Homosexuality in the Population

28. While it is difficult to ascertain the exact numbers of self-identifying LGBT persons in a given population, it is widely accepted that about 5-7% of an adult population identifies itself as not heterosexual. One of the first studies on this subject was by American sexologist Alfred Kinsey, who in 1948, by surveying thousands of people, found that homosexuality was much more widely prevalent in the population than earlier believed.²⁰ Kinsey estimated 10% of the population to be homosexual, but this estimate has through subsequent studies been revised to a slightly lower figure. According to the Final Regulatory Impact Assessment: Civil Partnership Act 2004 conducted by the Department of Trade and Industry of the Government of the United Kingdom states that a "...wide range of research suggests that a lesbian, gay and bisexual people constitute 5-7% of the total adult population." These figures are based on studies done across the world and reflect a widely accepted figure across the world that represents an approximate percentage of homosexuality in society.²¹ There are studies and that indicate that LGBT persons constitute a substantial number of persons in Indian society.²² A number of surveys conducted with representative

¹⁷ Charles E. Roselli and Fred Stormshak, "The Neurobiology of Sexual Partner Preferences in Rams", *Hormones and Behavior* 55 (2009) 611-620.

¹⁸ Franz B. M. de Waal, "Bonobo Sex and Society", *Sci Am.* 1995 Mar;272(3):82-8. Bonobos share more than 98 per cent of human genetic profile. De Waal has observed that bonobos show a partial separation between sex and reproduction, an important characteristic of the human species. Relevant extracts from this article are produced as **Annexure V**.

¹⁹ *Ibid* at p. 60.

²⁰ Jack Drescher, "A History of Homosexuality and Organised Psychoanalysis", *Journal of the American Academy of Psychoanalysis and Dynamic Psychiatry*, 36(3) 443 at 449, 2008.

²¹ Final Regulatory Impact Assessment: Civil Partnership Act, 2004, p. 13 available at <http://ebookbrowse.com/final-regulatory-impact-assessment-civil-partnership-act-2004-pdf-d36518333> Extracts from this document are produced as **Annexure VI**.

²² Amita Gupta et al., "Same Sex Behaviour and High Rates of HIV among Men attending Sexually Transmitted Infection Clinics in Pune", *Journal of Acquired Immune Deficiency Syndromes*, December 2006, Vol. 43, Issue 4, 483-490 available at http://journals.lww.com/jaids/fulltext/2006/12010/same_sex_behavior_and_high_rates_of_hiv_among_men.16.aspx. This study shows that 6.6 per cent of over 10,000 men interviewed in a clinic in Pune over a ten year period showed same sex behaviour. See also Ravi Verma Kumar and Martine Collumbien,

samples of the Indian population over the last two decades indicate that a large number of persons have had sexual intercourse with persons of the same sex.²³

C. Homosexuals have no Choice in their Attraction to the Same Sex

29. The amicus brief filed in 2002 by the American Psychiatric Association and the American Psychological Association before the United States Supreme Court in the case of *Lawrence v. Texas*²⁴ where the U.S. Supreme Court struck down the anti sodomy law in the state of Texas states

*According to current scientific and professional understanding, the core feelings and attractions that form the basis of adult sexual orientation typically emerge between middle childhood and early adolescence. These patterns typically arise without any prior sexual experience*²⁵

30. It is submitted that recent studies have shown that most homosexuals have little or no choice in their attraction to members of the same sex.²⁶ An individual's

"Homosexual activity among Rural Indian Men: Implications for HIV Interventions", *Journal of the International AIDS Society*, 3 September 2004 Vol. 18 Issue 13 pp 1845-1847 available at http://journals.lww.com/aidsonline/fulltext/2004/09030/homosexual_activity_among_rural_indian_men_14.aspx which showed that 10% of single men and 3% of married men had anal sex with other men.

²³ The Debonair sex survey in 1991, one of the earliest surveys on the sexual habits of Indian males showed that out of the 81 per cent of the respondents who said they had sexual intercourse, 36.8 per cent said they had done so with another male. "Debonair Sex Survey", *Debonair*, October 1991 in Parmesh Shahani, "Gay Bombay: Globalisation, Love and (Be)longing in Contemporary India", Sage Publications, New Delhi, 2008, pp 186-188. The *Outlook* magazine survey conducted in eight cities in 1996 shows 15 per cent of the respondents as having engaged in homosexual activities. "Sex in the '90s, Uneasy Revolution, *Outlook*, 11 September 1996. (available at <http://www.outlookindia.com/article.aspx?202086>). The Kama Sutra Sex Survey 2004 conducted in 10 Indian cities shows 15 per cent of the respondents acknowledging that they are attracted to the same sex, and of these 51 per cent acknowledge having had sex with a person of the same sex (cited in Parmesh Shahani, "Gay Bombay: Globalisation, Love and (Be)longing in Contemporary India", Sage Publications, New Delhi, 2008, pp 186-188.) According to a survey conducted by Social Scientist Shiv Vishwanathan commissioned by India Today-AC Nielsen-ORG-MARG in 2006, 37% of males between the ages of 16 to 25 in India have had a homosexual sexual experience. The survey is available at <http://www.india-today.com/itoday/20061113/cover.html> According to India Today's 2010 Sex Survey, 9 per cent of its respondents say they have had a homosexual experience. In this survey 6 per cent of the female respondents and 12 per cent of the male respondents said they had a homosexual experience. The survey is available at <http://indiatoday.intoday.in/special/sexsurvey2010/others3.shtml>.

²⁴ *Lawrence v Texas* 539 U.S. 558 (2003).

²⁵ American Psychological Association, American Psychiatric Association et al, Brief as Amicus Curae in *Lawrence v. Texas* 539 U.S. 558 (2003).

²⁶ See Gregory M. Herek, J. Roy Gillis and Jeanine C. Cogan, "Internalised Stigma among Sexual Minority Adults: Insights from a Social, Psychological Perspective", *Journal of Counseling Psychology* 2009, Vol. 56, No. 1, 37. (Relevant extracts are produced as **Annexure VII**) A subsequent larger study that included 898 gay men and 980 lesbians showed 85% of the gay men and 68% of the

sexual orientation is determined by biological and environmental factors as submitted above (See Para 26 and 27 above). Thus homosexuality is not a manifestation of a choice that can be prevented by the presence of criminal law. Just as one cannot choose to be homosexual one cannot choose to abandon homosexual desire.²⁷

31. It is submitted that the contentions put forward by the petitioners that homosexuality is a disease, and can spread from one person to another is not based on any scientific evidence. The concept of homosexuality spreading from one person to another is as ridiculous as saying that the color of the eye can spread from one human to another.
32. A person's sexual orientation appears to emerge between middle childhood and early adolescence.²⁸ It is submitted that sexuality is at the core of an individual's personality, and that this is immutable and hence the question of youth being 'converted' or disoriented into becoming homosexuals does not arise.
33. To criminalise what is an inborn characteristic of human beings over which they have no control is much like criminalizing left handed people for being left handed or blue eyed people for having blue eyes. It is respectfully submitted that Section 377 in targeting LGBT persons whose sexual orientation is immutable, natural and innate, is prima facie arbitrary and a violation of Art 14.

D. Scientific Recognition That Homosexuality is not a "Mental Disorder"

34. It is submitted that according to the latest guidelines of the the World Health Organisation (International Classification of Diseases-10)²⁹ and the American Psychiatric Association (Diagnostic and Statistical Manual-IV)³⁰ followed by mental health professionals across the world, including in India, clearly state that homosexuality is not a mental health disorder. In December 1973 the Board of Trustees of the American Psychiatric Association voted to remove homosexuality per se from the DSM, a decision that was ratified by members of the APA. Subsequently, a new category called ego-dystonic homosexuality was

lesbians reported having either "no choice" or "very little choice" about their sexual orientation. This study is cited in the American Psychological Association, American Psychiatric Association et al, Brief as Amicus Curae in *Lawrence v. Texas*, 539 U.S. 558 (2003), p. 9.

²⁷ There have been attempts to 'cure' homosexuality but these have been widely discredited. See Paras 39-41 below.

²⁸ American Psychological Association, American Psychiatric Association et al, Brief as Amicus Curae in *Lawrence v. Texas*, 539 U.S. 558 (2003), pp. 7-9. Relevant extracts are produced as **Annexure VIII**.

²⁹ World Health Organisation, ICD-10 Classification of Mental and Behavioural Disorders: Clinical Description and Behavioural Guidelines, p. 11..

³⁰ American Psychological Association, American Psychiatric Association et al, Brief as Amicus Curae in *Lawrence v. Texas*, 539 U.S. 558 (2003), pp. 9-12. Relevant extracts are produced as **Annexure VIII**.

introduced in the revised DSM Third Edition in 1980³¹. In 1987 this diagnosis was completely removed from the DSM-III Guidelines.

35. Until its 9th Edition, the WHO's ICD Classification of Mental and Behavioural Disorders included homosexuality as a diagnostic category.³² Homosexuality as a specific diagnostic category was removed from the ICD-10 Classification of Mental and Behavioural Disorders published in 1992.³³ (A copy of these Guidelines is produced as **Annexure IX**). The ICD Classification is used worldwide, including in India, and the ICD as well as various editions of the DSM have been translated into more than 20 languages and have replaced national classifications that were in use prior to 1974.³⁴ In India the medical establishment (i.e. The Medical Council of India, Indian Medical Association and Indian Psychiatric Association) has adopted the WHO ICD-10 system of classification of mental and behavioral disorders but many psychiatrists in India are heavily influenced by the DSM-IV Guidelines. For instance, the Clinical Practice Guidelines for Psychiatrists drafted by the Indian Psychiatric Association has been heavily influenced by the APA's DSM-IV Guidelines.³⁵ It is submitted that homosexuality was declassified as a pathology in China in 2006 in the Chinese Classification and Diagnostic Standards for Mental Illness based on a study conducted by the Chinese Psychiatric Association³⁶.
36. It is submitted that the basis of the DSM and ICD Guidelines to remove homosexuality from the list of mental illness was an important study conducted by Dr. Evelyn Hooker. Hooker conducted a number of standard psychological tests on both homosexuals and heterosexual men to evaluate differences in their psychological adjustment. None of the men in the study were undergoing therapy. Both groups were matched for age, intelligence quotient and education level and subjected to psychological tests. Two independent experts were then asked to rate the overall adjustment in these groups without giving prior

³¹ An egodystonic condition is perceiving sexual orientation or attraction that is at odds with one's idealised self-image.

³² ICD-9 Classification in Appendix E, Diagnostic and Statistical Manual of Mental Disorders (3rd Edn.), American Psychiatric Association, 1987, pp. 433-463.

³³ World Health Organisation, ICD-10 Classification of Mental and Behavioural Disorders: Clinical Description and Behavioural Guidelines, p. 11.

³⁴ George Mendelson, "Homosexuality and Psychiatric Nosology", *Australian and New Zealand Journal of Psychiatry*, 2003; 37:678-683 .

³⁵

Dishanter Goel and Jitender Kumar Trivedi, "Clinical Practice Guidelines for Psychiatrists- Indian Psychiatric Society Guidelines v International Guidelines: A Critical Appraisal", *Indian Journal of Psychiatry*, Vol. 49, No. 4. October-December 2007, available at <http://www.indianjpsychiatry.org/downloadpdf.asp?issn=0019-5545;year=2007;volume=49;issue=4;spage=283;epage=286;aulast=Goel;type=2>

³⁶ "Homosexuality no Longer Considered a Disease in China", *City Weekend*, Beijing, 4 December 2006 available at <http://www.cityweekend.com.cn/beijing/articles/cw-magazine/news/News-04120732/>

knowledge of their sexual orientation. There were no significant differences in the two groups. Hooker concluded from her tests that homosexuality as a clinical entity did not exist and that it was not inherently associated with psychopathology. Hooker's study changed the landscape of homosexual behaviour from one of pathology to a normal type of sexual behaviour in the minds of academicians.³⁷ Based on these findings, the Nomenclature Committee of the American Psychiatric Association conducted a review that lasted more than a year, and then recommended to the Board of Trustees that the APA remove homosexuality "per se" from its Diagnostic Manual. In 1973, the APA voted to remove homosexuality from the DSM-II. Within two years other major mental health professional organisations, including the American Psychological Association, the National Association of Social Workers, and the Association for the Advancement of behaviour therapy, endorsed the APA decision.³⁸

37. A study conducted among homosexual men in Bangalore using a similar method, showed that Hooker's findings do hold good within the Indian context.³⁹ While homosexual men are not inherently associated with psychopathology, the discrimination, stigma and violence they face, leads to minority stress, (See Paras 59-62 below) and greater risk of psychological morbidity, anxiety and suicide. (See Paras 54-56 below)
38. The arguments in the Special Leave Petitions that homosexuality akin to a perversion, paranoid delusion and to rape and murder is not based on any scientific evidence. It is submitted that it is incorrect to link homosexuality to a perversion, paranoid delusion or to rape and murder. It is submitted that the scientific consensus among the mental health profession is that homosexuality per se is not a mental disorder but rather only a normal variant of human sexuality.

E. Efforts to Change Sexual Orientation Have Been Discredited as Unscientific

39. It is respectfully submitted that attempts to 'cure' homosexuality have been discredited and widely seen to be unscientific. There is no scientific evidence to show that sexual orientation can be redirected through therapy. In fact, the potential risks to patients undergoing conversion therapy have led to treatment

³⁷ K.K. Gulia and H.N. Mullick, "Homosexuality: A Dilemma in Discourse", *Indian J Physiol Pharmacol* 2010 54(1) 8.

³⁸ Jack Drescher, "A History of Homosexuality and Organised Psychoanalysis", *Journal of the American Academy of Psychoanalysis and Dynamic Psychiatry*, 36(3) 443 at 450, 2008.

³⁹ Bharath Reddy, "A Comparative Study of Homosexuals and Heterosexuals with respect to Quality of Life, Substance Abuse and Suicidality", presented at the National Conference of Sexology and Reproductive Health, Bangalore, 2006.

protocols to assist them to overcome a wide range of psychological and relational problems that have resulted after undergoing conversion therapy.⁴⁰ However, there are psychiatrists who continue to attempt to 'cure' homosexual clients, sometimes through violent methods such as aversion therapy, and prescription drugs.⁴¹

40. It is submitted that in 2001, a complaint was filed before the National Human Rights Commission (NHRC) related to the case of a patient admitted to the All India Institute of Medical Sciences (AIIMS), Delhi, who was being treated by a doctor in the psychiatric department for four years to cure him of his homosexuality. The patient went to Naz Foundation India, and the coordinator of the MSM project at the time filed a complaint on his behalf to the NHRC.⁴² The treatment reportedly involved two components, counselling therapy and drugs. During counselling therapy sessions, the doctor explicitly told the patient that he needed to curb his homosexual fantasies, as well as start making women rather than men the objects of his desire. The doctor also administered drugs intended to change the sexual orientation of the patient, providing loose drugs from his stock rather than disclosing the identity of the drugs through formal prescription. The patient reported experiencing serious emotional and psychological trauma and damage, as well as a feeling of personal violation.⁴³ After the complaint was filed, a number of letters were written by concerned citizens to the NHRC urging it to protect the rights of the affected individual.⁴⁴ The NHRC, after admitting the complaint finally rejected it. According to reports on this incident, that NHRC did not take cognizance of the complaint because homosexuality was a criminal offence.⁴⁵

⁴⁰ See Douglas C. Haldeman, "The Practice and Ethics of Sexual Orientation Conversion Therapy", *Journal of Consulting and Clinical Psychology*, 1994, Vol. 62, No. 2, 221-227. Relevant extracts are produced herewith as **Annexure X**. Also See American Psychological Association, Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts, 1997, available at <http://www.apa.org/about/governance/council/policy/sexual-orientation.aspx> Also see Judith M. Glassgold et al, Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation, Washington D.C., 2009.

⁴¹ Vinay Chandran and Arvind Narrain, "It's Not my Job to Tell You its OK to be Gay: Medicalisation of Homosexuality, A Queer Critique", presented at the 23rd National Conference on Sexology, Bangalore, October 2006, published in Arvind Narrain and Gautam Bhan (eds.) "Because I Have a Voice: Queer Politics in India", Yoda Press, New Delhi, 2005 pp 49-69.

⁴² Complaint No. (#3920), cited in Arvind Narrain, "Queer: Despised Sexuality, Law and Social Change", Books for Change, 2004, p. 88

⁴³ See Action Alert by International Gay and Lesbian Human Rights Commission (IGLHRC) with respect to medical treatment of homosexuality in India, 2001, <http://www.iglhrc.org> cited in Arvind Narrain, "Queer: Despised Sexuality, Law and Social Change", Books for Change, 2004, p. 89.

⁴⁴

⁴⁵ *The Pioneer*, August 2, 2001 cited in Arvind Narrain, "Queer: Despised Sexuality, Law and Social Change", Books for Change, 2004, p. 88.

41. Thus it is submitted that the contentions put forward by the petitioners that homosexuality is a perversion and is unnatural are irrational and unfounded. Homosexuality is a natural variant of human sexuality, present in human and animals. Homosexuality is innate and caused by genetic and environmental factors before birth. Homosexuality cannot spread from one person to another and is not a disease. Homosexuality has been scientifically proven not to be a mental disorder and sexual orientation cannot be changed or converted. The criminalization of homosexuality is therefore prima facie arbitrary and in violation of Art 14.

II. SECTION 377 DOES NOT FULFILL THE TEST OF PERMISSIBLE CLASSIFICATION AND THE TEST OF ARBITRARINESS, AND IS A VIOLATION OF ART 14

42. There are two tests laid down by the Hon'ble Supreme Court in its interpretation of Article 14:

≡ The test of permissible classification

≡ The test of arbitrariness

A. Section 377 violates the Test of Permissible Classification

43. As per the first test the judiciary has held that a classification made by the legislature is permissible if (i) it can be shown to be based on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differential must have a rational relation to the object sought to be achieved by the statute in question⁴⁶. It is humbly submitted that the classification created by section 377 of 'unnatural sexual offences' lacks intelligible differentia. Section 377 criminalises 'carnal intercourse against the order of nature.' Therefore, for a sexual act to fall within the prohibition of section 377, that act must be 'unnatural'. The provision itself gives no indication of what 'carnal intercourse against the order of nature means' A reading of the provision combined with the case law dealing with the section⁴⁷ indicates that all penile non-vaginal sexual acts fall under the meaning of 'unnatural' under section 377.

44. It is submitted that that homosexuality is widely prevalent not just in any given human population but also among animals and is as 'natural' as heterosexual

⁴⁶ *Budhan Choudhry v. State of Bihar* AIR 1955 SC 191, *Hanif v. State of Bihar* AIR 1958 SC 731; *Harakchand Ratanchand Banthia v. Union of India* 1969 (2) SCC 166, *Pathumma v. State of Kerala* AIR (1978) 2 SCC 1, *Babu Ram v. State of Uttar Pradesh* (1995) 2 SCC 689.

⁴⁷ *Queen Empress v. Khairati* 1884 ILR 6 ALL 204, *Noshirwan v. Emperor* AIR 1934 Sind 206, D.P. *Minwalla v. Emperor* AIR 1935 Sind 206, *Khanu v. Emperor* AIR 1925 Sind 286, *Fazal Rab Chaudhury v. State of Bihar* AIR 1983 SC 323, *Pooran Ram v. State of Rajasthan* 2001 CriLJ 91.

acts. (See Paras 26-27 above) This grouping of 'natural' and 'unnatural sex' where all non-penile vaginal sex is considered unnatural, is therefore suspect. There is therefore no intelligible differential in the classification of 'natural' and 'unnatural' and section 377 therefore does not pass the test of Permissible Classification.

B. Section 377 violates the Test of Arbitrariness

45. As per the second test, a classification will not be justified if it is palpably arbitrary.⁴⁸ This Hon'ble Court has emphasised the importance of this in *Maneka Gandhi's* case⁴⁹ where it was held that the State has to avoid arbitrariness in any form. The Court in this case reiterated what was pointed out by the majority in *E.P. Royappa v. State of Tamil Nadu*⁵⁰, that "from a positivistic point of view, equality is antithetic to arbitrariness". In this judgement the Hon'ble Supreme Court said

Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch (Para 85)

Thus the right to equality has been held to mean not just the right not to be discriminated against, but also protection against arbitrary and irrational acts of the State.

46. This viewpoint was affirmed by the Constitution Bench in *Ajay Hasia v. Khalid Mujib Sehravardi*⁵¹, where it was held that what Article 14 strikes at is arbitrariness because any action that is arbitrary must necessarily involve negation of equality. In this case, this Hon'ble Court clearly said that where an Act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14.
47. It has been scientifically proven that homosexuality is a natural variant of human sexuality, present in human and animals. Homosexuality is innate and caused by genetic and environmental factors before birth. Homosexuality cannot spread from one person to another and is not a disease. Homosexuality has been

⁴⁸ *Re Special Courts Bill* (1979) 1 SCC 380.

⁴⁹ *Maneka Gandhi v. Union of India and Anr* (1978) 1 SCC 248.

⁵⁰ *E.P. Royappa v. State of Tamil Nadu* (1974) 4 SCC 3.

⁵¹ *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722.

scientifically proven not to be a mental disorder and sexual orientation cannot be changed or converted. (See Paras 34 to 38 above)

48. A record of the history of the law shows that the object sought to be achieved was to deter homosexual acts or that were considered to be immoral by the British. (See Paras 21-24 above) It is submitted that there is no rationale in using the criminal law to prevent or deter persons from homosexuality as homosexuality is an innate and unchangeable characteristic, determined largely by genetic and pre natal environmental factors. (See Paras 26-27 above) Homosexuals do not have a choice in their sexual orientation. (See Paras 29-33 above) Criminalising homosexuality cannot, and has not changed their sexual orientation or prevent them from becoming homosexual. Instead, criminalising homosexuality has only lead to mental stress, anxiety and morbidity among homosexuals, reinforce prejudice and stigma against them and force them to live closeted and double lives. (See Paras 57-58 below)
49. The Delhi High Court reiterated the test for a valid classification under Article 14. At Para 88 of the impugned judgment, relying upon the pronouncement of this Hon'ble Court in *Deepak Sibal v. Punjab University*⁵² correctly held that the "Court has also to consider the objective for such classification. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable".
50. Moreover, it is a fundamental principle in criminal law that one must have knowledge or intention in order to commit a crime, and the State could not have intended to criminalise something that an individual has no control over. Since homosexuality is as 'natural' as heterosexuality, neither of which are based on intention or knowledge, homosexuals should not fall within the ambit of the term 'carnal intercourse against the order of nature' as used in Section 377. Criminal intention is attributed when there is lack of consent in a sexual act, whether it is heterosexual or homosexual. Section 377 criminalises all homosexual acts even if they are consensual based on the assumption that these acts are 'unnatural'.
51. The reasons put forward in the Special Leave Petitions for retaining section 377 are irrational and unscientific. It is incorrect to link homosexuality to child sexual abuse and to value disorientation in children. The Intervenors submit that there is no connection between decriminalising same sex acts in private and the causing of so called 'value disorientation' in children. On the contrary, in the opinion of the Intervenors the impugned judgment would have a positive impact by promoting the values of inclusiveness, tolerance of diversity and respect for difference. The Intervenors also submit that the specific decision of the Delhi High Court to retain the applicability of Section 377 IPC to all sexual acts between adults and those below the age of eighteen takes care of the valid concern with respect to having laws to prosecute certain forms of child sexual abuse. Moreover the Union Ministry for Women and Child Development has

⁵² *Deepak Sibal v. Punjab University* (1989) 2 SCC 145.

recently introduced the Protection of Children from Sexual Offences Bill in the Rajya Sabha, a legislation to deal with sexual offences against children thus fulfilling the long-standing demand from human rights groups to fill this lacuna.⁵³ (A copy of the proposed law has been produced as **Annexure XI**). A large majority of convictions under section 377 so far are of heterosexual child sexual abuse, and not homosexual child sexual abuse⁵⁴ showing that child sexual abuse is about violence and power, and not about sexual orientation.

52. The Intervenors further submit that there is no link between the spread of HIV/AIDS and the decriminalisation of homosexuality. It is submitted that the National AIDS Control Organisation (NACO) affidavit before the Delhi High Court during the proceedings of the impugned judgment makes it abundantly clear that Section 377 IPC hinders HIV/AIDS prevention efforts. The U.N. Special Rapporteur for Health on the Right of Everyone to Enjoy the Highest Standard of Physical and Mental Health in his report to the U.N. Human Rights Council in 2010 in his report has said⁵⁵

..a general atmosphere of fear has been the predominant factor in preventing HIV positive individuals from accessing health services and treatment. This atmosphere of fear also impacts on the wider community. In countries where homosexuality is criminalized, the negative association of AIDS with homosexuality can result in individuals who do not engage in consensual same sex conduct avoiding testing and treatment for HIV/AIDS, for fear of being subject to criminal sanctions, violence or discrimination (Para 19, page 8)

53. It is submitted that the classification of homosexuality as unnatural sex and its criminalization is palpably irrational and does not meet the test of arbitrariness and is therefore in violation of Art 14

III. SECTION 377 VIOLATES THE RIGHT TO LIFE AND THE RIGHT TO LIVE WITH DIGNITY GUARANTEED UNDER ART 21

⁵³ Krishna Tirath, "Tough Child Abuse Bill Introduced in Rajya Sabha", Times of India 23 March 2011 available at http://articles.timesofindia.indiatimes.com/2011-03-24/india/29182019_1_penetrative-sexual-assault-sexual-harassment-sexual-offences-bill See also "Law to Deal Exclusively with Child Sexual Offences on Track", DNA 23 March 2011 available at http://www.dnaindia.com/india/report_law-to-deal-exclusively-with-sexual-offences-against-children-on-track_1523337 .

⁵⁴ Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals", *Economic and Political Weekly*, November 18, 2006, pp. 4185-4823.

⁵⁵ Report of the United Nations Special Rapporteur on the Right of Everyone to Enjoy the Highest Standard of Physical and Mental Health, A/HRC/14/20, 27 April 2010, p. 8.

A. Section 377 leads to Higher Risk of Psychiatric Morbidity and Suicide among LGBT persons

54. It is submitted that Section 377 has caused enormous mental and psychological distress to LGBT persons placing them at a significantly higher risk of psychiatric morbidity and fatal outcomes like suicide. The United Nations Special Rapporteur on the Right of Everyone to Enjoy the Highest Standard of Physical and Mental Health in his report to the U.N. Human Rights Council in 2010 has pointed out the adverse impact of the criminalization of same-sex conduct on the physical and mental well-being of homosexuals.⁵⁶ In his report he says

The Special Rapporteur believes that criminalization has adverse consequences on the right to health of those who engage in consensual same-sex conduct, through the creation of the societal perception that they are “abnormal” and criminals. This has a severe deleterious impact on their self-regard, with significant and sometimes tragic consequences, on their health seeking behaviour and mental health. Rates of suicide attempts among youth who engage in consensual same-sex conduct have been variously reported as being between three and seven times higher among youth who identify as heterosexual⁵⁷; the rate are similar for adults. (Para 17, page 8)

A copy of the relevant extracts from the U.N. Special Rapporteur’s Report is produced as **Annexure XII**.

55. It is submitted that the mental health problems that homosexuals face are not inherent, and are a result of a combination of sexual stigma, low self worth and social and institutional discrimination that they face.⁵⁸ ‘Sexual stigma’ is negative regard, inferior status, and relative powerlessness that society collectively accords anyone associated with non-heterosexual behaviour, identity, relationships and communities.⁵⁹ Scientific studies have shown a direct correlation between increased mental health disorders among LGBT persons

⁵⁶ Report of the United Nations Special Rapporteur on the Right of Everyone to Enjoy the Highest Standard of Physical and Mental Health, A/HRC/14/20, 27 April 2010.

⁵⁷ C. Mahon, “Sexual Orientation, Gender Identity and the Right to Health”, in Swiss Human Rights Book, Vol. 3, Realizing the Right to Health, A. Clapham and M. Robinson (eds.) (Rüffer & Rub, Zurich, 2009), p. 236 cited in Report of the United Nations Special Rapporteur on the Right of Everyone to Enjoy the Highest Standard of Physical and Mental Health, A/HRC/14/20, 27 April 2010 at p.8.

⁵⁸ Kenneth H. Mayer, Judith B. Bradford, Harvey J. Makadon, Ron Stall, Hilary Goldhammer, and Stewart Landers, “Sexual and Gender Minority Health: What We Know and What Needs to be Done”, *American Journal of Public Health*, June 2008, Vol. 98, No. 6, 989-995. British psychiatrists in a series of systematic studies have concluded that homosexuals because of social stigma are at a higher risk of mental disorders like suicide ideation and deliberate self harm. See Michael King et al, “A Systematic Review of Mental Disorder, Suicide, and Deliberate Self Harm in Lesbian, Gay and Bisexual People”, *BMC Psychiatry* 2008, 8:70.

and institutional discrimination including legal discrimination. Mood disorders, generalised anxiety disorders including hopelessness, chronic worry, and hypervigilance, are common psychological responses to perceived discrimination.⁶⁰

56. In India many same-sex couples have committed suicide because of social ostracism, violence from society and from families,⁶¹ and pressure from society and their families to break off their relationship with their partners or lovers and marry individuals chosen by their families.⁶² Newspaper reports of double suicides of lesbian couples unwilling to be separated are the most visible indicator of the difficulties endured by same sex couples in India.⁶³ Sahayatrika, an organization in Kerala that is a support group for lesbians⁶⁴, has compiled details on 20 instances of same sex couple suicides reported in the state from 1992 to 2003. These details have been produced as a table in **Annexure XV**.

B. Section 377 forces LGBT Persons to Conceal their Identity

57. It is submitted that many LGBT persons are forced to live in the closet i.e. forced to conceal their identity, because of Section 377. The need for self-concealment has deleterious effects on mental health. The need for self-concealment also contributes to social anxiety among LGBT persons. Perceiving one's social environment as threatening and fearing social interactions is referred to as social anxiety.⁶⁵ Legal scholar Kenji Yoshino

⁵⁹ Gregory M. Herek, J. Roy Gillis and Jeanine C. Cogan, "Internalised Stigma among Sexual Minority Adults: Insights from a Social Psychological Perspective" *Journal of Counseling Psychology* 2009, Vol. 56, No. 1, 32-43.

⁶⁰ Mark L. Hatzenbuehler, Katie A. McLaughlin, Katherine M. Keyes, and Deborah S. Hasin, "The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study", *American Journal of Public Health* (March 2010) Vol. 100, No. 3, 452-459 produced as **Annexure XIII**.

⁶¹ Bina Fernandes and N.B. Gomathy, "Voicing the Invisible: Violence Faced by Lesbian Women in India", in Kalpana Kannabiran (ed.) "The Violence of Normal Times: Essays on Lived Women's Realities, Zed Books/Kali for Women, New Delhi, This essay is produced as **Annexure XIV**.

⁶² Ruth Vanita, *Love's Rite, Same Sex Marriage in India and the West*, Penguin Books, New Delhi, 2005, pp 134-136 . Also see Deepa V.N., "Queering Kerala" in Arvind Narrain and Gautam Bhan (eds.), *Because I Have a Voice: Queer Politics in India*, Yoda Press, New Delhi, 2006, pp. 179-186.

⁶³ "Harassed Lesbian Couple ends Life" *Times of India*, Chennai, 18 May 2008 available at http://articles.timesofindia.indiatimes.com/2008-05-18/chennai/27750870_1_relatives-husbands-christy-jayanthi-malar . See "Lesbian Couple Commits Suicide", *Times of India*, Kolkata, 24 Jan 2011 available at http://articles.timesofindia.indiatimes.com/2011-01-24/kolkata/28367047_1_girls-suicide-lesbian-couple.

⁶⁴ For a detailed account of Sahayatrika's work see Deepa V.N. "Queering Kerala: Reflections on Sahayatrika", in Arvind Narrain and Gautam Bhan (eds.), "Because I Have a Voice: Queer Politics in India", Yoda Press, New Delhi, 2005, pp. 175-196.

describes how LGBT persons are forced to “manage their identity” and to pass as “normal” to avoid being judged by society

*“To pass” can mean to ‘judge’ as in ‘pass on’ a particular issue. Yet when used in the context of human identity, “to pass” means to be judged, or more precisely, to be misjudged, to be held or accepted as a member of ..a group other than one’s own. The concept of passing assumes that the passer fails to convert the underlying identity, secretly retaining it even as she presents a separate face to the outside world..*⁶⁶

58. Many LGBT persons in India lead double lives⁶⁷ seeking to arrive at a compromise between their emotional and sexual needs, and the stigma with which they are branded by society. Other lead lonely lives, scared to bring too much attention to themselves and unable to find spaces where they can be themselves. This situation predisposes LGBT persons to greater risk of psychiatric morbidity, depression and even suicide. (See Paras 54-56 above) In India, many gay men, as a result of social anxiety and family pressure get married to women, leading to unhappy and unconsummated marriages and a tragic situation for their wives.⁶⁸

C. Section 377 Contributes to “Minority Stress” among LGBT persons

59. It is respectfully submitted that homosexuals are prone to ‘minority stress’ which are unique stressful experiences experienced by homosexuals and results in higher risk of mental health problems including depression, suicidal behaviour, anxiety, and other forms of psychiatric distress.⁶⁹ ‘Minority stress’ is caused by stigmatization, incongruence between minority person’s culture, needs and experience and societal structure, internalized prejudice, expectation of rejection and discrimination and actual events of discrimination and violence.⁷⁰

⁶⁵ Daniel J. Potoczniak, Mirela A. Aldea, and Cirleen DeBlaere, “Ego Identity, Social Anxiety, Social Support and Self Concealment among Lesbian, Gay and Bisexual Individuals”, *Journal of Counseling Psychology*, 2007, Vol. 54, No. 4, 447– 457.

⁶⁶ Kenji Yoshino, “Covering”, *Yale Law Journal*, December 11, 2001, Vol. 111, 813 available at <http://www.yalelawjournal.org/the-yale-law-journal/content-pages/covering/>.

⁶⁷ Shakuntala Devi, *The World of Homosexuals*, Bell Books, New Delhi, 1977, p 107.

⁶⁸ *Whistling in the Dark: Twenty-One Queer Interviews* (eds. R. Raja Rao and Dibyajyoti Sarma), Sage Publications, 2009, pp 74-84.

⁶⁹ Ilan H. Meyer, “Prejudice, Social Stress and Mental Health in Lesbian, Gay and Bisexual Populations: Conceptual Issues and Research Evidence”, *Psychol. Bull.* 2003 September ; 129(5): 674–697.

⁷⁰ Craig R. Waldo, “Working in a Minority Context: A Structural Model of Heterosexism as Minority Stress in the Workplace”, *Journal of Counseling Psychology* 1999, Vol. 46, No. 2, 218-232.

The reason for 'minority stress' is not inherent and lies in experiences of social discrimination and sense of low self worth (self-stigma), lack of social support including family support, need for self-concealment.⁷¹ The most explicit reasons for 'minority stress' are rejection, discrimination and violence that LGBT persons face.⁷² Anti-sodomy statutes by fostering a climate of intolerance, reinforcing stigma, and compelling LGBT persons to conceal themselves, contribute to minority stress.⁷³

60. A recent study on the mental health needs of Lesbian, Gay and Bisexual youth in India shows that they face a sense of isolation, and confusion and difficulty in reconciling messages from the external world that bombard rigid images of heteronormative and gender appropriate behaviour and internal processes and feelings.⁷⁴ (A copy of this study has been produced as **Annexure XVI**) This study shows that invisibility, silence and a lack of language to express desires is a major issue that Lesbian, Gay and Bisexual youth face in India.⁷⁵ The study was conducted among 40 men and women in Pune and Mumbai in the range of 21-31 years. This study shows that most of the emotional disturbance experienced by homosexuals around their sexual orientation is psychosocial, due to a sense of alienation in an unaccepting environment. Living with constant uncertainty & threat, homosexuals are more prone to low self-esteem, depression and suicidal thoughts as they feel that in a society which they will not be accepted.

61. Some of the responses in this study demonstrate this sense of isolation and of being different leading to enormous mental stress. A lesbian woman from Mumbai talking about experiences said

*I was like at that time isolated...I was the only woman in Bombay who feels this way ..I mean no one feels the same way like me. And where do I find them? And I was under real stress...*⁷⁶

62. One lesbian respondent from Mumbai described her attempts to develop interest in the opposite sex

⁷¹ For an account of anxiety faced among homosexuals in India See Shakuntala Devi, "The World of Homosexuals", Bell Books, New Delhi, 1977, p. 107.

⁷² Ilan H. Meyer, "Minority Stress and Mental Health in Gay Men", *Journal of Health and Social Behaviour* (March 1995), Vol. 36, No. 1, 38-56.

⁷³ American Psychological Association, American Psychiatric Association et al, Brief for Amicus Curiae, *Lawrence v. Texas*, citation, pp 28-30.

⁷⁴ Ketki Ranade, "Process of Sexual Identity Development for Young People with Same-Sex Desires: Experiences of Exclusion", *Psychological Foundations – The Journal* (2008). Issue 1, Vol. X, pp. 1-15.

⁷⁵ Ibid.

⁷⁶ Ibid at p. 6.

Ya, I could find that I was different. Even when I was in St. Peter's (name of school changed) I was liking girls a lot and I could see that all these girls are attracted to boys. I was feeling that maybe I will also write a love letter to a boy sometime. And I tried my best to have crushes on boys but it was just not real. It was like..Like telling a heterosexual girl that you must like girls ..so society was telling me that I should like a boy it was not coming only, it was not happening naturally for me..⁷⁷

D. Right to live with Dignity Recognised as an Integral Part of Art 21

63. It is submitted that the Hon'ble Supreme Court, recognised that the Right to live with Dignity as a dimension of Art 21. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others*⁷⁸, Justice P.N. Bhagwati explained the concept of right to dignity in the following terms:

"... We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings...Every act which offends against or impairs human dignity would constitute deprivation pro-tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."
[Para 8]

64. The expression "dignity of the individual" finds specific mention in the Preamble to the Constitution of India. In *Prem Shankar Shukla v. Delhi Administration*,⁷⁹ Justice Krishna Iyer held that "The guarantee of human dignity forms part of an Constitutional culture."
65. The Hon'ble Supreme Court in the *Aruna Ramachandra Shanbaug* case has reiterated that the right to live with human dignity is a fundamental right of every Indian citizen.⁸⁰

E. Right to Dignity Protects Development of Sexual Identity and Personhood

⁷⁷ Ibid.

⁷⁸ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors* (1981) 1 SCC 608.

⁷⁹ *Prem Shankar Shukla v. Delhi Administration* (1980) 3 SCC 526.

⁸⁰ *Aruna Ramchandra Shanbaug v. Union of India and Ors* 2011(2)UJ771(SC), MANU/SC/0176/2011, Para 15.

66. The Delhi High Court in Para 48 of the impugned judgment stated

“In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution”

67. The Delhi High Court in the impugned judgment further held

It is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others.

68. It is submitted that the protection of the dignity of the individual is emphasised in the Preamble to the Constitution of India. The Right to Dignity is intimately linked to protecting the personhood of the individual. In *National Coalition for Gay and Lesbian Equality and others v. Minister of Justice and others*⁸¹ where the constitutional validity of the anti-sodomy law was challenged and held to be unconstitutional, Ackermann J. said

“The criminalization of sodomy in private between consenting adults is ... at the same time a severe limitation of a gay man's rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays” (Para 36)

A copy of this judgment is produced as **Annexure XVII**.

69. The Canadian Supreme Court in *Law v. Canada (Ministry of Employment and Immigration)*, [1999 1 S.C.R. 497] while explaining the concept of dignity link human dignity to ‘psychological and physical integrity’.

“Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair

⁸¹ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 6 BHRC 127 (CC, 1998), 1998 (12) BCLR 1517 (CC)

treatment premised upon personal traits or circumstances, which do not relate to individual needs, capacities, or merits. It is enhanced by laws, which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society.”[at Para 53]

A copy of this judgment is annexed at **Annexure XVIII**.

70. The Delhi High Court in Para 97 of the impugned judgment referred to the Canadian case of *Vriend v. Alberta*⁸² where the Canadian Supreme Court recognised the psychological harm from concealment of one’s true identity to the harm caused to the dignity of the individual.

“Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates [sic] the view that gays and lesbians are less worthy of protection as individuals in Canada’s society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.”
[Para 102]

71. Thus, Section 377 by leading to higher rates of suicide and psychological morbidity, forcing LGBT persons to conceal their identity, and contributing to “minority stress” among LGBT persons, violates the Right to Life and the Right to Live with Dignity of LGBT persons guaranteed under Art 21.

IV. SECTION 377 BY DENYING LGBT PERSONS THE OPPORTUNITY TO FORM INTIMATE ATTACHMENTS VIOLATES THE RIGHT TO PRIVACY GUARANTEED UNDER ART 21

A. Criminalizing Sexual Intimacy Deprives LGBT Persons from Participating in a Fundamental Human Experience

72. It is submitted that Section 377 by criminalizing sexual intimacy between adult consenting adults of the same sex, deprives homosexuals of the right to

⁸² *Vriend v. Alberta* 1998 1 S.C.R. 493.

participate in a fundamental human experience. Sexual attraction and intimacy are important components of romantic relationships, and is essential to physical and mental well-being (See Para 73 below). Sexual orientation is thus inextricably linked to the close bonds formed between human beings to meet their personal needs for attachment, love, and intimacy. Section 377, by prohibiting sexual intimacy between persons of the same sex strikes at the root of human need and impulse, and prevented the formation of personal bonds between human beings that fulfill the human requirement for love, attachment and intimacy. Depriving persons of sexually expressing themselves, whether they are heterosexual or homosexual, affects their physical and mental well-being. (See Para 73 below) By criminalising sexual acts that are a part of the very sexual expression of LGBT persons, the State seeks to deny LGBT persons the right to form intimate attachments.

73. The Delhi High Court in the impugned judgement (Para 41) cites the U.S. Supreme Court case of *Bowers v. Hardwick*⁸³, where the constitutionality of the anti-sodomy law in the U.S. state of Georgia was challenged, and upheld by a narrow majority, Blackmun, J. in his dissent cited the following passage from *Paris Adult Theatre I v. Slaton*, [413 US 49 (1973), page 63] : “Only the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.”

A copy of *Bowers v. Hardwick* is produced as **Annexure XIX**.

B. The Right to Privacy is an Integral Part of the Right to Personal Liberty guaranteed by Art. 21

74. The Hon'ble Supreme Court has held that the Right to Privacy is an integral part of the Right to Personal Liberty under Article 21. The High Court in the impugned judgment correctly relies upon the judgment of the Hon'ble Supreme Court in *Kharak Singh v. State of Uttar Pradesh*⁸⁴ wherein Justice Subba Rao held

*It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.*⁸⁵

⁸³ *Bowers v. Hardwick* 478 U.S. 186 (1986).

⁸⁴ *Kharak Singh v. State of Uttar Pradesh* AIR 1963 SC 1295.

⁸⁵ *Ibid* at Para 31.

This was reiterated in *Gobind v. State of Madhya Pradesh*.⁸⁶

75. Reiterating this further, the Delhi High Court in the impugned judgment recognised the constitutional protection of the Right to Privacy and the Dignity of LGBT persons.

“In the Indian Constitution, the right to live with dignity and the right of privacy both are recognised as dimensions of Article 21. Section 377 IPC denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21 of the Constitution. As it stands, Section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under Article 21 of the Constitution” (Para 48).

C. Right to Privacy includes the Right to Make Decisions about Intimate Aspects of One’s Life

76. It is submitted that the Hon’ble Supreme Court in the case of *District Registrar and Collector, Hyderabad v. Canara Bank*⁸⁷ has recognised that the right to privacy is also premised upon the personhood of the individual. This observation was based on several decisions of the United States Supreme Court, in particular *Griswold v. State of Connecticut*⁸⁸, where it was held that the right to privacy included the right to make decisions about the intimate aspects of one’s life. The Hon’ble Supreme Court similarly expanded the right to privacy to mean that the individual has the right to determine, make decisions and choices without the interference of the State. This right to privacy refers to the freedom from unwarranted interference, sanctuary and protection against intrusive observation and intimate decision to autonomy with respect to the most personal of life choices.
77. The Delhi High Court, in the impugned judgment, recognised that the Right to Privacy protected by Art 21 includes both ‘zonal’ and ‘decisional’ privacy. The court held that privacy deals with ‘persons’ and not ‘places’

For every individual, whether homosexual or not, the sense of gender and sexual orientation of the person are so embedded in the individual that the individual carries this aspect of his or her identity wherever he or she goes. A person cannot leave behind his sense of gender or sexual orientation at home. (Para 47)

⁸⁶ *Gobind v. State of Madhya Pradesh* (1975) 2 SCC 148.

⁸⁷ *District Registrar and Collector, Hyderabad v. Canara Bank*, (2005) 1 SCC 496 (Paras 26-33).

⁸⁸ *Griswold v. State of Connecticut* (1965) 381 US 278.

The court has held that privacy is not just a claim to space but protects the autonomy of the private will and a person's freedom of choice and action

The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfillment, grow in self-esteem, build relationships of his or her choice and fulfill all legitimate goals that he or she may set. (Para 122)

78. The Delhi High Court at Para 47 of the impugned judgment, correctly relying upon the judgment of this Hon'ble Court in *District Registrar and Collector, Hyderabad v. Canara Bank*⁸⁹ held that

The Supreme Court has acknowledged that the sphere of privacy deals with persons and not places. Explaining this concept in District Registrar & Collector, Hyderabad v. Canara Bank, Lahoti, CJ. referred to observations of Stevens, J. in Thornburgh v. American College of O and G, 476 US 747 (1986), that "the concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole". Lahoti, CJ. Also referred to an observation of a commentator in (1976) 64 Cal. L. Rev 1447, that privacy centers round values of repose, sanctuary and intimate decision. Repose refers to freedom from unwanted stimuli; sanctuary to protection against intrusive observation; and intimate decision, to autonomy with respect to the most personal of life choices

79. The Delhi High Court in the impugned judgment links the right to dignity to the right to privacy through the protection of a person's freedom of choice and action

"At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others" (Para 26)

80. Legal scholar and former Vice Chancellor of the University of Delhi, Professor Upendra Baxi, commenting on the *Naz Foundation* judgment has emphasised this aspect of the judgment

The Naz Justices elaborate the right to live with dignity, as entailing a

⁸⁹ *District Registrar and Collector, Hyderabad v. Canara Bank* AIR 2005 SC 186 (Para 30).

further development of the right to privacy... For the moment, I may only say that any claim to a 'full personhood' makes both moral and ethical sense only when intimate relations are liberated from the sovereign public gaze. 'Privacy' as a right to live with dignity, means in and with Naz, an amplitude of free choice of lifestyles—or more heavily put, the modes of creating and being in the world of one's own choosing. Put another way, the right to privacy is an integral component of the right to live with dignity; to take it out or away is to diminish the value of dignity, both as a moral and as a juridical idea.⁹⁰

A copy of Professor Baxi's article is produced as **Annexure XX**.

81. In a recent order, the News Broadcasting Standards Authority, a self-regulatory body set up by private television channels, ruled against a television channel in Hyderabad that conducted a "sting operation" to "expose" the city's gay culture. The reporters logged on to a popular gay social networking site, and using fake names and ids caught on camera a number of gay men without blurring their faces, thus exposing them to their families, colleagues and neighbours. Former Chief Justice of the Hon'ble Supreme Court Justice J.S. Verma, in the order, ruled against the channel, fining the channel Rs. 1 lakh and forced it to broadcast an apology. In its order, the News Broadcasting Standards Authority said that since details of the names and photographs of the individuals concerned were accessible only through a membership identity and password, such information was not in the public domain. The Authority held that the channels had violated the rights to privacy of individuals of "alternate sexual orientation" and stated that homosexuality was "no longer considered a taboo nor a criminal act". A copy of the order has been produced as **Annexure XXI**.
82. The U.S. Supreme Court in *Lawrence v. Texas*⁹¹ struck down that the Texas law that criminalised sodomy between consensual adults as unconstitutional. The Court held that the law interfered with the most private of human conduct, sexual behaviour. The Court held that the right to liberty protected the right of homosexuals the right to choose to enter into sexual relationships in the confine of their homes and their own private lives and still retain their dignity as free persons. The Court overruled its decision in the *Bowers* case⁹² where it had upheld the constitutionality of the Georgia statute that criminalised sodomy. Justice Kennedy, who delivered the judgment on behalf of the Court held

Liberty protects the person from unwarranted government intrusion into a dwelling or other private places. In our tradition, the State is not omnipresent in the home. And there are other spheres of our lives

⁹⁰ Upendra Baxi, "Dignity in and with Naz", Justice HR Khanna Memorial Lecture, February 25, 2010 published in Alok Gupta and Arvind Narrain (ed.), *Law Like Love: Queer Perspectives on Law*, Yoda Press, New Delhi, 2011, pp. 231-252.

⁹¹ *Lawrence v. Texas* 539 U.S. 558 (2003).

⁹² *Bowers v. Hardwick* 478 U.S. 186 (1986).

and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendental dimensions.

A copy of *Lawrence v. Texas* is produced as **Annexure XXII**.

83. Thus Section 377 by denying LGBT persons the right to form intimate attachments prevents them from participating in a fundamental human experience and violates the Right to Privacy guaranteed by Art 21 which protects a person's right to freedom of choice and action and the right to make decisions on intimate aspects of one's life

V. POPULAR MORALITY OR PUBLIC DISAPPROVAL OF CERTAIN ACTS CANNOT BE THE BASIS FOR CURTAILING RIGHTS UNDER ART 14 AND 21

84. The Delhi High Court has recognised that popular morality, even if it is the majoritarian view, cannot be the only reason to override 'constitutional morality' which stands derived from basic constitutional values and may provide 'a valid justification for restriction of the fundamental rights under Article 21'.

This means that in no event, can 'moral indignation, howsoever strong' provide any 'valid basis for overriding individual's fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view' (Para 86).

85. The Delhi High Court in the impugned judgment has made a distinction between morality that is in consonance with the values of the Constitution, and morality that is not. The essence of the distinction between popular and constitutional morality is that public morality is merely a reflection of the moral and normative values of the majority of the population (as expressed by the legislature), while Constitutional morality not only reflects the majority's values, but also shapes and changes them as part of the liberal, democratic, ideals of our Constitution. Constitutional morality is not based on any particular religious or cultural tradition.
86. The Delhi High Court in the impugned judgment refers to the idea of constitutional morality insisted upon by Dr. Ambedkar in the Constituent Assembly. While moving the Draft Constitution in the Assembly [Constitutional

Assembly Debates: Official Reports Vol.VII: November 4, 1948, page 38], Dr. Ambedkar quoted Grote, the historian of Greece, who had said:

"The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves."

After quoting Grote, Dr. Ambedkar added:

"While everybody recognised the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognised. One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution.The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated.

We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic."

87. The Delhi High Court in the impugned judgment went on to hold

The Constitution of India recognises, protects and celebrates diversity. To stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.

88. Professor Upendra Baxi, remarking on this distinction observes that the Delhi High Court has only extended existing notions of constitutional morality

At least in my reading, the Naz Justices further develop the notion of 'constitutional morality' as based on, as well as reinforcing, the right to dignity. What is novel is not the notion of constitutional morality but rather the scrupulous extension of it by the Naz Justices. Those who take seriously Parts IV and IV-A of the Indian Constitution know full well that these constitute a nearly complete code of constitutional morality. Surely, both the Parts suggest—Part IV for the State and Part IV-A for citizens—thresholds of critical morality by which some actually existing standards of positive morality ought to be judged and

*where necessary further constitutionally displaced. Further, even Part III of the Indian Constitution enshrining fundamental rights enacts these thresholds of distinction*⁹³

A copy of Professor Baxi's article is produced as **Annexure XXIII**.

89. The South African Constitutional Court addressed the question of constitutional morality in a decision striking down the anti sodomy law:

*'A State that recognises difference does not mean a State without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil... The Constitution certainly does not debar the State from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.'*⁹⁴

90. Thus it is submitted that popular morality, or public disapproval of certain acts is not a valid justification for restriction of the rights under Articles 14 and 21. Instead, it is the moral values of the Constitutional framework, deeply rooted in a commitment to preserving diversity and difference, and protecting the fundamental rights of vulnerable minorities, should prevail.

CONCLUSION

91. Sec 377 violates the constitutional protections embodied in Articles 14 and 21. It suffers from the vice of unreasonable classification, is arbitrary in the way it targets the LGBT community for a characteristic that is innate, unchangeable and a natural variant of human sexuality. It also leads to serious harm to the mental health of LGBT persons and acts as a barrier to sexual intimacy thereby infringes upon the Right to Life, the Right to Live with Dignity and the Right to Privacy. Furthermore, it is only constitutional morality and not popular morality that can be a valid ground for restricting fundamental rights under Art 14 and Art 21.

⁹³ Upendra Baxi, "Dignity in and with Naz", Justice HR Khanna Memorial Lecture, February 25, 2010 published in Alok Gupta and Arvind Narrain (ed.), *Law Like Love: Queer Perspectives on Law*, Yoda Press, New Delhi, 2011, pp. 231-252.

⁹⁴ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 6 BHRC 127 (CC, 1998), 1998 (12) BCLR 1517 (CC) at Para 136.