

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 88 OF 2018
PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA
SEEKING A DECLARATION THAT THE RIGHT TO CHOICE OF
SEXUAL ORIENTATION IS EMBEDDED IN ARTICLE 21 OF THE
CONSTITUTION OF INDIA AND THAT SECTION 377 OF THE
INDIAN PENAL CODE, 1860 IS UNCONSTITUTIONAL AND
INAPPLICABLE TO CONSENTING HOMOSEXUAL ADULTS

IN THE MATTER OF:

KESHAV SURI

.... PETITIONER

VERSUS

UNION OF INDIA

.... RESPONDENT

WITH

CRL.M.P. NO. _____ OF 2018
APPLICATION FOR EX-PARTE AD-INTERIM/ INTERIM RELIEF

PAPER BOOK

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ADVOCATE FOR THE PETITIONER : Ms. SHALLY BHASIN

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PROFORMA FOR FIRST LISTING

SECTION: _____

The case pertains to (Please tick/check the correct box):

Central Act: (Title) Indian Penal Code & Constitution of India

Section: Section 377 of IPC & Article of the Constitution

Central Rule: (Title) N/A

Rule No(s): N/A

State Act: (Title) N/A

Section: N/A

State Rule: (Title) N/A

Rule No(s): N/A

Impugned Interim Order: (Date) N/A

Impugned Final Order/Decree: (Date) N/A

High Court: (Name) N/A

Names of Judges: N/A

Tribunal/Authority: (Name) N/A

1. Nature of matter: Civil Criminal

2. (a) Petitioner/Appellant No.1: Keshav Suri

(b) e-mail ID: N/A

(c) Mobile phone number: N/A

3. (a) Respondent No.1: Union of India

(b) e-mail ID: N/A

A-2

- (c) Mobile phone number: N/A
4. (a) Main Category classification: 14 – Criminal matters
(b) Sub-classification: 1418 – Others
5. Not to be listed before: N/A
6. Similar/Pending matter: WP (Cri.) No. 76 of 2016 – Navtej Singh Johar & Ors. Vs. Union of India
7. **Criminal Matters: N/A**
(a) Whether accused/convict has surrendered: Yes No
(b) FIR No. N/A
(c) Police Station: N/A
(d) Sentence Awarded: N/A
(e) Sentence Undergone: N/A
8. **Land Acquisition Matters: N/A**
(a) Date of Section 4 notification: _____
(b) Date of Section 6 notification: _____
(c) Date of Section 17 notification: _____
9. **Tax Matters:** State the tax effect: N/A
10. **Special Category (first petitioner/appellant only):**
 Senior citizen > 65 years SC/ST Woman/child Disabled
 Legal Aid case In custody
11. Vehicle Number (in case of Motor Accident Claim matters):
12. Decided cases with citation: N/A

Date: 10.04.2018

AOR for petitioner(s)/appellant(s)

(SHALLY BHASIN)
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SYNOPSIS

- A. The Petitioner is a responsible, law-abiding and public spirited adult citizen of India. The Petitioner is a well-educated individual who received his primary education in India and pursued his further education [undergraduate and masters degree] in the fields of Law and Business Management from highly ranked Universities in the U.K. The Petitioner is in a committed relationship for nearly a decade with another adult man and has been consensually residing together with him. Thus, the Petitioner himself is a part of the Lesbian, Gays, Bi-sexual, Transgender and Queer ['LGBTQ'] community in India. The Petitioner hails from an industrial background and is engaged in the business of Hospitality as well as Education. The Petitioner works with and is a shareholder of Bharat Hotels Ltd, which promotes the hospitality chain by the name and style of 'The Lalit'.
- B. Battling discrimination on account of his sexual-orientation and being passionate about the cause of inclusion of members of the LGBTQ community in economic and social spheres, the Petitioner has championed a social campaign titled as 'Pure-Love' for creating a platform for persons from all walks of life, including the LGBTQ community to come forth and share their life experiences and thereby feeling included in society. The 'Pure-Love' campaign is in tandem with the 'United Nations Guiding Principles on Tackling Discrimination against Lesbians,

Gays, Bi-Sexuals, Transgender and Inter-sex people: Standards of conduct Business'. The whole objective behind the 'Pure-Love' campaign is to create awareness, acceptance and inclusion for persons belonging to the LGBTQ community in and amongst Corporate India. Persons from the LGBTQ community are otherwise marginalised and continue to live in the shadows of fear of stigma, exclusion, despair and prosecution.

- C. The Petitioner is approaching this Hon'ble Court seeking an appropriate Writ, Order or direction in the nature of a mandamus declaring that the 'Right to choice of sexual orientation' is a fundamental right enshrined in Part-III of the Constitution of India and that any discrimination of any person on the basis of exercising such choice is violative of Part-III of the Constitution of India. Further, the Petitioner also seeks a mandamus that intercourse between consenting adults of the same gender is not carnal intercourse against the order of nature and thus, Section 377 of the Indian Penal Code [**Section 377 IPC**], is not applicable to such consenting adults. The Petitioner does not have any other alternative efficacious remedy available to him as the issue of constitutionality of Section 377 IPC is pending before this Hon'ble Court in Writ Petition [Crml] No 76 of 2016 titled as 'Navtej Singh Johar & Ors v Union of India'. This Hon'ble Court vide order-dated 08.01.2018 passed in Writ Petition [Crml] No 76 of 2016, inter alia, directed that, *"Taking all aspects in a cumulative manner, we are of the view, the decision in Suresh*

Kumar Kaushal's case (supra) requires re-consideration. As the question relates to constitutional issues, we think it appropriate to refer the matter to a larger bench." Thus, in light of the pendency of Navtej Singh's Writ Petition on the same issue before this Hon'ble Court, the Petitioner has no other remedy available but to approach this Hon'ble Court by way of the present petition seeking redressal for the violation of his [and other's similarly situated like him] fundamental rights.

- D. The Petitioner is approaching this Hon'ble Court seeking the above-said relief in light of the 'Right of Choice', 'Right of Privacy', 'Right to Dignity', 'Right to Non-Discrimination' and 'Right to Liberty' of the Petitioner and many such person[s] whom the Petitioner has come in contact with through the 'Pure-Love' campaign are being impinged and affected on a daily basis. Persons from the LGBTQ community are ridiculed in various spheres of life. Equal work opportunities and pay is not given to individuals who have chosen their sexual orientation which is so-called 'different' i.e. those who are homosexuals. Aggrieved by discrimination and non-inclusion of individuals on account of their sexual orientation, the Petitioner is approaching this Hon'ble Court.
- E. The Petitioner himself has suffered mentally and been stigmatised on account of his sexual orientation at a personal and professional front. The Petitioner had to deal with non-

acceptance of his fundamental and intrinsic choice i.e. his homosexuality with his family, and thereafter, even professionally question were raised about his sexuality, which does not normally happen with heterosexual individuals. In addition, the Petitioner is constantly living under the fear of a false/potential prosecution with Section 377 IPC being on the statute book, and thus, the Petitioner is unable to express his relationship and his right to choose his sexual partner without being worried. This is by no yardstick a life of dignity and respect. The Petitioner emphatically understands this problem faced by the LGBTQ community and through the 'Pure-Love' campaign aiding other members of the LGBTQ community in coming to terms with themselves and their choices.

- F. With Section 377 IPC on the statute book, promoting the social campaign of 'Pure-Love' and/or filing of the present Petitioner by the Petitioner has taken numerous deliberations, as the Petitioner faces the risk of a social adversarial impact and/or prosecution. The Petitioner is mostly humbly approaching this Hon'ble Court to acknowledge the rights of the growing LGBTQ community in the Country as a large number of the demography of the country cannot live in discrimination and denial of their fundamental rights.
- G. Criminalisation of homosexuality is based on stigma and the same stigma being perpetuated by the legal system shatters the

constitutional pillars of right to liberty, right to dignity and right to non-discrimination. Enactments based on stigma and/or popular yet unsubstantiated notions of right or wrong affect millions of lives, by denying them not just their individuality but also does economic, social and psychological harm to them.

- H. In times when world-nations, including India pursuant to a judgment of this Hon'ble Court in *NALSA v UoI* reported in 2014 [5] SCC 438 has recognised the third gender. There exists no rational basis/nexus for any person to be criminalised only because of a choice exercised by them in their private life to love and have consensual sexual relations with another individual of the same-sex.
- I. Gender identity and Sexual Orientation are the most fundamental aspects of life which refers to a person's intrinsic sense. Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. Article 19[1][a] of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender and naturally thus also includes a citizens right to express his love regardless of gender dynamics. Article 21 is the heart and soul of the Indian

Constitution, which speaks of the rights to life and personal liberty. Right to Choice has also been held to be an inherent fundamental right. The Right to Choice includes the right to choose a partner. Such right cannot be limited by the state, law or society. Thus, criminalisation of homosexuality in the face of Article 19[1][a] and 21 is patently illegal. It denies the most basic fundamental rights to citizens of this country. Besides, denying such fundamental rights, it infact does substantial psychological and financial damage to members of the LGBTQ community.

- J. Continued criminalisation of homosexuality comes with an economic cost. This is in addition to the socio-psychological adverse impact and deprivation of health access to the LGBTQ community.
- K. The economic cost has atleast two facets: i. exclusion and/or limited inclusion of an able and talented work force belonging to the LGBTQ community. This directly impacts personal health-costs, wealth-creation and work-force loss and ii. Loss of contribution to the GDP.
- L. A preliminary study sponsored by the World Bank on the Economic Cost of Homophobia and the exclusion of LGBT People: A case study of India is highly relevant herein. It depicts an alarming an disturbing statics. It is noteworthy that though the results of this study are preliminary [and as such subject to change], however, they have high persuasive value in the

absence of any other such exhaustive recent report, which focuses on India.

M. Key features from the report[s] are quoted herein-below:

- i. The 2011 Indian Census marked the first time that an "other" category was added to the male and female options on the question about sex, in essence providing a third gender category, but the resulting count of transgender people is thought by some observers to be unreliable. A total of 490,000 individuals of all ages reported the "other" option, or about
- ii. 0.04% of the Indian population of 1.2 billion people
- iii. Estimated cost of homophobia [based on an India study] is approx. anywhere between 0.1 to 1.7% of GDP
- iv. 56% of white-collar LGBT workers have reported discrimination
- v. Health costs of Homophobia in India [as of 2012] ranged between US\$ 712 million to US\$ 23.1 billion.
- vi. 28% of urban lesbians experienced physical abusive violence in family
- vii. Data on public opinion from 2006 shows that 41% Indians would not want a homosexual neighbour

N. Members of the LGBTQ community are left to deal with oppression, exclusion, limited avenues for personal growth, limited opportunities for employment: The question really is are

1

such citizens [assuming them to be a small percentage of the Indian demograph] living a meaningful life of respect and dignity or are they living a life which diminishes the constitutional mandate of inclusiveness, respect for life and the individual.

O. Hence, the present Writ Petition.

LIST OF DATES

- 06.12.2001 Naz Foundation v. Govt. of NCT of Delhi & Ors. being Writ Petition (C) No. 7455/2001 was filed before the Delhi High Court. The said petition, *inter alia*, challenged the constitutionality of Section 377 IPC.
- 02.09.2004 A Division Bench of the Delhi High Court dismissed Naz Foundation v. Govt. of NCT of Delhi & Ors. on the ground of maintainability.
- 03.11.2004 A Review Petition being Review Petition No. 384/2004 against the order dated 02.09.2004 was filed before the Delhi High Court. The said Review Petition was dismissed by the Delhi High Court on 03.11.2004.
- 03.02.2006 This Hon'ble Court set aside the order of dismissal and remanded the matter i.e. Naz Foundation v. Govt. of NCT of Delhi & Ors [being Writ Petition (C) No. 7455/2001], back to the Delhi High Court for reconsideration.
- 02.07.2009 Delhi High Court allowed Naz Foundation v. Govt. of NCT of Delhi & Ors. [W.P. (C) No. 7455/2001] by

declaring that Section 377 of the Indian Penal Code, 1860 is violative of Articles 14, 15 and 21 of the Constitution insofar as it criminalizes consensual sexual acts of adults in private.

- 09.07.2009 An SLP titled as Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors. being SLP [Civil] No. 15436 of 2009 was filed before this Hon'ble Court. The said SLP impugned the Delhi High Court judgment-dated 02.07.2009 passed in the Naz Foundation case. This Hon'ble Court issued notice in SLP [Civil] No. 15436 of 2009 on 09.07.2009.
- 11.12.2013 Vide judgment dated 11.12.2013, this Hon'ble Court allowed the appeal in the case of Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors. [Civil Appeal No. 10972/2013] and held that Section 377 of the Indian Penal Code, 1860 does not suffer from the vice of unconstitutionality.
- 28.01.2014 This Hon'ble Court dismissed the review petition filed by Naz Foundation being Review Petition (C) No. 41-55/2014 titled as Naz Foundation (India) Trust v. Suresh Kumar Koushal & Ors. challenging the order of this Hon'ble Court dated 11.12.2013.
- 22.04.2014 Pursuant to the dismissal of the Review Petition, Naz Foundation filed a Curative Petition being Curative Petition (Civil) No. 88-102/2014 titled as Naz Foundation

Trust v. Suresh Kumar Koushal & Anr, impugning the judgment and order[s] dated 11.12.2013 and 28.01.2014. Vide order-dated 22.04.2014, this Hon'ble Court directed that the Curative Petition[s] be listed before the Court.

02.02.2016 Vide order dated 02.02.2016, this Hon'ble Court directed that Curative Petition (Civil) No. 88-119/2014 titled as Naz Foundation Trust v. Suresh Kumar Koushal & Anr., may be placed before a Constitution Bench of this Hon'ble Court as the issues involved are of considerable importance and public interest, and some of the issues have constitutional dimensions.

29.06.2016 Certain members of the LGBTQ community in India, each of who are well-accomplished and respected citizens, filed a Writ Petition being Writ Petition [Criminal] No 76 of 2016 titled as 'Navtej Singh Johar v Union of India', under Article 32 of the Constitution of India, before this Hon'ble Court challenging the constitutional validity of Section 377 IPC, as their fundamental rights were being jeopardized by the said provision. This Hon'ble Court vide order-dated 29.06.2016 directed that since the matter pertains to the challenge to the constitutional validity of Section 377 IPC, which is pending before a Constitution Bench, this matter be

placed before the Hon'ble Chief Justice for appropriate orders.

Sometime in
2017

The Petitioner herein launched the 'Pure-Love' campaign. This campaign is inspired by the objective of inclusivity and diversity and takes guidance from the UN Guidance Principles on Discrimination against Lesbians, Gays, Bi-Sexuals, Transgender and Inter-sex people: Standards of conduct Business. The Petitioner launched this campaign after facing difficulties, prejudices and stigma himself owing to his sexual orientation. Through the Campaign, the Petitioner has come into direct contact with other members of the LGBTQ community who are battling denial of employment owing to their sexual orientation or suffering from depression on account of not being accepted by family and friends. Each of these individuals are talented and educated. If they are given the opportunity to live a life of dignity and respect, each of them can contribute to economic growth and development.

08.01.2018

This Hon'ble Court in Writ Petition [Criminal] No 76 of 2016 titled as 'Navtej Singh Johar v Union of India' passed an order directing that "*Taking all aspects in a cumulative manner, we are of the view, the decision in Suresh Kumar Kaushal's case (supra) requires re-consideration. As the question relates to constitutional*

issues, we think it appropriate to refer the matter to a larger bench." Thus, in light of the pendency of Navtej Singh's Writ Petition on the same issue before this Hon'ble Court, the Petitioner has no other remedy available but to approach this Hon'ble Court by way of the present petition seeking redressal for the violation of his [and other's similarly situated like him] fundamental rights.

April 2018

Hence, the present Writ Petition.

IN THE SUPREME COURT OF INDIA
[CRIMINAL ORIGINAL JURISDICTION]

WRIT PETITION [CRIMINAL] NO. _____ OF 2018
[Under Article 32 of the Constitution of India]

IN THE MATTER OF:

Keshav Suri



....PETITIONER

VERSUS

Union of India
Through the Secretary,
Ministry of Law & Justice
Shashtri Bhawan,
New Delhi

... RESPONDENT

PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF
INDIA SEEKING A DECLARATION THAT THE RIGHT TO
CHOICE OF SEXUAL ORIENTATION IS EMBEDDED IN
ARTICLE 21 OF THE CONSTITUTION OF INDIA AND THAT
SECTION 377 OF THE INDIAN PENAL CODE, 1860 IS
UNCONSTITUTIONAL AND INAPPLICABLE TO
CONSENTING HOMOSEXUAL ADULTS

TO,
THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS OTHER COMPANION JUDGES
OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. The Petitioner is a responsible, law-abiding and public spirited adult citizen of India. The Petitioner is a well-educated individual who received his primary education in India and pursued his further education [undergraduate and masters degree] in the fields of Law and Business Management from highly ranked Universities in the U.K. The Petitioner is in a committed relationship for nearly a decade with another adult man and has been consensually residing together with him. Thus, the Petitioner himself is a part of the Lesbian, Gays, Bi-sexual, Transgender and Queer ['LGBTQ'] community in India. The Petitioner hails from an industrial background and is engaged in the business of Hospitality as well as Education. The Petitioner works with and is a shareholder [REDACTED] which promotes the hospitality chain by the name and style of 'The [REDACTED] Battling discrimination on account of his sexual-orientation and being passionate about the cause of inclusion of members of the LGBTQ community in economic and social spheres, the Petitioner has championed a social campaign titled as 'Pure-Love', which was launched in 2017 for creating a platform for persons from all walks of life, including the LGBTQ community to come forth and share their life experiences and thereby feeling included in society. The 'Pure-Love' campaign is in tandem with the 'United Nations Guiding Principles on Tackling Discrimination against Lesbians, Gays, Bi-Sexuals, Transgender and Inter-sex

people: Standards of conduct Business'. The whole objective behind the 'Pure-Love' campaign is to create awareness, acceptance and inclusion for persons belonging to the LGBTQ community in and amongst Corporate India. Persons from the LGBTQ community are otherwise marginalised and continue to live in the shadows of fear of stigma, exclusion, despair and prosecution.

- 1A. The Petitioner has not approached before any concerned authority for the similar relief.
2. The Petitioner has [REDACTED] and is professionally engaged with the [REDACTED] and has an annual income of over [REDACTED]. The Petitioner is a public spirited person as is evident from the social-cause 'Pure-Love' campaign he has launched to reach out to members of the LGBTQ community as he empathises with them. The Petitioner is filing the present writ petition in public interest and in order to seek a life of dignity for members of the LGBTQ community in India, of which, he himself is a part. There has been not and neither is there any criminal, civil, revenue and/or any litigation concerning the Petitioner which would impact the present Writ Petition.
3. The Petitioner is approaching this Hon'ble Court by filing the present Writ Petition in the nature of a public interest litigation seeking an appropriate Writ, Order or direction in the nature of a

mandamus declaring that the 'Right to choice of sexual orientation' is a fundamental right enshrined in Part-III of the Constitution of India and that any discrimination of any person on the basis of exercising such choice is violative of Part-III of the Constitution of India. Further, the Petitioner also seeks a mandamus that intercourse between consenting adults of the same gender is not carnal intercourse against the order of nature and thus, Section 377 of the Indian Penal Code [**Section 377 IPC**], is not applicable to such consenting adults. The Petitioner has not approached any other Court including any High Court and/or this Hon'ble Court in any other petition seeking the above-said remedy. The Petitioner does not have any other alternative efficacious remedy available to him as the issue of constitutionality of Section 377 IPC is pending before this Hon'ble Court in Writ Petition [Crml] No 76 of 2016 titled as 'Navtej Singh Johar & Ors v Union of India'. This Hon'ble Court vide order-dated 08.01.2018 passed in Writ Petition [Crml] No 76 of 2016, inter alia, directed that, *"Taking all aspects in a cumulative manner, we are of the view, the decision in Suresh Kumar Kaushal's case (supra) requires re-consideration. As the question relates to constitutional issues, we think it appropriate to refer the matter to a larger bench."* Thus, in light of the pendency of Navtej Singh's Writ Petition on the same issue before this Hon'ble Court, the Petitioner has no other remedy available but to approach this Hon'ble Court by way of the

present petition seeking redressal for the violation of his [and other's similarly situated like him] fundamental rights. Further, in view of the pendency of Navtej Singh's Writ Petition there was no occasion for the Petitioner to approach the Respondent for any relief. The only recourse the Petitioner has is to approach this Hon'ble Court. A copy of the order dated 08.01.2018 passed by this Hon'ble Court in Writ Petition [Crml] No 76 of 2016 titled as 'Navtej Singh Johar & Ors v Union of India' is annexed hereto as 'ANNEXURE P-1'. (At pages 37 to 45)

4. **Facts constituting cause of action:** The Petitioner is approaching this Hon'ble Court seeking the above-said relief in light of the 'Right of Choice', 'Right of Privacy', 'Right to Dignity', 'Right to Non-Discrimination' and 'Right to Liberty' of the Petitioner and many such person[s] whom the Petitioner has come in contact with through the 'Pure-Love' campaign are being impinged and affected on a daily basis. Persons from the LGBTQ community are ridiculed in various spheres of life. Equal work opportunities and pay is not given to individuals who have chosen their sexual orientation which is so-called 'different' i.e. those who are homosexuals. Aggrieved by discrimination and non-inclusion of individuals on account of their sexual orientation, the Petitioner is approaching this Hon'ble Court.
5. The Petitioner has himself has suffered mentally and been stigmatised on account of his sexual orientation at a personal

and professional front. The Petitioner had to deal with non-acceptance of his fundamental and intrinsic choice i.e. his homosexuality with his family, and thereafter, even professionally question were raised about his sexuality, which does not normally happen with heterosexual individuals. In addition, the Petitioner is constantly living under the fear of a false/potential prosecution with Section 377 IPC being on the statute book, and thus, the Petitioner is unable to express his relationship and his right to choose his sexual partner without being worried. This is by no yardstick a life of dignity and respect. The Petitioner emphatically understands this problem faced by the LGBTQ community and through the 'Pure-Love' campaign aiding other members of the LGBTQ community in coming to terms with themselves and their choices.

6. The social mandate of the 'Pure-Love' as captured on its web-portal [Ref: www.thelalit.com/purelove] is reproduced below:

*"The Lalit is a safe, gender agnostic, equal opportunity place. Our message to the world is **#PureLove** and we welcome everyone without any discrimination on the basis on gender, sexual preferences, religion, physical abilities. We respect your choices and celebrate diversity! In 2017, we initiated some path breaking endeavours – such as hosting events for differently abled, C U Next Thursday for people from the LGBTQIA community, acid attack survivors, transgender fashion show, drag shows, pet friendly*

brunches and more. We celebrate diversity and welcome all with a message of #PureLove!

*Elphie, dressed in rainbow colours, is our mascot for the celebrations of **Inclusivity and Diversity**. Elphie welcomes all, without any discrimination on the basis of religion, caste, gender or sexual preferences. The rainbow colour denotes we are a **Gender Neutral Company** and perfectly complements our theme of **Inclusivity**."*

7. With Section 377 IPC on the statute book, promoting the social campaign of 'Pure-Love' and/or filing of the present Petitioner by the Petitioner has taken numerous deliberations, as the Petitioner faces the risk of a social adversarial impact and/or prosecution. The Petitioner is mostly humbly approaching this Hon'ble Court to acknowledge the rights of the growing LGBTQ community in the Country as a large number of the demography of the country cannot live in discrimination and denial of their fundamental rights. Various research internationally has shown that anywhere between 2% to 13% of a population forms part of the LGBTQ community [Ref: <https://timesofindia.indiatimes.com/india/Gay-count-varies-from-2-to-13-of-population/iplarticleshow/4731097.cms>]. These figures in the Indian context would lead to a sizeable number of the Indian population forming part of the LGBTQ population. A copy of the article titled as "Gay count varies from 2% to 13% of population" published and available on The Times of India website at the link <https://timesofindia.indiatimes.com/india/Gay->

count-varies-from-2-to-13-of-population/iplarticleshow /4731097

.cm is annexed hereto as 'ANNEXURE P-2'. (At pages 46 to 47)

8. **Nature of Injury**. Such denial and discrimination not only impact the individual but has a larger economic impact as well. The LGBTQ community, as can be gathered from jurisdictions which have decriminalised homosexuality, contributes to the GDP of an economy in numerous ways, which includes [though is not limited to] tourism, fashion, culture and so on. Unquestionably it can be said, denial of rights of the LGBTQ community, in other words, denial of the right to choose sexual orientation comes with economic costs as well.
9. Thus seen from the standpoint of: i. violation of basic fundamental and human rights and ii. loss of economic opportunities, the continued criminalisation of homosexuality, in other words, denial of the right to choose sexual orientation, ought to be set-aside and struck down.
10. **Section 377 IPC is archaic, outdated and impinges upon fundamental rights to a section of society**: Section 377 IPC which criminalises homosexuality has been on the statute book since 1858. Thus, it has been on the statute book even prior to coming into force of the Indian Constitution. Section 377 IPC mirrored the then Buggery Act 1533 as enacted and existed in the United Kingdom. Since then the United Kingdom itself has

drastically altered its position on homosexuality. In a manner of speaking, the United Kingdom [like other Countries such as: Nepal, Canada, parts of North America and South America, parts of Africa [22 out of 56 African countries have de-criminalised homosexuality], Iraq, Bahrain, Japan, Thailand to mention a few] has de-criminalised homosexuality. Infact, the United Kingdom allowed for Civil Partnerships in 2005 and further, went ahead to recognise same-sex marriages in 2014. Needless to say, such a drastic change in law in the United Kingdom, from whom India in a sense borrowed the anti-homosexuality law, speaks of the need of such legislative changes in light of the growing socio-economic changes over the years as well as recognising the fact that sections of society cannot be denied the right to make a choice of their innate being.

11. Criminalisation of homosexuality is based on stigma and the same stigma being perpetuated by the legal system shatters the constitutional pillars of right to liberty, right to dignity and right to non-discrimination. Enactments based on stigma and/or popular yet unsubstantiated notions of right or wrong affect millions of lives, by denying them not just their individuality but also does economic, social and psychological harm to them.
12. In times when world-nations, including India pursuant to a judgment of this Hon'ble Court in NALSA v UoI reported in 2014 [5] SCC 438 has recognised the third gender. There exists no

rational basis/nexus for any person to be criminalised only because of a choice exercised by them in their private life to love and have consensual sexual relations with another individual of the same-sex.

13. Gender identity and Sexual Orientation are the most fundamental aspects of life which refers to a person's intrinsic sense. Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. Article 19[1][a] of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender and naturally thus also includes a citizens right to express his love regardless of gender dynamics. Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognised to be an essential part of the right to life and accrues to all persons on account of being humans. Criminalisation of homosexuality in the face of Article 19[1][a] and 21 is patently illegal. It denies the most basic fundamental

rights to citizens of this country. Besides, denying such fundamental rights, it infact does substantial psychological and financial damage to members of the LGBTQ community.

14. Members of the LGBTQ community are left to deal with oppression, exclusion, limited avenues for personal growth, limited opportunities for employment. The question really is are such citizens [assuming them to be a small percentage of the Indian demograph] living a meaningful life of respect and dignity or are they living a life which diminishes the constitutional mandate of inclusiveness, respect for life and the individual.
15. This Hon'ble Court in the case of K.S. Puttaswamy v Union of India reported in 2017 [10] SCC 1 also known as the Privacy Judgment, has emphatically observed, as follows:

"298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make

decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of

personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a

way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.” [emphasis supplied]

16. The above-said observations by this Hon'ble Court make it abundantly clear that the right to choose one's sexual orientation is part and parcel of the right to live with dignity and right of privacy of an individual. Denial of such right by criminalisation of homosexuality is archaic and patently violative of the constitutional mandate prescribed in Part III of the Constitution of India.
17. Further, this Hon'ble Court in its recent decision-dated 27.03.2018 in the case of Shakti Vahini v Union of India & Ors passed in Writ Petition [Civil] No 10 of 2010 has, inter alia, held:

“43. The concept of liberty has to be weighed and tested on the touchstone of constitutional sensitivity, protection and the values it stands for. It is the obligation of the Constitutional Courts as the sentinel on qui vive to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. Without sustenance of liberty, subject to constitutionality valid provisions of law, the life of a person is comparable to the living dead having to

endure cruelty and torture without protest and tolerate imposition of thoughts and ideas without a voice to dissent or record a disagreement. The fundamental feature of dignified existence is to assert for dignity that has the spark of divinity and the realization of choice within the parameters of law without any kind of subjugation. The purpose of laying stress on the concepts of individual dignity and choice within the framework of liberty is of paramount importance. We may clearly and emphatically state that life and liberty sans dignity and choice is a phenomenon that allows hollowness to enter into the constitutional recognition of identity of a person.

44. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation. The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they

desire possibly harbouring the notion that they are a law unto themselves or they are the ancestors of the Caesar or, for that matter, Louis the XIV.. The Constitution and the laws of this Country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law." [emphasis supplied]

18. This Hon'ble Court in its recent judgment in the case of Shafin Jahan v Asokan K.M. & Ors passed in Criminal Appeal No 366 of 2018 on 09.04.2018 has, inter alia, held "... The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. ***Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.*** They form the essence of personal liberty under the Constitution. In deciding whether Shafin Jahan is a fir person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audiences." [emphasis supplied]
19. The decisions in the case[s] of Shakti Vahini [supra] and Shafin Jahan [supra] once again highlights the significance given to the 'Right of Choice' of an adult citizen. This right of choice in

conjunction with the right to liberty, dignity and privacy encompasses the right of an individual to decide/elect their gender, sexual-orientation and who they want in their private life as a companion.

20. It is relevant to extract certain passages from the Late Justice [Retd] Leila Seth's article titled as '*A Mother and a Judge Speaks Out on Section 377*', which was published in the Times of India in January 2014. The Article highlights the pain and suffering not just persons belonging to the LGBTQ community go through but also what their families go through. Further, the article succinctly articulates the essence of the right to love. [Note: Late Justice [Retd] Leila Seth's elder son belongs to the LGBTQ community].

"...The voluminous accounts of rape, torture, extortion, and harassment suffered by gay and transgender people as a result of this law do not appear to have moved the court. Nor does the court appear concerned about the parents of such people, who stated before the court that the law induced in their children deep fear, profound self-doubt, and the inability to peacefully enjoy family life. I know this to be true from personal experience. The judgment fails to appreciate the stigma that is attached to persons and families because of this criminalization.

The judgment claimed that the fact that a minuscule fraction of the country's population was gay or transgender could not be considered a sound basis for reading down Section 377. In fact, the numbers are not small. If only 5 percent of India's more than a billion people are gay, which

is probably an underestimate, it would be more than 50 million people, a population as large as that of Rajasthan or Karnataka or France or England. But even if only a very few people were in fact threatened, the Supreme Court could not abdicate its responsibilities to protect their fundamental rights, or shuffle them off to Parliament. It would be like saying that the Parsi community could be legitimately imprisoned or deported at Parliament's will because they number only a few tens of thousands. The reasoning in the judgment that justice based on fundamental rights can only be granted if a large number of people are affected is constitutionally immoral and inhumane.

What makes life meaningful is love. The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalization or, worse, to re-criminalize it is to display the very opposite of compassion. To show exaggerated deference to a majoritarian Parliament when the matter is one of fundamental rights is to display judicial pusillanimity, for there is no doubt that in the constitutional scheme it is the judiciary that is the ultimate interpreter."

A copy of the Late Justice [Retd] Leila Seth's article titled as 'A Mother and a Judge Speaks Out on Section 377', which was published in the Times of India in January 2014 is annexed hereto as 'ANNEXURE P-3'. (At pages 48 to 51)

21. There is an urgent need today to address the coming of age of the Indian social fibre, which accepts the LGBTQ community.

Parents of such persons are also actively accepting their children[s] choices. However, social stigmatization remains on account of continued criminalization resulting from Section 377 IPC being on the statute book. Homosexuality is an intimate and innate choice an individual makes. Such choice is driven by intrinsic desires of an individual. This intrinsic desire cannot be criminalised because it manifests into a choice to love and accept another being from the same-gender as their sexual partner.

22. The Indian Constitution has been held to be a living, thriving and evolving document. This is apparent from the recent decision of this Hon'ble Court in the Privacy Judgment. Declaring the right to privacy to be a fundamental right protected under Article 21 of the Constitution of India tells of the maturity and the dynamic nature of the Indian Constitution. However, today India faces a piquant situation, on the one hand, the right to privacy and the right to choice of gender have been constitutionally recognised and on the other hand, a facet of the right to privacy and right to choice ie right to choose sexual orientation and/or right to choose sexual partner regardless of the gender, continues to be criminalised. There is needless to say an ostensible dichotomy. There is an urgent need for such dichotomy to be cured and corrected as criminalisation of homosexuality is an anti-thesis to the notion of inclusiveness – a major tenet of the Constitution- while also being violative of Article 14, 19 and 21 of the Constitution.

23. Section 377 IPC is undoubtedly archaic is a relic of the colonial era. Infact, Section 377 IPC is contrary to aspects of Indian History, which since the pre-colonial era in its scriptures such as Kamasutra and Khajuraho temples depicted and in a way accepted homosexuality. In light of the foregoing, it is time the dichotomy as mentioned above, be cured in respect to consenting adults engaging in same-sex relationships, so that such citizens can without retrain and fear of prosecution exercise their fundamental rights to live with liberty, dignity and in privacy.

Section 377 IPC being on the statute book has economic costs:

24. Continued criminalisation of homosexuality comes with an economic cost. This is in addition to the socio-psychological adverse impact and deprivation of health access to the LGBTQ community.
25. The economic cost has atleast two facets: i. exclusion and/or limited inclusion of an able and talented work force belonging to the LGBTQ community. This directly impacts personal health-costs, wealth-creation and work-force loss and ii. Loss of contribution to the GDP.
26. It is further relevant to mention the 'Power of the Pink Money' also known as Pink Pound and/or Pink Dollar. Pink Money describes the purchasing power of the gay community, often especially with respect to political donations. With the rise of the gay rights movement, pink money has gone

from being a fringe or marginalized market to a thriving industry in many parts of the Western world such as the United States and United Kingdom. Many businesses now specifically cater to gay customers, including nightclubs, shops, restaurants and even car-rentals. The demand for these services stems from commonly perceived discrimination by traditional businesses. Worldwide in 1998, pink money was valued at £350 billion (\$560 billion) across a variety of sectors—especially entertainment and consumer goods. Purchasing power in 2012 in the United States was expected to increase to \$790 billion. In 2015, the purchasing power of the U.S. LGBT adults reached approximately \$917 billion. The economic power of pink money has been seen as a positive force for the gay community, creating a kind of "financial self-identification" which helps gay and lesbian individuals feel like part of a community which values them. [Ref: https://en.wikipedia.org/wiki/Pink_money]

27. The above-mentioned figures speak for themselves, in terms of the economic contribution the LGBTQ community can have to the GDP of any Country. De-criminalising Section 377 IPC, in India, will benefit India in terms of an added work-force, which will live with dignity and respect and not be brought down to suffer from stigma of being criminals. In addition thereto, India will open up as a tourist destination for members of LGBTQ communities from other countries as well. Needless to say, this

will enhance the revenue contribution of the Tourism sector to the GDP.

28. A preliminary study sponsored by the World Bank on the Economic Cost of Homophobia and the exclusion of LGBT People: A case study of India is highly relevant herein. It depicts an alarming and disturbing statics. It is noteworthy that though the results of this study are preliminary [and as such is subject to change], however, they have high persuasive value in the absence of any other such exhaustive recent report, which focuses on India. A copy of the World Bank Report titled as 'The Economic Cost of Homophobia and the exclusion of LGBT People: A case study of India: The economic Cost of Homophobia & the Exclusion of LGBT People is annexed hereto as 'ANNEXURE P-4', (At pages 52 to 67) and the detailed report prepared by World Bank only is annexed hereto as 'ANNEXURE P-5'. (At pages 68 to 125)

29. Key features from the report[s] are quoted herein-below:

- i. The 2011 Indian Census marked the first time that an "other" category was added to the male and female options on the question about sex, in essence providing a third gender category, but the resulting count of transgender people is thought by some observers to be unreliable. A total of 490,000 individuals of all ages reported the "other" option, or about

- ii. 0.04% of the Indian population of 1.2 billion people
- iii. Estimated cost of homophobia [based on an India study] is approx. anywhere between 0.1 to 1.7% of GDP
- iv. 56% of white-collar LGBT workers have reported discrimination
- v. Health costs of Homophobia in India [as of 2012] ranged between US\$ 712 million to US\$ 23.1 billion.
- vi. 28% of urban lesbians experienced physical abusive violence in family
- vii. Data on public opinion from 2006 shows that 41% Indians would not want a homosexual neighbour

30. The table below sums up the cost of stigma and exclusion of LGBTQ community in India [Ref: World Bank Report as mentioned above]:

SUMMARY OF COSTS OF STIGMA AND EXCLUSION OF LGBT PEOPLE INDIA

<u>Form of stigma or exclusion</u>	<u>Nature of cost</u>	<u>Evidence from India</u>
Education		
Harassment and discrimination	Lower investments in human capital	Surveys, 2011 Census
Fewer family resources	Lower investments in human capital	
Labour market discrimination		

Lower wages	Lower productivity, inefficient use of existing human capital	Surveys, individual reports
Loss of employment	Lost labor input	Surveys, 2011 Census
Unemployment	Lost labor input	2011 Census
Harassment, discrimination	Lower productivity	Surveys, individual reports
Labor supply constraints		
Not in labor force	Lost labor input	
Health disparities		
HIV	Lower productivity; lower output	HIV surveillance data
Depression	Lower productivity; lower output	Health surveys
Suicidal thinking	Lower productivity; lower output	Health surveys

31. Economic opportunities to members of the LGBTQ community are limited as they are largely excluded from the work-space on account of being perceived as criminals. Question is are they really criminals just because members from the LGBTQ community have exercised their right to choose their sexual-orientation. The Petitioner himself has had to battle with the social stigma's associated with homosexuality at school-level, society and at the work place. The stigma of not being taken seriously as opposed to a counter-part who is hetro-sexual. The

stigma of not openly being able to express love for the fear of prosecution. Having suffered such stigma's and having had the ability to withstand them, the Petitioner dedicated himself to the inclusion campaign of 'Pure-Love'. Through the campaign the Petitioner has generated awareness about the truth[s] about homosexuality in the work-space and is attempting to foster an environment of inclusion. The Petitioner has modelled the 'Pure-Love' inclusion campaign in-sync with the UN Guidance Principles on Discrimination against Lesbians, Gays, Bi-Sexuals, Transgender and Inter-sex people: Standards of conduct Business'. Copies of the relevant media articles on the 'Pure-Love' campaign are annexed hereto as 'ANNEXURE P-6' (At pages 126 and 'ANNEXURE P-7'. (At pages 127)

32. The United Nations Guiding Principles are guided by the understanding that businesses play a huge role in society and have the ability to be agents of change. The UN High Commissioner for Human Rights quote in thus regard is relevant, *"If we are to achieve faster global progress towards equality for LGBTI people, businesses will not only have to meet their human rights responsibilities, they must become active agents of change."* A copy of the UN Guidance Principles on Discrimination against Lesbians, Gays, Bi-Sexuals, Transgender and Inter-sex people: Standards of conduct Business' is annexed hereto as 'ANNEXURE P-8' (At pages 128

to 178). This campaign assumes significance in light of the above-said World Bank Report data:

33. Through the 'Pure-Love' inclusion campaign the Petitioner has at least within his own corporate structure sensitised personnel about the LGBTQ community and their rights. Further, the Petitioner has rehabilitated at least 10 persons belonging to the LGBTQ community since 2017 and has come into contact with over 100 members of the LGBTQ community. Many such members have expressed how they have had complaints registered against them under Section 377 IPC, not by their partners with whom they have had consensual relations but neighbours/strangers. Such prosecution is needless to say false and malicious and on account of this such members of the LGBTQ community live under constant fear, suffer from depression and other severe mental health disorders. Details of such members are not being revealed in order to maintain their privacy.

34. Inclusion of persons belonging to the LGBTQ community in a work-place provides them with a sense of social-acceptance, aids them in human development and achieving a better standard of living. Further, addresses their self-actualization needs. With an added work-force, who are free from any kind of social stigma, the value generation to business, intellectually and financially is immense. Value generation to business, needless

to say, percolates and adds to the economy as well. There is no reason for denial of the rights to self-development of persons belonging to the LGBTQ community, especially when the existence of Section 377 IPC on the statute book is violative of Part-III of the Constitution.

35. It is relevant to mention that the Petitioner is not the only citizen owing its allegiance to Corporate India to promote inclusion of LGBTQ community in the work-place. Firms such as Godrej, Genpact, Intuit, Thought Works, Microsoft, and Google have taken a public stance against Section 377 IPC. Examples of brands that have run ads against Section 377 IPC include: jewellery brand Tanishq—owned by Titan, a Tata Group company—which posted an ad on Twitter that showed a pair of diamond earrings with the tagline "*Two of a kind always make a beautiful pair! #sec 377*"; Fastrack, a popular youth fashion brand in India, ran a campaign called "Move On" in favour of repealing Section 377 IPC; and luxury goods brand Hidesign tweeted in support of repealing Section 377 IPC. It is also relevant to mention that Anouk and Ogilvy & Mather Bangalore created an Ad for Anouk- a fashion apparel brand representing a Lesbian relationship with the tag-line, "*Bold is beautiful*".
36. Clearly, sections of Corporate India are fathoming the value addition from opening upto the LGBTQ community. There is needless to a huge positive impact that will be witnessed towards

Art, Culture, Cinema, Fashion Industry and Businesses with the decriminalisation of homosexuality.

GROUNDS

37. Aggrieved by his [and other similarly situated like him] Fundamental Rights being violated by the draconian and unjust Section 377 IPC, the Petitioner is invoking the extraordinary writ jurisdiction of this Hon'ble Court under Article 32 of the Constitution of India, on the following amongst other, each of which are without prejudice to the other:

A. For that with the criminalisation of homosexuality persons from the LGBTQ community continue to live in oppression and the fear of prosecution. The economic potential that can be generated from such persons living a life free from fear and stigma is as a result suppressed. Decriminalisation of homosexuality will have the benefit of persons from the LGBTQ community actively being employed and/or creating more employment. Such job-creation and absorption of a talented and able work force will lead to contribution towards the GDP. Campaigns such as 'Pure-Love' which are based on the UN Guidance Principles are for the purpose of including citizens belonging to the LGBTQ community into the work-force with respect and dignity. Section 377 IPC denies persons from the LGBTQ community their right of human dignity

and human development. In such manner, Section 377 IPC is violative of the Constitution and ought to be struck down.

B. For that the significances of fundamental rights is that they assist every citizen to achieve their fullest potential, which eventually leads to common public good. Human beings are also valuable asset[s] of any country who contribute to the growth and welfare of their nation and the society. If a sizable population is facing identity crisis and is being oppressed, stigmatised and face the fear of exercising their choice of who they really are in order to avoid a prosecution, that is an alarming thought from the standpoint of human progress and economic development. Section 377 IPC is a deterrent to human progress and economic development for the impact it has on responsible consenting adults who make a conscious choice to engage in having sexual relations with others of the same-sex. Section 377 IPC thus ought to be struck down for being violative of Part III of the Constitution.

C. For that Article 21 guarantees the protection of 'personal autonomy' of an individual. This Hon'ble Court in the case of *Anuj Garg v. Hotel Assn. of India* reported in 2008 [3] SCC 1, inter alia, held that personal autonomy includes both the negative right of not to be subject to interference

by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of sexual-orientation is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

- D. For that the basic spirit of the Indian Constitution is to provide each and every person of the nation equal opportunity to grow as a human being, irrespective of race, caste, religion, community and social status. The continued criminalisation of homosexuality ie Section 377 IPC qua consenting adults is against the spirit of the Indian Constitution.
- E. For that the phrase 'carnal intercourse against the order of nature' as provided in Section 377 IPC is vague and cannot be the basis for criminalisation. It is well-settled law that no criminal prosecution can be initiated on the basis of a vague provision. Hence, for this reason as well Section 377 IPC is violative of Section 14, 19 and 21 of the Constitution and ought to be quashed.
- F. For that Sexual-Orientation is the most innate facet of any individual. There is no rational and/or logic basis for ascertaining that intercourse between two individuals of

the same-sex is against the order of nature. As long as intercourse between any two individuals, regardless of their gender, is consensual it cannot be said to be against the order of nature. More so the belief and stigma about homosexuality being against the order of nature did not originate in India but from the then British Laws. The Indian sculptures and history for time immemorial depicted homosexual relations. The United Kingdom has itself modified its position on homosexuality. Hence, not only is Section 377 IPC vague, it is archaic. Thus, for this reason as well it violates Article 14, 19 and 21 of the Constitution and ought to be set-aside.

- G. For that the concept of equality in Article 14 so also the meaning of the words 'life', 'liberty' and 'law' in Article 21 have been considerably enlarged by this Hon'ble Court in its decisions in a catena of cases and more particularly in recent times in the cases of NALSA [supra], K.S. Puttaswamy [supra] and Shakti Vahini [supra]. Any statutory provision which is not reasonable, just and fair, and infact results in exclusion and thereby denial of the right to dignity is violative of Article 14, 19 and 21 of the Constitution. Section 377 IPC is unreasonable, illogical and excludes/discriminates against a genre of the citizens and thereby denies them their fundamental rights of right to life, right to dignity, limits their right to choice. Hence,

Section 377 IPC is violative of Part-III of the Constitution of India.

H. For that the decisions of this Hon'ble Court in the case[s] of Shakti Vahini [supra] and Shafin Jahan [supra] once again highlights the significance given to the 'Right of Choice' of an adult citizen. This right of choice in conjunction with the right to liberty, dignity and privacy encompasses the right of an individual to decide/elect their gender, sexual-orientation and who they want in their private life as a companion. Section 377 IPC violates all these vital and inherent rights of consenting adults who choose to engage in sexual intercourse with another adult from the same-sex. Thus, Section 377 IPC to the extent it criminalises same-sex relations between consenting adults is violative of the 'Right to Choice' and thereby, violative of Article 21 of the Constitution of India.

38. The Petitioner reserves liberty to raise and/or plead any other ground as may be available to him at the time of submissions/later stage, as and when the need may arise.
39. The Petitioner has not filed any other petition either before this Hon'ble Court or any other High Court challenging the constitutional validity of Section 377 IPC.
40. The present Petition is filed bona fide and in the interests of justice.

PRAYER

In light of the above mentioned facts and circumstances, it is prayed that that this Hon'ble Court may be pleased to pass:

- A. Writ of mandamus declaring the 'Right to Choice of Sexual Orientation' encompasses the Right to Life with Dignity and Right to Privacy and is thus part of the fundamental rights enshrined in Article 21 of the Constitution of India and that any discrimination of any person on the basis of exercising the Right of Choice of Sexual Orientation is violative of Article 14 of the Constitution of India; and;
- B. Writ of mandamus reading down and/striking down Section 377 of the Indian Penal Code as being inapplicable to any intercourse between consenting adults of the same gender; and/or
- C. Pass any other order this Hon'ble Court may deem fit and unnecessary in the interests of justice.

AND FOR THIS ACT OF KINDNESS YOUR PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

FILED BY

[SHALLY BHASIN]
ADVOCATE FOR THE PETITIONER

DRAWN ON: 09.04.2018
FILED ON: 10.04.2018
NEW DELHI

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO _____ OF 2018

34

IN THE MATTER OF:

Keshav Suri

...Petitioner

Verses

Union of India

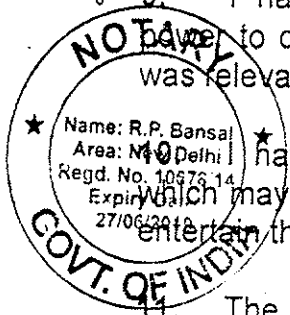
...Respondent



1. I am Petitioner above named and well acquainted with facts of the case and as such competent to swear this affidavit.
2. I have read and understood contents of accompanying synopsis and list of dates (Page B-M) writ petition paras (1 - 40) pages (1-33) which are true and correct to my knowledge and belief.
3. Annexure filed with petition is true copy of their respective originals.
4. I have not filed any other petition either in this Hon'ble Court or in others Court seeking same or similar directions prayed in this petition.
5. The present petition is being filed in public interest to in order to protect the fundamental rights of members of the LGBTQ community in India. I am too a member of the LGBTQ community and thus in filing the present petition, I per se do not have any individual gain, private motive or oblique reasons in filing this petition. Petition is not guided for gain of any other individual person, institution or body. There is no motive other than the larger public interest and interest of justice.
6. There is no civil, criminal or revenue litigation, involving me, which has or could have legal nexus, with issue involved in this.
7. There is no requirement to move concerned government authority for relief sought in this petition. There is no other remedy available except approaching this Hon'ble Court by way of the instant petition.
8. I have gone through the Article 32 and the Supreme Court Rules and do hereby affirm that present application is in conformity thereof.

IDENTIFIED BY

9. I have done whatsoever enquiry/investigation, which was in my power to do, to collect the data/material, which was available; and which was relevant for this Hon'ble Court to entertain application.



10. I haven't concealed any data/material/information in the petition; which may have enabled this Hon'ble Court to form an opinion, whether to entertain this or not and/or whether to grant any relief or not.

11. The averments made in this affidavit are true and correct to my personal knowledge and belief. No part of this affidavit is false or fabricated, nor has anything material been concealed there from.

DEPONENT

VERIFICATION

I, Deponent do hereby verify that contents of above affidavit are true and correct to my personal knowledge and belief. No part of this affidavit is false nor has anything material been concealed there from.

ATTESTED

I solemnly affirm today i.e. 16th day of April 2018 at New Delhi.

Notary Public, Delhi
(Notarially attested)

16/04/18

DEPONENT

Section 377 in The Indian Penal Code

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 of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Appendix - 2Article 21 in The Constitution Of India 1949

21. Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law

ANNEXURE P-1

37

WP(Crl.) No.76/2016

1

ITEM NO.37

COURT NO.1

SECTION X

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Writ Petition(s) (Criminal) No(s).76/2016

NAVTEJ SINGH JOHAR & ORS.

Petitioner(s)

VERSUS

UNION OF INDIA MINISTRY OF LAW AND JUSTICE
SECRETARY.

Respondent(s)

Date : 08-01-2018 This petition was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.M. KHANWILKAR
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD

For Petitioner(s) Mr.Arvind Datar, Sr.Adv.
Mr.Kapil Sibal, Sr.Adv.
Mr.Mahesh Agarwal, Adv.
Dr.Menika Gurumurthy, Adv.
Mr.Saurabh Kirpal, Adv.
Ms.Arundhati Katju, Adv.
Ms.Neeha Nagpal, Adv.
Mr.Himanshu Satija, Adv.
Mr. E. C. Agrawala, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E R

Heard Mr.Arvind Datar, learned senior counsel for the
petitioner.

In the instant writ petition, the petitioners who claimed
to be directly affected by the offence enumerated under Section 377
of the Indian Penal Code, 1860 (for short, 'IPC'), pray for

by Mr.Datar that on an earlier occasion, this Court in Suresh Kumar
Koushal and another vs. Naz Foundation and others, (2014) 1 SCC 1,
has declared the provision to be intra vires and overruled the

Signature Not Verified
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SATISH KUMAR YADAV
Date: 2018.01.08
18:51:56 ICT
Reason:

decision rendered by the Division Bench of the Delhi High Court in Naz Foundation vs. Government of NCT of Delhi and others, (2009) 111 DRJ 1. According to Mr.Datar, Naz Foundation was canvassing the cause as a non-governmental organization by invoking the jurisdiction under Public Interest Litigation whereas the petitioners are directly affected persons. The aforesaid submission leaves us unimpressed.

It is further submitted by Mr.Datar that the two-Judge Bench decision in Suresh Kumar Koushal (supra) has been guided by the perception of the majority which is based on social morality and stands on a platform distinct from constitutional morality. Learned senior counsel would submit that the fundamental facet of rule of law is dependent on the fulcrum of constitutional provisions in a democracy. Where the constitutional supremacy prevails, any social principle will not be allowed to come in the way. He would also submit that the interpretation placed by the two-Judge Bench under Article 21 of the Constitution is in an extremely narrow compass and, in fact, the two-Judge Bench has been guided by Article 14 of the Constitution. Learned senior counsel has drawn our attention to the later judgment in National Legal Service Authority vs Union of India and others, (2014) 5 SCC 438, where this Court has emphasised on "gender identity and sexual orientation". He has commended us to paragraphs 21 and 22 of the said judgment which we think appropriate to reproduce:

"21. Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of

persons may be born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

22. Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexuals, bisexuals, heterosexuals, asexual etc. Gender identity and sexual orientation, as already indicated, are different concepts. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom and no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.

Mr. Datar has also drawn inspiration from the Nine-Judge Bench decision in Justice K.S. Puttaswamy (Retd.) and another vs.

Unoin of India and others, (2017) 10 SCC 1, wherein the majority dealing with Suresh Kumar Kaushal's case has expressed the view thus:

"144. Neither of the above reasons can be regarded as a valid constitutional basis for disregarding a claim based on privacy under Article 21 of the Constitution. That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the 'mainstream'. Yet in a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

145. The view in Koushal that the High Court had erroneously relied upon international precedents "in its anxiety to protect the so-called rights of LGBT persons" is similarly, in our view, unsustainable. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without

discrimination.

146 The decision in Koushal presents a de minimis rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. For instance, pre-publication restraints such as censorship are vulnerable because they discourage people from exercising their right to free speech because of the fear of a restraint coming into operation. The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one's sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the Koushal rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, we disagree with the manner in which Koushal has dealt with the privacy -dignity based claims of LGBT persons on this aspect."

Be it noted, the said decision did not deal with the constitutional validity of Section 377 IPC as the matter was pending before the larger Bench. The matter which was pending before the larger Bench is a Curative Petition which stands on a different footing. In this regard, Mr. Datar has also referred to paragraph 647 of the judgment of the concurring opinion. It is as follows:

"647. There are two aspects of the opinion of Dr. D.Y. Chandrachud, J., one of which is common to the opinion of Rohinton F. Nariman, J., needing specific mention. While considering the evolution of Constitutional jurisprudence on the right of privacy he has referred to the judgment in Suresh Kumar Koushal Vs. Naz Foundation. In the challenge laid to Section 377 of the Indian Penal Code before the Delhi High Court, one of the grounds of challenge was that the said provision amounted to an infringement of the right to dignity and privacy. The Delhi High Court, inter alia, observed that the right to live with dignity and the right of privacy both are

recognized as dimensions of Article 21 of the Constitution of India. The view of the High Court, however did not find favour with the Supreme Court and it was observed that only a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and thus, there cannot be any basis for declaring the Section ultra virus of provisions of Articles 14, 15 and 21 of the Constitution. The matter did not rest at this, as the issue of privacy and dignity discussed by the High Court was also observed upon. The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J., who in paragraphs 123 & 124 of his judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to Constitutional rights and the Courts are often called up on to take what may be categorized as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy. The observations made in *Mosley vs. News Group Papers Ltd.*, in a broader concept may be usefully referred to:

"130... It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognized criteria.

131. When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say, because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of

drug-taking)? Or was it necessary because the information, in the words of the Strasbourg court in Von Hannover at (60) and (76), would make a contribution to "a debate of general interest"? That is, of course, a very high test, it is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years."

The submission advanced by Mr.Datar is that privacy of the individual having been put on such a pedestal and, in the National Legal Service Authority's case(supra) (popularly known as the transgender's case), sexual orientation has been emphasised, Section 377 IPC cannot be construed as a reasonable restriction as that has the potentiality to destroy the individual autonomy and sexual orientation. It is an accepted principle of interpretation of statutes that a provision does not become unconstitutional because there can be abuse of the same. Similarly though a provision of the statute book is not invoked on many occasions, it does not fall into the sphere of Doctrine of Desuetude. Suresh Kumar Kaushal's case has been guided by that.

Certain other aspects need to be noted. Section 377 IPC uses the phraseology "carnal intercourse against the order of nature". The determination of order of nature is not a constant phenomenon. Social morality also changes from age to age. The law copes with life and accordingly change takes place. The morality that public perceives, the Constitution may not conceive of. The individual autonomy and also individual orientation cannot be

atrophied unless the restriction is regarded as reasonable to yield to the morality of the Constitution. What is natural to one may not be natural to the other but the said natural orientation and choice cannot be allowed to cross the boundaries of law and as the confines of law cannot tamper or curtail the inherent right embedded in an individual under Article 21 of the Constitution. A section of people or individuals who exercise their choice should never remain in a state of fear. When we say so, we may not be understood to have stated that there should not be fear of law because fear of law builds civilised society. But that law must have the acceptability of the Constitutional parameters. That is the litmus test.

It is necessary to note, in the course of hearing on a query being made and Mr.Datar very fairly stated that he does not intend to challenge that part of Section 377 which relates to carnal intercourse with animals and that apart, he confines to consenting acts between two adults. As far as the first aspect is concerned, that is absolutely beyond debate. As far as the second aspect is concerned, that needs to be debated. The consent between two adults has to be the primary pre-condition. Otherwise the children would become prey, and protection of the children in all spheres has to be guarded and protected. Taking all the aspects in a cumulative manner, we are of the view, the decision in Suresh Kumar Kaushal's case (supra) requires re-consideration. As the question relates to constitutional issues, we think it appropriate to refer the matter to a larger Bench.

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WP(Crl.)No.76/2016

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In the meantime, a copy of the petition be served on the Central Agency so that the Union of Indian can be represented in the instant matter.

Let the matter be placed before Hon'ble the Chief Justice of India, on the administrative side, for consideration of the appropriate larger Bench.

(Chetan Kumar)
Court Master

(H.S.Parasher)
Assistant Registrar

Tone Copy

Gay count varies from 2% to 13% of population

TNN | Jul 3, 2009, 03.24 AM IST

How many gays and lesbians are there in the world? The answer is difficult to find because not only are same-sex preferences considered taboo, in many countries they are defined as criminals. Most studies have been carried out in Western countries and they report a wide range of anything between 2% and 13% of the population exhibits same sex preference.

In India, the National Aids Control Organisations Expert Group on high risk groups says that there are 25 lakh males having sex with males. But if the most conservative western estimate of 2% is taken, and extrapolated on the Indian population in the assumption that gayness is universal, the Indian gay community including men and women would at least be over 20 million strong. At the upper end of 13%, it would be as large as the country's largest minority community. The first and path-breaking estimate came in the Kinsey report on male sexuality in the US, published in 1948, that an astonishing 46% males were attracted to both sexes while 37% reported having sex with other males. The report came in for criticism for its methodology.

Two other prominent surveys in US the Hite report of 1991 and the Janus study of 1993 reported exclusive

homosexuality among 1% to 10% of surveyed people, with male gays slightly higher in number than lesbians. Several other studies confirmed similar ranges.

In an exit poll taken on polling day for the 2008 Presidential election in the US, 4% of those surveyed declared themselves as gay, lesbian or bisexual. Experts say that differing estimates arise because of the different nature of questions asked. If the question is about being attracted towards the same sex then a higher number is reported. However, if sexual activity with same sex persons is asked about then a lower figure appears. A 1992 study found that 6.1% of males in Britain and 4.1% in France had experienced homosexual activity. In Norway, 12% of those surveyed in 2003 reported having homosexual activity. In New Zealand, 20% of participants in a 2006 study said that they secretly had homosexual feelings, but only 2-3% identified themselves as homosexuals.

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THE TIMES OF INDIA

A mother and a judge speaks out on section 377

TNN | Jan 26, 2014, 06:10 AM IST

My name is Leila Seth. I am 83 years old. I have been in a long and happy marriage of more than sixty years with my husband Premo, and am the mother of three children. The eldest, Vikram, is a writer. The second, Shantum, is a Buddhist teacher. The third, Aradhana, is an artist and film-maker. I love them all. My husband and I have brought them up with the values we were brought up with - honesty, courage and sympathy for others. We know that they are hardworking and affectionate people, who are trying to do some good in the world.

But our eldest, Vikram, is now a criminal, an unapprehended felon. This is because, like many millions of other Indians, he is gay; and last month, two judges of the Supreme Court overturned the judgment of two judges of the Delhi High Court that, four years ago, decriminalized homosexuality. Now, once again, if Vikram falls in love with another man, he will be committing a crime punishable by imprisonment for life if he expresses his love physically. The Supreme Court judgment means that he would have to be celibate for the rest of his life - or else leave the country where he was born, to which he belongs, and which he loves more than any other.

I myself have been a judge for more than fourteen years - first, as a judge of the Delhi High Court, then as Chief Justice of the Himachal Pradesh High Court. Later, I served as a member of the Law Commission, as well as the Justice J.S. Verma Committee, which resulted in the Criminal Law Amendment Act 2013 being passed. I have great respect for legal proprieties in general, and would not normally comment on a judgment, but I am making an exception in this case.

I read the judgment of the Delhi High Court when it came out four years ago. It was a model of learning, humanity and application of Indian Constitutional principles. It was well crafted, and its reasoning clearly set out. It decided that Section 377 of the Indian Penal Code infringed Article 14 of the Constitution, which deals with the fundamental right to equality. It infringed Article 15, which deals with the fundamental right to non-discrimination. And it infringed Article 21, which covers the

ANNEXURE P-3
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fundamental right to life and liberty, including privacy and dignity. The judgment of the High Court 'read down' Section 377 in order to decriminalize private, adult, consensual sexual acts.

The government found no fault with the judgment and did not appeal. However, a number of people who had no real standing in the matter did challenge it. Two judges of the Supreme Court heard the appeal in early 2012. Then, 21 months later, and on the very morning of the retirement of one of them, the judgment was finally pronounced. The Delhi High Court judgment was set aside, Section 377 was reinstated in full, and even private, adult, consensual sexual acts other than the one considered 'natural' were criminalized again.

As the mother of my elder son, I was extremely upset. But as a lawyer and a former judge, I decided to reserve my views till I had read the judgment. When I read it, it would be true to say that I found it difficult to follow its logic.

A host of academics and lawyers have critiqued the judgment in great detail, including the non-addressal of the Article 15 argument, and have found it wanting in many respects. I do not intend to repeat those criticisms. However, I should point out that both learning and science get rather short shrift. Instead of welcoming cogent arguments from jurisprudence outside India, which is accepted practice in cases of fundamental rights, the judgment specifically dismisses them as being irrelevant. Further, rather than following medical, biological and psychological evidence, which show that homosexuality is a completely natural condition, part of a range not only of human sexuality but of the sexuality of almost every animal species we know, the judgment continues to talk in terms of 'unnatural' acts, even as it says that it would be difficult to list them.

But what has pained me and is more harmful is the spirit of the judgment. The interpretation of law is untempered by any sympathy for the suffering of others.

The voluminous accounts of rape, torture, extortion and harassment suffered by gay and transgender people as a result of this law do not appear to have moved the court. Nor does the court appear concerned about the parents of such people, who stated before the court that the law induced in their children deep fear, profound self-doubt and the inability to peacefully enjoy family life. I know this to be true from personal experience. The judgment fails to appreciate the stigma that is attached to

persons and families because of this criminalization.

The judgment claimed that the fact that a minuscule fraction of the country's population was gay or transgender could not be considered a sound basis for reading down Section 377. In fact, the numbers are not small. If only 5% of India's more than a billion people are gay, which is probably an underestimate, it would be more than 50 million people, a population as large as that of Rajasthan or Karnataka or France or England. But even if only a very few people were in fact at threat, the Supreme Court could not abdicate its responsibilities to protect their fundamental rights, or shuffle them off to Parliament. It would be like saying that the Parsi community could be legitimately imprisoned or deported at Parliament's will because they number only a few tens of thousands. The reasoning in the judgment that justice based on fundamental rights can only be granted if a large number of people are affected is constitutionally immoral and inhumane.

The judgment has treated people with a different sexual orientation as if they are people of a lesser value.

What makes life meaningful is love. The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalization or, worse, to recriminalize it, is to display the very opposite of compassion. To show exaggerated deference to a majoritarian Parliament when the matter is one of fundamental rights is to display judicial pusillanimity, for there is no doubt, that in the constitutional scheme, it is the judiciary that is the ultimate interpreter.

A review petition is now up for hearing before one of the two original judges plus another, who will replace the now-retired Justice Singhvi. It will be heard in chambers. No lawyers will be present.

I began by saying that Premo and I had brought up our children to believe in certain values. I did not mention some others

which we have also sought to inculcate in them: to open their hearts and minds; to admit their errors frankly, however hard this may be; to abjure cruelty; and to repair in a willing spirit any unjust damage they have done to others.

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Annex P4
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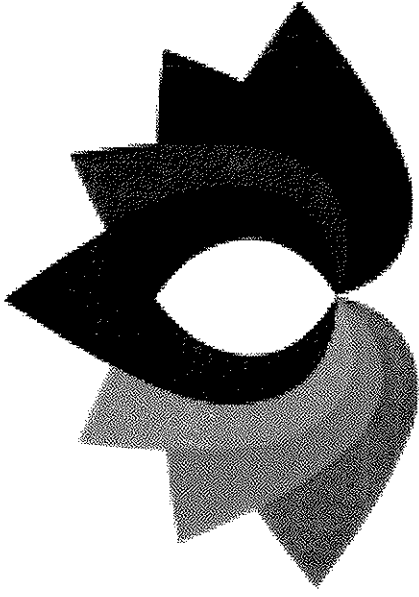
THE ECONOMIC COST OF
HOMOPHOBIA

& the Exclusion of LGBT People: A Case Study of India

M. V. Lee Badgett, Ph.D.
February 2014

Preliminary results—please do not cite

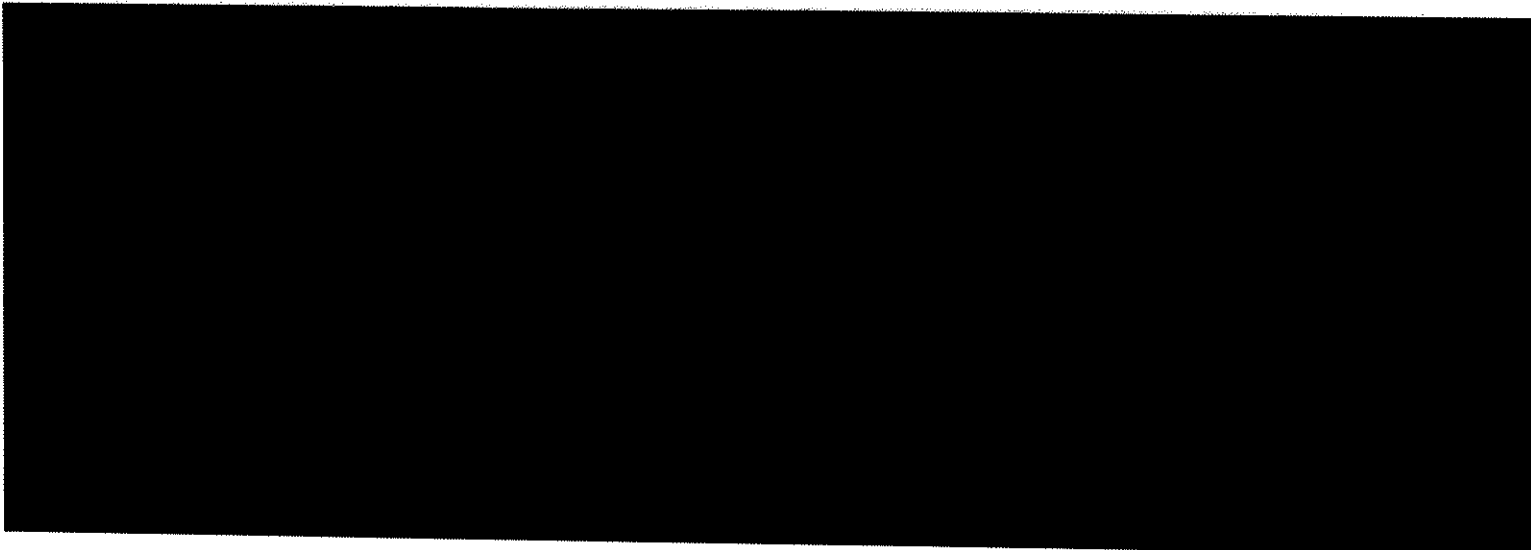
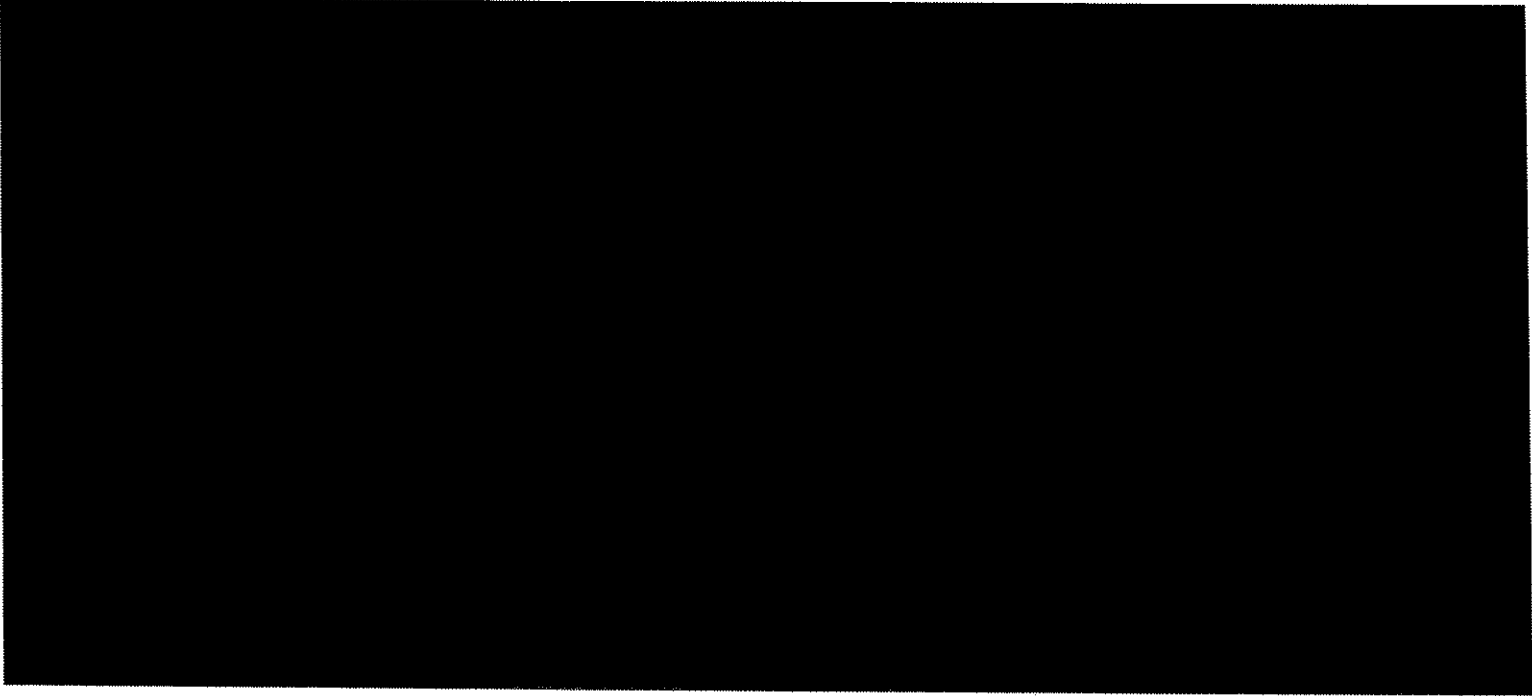
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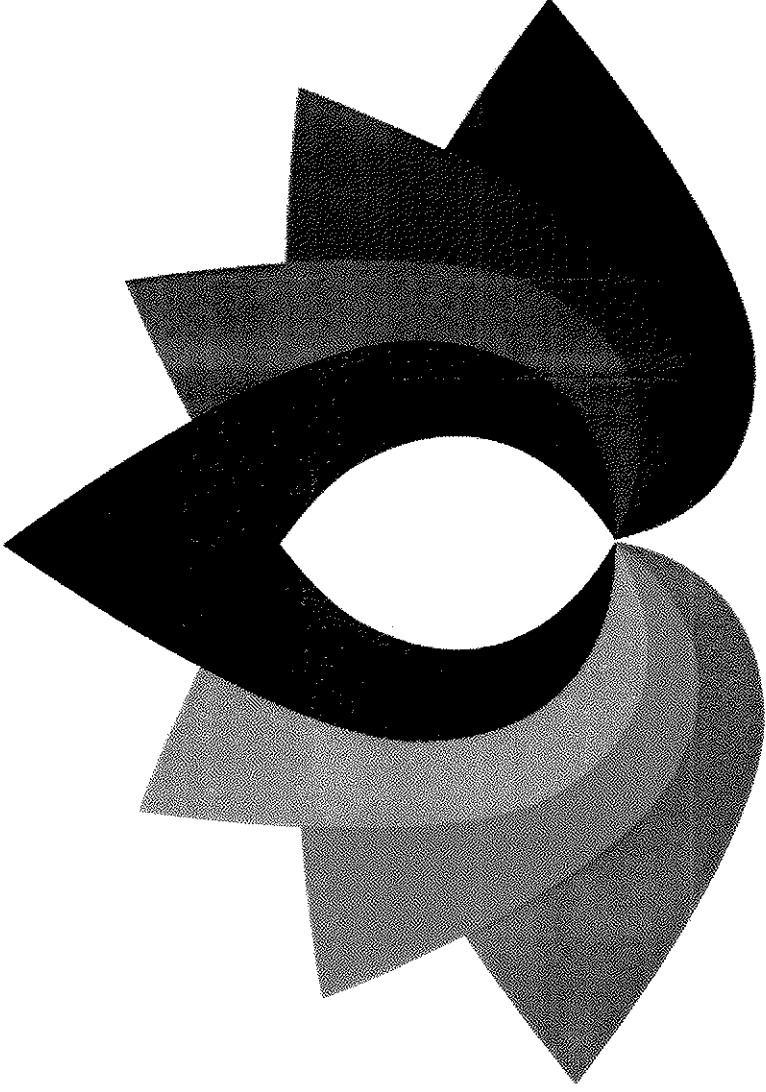
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SEXUAL MINORITIES
AND DEVELOPMENT

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S O G I

SEXUAL MINORITIES
AND DEVELOPMENT

THE WORLD BANK 

Key points

SS

- **A model:** Homophobia and economic development are closely connected through multiple links.
- **A case study:** A focus on India allows an estimate of the cost of homophobia, although not all costs can be quantified:
0.1 – 1.7% of GDP
- **Future directions:** We need more data, research, and development attention on LGBT exclusion.

Methodological issues

56

- Big conceptual issue: Local vs. global identities
- Data challenges
- Expanding international scholarship

HOMOPHOBIA

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Violence

Prison

Job loss

Discrimination

Family rejection

Harassment in school

Pressure to marry

HOMOPHOBIA

Violence

Prison

Job loss

Discrimination

Family rejection

Harassment in school

Pressure to marry

58

Research from India

Discrimination

56% of white-collar LGBT workers report discrimination

Poverty

64% of Kothis had incomes below \$70 per month

66% of MSM in Chennai below \$1.50/day

Violence

28% of urban lesbians experienced physical abusive violence in family

59

**Economy-level
outcomes**

- Higher health care & social program costs
- Lower economic output
- Fewer incentives to invest in human capital

**Individual-level
outcomes**

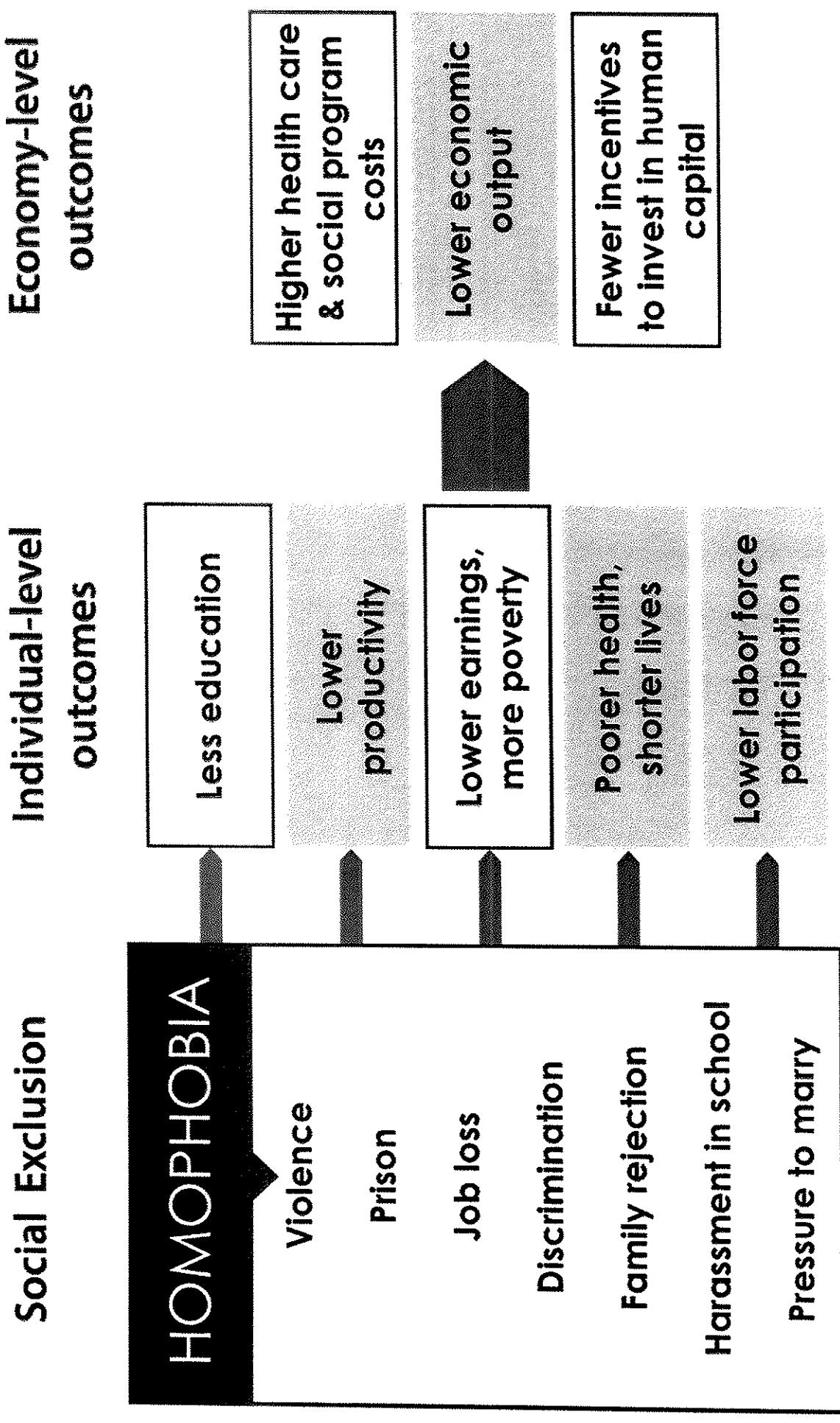
- Less education
- Lower productivity
- Lower earnings, more poverty
- Poorer health, shorter lives
- Lower labor force participation

Social Exclusion

HOMOPHOBIA

- Violence
- Prison
- Job loss
- Discrimination
- Family rejection
- Harassment in school
- Pressure to marry

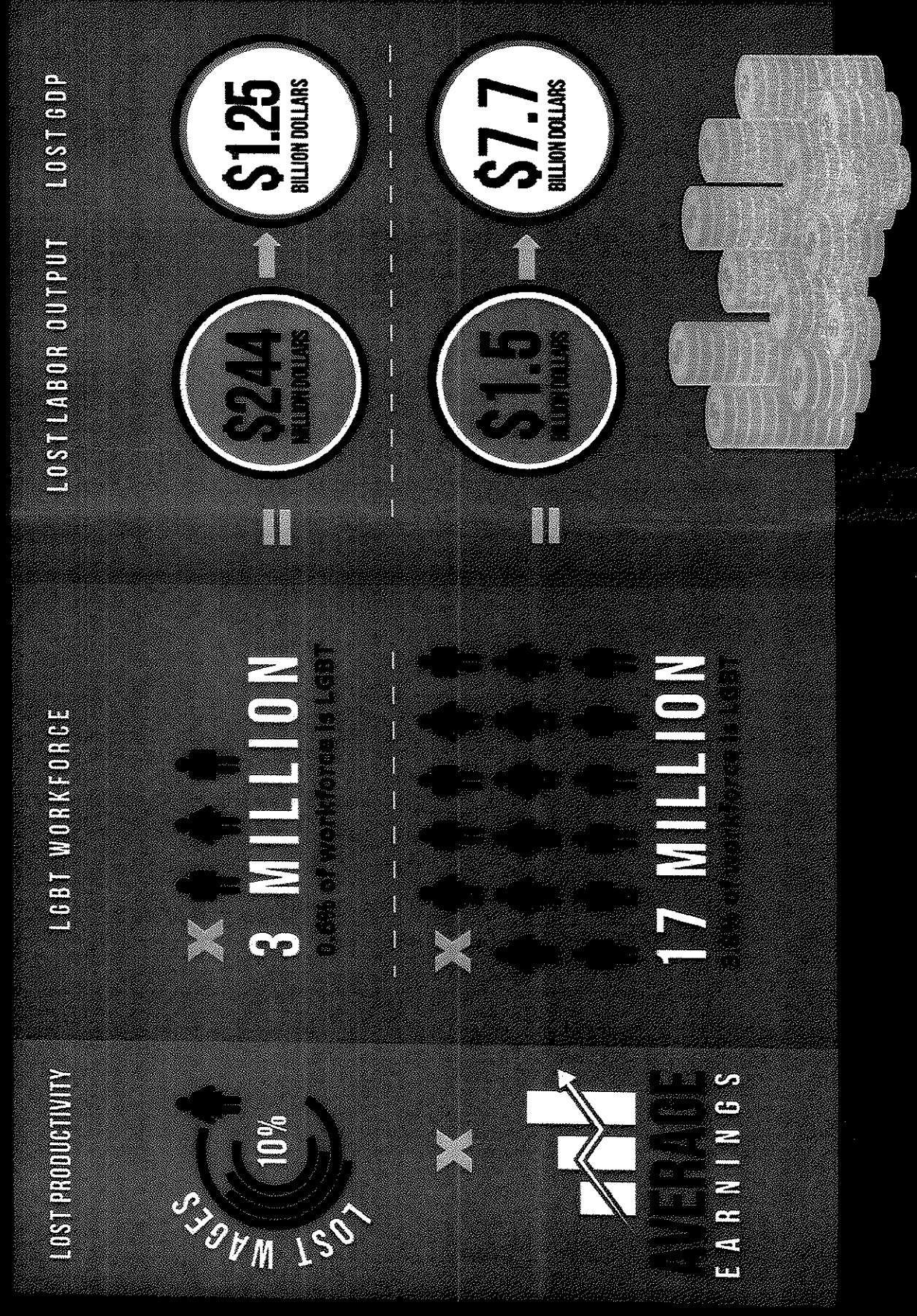
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ESTIMATED COSTS OF HOMOPHOBIA

Using India as a case study

64



Lost output from health disparities: 62

HIV, depression, suicide

- **Depression:** MSM rates 6-12 times population rate of 4.5% from the World Mental Health Survey
- **Suicidal thoughts:** LGBT Rates 7-14 times population rate of 2.1% from developing countries
- **HIV:** HIV prevalence among MSM is 15 times population rate

Estimating lost output from health

- Disability-adjusted life years (DALYs) lost per health condition by country
- **“Excess DALYs” = number of current LGBT DALYs minus expected DALYs at population rate**
- **Each excess DALY valued at 1 - 3 times per capita national income (\$1,530-\$4,590 in 2012)**

by ~~GA~~

Health cost of homophobia in India, 2012

	Low estimate	High estimate
HIV disparity	\$228 million	\$683 million
Depression	\$184 million	\$8.8 billion
Suicide	\$300 million	\$13.7 billion
Total	\$712 million	\$23.1 billion

Partial cost of homophobia in India, 2012

65

	Low estimate	High estimate
Health disparities	\$712 million	\$23.1 billion
Labor-related loss	\$1.2 billion	\$7.7 billion
Total	\$1.9 billion	\$30.8 billion
% of GDP	0.1%	1.7%

Projected annual IBRD lending to India: \$3.4 billion

Below the tip of the iceberg ⁶⁶

- Other costs cannot be modeled with current data: **education, emigration, costs to families**
- Broader positive effects of inclusion: **increase attraction to skilled labor, investment, widening options for women, savings on health and other costs**

Next steps: broadening & ~~67~~ deepening

- Invest in data
- Research priorities: focus on poverty
 - Identifying problems
 - Evaluating existing interventions
 - Develop new policies and interventions
- Research infrastructure
- Replicate in other countries

The Economic Cost of Stigma and the Exclusion of LGBT People:
A Case Study of India

M. V. Lee Badgett, Ph.D.
October 2014

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EXECUTIVE SUMMARY

Human rights and equality for lesbian, gay, bisexual, and transgender (LGBT) people are usually considered through a social, cultural, or ethical lens, but equality and inclusion of LGBT people are also economic development issues. This report develops a model to estimate the economic cost of stigma—negative attitudes toward LGBT people—and the exclusion of LGBT people in social institutions such as education, employment, families, and health care. The model is applied to a case study of India.

Three major findings emerge from this report.

Clear evidence of stigma and exclusion exists for LGBT people in India.

- Data on public opinion from 2006 shows that 41 percent of Indians would not want a homosexual neighbor, and 64 percent believe that homosexuality is never justified. Negative attitudes have diminished over time, however.
- Homosexual behavior is criminalized in India, no protective legislation exists for LGB people, and transgender people in India have only recently been accorded full legal rights and recognition through a Supreme Court decision.
- LGBT people in India report experiences of violence, rejection, and discrimination, including in employment, education, health care, and access to social services. High rates of poverty are found in some studies of LGBT people.
- Public health studies find evidence of health disparities that are linked to stigma and exclusion. Rates of the prevalence of depression, suicidal thinking, and HIV among LGBT people are higher than rates for the general population.

The effects of stigma and exclusion are potentially costly to economies. A conceptual model links exclusion of LGBT people and economic development through (1) lower productivity and lower output as a result of employment discrimination and constraints on labor supply; (2) inefficient investment in human capital because of lower returns to education and discrimination in educational settings; (3) lost output as a result of health disparities that are linked to exclusion; and (4) social and health services required to address the effects of exclusion that might be better spent elsewhere.

In India, existing research does not allow for a precise estimate of the cost of LGBT exclusion, but the cost could be substantial. The loss of labor productivity and output because of employment discrimination and the loss of life years due to early death or disability will reduce the economic output of the Indian economy. With better research on the lived experiences of LGBT people, researchers could use existing analytical tools to estimate the total cost of LGBT exclusion.

Recommendations for future research priorities include studying LGBT poverty, developing data on LGBT people to accelerate research, and building a research infrastructure. In addition, assessing actual anti-poverty interventions and ongoing public and private efforts to reduce homophobia and LGBT exclusion should be a high priority so that effective programs can be considered for scaling up.

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1 INTRODUCTION

1.1 HUMAN RIGHTS AND EQUALITY FOR LGBT PEOPLE ARE ECONOMIC DEVELOPMENT ISSUES

Over the last several decades, the increasing global attention to issues of human rights for lesbian, gay, bisexual, and transgender (LGBT) people and other sexual minorities has focused on the intrinsic value of those rights from a social, cultural, and ethical perspective. Recognizing those rights represents a commitment to equality for a stigmatized group of people and to guaranteeing universal freedoms for those individuals. Enacting those rights to achieve equality means working to end discrimination and violence against LGBT people. The need for attention is clear: human rights agencies and scholars from around the world have documented violations of human rights, finding discrimination, family rejection, violence, imprisonment, and other forms of exclusion faced by LGBT people in every country studied.¹

Human rights and equality for LGBT people are also economic development issues. Social inclusion, defined as “the process of improving the ability, opportunity, and dignity of people, disadvantaged on the basis of their identity, to take part in society,” has come to be seen as an economic imperative: “Social inclusion matters because exclusion is too costly,” as a recent World Bank report concludes (The World Bank 2013). Many multinational businesses now recognize the links between inclusion of LGBT employees and business outcomes and have taken voluntary steps to end discrimination against LGBT workers in order to maintain a competitive workforce. Indeed, there are many reasons to think that exclusion of LGBT people—rooted in stigma—is costly to economies. Exclusion can generate economic costs through several important channels: lower productivity, diminished human capital development, and poorer health outcomes, for example. From this economic perspective, exclusion of LGBT people is costly to everyone.

On a concrete level, this report identifies evidence of workplace discrimination and health care disparities in HIV, suicide, and depression that would reduce the economic contributions of LGBT people in India. This report also develops an economic model of the cost of stigma and the resulting exclusion of LGBT people from full participation in social institutions such as education, employment, families, and health care services.² Existing data for the model of stigma and exclusion are discussed, and a general approach is developed for use with future data.

Following psychologist Gregory M. Herek, the term **stigma** is used in this report to represent negative responses to LGBT people and the inferior social status of LGBT people

¹ Research and documentation by Human Rights Watch, the International Gay and Lesbian Human Rights Commission (IGLHRC), and the United States State Department Country Reports on Human Rights Practices is extensive, among other sources.

² This is the final report on “India - Gender Identity, Sexual Orientation and Development: A Preliminary Case Study (P143951).”

(Herek 2009). The term **exclusion** in this report captures the structural manifestations of stigma in institutional settings, reducing LGBT people's access to equal treatment and participation in a wide range of social institutions, including schools, workplaces, health care settings, the political process, the financial system, the criminal justice system, families, government programs, and other laws and policies. **Discrimination** is a form of exclusion and refers in this report to the practice of treating members of one group differently from equally qualified members of another group. This report uses "stigma" and "exclusion" somewhat interchangeably since they are intertwined in shaping the lived experiences of LGBT people.

1.2 ROADMAP FOR THE REPORT

The report begins in the next section with a review of attitudes and laws in India that reflect a social and legal context of stigma that would contribute to the exclusion of LGBT people. Section 3 discusses terminology related to sexual orientation and gender identity, focusing on how it might be useful for understanding the experiences of diverse sexual and gender minorities in India.

Section 4 introduces a conceptual framework for understanding the impact of stigma in educational settings, with a focus on the economic losses that would occur if harassment and discrimination discourage or prevent LGBT people from achieving higher levels of education. Section 5 moves into the workplace setting, presenting evidence of discrimination against LGBT people and showing how that treatment generates economic loss. That section also considers the impact of pressure to marry on the labor force participation decisions of LGBT people, noting constraints that could also generate economic costs. Section 6 analyzes health disparities, connecting health with economic outcomes and reviewing evidence of health disparities in India for three conditions: HIV infection, depression, and suicide. Section 7 discusses the types of avoidable costs that are tied to health disparities. The final section summarizes the report's findings.

Although the terms of reference for this project did not include policy recommendations, the report makes suggestions in two key areas along the way and in the final section: the need for better data on LGBT people and the need for more research on the impact of stigma and exclusion on LGBT people, particularly with respect to poverty. Rapid advances in the understanding of how to ask questions about sexual orientation and gender identity suggest that collecting better data is feasible. Support for research projects focusing on poverty, participation in existing anti-poverty programs, education, and other topics would greatly expand our understanding of how exclusion of LGBT people operates in India and other countries and what the implications are for economic development.

2 EVIDENCE OF ATTITUDES TOWARD LGBT PEOPLE IN INDIA

This section presents data on attitudes toward homosexuals from the World Values Survey for India and discusses the broad legal context that creates space for the exclusion of LGBT people. In the 2006 World Values Survey, 64 percent of Indians say that they believe that homosexuality is never justified; 41 percent say that they would not want to have a homosexual neighbor. However, comparisons with data from earlier surveys show that negative attitudes about homosexuality have diminished since 1990. Indian law still criminalizes same-sex sexual activity, and no laws explicitly protect LGBT people from discrimination. Recent Indian Supreme Court decisions point in different directions for transgender people and LGB people, however.

2.1 WORLD VALUES SURVEY DATA

Survey data from India indicate that many people hold negative attitudes related to homosexuality. The World Values Survey (WVS) is a periodic survey of attitudes and values of individuals that is conducted using the same survey instrument in many different countries. India has been included in four waves of the WVS, and this report draws primarily on the most recent survey conducted in 2006. The survey was translated into ten languages and administered in face-to-face interviews with a random sample consisting of 2001 residents in the 18 largest states.³

Two questions allow for measures of tolerance for homosexuality in India. The first measure is a question that asks respondents whether they think that homosexuality (among other stigmatized behaviors) is ever justified. Respondents could give one of five possible answers: never justified, sometimes not justified, neither justified nor unjustified, sometimes justified, and always justified. A second measure asked whether respondents would not want to have members of particular groups as neighbors, including homosexuals. The measure based on that question captures whether homosexuals were mentioned or not, i.e. that the respondents would not want a homosexual neighbor.

Both measures indicate significant negative attitudes toward homosexuals but also perhaps some distinction between attitudes and respondents' own intention to avoid homosexuals. In the first measure, 64 percent of Indians say that they believe that homosexuality is never justified, 13 percent believe it is sometimes not justified, 10 percent believe it is neither justified nor unjustified, and only 14 percent said that it is sometimes or always justified.⁴ In the second simpler measure, 41 percent say they would not like to have a homosexual neighbor.

³ See "Study Description: [India]," 2006, available from <http://www.wvsevsdb.com/wvs/WVSDocumentation.jsp?Idioma=1>.

⁴ A large proportion of the sample, 499 people, either said they don't know or did not answer the justifiability question. Only 40 respondents did not answer the neighbor question.

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Interestingly, the patterns in India by subgroups do not appear to conform to what is seen in other countries. In some other countries, certain personal characteristics have been shown to be correlated with views of homosexuality: younger people, less religious people, people in cities, and more educated people tend to have more positive attitudes toward LGBT people and homosexuality (Herek 2009). The detailed table in Appendix 2 breaks down Indians' attitudes by those characteristics but shows different patterns. In India, more positive attitudes are seen among people in older age groups, in small (but not the smallest) towns, among people who attend religious services relatively often, and among the least educated and most highly educated groups.⁵ Using a multivariate model to predict negative attitudes on these two measures confirmed that, holding all else equal, positive attitudes are most likely to be found among men, people over 25, those in small towns, those who are not literate, and those with moderate religious service attendance.

2.2 ATTITUDES COMPARED TO OTHER COUNTRIES AND OVER TIME

To further put these measures in context, consider two perspectives comparing Indian data to other countries and to surveys in earlier years. First, from a comparative perspective, India falls in the middle of the pack of countries included in the WVS. On the neighbor question, for example, Indians are more likely not to want a homosexual neighbor than are respondents in Mexico (30 percent), Vietnam (29 percent), the United States (25 percent), and Thailand (34 percent). However, Indians are less likely not to want a homosexual neighbor than respondents in China (68 percent), Ghana (79 percent), Hong Kong (49 percent), Indonesia (67 percent), and South Korea (87 percent).⁶

Second, the attitudes of Indians have gotten more positive over time, as a comparison of the 2006 figures with earlier WVS waves in 1990, 1995, and 2001 shows.⁷ Figure 1 charts the percentage of Indians who say homosexuality is never justified and the percentage that would not want a homosexual neighbor. The first measure has declined steadily. The neighbor measure shows an unexpectedly sharp decrease in 2001 and then an increase in 2006, but even the 41 percent figure in 2006 is considerably lower than the two earliest surveys.

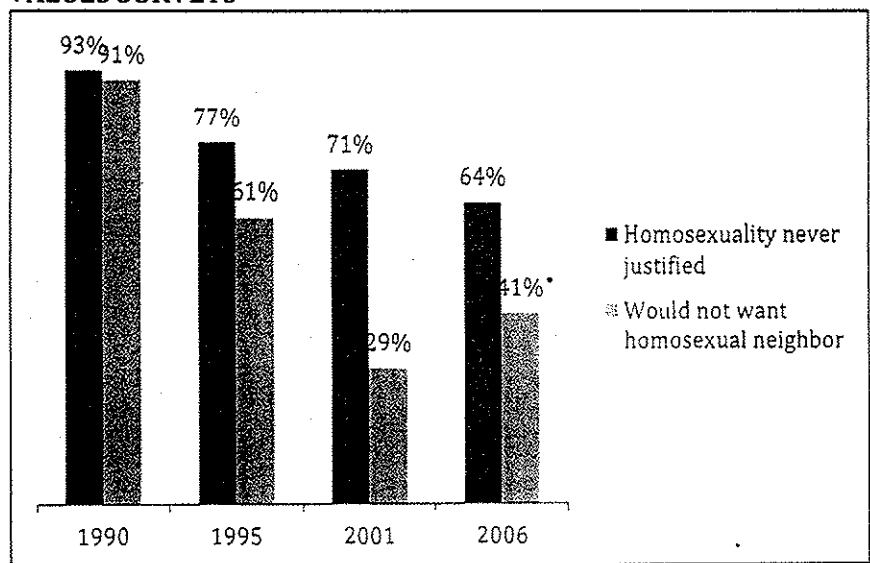
⁵ Chi-squared tests indicate that differences are statistically significant at the 5% level for age differences (neighbor question), size of town (both questions), religious denomination (justified question), religious service attendance (both questions), and education (both questions).

⁶ Based on reported percentages of respondents mentioning homosexuals as someone they would not want to have as neighbors, WVS_Codebook_2005_v20090415.pdf, Table V38.

⁷ India was not included in the 2010-2014 wave of the WVS.

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FIGURE 1: ATTITUDES TOWARD HOMOSEXUALITY IN INDIA FROM FOUR WORLD VALUES SURVEYS



Source: Author's calculations from World Values Surveys online data analysis tool at <http://www.worldvaluessurvey.org/index.html>.

While these measures do not capture the full range of possible opinions and attitudes toward LGBT people, the WVS measures suggest that stigma of homosexuality is present and still very common in India. Negative attitudes create a context in which stigma can be enacted in the workplace, families, and communities to discriminate against and exclude LGBT people from important social contexts and opportunities.

2.3 LEGAL STATUS

In addition to understanding Indians' attitudes, it is important to understand the basic legal context for LGBT people under Indian law (see The World Bank South Asia Human Development Sector 2012). On one hand, LGBT people enjoy some freedom of association in India, and space exists in civil society for participation by LGBT people: LGBT organizations can form and operate, public demonstrations on LGBT issues take place, and LGBT cultural life exists publicly. On the other hand, Section 377 of the Indian Penal Code criminalizes sexual activities between adults of the same sex, and to date, the Indian Parliament has not passed any direct legal protections against discrimination against LGBT people, such as laws that prohibit discrimination based on sexual orientation or gender identity in social and economic spheres. Similarly, no legal recognition of same-sex relationships exists.

Two recent decisions by the Supreme Court of India demonstrate two very different directions for the current trajectory of the interpretation of Indian law and human rights with respect to LGBT people. The first decision concerned the criminalization of same-sex sexual activity. In 2009, the Delhi High Court had ruled in its *Naz Foundation* judgment that Section 377 of the Indian Penal Code was unconstitutional with respect to criminalizing

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private consensual sexual activities between adults of the same sex (the law could still be applied to non-consensual sex and sex with minors) (Jain 2012). However, the Indian Supreme Court overturned that ruling in December 2013 in *Koushal v. Naz Foundation*, deferring to Parliament to make changes to Section 377 and leaving in place the criminalization of homosexual behavior in India.

In the second case, just a few months later on April 15, 2014, the Supreme Court of India ruled in *National Legal Services Authority v. Union of India* that transgender Indians were entitled to a third gender status as a means to equal treatment under the law, including legal recognition. The ruling paves the way for transgender people to use a third gender category on important identity documents. The Court also declared transgender people to be a "socially and educationally backward class," entitling them to affirmative action in education and government employment. In addition, the Court directed the Government to include transgender people in social welfare schemes, to provide appropriate medical care, and to increase public awareness. As such, this far-reaching decision could lead to rapid improvements in the legal, social, and economic status of transgender people, since such protections have not been available at the national or state level (Jain et al. 2014). However, the two recent decisions by the Court create a protected category for transgender persons like *hijras*, while placing them within the purview of criminality for their sexual acts.

3 TERMINOLOGY AND ESTIMATES OF THE SIZE OF RELEVANT POPULATIONS

This section presents terminology related to sexual orientation and gender identity, along with estimates of the prevalence of LGBT people in the population. While the western LGBT categories do not map precisely onto Indian categories, the term "LGBT" captures at least the potential for common experiences of sexual and gender minorities in India and of LGBT people in other countries that result from stigma and prejudice. Prevalence estimates would provide a basis for scaling up individual costs of exclusion to the country level.

3.1 DEFINING SEXUAL ORIENTATION AND GENDER IDENTITY

In assessing the potential impact of exclusion and stigma on LGBT people and the Indian economy, a discussion of what is meant by "lesbian, gay, bisexual, and transgender" is necessary as a preliminary matter. In India, identities and terms such as lesbian, gay, bisexual, and transgender do not fully capture the range of sexual orientation and gender identities that exist across the Indian population. Nevertheless, the term "LGBT" is used in this report because as an umbrella term it is concise and captures at least two important elements that link the experiences of sexual and gender minorities in India to the growing global research on LGBT people: stigma and prejudice against those whose sexual attractions and behavior include people of the same sex, and stigma and prejudice against those who are gender nonconforming (with respect to their birth sex) in their expressions and identities.⁸ These identity terms that represent sexual orientations and gender identities are often used in human rights discourse to provide an overarching understanding of who the people are who face human rights violations because of their sexual orientation or gender identity.⁹

As noted earlier, "stigma" in this report is meant to broadly cover this sort of prejudice and other negative attitudes toward LGBT people, including attitudes related to someone's gender identity or expression. "Exclusion" refers to the disadvantages and discrimination that result from stigma. Stigma and exclusion are used interchangeably in this report's economic model since one concept, stigma, is the source of the other, exclusion. "Discrimination" is used in certain contexts, such as employment, to indicate the differential and disadvantageous treatment of LGBT people when compared with similarly qualified non-LGBT people.

International researchers involved in the scholarly study of sexuality and gender define sexual orientation and gender identity in different ways, depending on the purposes of a study and its theoretical context. In the HIV health and policy arena, which is an important source of data for India, the term "MSM" for "men who have sex with men" captures the

⁸ Psychologist Gregory M. Herek defines stigma as "the negative regard and inferior status that society collectively accords to people who possess a particular characteristic or belong to a particular group or category." He defines sexual prejudice as "internalized sexual stigma that results in the negative evaluation of sexual minorities." (Herek 2009)

⁹ See, for example, the Preamble to the Yogyakarta Principles.

behavioral aspects of being LGBT: the sex of one's sex partners. While such a concept is expandable to thinking about women who have sex with women (WSW), that is a group generally seen as less relevant in the context of the HIV epidemic, including in India, and no research on WSW *per se* in India has been found.

In addition to behavioral definitions, researchers also commonly draw on two other dimensions of sexual orientation: attraction to people of the same sex or a different sex, and identification as lesbian, gay, bisexual, or heterosexual (Laumann et al. 1994; Sexual Minority Assessment Research Team 2009). In most surveys that allow for comparisons across the three dimensions of sexual orientation, attraction to (or sexual desire for) people of the same-sex is more common than either actual sexual experiences with someone of the same sex or identifying as lesbian, gay, or bisexual. However, social science researchers have generally not theorized or measured direct connections between attraction and social or economic outcomes, focusing instead more on behavior and identity.

Sexual orientation identities involve thinking of oneself as having a socially constructed identity—such as lesbian, gay, or bisexual—and usually (although not always) involve same-sex sexual behavior and attraction to people of the same sex. Those identities are thought to have many psychological, social, cultural, and political dimensions that are relevant to such social and economic outcomes as family formation, employment outcomes, sexual orientation disclosure, or social movement creation. Being behaviorally LGB (i.e. MSM or WSW) might also expose a person to violence, police harassment, or discrimination, but without some kind of LGB identity, those behaviorally gay individuals might be less likely to organize important parts of their lives around their sexual orientation.

Gender identity captures a different human dimension, focusing on how one thinks of oneself in terms of being male or female. One way to define a transgender person is as someone whose sex at birth differs from how they currently think of themselves and how they live their life.¹⁰ In addition to gender identity, being transgender can also involve differences in gender expression, such as appearance and mannerisms that do not conform to what is socially expected of one's birth sex (Sexual Minority Assessment Research Team 2009).

3.2 INDIGENOUS CONCEPTS OF SEXUAL ORIENTATION AND GENDER IDENTITY

In the Indian context, sexual orientation and gender identity are intertwined and not necessarily distinct concepts, and the research from India cited in this report mostly draws on those indigenous concepts. Gender, geography, class, language, and religion have influenced the development of local non-heterosexual identities (Asthana & Oostvogels 2001; Mohan & Murthy 2013).

¹⁰ Using the third person plural form of pronouns is one way to indicate that personal pronouns used by transgender people might not fit their birth sex, for example.

However, we can also see the Indian terms being mapped into terms used in the global research related to sexual orientation and gender identity. In Indian health surveys, the term MSM includes transgender people who are born male but now have a female or feminine identity.¹¹ Several identities or groups have been noted across studies, with variations in the degree of sexual interest in men or women, their gender expression and identity, and whether they take insertive or receptive roles in oral and anal sex. These descriptions are fairly similar across studies (Asthana & Oostvogels 2001; Newman et al. 2008; Phillips et al. 2008), but it is important to keep in mind that variations in these characteristics of identities are possible, particularly in sexual roles. Such categories including these examples:

- *Hijras* (also known as *ali* in some places) are born male but take on a third gender along with a feminine appearance, and they generally have sex with men. Their ties to Hindu texts and traditions can still be seen in their role providing blessings at weddings or births. Despite that role, the socioeconomic status of hijras is often low and now often involves commercial sex work. They map onto male-to-female transgender or transgender women in western identity categories.
- *Panthis* are men with a masculine identity, are mainly oriented to sex with women, and when having sex with men generally take an insertive role. They are diverse in their socio-economic backgrounds.
- *Double-deckers* are men who are sexually attracted to other men, take insertive or receptive roles, and their gender identity can be masculine or neutral. Some argue they are the closest equivalent to a western "gay" identity (Asthana & Oostvogels 2001).
- *Kothis* are feminine men who might cross-dress; they mainly have sex with panthis, and are often of lower socioeconomic status.

A similarly complex taxonomy does not appear to be commonly used for women who are attracted to or have sex with other women or who take on a masculine gender (Mohan & Murthy 2013). One source noted the use of "single women" or same-sex loving women instead of "lesbian," but those terms have not been widely adopted. Furthermore, the difficulty in studying lesbians in India is demonstrated by the fact that very little English-language survey data that focused on women who either identify as lesbians or who have sex with other women could be located. Indeed, recent attempts to collect survey data were unsuccessful in recruiting samples large enough to analyze quantitatively (e.g. CREA 2012).

The individuals who are sexually attracted to someone of the same sex but decide not to act on those attractions remain beyond identification by most research studies. It is likely that women are more likely than men to fall into this category in India. Marriage to a different-sex partner is expected for both men and women, but marital roles appear to be more limiting for women (CREA 2012; Asthana & Oostvogels 2001; Fernandez & Gomathy 2003;

¹¹ More recent HIV surveillance practice appears to be moving toward defining transgender populations as separate from MSM, however.

Mohan & Murthy 2013). Different-sex marriage does not appear to have the same limiting impact on married men's ability to seek out male sex partners and relationships. The stigma faced by unmarried women and the lack of freedom for married women suggest that many women who might prefer to live as lesbians if stigma were reduced will not be visible to most researchers. The missing lesbians in the research literature complicate our ability to understand the potential economic costs for women of stigma and exclusion.

3.3 PREVALENCE OF SEXUAL AND GENDER MINORITIES IN INDIA

Understanding the terminology and state of research in India is important for interpreting the potential costs of exclusion. The magnitude of the potential losses described in this report will be directly related to the size of the LGBT population (or the prevalence of being LGBT): the larger the number of LGBT people, the larger the costs of exclusion. In theory, one could aggregate estimates of the size of each of the different identity-based groups described above. However, there are no known national population-based studies that could generate reliable prevalence estimates for India for any of those groups, so this section also discusses other sources. Box 1 describes some of the challenges of collecting data but also the potential for greater data collection on LGBT people.

BOX 1: DATA CHALLENGES FOR ASSESSING INCLUSION OF LGBT PEOPLE

Finding empirical data on economic, health, family, and other outcomes for LGBT people is complicated by several challenges:

- Understanding local identities is essential but challenging, since the mapping of identities, sexual attraction, sexual behavior, and understandings of gender may work in very different ways across countries.
- Most countries' general surveys related to the economy or health do not include questions about sexual orientation or gender identity.
- Existing surveys of LGBT people are often administered to samples of individuals who are not representative of the LGBT population, such as surveys of people online, members of LGBT organizations, or "snowball" samples (when respondents provide contacts to other LGBT people) of people in a social network.
- Stigma and fear of discrimination might reduce the willingness of LGBT people to correctly report their sexual orientation or gender identity on surveys.
- Most efforts have focused on sexual orientation data with few allowing identification and analysis of transgender people; fewer studies exist of lesbian and bisexual women than of gay and bisexual men.

Data on LGBT people in developing countries are particularly difficult to find. Perhaps the biggest source of relevant survey data in these countries is research on MSM in the context of HIV/AIDS. Those studies often use samples of MSM and transgender women drawn from public sex environments, clinical samples, or through snowball sampling. Such sampling methods can be very useful for learning about the lives of LGBT people and about variation in their lives. The disadvantage is that the findings cannot be generalized from those nonrandom samples, and such surveys cannot be used to estimate the prevalence of LGBT people in the population.

In several countries, including some developing and emerging economies, statistical agencies and NGOs have made notable attempts to collect data on LGBT people, including these examples:

- Brazil (2010) and Uruguay (2011) asked questions about same-sex partnerships on their most recent census (Goldani & Esteve 2013).
- In 2011, Nepal's Central Bureau of Statistics (CBS) added a "third gender" category to its census form used to collect basic demographic data in the Household Registry. However, issues of disclosure, harassment by enumerators, and errors appear to have led to a very small count, and the CBS did not report the number of third gender people counted (Bochenek & Knight 2012).
- Ecuador's National Institute of Statistics and Census (INEC) used a snowball sampling method to survey more than 2,800 LGBTI people recently about their living conditions and experiences of discrimination (Anon 2013).

BOX 1 CONTINUED

- A 2011 study in Kenya interviewed 474 respondents about discrimination. The study found evidence of police harassment, family-related stigma, employment discrimination, discrimination by health care providers, discrimination in educational settings, and physical violence (The Kenya Human Rights Commission 2011).

The survey techniques used in those examples are also still common in high-income countries, but statistical agencies in the United States, the United Kingdom, and Canada are beginning to add questions on self-identified sexual orientation, same-sex relationships, and sexual behavior, to large-scale random samples of the population. That approach to collecting population-based data has allowed for more detailed analyses of differences by sexual orientation in income, poverty, health, and education. For more information, see lgbtdata.com and Sexual Minority Assessment Research Team (2009).

As data collection on LGBT people improves in developing countries, researchers will be able to show how LGBT people are included or excluded, including comparisons of earnings, poverty, health, political participation, and other important outcomes. Such findings would be very useful in the context of modeling the economic costs of exclusion.

The 2011 Indian Census marked the first time that an “other” category was added to the male and female options on the question about sex, in essence providing a third gender category, but the resulting count of transgender people is thought by some observers to be unreliable. A total of 490,000 individuals of all ages reported the “other” option, or about 0.04% of the Indian population of 1.2 billion people. Many observers believe that figure to be an undercount given the unfamiliarity of the option, concerns about the quality of answers coded by enumerators, and the likely underreporting by transgender people worried about revealing a stigmatized status to the government (Nagarajan 2014; Roy 2011).¹² Of those using the “other” status, 66 percent lived in rural areas, compared with 69 percent of the whole population (Nagarajan 2014).

Otherwise, most available Indian data on the prevalence of men having sex with men (MSM) comes from HIV-related research and provides a range of estimates. A review of studies conducted between 2003 and 2007 in South Asia suggests that the lifetime prevalence of men ever having sex with a man is 8 to 34 percent. The authors of that review note that features of the two studies generating the high end of that range include sex workers and truck drivers, two groups likely to have a higher-than-average rate of same-sex sex and unlikely to be representative of all men in India (Cáceres et al. 2008). One study suggests that estimates of MSM prevalence in India might be suppressed because of respondents’ unwillingness to report same-sex behavior. When that study used survey modes that provide more privacy for men to report that they have had male sex partners (including computer-assisted surveys rather than face-to-face interviews), the prevalence rates were higher (Potdar & Koenig 2005). In that study, 7 to 8 percent of male college students and of young men living in slums reported having had male sex partners.

A different approach estimates the prevalence of MSM by comparing HIV statistics to the Indian population. HIV surveillance statistics reported by UNAIDS estimate that 2.3 million MSM lived in India in 2012, or 0.6% of population estimates for Indian men aged 15-59. (UNAIDS 2012) This prevalence rate provides a lower bound.

For comparison, these estimates from India overlap with the range seen in other countries. Surveys from the United States and Europe suggest that approximately 1-5 percent of those populations identify in some way as LGBT (Gates 2011). Broadening the definition to include same-sex sexual behavior (MSM or WSW) or attraction increases the prevalence range from 1.8 percent to 11 percent in those surveys.

Overall, the available data suggest that Indian men, at least, are not dissimilar from men in countries that have more representative data on prevalence, and regrettably no such data exist for women. For all of these reasons—the evidence of MSM behavior in many geographic settings¹³ and the fact that women are likely to suppress their attractions to

¹² Detailed data on “others” can be found on the census website, http://www.censusindia.gov.in/2011census/PCA/PCA_OTH_0000_2011.xlsx, last accessed 8/1/14.

¹³ For instance, the National AIDS Control Organization assumes that 40 percent of Indian MSM live in rural areas (National AIDS Control Organization 2006).

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other women in the context of marriage—any attempts to estimate the model outlined in this report should take an expansive view of who is included as LGBT. When it is necessary to estimate prevalence, a range should be applied to both men and women to account for uncertainty. Indian HIV surveillance statistics data suggest a low end of 0.6 percent. A reasonable high end estimate might be either the 3.8 percent average of those identifying as LGBT in the U.S. and Europe from Gates (2011), or even the 7 percent low end of the studies of MSM prevalence among Indian men.

4 EXCLUSION IN EDUCATION: INEFFICIENT INVESTMENTS IN HUMAN CAPITAL?

This section assesses the impact of exclusion in the educational realm, which would hurt the economy by reducing investments in human capital. Some reports suggest that harassment and discrimination are present in educational settings, potentially reducing investments in human capital. If LGBT people are prevented or hindered by discrimination from pursuing formal education or by lower returns to human capital investments, then economic losses from lost human capital investments are very likely. However, a review of the literature found insufficient information with which to estimate the impact of stigma on LGBT people's educational outcomes in India.

This section begins the explicit analysis of the impact of stigma and exclusion of LGBT people on the Indian economy, starting with exclusion in the education and training systems. Following this discussion, the report analyzes the treatment of LGBT people in the labor market, and then turns to issues related to health. Each of these domains of human activity has an impact on the potential and realized economic contributions of LGBT people in India. The different domains are also linked to each other in ways that reinforce the impact of exclusion in one setting.

An important connection between stigma, exclusion, and economic outcomes flows through the educational and training process. Education is the primary setting for young people to acquire general human capital, which are the skills, ability, knowledge, and health that lead to higher productivity and economic growth. Exclusion and stigma can lead to lower levels of human capital for two reasons. First, exclusion of LGBT people in educational and training contexts would reduce their opportunities to develop human capital and would therefore diminish future economic output. Second, discrimination in wages could result in unequal compensation for LGBT people's human capital, and reduced returns to an investment in human capital may discourage investments by LGBT people.

Some evidence suggests that LGBT people face exclusion in educational settings. A small set of studies in India find that education and training opportunities are denied to LGBT people or are made more difficult by negative treatment of and lack of support for LGBT people. Indeed, a 2005 Naz Foundation study found that half of MSM respondents had experienced harassment and violence by teachers and classmates, and that treatment reduced their ability to continue with their education (Khan et al. 2005). Another study of a small group of transgender students in secondary schools found evidence of harassment and discrimination by students and teachers (Nirantar, a Centre for Gender and Education 2013). Furthermore, the incentives to engage in education and general training might be diminished if individuals doubt their ability to overcome discrimination and to receive their expected return on investment in the labor market. Resources for investment in training or education by families might also be diminished for children who are gender non-conforming.

A literature review found very little research on educational outcomes of LGBT people in India.¹⁴ In particular, the lack of data collected from representative samples of LGBT people prevents a detailed empirical comparison of educational outcomes by sexual orientation or gender identity (Traeen et al. 2009). Therefore, an estimate of the cost to educational outcomes or the benefits of compensatory resilience of LGBT people in the context of educational attainment is not possible at this time.

The 2011 Census provides one important preliminary comparison of the literacy rates for those using the "other" gender option. Only 46 percent of those using the other gender option were literate, compared with 74 percent of the other population (Nagarajan 2014). This stark difference in literacy rates could be the result of especially harsh and pervasive harassment of transgender people in educational settings. However, given the likely undercount of the transgender population, it is also possible that the question resulted in some response bias in which nonliterate individuals were more likely to use that option.

In addition, some of the HIV surveillance surveys of MSM in India have collected literacy and educational level data that allow for some rough comparisons. The 2002 National Baseline High Risk and Bridge Population Behavioural Surveillance Survey conducted for the National AIDS Control Organization (NACO) included surveys of 1,357 MSM in Delhi, Kolkata, Mumbai, Chennai, and Bangalore (National AIDS Control Organization 2002). Since the survey recruited respondents from public places that men go for sex with other men or for "hanging out," they may not be a representative sample of MSMs or those identifying as gay or bisexual. Overall, 81 percent of the respondents fell between the ages of 19-35, with an average age of 28.

Table 2 compares the illiteracy rates reported by NACO for MSMs to 2001 Census figures on literacy for urban men in the relevant state for each city. Overall, the illiteracy rate for MSM is higher than for urban men in the same state in Chennai and is about equal in Delhi. The illiteracy rate is lower for MSM in Bangalore, Kolkata, and Mumbai.

¹⁴ The only study found compared quality of life measures in a convenience sample of LGB university students in four countries, including 25 female and 175 male students from one Indian university. However, the samples of LGB students and students who had had same-sex sexual experiences were fewer than ten for either men or women, limiting the study's ability to make meaningful comparisons (Traeen, et al., 2009).

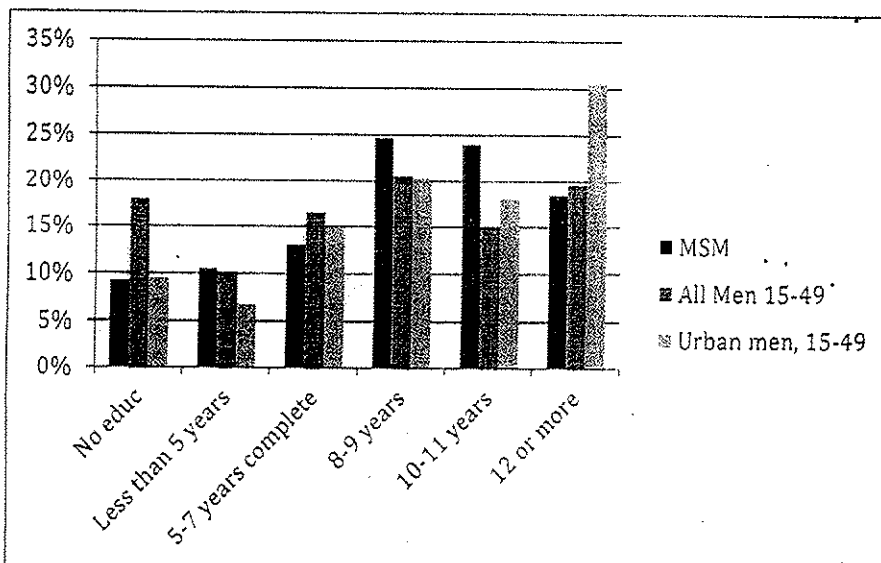
Table 2: Rates of illiteracy for MSM and all urban men (by state)

City	MSM	Urban in state, men, 2001
Bangalore	9%	13%
Chennai	15%	11%
Delhi	13%	13%
Kolkata	6%	14%
Mumbai	3%	9%

Source: NACO; Census 2001, http://www.nlm.nic.in/literacy01_nlm.htm accessed 11/5/13

Figure 2 compares education levels of MSM to those for all men in India in the National Family Health Survey (NFHS) of 2005-2006 (International Institute for Population Sciences (IIPS) and Macro International 2007). The education concepts reported by NACO do not appear to line up precisely with those in the NFHS, since NACO defines illiterate as "includes those respondents who can read and write but have no formal education." Figure 2, therefore, includes "illiterate" MSM in the "no education" category. When compared to all Indian men, MSM are about equally likely to have 12 or more years of education and are more likely to have 8-11 years, suggesting slightly higher educational levels for MSM. Given the urban sample of MSM, the more appropriate comparison would be to urban men. That comparison shows that MSM are much less likely to have 12 or more years of education (19 percent for MSM vs. 31 percent for all urban men). Putting together the top three categories shows that 67 percent of MSM have eight or more years of education compared to 55 percent of all Indian men and 69 percent of urban Indian men.

Figure 2: Comparison of education levels for MSM and Indian population groups



Sources: National Aids Control Organization, 2002; International Institute for Population Sciences, 2007.

These comparisons suggest that there might be lower levels of literacy and educational achievement overall for transgender people and MSM. With regard to the distribution across educational levels, the more appropriate comparison to urban men suggests that MSM may have lower levels of educational attainment, as do Census 2011 data for transgender respondents. However, given the potential bias in the samples, such comparisons must be considered preliminary and suggestive. Also, there is no similar source of data for LGBT women, so such comparisons are not possible.

One additional possibility complicates an analysis of education and LGBT stigma. The possible linkage of discrimination and human capital investment opportunities has the potential, at least, to trigger the resilience of the LGBT population by increasing the demand by LGBT people for more formal education. In the U.S., for example, most surveys show that LGB people have higher levels of education than comparable non-LGB people (Badgett 2006). Many possible explanations have been offered for that pattern, but as yet there is little research on this issue even where data exist. Formal education may take place in relatively accepting environments, allowing individuals to develop LGBT identities. LGBT people might see greater investments in human capital as a strategy to overcome or mitigate the economic effects of discrimination. Higher education might prepare individuals for jobs that involve more tolerant working environments. All of these factors might increase demand for formal education among LGBT people. Whether or not they are able to translate that demand into actual outcomes given a context of educational discrimination in a particular country is another matter, however.

Beyond the realm of formal education, individuals also acquire human capital through on-the-job training and more formal training in their workplaces, and exclusion could also reduce access for LGBT people to those forms. To date, very little is known about whether or how exclusion against LGBT people translates into suboptimal opportunities and investments in human capital by firms and workers in India or other countries. And unless discrimination is limited to very low-skilled job categories—and the evidence discussed in the next section suggests that it is not—employment discrimination against LGBT people would also exclude them from opportunities to increase their human capital in higher-skilled jobs. As with education, diminished opportunities and investments in training would reduce the stock of human capital in the economy and result in lower output than could have been achieved.

The second route by which exclusion could diminish human capital is if discrimination in wages results in lower returns for LGBT workers' investments in human capital than non-LGBT workers' returns for the same level of human capital. If LGBT people receive lower returns because of discrimination, they may be less likely to make investments.

Unfortunately, we have no data on the returns to education for LGBT people in India. Such research in other countries is also rare, but does reveal lower returns to education for lesbians in same-sex couples in the United States (Jepsen 2007; Antecol et al. 2008), for example.

This important potential link between the treatment of LGBT people in education and training settings and in the labor market demonstrates the interconnectedness of forms of

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exclusion. Exclusion in health settings and health disparities for LGBT people are discussed later in the report. Those disparities may also play a role in human capital investment, since better health and longer lives increase the incentives for individuals to invest in education and other forms of human capital that pay a return over time. Thus a disadvantage in one domain (health or education) can have effects in another domain (education or the labor market), suggesting that social and policy changes to promote full inclusion of LGBT people would need to be coordinated and aligned across different economic settings.

Box 3 describes additional dimensions of exclusion that would increase the economic costs of stigma and exclusion but lack sufficient research to identify evidence of exclusion. Further research on barriers to education and training for LGBT people and the other dimensions in Box 3 would increase our understanding of the full costs of exclusion.

5 EXCLUSION IN EMPLOYMENT: LOWER PRODUCTIVITY AND OUTPUT

This section develops a conceptual framework for understanding the impact of stigma in the workplace. Discrimination against LGBT people involves inefficiencies that reduce the productivity of labor and, therefore, economic output. A small but growing set of studies, both qualitative and quantitative, demonstrate that discrimination against LGBT people is present in Indian workplaces. For example, a 2013 survey of college-educated, white-collar LGBT workers in India found that 56 percent had experienced discrimination in the workplace based on their sexual orientation. Constraints on the labor supply of lesbians are also likely to reduce their economic contributions.

5.1 EMPLOYMENT DISCRIMINATION LEADS TO ECONOMIC INEFFICIENCIES

The conceptual model of the cost of stigma and exclusion is rooted in economic models of discrimination and of the family, as well as in health economics and psychological research on minority stress. From economics, we know that such treatment can reduce the economic contributions of LGBT people, both directly through unemployment, underemployment, and lower productivity, and indirectly through behavioral feedback loops that reduce individual and social investment in human capital and health. Lower wages and unemployment are associated with poverty, therefore LGBT people are likely to have higher rates of poverty, as discussed in Box 2. Models of social exclusion also focus attention on the links between social stigma and discrimination in various contexts, and such models show how earnings inequality can affect housing options, family formation, and education decisions.

In general, discrimination in workplaces can lead to underutilization of human capital if skilled workers from a stigmatized group are passed over in hiring or are replaced with less-skilled workers from favored groups. The degree of inefficiency would diminish to the extent that less biased employers exist who are willing to pay similar wages to the members of disfavored groups (Becker 1971), or to the extent that there might be other equally productive employment options in either the formal or informal economy. If there are not enough nondiscriminatory employers, or if information about other employment options is slow to reach jobseekers, then unutilized or underutilized skilled workers constitute a loss to economic output. In addition, the discriminatory treatment and harassment of LGBT people in the workplace can reduce their productivity, even if their wages and employment are not directly affected.

BOX 2: POVERTY IN THE LGBT COMMUNITY

The susceptibility of LGBT people to poverty is sometimes obscured by false stereotypes of affluent gay men, in particular. However, discrimination and exclusion are likely to lead to increased poverty in the LGBT community in India and elsewhere. Lack of access to jobs, barriers to education and housing, and rejection by families, for example, can put LGBT people in precarious economic positions. While all LGBT people potentially face those barriers, those living in poverty would have fewer financial resources and opportunities with which to mitigate the impact of stigma and discrimination.

Evidence of poverty among LGBT people is emerging in India and elsewhere:

- Third gender people in Chhattisgarh, India, who were involved in a leadership development project were found to be mostly living below the poverty line (Masih et al. 2012). Most of them made a living through begging, sex work, or dancing in weddings.
- A study of kothis in Chennai found that family rejection exacerbated the risk of poverty (Chakrapani et al. 2007).
- A study of kothis in five Indian cities and one city in Bangladesh found that 64% of respondents had incomes below \$70 per month (Khan et al. 2005).
- A community-based sample of MSM in Chennai found that two-thirds were living on incomes below \$1.50/day (Newman et al. 2008).
- In 2008 Tamil Nadu established a Transgender Welfare Board to improve the socioeconomic position of transgender people (known as aravanis) due to their particular vulnerabilities, such as discrimination and financial insecurity. The Transgender Welfare Board provides self-employment grants, income assistance, housing assistance, food cards, and health care to eligible low-income transgender people (Chakrapani 2012). In 2012, the board began providing a Rs1,000 monthly pension to eligible aravanis.

Focus groups of MSM from South Africa, Kenya, and Nigeria revealed that poverty itself also contributed to exclusion (Arreola et al. 2012). MSM felt forced to conceal their sexual behavior, making them vulnerable to blackmail, extortion, and violence. Some turn to sex work when they have no other options.

Direct comparisons of poverty rates and risk of poverty across sexual orientations and gender identities require data from representative samples of a population. The only known direct comparisons of poverty come from the United States. The most recent data there show that LGBT people are more vulnerable to poverty than heterosexual people with similar characteristics. In addition, when compared with heterosexual people, LGBT people are more likely to qualify for cash and food assistance, and they are more likely to report times when they did not have enough money to buy food (Badgett, Durso & Schneebaum 2013; Gates 2014).

5.2 EVIDENCE OF DISCRIMINATION AGAINST LGBT PEOPLE IN THE WORKPLACE

In India, discrimination based on sexual orientation and gender identity is not prohibited by law, and a growing body of evidence suggests that discrimination and unequal labor market outcomes exist in a wide range of economic contexts for male, female, and transgender LGBT people.

- The consultation process for the project, "Charting a Programmatic Roadmap for Sexual Minority Groups in India," identified discrimination, including workplace discrimination, as "the core issue in the LGBT movement." That report involved consultations with LGBT community members and leaders who reported the existence of discrimination (The World Bank South Asia Human Development Sector 2012).
- The 2011 Census of the Indian population revealed that 38 percent of third gender respondents were working, compared with 46 percent of the general population (Nagarajan 2014). Third gender workers also appear to have less secure employment: only 65 percent of the third gender workers were employed for at least six months of the year compared with 75 percent of the general employed population.
- A 2005 report on a survey of 240 MSMs in India and Bangladesh found that 75 percent of respondents engaged in sex work out of economic necessity since discrimination severely limited other opportunities (Khan et al. 2005).
- A 2011-12 study of 455 LGB individuals in India working for Indian or multinational companies in the financial, software, and engineering sectors in India showed evidence of discrimination (MINGLE 2011).¹⁵ One fifth of LGB employees who had disclosed their sexual orientation to others in the workplace had experienced discrimination either sometimes (9 percent) or often (11 percent). Thirty percent have experienced harassment by co-workers, and 80 percent have heard anti-gay comments in the workplace sometimes or often.
- In a 2013 survey of college-educated, white-collar LGBT workers in India, 56 percent reported experiencing discrimination in the workplace based on their sexual orientation (Hewlett et al. 2013).¹⁶
- U.S. State Department Country Reports on Human Rights Practices have consistently noted that Indian activists report employment discrimination based on sexual orientation and gender identity.

The fact that discrimination is common and well-documented in the multinational economic sector, with its reliance on an educated workforce that (in many countries) has more tolerance toward homosexuality, suggests that LGBT workers in other sectors might face even greater discrimination.

¹⁵ Respondents came from 17 companies operating in India. There were no transgender respondents to the survey.

¹⁶ In the sample, 314 respondents identified as gay, lesbian, or bisexual and 12 as queer, while another 24 people identified as transgender, 62 identified as intersex, and 6 as *Hijra*.

It is possible that casual labor or self-employment might be strategies for LGBT people in India to avoid discrimination and stigma in formal sector workplaces. Most people in India work in the informal sector, with a heavy concentration in agriculture (Basole & Basu 2011).¹⁷ The Indian economic context thus raises two issues. First, whether this avoidance strategy would provide effective protection against economic harms related to stigma will depend on the degree to which potential employers of casual laborers or potential customers and creditors of self-employed people have prejudiced attitudes toward LGBT people. Indeed, data on attitudes from the World Values Survey in Section 2 showed that negative attitudes toward homosexuality exist in both rural and urban areas of India. Additional research will be very important for understanding how LGBT people fare in those contexts. Second, the avoidance strategy would still result in economic inefficiency if work in the formal sector is more economically productive than work in the informal sector, as is generally thought to be the case.

Studies of discrimination from many other countries demonstrate other research methods that could be used to study discrimination against LGBT people in the Indian economy. That growing international body of evidence draws on several methods: self-reports of discrimination, regression analysis of wage differences by sexual orientation or gender identity that likely result from discrimination, and "audit studies" that show that LGBT job applicants are not treated in the same way as heterosexual applicants by employers (Badgett 2006; Klawitter n.d.).¹⁸ Also, a small but growing body of research in the United States suggests that employment discrimination against transgender people might be more severe than against LGB people (Grant et al. 2011).

Discrimination against LGBT people also appears to reduce their wages, at least for men. According to Klawitter's review of a variety of studies of wage differences in the United States, Netherlands, UK, Sweden, Greece, France, and Australia, on average gay and bisexual men earn 11 percent less than heterosexual men with the same qualifications (Klawitter n.d.). Not all scholars agree on the cause of this wage gap, although most consider discrimination to be a reasonable contributing factor, if not the sole cause.¹⁹

While no similar studies exist for LGBT people in India, it is interesting to note that this international sexual orientation wage gap estimate is comparable to the wage gap for members of scheduled castes and tribes in India. Madheswaran and Attewell found a 9 percent negative gap for members of scheduled castes and tribes and an 11 percent gap for Other Backwards Classes in data from 1999-2000 (Madheswaran & Attewell 2007). In

¹⁷ There is evidence that MSM may be at least roughly as common in rural areas as in urban ones (Setia et al. 2008).

¹⁸ Countries with such findings include Austria, Australia, Canada, France, Italy, Greece, Netherlands, Sweden, U.K., and the U.S.

¹⁹ Other potential causes have to do with possible reductions in human capital and reductions in labor force participation. Badgett (2006) argues that gay men are not likely to have lower rates of unobserved human capital, given that rates of observed human capital investments in education are actually higher for gay men than for heterosexual men. Also, the difference in employment hours for gay and heterosexual men is very small.

contrast, the gender wage gap in India is much larger than the 11 percent pay gap for gay men. While the actual value of the gender wage gap varies across studies, one meta-analysis averaged findings across studies to get an average earnings gap for Indian woman of about 25 percent after controlling for observed differences in qualifications (Zweimüller et al. 2007).

5.3 ROLE OF DISCLOSURE

Additional forces connect the workplace treatment of LGBT people and the potential utilization of existing human capital. In particular, sexual orientation and gender identity are not always obvious personal traits, and they can often be hidden, colloquially known as "being in the closet," as opposed to being known, or "being out." Decisions about disclosure of one's sexual orientation or gender identity appear to be influenced by many factors, including the perceived psychological cost of hiding, the perceived risk of disclosure, and the potential benefits of disclosure. In addition, LGBT individuals might be more open in some contexts than others, whether to family, friends, coworkers, or supervisors, for instance. India's cultural context shapes the context and potential consequences for coming out, which might be a much stronger limit on women, who have fewer economic resources and options than men as well as more constraints on freedom (Mohan & Murthy 2013).

The workplace studies earlier show fairly low levels of disclosure in the workplace in India. The Center for Talent Innovation (CTI) study found that 45 percent of Indian respondents were out in the workplace (compared with 59 percent of U.S. workers in the same survey). In the MINGLE study, about half of Indian employees were out (16.5 percent) or partially out (34.5 percent) to their coworkers, but fewer were out (17.5 percent) or partially out (14 percent) to managers.

As a result of this potential invisibility of their stigmatized status, even discriminatory employers might hire sexual minorities into jobs. In closer working relationships, coworkers of LGBT employees might infer or presume an LGBT status, or LGBT workers themselves might disclose their status to coworkers or supervisors. Greater knowledge of the presence of LGBT workers in the workplace can also affect economic outcomes. If coworkers hold prejudicial attitudes toward LGBT people, then conflict might emerge if LGBT workers are open, reducing workplace productivity of LGBT and non-LGBT workers alike. If LGBT workers reveal their stigmatized status, though, they might be more vulnerable to discrimination. For example, the CTI study found that 71 percent of out Indian employees feel stalled in their careers, while only 57 percent of those not out feel stalled. The closet is not complete protection from discrimination, though. If LGBT workers successfully hide their stigmatized status, research from other countries suggests that they might have lower productivity and poorer health outcomes than they are capable of reaching (Badgett, Durso, Kastanis, et al. 2013).

5.4 THE POSITIVE IMPACT OF NONDISCRIMINATION POLICIES

However, employers can reduce possible negative outcomes by implementing policies of equality and other cultural changes. Many Indian workforces are increasing their attention to the need to manage a workforce that is diverse in terms of sex, language, disability, caste, ethnicity, religion, and other factors (Buddhapriya 2013). Although little diversity attention has been given to sexual orientation and gender identity, awareness of the need for and advantages of being attentive to sexual orientation and gender identity diversity is growing in India (Banerji et al. 2012).

Some evidence suggests that positive connections exist between less discrimination, more disclosure, and higher productivity likely apply to the formal Indian workforce. In the MINGLE study, 50 percent of respondents believed that discrimination and being closeted had an effect on their productivity at work (MINGLE 2011). That survey also found that respondents who reported being out in their workplaces were more comfortable with their managers, more loyal to their coworkers, more satisfied with their promotions, and reported making more of a contribution to their workplace than were workers who were not out.

The research in India is consistent with a broader international body of research finding that nondiscrimination policies and signals that LGBT people are treated fairly have positive impacts on employer outcomes—the so-called “business case for diversity.” (Conversely, discriminatory environments can have effects that would be detrimental to an employer’s outcomes.) A recent review of literature in psychology, economics, sociology, public health, and management reveals several key findings from studies mostly conducted with U.S.-based samples (Badgett, Durso, Kastanis, et al. 2013):

- Having LGBT-supportive policies in the workplace is associated with reduced incidence of discrimination, and less discrimination is associated with better psychological health and increased job satisfaction among LGBT employees.
- A supportive workplace climate—which includes both LGBT-supportive diversity policies and broad support from co-workers and supervisory staff—is associated with a greater likelihood that LGBT employees will feel comfortable disclosing their sexual orientation at work. In turn, increased disclosure of sexual orientation is related to improved psychological health outcomes among LGBT employees.
- LGBT employees report more satisfaction with their jobs when covered by LGBT-supportive policies and working in positive climates.
- The presence of LGBT-supportive diversity policies and practices in the workplace is associated with improved relationships among LGBT employees and their co-workers and supervisors. In addition, LGBT employees are more engaged in the workplace, are more likely to go above-and-beyond their job description to contribute to the work environment, and report greater commitment to their jobs.

Many of these outcomes related to LGBT people have been shown in related workplace literatures (not focused on LGBT people) to be associated with higher productivity and lower labor costs, potentially increasing employer profits.

In summary, exclusion of LGBT people in the realm of employment as the result of stigma means lower wages, reduced access to employment that fully utilizes an LGBT individual's existing productive capacity, increased unemployment of LGBT people, and conditions within places of employment that reduce the productivity of LGBT people. Eliminating stigma and discrimination would increase worker wages or income and thus would increase productivity and output as human capital is better utilized. Also, employers have access to policies and practices that can reduce discrimination and lost productivity.

5.5 CONSTRAINTS ON LABOR SUPPLY

While evidence from Section 5.2 shows that lesbian and bisexual women face discrimination in India, the impact of discrimination is more complex and requires additional considerations related to women's labor supply. For women, assessing the cost of stigma is not easily summarized by a wage gap; instead predicting the impact of stigma on labor market outcomes requires predicting its effect on family formation and household decision-making. If, in the absence of stigma, LGBT people were free to form families and households without being forced to marry a different-sex partner, their family decision-making would take place in a different context and might well result in different economic decisions about labor force participation.

For example, as discussed earlier in Section 3, research suggests that a lesbian in India faces enormous pressure from her family and culture to marry a man. She and her husband would likely have children and make decisions to use her time more in care work and productive work in the home. Even if she is more productive in the labor force than she is in work in the home, the family might still decide that the family is economically better off with the husband working for wages outside the home.²⁰ These economic decisions would be reinforced or even dictated by social and cultural norms about the proper roles of husbands and wives in the family. Additional household decisions might further reduce her economic contributions, for instance, making fewer investments to increase the productivity of her labor in agriculture or in her small business. In line with this analysis, the 2011-2012 Indian labor force data described below shows that only 22.5 percent of women are in the labor force (using both their primary and secondary employment statuses), compared with 55.6 percent of men in the labor force.

However, lesbians might well make different kinds of labor market decisions if they are freed from these pressures to marry a man and work in the home. Gender norms are likely to play smaller roles (if any) in decision-making in same-sex couples, particularly when it comes to decisions about working in the paid labor market. These differences might allow lesbians who can create families with other women to shift their economic contributions from the household into paid labor when it makes sense to do so, increasing both family

²⁰ Gary Becker's theory of the family argues that families are more efficient when dividing up labor based on the comparative advantage of spouses rather than on their individual advantage in one realm or the other.

resources and overall economic output. Or some lesbians might choose not to marry but instead live independently on their own labor market earnings.

As a result, reducing stigma for LGBT people may also increase the labor force participation of lesbians and bisexual women in India. Although we have no quantitative data on the labor force decisions of lesbians in India, evidence from other countries supports this prediction, showing that lesbians work more in paid labor than do heterosexual women (Klawitter n.d.). The fact that lesbians in the countries studied so far also earn more than heterosexual women suggests that their human capital (most likely on-the-job training and other impacts of greater experience) is enhanced as a result of living a life outside of the constraints of heterosexual families. The fact that the "lesbian wage premium" is strongest for women who have never married suggests that women whose careers have not been shaped by the division of labor in heterosexual households are doing better in the labor market because of their greater accumulation of experience and other human capital (Daneshvary et al. 2009). Therefore, reducing or ending LGBT stigma might increase both labor force participation and wages for lesbian and bisexual women.

These family-generated differences are likely to be much larger for women than for men. Although gay and bisexual men in India are also likely to be pressured to marry a different-sex spouse, men have more agency in the context of Indian culture to act according to their labor market interests, even though they cannot necessarily avoid the effect of discrimination (Fernandez & Gomathy 2003; Mohan & Murthy 2013).

While some studies in high-income countries show that men in same-sex couples have lower employment hours than comparable men in different-sex couples, that difference is very small. Male same-sex couples' difference in hours could instead be a jointly-determined decline in hours not associated with stigma or discrimination but rather associated with having another relatively high-earning male in the household. However, we might plausibly see differences in hours worked by sexual orientation and gender identity if employers discriminate against gay men—or lesbians, bisexuals, and transgender people—in ways that reduce their employment hours or increase unemployment.²¹ If LGBT people are more likely to be unemployed or have lower hours worked than heterosexual people because of discrimination, then the lost labor productivity and output could be even greater than that implied by wage differentials.

5.6 METHODS FOR MODELING THE IMPACT OF STIGMA ON PRODUCTIVITY AND LABOR HOURS

Following the conceptual framework outlined in this section, we would expect two general negative effects on economic output in the presence of stigma and labor market discrimination that could be estimated for India if adequate data were available. First, any

²¹ For example, Klawitter finds that state laws against sexual orientation discrimination in the United States are associated with more employment hours for gay men (Klawitter 2011).

observed wage gaps experienced by LGBT people would reflect discrimination, that is the fact that they are not hired into positions for which they are best suited given their abilities and human capital. The wage gaps would reflect a decrease in productivity, so output falls per work hour and total output falls. Second, output would also decrease as LGBT men and, especially, women work fewer hours as a result of discrimination and constrained labor supply decisions. In this section, two different methods for estimating the economic loss from stigma and discrimination are described.

Studies of other forms of exclusion offer methods by which to estimate these economic effects of exclusion, including in the contexts of gender equity in education, the exclusion of Roma people, and interpersonal violence. One method estimates the loss in the wage rate that results from inequities; the other estimates the economic impact of inequities on the amount of time worked. Those changes in income (either from changes in the wage or time worked) are then scaled up by the number of affected individuals to estimate the total lost income—that is, lost productivity—from exclusion, as seen in these examples:

- *Cost of gender inequity:* Completing the next higher level of education would increase wages earned by women, and therefore, raise GDP by an estimated 0.5 percent in India. Reducing joblessness rates of young women to those of young men would increase women's time worked, adding 4.4 percent to GDP in India. (Chaaban & Cunningham 2011)
- *Cost of intimate partner violence:* Lower earnings for women who experience intimate partner violence cost the Tanzanian economy 1.2 percent of GDP (not including lost productivity of self-employed agricultural workers) (Vyas 2013). Women's lost days of work as a result of intimate partner violence led to a loss of 1.6 percent of GDP in Vietnam in 2011 (Duvvury et al. 2013).
- *Cost of Roma exclusion:* The lost productivity from exclusion of Roma people in Europe was measured as the wage gap between Roma and non-Roma people, with an estimate of €3.4-9.9 billion per year for Central and Eastern Europe and Balkan countries (Europe and Central Asia Region Human Development Sector Unit 2010).²²

At least conceptually, similar estimates would be possible for LGBT people in India if adequate data were collected to estimate the key parameters of such a model, described below.

(1) *Wage gaps:* Survey data that included questions on sexual orientation and gender identity, as well as on earnings, would allow for comparisons that would reveal any wage gaps in India. For example, a meta-analysis of data from several countries shows that gay and bisexual men typically earn 11 percent less than equally qualified heterosexual men (Klawitter n.d.). In the economic cost models described above, that figure would imply a loss in economic output per gay or bisexual man of 11 percent of heterosexual men's

²² Although that study also estimate the wage gap net of observable differences between workers, the cost of exclusion was based on the gross difference in earnings between Roma and non-Roma.

average earnings in those countries. In contrast, for lesbians Klawitter reports 9 percent higher earnings than heterosexual women. As noted earlier, this "lesbian premium" likely represents additional (unmeasured) experience that accrues from higher levels of labor force participation, generating a form of human capital that would increase their productivity. As such, 9 percent of heterosexual women's wages would be an estimate of the decrease in labor market productivity of a lesbian or bisexual woman whose family and labor force options are limited by stigma.²³ However, currently no such survey data exists to make these comparisons in India.

(2) *Employment gaps*: Survey data on time worked would also allow an analysis of any differences in unemployment or work hours for LGBT people. Also, any decreases in employment or increased in unemployment that are unrelated to LGBT people's human capital and ability would be another source of lost output as a result of stigma, providing a per worker loss in employment time. Very little research on this effect exists in other countries, and none is available in India.

(3) *Earnings*: Published figures from India's National Sample Survey Office (NSS) provide an estimate of average individual earnings to turn the percentage of wage or lost labor time from steps (1) and (2) into actual quantified losses. The NSS data from 2011-2012 imply a weighted average of earnings of Rs. 55,532, estimated in two steps. First, published figures based on the NSS data include average annual earnings for Indian workers aged 15 to 59 (including rural and urban workers and men and women). Assuming that employed people work 6 days per week for 52 weeks per year, the average annual earnings for wage/salary and casual workers is calculated to be Rs. 74,507.²⁴ Second, for self-employed workers (just over 50 percent of Indian workers are self-employed according to the NSS), other Indian data are available for unincorporated non-agricultural businesses that includes financial data on "own account enterprises," which are predominantly sole proprietorships without additional employees.²⁵ In such businesses, the average annual gross value added for such businesses is Rs. 40,498, and 94.22 percent of it constitutes net surplus to the business owner on average, implying an average income for those business owners of Rs. 38,157, which is similar to the NSS estimate of earnings for casual laborers. Weighting the two earnings estimates by the proportion of workers in the three categories (self-

²³ The countries that are the source of the 9 percent lesbian wage premium are not societies that have eliminated stigma and discrimination against LGBT people. But institutionalized stigma in these countries has diminished sufficiently to give many women the opportunity to live their lives and form families with another woman or to live independently. Other evidence, such as self-reports of discrimination by lesbian and bisexual women, suggest that this estimate of the wage premium may have netted out negative discrimination-related pressure on lesbians' wages, so that 9 percent would be a conservative estimate of the gains from eliminating stigma.

²⁴ This calculation required weighting the reported daily earnings for casual and wage and salary workers by their shares of that combined employment group.

²⁵ Government of India, Ministry of Statistics and Program Implementation, National Sample Survey Office, "Economic Characteristics of Unincorporated Non-Agricultural Enterprises (Excluding Construction) in India," NSS 67th Round, February 2013.

employed, casual, and wage/salary workers) gives an average of Rs. 55,532. Multiplying this average by the proportion of wages lost would give an estimate of lost earnings for an LGBT worker.

(4) *Prevalence of Being LGBT*: Estimates of the prevalence of being LGBT would allow a calculation of an estimate of the number of LGBT individuals whose wages and employment are diminished by stigma. Multiplying the prevalence rate by the number of employed people in India (445 million according to the National Sample Survey in 2011-12²⁶) or the number of potential workers (to capture those currently unemployed) would provide the factor by which to scale up the per LGBT worker loss. As presented in Section 3, the HIV surveillance data suggests a lower bound prevalence of MSM as 0.6%, which could also be used for women and transgender people as a highly conservative estimate of prevalence. If the proportion of people is larger who either have same-sex sex partners or identify as LGBT or another sexual or gender minority term, as might be expected given the international scholarship, then an upper bound for modeling a range of estimates would also be appropriate to use.

(5) *Wage share of output*: Lost economic output will likely be even greater than the lost labor income estimated in the method outlined in steps (1) - (4), however, since labor typically combines with capital and other inputs to produce output. Following a method used in other World Bank studies (Europe and Central Asia Region Human Development Sector Unit 2010), it is possible to use the wage share of output to estimate the likely overall loss in output from discrimination in the labor market. Two different sources, one for manufacturing industries and one for unincorporated non-agricultural businesses, suggest that the wage share of the overall value of economic output in India is 20 percent.²⁷ In other words, dividing wages paid to workers by the value of total output is 20 percent. Another widely used source of data for many macroeconomic studies of economic development reports that the labor share of output for the whole Indian economy was 48.6 percent in 2011.²⁸ Accordingly, a model would divide an estimate of lost income by an estimate of the wage share percentage to estimate total lost output.

²⁶ National Sample Survey Office, Ministry of Statistics and Programme Implementation, "Key Indicators of Employment and Unemployment in India: NSS 68th Round (July 2011-June 2012)," June 2013, Table 8.

²⁷ Government of India, Ministry of Statistics and Program Implementation, National Sample Survey Office, "Economic Characteristics of Unincorporated Non-Agricultural Enterprises (Excluding Construction) in India," NSS 67th Round, February 2013; United Nations Industrial Development Organization (UNIDO), Statistics for India 2009, http://www.unido.org/Data1/IndStatBrief/D_MVA_per_Employee_and_Output_Share_per_Sector.cfm?print=no&ttype=D&Country=IND&sortBy=isic&sortDir=&Group=, last accessed January 10, 2014.

²⁸ Feenstra, Robert C., Robert Inklaar and Marcel P. Timmer (2013), "The Next Generation of the Penn World Table" available for download at www.ggdc.net/pwt, last accessed July 18, 2014.

Unfortunately, existing data sources to directly estimate values for model steps (1), (2), and (4) are inadequate for India, so this study does not quantify an estimate of the lost output related to stigma and discrimination against LGBT people in the labor market. However, the current evidence of discrimination and labor market constraints in India presented in this section clearly suggest that the Indian economy's output is lower than it otherwise would be with the full inclusion of LGBT workers.

BOX 3: LIMITATIONS IN RESEARCH ON POTENTIAL COSTS OF EXCLUSION

Some important indicators of LGBT exclusion that could have an impact on economic output and productivity have not been included in this report, usually because little or no research exists in general, or because estimates specific to India are not possible given the current state of research. These are important directions for future research in order to better estimate the full cost of LGBT exclusion.

Lack of access to important government institutions and services: LGBT people might face barriers to pursuing enforcement of rights and filing criminal claims of assault, such as police harassment and difficulty in gaining access to the justice system. Transgender people often have difficulty getting the proper identity documentation necessary for employment or access to social services and benefits. LGBT people may face barriers to participation in anti-poverty or social security programs.

Cost of emigration: Economies might lose the productive capacity of LGBT people who migrate to countries with policies promoting equality of LGBT people, including those who leave to seek asylum as protection against violence. In some cases LGBT people might receive their education before migrating, increasing the social cost of emigration.

Additional health concerns: Other health-related concerns for LGBT people that require further research include the use and overuse of alcohol and drugs, other health care disparities, physical violence, domestic violence, and access to appropriate health care. Also, the lack of reproductive rights for LGBT people can generate added economic costs through reduced investment in children.

Property rights and inheritance: LGBT people may be disinherited from ancestral property, which could increase their risk of poverty and generate other economic costs from the potential loss of efficiency in use of existing assets (Khan et al. 2005).

Housing and homelessness: LGBT people might have difficulty getting housing, an essential component of stability to enable good health care and employment (Ayala et al. 2010; Masih et al. 2012; CREA 2012).

Extending the impacts of exclusion to other people: While this model of exclusion has been focused on the individual LGBT person, the larger economic impacts can extend to birth families of LGBT people, who might experience social stigma and exclusion by association, and particularly to any children the LGBT people might be raising. For instance, discrimination and poverty might reduce the financial resources an LGBT parent would have to educate their children, leading to lower than optimal educational levels.

The offsetting effects of resilience: The resilience of LGBT people could create economic gains that mitigate the economically harmful effects of exclusion to some extent. Resilience might be manifested as building social capital with other LGBT people, which can help build trust, solidarity, and more formal associations that would aid LGBT individuals in coping with poverty and insecurity. However, aside from the existence of some LGBT health and political organizations as well as some leadership training efforts, we know very little about these forms of resilience through existing research.

6 LOST OUTPUT DUE TO EXCLUSION-LINKED HEALTH DISPARITIES

This section analyzes the connections between exclusion, health, and economic productivity. Models of "minority stress" show how stigma and exclusion can create or exacerbate health conditions, leading to health disparities between LGBT people and non-LGBT people. Those disparities can reduce LGBT people's ability to work, their productivity in the workplace, and their ability to invest in other forms of human capital. This section also outlines a method that could be used to estimate the cost of health disparities for LGBT people in India.

6.1 CONCEPTUALIZING THE IMPACT OF STIGMA AND EXCLUSION ON LGBT HEALTH

Health is another form of human capital with important implications for economic outcomes. Sexual and gender minorities in India, of course, face the same health challenges as others in India. In addition to the typical challenges, however, LGBT people face additional mental and physical health issues that have been documented in India and elsewhere.

"Minority stress" is a conceptual framework that focuses on the psychological impact of LGBT people's disadvantaged position, whether at a broad level, such as unequal treatment in legal or economic institutions, or the stigma revealed in everyday interactions and "micro-aggressions" against LGBT people (Meyer 2003). Through minority stress, many forms of stigma and exclusion in other important social and economic settings could have impacts on the health of LGBT people. In addition to creating psychological stress, economic discrimination would reduce financial resources available to seek health care services, and social exclusion might make health care services less relevant or accessible to LGBT people. Rejection by families creates stress as well as reductions in potential resources. Experiences of violence and sexual assault that LGBT people experience can affect both mental and physical health. The disfavored position of LGBT people in their families could increase minority stress and accompanying health problems.

Even as the health needs for LGBT people may be greater as a result of minority stress, the health care system may not offer culturally competent or nondiscriminatory services to LGBT people. The fear of stigma in health care settings can lead to avoidance of care or poorer quality of care when relevant information about sexual practices is not revealed by patients.

In addition to larger social forces of discrimination as an influence on health outcomes, families of LGBT people in India might play a particularly important and complicated role in health. Family support can improve the situation for LGBT people. Families sometimes accept LGBT sons and daughters, and that support might mitigate the harm of social exclusion, although supportive families might not be common (Vanita 2009). One study found that married MSM had lower rates of depression than unmarried MSM, perhaps because they could avoid some social stigma and had more general sources of support, although that support seems unlikely to extend to having sex with men outside of the marriage (Safren et al. 2009).

Family influence can also be negative. Marriage is common for LGBT people in India, and many LGBT people report pressure to marry from their families. Avoidance of different-sex marriage is one strategy employed by LGBT people, as some surveys find low rates of marriage among MSM, and some highly visible marriages of female couples occur in the context of family pressure to marry men.²⁹ Being forced into different-sex marriages also creates minority stress, perhaps especially for lesbians, for whom marriage might not provide a zone of privacy for same-sex relationships (as may be true for some MSM) but instead a stricter set of social roles and reduced freedom. Some anecdotal reports suggest that depression and thoughts of suicide may be common for lesbian or bisexual women forced into marriages. And, of course, marriage and other legal recognition does not exist for same-sex couples, preventing them from having a source of social and emotional support from their chosen or preferred partners.

As a result of these additional challenges, the health status of LGBT people might be lower than that of non-LGBT people in India. Minority stress and poorer health would reduce the well-being of LGBT people. Poorer health can also reduce individuals' ability to work and to invest in human capital, reducing economic output both in the short and long run.

6.2 EVIDENCE OF HEALTH DISPARITIES FOR LGBT PEOPLE IN INDIA: DEPRESSION, SUICIDALITY, AND HIV

Existing studies of LGBT people in India find very high rates of depression, suicidality, and HIV infection, especially when compared with general population rates. While the literature on LGBT people's health in India is not extensive, some clear evidence of those particular negative health outcomes exists, and those outcomes can often be linked to stigma or lack of social support and resulting minority stress.

Depression: Several studies that suggest that the rate of depression among LGBT people is very high in India. In Chennai, 55 percent of a community (non-random) sample met the criteria for clinical depression (Safren et al. 2009). A community-based study in Mumbai found that 29 percent of MSM met the standard for current major depression (Sivasubramanian et al. 2011). Other qualitative research on MSM (Chakrapani et al. 2007) and lesbians (CREA 2012) shows that depression is common and is related to the stigma experienced by LGBT people in India.

Comparing the Indian population prevalence of depression to the prevalence in LGBT samples shows that rates of clinical depression for MSM were 6-12 times higher than population rates. The population prevalence estimated in the World Mental Health Survey

²⁹ See Vanita (2009) on lesbians. For low rates of marriage among men, ranging from 21-42 percent in three studies, see Caceres et al. (2008). See also Sivasubramanian, et al. (2011); Safren et al. (2006; 2009).

(WMHS) for India was 4.5 percent for a twelve month rate (Kessler et al. 2010).³⁰ Of course, the LGBT studies did not use representative samples of the LGBT population, and it is possible that individuals suffering more stigma and depression were more likely to respond to the survey, either because of its recruitment method or because of other sources of response bias. Therefore, any attempts to estimate the cost of this health disparity could adjust this excess risk of depression to account for the possibility of sample selection bias.

Suicidality: High rates of suicidality have been found in studies of LGBT people in India. One suicide behavior measure is suicide attempts. Strikingly, one qualitative study of lesbians in India found that four out of 24 respondents (17 percent) had attempted suicide during their adult lifetimes (CREA 2012). Qualitative research in that report and other studies suggest that lesbian suicides may be often related to family pressures to marry a man. In some documented cases lesbian couples have considered, attempted, or even committed suicide together (National Alliance of Women 2006; Fernandez & Gomathy 2003; Vanita 2009). Unfortunately, these qualitative studies are not directly comparable to the 12-month incidence rate found for the general population, which was 0.4 percent over the prior 12 months in the World Mental Health surveys of developing countries (Borges et al. 2010).

The only available quantitative studies allowing comparison to population-based studies assess suicidal ideation, or thoughts about killing oneself, and rates for LGBT people are also very high. In a nonclinical sample of MSM in Mumbai, 45 percent were currently suicidal, with 15 percent at particularly high risk (Sivasubramanian et al. 2011). In Tamil Nadu, approximately 30 percent of MSM and transgender people living with HIV expressed suicidal intent (Family Planning Association of India n.d.).³¹ A qualitative study of MSM found that suicidal thoughts were common (Chakrapani et al. 2007), and a survey of urban lesbians found that 20 percent had suicidal ideation at some point in their lives (Fernandez & Gomathy 2003).

Comparisons with World Mental Health Survey data show that this range of LGBT suicidal ideation rates is 7-14 times the population rate from developing countries. The developing country 12-month prevalence rate of suicidal ideation is 2.1 percent, which combines WMHS data for India with other developing countries (Borges et al. 2010). No other population-based results for India were found for direct comparisons.

HIV: Rates of contracting HIV/AIDS are higher among sexual minority populations in India than for the population as a whole. In the research literature, estimated prevalence rates for MSM range from 7 percent to 16.5 percent, and prevalence estimates go as high as 55 percent for transgender people (Setia et al. 2008). Official rates are 5.7 percent for MSM and transgender people combined, and some local surveillance prevalence rates for transgender people (primarily hijra) are 8.8 percent and higher (UNAIDS 2012). In

³⁰ The World Mental Health Survey for India was conducted on a probability sample of household residents in the Pondicherry region.

³¹ These figures were estimated from Figure 3, p. 21, of that report.

contrast, the overall population prevalence was only 0.3 percent in 2011 (National AIDS Control Organization 2013).

Institutional actors, advocates, and scholars who have studied and fought the HIV epidemic suggest that stigma and exclusion might be a powerful reason for the higher rates of infection among MSM and transgender people. Many of the largest funders of HIV prevention and treatment, such as UNAIDS, the World Bank, and the Global Fund to Fight AIDS, Tuberculosis and Malaria have pointed to the importance of human rights in the fight to contain and turn back the epidemic (Beyrer et al. 2011). Those organizations and others have argued for prioritizing structural changes, such as changes in public policy and in public attitudes toward people living with HIV (PLHIV) and MSM, arguing that negative attitudes toward MSM, for instance, can reduce the effectiveness of other prevention policies (Ayala et al. 2010).

Research in India also supports the existence of a strong link between stigma and exclusion in many settings and HIV-related outcomes. Stigma among health care providers, perceptions of anti-LGBT bias in one's country, and experiencing negative consequences when out, for instance, were associated with reductions in MSM's access to health care and prevention through condoms and lubricants (Arreola et al. 2012). In a 2010-2011 survey in Tamil Nadu, MSM and transgender people who were living with HIV reported greater levels of social and self-stigma and discrimination. They also reported that much of that treatment was related to their sexual orientation on top of their HIV status (Family Planning Association of India n.d.). MSM report barriers—including harassment by police—to getting testing, information, and other HIV-related services (Safren et al. 2006). Also, the impact of other forms of exclusion, such as low incomes, low levels of education, low self-esteem, and depression, increase the likelihood of high-risk sexual practices (Chakrapani et al. 2007; Newman et al. 2008; Thomas et al. 2009; Thomas et al. 2012; Safren et al. 2009).

**BOX 4: INCREASING EFFORTS TO ADDRESS HIV AMONG MSM AND
TRANSGENDER PEOPLE IN INDIA**

In 1987 and with help from the World Bank, the National Aids Control Organization (NACO) established the National Aids Control Program (NACP). From 2007-2012, NACP entered its third phase with the goal of reducing incidence in high prevalent states by 60% and vulnerable states by 40%. NACP-III utilized various strategies including targeted interventions of "core transmitters," or those most likely to acquire and transmit HIV.

In particular, NACP-III included more than 200 targeted interventions for men who have sex with men and for transgender people (National AIDS Control Organization 2013). These efforts include the development of guidelines for prevention services and for health services for MSM and hijras (National AIDS Control Organization 2010; Beyrer et al. 2011). Interventions included services such as HIV testing, condom and lubricant provision, and antiretroviral therapy. In addition, many projects were turned over to community-based organizations, thus allowing groups run by MSM and transgender individuals to provide appropriate solutions.

Overall, NACO estimates that 70.6% of MSM and transgender people—nearly 300,000 individuals by NACO's estimate—had received some form of targeted intervention through NACP-III. The most recent NACO report showed that HIV prevalence rates for MSM appeared to decline from 2003-2011 (National AIDS Control Organization 2013).

6.3 METHODS FOR MODELING THE ECONOMIC IMPACT OF HEALTH DISPARITIES

It is possible to construct a model that could be used to estimate the economic impact of health disparities for LGBT people, such as HIV, depression, suicidality, and additional disparities that might someday be identified in new research. A study of the "cost of homophobia" in Canada used public health studies of health disparities for LGBT people in measures of suicide, smoking, alcohol use, depression, and drug use to estimate the cost of those disparities (Banks 2001). Other studies have drawn on detailed data on hospitalization, lost days of work, and early mortality to estimate the cost of racial and ethnic disparities in health in the United States (Hanlon & Hinkle 2011; LaVeist et al. 2009). This section proposes a method similar to these studies that draws on existing data for India that could be used to estimate the cost of health disparities related to stigma and exclusion of LGBT people.

Such modeling involves two basic steps. First, estimate the "excess risk" of the condition in question, or the number or percentage of LGBT people who currently have the disease but would not have it in a world of LGBT inclusion. Second, assign a cost to excess cases based on health care costs, lost productivity, early mortality, or other measure of economic cost of the disease.

Estimating excess risk for LGBT people: The first step calculates the current excess prevalence or risk of the health condition for LGBT people. This step involves comparing the current prevalence rate of the illness to the prevalence rate for LGBT people in the absence of stigma and exclusion. The Canadian study used the prevalence rate for heterosexual people as a benchmark for inclusion; studies of racial and ethnic disparities have used the best health outcomes observed for a racial-ethnic group as a benchmark. While the studies reviewed in the previous section provide prevalence estimates for the three conditions in the LGBT community in India, no studies also provide a comparable estimate for non-LGBT people in India. Given the lack of the most obvious comparison group for LGBT people, another benchmark option is to use the population prevalence of a condition, which are available in India for HIV, suicidal ideation, and depression and were presented in the previous section.

While the population rates for depression and suicidal ideation are plausible benchmarks for an LGBT-inclusive prevalence rate, the population prevalence for HIV in India, currently 0.3 percent as noted earlier, is too low as a benchmark. Recent research and epidemiological modeling suggest that MSM prevalence rates are higher than adult population rates for a variety of biological and behavioral reasons, particularly because of the "...high per-act and per-partner transmission probability of HIV transmission in receptive anal sex." (Beyrer et al. 2012)

Nevertheless, the HIV prevalence rate for MSM and transgender people in India could clearly go much lower than the current rates. The Government of India, through the National AIDS Control Organization (NACO), has successfully increased prevention efforts and access to HIV-related health care services for MSM. Working with community-based organizations, NACO has steadily increased the number of targeted interventions for MSM

(see Box 4). These efforts include the development of guidelines for prevention services and for health services for MSM and hijras (National AIDS Control Organization 2010; Beyrer et al. 2011). In recent years, NACO reports that HIV prevalence among MSM is now stable or declining (National AIDS Control Organization 2010; National AIDS Control Organization 2013).

Estimated the cost per condition: The second step assigns a cost to each condition based on some measure of the economic cost of the disease. Two analytical tools that provide a country-level measure of the health impact of disease and a way to value the health impact in economic terms could be used for India.

The health impact measure is the disability-adjusted life year, or DALY, which was estimated by the Global Burden of Diseases, Injuries, and Risk Factors Study 2010 for India. That project calculated the "disease burden," or impact, of different conditions and injuries on years of life lost (YLLs) and years lived with a disability (YLDs) for people living in 187 countries (Murray et al. 2012). YLLs are calculated for someone with a disease by subtracting the age at death from a standard life expectancy value, defined as the lowest death rate for an age group across countries. YLDs are years lived with a disability and are valued based on the public's perceptions about the severity of health conditions. One YLD is less than a year of life lost. Its actual weighting reflects survey data on the public's judgment of the severity of a disability, meaning that more severe conditions generate more YLDs. Adding YLLs and YLDs together provides the measure of disability-adjusted life years, or DALYs, for the three conditions that could be assessed for LGBT people in India.

The Global Burden of Disease reports total DALY values for India in 2010:

- HIV generated 9,265,130 DALYs (Ortblad et al. 2013).³²
- Major depressive disorders generated 10,038,500 DALYs.³³
- "Self-harm" generated 13,063,200 DALYs.

The health impact can be translated into economic loss by valuing one DALY as one to three times a country's per capita income. This intuitive rule-of-thumb was proposed by the World Health Organization's Commission on Macroeconomics and Health (Commission on Macroeconomics and Health 2001). This rule-of-thumb to value DALYs has been adopted

³² Comparing this figure with the estimated 2 million people in India who are HIV-infected implies an average value of 4 DALYs per HIV-infected person. That average is much smaller than that used by the WHO Commission, which referenced a value of 34.6, and by Bertozzi et al., which assumed a uniform 20 DALYs (Bertozzi et al. 2006). The 2010 implied averages were likely lower because the increasing use of antiretroviral therapies also reduced mortality from HIV. In addition, the 2010 DALYs were generated with some important changes in methods from the earlier DALY values.

³³ Total DALYs for major depressive disorder and self-harm for India come from the database for the Global Burden of Disease project, <http://vizhub.healthdata.org/gbd-compare> last accessed 8/1/14.

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by many researchers to estimate the overall economic cost of a year of life lost to death or disability. This approach has also been used in studies that measure the cost-effectiveness of different HIV prevention and treatment programs targeted at MSM in India. In 2012, per capita annual income in India was Rs. 80,281, or US\$1,530.³⁴ Three times per capita income is Rs. 240,842, or US\$4,590.

The WHO Commission notes that this macroeconomic measure would not capture some other important effects of health on the economy, particularly factors that would affect per capita income, such as burdening business with higher turnover and absenteeism, loss of investment capital and savings as families spend savings on health care, reducing tourism, or depressing productive investments in education (Commission on Macroeconomics and Health 2001, pp 30-39). Therefore, using one to three times per capita income per DALY would be a conservative measure of the economic effect.

Given these inputs into the analysis—total DALYs per condition, per capita income, population prevalence of LGBT people, and the excess risk for LGBT people per condition—an estimated cost per health disparity could be easily calculated:

1. Calculate the share of DALYs experienced by LGBT people with the benchmark rate (if the benchmark rate is the population rate, then the share will be simply the prevalence of being LGBT in the population);
2. Calculate the share of DALYs at current LGBT prevalence rate (figure 1 times excess risk);
3. Subtract the figure from step 1 from the step 2 figure;
4. Multiply figure from step 3 by total DALYs;
5. Multiply figure from step 4 by one to three times per capita income.

Deriving estimates of the cost of health disparities by this process would provide conservative estimates given the lack of detail on the broader impact on businesses, family savings, and future investments in human and physical capital, as noted by the WHO Commission. However, these estimates would illustrate the magnitude of the economic cost of stigma and exclusion on the health of LGBT people. In addition to these costs, the next section addresses the avoidable costs to health and social services that are also generated by exclusion.

³⁴ These figures come from the World Bank database, <http://data.worldbank.org/>, accessed 11/12/13, using the GNI per capita, Atlas method for conversion to dollars.

7 AVOIDABLE COSTS FOR SOCIAL AND HEALTH SERVICES REQUIRED TO ADDRESS THE EFFECTS OF STIGMA AND EXCLUSION

This section discusses the types of avoidable costs that are difficult, if not impossible, to estimate. Money spent on care for LGBT people that is exacerbated or generated by stigma adds to the economic burden of exclusion. One example concerns spending on HIV prevention and services, where stigma may add to national expenditures on those programs.

One important potential consequence of health disparities for LGBT people, beyond the opportunity cost of lost productive effort from health disparities and discrimination, would be the need to provide services that might be avoided if levels of exclusion were lower. These costs would be related to the Government of India's efforts to prevent and treat HIV, for example, particularly with the increasing efforts of the Government to reach more MSM and transgender people. In some cases, the LGBT community has also stepped in to provide needed services, devoting their own resources to dealing with the effects of exclusion that might be better used elsewhere. For instance lesbian organizations have provided help lines and crisis services to deal with violence. Some health centers focus on the needs of all or part (e.g. MSM) of the community.

More generally, reducing prevalence of HIV, depression, suicide, and violence from high levels in the LGBT community to at least general population levels would reduce needed health expenditures. Such expenditures could be at the public or private level, so reducing the prevalence of stigma-related disease would free up public resources to serve others and, potentially, to invest private resources in preventative care or other economic opportunities.

In addition, to the extent that exclusion leads to fewer employment opportunities and lower incomes, LGBT will have a greater than average need and demand for anti-poverty programs and other public services for low-income people. Reductions in exclusion can, therefore, lead to reductions in the need for such programs.

To provide an example, a small amount of information on spending on HIV-related prevention programs and services is available at the national level. India's National AIDS Control Programme III (NACP-III) involved domestic expenditures as well as funding through development agencies and international funders. Domestic expenditures averaged Rs. 2,231,240,000 (US\$37 million) over the five years of the program. Future expenditures on NACP-IV are predicted to be more than twice as large. If reduced stigma against LGBT people leads to more prevention and better treatment, then prevalence rates for MSM and transgender people might fall. Lower prevalence rates could mean that eventually the Government expenditures on HIV would fall, or that the funds allocated to serve MSM and transgender people could be used for other subpopulations.

8 CONCLUSION, CAVEATS, AND RECOMMENDATIONS

This section summarizes the findings on economic harms of stigma and exclusion of LGBT people in this case study of India. The implications of these findings are discussed with respect to future research on the effects of exclusion, on potential policies to achieve inclusion, and on development interventions.

8.1 SUMMARY OF ECONOMIC COSTS OF STIGMA AND EXCLUSION OF LGBT PEOPLE

As this analysis indicates, stigma and exclusion of LGBT people are likely to generate economic costs, particularly from lost productivity as a result of workplace discrimination, and health disparities (in HIV, depression, and suicidal ideation). Evidence suggests that educational outcomes might also be lower for LGBT people because of discrimination and harassment in schools and universities. Each of those forms of exclusion results in the loss of potential human capital or the underutilization of existing human capital.

Table 3 presents a matrix summarizing the types of costs of exclusion for which some evidence was available in India. Estimating the cost of each of these elements is theoretically possible by following current methods used in estimating the cost of exclusion: valuing lost time in the labor market, estimating lower incomes that result from lower productivity (as a result of lower levels of human capital), or by using DALYs to measure the lost productive time resulting from premature death and disability. The lack of data on LGBT people and their lives makes it difficult to quantify the cost with precision, so that is not attempted in this report, but the evidence clearly demonstrates the existence of discrimination and health disparities that generate economic costs. Future research on LGBT in India could make such estimates feasible.

TABLE 3: SUMMARY OF COSTS OF STIGMA AND EXCLUSION OF LGBT PEOPLE IN INDIA

Form of stigma or exclusion	Nature of cost	Evidence from India
<i>Education</i>		
Harassment and discrimination Fewer family resources	Lower investments in human capital Lower investments in human capital	Surveys, 2011 Census
<i>Labor market discrimination</i>		
Lower wages	Lower productivity, inefficient use of existing human capital	Surveys, individual reports
Loss of employment	Lost labor input	Surveys; 2011 Census
Unemployment	Lost labor input	2011 Census
Harassment, discrimination	Lower productivity	Surveys, individual reports
<i>Labor supply constraints</i>		
Not in labor force	Lost labor input	
<i>Health disparities</i>		
HIV	Lower productivity; lower output	HIV surveillance data
Depression	Lower productivity; lower output	Health surveys
Suicidal thinking	Lower productivity; lower output	Health surveys

The economic impact of exclusion of LGBT people is potentially even larger and more pervasive than suggested by Table 3, but the absence of research in other areas prevents a more detailed analysis. Box 3 describes some additional types of costs that might be revealed through future research, and other issues that could not be fully captured in the report include the following:

- Families of LGBT people might face discrimination when the sexual orientation or gender identity of their family members becomes commonly known.
- Transgender people might face even greater costs from discrimination and exclusion than lesbian, gay, or bisexual identified people.
- Government services and NGOs will see extra demand for poverty reduction and health programs as a result of stigma and exclusion, generating public and private costs that could be avoided.

In addition, while there is no firm basis for a quantitative estimate, there are other likely costs to the economy in terms of diverted economic contributions of LGBT individuals and collective effort by LGBT people. LGBT groups might self-provision to make up for lost services, such as HIV education, anti-domestic violence programs, and perhaps other development-relevant programs, and they need to lobby governments to reduce the

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disadvantages that they face. Those human resources could be diverted to other economically productive uses in the absence of stigma and exclusion.

8.2 POTENTIAL FOR GREATER GAINS FROM INCLUSION

The economic costs of exclusion estimated and discussed in this report are costs that can be reduced through effective efforts toward full social, economic, and political inclusion of LGBT people. Inclusion is likely to lead to increases in productivity of existing workers, greater investment in human capital, and better health.

Beyond those gains are other broader gains to society from inclusion of LGBT people. Box 5 presents several "positive externalities" from inclusion that could lead to greater economic gains. In particular, inclusion of LGBT people can send a powerful message of tolerance and openness in a society—a message that may be attractive to many non-LGBT people who might decide to visit, to remain in, or to immigrate to countries offering such an environment. Tolerance, along with the loosening of restrictive gender roles, can contribute to unleashing additional creative energy and economic growth opportunities.

BOX 5: POSITIVE EXTERNALITIES OF LGBT INCLUSION

Some effects of inclusion of LGBT people are likely to contribute to economic growth above and beyond reversing the effects of exclusion. Therefore, the benefits of equality and efforts toward full inclusion of LGBT people would add substantially more to the economy than the sources discussed in the text of this report. These "externalities" have impacts extending to non-LGBT people as well as LGBT people, enhancing the creativity and openness of societies:

- Tolerance for LGBT people might attract creative non-LGBT people seeking tolerant societies to live and work in, as Richard Florida argues: "[M]ore tolerant and open nations can also attract entrepreneurs, educated workers, and even gifted athletes, or the families that produce them." (Florida 2014) Positive policies toward LGBT people are visible indicators of openness.
- Addressing the issues of LGBT people are likely to generate discussions and changes of restrictive gender norms, and such changes could expand the acceptable social and economic roles for all men and women. If roles expand, the rights of women are likely to be enhanced, in particular, leading to a much larger potential gain in economic output.
- Better individual health for LGBT people can affect all individuals, such as reducing the transmission of disease or freeing up health care resources to treat other conditions.
- Community organizations founded by LGBT people to create safe spaces and advocacy or health services can also serve to help LGBT overcome other forms of exclusion. The presence of community-based organizations creates social capital and contributes to better health and a sense of community among LGBT people (Arreola et al. 2012).

8.3 RECOMMENDATIONS FOR FUTURE RESEARCH PRIORITIES AND INFRASTRUCTURE

Rather than attempt to provide and prioritize a long list of research topics, this discussion lays out several dimensions that are particularly important for LGBT-related research. Where the need for more research is so great, as this report finds, it is essential to prioritize in order to further the goal of inclusion for LGBT people more rapidly. Below are recommendations for pursuing several research goals, utilizing diverse sampling methods and research designs, and building a research infrastructure.

Clarifying research goals is essential to ensure efficient use of resources. In the context of LGBT exclusion and economic development, several potential goals of research appear particularly important:

- *Identifying problems:* Research can measure the impact of stigma on important economic outcomes, such as identifying inequalities in positive outcomes (e.g. gaps in wages or access to stable employment) and disproportionate burdens of poverty, poor health, or other forms of exclusion in anti-poverty programs. Understanding patterns of inequality could be useful in the creation and targeting of development efforts and for identifying the underlying reasons for exclusion.
- *Evaluation of the impact of interventions:* Research can be used to evaluate the success of interventions designed to address exclusion. The programs evaluated could be general anti-poverty efforts that are assessed with respect to their effectiveness for LGBT people. The Institute of Development Studies in the U.K. has been conducting "policy audits" of whether and how social development efforts in some countries include LGBT people (Lim & Jordan 2013). In addition, programs that are already targeted to LGBT people might be assessed for effectiveness and scalability. (See the discussion below of possible high-priority topics.)
- *Constructing policy alternatives:* Research can be helpful in designing new policy approaches to further the inclusion of LGBT people. In the Indian context, one strategy is to assess whether current positive discrimination or other related policies would be appropriate to extend to LGBT people. Monitoring the process of providing those protections to transgender people as the recent Supreme Court decision is implemented in India could provide ideas for LGBT people. Other ideas might come from research on policies in other countries.
- *Research as an economic development program:* In addition, the research process itself can contribute to economic growth through the development of research capacity and employment among LGBT people and organizations. The leadership and involvement of local members of the LGBT community in research projects could provide valuable training for them and enhance the relevance and value of the research. Also, providing research support to local university students and faculty can enhance the status of research on LGBT people. Analyzing the history of HIV-related social science and health research might suggest ways of organizing research efforts to achieve this goal for the LGBT communities.

Research on LGBT people requires diverse sampling methods and research designs. While population-based samples of LGBT and non-LGBT people are not impossible (see Box 1),

the challenges can be difficult to overcome without other kinds of research being conducted first. Small-scale qualitative research projects and medium-scale surveys of convenience samples of LGBT people not only result in valuable knowledge about LGBT people's lives, but also contribute to better understandings of how to eventually study LGBT people in population-based surveys (Sexual Minority Assessment Research Team 2009). Therefore, a diversified approach to research methods is essential.

In the context of a large and diverse country such as India, useful research requires attention to population diversity in sampling and construction of research questions. Confronting the needs and limitations of existing data in this report suggest the following sources of variation in LGBT experiences to incorporate into future research efforts:

- Inclusion of diverse sexual orientations and gender identities;
- Urban and rural differences;
- Differences in LGBT experiences in formal and informal sectors of the economy, including agricultural work and self-employment;
- Inclusion of women and transgender men as well as men and transgender women;
- Intersectionality of sexual orientation and gender identity with other important identities, such as disability or Scheduled Caste/Tribe;
- Attention to age cohort differences in experiences.

Proactively building a local research infrastructure would help meet the research needs related to LGBT inclusion more efficiently and effectively. As noted above, if local researchers are central to research projects from the beginning, the research infrastructure could serve two goals, creating more research on LGBT people and creating a research community. The infrastructure envisioned here is primarily a virtual one, but consideration of institutionalization of the infrastructure might also be desirable. Important goals of the infrastructure would include the following:

- Promoting interdisciplinary conversations by bringing together, for example, economists, sociologists, anthropologists, and public health scholars studying LGBT inclusion to pool research knowledge and insights related to specific policy domains, such as employment, health, or family;
- Encouraging researchers to share survey instruments, research protocols, training materials, data, and other materials related to LGBT issues;
- Coordinating LGBT-related research efforts in multi-country research projects to encourage comparability of measures across countries;
- Encouraging or requiring existing research projects related to social inclusion to incorporate data collection on sexual orientation and gender identity and to consider LGBT issues, and providing technical support to implement this goal.

8.4 HIGH-PRIORITY RESEARCH AREAS FOR POLICY AND DEVELOPMENT INTERVENTIONS

The findings of this study demonstrate a need to consider policy and development strategies for promoting inclusion of LGBT people, both as a way to ensure the basic human

rights of LGBT people and as a way to enhance conditions for overall economic development. While the terms of reference for the study did not include policy recommendations per se, additional research in three high-priority areas could provide an evidence base to guide future considerations of policy and development programming...

First, research on poverty among LGBT people should be prioritized. The small amount of research that exists (see Box 2) shows that LGBT people are highly vulnerable to poverty. Research can help policymakers understand the challenges faced by poor LGBT people, as well as how stigma and intergenerational poverty interact to further exclude the LGBT poor from full and equal participation in society. That understanding will also be important for economic development agencies working to end poverty. Research on LGBT poverty is the least likely research to be taken up by private research organizations and academic researchers, who tend to focus on easier-to-reach and higher-status LGBT subpopulations, such as employees of multinational corporations, making a public investment essential.

Second, developing data on LGBT people should be a high priority since an investment in data can accelerate research. Policymakers can ask for an analysis of whether and how existing national surveys could include questions or response options that would include LGBT people, such as gender options beyond male or female, or new response options for same-sex couples. India has started this process with its third gender category on the most recent census, but low counts and reports of problems suggest that further improvements are needed to gain a more accurate count. Box 1 lists several innovative approaches that could be evaluated for use in India and other countries. Coordination of national statistical agencies could facilitate creation of at least some measures that are comparable across countries.

Finally, assessing actual anti-poverty interventions and ongoing public and private efforts to reduce LGBT exclusion should be a high priority so that successful programs can be considered for scaling up. Some examples to consider in India and elsewhere would include the following:

- Monitoring the addition of transgender people to reservation programs in education, health care, or other programs in India (Mohan & Murthy 2013);
- Current efforts to create livelihood and education programs for transgender people and MSM, such as programs run by SAATHII (Solidarity and Action Against the HIV Infection in India);
- The local effects of voluntary employer policies of nondiscrimination, such as multinational corporations' corporate-wide policies;
- The impact of news media and the entertainment industry in shaping non-LGBT people's attitudes toward LGBT people in India and other countries.

These research priorities have the potential to lead to a fuller understanding of the needs of the most excluded among LGBT people and to provide promising strategies for their inclusion.

APPENDIX 1: ABBREVIATIONS

DALY	disability-adjusted life year
FSW	female sex workers
LGBT	lesbian, gay, bisexual, and transgender
MSM	men who have sex with men
MSW	male sex workers
NACO	National AIDS Control Organization
NSS	National Sample Survey
PLHIV	people living with HIV
WMHS	World Mental Health Survey
WVS	World Values Survey
YLD	years lived with a disability
YLL	years of life lost

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APPENDIX 2: ATTITUDES TOWARD HOMOSEXUALITY IN INDIA, WORLD VALUES SURVEY 2006

	Is homosexuality ever justified?						Would not want homosexual neighbor	
	Never justified	Some-times unjustified	Neither	Some-times justified	Always justified	N	%	N
Total	64%	13%	10%	5%	9%	1502	41%	1961
Men	64%	13%	10%	5%	8%	897	41%	1115
Women	63%	12%	9%	4%	11%	604	41%	843
AGE #								
15-24 years old	73%	9%	7%	3%	8%	161	39%	209
25-34	64%	14%	9%	4%	9%	401	42%	512
35-44	63%	12%	10%	5%	10%	391	47%	496
45-54	64%	13%	12%	4%	7%	262	35%	357
55-64	61%	12%	8%	6%	13%	155	43%	199
65 and up	56%	17%	11%	7%	9%	132	38%	186
SIZE OF TOWN * #								
2,000 and less	71%	13%	9%	2%	5%	443	42%	623
2,000-5,000	64%	14%	9%	4%	9%	565	44%	686
5,000-10,000	50%	15%	13%	7%	16%	256	31%	318
10,000-20,000	49%	8%	11%	10%	22%	91	66%	113
20,000-100,000	77%	6%	11%	6%	0%	35	38%	56
100,000-500,000	73%	4%	8%	9%	5%	75	38%	96
500,000 and up	80%	10%	3%	3%	3%	30	12%	60
RELIGIOUS DENOMINATION *								
Buddhist	43%	11%	21%	11%	14%	28	53%	32
Christian	65%	20%	10%	2%	4%	51	37%	62
Hindu	66%	13%	9%	4%	9%	1128	41%	1492
Jain	70%	15%	5%	0%	10%	20	14%	21
Jew	70%	10%	0%	10%	10%	10	42%	12
Muslim	52%	18%	10%	7%	13%	123	47%	159
Other	67%	33%	0%	0%	0%	3	25%	4
Sikh	73%	6%	18%	2%	0%	49	37%	65
RELIGIOUS SERVICE ATTENDANCE *#								
More than once/week	66%	10%	3%	5%	16%	292	26%	423
Once a week	59%	15%	14%	6%	6%	315	42%	402
Once a month	63%	18%	9%	2%	9%	222	48%	265

Only special Holy Days	68%	12%	8%	4%	8%	286	45%	387
Once a year	54%	16%	11%	4%	15%	96	48%	115
Less often	71%	11%	11%	3%	3%	175	49%	194
Never/practically never	71%	3%	8%	5%	13%	63	54%	80
EDUCATION *#								
Nonliterate	52%	21%	14%	5%	9%	387	33%	587
Below primary	64%	6%	9%	7%	14%	104	41%	152
Primary Pass (completed Class V, not Class VIII)	58%	20%	9%	5%	8%	174	41%	234
Middle Pass (Completed Class VIII, not Class X)	66%	11%	11%	2%	11%	205	48%	256
Matric (Completed Class X/high school or equiv)	77%	5%	6%	4%	9%	243	47%	283
Intermediate/College no Degree	67%	10%	7%	6%	10%	168	46%	194
Graduate (BA, BS, etc)	69%	9%	8%	6%	9%	158	46%	176
Post Graduate (MA, MS, etc)	76%	7%	12%	5%	0%	41	35%	46
Professional degrees and higher research degrees	58%	17%	8%	8%	8%	12	36%	14

Source: Author's calculations from raw WVS data

Notes: May not sum to 100% because of rounding. An asterisk, *, indicates differences in rates across rows are statistically significant at the 5% level for the Justification measure, and # indicates statistical significance for the Neighbor measure.

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THIS CHEF SERVES #PURELOVE ON A PLATE



On his maiden trip, American transgender chef Chris Trapani talks about skill development for members of the transgender community

Chef Chris Trapani is using food as a tool of empowerment for his community

Ildres Bukhtiyar

Food has an immense strength to instill creativity and empower people of the LGBTQ+ community, says chef Chris Trapani, who is known to go beyond the walls of the kitchen with his TransEmpowerment movement as a transgender role model. One of the first transgender chefs to appear on the cable channel dedicated to food scene in the United States over a decade ago, Trapani is a Tex-Mex specialist.

The culinary artist, who was recently in India on a five-city tour, conducted culinary workshops for the members of the transgender community to enable them to run a food truck business.

He says, "I know that eking out a living in India is a huge struggle for transgenders in the country. But I believe that every gender is equal, and people here will soon realise and give them their due."

He adds, "Food has the power to bring everyone together. The food that I am teaching transgenders to cook is fun, delicious and simple to make. Dishes such as fried pimento cheese, Sriracha chicken, avocado taco and street corn are a hit everywhere."

During his maiden trip to India, the chef says that he has met numerous transgenders, who are passionate about cooking. "If given an equal chance, they can prove to be excellent. Their passion and love for food and the desire to learn more are so heartening.

Cooking can also be a very therapeutic experience for them, and if they get into the business of food truck, like me, it can take off in India," says Trapani who was invited to India by The Lalit Suri Hospitality Group, which is supporting this initiative.

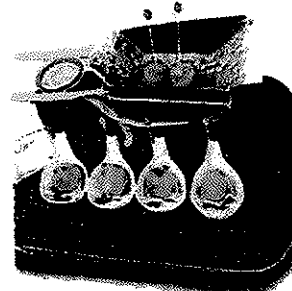
Trapani, who was born a woman, changed his sex and became a man. "Since my childhood, I felt that something was missing in my life. I felt let down and upset. I finally found the courage to live the way I wanted to," he shares, adding that the credit to his happiness goes to his wife. "She is my best friend. She stood by me through many challenges. She helped me realise who I was, and gave me the strength to undergo sex change surgery," he says.

Along with creating job opportunities for transgenders by teaching culinary skills, Trapani also wants to send out the message that transgenders deserve better. Trapani hopes that Indians will overcome their prejudice and give the LGBTQ+ community the chance to excel in life.

"We are promoting #purelove that stands for being inclusive. Transgenders need to be given the same rights. It's inhuman to deny them jobs and opportunities and judge them by gender. But I have hope that India will change," says the chef.

PIMENTO CHEESE FRITTERS

In a bowl, mix equal quantities of shredded cheddar and cream cheese, a bit of mayo, minced roasted peppers or mild chillies, a pinch of salt, sherry, a small amount of corn starch and some bread crumbs. Roll into small balls. Dip in flour, coat in milk, dip in panko crumbs and freeze. Thaw/defrost and fry in olive oil and serve with your favourite chutney.



A HOTEL FOR US ALL

As India wakes up to the potential of ethical marketing, Keshav Suri of the Lalit group is ahead of the curve, leading the change he wants to see. By Cynthia Lewis

Befitting the youngest executive director of the largest privately owned hotel chain in India, Keshav Suri wants to "welcome one and all", throwing open their luxurious gates to members of the LGBTQIA community, persons with disabilities, acid attack victims and more. 2018 saw the announcement of Ellie, their multicoloured mascot who "welcomes all, without any discrimination on the basis of religion, caste, gender or sexual preferences". But it's a story that started with something much simpler: Suri just wanted to have fun, and he wanted everyone to be able to have fun with him.

In 2011, the Lalit opened the nightclub Kitty Su in Delhi, an anthropomorphised space complete with a back story and personal eccentricities — Kitty Su is a discerning woman of taste, class and distinction. "The party and nightlife culture in the city was very different [then], I opened the club out of my own selfish interests, to create the kind of place where I would like to party and create an inclusive space." The club was the first to play host to numerous inclusivity-driven parties, from drag nights to gay parties, and they did so with all the



luxury and charm that comes with the Suri name. It was among the first of the Lalit Group's many path-breaking moves toward inclusivity in luxury hospitality, and definitely the most glamorous. "The club will be completing 7 years in August in Delhi, and we continue to be the trend setters, Kitty Su Mumbai, Chandigarh and Kitty KO Bangalore have also gained the same love in their respective cities." What set Kitty Su apart was its

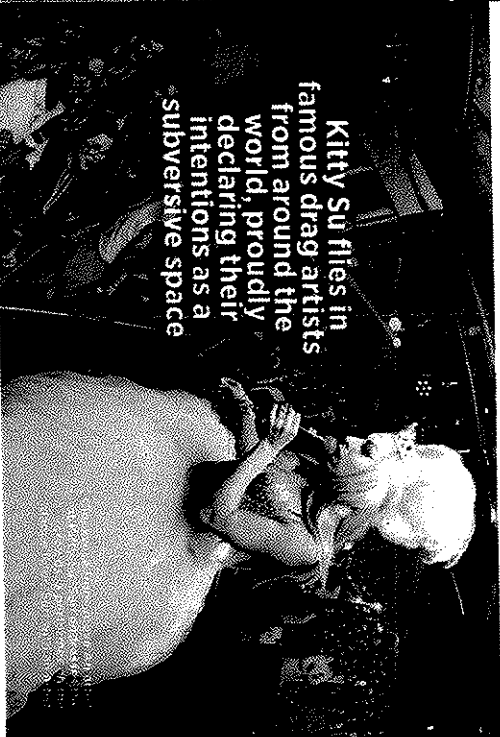
unequivocal support of marginalised lifestyles, a space almost entirely untouched by the hospitality sector at the time. Neel, 36, recounts his own attempts to find a place where he could be himself. "When I was a really young gay kid, 19 or so, there was only one gay club you could go to and you had to be really careful how you dressed. Now people are dragging [sic] and wearing gender fluid clothing, then you had to cheat. Go in and then take something off or put

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something on. But you couldn't just walk in being who you wanted to be." Kitty Su, on the other hand, flies in famous drag artists from around the world, proudly declaring their intentions as a subversive space. As we see consumers calling for the boycott of brands over ethical concerns, often unrelated to their product, the Suris may in fact have been ahead of their time. With the rise of ethical marketing, studies in America have shown that 66 per cent of consumers stop buying from companies they

is India's first and only DJ in a wheelchair. We are an equal opportunity workplace, and the group has not only hired people from the community, but also held sensitisation training sessions on the LGBTQIA community by Alex Mathew across all our properties. A fresh HR Policy on equality and diversity, with clear guidelines on handling discrimination and harassment was drafted, along with spicing up of POSH (Prevention of Sexual Harassment) in August 2017." This careful rebranding blends personal

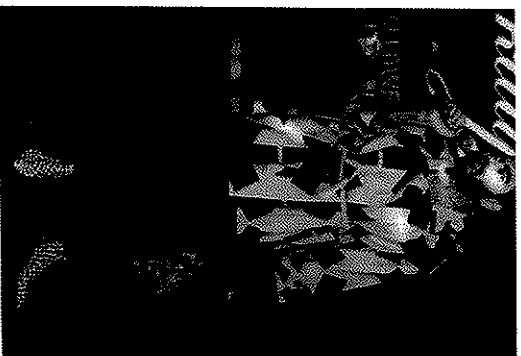
Kitty Su flies in famous drag artists from around the world, proudly declaring their intentions as a subversive space



bulbure are unethical, and 29 per cent take to social media to share their support of ethical companies, a trend that's picking up in India as well. It's good to remember that the socially marginalised are consumers too, and their coin is of equal value, given the incentive to spend.

Besides their support of the LGBTQIA community, the Suris have also made more concrete changes in the way their company is run. "We have curated special events for people who are differently-abled, acid attack survivors and who belong to the LGBTQIA community. I have also hired transgender, trans and acid survivors for work and supported them to chase their dreams. DJ Anish is a resident DJ at Kitty Su, and

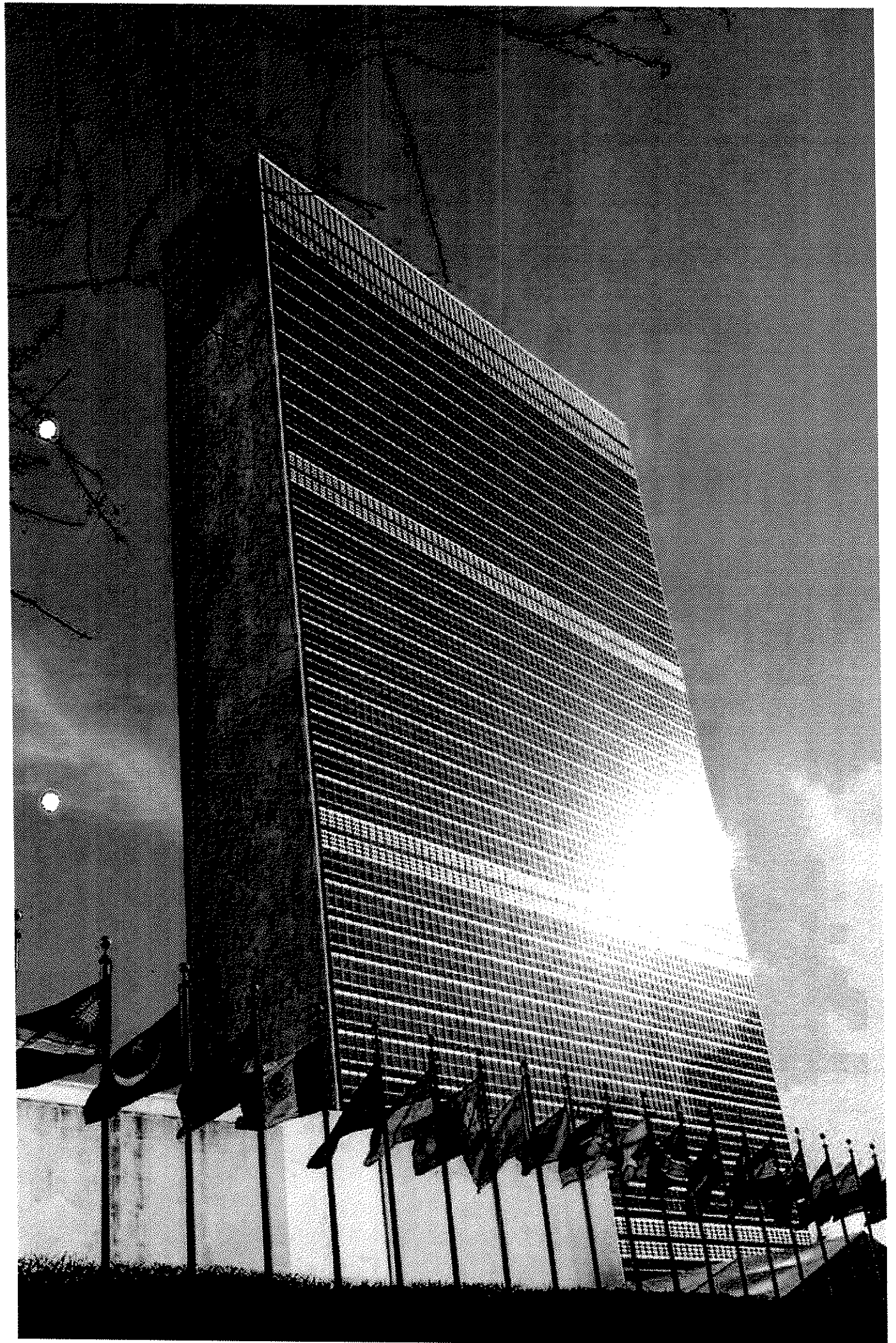
experiences with business goals. "It doesn't take much to notice that our world is not as inclusive as we would like it to be," says Suri. "I believe in India, it is the entrepreneur who bring about the change, not the government. As a hotelier, I want to put India on the global tourist map. I want to change the idea of India as an unsafe place. An economy as big as India can earn about \$32 billion annually from pink tourism alone; these are World Bank reports, and it is big money. I want to cash in on that. I feel it is the role of everyone to improve their community to open people's minds and make their country inclusive. We are certainly doing that. I don't know if people are getting inspired or jealous, or critical. I will continue to do it."



Tackling Discrimination against
Lesbian, Gay, Bi, Trans, & Intersex People
STANDARDS OF CONDUCT FOR BUSINESS



UNITED NATIONS
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OFFICE OF THE HIGH COMMISSIONER



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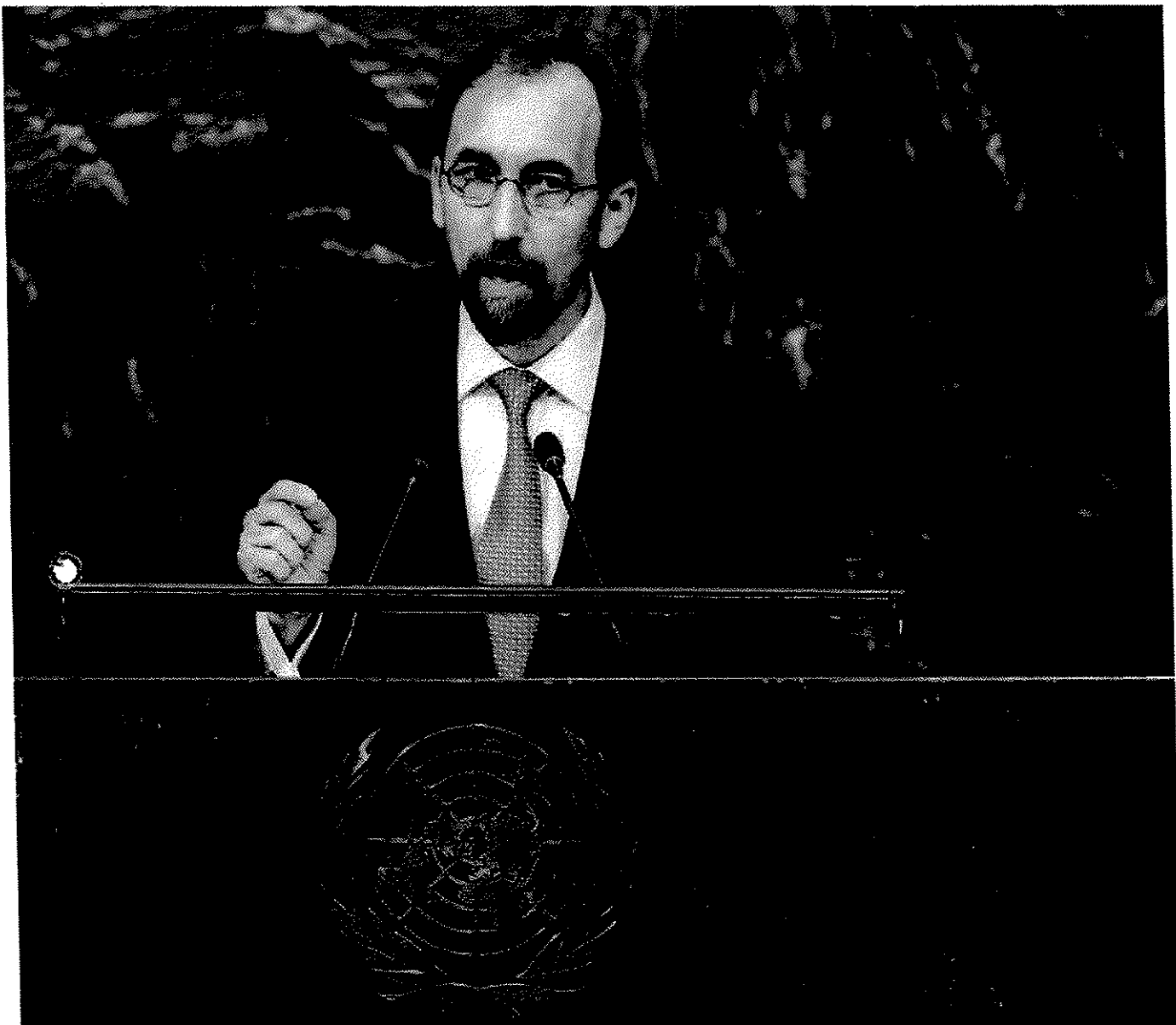
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"If we are to achieve faster global progress towards equality for lesbian, gay, bi, trans, and intersex people, businesses will not only have to meet their human rights responsibilities, they must become active agents of change."

Zeid Ra'ad Al Hussein
UN High Commissioner for Human Rights

A MESSAGE FROM THE HIGH COMMISSIONER

The UN Guiding Principles on Business and Human Rights set clear standards for the private sector to respect international human rights. The UN Global Compact provides a platform for companies to implement these standards and to advance them in the broader community.

The present Standards of Conduct build on both the UN Guiding Principles and on the UN Global Compact and offers guidance to companies on how to meet their responsibility to respect everyone's rights – including, in this case, the rights of lesbian, gay, bi, trans, and intersex (LGBTI) people. Meeting this benchmark means treating LGBTI people fairly in the workplace, as well as looking at business practice up and down the supply chain to seek to ensure that discrimination is tackled at every turn. But the Standards of Conduct also take the case for corporate engagement a step further – by pointing to the many opportunities companies have to contribute to positive social change more broadly in the communities where they do business.

The original idea for developing these Standards came from a panel discussion I was involved in at the World Economic Forum annual meeting in Davos in 2016. It was a turning point in a long-overdue conversation among prominent business leaders and activists about what practical measures companies can and should take to tackle LGBTI discrimination – beyond the kind of internal diversity and inclusion policies already in place in large corporations, vital though these are.

Over the past year, my Office, in conjunction with the Institute for Human Rights and Business, has held a series of region-wide consultative meetings with business and civil society representatives in Europe, Africa, Asia and the Americas. We listened to people's experiences and ideas, many of them reflected in the paper before you. I am grateful to all who took part and to many others who contributed electronically.

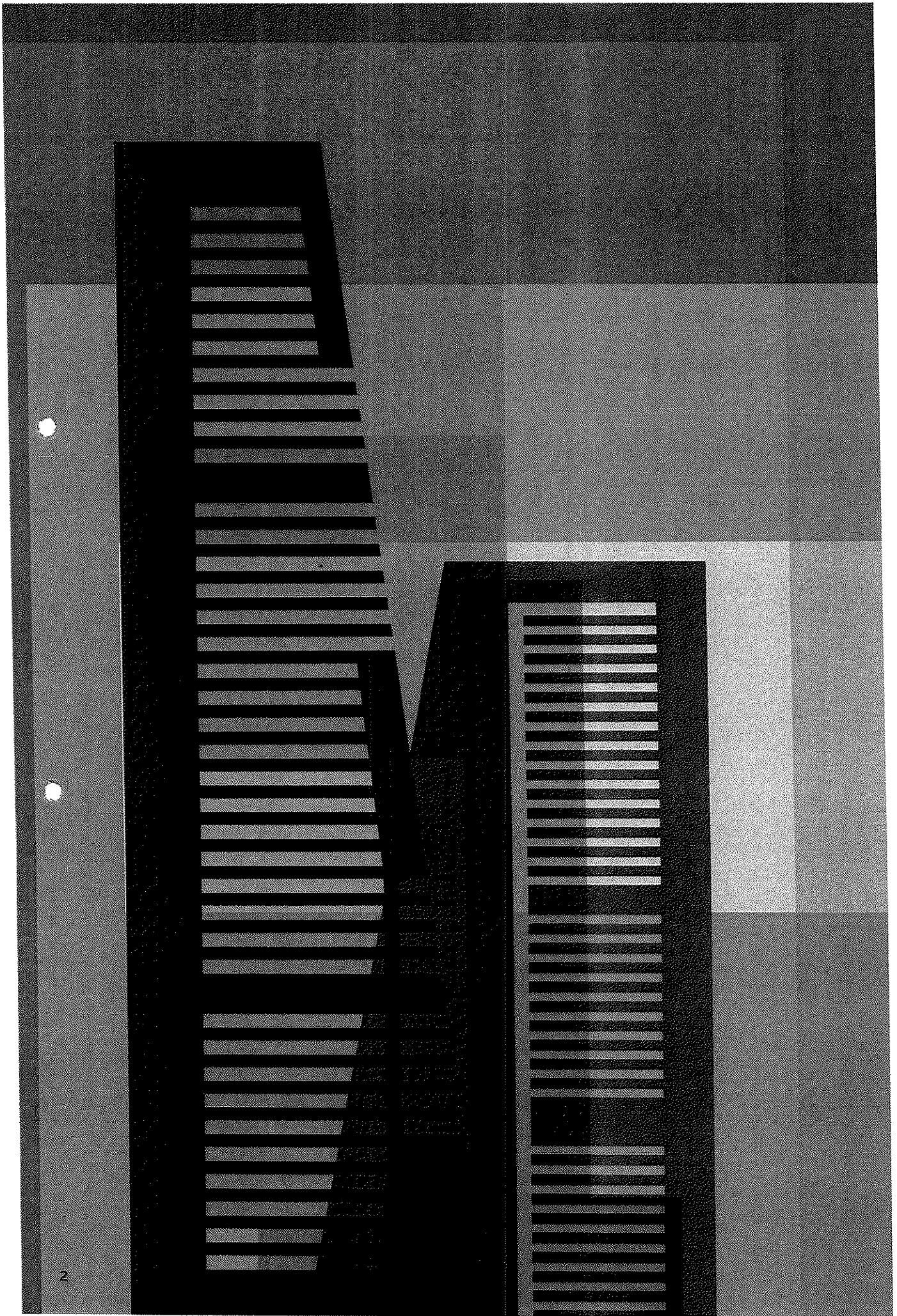
The influence of business can accelerate the pace of change. Companies all over the world – big and small, local and multinational – have the chance to use their leverage and their relationships with a variety of local stakeholders to help move the dial in the direction of greater equality for LGBTI people. We know from experience that every time discrimination is diminished, everyone benefits.

I see these Standards of Conduct as a step forward in helping companies translate their human rights commitments into practical action on the ground, and a potentially important opportunity to enlarge the role of business in tackling discriminatory practices in countries around the world.



UN High Commissioner for Human Rights
September 2017

the Standards of Conduct take the case for corporate engagement a step further – by pointing to the many opportunities companies have to contribute to positive social change more broadly in the communities where they do business



EXECUTIVE SUMMARY

The past decade has seen important progress in many parts of the world in the lives of millions of lesbian, gay, bi, trans, and intersex (LGBTI) people who have benefited from a raft of legal reforms and, in some cases, shifts in social attitudes. But such progress has been partial and uneven, with major advances in some countries and for some communities offset by lack of progress, or even reversals, in others. Seventy-three countries still criminalize consensual same-sex relationships, very few countries legally recognize the identity of trans people and only a handful protect the rights of intersex people. In most countries, protection against discrimination based on sexual orientation and gender identity is inadequate at most. Even in countries that have made significant strides, LGBTI people face high hurdles, with studies suggesting that they are more likely than the general population to be bullied at school, treated unfairly at work, and denied access to basic services.

Companies have a responsibility to respect international human rights standards, to make sure they respect everyone's human rights, including the rights of LGBTI people. This applies regardless of the company size, structure, sector, or location. Companies also have important opportunities to foster diversity and promote a culture of respect and equality both in the workplace and in the communities where they and their business partners operate. Many firms have found that actively tackling discrimination and promoting diversity and inclusion also brings economic benefits — helping tap new talent, improving decisions and building loyalty with customers and investors alike.

In 2000, the United Nations launched the UN Global Compact, the world's largest corporate responsibility initiative, to encourage companies to respect universal principles and contribute to a more sustainable and inclusive global economy. A decade later, in 2011, the UN Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights, affirming that every business bears responsibility to respect human rights, and calling on companies to avoid infringing upon human rights and to address adverse human rights impacts with which they are involved. In 2015, UN Member States agreed upon a set of 17 Sustainable Development Goals (SDGs) with a promise to “leave no one behind”. Fulfilment of these goals, which include tackling social and economic discrimination and marginalization, depends now on the collective efforts, not just of governments, but of civil society and businesses as well.

most are just beginning to grapple with these issues, and accumulated knowledge and best practices remain thin

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Awareness of the role that companies can play in curbing discrimination and promoting diversity is growing, and many companies have already taken steps to translate a commitment to LGBTI inclusion into action. Even so, most are just beginning to grapple with these issues, and accumulated knowledge and best practices remain thin, particularly in environments that are hostile to LGBTI people. Overall, the corporate sector's approach has often been ad hoc and inconsistent. Some global companies do well in championing LGBTI equality at home, less well abroad. Others may find their voice in relatively supportive environments, but stay silent in contexts where rights protection for LGBTI individuals is weak or lacking. Some companies have policies in place to protect lesbian, gay and bisexual people, but have yet to take measures to protect trans and intersex people.

The Standards of Conduct summarized below, and set out in more detail later in this paper, offer practical guidance to companies on how to respect and support the rights of LGBTI people in the workplace, marketplace and community. They have been developed by the United Nations Human Rights Office in partnership with the Institute for Human Rights and Business, and build on the outcome of a series of regional consultations held in 2016 and 2017 in Mumbai, New York, Kampala and Brussels. The Standards are designed to support companies in reviewing existing policies and practices – and establishing new ones – to respect and promote the human rights of LGBTI people.

The Standards are grounded in existing international human rights law and are in line with the UN Guiding Principles on Business and Human Rights. They also have a strong empirical foundation, building on many of the good practices that responsible businesses have already adopted. They present measures that companies can and should take to align their policies and practices with existing human rights standards. They recognize the need for a nuanced and differentiated approach based on the diversity of contexts and of individuals making up the LGBTI spectrum. Finally, they are intended to support rights-affirming interactions between companies and a wide range of stakeholders – from staff to customers, suppliers, shareholders, communities, governments, lawmakers, and trade unions – since achieving progress in this area requires the participation of all actors at all levels.

The Standards are grounded in existing international human rights law and are in line with the UN Guiding Principles on Business and Human Rights.

The Five Standards

At All Times

- 1 RESPECT HUMAN RIGHTS.** All businesses have a responsibility to respect human rights — including the rights of LGBTI people — in their operations and business relationships. Businesses are expected to develop policies, exercise due diligence, and, in cases where their decisions or activities have adversely affected the enjoyment of human rights, remediate such impacts. Businesses should also establish mechanisms to monitor and communicate about their compliance with human rights standards. Where higher levels of human rights violations against LGBTI people have been documented, including in countries with discriminatory laws and practices, companies will need to undertake more extensive due diligence to ensure that they respect the rights of LGBTI people.

In the Workplace

- 2 ELIMINATE DISCRIMINATION.** Employees and other people with whom the business engages are entitled to freedom from discrimination. Businesses should ensure that there is no discrimination in their recruitment, employment, working conditions, benefits, respect for privacy, or treatment of harassment.
- 3 PROVIDE SUPPORT.** LGBTI individuals are employees, managers, business owners, customers, and community members, among others, and yet many face formidable obstacles to workplace acceptance and inclusion. Businesses are expected to provide a positive, affirmative environment within their organization so that LGBTI employees can work with dignity and without stigma. This standard requires businesses to go beyond equal benefits and take steps to ensure inclusion, including addressing the specific workplace needs of LGBTI people.

In the Marketplace

- 4 PREVENT OTHER HUMAN RIGHTS VIOLATIONS.** Businesses should ensure that they do not discriminate against LGBTI suppliers or distributors, or against LGBTI customers in accessing the company's products and/or services. In their business relationships, businesses should also ensure that business partners do not discriminate. Where a business partner discriminates against LGBTI people, businesses should use their leverage to seek to prevent that act of discrimination. This means looking beyond avoiding discrimination to address issues of violence, bullying, intimidation, ill-treatment, incitement to violence, or other abuses against LGBTI people that a company may be implicated in through their products, services, or business relationships. Companies should also ensure that they provide access to products and services to LGBTI customers.

In the Community

- 5 ACT IN THE PUBLIC SPHERE.** Businesses are encouraged to use their leverage to contribute to stopping human rights abuses in the countries in which they operate. In doing so, they should consult closely with local communities and organizations to identify what constructive approaches businesses can take in contexts where legal frameworks and existing practices violate the human rights of LGBTI people. Such steps can include public advocacy, collective action, social dialogue, financial, and in-kind support for organizations advancing LGBTI rights and challenging the validity or implementation of abusive government actions. Companies will need to undertake more extensive due diligence to ensure that they respect the rights of LGBTI people where higher levels of human rights violations have been documented, including in countries with discriminatory laws and practices.

The Standards outlined above are intended to provide a set of benchmarks for assessing the role of business in tackling discrimination and related human rights abuses affecting LGBTI people, and to support good practice by companies. The United Nations Human Rights Office encourages companies to endorse, use, and refer to these Standards and promote their use by others. It also encourages civil society and other stakeholders to use the Standards as a tool in assessing and reporting on companies' commitments, policies, and practices in respect to the rights of LGBTI people.

FIVE STANDARDS OF CONDUCT

AT ALL TIMES

1. Respect human rights

WORKPLACE

2. Eliminate discrimination

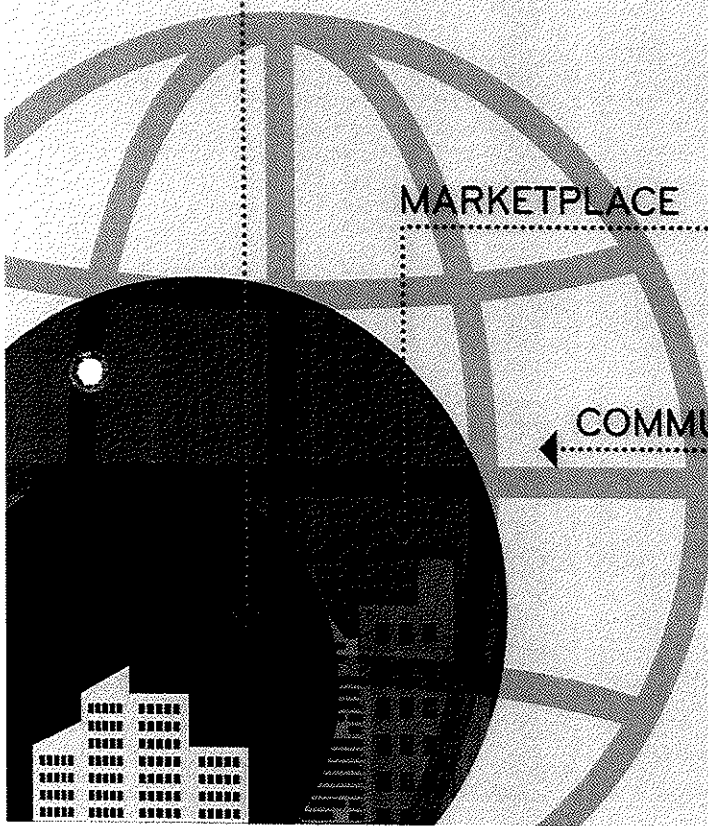
3. Provide support

MARKETPLACE

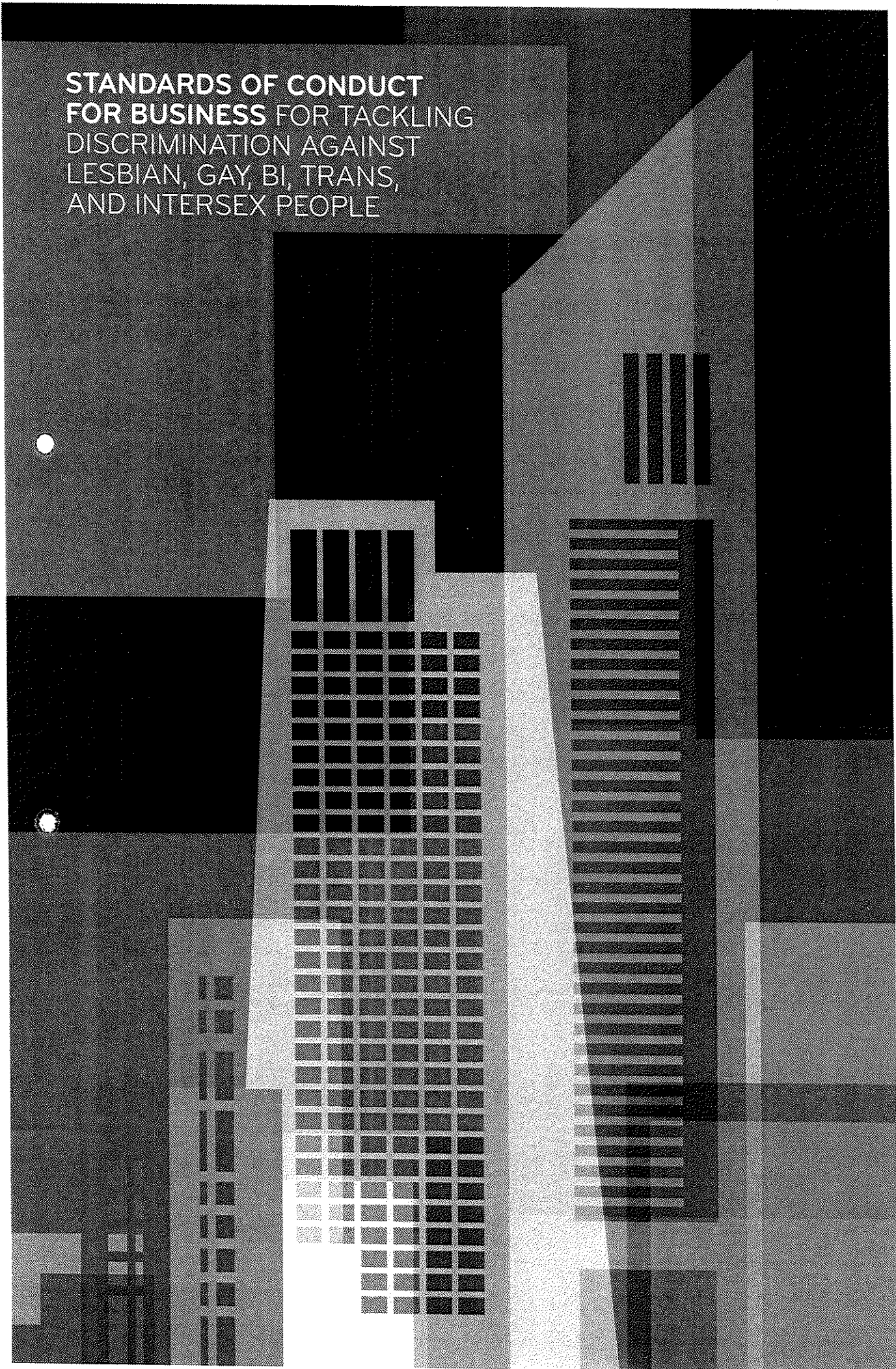
4. Prevent other human rights violations

COMMUNITY

5. Act in the public sphere



**STANDARDS OF CONDUCT
FOR BUSINESS FOR TACKLING
DISCRIMINATION AGAINST
LESBIAN, GAY, BI, TRANS,
AND INTERSEX PEOPLE**



At All Times

1 RESPECT HUMAN RIGHTS

In line with the UN Guiding Principles on Business and Human Rights and in consultation with workers and their representatives and with LGBTI organizations, as well as other relevant stakeholders, companies should put in place policies and processes appropriate to their size and circumstances to ensure that they are respecting human rights, including the rights of LGBTI people:

a Policy commitment: Companies should develop policies to meet their responsibility to respect human rights, expressly including the rights of LGBTI people.

b Due Diligence: Companies should conduct due diligence to identify, prevent, mitigate and account for, any actual or potential negative impact on the enjoyment of human rights by LGBTI people that they have caused or contributed to or which are directly linked to their operations, products and services, and business relationships. The assessment of any such actual or potential adverse impacts should be done in consultation with relevant stakeholders in countries of operation, including, in this case, LGBTI organizations. Companies should account for how they address any actual or potential adverse impacts identified.

c Remedy: Companies should seek to resolve any adverse human rights impact they might have caused or contributed to, engaging actively in remediation mechanisms by itself or in cooperation with other legitimate processes, including establishing and participating in effective operational-level grievance mechanisms for individuals or communities concerned. Such mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, enable continuous learning, and be based on

engagement and dialogue. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor preclude access to judicial or other non-judicial grievance mechanisms. Companies should ensure that grievance mechanisms address specific issues of concern to LGBTI people. An essential element of a robust grievance mechanism is protection for whistle-blowers. Companies should use their leverage to influence and change discriminatory policies and practices of business partners or suppliers who discriminate against LGBTI persons. Where such efforts do not meet relevant standards, they should consider and assess the impact of terminating business relationships with such business partners or suppliers, unless doing so might itself lead to adverse human rights impact.

In the Workplace

2 ELIMINATE DISCRIMINATION

Companies should not discriminate among individuals or groups as potential or current employees based on sexual orientation, gender identity, gender expression, or sex characteristics:

a Employment: Companies should recruit staff and extend each individual the same benefits, salaries, opportunities for training or promotion regardless of a candidate's sexual orientation, gender identity, gender expression or sex characteristics, and include reference to non-discrimination on these grounds in vacancy announcements where legally feasible. Companies should take steps to ensure that LGBTI staff feel fully included in the workforce and avoid them from being forced to either reveal or conceal their identity/status within the workforce.¹ The role of top and middle management in ensuring effective compliance with fair recruiting practices is critical in this regard.

b Harassment and discrimination:*

Companies should take active steps to prevent, protect against, and eliminate discrimination, harassment (external or internal) and violence directed against LGBTI individuals. Companies should offer reporting processes to prevent and address harassment and discrimination in the workplace while protecting those who report such abuses from retaliation. Companies should take steps to protect LGBTI staff from external harassment by identifying and addressing security issues in consultation with employees, including the safety of staff traveling to and from work and on company-related business.

c Diversity awareness: Companies should train staff and in particular, managers, to raise awareness of human rights concerns faced by LGBTI people and ensure that they are aware of their responsibility under company policy to respect and uphold the rights of LGBTI people, including colleagues. In particular, organizations should ensure that relocation policies and practices for all staff (regardless of their sexual orientation, gender identity or sex characteristics) deliver awareness of any risks or other reduced rights considerations for LGBTI people.

d Extend benefits: Companies should extend the same benefits to partners, spouses, children or other dependents of staff members, regardless of sexual orientation, gender identity and expression, or sex characteristics.

e Respect privacy: Companies should respect and support the right to privacy of all persons, including by keeping any information relating to the sexual orientation, gender identity, gender expression, or sex characteristics of individuals confidential and secure, and not revealing such information to third

parties, including authorities, without the express authorization of the individual concerned. Data encryption is critical in this regard.

In their efforts to eliminate discrimination in the workplace, companies should ensure that they address the specific rights of trans people and intersex people at work. States and companies tend to lag behind on these two components within the LGBTI community.

Companies should adopt policies for trans inclusion, including recognizing the gender identity of trans staff, customers and other stakeholders based on the self-identification of the person, regardless of whether this is reflected in official documents. This also includes establishing policies that require company staff to respect the name, pronouns, terms and gender used by the person concerned.

Companies should adopt policies to support and protect the rights of trans staff who are transitioning, including those relating to modification of company records, and provide training and guidance to managers and colleagues in respect to gender identity and expression.

Companies should ensure that gender-affirming surgery, treatment and support are covered by company health insurance policies. Other important aspects of trans inclusion include safe and non-discriminatory access to bathrooms and other single-sex facilities for trans people, and non-discriminatory dress codes.

Companies should adopt policies to respect the rights of intersex people at work, including in relation to accessing personal services and changing rooms, dress codes, health care and medical attention.

*Some concrete steps companies may consider include: analyzing travel exposures, developing commuting policies, and educating employees on safety risks. In exceptional cases, companies may consider arranging for escorts to accompany targeted LGBTI employees.

3 PROVIDE SUPPORT

In addition to policies to eliminate discrimination and other human rights violations, companies should take proactive positive measures to create a positive, affirmative environment within their organization so that LGBTI employees can work with dignity. Companies should support efforts by LGBTI employees to create their own informal staff groups and extend the same opportunities to them for extra-curricular activities as they would to any other group. Pro-LGBTI policies are critical but for them to be effective, in order to attract or retain LGBTI staff, companies should have a proactive approach with high visibility.

In the Marketplace

4 PREVENT OTHER HUMAN RIGHTS VIOLATIONS

Companies should identify, prevent, and mitigate other risks to the human rights of LGBTI people that may be specific to their industry, local context, or set of partners and stakeholders. In that area too, companies should provide employees and other stakeholders with the ability to safely register complaints, with both an identified complainant and those delivered anonymously. Violence, torture and ill treatment against LGBTI people have been documented inter alia in schools, clinics and hospitals, in detention, and in the context of law enforcement or security operations, while incitement to hatred and violence has been documented in the media sector.

All companies, and particularly those within the aforementioned sectors or those who interact with partners and stakeholders in

these sectors, should assess whether through their operations or business relations they are causing or contributing to violence, bullying, intimidation, ill-treatment, incitement to violence or other abuses against LGBTI people, and take concrete measures to prevent and mitigate such risks. The company should use its leverage to stop abuses in instances where its business partner is engaged in abuse that the company has not caused or contributed to, but which is nevertheless linked to its operations, products, or services through a business relationship. However, the appropriate action will depend on a range of factors including: the degree of leverage over the entity concerned; how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

Employees should also be held accountable if their conduct abuses others' human rights. Companies should not withhold products or services from individuals or groups based on sexual orientation, gender identity and sex characteristics. Companies should use their leverage to influence the behaviour of suppliers and partners, whose practices may, intentionally or not, discriminate against or otherwise violate the rights of LGBTI people. In some cases, it may be appropriate for companies to take public advocacy positions. As an important corollary, companies should actively support partners and suppliers who extend opportunities, products and services on a non-discriminatory basis to LGBTI people and those who recruit them, including in jurisdictions where the rights of LGBTI people are not respected.

In the Community

5 ACT IN PUBLIC SPHERE

Companies cannot alone transform societies in which they operate. Even so, it is important for companies to take positive, affirmative steps to respect and, where there are opportunities to do so, promote human rights, using their influence to champion rights through words and deeds.



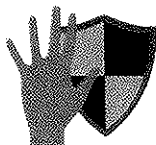
PUBLIC ADVOCACY

Companies should communicate their policies effectively in appropriate contexts, in consultation with local stakeholders. Companies should also exchange their experiences in this area in relevant forums such as the annual Forum on Business and Human Rights, guided by the UN Working Group on Business and Human Rights, with the support of the UN Human Rights Office.



COLLECTIVE ACTION

Companies should, together with other companies, consult with local organizations working to promote the rights of LGBTI persons as to appropriate steps that they could collectively take to challenge discriminatory laws and practices. They should sponsor and partner with local LGBTI groups, including youth centres, community centres, advocacy groups and charities.



QUESTION & DELAY IMPLEMENTING ABUSIVE ORDERS

Companies should take every available legal step to question, challenge, delay, and resist implementing government orders that might lead to human rights violations, including human rights violations against LGBTI people.



SOCIAL DIALOGUE

Companies and their organizations should engage in negotiation, consultation, and information exchange with trade unions at the sectoral, regional and national levels on issues of common interest relating to rights of LGBTI workers.

STANDARDS OF CONDUCT FOR BUSINESS: EXPLANATORY NOTE

- 1 **These Standards reflect already existing international human rights norms.** The standards are intended to serve as guidance for companies — large and small, state-owned and privately-owned, operating only in one country or in many — on how existing international human rights standards, including those derived from the Universal Declaration of Human Rights and reflected in the UN Guiding Principles on Business and Human Rights, may be applied in respect to the rights of LGBTI people.
- 2 **These Standards stem from internationally-recognized human rights to which LGBTI people are entitled by virtue of existing international human rights treaties.** Companies have a responsibility to respect all human rights of all people and in all circumstances, and should fulfil all of their human rights responsibilities as articulated in the *UN Guiding Principles*. Because LGBTI people disproportionately experience discrimination, violence, and related human rights violations, particular attention is needed in order to ensure that they are able to exercise their rights.
- 3 **These Standards apply to all business enterprises, regardless of size, sector, location, ownership, and structure.** While multinational and other companies operating in jurisdictions where the law is discriminatory towards LGBTI people face specific challenges in discharging their responsibility to respect rights, violence, and discriminatory practices against LGBTI people take place in every region and country in the world, and international standards apply in all cases.
- 4 **For the Standards to be effective, each industry sector will have to assess the risks and impacts in specific contexts and countries and adapt their approach to implementation accordingly.** The Standards describe in broad terms the kind of measures that companies should consider in order to align their policies and practices with international human rights standards. They also include suggested optional measures to promote equality and combat stigma that are advisable, circumstances permitting.
- 5 **The application of the Standards should be guided by local stakeholders.** Respecting and understanding local parameters in applying these standards will reduce the likelihood of companies taking ineffective or counter-productive initiatives. This can be achieved by actively promoting the involvement in and ownership by local stakeholders, including LGBTI civil society organizations.
- 6 **In applying these Standards, companies should adopt a nuanced and differentiated approach, taking into account the different human rights challenges faced by lesbian, gay, bi, trans, and intersex people respectively.** LGBTI people face both common and distinct human rights concerns. In some cases, some may be specifically targeted by violence and discriminatory laws and practices. While in many countries, all LGBTI people suffer from gaps in the legal framework and related protection challenges, trans, and intersex people are often especially exposed — given the scant attention given in most cases to their human rights concerns. As companies elaborate and implement policies, they should be mindful of these specificities and the diversity of the LGBTI population, which will frequently require taking differentiated approaches to each segment of the LGBTI population. Companies should also take into account that LGBTI individuals may be affected by multiple forms of discrimination — including racial discrimination, and discrimination based on sex, age, ethnicity, indigenous origin, religion, health, disabilities, and socio-economic status.
- 7 **While companies are encouraged to support, endorse, and refer to these Standards in reporting on their actions to respect and promote human rights, the Standards do not come with a mechanism to monitor their application.** The UN Human Rights Office encourages companies themselves, as well as trade unions, civil society organizations, academic institutions, and other stakeholders to monitor and evaluate performance, set benchmarks, identify and share good practices, and engage in dialogue on further steps that might be taken in line with these Standards.

BACKGROUND PAPER

This paper examines some of the challenges facing companies as they seek to meet their responsibilities and play a wider role in addressing discrimination against members of the LGBTI community.

Why Standards of Conduct?

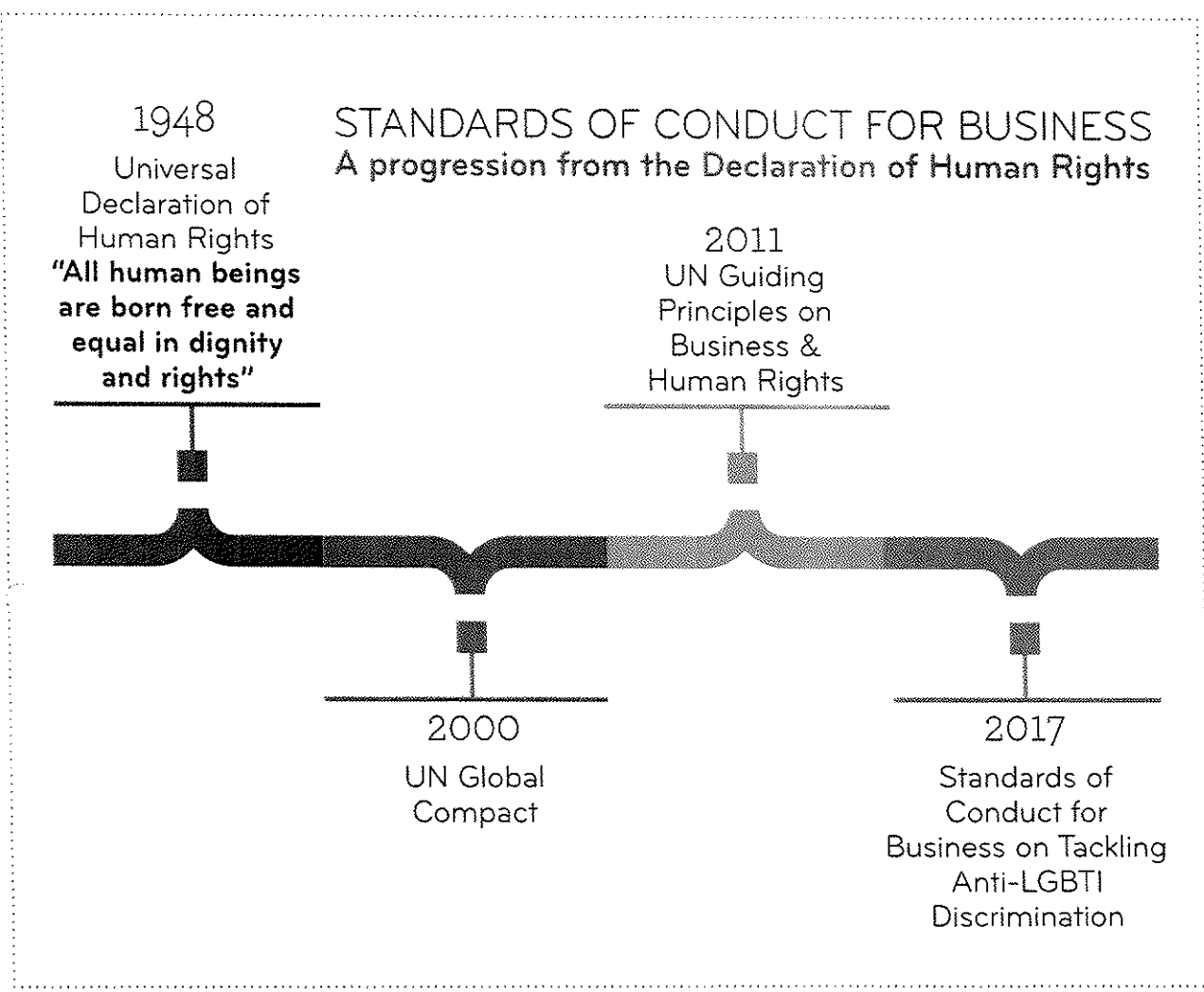
Awareness has grown throughout the world in the past decade of the gravity and extent of violence and discrimination directed at LGBTI people. Ending these abuses is increasingly the focus of discussion in many countries and at the United Nations. More than a hundred Member States have accepted UN recommendations to reform their national laws and take other measures to protect the rights of LGBTI people, and in recent years many have enacted important legal reforms: from repealing discriminatory criminal laws to amending anti-discrimination legislation to protect LGBTI individuals from unfair treatment.

Nevertheless, standards of legal protection for members of the LGBTI community still vary dramatically from country to country. Seventy-three UN Member States continue to criminalize same-sex relationships and many criminalize trans people. Most Member States lack effective protection from discrimination on grounds of sexual orientation, fewer still protect the rights of trans people and very few have taken measures to protect intersex people. In a handful of countries, governments are actively pursuing measures that would further restrict the rights of LGBTI people – including curbing activism and banning cultural events. Such stark differences in legal frameworks and practices pose particular problems for companies committed to respecting and supporting human rights – whether those companies operate in one jurisdiction, with international partners, or across multiple jurisdictions.

Even in countries with more progressive legal frameworks, deep-rooted stigma and negative stereotypes perpetuate discrimination against LGBTI people, including in the workplace, marketplace, and community. Beyond legal reforms, achieving social acceptance and equality requires the engagement of the broader community crucially including the corporate sector.

While governments have the primary obligation to respect, protect and fulfil human rights, companies also have an independent and complementary responsibility to respect human rights in their own operations and business relationships. The Universal Declaration of Human Rights⁴ explicitly states that “every individual and every organ of society” should strive to promote respect for human rights. Tackling discrimination is not the sole preserve of the State: as organs of society, companies have both a responsibility to respect human rights and tremendous economic power and influence to bring about positive change.

Throughout this paper the terms lesbian, gay, bisexual (or bi) are used to indicate individuals with same-sex attraction; transgender (or trans) is used to indicate individuals whose gender identity differs from the sex assigned at birth, and intersex is used to indicate individuals whose sex characteristics do not fit typical binary notions of male or female bodies. While these terms are increasingly widely understood, different terms may be used in different regions and/or cultures.



In 1948, the Universal Declaration of Human Rights was adopted and today forms a key plank of international human rights law. Since the Declaration entered into force, Member States have adopted two major Covenants (on Civil and Political Rights, and on Economic, Social, and Cultural Rights), as well as a number of conventions that safeguard human rights in specific cases and circumstances.

In 2000, the UN Global Compact was unveiled, which specified nine principles by which business should abide (later a tenth principle was added) – among them human rights, labour rights, environmental protection and anti-corruption.

In 2005, John Ruggie was appointed UN Secretary General’s Special Representative on Human Rights and Transnational Corporations and other Business Enterprises.

In 2011, the UN Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights. The Guiding Principles created the Protect-Respect-Remedy framework, under which the State has the obligation to protect human rights; companies have the responsibility to respect human rights; and access to remedy is essential when rights are violated.

UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLICATIONS FOR COMPANIES

The UN Guiding Principles on Business and Human Rights,⁵ endorsed by the UN Human Rights Council in June 2011, are the global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. They provide companies with a framework to better understand their human rights responsibilities, including the responsibility to prevent and mitigate harm to human rights due to the adverse impact of their activities. The responsibility to respect human rights is a global standard of expected conduct for all enterprises, wherever they operate and whatever their size, ownership and structure, or industry.

According to the UN Guiding Principles, the responsibility to respect has a number of implications. Companies should:

- Have in place a human rights policy⁶ informed by relevant internal and external expertise, which should be reflected in operational policies and procedures. It should be publicly available, approved at the most senior level, and refer to the human rights expectations of personnel and business partners;
- Conduct human rights due diligence
 - To identify actual and potential adverse human rights impacts
 - To integrate the findings across relevant internal functions and processes
 - To use its leverage in business relationships to reduce human rights risks
 - To track the effectiveness of responses to adverse human rights impacts
 - To account for how it addresses its human rights impacts
 - To take corrective action to mitigate or eliminate adverse impacts that it has caused or to which it has contributed, and
 - To build internal processes and procedures that are known to all staff, including incentives to promote appropriate conduct and disincentives against taking steps that might harm human rights;
- Provide for or cooperate in remediation through legitimate processes where they may have caused or contributed to adverse human rights impact;
- Establish or participate in effective operational-level grievance mechanisms so that grievances can be addressed early and affected parties can access a remedy directly,⁷ and
- Develop operational-level mechanisms that are based on engagement and dialogue with affected stakeholders and affected communities. Begin by gaining an understanding of the situation of LGBTI persons in countries where they carry out their business activities.

IS THE
CORPORATE
RESPONSIBILITY
TO RESPECT A
LEGAL DUTY?

The UN Guiding Principles do not constitute an international instrument creating legal obligations for companies. Under the UN Guiding Principles on Business and Human Rights, the corporate responsibility to respect is a norm of expected conduct based on existing international law and conventions. However, this does not mean the corporate responsibility to respect is unrelated to legal obligations. The responsibility to respect may be reflected in domestic law regulating business activities or in binding contractual requirement between companies and their corporate and private clients and suppliers which can then be enforced through judicial means. Companies may also be subject to duties under international humanitarian and international criminal law in certain circumstances.

Companies that want to better understand their potential impact on LGBTI persons could begin by gaining an understanding of the situation of LGBTI persons in countries where they carry out their business activities.⁸ In addition, companies should review their own non-discrimination policies to see whether LGBTI individuals are specifically included. In particular, companies that have non-discrimination policies and which operate in multiple jurisdictions, including some where the law offers no protection to LGBTI persons, should extend such protection from discrimination throughout their operations. Such policies should be global and cover all offices and worldwide employees, irrespective of the country of operation.

In its narrowest sense, this approach requires strict adherence to the principle of “do no harm.” It means ensuring that the company’s conduct, including acting on its business relationships, does not infringe upon the exercise of anyone’s human rights. Respect for human rights also has significant positive impacts on people’s lives and on communities. It is an important contribution towards achievement of the Sustainable Development Goals.

In addition to committing themselves to meet their responsibility to respect human rights by way of a policy commitment, enterprises should establish a process to conduct ongoing human rights due diligence. Such a process will enable enterprises to identify, prevent, mitigate, and account for how they address their impacts on human rights. Where discrimination and other human rights abuses are identified, enterprises should provide access to effectively remedy or cooperate with legitimate remediation processes. The UN Guiding Principles make clear⁹ that in any context, the corporate responsibility to respect human rights exists independently of the willingness or capacity of States to meet their own human rights obligations in this regard, and does not diminish those obligations. The actions that need to be taken by States and businesses are distinct but complementary.

Beyond discharging their responsibility to respect human rights, companies also have important opportunities to support human rights — including the rights of LGBTI people — in the countries where they do business. The role that companies can play and the approaches that might be deployed will vary depending on the social and legal context. But in all parts of the world, and irrespective of local laws and political dynamics, there are actions that companies can take to promote inclusion and empowerment of LGBTI people, protect them from unfair treatment and challenge discriminatory practices within the workplace, in the marketplace and community. Business can make a vital contribution to reducing levels of stigma and prejudice directed at LGBTI employees, customers, and communities.

THE BUSINESS AND ECONOMIC CASE FOR TACKLING LGBTI DISCRIMINATION

Companies have a responsibility to respect human rights regardless of perceived or actual economic benefits or costs. Just as companies must comply with health and safety regulations, environmental protection standards, and minimum wage provisions, they should adhere to international human rights standards — even if doing so has cost implications. As the International Labour Organization's 2008 Social Justice Declaration states: "the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage".¹²

But, in addition to this, there is also a business and economic case for inclusion that bolsters the human rights case. Discrimination, including against LGBTI people, affects productivity and undermines social and economic development with negative consequences for both companies and communities. It also leads to loss of market share. In numerous studies, diversity and inclusion is associated with business success.¹³

MACRO-ECONOMIC COSTS

All discrimination against specific groups of people carries a heavy cost, shrinking the talent pool, constricting markets and acting as a drag on economic growth. A 2015 World Bank study focused on India found that discrimination against the country's LGBT community cost the country up to 1.7 per cent in potential gross domestic product, the equivalent of \$32 billion. In 2017, UNAIDS released a study estimating the global cost at \$100 billion per year.¹⁴ The Williams Institute found a positive correlation between per capita GDP and legal rights for LGBT people.¹⁵

CORPORATE COSTS

- **Recruitment.** When employers pass over talented individuals based on characteristics with no bearing or relevance for the job, such as their sexual orientation, gender identity and sex characteristics, businesses are left with a sub-optimal workforce, diminishing their ability to deliver. A recent US study found that women whose resumes suggested that they are LGBT received about 30 per cent fewer callbacks.¹⁶
- **Retention.** Discrimination forces otherwise qualified LGBTI employees to quit their jobs, creating unnecessary turnover-related costs and loss of talent. In the US, closeted LGBT employees who feel isolated at work are 73 per cent more likely than "out" employees to leave their job.¹⁷
- **Job performance.** Discrimination and prejudice in the workplace impair productivity, contribute to absenteeism, and undercut motivation, entrepreneurship, and company loyalty. In the US, 27 per cent of LGBT employees who are not out said in a study that hiding their identity at work had held them back from speaking up or sharing an idea.¹⁸ Studies have shown that overall employee engagement — not just of LGBT staff — improves when workplaces are perceived as being inclusive.

THE "DIVERSITY DIVIDEND"

Analysis by the *Harvard Business Review* shows that companies with a high level of diversity perform better. Employees at more diverse companies in the US were 45 per cent more likely to report that their firm's market share grew over the previous year and 70 per cent more likely to report that the firm had entered a new market. A recent Credit Suisse study also showed that companies that embraced LGBT employees outperformed in average return on equity, cash flow return on investment, and an increase in profit.¹⁹

THE LGBT & ALLY COMMUNITY PURCHASING POWER

In 2015, Global Spending Power of the LGBT consumer segment was estimated at \$ USD 3.7 trillion per annum, excluding the purchasing power of friends and families of LGBT individuals that make up the ally community.²⁰ In 2007, a national survey of US adults revealed that 88 per cent of gay and lesbian self-identified adults were likely to consider brands that are known to provide equal workplace benefits for all employees, 77 per cent were likely to consider brands that support non-profits or causes that are important to the LGBT community, and 58 per cent were likely to purchase products, including food and beverages, and services from companies that market directly to them.²¹ The trend of LGBT consumer preference has only been on the rise, and has also increased brand preference among LGBT allies. In 2011, the survey revealed that 87 per cent (an increase of 10% since 2007) of US LGBT adults were likely to consider brands that support non-profits or causes that are important to the LGBT community, and that 75 per cent of heterosexual adults were likely to consider a brand that is known to provide equal workplace benefits for all of their employees.²²

Workplace, Marketplace, Community: Challenges & Opportunities

Across the workplace, the marketplace and in the community, businesses typically engage with a range of stakeholders on LGBT and intersex issues, including workers and trade unions in the workplace, customers, suppliers and shareholders in the marketplace, and civil society, governments and lawmakers in the community. In this chapter, challenges and opportunities related to engaging these various stakeholders are explored.

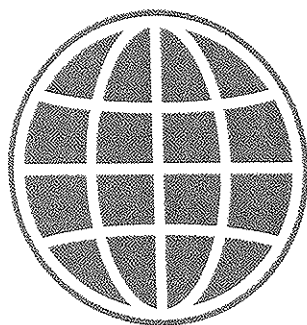


The starting point for the present Standards of Conduct is the responsibility that businesses already have under the UN Guiding Principles not to be involved in adverse human rights impacts – including the rights of LGBTI people. This represents the minimum standard with which all companies should comply. It extends to not discriminating or otherwise causing or contributing to human rights violations against any individual on the basis of their sexual orientation, gender identity, and sex characteristics. Commitments in this regard should be accompanied by action to ensure that changes in policy are reflected in changes in practice.

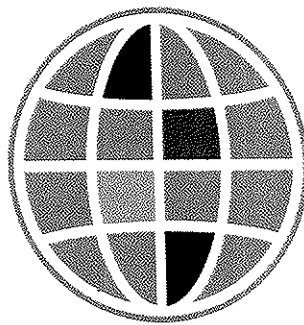
But beyond meeting these responsibilities, companies also have an opportunity to make a wider contribution to countering discrimination against members of the LGBTI community at large: by engaging with other stakeholders, providing support and, in some circumstances, taking a public stand in favour of equal rights and fair treatment of LGBTI people.

The aim is not to prescribe one course of action over another but rather provide possible responses, drawing from applicable international human rights standards and observed corporate practice.

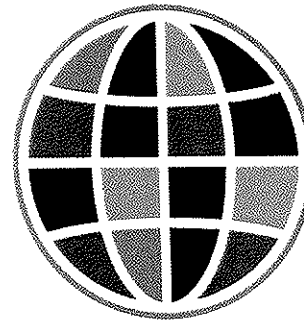
The Center for Talent Innovation has proposed three models²³ to describe the ways that companies interact with various stakeholders to protect their workers and contribute to local LGBTI communities in different legal and cultural environments. These models apply equally to national and global companies:



WHEN IN ROME



EMBASSY



ADVOCATE

- **“When in Rome” approach:** allows a company to create exceptions to certain global pro-LGBTI corporate policies, taking into account local conditions. By being transparent about these exceptions and by allowing individual employees to “opt out” of certain postings, companies signal their vigilance on behalf of employees. For example, an ICT company and an international law firm allow LGBT employees to refuse, without any negative career repercussions, to travel to particular countries where they might face risks. While this approach may shield some international staff from risk of abuse, it does little to protect the rights of local LGBTI staff and other LGBTI people that might be impacted by the company in the countries concerned, and nothing to change wider patterns of discrimination in those countries. In some situations it might even contribute towards perpetuating discrimination and fail the company’s responsibility to avoid infringing upon human rights and addressing their adverse human rights impacts under the UN Guiding Principles.
- **“Embassy” approach:** enforces corporate policies regardless of local context, creating safe space in jurisdictions where the rights of LGBTI people are not otherwise respected or protected, while arguably helping promote greater tolerance among local staff. A large financial corporation, for example, enforces global anti-discrimination policies everywhere it has offices; effectively raising the bar in jurisdictions where those protections are absent from domestic law. It should be noted that with the “Embassy” approach employees are typically protected only within the workplace.
- **“Advocate” approach:** attempts to influence local labour regulations and other local laws affecting LGBTI people in order to strengthen legal protections and contribute to a more-accepting environment for LGBTI workers in the country concerned. Such advocacy need not be public and loud; it can be through private conversations and quiet diplomacy. Many governments may be less willing to change existing law or practices if it might appear that they are doing so in response to external pressure or advocacy.

A company can utilize all three models at once, depending on prevailing local conditions in the jurisdictions where it operates, bearing in mind that in any given context, legal and social attitudes are not uniformly the same towards lesbian, gay, bi, trans, and intersex people.²⁴ For example, a company could adopt an embassy stance in one locale that is legally welcoming but culturally hostile to LGBTI individuals, while simultaneously pushing more forcefully for equal rights for LGBTI people in another location where the law and norms lag behind.

The virtue of an adaptable approach is flexibility. The risk is inconsistency, potentially undermining global policies, and in some cases, perpetuating discrimination and falling short of the corporate responsibility to respect human rights enshrined in the UN Guiding Principles and the Standards of Conduct and possibly also legal/contractual responsibilities, depending on context. For example, a company that took a strong stance against a law in the US state of North Carolina that denies LGBT people protection from discrimination was accused of hypocrisy because it also operates in Malaysia, where gay and trans people are criminalized. Another risk is to hide behind an “Embassy” policy with no active education program, implementation or enforcement. These risks should be examined and analysed as part of any human rights due diligence process and appropriate steps taken to eliminate or mitigate harm.

A company may have good reason not to opt for a public advocacy model (such as safety of its staff), and in certain societies quiet diplomacy and support for diversity and inclusion generally may yield more effective results than public statements. Where it is deployed, public advocacy, which should always be developed in consultation with local civil society, does not necessarily need to be critical of the authorities; it may be affirmative in backing positive initiatives that enhance protection and promotion of human rights, while urging further steps.

Notwithstanding the need for a certain degree of flexibility in the approach that companies take from one country to another, companies must meet the minimum standard of not infringing human rights and of addressing their adverse human rights impacts – and the objective should be to create improvements wherever a company operates. Ultimately, human rights are universal, indivisible, inalienable, interdependent, interrelated, and complementary, and creating exceptions for certain rights or groups of people in particular contexts risks undermining human rights and should be avoided wherever possible. “When in Rome” may have pragmatic utility as a last resort, but it risks legitimizing and reinforcing injustice and discrimination and in some cases may fall short of international standards and other legal/contractual obligations. Where it is applied, as a minimum, the company should ensure that it is not causing or contributing to human rights abuses, including against LGBTI employees and other LGBTI people, and protective/remedial measures should be in place to address any adverse impacts that the company causes or contributes to.

In applying these three models to the specific contexts in which they operate, companies should be aware of the challenges with regard to each stakeholder and the practical approaches available to them.

The following section looks at how companies can discharge their responsibilities towards LGBTI people and support their rights through engagement with seven categories of stakeholders: workers and their representatives, customers, suppliers, shareholders, communities, trade unions, and governments and lawmakers. While these stakeholders interrelate with each other, this paper treats each category separately. Each sub-section highlights the challenges and potential benefits of engagement with each category of stakeholder and some practical approaches.

In the Workplace

STAFF

Extending LGBTI-inclusive workplace policies and practices and ensuring the safety and security of LGBTI workers and their representatives can raise a number of legal, cultural and organizational challenges for business. There may be specific legal implications in countries where same-sex relationships, trans people, and/or public discussion of sexual orientation or gender identity are criminalized. In addition, companies must navigate and manage different cultural and corporate environments.

In many countries, for example, lesbian, gay and bisexual employees in a same-sex relationship, and trans employees may be at heightened risk of prosecution. This is a risk for any business — and for heavily regulated sectors there are additional complexities. In financial services, for example, terms of employment may require that criminal conviction must result in termination of employment. In addition, systemic violence and discrimination against LGBTI people may have a negative impact on their health, their educational opportunities, and employment options. While this issue is a global one, companies can and should play a proactive role in contributing to addressing such structural inequalities.

In working to align their own practices and operational policies with international human rights standards, companies need to consider the local landscape carefully. This includes taking into account potential lack of legal protection from discrimination and harassment in the workplace and beyond, lack of legal recognition of the gender identity of trans people or onerous and abusive restrictions on such recognition, and lack of legal recognition of same-sex couples and of their parental duties. Other factors include restrictions on freedom of speech or association, risk of hate-motivated violence, risk of parental or family rejection, and the impact on employees in a hostile social environment.

Practical Approaches

The first step in addressing concerns related to staff is an effective corporate diversity and inclusion policy that states specific desired outcomes and establishes a framework for determining whether those outcomes have been met. An effective policy should articulate the company's commitment to diversity and inclusion and clearly and specifically reference sexual orientation, gender identity and expression, and sex characteristics/intersex status. It should explain the company's responsibilities and employees' responsibilities, and consequences of contravening the policy.

The next step is to ensure buy-in from key internal stakeholders, including employees, unions, and management, along with sponsorship and commitment to take the diversity and inclusion strategy forward.

Some companies even have this commitment hard-coded into senior executives' bonuses and performance frameworks. Another step is to have a global implementation strategy — mindful that many companies are expanding in markets where concepts of equal rights and fair treatment of LGBTI people may not be well-institutionalized or be seen as a threat to local culture and beliefs. It is critical for companies to engage with stakeholders, particularly local stakeholders, to better understand the local context.

Building a support network for LGBTI employees globally is recommended — even if in certain country contexts this may exist as a virtual network only (due to legitimate concerns for privacy and safety of the concerned workers and their representatives).

Monitoring and maintenance of these diversity and inclusion efforts is crucial. Senior management and/or the board should receive regular progress reports. A senior level officer should oversee and direct diversity and inclusion initiatives and ensure that there is regular diversity and inclusion education and training. Finally, companies should take proactive steps to promote a diverse pool of candidates for senior leadership and board positions.

These recruitment and promotion efforts should not be limited to senior management. In order to address issues of structural discrimination and violence against LGBTI people, companies can take proactive steps to contribute to combating the inequalities that they face, including exercising targeted outreach and specific training and recruitment schemes, particularly for more marginalised members of LGBTI communities.

LGBTI organizations in different countries have produced guidance for employers on inclusive workplace policies and practices. Resources from HRC, Stonewall, Community Business, Workplace Pride, or ACON provide concrete strategies and best practices to recruit, hire, include, develop, retain, engage and motivate a diverse workforce.²⁵

TRADE UNIONS 

In dealing with discrimination, many companies have found natural allies among trade unions.²⁶ In Northern Ireland, for example, unions have played a positive role in bridging religious or sectarian divides. Similarly, unions can make an important contribution to tackling discrimination, given a natural alignment between their objective of fair treatment of workers and their representatives and corporate compliance with the highest international standards.

As early as 1981, the Canadian Union of Postal Workers (CUPW) became the first union in Canada to include language in a collective agreement prohibiting discrimination on the basis of sexual orientation. Following the example of the CUPW, other unions soon added non-discrimination as a bargaining priority, and in 1985, a union representing library employees won domestic partner benefits for its members. In the 1980s,

alliances between gay and lesbian activists and British mining unions played a role in broadening support for the gay and lesbian community in the United Kingdom. These included the participation of miners' labour groups in various gay pride marches and events, and the adoption of an unprecedented resolution at the 1985 Labour Party conference committing the Labour Party to support equal rights for members of the gay and lesbian community.²⁷ Miners' groups were also among the most outspoken allies of the UK's gay and lesbian community in the 1988 campaign against Section 28 of the Local Government Act, which restricted the so-called "promotion" of homosexuality by local authorities.

Wherever unions are independently constituted and able to operate freely, such alliances can be beneficial to all concerned and create synergies in contributing to social change in countries, industries and among workers.

Practical Approaches 

Companies can, as a starting point, support and coordinate with trade unions in their efforts to develop specific union policies to combat discrimination against LGBTI individuals. Union policies can have the effect of creating a positive climate and increase visibility of LGBTI issues. As employers themselves, unions should model good practice by having in place explicit policies to ensure equal rights, benefits, and entitlements of their own LGBTI workers and their representatives. They should also support the efforts of LGBTI union members to meet and organize and provide resources for LGBTI outreach, networking, and conferences.

Unions also have an opportunity to engage with the wider LGBTI community. This can translate into a public commitment by the union and joint work with LGBTI civil society organizations at LGBTI events. When the British union UNISON first sponsored the London Pride March there was significant union opposition to spending money on what appeared to some to be an irrelevant activity. However, the union's visible commitment was well received by members and had a positive impact on other labour organizations.

Critically, employers need to work with unions to develop comprehensive equality action plans. Central to this, there should be an equal opportunities statement with specific reference to sexual orientation, gender identity, gender expression, and sex characteristics in companies' policies. Unions should negotiate guidance on implementation of the plans leaving as little as possible to the attitudes and judgement of individual managers. Plans need to include publicity campaigns and monitoring of implementation.

An example of this type of engagement is the way the Confederazione Generale Italiana del Lavoro, a large union in Italy, has promoted the introduction of codes of conduct in Italian enterprises that provide people with protection from discrimination and recourse in cases where discrimination occurs. In the region of Emilia Romagna, the union has an agreement with Arcigay, an LGBT non-governmental organization, aimed at changing perceptions of LGBT people among union members and in the workplace.

In the Marketplace

CUSTOMERS

Discrimination can have an adverse impact on companies in terms of consumer demand. Many consumers now also expect businesses to speak up and advocate for the rights of LGBTI people around the world. A company operating in countries where the rights of LGBTI people are systematically violated may feel under pressure in those countries to take a position inconsistent with the values of consumers in the company's home and other markets. While businesses should always assess the human rights impact of their conduct and act in ways to mitigate and eliminate harm, many find that actively challenging discrimination also brings some commercial benefits. There is a trend towards socially responsible consumption in many countries, where consumers identify with and reward companies committed to meeting environmental, labour, social, and human rights standards. These market segments vary in size but are influential and often use social media to mobilize support across continents.

Similarly, when companies discriminate or otherwise cause or contribute to human rights abuses, consumers in some countries increasingly react by actively choosing to take their business elsewhere. Industries dealing with diamonds, chocolates, soft drinks containing sugar, foods containing genetically-modified ingredients, coffee bought from fair trade farmers, coalitions that demand apparel not made under sweatshop conditions, are all examples of sectors that have seen such consumer mobilization.

This is certainly true of LGBTI consumers who are especially responsive to evidence of corporate social responsibility. As an example, a recent survey showed that 68 per cent of Polish LGBT consumers prefer to choose

LGBT-friendly brands and 91 per cent of Polish LGBT consumers would stop buying brands perceived as "homophobic" or protest against them publicly.²⁸ Perhaps not surprisingly, brand-driven companies are more likely than others to adopt socially-driven policies and more likely than others to set standards.

Consumer pressure can cut both ways. Purpose-driven buying can be adopted by civil society organizations that oppose human rights for LGBTI people. Some companies have experienced online campaigns seeking commitments from consumers to boycott their products as a result of their stance on these issues.

Practical approaches

Many companies have invested in building brands that convey social purpose built on respect for human rights and a commitment to contribute to positive social change. This can leverage a company's power and influence for positive social impact – including, in this case, ending discrimination against LGBTI persons. At the same time, it requires companies to make sure company policies relating to staff, suppliers and other stakeholders respect human rights, including those of LGBTI people, and are coherent with marketing messages.

Companies increasingly rely on LGBTI Business Resource Groups (BRGs) designed to increase employee engagement in these efforts. Some companies also call them Employee Resource Groups (ERGs) or associate networks. LGBTI BRGs are voluntary groups of LGBTI employees who join together in their workplace and serve as a resource for members and organizations by fostering a diverse, inclusive workplace aligned with organizational goals. They are an established means of building peer group support. People who experience similar issues can offer much more authentic and knowledgeable support to others. These groups, which often started as informal forums to connect LGBTI colleagues, have in many companies become more formalized and receive support from the company. Companies tap into BRGs to ensure their marketing messages are in line with their customer communities, gain market insights, and further access market segments they have not traditionally been engaged in. This helps the customers and the brand, and keeps employees engaged.

SUPPLIERS

The UN Guiding Principles on Business and Human Rights point out that besides a company's own activities, it is important to identify and assess any adverse human rights impacts that might occur as a result of their business relationships with associates, suppliers, partners, and subsidiaries. As set out in the UN Guiding Principles, a company should consider within its human rights due diligence "adverse human rights impacts that may be directly linked to its operations, products or services by its business relationships."

This is important because companies increasingly rely on workers who may not be their direct employees. According to one trade union study, only six per cent of multinational companies' global workforce work directly for multinational companies; the rest — 94 per cent — work for the firms' suppliers.²⁹ Globalization has led to ever-more complex corporate structures and relationships³⁰ but those structures do not diminish the corporate responsibility to respect human rights. Companies are expected not only to avoid causing or contributing to human rights abuses but also to use leverage to address adverse human rights impacts with which they are directly linked through their business relationships, including with suppliers.


Adverse human rights impacts affecting LGBTI people can occur across the supply chain. The corporate responsibility to respect human rights includes not only striving to ensure respect for the rights for LGBTI people within one's own organization but also paying attention to the way the suppliers and business partners behave.

Practical Approaches

A company can use its leverage in its relationship with a supplier, including the commercial or reputational importance of the business relationship, to push for LGBTI people to be treated fairly and to have their rights respected — for example through binding human rights and non-discrimination contractual clauses. Sometimes the company has leverage through its purchasing power: suppliers want to maintain commercial business relationships, and will take actions required by their clients in order to maintain that business. Integrating such requirements in the procurement process, explaining them to suppliers and supporting suppliers to effectively implement such policies are critical steps to achieving impact.

Many companies' diversity teams partner with their procurement department to expand contract-bidding opportunities to LGBTI-owned enterprises. A financial services company, as an example, has built a database of LGBT-owned suppliers and opens up contract opportunities to these vendors for products and services.

In the United States, the Human Rights Campaign Foundation's annual Corporate Equality Index evaluates supplier diversity programs under the Public Engagement section in their survey. In the 2013 Index, 50 per cent of employers reported having supplier diversity programs. Of these, 57 per cent reported that their diversity programs include LGBTI-owned businesses. The Index's next set of criteria will focus more explicitly on supplier diversity.

SHAREHOLDERS **Companies that fail to stand up for LGBTI inclusion may risk losing investment, including from socially-responsible funds.**

Since the late 1990s, investors have increasingly recognized the role that companies play in contributing to – and potentially bettering – the societies in which they operate. Increasingly, corporations find themselves facing activist investors who expect companies to demonstrate their respect for human rights. The development of the UN Guiding Principles on Business and Human Rights is both reflective of this shift and contributes to its further development.

In some cases, shareholder pressure can help move the dial from policy to practice. Whereas in the past, pressure on companies to abide by human rights standards might have elicited a general commitment in the form of a corporate statement, today there is an increased expectation that companies will put in place the policies and safeguards needed to operationalize such commitments.

While it is difficult to assess the collective position that shareholders might have in respect to discrimination against LGBTI people or any other group, shareholder activism in favour of LGBTI inclusion is increasingly visible.³¹ Shareholders influence company decision-making on these issues in a variety of ways, including through shareholder proposals or resolutions. In 2014, for example, a shareholder group collectively owning or managing \$210 billion in assets filed resolutions at more than 20 publicly traded corporations in the US urging an extension of LGBT non-discrimination policies and equal benefits policies abroad. Investors expressed concern about the highly varied and often harsh legal and cultural environments faced by LGBT individuals in some parts of the world and the related risks for companies operating in these environments. The letter³² also sought clarity on corporate preparedness to deal with threats or persecution faced by such workers and their representatives.

Shareholders have also on some occasions used investors meetings to voice their concerns over decisions by corporations to support the human rights of LGBTI people and the ensuing calls for boycott. Such decisions included taking a public stance on LGBTI equality or offering bathroom facilities to transgender individuals in accordance with their gender identity. In 2013, the CEO of Starbucks responded to such a shareholder's question by asserting that: "not every decision is an economic decision. [...] The lens in which we are making that decision is through the lens of our people. We employ over 200,000 people in this company, and we want to embrace diversity. Of all kinds."³³ When shareholders challenge the management and oppose corporate policies that extend non-discrimination towards LGBTI employees, companies have the responsibility to respect human rights, which include adhering to national laws or international standards. A company would not normally accept a resolution saying women should be paid less than men; by the same principle, companies should not accede to resolutions from shareholders which might restrict the rights of LGBTI employees

Practical Approaches 

A growing body of evidence suggests that businesses that commit themselves to diversity and inclusion are rewarded by the markets.³⁴ Investors and businesses seeking partners committed to respecting human rights are turning increasingly to companies that act in accordance with the UN Guiding Principles. Such market pressure will encourage many companies to take further steps to operationalize the UN Guiding Principles, and to present an accurate account of their performance and adherence to international standards in their annual reports. With standards emerging on reporting³⁵ and more companies looking for benchmarks³⁶ to measure their performance, investors likely seek out companies whose record matches their claims and whose actions are consistent with international standards.

A corporate culture that values diversity and inclusion bolsters a company's reputation as a fair employer, attracts a broader pool of well-qualified candidates, boosts employee morale and productivity, drives innovation, and reduces risks of discrimination and harassment. Initiatives taken in this respect may be communicated clearly – both to shareholders and the general public – including in a company's annual report, sustainability reports and shareholder newsletters.

In the Community

COMMUNITIES

The global human rights landscape for LGBTI people is highly varied and constantly changing.³⁷ Conditions on the ground are evolving rapidly: in most places improving, although in some instances, deteriorating. There may be significant differences in the treatment of LGBTI persons within countries and even within communities – with lesbians, gay and bisexual people, trans, and intersex people, all experiencing distinct kinds of violence, discrimination, and other human rights violations. In addition, progress in the law and in policies may bear little resemblance to the reality of people's lives. Prejudice remains present at some level in all societies long after necessary legal reforms have been achieved.

Companies need to understand the wider challenges that many LGBTI individuals face in the community, such as family rejection, abuses, and challenges in accessing healthcare, housing and education, lack of protection from violence and harassment, and limits on freedom of expression, association and assembly. Increasingly LGBTI communities are adopting the notion of “nothing about us without us”³⁸ which points

to the importance of first voice inclusion in all endeavours to tackle discrimination against LGBTI people. This is true of any social issue – the people who are living it usually have the best understanding of the problem and how best to address it.

Practical Approaches

Partnerships with local LGBTI groups demonstrate long-term commitment to the LGBTI community and can help companies better understand the challenges faced by members of the community. Such partnerships can inform corporate policy-making and provide a way for companies to foster and support positive social change.

In societies where discriminatory attitudes against LGBTI people are especially prevalent, financial support for community organizations and events may be the most practical way for a company to contribute to change – and in some circumstances could be more effective than taking a visible public stance. In these settings, the importance of being guided by local stakeholders is even stronger.

Organizations that can benefit from such corporate sponsorship include LGBTI youth centres, community centres, advocacy groups and charities. In addition to providing direct support and other forms of assistance, companies may encourage staff to volunteer in such organizations and/or offer to match staff donations to these groups. Companies may also establish or support awards, which can help protect and legitimize the work of human rights defenders by raising their public profile and giving them a platform. The risk for domestic LGBTI groups receiving foreign assistance to be perceived as so-called “foreign agents” should be considered and mitigated to the extent possible.

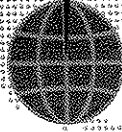
AMONG 193 COUNTRIES...

67 


ban discrimination
based on sexual orientation
in employment

20 

ban discrimination
based on gender identity

3 

ban discrimination
against intersex persons

GOVERNMENTS AND LAWMAKERS 
Lack of adequate legal protection from violence and discrimination exposes LGBTI people in countries around the world to egregious violations of their human rights and denies recourse and remedy to victims³⁹ of such violations.

LGBTI people are often discriminated against in the labour market, as well as in accessing education, healthcare, housing, and public services. They are at disproportionate risk of hate-motivated violence: including verbal and physical aggression, sexual assault, torture and killings, as well as ill treatment and abuse in doctors' offices, hospitals, and clinics. In some 73 countries⁴⁰ the law criminalizes consensual same-sex relationships,⁴¹ at least eight criminalize so-called "cross-dressing", and in many more, other, often vaguely defined, laws are used to punish trans people.⁴²

These laws have a tremendous, negative impact on the lives of LGBTI people – in effect, legitimizing discriminatory treatment, entrenching stigma and forcing many LGBTI people to hide their identities and relationships. According to the European Union Fundamental Rights Agency, one-third of trans job-seekers in the EU have experienced discrimination when they seek employment and a third report unfair treatment at work because they are trans.⁴³

As of the start of 2017, only 67 out of 193 countries ban discrimination in employment on grounds of sexual orientation, while only 20 offer explicit protection on grounds of gender identity or expression. Only three countries protect intersex persons against discrimination and only one bans medically unnecessary surgery to which many intersex children are subjected.⁴⁴ Thirty-nine States – or 20 per cent of the world's countries – legally recognize same-sex partnerships, of which 21 recognize marriage for same-sex couples on an equal basis to different-sex couples. A number of countries, notably in Asia, Latin

America and Europe, have taken steps to extend legal recognition and protection to trans people, although often with preconditions that violate human rights norms.

Companies can and should support necessary legal reforms, where local stakeholders indicate that this would be helpful and contribute to positive change. Inclusive workplace policies are not sufficient by themselves to protect LGBTI workers and their representatives and other stakeholders in countries with anti-LGBTI laws. Where helpful and called for by local actors, companies also have an opportunity to support local communities by directly engaging with governments and lawmakers in the countries where they operate. Global corporate support for local LGBTI equality movements in many countries in Europe, Americas, and Asia are contributing towards building a more inclusive environment society-wide.

Practical Approaches 

The "Advocate" approach, described earlier, seeks to encourage and support change at the national level. Such advocacy can take many forms, ranging from direct lobbying to support for local advocacy and symbolic actions that signal solidarity with the local LGBTI community, (see page 21).

In the past, companies have adopted an "Advocate" approach to challenge both existing and proposed criminal and so called "anti-propaganda" laws, as well as other efforts to curtail the rights of LGBTI people. Integrating criticism of such proposals in a broader push for greater respect and protection has sometimes proven effective, particularly in difficult contexts. For example, companies can encourage governments to protect free speech for all minority communities, including the LGBTI community, and promote the value of diversity and inclusion more generally. Companies can also play a role in educating counterparts on LGBTI issues.

Companies are encouraged to work closely with local civil society groups and affected communities. They should follow the advice of such groups in deciding when to speak out, when to work more quietly and on how to offer support in the most effective way possible.

ASSESSING POLICIES ON TACKLING DISCRIMINATION AGAINST LGBT WORKERS

UNITED STATES

In 2002, the **Human Rights Campaign** found that only 61 per cent of companies surveyed had policies banning discrimination based on sexual orientation and only 5 per cent based on gender identity. By 2015, those numbers had increased to 93 per cent and 87 per cent respectively. During that period, the proportion of companies offering trans-inclusive health insurance rose from zero to 60 per cent; over 300 major companies now have gender transition guidelines in place. Every year, new criteria are added, making the qualification process more stringent. In February 2016, the **Human Rights Campaign** released the first global edition of its *Corporate Equality Index*. The best score is 100 per cent and while many companies reach it, a number of Fortune 1000 companies still have very low scores.

UNITED KINGDOM

Stonewall has produced an annual index of top 100 companies since 2005, ranking companies on ten criteria, including employee policies, employee engagement, staff training, supplier policy, and community engagement. Since 2011, **Stonewall** also offers a global index, measuring and benchmarking the performance of multinational organizations and their approach to LGBT equality globally.

HONG KONG SAR, CHINA

A new index created by **Community Business** ranks companies with reference to corporate policies and practices that support an LGBT inclusive workplace. In 2010, the organization carried out a survey of LGBT employees and allies regarding the workplace culture in Hong Kong.

AUSTRALIA

The *Australian Workplace Equality Index* produced by the **AIDS Council of New South Wales (ACON)** provides a national benchmark for LGBTI workplace inclusion and comprises the largest and only national employee survey designed to gauge the overall impact of inclusion initiatives on organizational culture and employees.

GLOBAL

Amsterdam-based **Workplace Pride** launched *The Global Benchmark*, an international LGBT workplace index in 2014, designed to address cross-border aspects of LGBT workplace inclusion. In 2016, it encompassed 30 multinationals and more than three million employees. The **Human Rights Campaign** and **Stonewall** have also introduced an international dimension to their surveys, enabling companies to benchmark their global commitments to LGBT equality. These indices can form the basis of an effective benchmarking system.

THE EXPERIENCE OF THE SULLIVAN PRINCIPLES IN SOUTH AFRICA

During the apartheid years in South Africa, many US companies adopted the Sullivan Principles, under which they promoted on merit and provided equal pay for equal work, regardless of local laws that discriminated on the basis of race. These principles required:

- Non-segregation of races in all eating, comfort, and work facilities;
 - Equal and fair employment practices for all employees;
 - Equal pay for all employees doing equal or comparable work for the same period of time;
 - Initiation of and development of training programmes that will prepare, in substantial numbers, black and other non-whites for supervisory, administrative, clerical, and technical jobs;
 - Increasing the number of blacks and other non-whites in management and supervisory positions;
 - Improving the quality of life for blacks and other non-whites outside the work environment in such areas as housing, transportation, school, recreation, and health facilities; and
 - Working to eliminate laws and customs that impede social, economic, and political justice (added later).
- Without exaggerating their importance, the Sullivan Principles helped to create a climate in which white and non-white employees operated as equals, and implementation of the Principles among companies that continued to operate in South Africa helped prepare a cadre of managerial talent that South Africa would later draw on when apartheid eventually ended in 1991.

EXISTING LGBT BUSINESS PRINCIPLES

In France, **L'Autre Cercle** has created a "Charte d'engagement LGBT" which companies can sign in order to demonstrate publicly their commitment to equality for LGBT employees. Companies signing up to the Charter commit to:

- Create an inclusive workplace for LGBT staff;
- Ensure equality in law and treatment for all staff irrespective of their sexual orientation or gender identity;
- Support any staff members who are victims of discriminatory words or acts; and
- Monitor career advancement and share good practice to ensure an evolution of the general working environment.

Similarly, in the Netherlands, the Declaration of Amsterdam created by **Workplace Pride** in 2011, signed by many large corporations, commits companies to ten steps aimed at addressing unfair treatment of LGBT people in the workplace. One step urges employers to identify and support leaders and decision-makers (gay and straight, trans, and cis-gender²⁶) that actively strive to create LGBT-inclusive working environments; another step advocates support of employee resource groups and training programs, such as LGBT diversity training for managers.

APPENDIX CASE STUDIES

This section discusses concrete examples of challenges met by corporate stakeholders as they seek to meet their responsibilities and play a wider role in addressing discrimination against members of the LGBTI community, as well as practical approaches they have adopted.

Dealing with so-called anti-gay propaganda laws

In November 2013, **IKEA Group**, the global home furnishing retailer, removed from its online Russian magazine an article that portrayed a same-sex couple and their baby at home. The piece had been included in the company's global publication that showed diverse families enjoying their homes. The decision not to feature same-sex parents in the Russian edition was motivated by Russia's so-called "anti-gay propaganda" law that prohibits promoting "non-traditional" relationships. The company took the decision to comply with the law in order to protect its co-workers and their families, and faced some criticism from customers and other stakeholders, including LGBT+ groups and human rights groups abroad. The case illustrated how companies' global policies can come up against local realities.

This episode, however, represented a turning point in IKEA's approach to LGBT+ inclusion in the workplace and led the company to develop and launch a global systematic LGBT+ inclusion plan. The plan, now in place, aims at creating a fully inclusive work environment and it is contributing to a positive change for LGBT+ co-workers. Such plans, accompanied by efforts to explore collective advocacy avenues, have the potential to bring about positive long-term change.

Ad-hoc solutions to discriminatory legislation

When posted abroad, some LGBT diplomats and their partners have been able to arrive at informal arrangements with host countries which may have laws restricting LGBT rights or criminalizing LGBT people. Private sector employees wanting to take their partners with them on their overseas posting sometimes face challenges. Some companies have developed policies so that employees who decide not to move to places where the regulatory framework is discriminatory towards LGBT people are not penalized. Others have developed ad hoc solutions to work around difficult legislation often benefiting non-local workers.

Baker McKenzie translates its “not neutral” stance on LGBT issues by having, in every office, a partner responsible for LGBT inclusion who leads on enforcing anti-discrimination policies and enacting diversity and inclusion commitments. Another company covers rent and cleaning fees for a two-bedroom apartment to maintain the appearance that same-sex partners are living in separate rooms. One multinational avoids making informal agreements with host governments where these may be subject to being overturned when the government, or its attitude, changes. If same-sex relationships are illegal in a country and the country will deny a visa or residency permit to the same-sex spouse of an employee, the same company assists the employee in question by providing additional leave to return home and maintain the familial relationship.

Purpose-driven Brands

In India, firms such as **Godrej, Genpact, Intuit, ThoughtWorks, Microsoft, and Google** have taken a public stance against Section 377 of the country’s penal code, which criminalizes same-sex relationships. Examples of brands that have run ads against Section 377 include: jewellery brand **Tanishq**—owned by **Titan**, a **Tata Group** company—which posted an ad on Twitter that showed a pair of diamond earrings with the tagline “Two of a kind always make a beautiful pair! #sec 377”; **Fastrack**, a popular youth fashion brand in India, ran a campaign called “Move On” in favour of repealing Section 377; and luxury goods brand **Hidesign** tweeted in support of repealing Section 377.

Taking a public stance can impact positively on a company’s business, particularly with young consumers. **Colgate Mexico’s** recent ad featuring a gay couple as part of the #SmileWithPride campaign had a positive response. In the US, **Google** recently studied two LGBT marketing⁴⁶ campaigns and published the following findings:

- 47 per cent of under-24-year-olds in the US are more likely to support a brand after seeing an LGBT equality-themed advertisement (compared with 30 per cent of over-24-year olds);
- **Burger King’s** “Proud Whopper” ad reached 20 per cent of the US population. Millennials (born between the early 1980s and early 2000s) were reached 4.8 times more frequently than the rest of the population;
- With their LGBT-affirmative advertising campaign, **Honey Maid** met its objective to ignite conversation and engagement: Google searches for the brand rose 400 per cent during the campaign.

Facing backlash

With a presence in 74 countries and nearly 200,000 employees worldwide, the French bank **BNP Paribas** is a major bank in the euro zone and one of the largest banks in the world. When it decided to sign the charter of l'Autre Cercle in 2015, it faced a significant backlash from a group strongly opposed to same-sex relationships, and the bank's executive committee received some 12,000 external emails protesting its decision. Even if the bank had not anticipated such a backlash, it did not change its decision but decided that in the future it would have a deeper internal communication policy in order to better involve employees and facilitate a better understanding of the Group purpose.

Reputational risk across the supply chain

French Telecom company **Orange** faced a reputational risk when it emerged that it was advertising in a newspaper in Uganda, *Red Pepper*, that had publicly exposed the names and photos of 200 individuals it alleged were gay. An online petition calling on the company to cancel its contract with the paper attracted 77,000 signatures. The company later announced that it would not be renewing its advertising contract with the newspaper.

Embedding LGBT equality into procurement practices and supply chain management

Simmons & Simmons LLP, an international legal practice with over 1,500 staff and 21 offices in Europe, the Middle East, and Asia, has a well-established programme of engagement with suppliers and has proactively embedded LGBT equality principles into procurement practices.

Simmons & Simmons requires potential suppliers to answer a prescribed set of questions during the tender process. This involves completing a corporate responsibility audit, which includes specific questions about equality and diversity. They also require potential suppliers to submit a copy of their diversity and inclusion policy.

As part of their annual supplier audit, the firm asks suppliers to provide evidence of how their employees are made aware of their company's diversity and inclusion policy which, to comply with the firm's own, must include all protected characteristics. This audit is sent annually to the firm's top suppliers and all new suppliers are required to complete it.

The firm continues to work with suppliers who do not run their own diversity and inclusion training sessions and supports them through briefing sessions and sharing best practices. It has developed a practical guide,⁴⁷ providing tools for companies looking to implement a similar approach, including sample audit questionnaires and event programmes, tips on measuring impact and other useful resources.

Working with affected communities

IBM has a team of employees dedicated to building partnerships with LGBT nonprofit organizations in many of the 170 countries in which they operate. In the past decade, IBM has donated to a wide variety of organizations, including LGBT organizations.

Similarly, in the United Kingdom, an advertising firm donated advertising space on billboards, bus shelters, and railway platforms to the LGBT advocacy organization Stonewall for its iconic 2007 campaign "Some People are Gay. Get Over It!" Stonewall also receives pro bono legal and policy advice from various corporate partners.

In Singapore, large companies sponsor Pink Dot, a day-long gathering of thousands of LGBT individuals and allies in the city's Hong Lim Park, where public speeches are permitted.⁴⁸ After Singapore asked multinationals not to support the Pink Dot celebrations in 2016, two multinational firms have applied to the government so that gay pride events may take place at Hong Lim Park in 2017. Local companies with a majority Singaporean ownership have already stepped forward to fill the vacuum left by multinational sponsors.

In 2013, a global institution announced it was indefinitely delaying a major project in Uganda to improve health care, in response to the passing of the discriminatory Anti-Homosexuality Bill. The move was criticized by some activists who felt it ultimately gave a political boost to the sponsor of the bill, pitted LGBTI people against the rest of the population and gave credence to the idea that LGBTI equality is a Western-sponsored agenda. They expressed their wish to be consulted on such decisions in future.

Using collective influence with governments and lawmakers

In Uganda, a few companies actively discouraged lawmakers from adopting new discriminatory laws and restrictions on freedom of expression, association, and assembly by highlighting potential negative repercussions, including for businesses. Others did so under pressure from international customers. In Northern Ireland, several unions and companies worked together to counter discrimination on religious grounds during the period of violent sectarian tensions. In other instances, companies have either spoken out or lobbied privately to support human rights defenders, or to address social or human rights challenges. In Singapore, in September 2015, a dozen multinational companies formed a coalition to push for LGBT equality in the global workplace.

When small business owners come together to oppose anti-LGBT legislation

In Texas in the United States, several hundred small business owners, ranging from coffee houses to bicycle shops, signed an open letter in 2016 opposing any efforts to pass laws in the state that would single out the LGBT community for discriminatory treatment in the aftermath of the passing of anti-LGBTI legislation in North Carolina.

Through their website “Texas Equality” and several other joint actions, these small businesses spanning every region of the state, came together around a single message: “Keep Texas Open for Business” and against anti-LGBTI legislation to be filed in the 2017 legislative session, calling it “an attack on Small Businesses and an attack on the Texas economy”.

When a company withdraws plan for expansion over discrimination law

PayPal, one of the largest providers of payment services globally, with over 180 million accountholders, made plans in April 2016 to open a new service centre in Charlotte, in the US state of North Carolina. Just a month after announcing the decision, new legislation, known as HB2, was passed in North Carolina invalidating protections of the rights of LGBT citizens and denying these members of the community equal rights under the law.

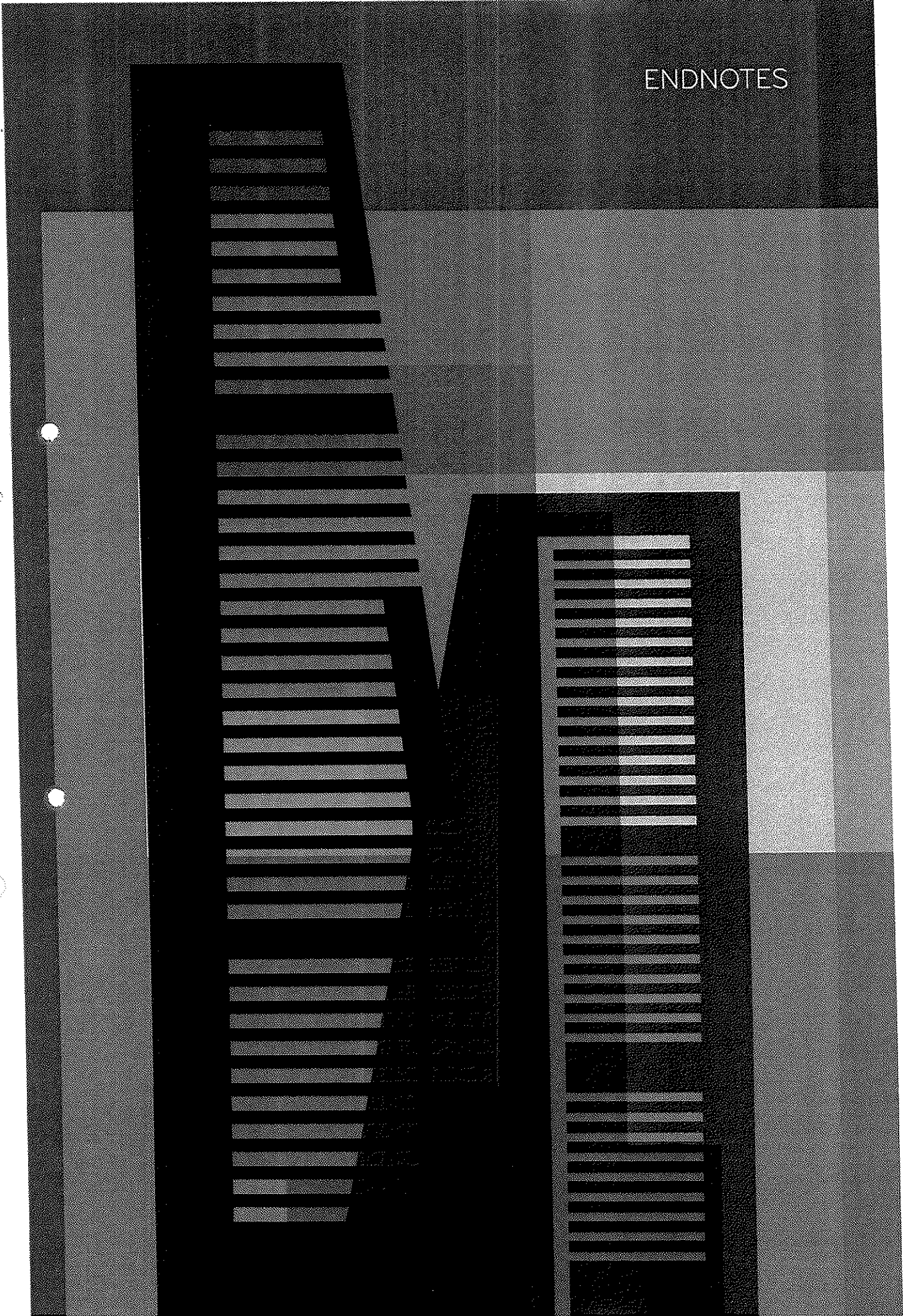
Despite many major corporations, like PayPal, objecting to the new legislation, the new law was upheld. As a result, PayPal reversed its expansion plan to locate a new facility in Charlotte. PayPal was planning to start with between 400 and 600 employees, with the potential to expand the number. **Deutsche Bank** too decided not to expand in North Carolina.

The cost to North Carolina’s economy of discrimination against members of the LGBT community has been estimated⁴⁹ at some \$5 billion a year, and

the HB2 legislation has already resulted in the loss of over \$40 million in business investment and the loss of more than 1,250 jobs. PayPal’s CEO, Dan Schulman wrote at the time: “This decision reflects PayPal’s deepest values and our strong belief that every person has the right to be treated equally, and with dignity and respect. These principles of fairness, inclusion and equality are at the heart of everything we seek to achieve and stand for as a company. And they compel us to take action to oppose discrimination.”

In early 2017, the North Carolina legislature passed a new law overturning elements of the HB2 legislation, largely because of the corporate backlash and its economic impact. On this occasion, the Governor shared his view that HB2 had been “a dark cloud hanging over our great state ... It stained our reputation, it has discriminated against our people and it has caused great economic harm in many of our communities”.

ENDNOTES



- ¹ According to one study in the United States by the Human Rights Campaign, some 62 per cent of new lesbian, gay, and bisexual graduates at university go "back in the closet" when they start their first job. Another survey shows that 23 European countries require trans people to be sterilized as a precondition of obtaining legal recognition of their preferred gender, while 8 countries do not provide any means by which trans people can obtain legal identity documents that reflect their preferred name and gender. ("Closeted" and "in the closet" are adjectives for LGBT people who have not disclosed their sexual orientation or gender identity and aspects thereof.)
- ² In 2009, in India, the Delhi High Court decriminalised same-sex relationships. In 2013, that ruling was overturned by the Supreme Court. Many Indian companies published advertisements that were critical of the Supreme Court decision, which is now under review.
- Tanseem Nashrulla, "15 Heartening Ways Indian Brands and Bollywood Are Fighting," *Buzzfeed*, December 2013, <http://www.buzzfeed.com/regajha/heartbreaking-responses-to-indias-ban-on-same-sex-interco>.
- ³ Deutsche Bank was among several organizations that decided to freeze their plans to create 250 new positions in North Carolina after the passage of a state law that eliminated antidiscrimination protections based on sexual orientation. https://www.db.com/newsroom_news/2016/medien/deutsche-bank-freezes-job-expansion-plans-in-north-carolina-en-11535.htm
- ⁴ Adopted 10 December 1948, UNGA Res. 217 (A/RES/3/217A).
- ⁵ The UN Guiding Principles call upon the State to *protect* human rights and on companies to *respect* human rights in their business operations and, where protection and other gaps exist, provide *remedies*. Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights* (Geneva: United Nations, January 2012), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
- ⁶ Lucy Amis, *A Guide for Business: How to develop a human rights Policy*, (New York City: The UN Global Compact Office, June, 2011), 1-26, http://www.ohchr.org/Documents/Publications/DevelopHumanRightsPolicy_en.pdf.
- ⁷ Corporate Social Responsibility (CSR) Europe, *Assessing the Effectiveness of Company Grievance Mechanisms* (Brussels: CSR Europe, December 2013), <https://www.csreurope.org/sites/default/files/Report%20Summary-%20Management%20of%20Complaints%20assessment-%20final%20Dec%202013.pdf>.
- ⁸ Companies seeking information on specific country conditions should consult resources including local LGBTI organizations as well as online resources such as the Stonewall's country briefings.
- "Global Workplace Briefings," Stonewall, accessed August 7, 2017, <https://www.stonewall.org.uk/global-workplace-briefings/>; "Maps: Sexual Orientation Laws," ILGA, accessed August 7, 2017, <http://ilga.org/what-we-do/maps-sexual-orientation-laws/>; "Comparative Data on 190 Countries Worldwide," TGEU, accessed August 7, 2017, <http://transrespect.org/en/>; "Employers: Guide to Intersex Inclusion," OII, October 8, 2014, <https://oii.org.au/employer/>.
- ⁹ The Office of the High Commissioner for Human Rights has also published an interpretive guide on the corporate responsibility to respect human rights as set out in the UN Guiding Principles: The Office of the High Commissioner for Human Rights (OHCHR), *The corporate responsibility to respect human rights: an interpretive Guide*, (Geneva: United Nations, June, 2012), <http://www.ohchr.org/Documents/Issues/Business/RIRInterpretativeGuide.pdf>
- ¹⁰ For a summary of the jurisprudence and recommendations of UN human rights mechanisms on this issue refer to the UN Human Rights Office publication "Born Free and Equal": The Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal*, (New York: United Nations, June, 2012), <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>. For additional reference points on applicable international human rights standards see the Yogyakarta Principles.
- The International Commission of Jurists and the International Service for Human Rights, "The Yogyakarta Principles", The international panel of experts in international human rights law and on sexual orientation and gender identity, March, 2007, http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

- ¹¹ "United Nations Reports," The Office of the United Nations High Commissioner of Human Rights, accessed August 2, 2017, <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNReports.aspx>.
- ¹² International Labor Organization, *ILO Declaration on Social Justice* (Geneva: International Labor Organization, June 2008), Document3 http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf.
- ¹³ David Rock and Heidi Grant, "Why Diverse Teams Are Smarter," *Harvard Business Review*, November 2016, <https://hbr.org/2016/11/why-diverse-teams-are-smarter>.
- ¹⁴ Charlie Ensor, "Homophobia Costs Countries \$100 billion a Year, Economist Argues," *Humanosphere*, February 2017, <http://www.humanosphere.org/human-rights/2017/02/homophobia-has-an-economic-cost-for-countries-economist-argues/>.
- ¹⁵ M.V. Lee Badgett et al., *The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies* (Los Angeles: The Williams Institute, 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-inclusion-and-development-november-2014.pdf>.
- ¹⁶ Emma Mishel, "Discrimination against Queer Women in the US Workforce," *SOCIOUS: Sociological Research for a Dynamic World*, January 2016, doi:10.1177/2378023115621316.
- ¹⁷ Sylvia Ann Hewlett and Karen Sumberg, "For LGBT Workers, Being 'out' Brings Advantages," *Harvard Business Review*, August, 2011, <https://hbr.org/2011/07/for-lgbt-workers-being-out-brings-advantages>.
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- ¹⁹ Eric Berger and Nicole Douillet, "What's the effect of pro-LGBT policies on stock Price?," *Harvard Business Review*, July, 2014, <https://hbr.org/2014/07/whats-the-effect-of-pro-lgbt-policies-on-stock-price>.
- ²⁰ LGBT Capital, *Global LGBT ("Lesbian, Gay, Bisexual, Transgender") annual spending power (LGBT-GDP) estimated to be US\$3.7 trillion in new data from LGBT Capital* (Hong Kong and London: August 3, 2015), LGBT Capital, http://www.lgbt-capital.com/docs/LGBT-GDP_2015_Press_Release.pdf.
- ²¹ Harris Poll and Witeck Communications, "Large Majorities of Heterosexuals and Gays Likely to Consider a Corporate Brand that Provides Equal Workplace Benefits to All Employees, Including Gay and Lesbian Employees," (Rochester: formerly Harris Interactive and Witeck-Combs Communications, February, 2007).
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- ²³ Hewlett and Yoshino, *Out in the World* (see note 18).
- ²⁴ To illustrate: in some countries, same-sex marriage is permitted, but sterilisation is required for trans people in order to obtain recognition of their gender identities. In other countries, trans people have obtained greater protection. In many countries, including those where the rights of lesbian, gay, bi, and trans people are protected, intersex people continue to face harmful medical practices.
- ²⁵ For example: "Workplace Resources," Stonewall, accessed August 7, 2017, <http://www.stonewall.org.uk/our-work/workplace-resources>; "Trans Toolkit for Employers," Human Rights Campaign, accessed August 7, 2017, <http://www.hrc.org/campaigns/trans-toolkit>; "Workplace Climate Resources," Human Rights Campaign, accessed August 7, 2017, <http://www.hrc.org/resources/workplace-climate-resources>; "Transgender Law Center Model Employer Policy," Transgender Law Center, accessed August 7, 2017, <https://transgenderlawcenter.org/resources/employment>; "Intersex Australia and Pride in Diversity Guide to Intersex Inclusion for Employers," OII Australia, October 2014, <https://oii.org.au/employer/>.

²⁶ International Trade Union Confederation, *Building Workers' Power* (Berlin: ITUC, May 2014), <http://www.ituc-csi.org/IMG/pdf/ituc-3co-e-5-congressstatement-en-210x297-01-140819.pdf>.

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²⁷ *Pride*, directed by Matthew Warchus (2013; London: Pathe International).

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²⁹ International Trade Union Confederation, *Scandal inside the Global Supply Chains of 50 Top Companies* (Brussels: International Trade Union Confederation, 2016) http://www.ituc-csi.org/IMG/pdf/pdffrontlines_scandal_en-2.pdf.

³⁰ The ILO Report on the changing nature of jobs emphasizes that the estimates of global supply chain-related jobs should be interpreted as an upper-bound estimate of the true number of jobs linked to global supply chains in the economies analysed—that is 40 countries representing 85 per cent of world GDP and covering two thirds of the global labour force. International Labour Office, *World Employment and Social Outlook: The Changing Nature of Jobs* (Geneva: International Labour Office, 2015), 133, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_368626.pdf.

³¹ Shareholder advocacy organization As You Sow noted in its 10th annual *Proxy Preview* report that in 2015, 17 resolutions requested formal protections for LGBT employees and half of the targeted companies already have agreed to these requests—including long-time holdout ExxonMobil, which changed its policy after more than a decade of proposals. <http://www.proxypreview.org/wp-content/themes/nanica/download/download-attachment-2016.php>.

³² Clean Yield Asset Management, "Copy of Letter for CY Website," Clean Yield Asset Management, November 2014, <http://cleanyield.com/assets/Copy-of-letter-for-CY-website-2.pdf>.

³³ Starbucks CEO Howard Schultz, Starbucks' annual meeting, Seattle, May 2013 https://www.bizjournals.com/seattle/video/c1eDBjYto4LXS3loL7s_pSdNyONvOFwF?autoplay=1.

³⁴ Lisa Van Beek, Alessandra Cancedda, and Carlien Scheele, *The Business Case for Diversity in the Workplace: Sexual Orientation & Gender Identity* (Brussels: European Commission, September 26, 2016), http://ec.europa.eu/justice/discrimination/files/report_companies_final_en.pdf; Vivian Hunt, Dennis Layton, and Sara Prince, "Why Diversity Matters," McKinsey and Company, January 2015, <http://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>; Tim Smedley, "The Evidence Is Growing - There Really is a Business Case for Diversity," *Financial Times*, May 14, 2014, <https://www.ft.com/content/4f4b3c8e-d521-11e3-9187-00144feabdc0>.

³⁵ "Human Rights Reporting Assurance Frameworks Initiative," Shift Project, November 2012, <https://www.shiftproject.org/resources/collaborations/human-rights-reporting-assurance-frameworks-initiative/>.

³⁶ "Corporate Human Rights Benchmark," Business & Human Rights Resource Center, March 2017, <https://business-humanrights.org/en/chr/b>.

³⁷ Office of the High Commissioner for Human Rights, *Report of the High Commissioner for Human Rights: Discrimination and Violence against Individuals Based on Sexual Orientation and Gender Identity (A/HRC/29/23)* (New York: United Nations Human Rights Council, May 2015) http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.doc.

³⁸ James I. Charlton, *Nothing about Us without Us: Disability Oppression and Empowerment* (Berkeley: University of California Press, August 2000), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.doc.

- ³⁹ In one case in Africa, a manager was terminated by her employer after her partner, a well-known celebrity, was outed in the local media. The former manager, now an activist, was asked to resign the same day and found she had no legal recourse to fight her dismissal. "The kind of person you are is not good for the public perception of the company," she was told, although the company has progressive anti-discrimination policies in place. (OHCHR consultations on Standards of Conduct, 2016).
- ⁴⁰ ILGA, "Sexual Orientation Laws in the World- Criminalisation," International Lesbian, Gay, Bisexual, Trans, and Intersex Association (ILGA), May 2017, http://ilga.org/downloads/2017/ILGA_WorldMap_ENGLISH_Criminalisation_2017.pdf.
- ⁴¹ The advocacy group Stonewall publishes the Global Workplace Equality Index, which divides jurisdictions into zones indicating different challenges that organizations face across their global operations. In Zone 1 countries, same-sex relationships are legal and there are clear national employment protections on grounds of sexual orientation. In Zone 2 countries, same-sex relationships are legal but no clear national employment protections exist, while in Zone 3 countries same-sex relationships are illegal. <http://www.stonewall.org.uk/global-workplace-equality-index>.
- ⁴² OHCHR, "Living Free and Equal: What States Are Doing to Tackle Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People," United Nations Human Rights Office, November 2016, <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LivingFreeEqual.aspx>; Zhan Chiam, Sandra Duffy, and Matilda Gonzalez Gil, "Trans Legal Mapping Report: Recognition before the Law," ILGA, November 2016, <http://ilga.org/what-we-do/gender-identity-and-gender-expression-program/trans-legal-mapping-report/>; "Comparative Research Data on 190 Countries Worldwide," Trans Respect versus Transphobia Worldwide (TGEU), 2017, <http://transrespect.org/en/>.
- ⁴³ European Agency for Fundamental Rights, *Being Trans in the European Union: Comparative analysis of EU LGBT Survey Data* (Luxembourg: Publications Office of the European Union, 2014), <http://fra.europa.eu/en/publication/2014/being-trans-eu-comparative-analysis-eu-lgbt-survey-data>.
- ⁴⁴ OHCHR, "Living Free and Equal: What States are Doing to Tackle Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People," United Nations Human Rights Office, November 2016, <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LivingFreeEqual.aspx>.
- ⁴⁵ Cisgender is a word that describes a person who is not transgender.
- ⁴⁶ Brendan Snyder, "LGBT Advertising: How Brands are Taking a Stance on Issues," Think with Google, March 2015, <https://www.thinkwithgoogle.com/consumer-insights/lgbt-advertising-brands-taking-stance-on-issues/>.
- ⁴⁷ Stonewall and Simmons & Simmons, "Embedding LGBT Equality into Procurement Practices and Supply Chain Management," Stonewall, 2016, https://www.stonewall.org.uk/sites/default/files/simmons_simmons_-_embedding_lgbt_equality_into_procurement_practices_and_supply_chain_management.pdf.
- ⁴⁸ Section 377A of the Penal Code of Singapore is the main remaining piece of legislation which criminalises sex between mutually consenting adult men. Singapore's Prime Minister Lee Hsien Loong once said that "there is space for the gay community [in Singapore], but they should not push the agenda too hard because if they (do), there will be a very strong pushback..." <http://www.straitstimes.com/singapore/singapore-not-ready-for-same-sex-marriage-as-society-is-still-conservative-prm-lee>.
- ⁴⁹ Christy Mallory and Brad Sears, "Discrimination, Diversity, and Development: the Legal and Economic Implications of North Carolina's HB2," The Williams Institute and Out Leadership, May 2016, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Discrimination-Diversity-and-Development_The-Legal-and-Economic-Implications-of-North-Carolinas-HB2.pdf.

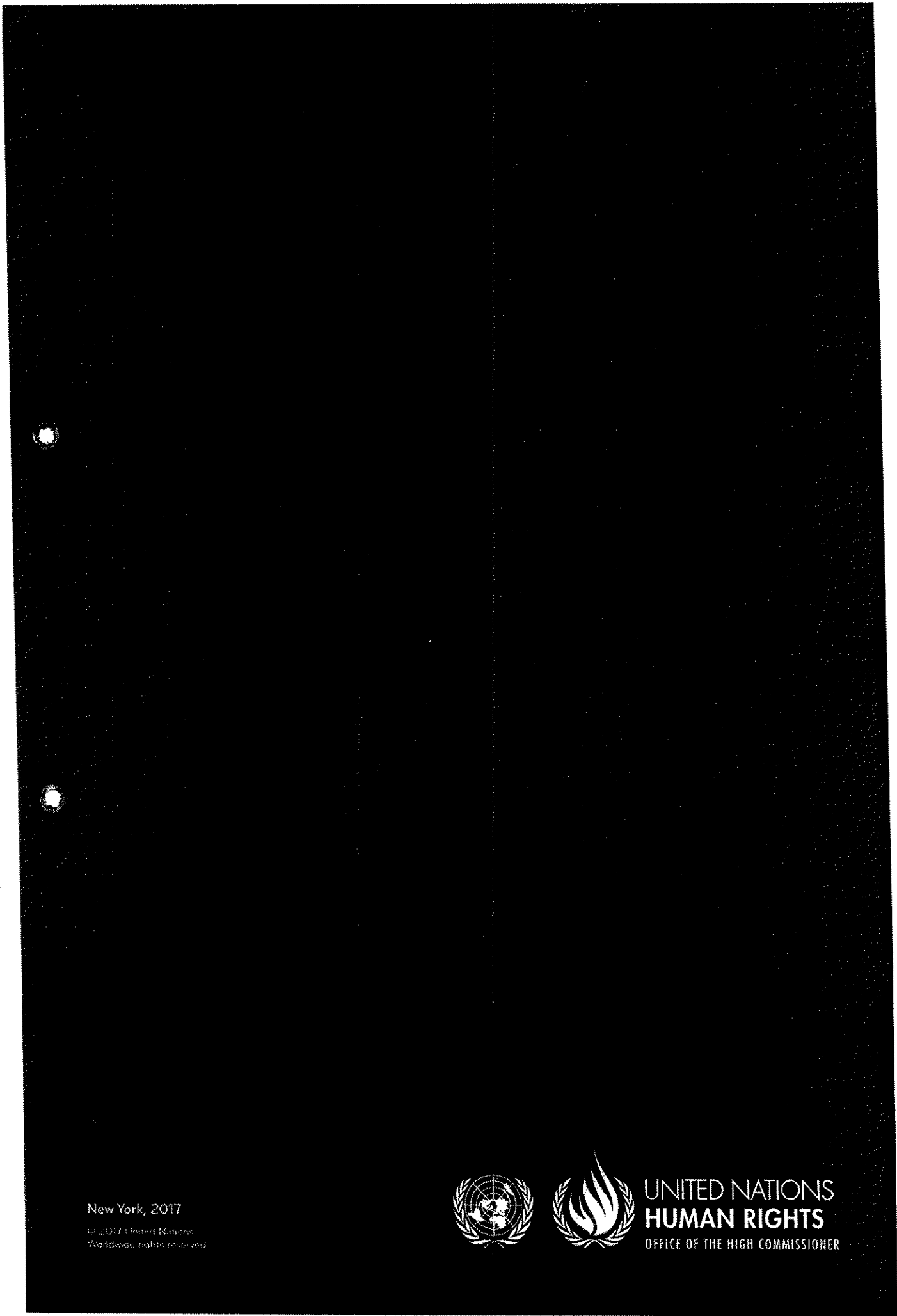
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OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
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The UN Human Rights Office's UN Free & Equal campaign is working to combat stigma and discrimination against LGBTI people globally. To learn more and sign up, please visit unfe.org.

The designations employed and the presentation of the material in this report do not imply the expression of any opinion whatsoever on the part of the Office of the High Commissioner for Human Rights concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers and boundaries.

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UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

THE FIVE STANDARDS OF CONDUCT FOR BUSINESS

1 **respect**
HUMAN RIGHTS

2 **eliminate**
DISCRIMINATION

3 **provide**
SUPPORT

4 **prevent**
OTHER HUMAN
RIGHTS VIOLATIONS

5 **act**
IN THE PUBLIC
SPHERE

179

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

Crl. M.P. No. _____ of 2018

IN

WRIT PETITION (CRIMINAL) NO. _____ OF 2018

IN THE MATTER OF:

KESHAV SURI, PETITIONER

VERSUS

UNION OF INDIA RESPONDENT

AN APPLICATION FOR EX-PARTE AD-INTERIM/INTERIM RELIEF

TO,

THE HON'BLE CHIEF JUSTICE AND
HIS COMPANION JUSTICES OF THE
HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE
PETITIONERS ABOVE NAMED:

MOST RESPECTFULLY SHOWETH:

1. The Petitioner has filed the abovesaid Writ Petition under Article 32 of the Constitution of India challenging the constitutional validity of Section 377 IPC. The Petitioner has not filed any other petition either before this Hon'ble Court or any other High Court challenging the constitutional validity of Section 377 IPC.
2. The Petitioner prays that the averments made in the Writ Petition may be read as part and parcel of this application and the Petitioners crave leave of this Hon'ble Court to refer to and to

rely upon the averments made in the Writ Petition which has not been reproduced herein for the sake of brevity.

3. The Petitioner is a responsible, law-abiding and public spirited adult citizen of India. The Petitioner is a well-educated individual who received his primary education in India and pursued his further education [undergraduate and masters degree] in the fields of Law and Business Management from highly ranked Universities in the U.K. The Petitioner is in a committed relationship for nearly a decade with another adult man and has been consensually residing together with him. Thus, the Petitioner himself is a part of the Lesbian, Gays, Bi-sexual, Transgender and Queer ['LGBTQ'] community in India. The Petitioner hails from an industrial background and is engaged in the business of Hospitality as well as Education. The Petitioner works with and is a shareholder of Bharat Hotels Ltd, which promotes the hospitality chain by the name and style of 'The Lalit'. Battling discrimination on account of his sexual-orientation and being passionate about the cause of inclusion of members of the LGBTQ community in economic and social spheres, the Petitioner has championed a social campaign titled as 'Pure-Love' for creating a platform for persons from all walks of life, including the LGBTQ community to come forth and share their life experiences and thereby feeling included in society. The 'Pure-Love' campaign is in tandem with the 'United Nations Guiding Principles on Tackling Discrimination against Lesbians,

Gays, Bi-Sexuals, Transgender and Inter-sex people: Standards of conduct Business'. The whole objective behind the 'Pure-Love' campaign is to create awareness, acceptance and inclusion for persons belonging to the LGBTQ community in and amongst Corporate India. Persons from the LGBTQ community are otherwise marginalised and continue to live in the shadows of fear of stigma, exclusion, despair and prosecution.

4. The Petitioner is approaching this Hon'ble Court seeking an appropriate Writ, Order or direction in the nature of a mandamus declaring that the 'Right to choice of sexual orientation' is a fundamental right enshrined in Part-III of the Constitution of India and that any discrimination of any person on the basis of exercising such choice is violative of Part-III of the Constitution of India. Further, the Petitioner also seeks a mandamus that intercourse between consenting adults of the same gender is not carnal intercourse against the order of nature and thus, Section 377 of the Indian Penal Code [**Section 377 IPC**], is not applicable to such consenting adults.
5. The Petitioner is approaching this Hon'ble Court seeking the above-said relief in light of the 'Right of Choice', 'Right of Privacy', 'Right to Dignity', 'Right to Non-Discrimination' and 'Right to Liberty' of the Petitioner and many such person[s] whom the Petitioner has come in contact with through the 'Pure-Love' campaign are being impinged and affected on a daily basis.

Persons from the LGBTQ community are ridiculed in various spheres of life. Equal work opportunities and pay is not given to individuals who have chosen their sexual orientation which is so-called 'different' i.e. those who are homosexuals. Aggrieved by discrimination and non-inclusion of individuals on account of their sexual orientation, the Petitioner is approaching this Hon'ble Court.

6. With Section 377 IPC on the statute book, promoting the social campaign of 'Pure-Love' and/or filing of the present Petitioner by the Petitioner has taken numerous deliberations, as the Petitioner faces the risk of a social adversarial impact and/or prosecution.
7. Such denial and discrimination not only impact the individual but has a larger economic impact as well. The LGBTQ community, as can be gathered from jurisdictions which have decriminalised homosexuality, contributes to the GDP of an economy in numerous ways, which includes [though is not limited to] tourism, fashion, culture and so on. Unquestionably it can be said, denial of rights of the LGBTQ community, in other words, denial of the right to choose sexual orientation comes with economic costs as well.
8. Thus seen from the standpoint of: i. violation of basic fundamental and human rights and ii. loss of economic opportunities, the continued criminalisation of homosexuality, in

other words, denial of the right to choose sexual orientation, ought to be set-aside and struck down.

9. Members of the LGBTQ community are left to deal with oppression, exclusion, limited avenues for personal growth, limited opportunities for employment. The question really is are such citizens [assuming them to be a small percentage of the Indian demograph] living a meaningful life of respect and dignity or are they living a life which diminishes the constitutional mandate of inclusiveness, respect for life and the individual.
10. A preliminary study sponsored by the World Bank on the Economic Cost of Homophobia and the exclusion of LGBT People: A case study of India is highly relevant herein. It is noteworthy that though the results of this study are preliminary [and as such is subject to change], however, they have high persuasive value in the absence of any other such exhaustive recent report, which focuses on India. A copy of the World Bank Report titled as 'The Economic Cost of Homophobia and the exclusion of LGBT People: A case study of India' has been annexed with the main Writ Petition as 'ANNEXURE P-4' and the another detailed report by the World Bank only has been annexed as 'ANNEXURE P-5'
11. Key features from the report[s] are quoted herein-below:
 - viii. The 2011 Indian Census marked the first time that an "other" category was added to the male and female

options on the question about sex, in essence providing a third gender category, but the resulting count of transgender people is thought by some observers to be unreliable. A total of 490,000 individuals of all ages reported the "other" option, or about

- ix. 0.04% of the Indian population of 1.2 billion people
 - x. Estimated cost of homophobia [based on an India study] is approx. anywhere between 0.1 to 1.7% of GDP
 - xi. 56% of white-collar LGBT workers have reported discrimination
 - xii. Health costs of Homophobia in India [as of 2012] ranged between US\$ 712 million to US\$ 23.1 billion.
 - xiii. 28% of urban lesbians experienced physical abusive violence in family
 - xiv. Data on public opinion from 2006 shows that 41% Indians would not want a homosexual neighbour
12. It is further submitted that owing to Section 377 IPC continuing on the statute book various adult and consenting members of the LGBTQ community continue to face the threat of a false prosecution and some are actually facing a false prosecution.

The Petitioner himself constantly lives under the threat of a false prosecution in light of the continuance of such an archaic provision. Owing to this, the Petitioner is under constant pressure and is unable to live a life of dignity whereby he can exercise his choice to love and have sexual relations with his Partner whom he has been with for a decade now.

- 13. It is thus respectfully prayed, that pending final hearing and disposal of the present Petition, this Hon'ble Court may be pleased to grant an ex-parte, ad-interim/interim relief staying the operation of Section 377 IPC in so far as consenting adults are concerned.
- 14. That the balance of convenience lies in the favour of the Petitioner and in the interest of justice, equity and good conscience the prayer may be granted.
- 15. The present application is being filed boanfide and in the interest of justice.

PRAYER

It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to

- i) Pass an order restraining the Respondent from taking coercive action against initiatives that promote equal opportunities for people with alternative [homosexual] sexual orientation, pending final hearing and disposal of the present Writ Petition; and/or

- ii) Pass such other or further orders as this Hon'ble Court may deem fit, just and proper in the facts and circumstances of the case.

FILED BY

[SHALLY BHASIN]
ADVOCATE FOR THE PETITIONER

FILED ON: 10.04.2018
NEW DELHI

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

CRML M.P. NO _____ OF 2018

IN

WRIT PETITION [CRIMINAL] NO. _____ OF 2018

IN THE MATTER OF:

KESHAV SURI

...PETITIONER

versus

UNION OF INDIA

...RESPONDENT

AFFIDAVIT

I, Keshav Suri, son of Late Mr. Lalit Suri, aged 32 years, resident of B-1/3, 2nd floor, Vasant Vihar, New Delhi-110057 do hereby solemnly affirm and state as under:

1. That I am the Petitioner in the aforesaid Writ Petition and am well acquainted with all the facts and circumstances of the case and as such I am competent to swear this affidavit.
2. I state that I have read and understood the contents of the accompanying application for ex-parte, ad-interim/interim relief/stay The contents thereof are true and correct to the best of my knowledge.

IDENTIFIED BY

DEPONENT

VERIFICATION:

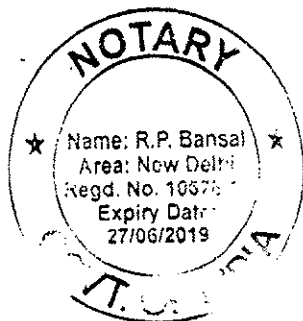
I, the above-named Deponent, do hereby verify that the contents stated herein above are true to the best of my knowledge and no part of it is false and no material fact has been concealed therefrom.

Verified at Delhi on this 10th day of April, 2018.

DEPONENT

ATTESTED

Notary Public, Delhi
(As Presented)



10/04/18