

LECTURE II

SCIENCE & SEXUAL VARIATION

The Causes of Hostility to Sexual Variation

Sex & Discomfort with the Unfamiliar

In the immediate aftermath of the decisions of the Delhi High Court and the Supreme Court of India in the *Naz Foundation* litigation,¹ discussion arose in India concerning homosexuality. Some commentators urged caution—and the need to study the particular Court’s decision carefully before jumping to conclusions. Others suggested that the reticence in India in approaching such a topic should end. Reticence might be an indication of discomfiture that many people still feel when the subjects of sex – and specifically sexual orientation and gender identity - are raised. A spokesperson of the BJP [Indian People’s Party], Rajiv Pratap Rudy, commented on Indian television that “it’s a fact that most of the politicians are shy to discuss it, and most of us otherwise would be shy to discuss it.”²

Shyness and uncertainty often arise when something apparently different or exotic presents itself—when something emerges from the realm of abstract speculation and hypothesis to the flesh and blood reality affecting identifiable human beings with their immediate concerns. Anxiety is a more or less universal human trait in the face of unfamiliar challenges. As often as not, when reality is brought closer to home, when it is confronted, engaged with, understood and discussed openly, the anxiety eases. In time it may be forgotten altogether.

There is no point in denying that homosexuality represents, to many people in India as indeed in Australia and elsewhere, something that is unfamiliar. In Western and particularly English-speaking countries, an historically negative attitude to sexual variations owes much of its force to the Abrahamic religions. Not all religions, nor even all Christian, Jewish or Islamic people today,

¹ [2009] 4 LRC 838. See also *Suresh Kumar Koushal v NAZ Foundation and Ors* (unreported, Supreme Court of India, 11 December 2013) Civil Appeal 15436 of 2009.)

² See YouTube clip at <<http://www.youtube.com/watch?v=9rmffucVIN4>>.

condemn members of the sexual minorities. The standing of homosexuality in India's own primary religious traditions is complex. Hinduism and Buddhism, in all their many variations and forms, cannot be assimilated to the Abrahamic view so far as sexuality is concerned. In some branches of Hinduism and Buddhism adherents have proved quite pragmatic on issues of sex. One student of Buddhism, himself a barrister and former Senior Prosecuting Counsel in England, and founder of the Buddhist Society of London, suggests that sex in the Theraveda traditions is:

A clean, impersonal creative force, as natural as water in a riverbed, as restless and tremendous as the sea. On the physical plain we call it sex; on the emotional plane it functions as artistic temperament, enthusiasm and emotional power; while in the realm of mind it is that 'creative urge' which is responsible for all that man has ever made, inclusive of himself.³

In Hinduism the attitudes to sex and sexuality are varied. However, generally, they are much less hostile than those found in traditional Judeo-Christian-Islamic beliefs.

The Common Judeo-Christian-Islamic Hostility

Nevertheless, Abrahamic monotheism has, through its impact upon national penal codes, exerted a hostile influence wherever these codes have been adopted as local law. Before turning to these laws, and precisely because the religious influence is still a force to be reckoned with, I will say something about the Judeo-Christian view of homosexuality as it has been traditionally understood. These views have been influential in Europe and Europe's colonies and diaspora from Roman times up to the present time.

Over a long trajectory of increasing awareness and understanding about sexual variations an improvement has occurred in the status of those who openly identify as homosexual, bisexual and transgender in the West. Still, the path from faith to fact contains many obstacles. Homosexuality has

³ C. Humphreys, *Buddhism* (1951) London, Penguin, at 113.

progressed, in successful stages, from being considered sinful, to criminal, to pathological and most recently, nothing more than one of many variations in human nature. The progression is not surprising. Each phase of human understanding has explanations.

In what the distinguished Cambridge archaeologist Colin Renfrew describes as the “mythic” stage,⁴ (which is essentially a religious or superstitious phase of human consciousness) homosexuality was accounted for in terms of sin, moral degradation and vice. Later, homosexuality was viewed largely in terms of what it meant for the industrial economy and state, and the perceived need to deter conduct that did not lead to reliable conjugal coupling, producing future citizens, soldiers and workers. According to this approach, criminalization and punishment were presumed to be an appropriate community response. Then, in the early days of the Enlightenment and following primitive forays into psychological science (which Renfrew calls the “theoretic” stage), homosexuality was seen as fitting rather neatly into a category of a disease or mental illness. These stages overlap. Accordingly, the concept of homosexuality as *sin* often persisted even as it was being investigated psychopathologically. Religious prejudice informed science. But then science began to inform, and eventually to change, human and social attitudes: including amongst many who generally adhered to antagonistic religious beliefs.

The dominant charge against homosexuality by fundamentalist Christians was that it was “unnatural.” Yet as one American Episcopalian [Anglican] bishop enquired, “Can a religious tradition that has long practised circumcision and institutionalized celibacy ever dismiss any other practice on the basis of its unnaturalness?”⁵ What makes a very common human practice “unnatural”? Perhaps its absence or paucity in the animal kingdom? That assertion would suffice to defeat the argument, however, because ongoing biological (zoological) research provides very strong evidence of homosexual, bisexual

⁴ Following Merlin Donald. See C. Renfrew, *Prehistory: The Making of the Human Mind* (2007) London, Weidenfeld & Nicolson, at 112-115.

⁵ J. S. Spong, *Living in Sin? A Bishop Rethinks Human Sexuality* (1988) New York, HarperCollins, at 71.

and non-reproductive sexual activity among most vertebrate animals.⁶ As another writer observed, “we would expect very few Christians to defend polygamy by appealing to nature, even though something quite like that goes on in much of the animal kingdom.” The writer concluded:

Too often Christians revert to the procreative argument in support of the thesis that homosexuality is “contrary to nature.” But in this sense, so is contraception which, like gay sex, provides the opportunity to separate function from feeling, to curtail reproduction while allowing stimulation of the sex organs. How is the morality of one unprocreative act any more admissible, or natural, than the other? The truth is that the moral condition of both types of participants—judging from participation in the sex act alone—is the same... That makes the homophobic consumer of contraceptives a hypocrite. Of course, such a hypocrite will point to various texts in the Bible which reveal, on the part of its authors, a tribal fear of sexual variety in the human race.⁷

I digress to consider what some of the scriptural texts of the influential Judeo-Christian-Islamic religions say. I do this because the Christian religion especially has been immensely important in the contents of the law in England, India, Australia and elsewhere through penal codes and other laws. Islam today is also sometimes seen as hostile to reform because of shared beliefs. To the calls for reform, the answer regularly comes back: “God commands a prohibition”. For some that is an end of the matter. However, for an increasing number of others, it is not.

When analysed, there are not many scriptural texts on homosexuality in either Judaism and Christianity. In fact, in comparison with prohibitions against, say, lying or idolatry, there are few references indeed. Not a direct word of condemnation can be found in any of the four gospels of the Christian religion to condemn sexual minorities or their sexual conduct.

⁶ J. Durden-Smith & D. de Simone, *Sex and the Brain* (1983) New York, Arbor House, at 101. See also the brief discussion of the scientific research in the latter part of this lecture.

⁷ J. Zerilli, “The Christians, homosexuality and the gay marriage question” *The Humanist*, May/June 2010.

Examining the Biblical Foundations for Hostility

In the Hebrew book of *Genesis*, the sin of Sodom and Gomorrah is abominable to God. This appears in the story of Lot and the men of Sodom.

The story is found in *Genesis* 19. It tells of the gathering of the men of Sodom outside the house of Lot in ancient Israel. They demanded that two foreign men within, who were under Lot's protection, should be surrendered to the crowd to be "known" by them. All the men of Sodom were present to the last man. It is said that what was envisaged was a kind of gang rape in which Lot's guests were to be obliged to adopt the passive/receptive role in the sex act. This was taken to constitute a deep insult. It represented a grave violation of the law of hospitality universal in the Holy Lands. Lot attempted to negotiate with the men of Sodom, even offering his virgin daughters up for gang rape instead of the male visitors. Lot, his daughters and guests escape. But God punishes Sodom and Gomorrah. Offering the daughters makes the story problematic as a source of clear moral instruction. Yet this story is still seriously quoted as the source of Divine hostility to LGBT people, especially gay men.

To make matters even more difficult for those seeking to construct a clear scriptural case against homosexuality from this curious story, when the prophet Ezekiel, many years later, turned his attention to the sin of Sodom and Gomorrah, he records "Behold, this was the iniquity of thy sister Sodom: pride, fullness of bread, and abundance of idleness was in her and in her daughters, neither did she strengthen the hand of the poor and needy."⁸ Gang rape, as in Sodom, was not even mentioned by Ezekiel. In the New Testament, The Epistle of Jude characterises the sin of Sodom and Gomorrah in the more polemical terms to which we have become accustomed. The writer describes their inhabitants as "going after strange flesh."⁹ Still, many modern observers, living in the world of today, would agree that, on analysis,

⁸ *Ezekiel* 16.49.

⁹ *Jude* 7.

this is a rather weak textual pretext for the worldwide vilification of homosexuality, LGBT people, MSM and gays generally.

Perhaps more convincing texts to use for this purpose can be found in *Leviticus* 18.22 and 20.13. There the homosexual *act* (as distinct from *homosexuality* as such), is possibly identified and condemned. As *Leviticus* was the official holiness code of the Jewish law, these texts were the most readily adaptable of all of the scriptural proscriptions to later codification by other nations, promulgating their own criminal laws supposedly conforming to God's laws. In this way the Jewish law influenced English law. And English law came to influence the law of England's imperial and colonial possessions – including in India and Australia.

The original purpose of the religious holiness code was to set the people of Ancient Israel apart from the other tribes in the Middle East and to emphasise the essential separateness and speciality of the young Israeli nation.¹⁰ The essential crime perceived by the Hebrew prophets may have been assimilation to the ways of foreigners, rather than hostility towards homosexual activity, as such. Breaches of the rule laid down in *Leviticus* attracted the death penalty. Still, the death penalty in Ancient Israel applied equally to adultery and fornication. Few people today call for the re-institution of that law. Yet many demand retention of the law against LGBT citizens.

A real question therefore arises as to whether it was really same-sex attraction that was the mischief in question in the Abrahamic scriptures or disobedience against a distinctive rule of acceptable Hebraic conduct.¹¹ The ethics underpinning a young desert tribe, ending its nomadic cycle and endeavouring to establish a primitive settlement community, should not, on the face of things, be translated into the penal codes of advanced twenty-first century states without awareness of the dangerous and unjust consequences that follow from that action. Yet this is, unfortunately, precisely what has happened. The residue of the Hebraic laws criminalizing homosexuality

¹⁰ *Leviticus* 18.26-27; 20.23.

¹¹ *Leviticus* 20.10.

persists in many parts of the world today, indeed in the laws of nearly 80 countries. Half of them exist in the English-speaking world of the former British Empire.

Of the three references in the *New Testament* to minority sexual attractions only one of them, from the Apostle Paul, seems clear and unequivocal in its denunciation of homosexuality as a *condition* rather than a *practice* or proscribed *conduct*. This is the explicit denunciation of both male and female homosexuality in the Book of *Romans* chapter 1. I will not dwell upon the exegetical details of this passage; nor refer to contemporary Biblical scholarship about it. Suffice it to say that there are a significant number of contemporary theologians and Bible scholars – most not themselves identifying as homosexual - who doubt and question the traditional interpretations of the passages of Scripture said to justify the law's hostility against LGBT people.¹² As one commentator puts it:

The Bible, transmitted in some form or another, has been sincerely subscribed to over twenty centuries...[T]hink what incalculably vast changes—social, technological, and moral—have occurred in this span of time. Think, moreover, what great diversity of moral opinion has been entertained, all the while with some religious psychology firmly in place and the Bible remaining the same. The civilized world [to-day] bears little resemblance in its customs and manners to the civilized world of twenty centuries ago, and—this is the real point—nearly all the intervening changes have been either countenanced or confuted in an almost alternating rhythm of consensus by the priestly authority of the day...Today's evangelicals dance, listen to popular music, partake in public amusements and diversions, and attend the theater, even though, on biblical authority, these activities were strenuously denounced and even outlawed.¹³

¹² N. Wright (ed) *Five Uneasy Pieces – Essays on Scripture and Sexuality* ATF Press, Adelaide, 2011.

¹³ J. Zerilli, “The Christians, homosexuality and the gay marriage question”, *The Humanist*, May/June 2010.

Social and Economic Foundations for Hostility

To understand s377 of the *Indian Penal Code*, adopted by the British rulers of India in 1861, it is necessary also to understand a little more about the way that the sodomy offence earlier came to exist in European legal systems over the preceding thousand years before its importation into India.

The first formalisation of anti-homosexual bias in Europe began with the imperial conversion of the Roman Empire to Christianity in the fourth century A.D... Before then, the laws in Greece and Rome were not much concerned with this aspect of private morality. In Greece, Plato even extolled erotic love between men, idealising homosexuality in the *Symposium*.¹⁴ But with the official arrival of Christianity in the Roman Empire, the atmosphere changed. The marriage of two men was outlawed in A.D. 342. In A.D 533, the Emperor Justinian decreed that castration and execution would follow upon anyone being found to have engaged in homosexual relations.

The Middle Ages saw a relaxation of some of the moral requirements in the field of sexuality (possibly influenced by the rediscovery and appreciation of the classical Greek and Roman texts): However, hardline religious believers again asserted their views by the mid-thirteenth century. The *Summa Theologica* of St Thomas Aquinas became the standard point of reference on morality and values throughout Catholic Europe. Aquinas reviled homosexuality as “unnatural”, along with masturbation and all forms of nonprocreative sexual intercourse. This mentality influenced the content of the English penal laws as declared by the judges and enacted by parliament. By this means, sodomy laws found their way, in time, into virtually every corner of the British Empire, including India and Australia.

It is probable that some of the vilification of homosexuality was influenced by religious attitudes towards women. This followed from a patriarchal perception of the roles of the sexes in the natural order of things. Gender typicality is pronounced in the Biblical canon. It is common in the patrilineal social

¹⁴ E.H. Warmington & P.G. Rouse, eds. *The Great Dialogues of Plato* (1984), New York, Mentor, at 86-88.

structures described in the Scriptures. It is easiest to see in Rome where, although homosexuality was at first viewed as part of the diversity of human behavior, “there was one important exception...participation by adult male citizens in passive sexual behavior...This was looked upon with scorn, and was equated with behaving like a woman, boy or slave: all people excluded from the power structure.”¹⁵

What purpose did a rigid sex code serve in society that justified converting the Hebraic holiness code into modern criminal law? George Orwell in his novel *1984* noted a connection between totalitarianism and sexual repression:

It was not merely that the sex instinct created a world of its own which was outside the Party’s control and which therefore had to be destroyed if possible. What was more important was that sexual privation induced hysteria, which was desirable because it could be transformed into war fever and leader-worship.

Orwell’s point was that sexual energy in controlled societies needed to be redirected into channels acceptable to those in power. There is some historical support for the view that the more rapid the process of modernization and industrialization a society underwent, the more intolerant of socially useless (or at any rate unregenerative) sexual practices that society was likely to be. This mechanistic analysis fits most obviously with Western Europe in the nineteenth century, Russia in the twentieth and twenty-first centuries, and most third world countries today. Conventional conjugal bonds stand as the primary vehicles through which the existing social order is able to maintain the *status quo*. This is the way that the state guarantees that the energies of its youth are directed towards the labours of maintaining a household, rearing children, and serving approved economic purposes through the necessity of some form of remunerated employment. For example, Carl Boggs wrote of the family as:

¹⁵ R.C. Friedman & J.I. Downey, *Sexual Orientation and Psychoanalysis* (2002) New York, Columbia University Press, at 170.

the primary agency of socialization, of the inculcation of established norms and ways of thinking, which makes it a vital connecting link between the individual and society...The effectiveness of the family as an instrument of hegemony is reinforced by the fact that it, more than any other social creation, appears to be a “natural” rather than man-made institution.¹⁶

Of course, this explanation of the family does not tell the entire story. It says nothing about the love and mutual support that typically exists within families, both narrowly and broadly defined. However, it does help to explain why sexual practices that are not economically useful, and that usually serve in the attainment of no goal beyond the participants, easily came to be opposed by political systems striving to put everyone to good economic use. In *Eros and Civilization*, Marcuse explained that “Against a society which employs sexuality as a means for a useful end, the *perversions* uphold sexuality as an end in itself...”¹⁷ This viewpoint, to some degree, helps to explain why homosexuality has sometimes been depicted as a left-wing, radical countercultural anti-family political movement, resisting co-option within the dominant social paradigm of utility and production. Yet for most people who are LGBT things are not as socially hostile as these view-points might suggest. They simply want to be themselves, without the harassment of social hostility, criminality and legal discrimination.

Questioning Hostility - From Religion Through Illness to Variation From the Ancient Greeks to Schopenhauer

The nineteenth century when British power in India (spread from Calcutta) was expanding and consolidating, is generally portrayed as a time of great sexual repression and enforced decorum. This was especially so in England. However, not everyone in the nineteenth century viewed homosexuality through the prism of religious commands. The most outstanding case of a European public intellectual who made a serious attempt to understand

¹⁶ C. Boggs, “Toward a New Consciousness,” quoted in D. Altman, *Coming Out in the Seventies* (1980) Ringwood, Penguin, at 155.

¹⁷ (1955, 1974) Boston, Beacon Press. (Emphasis added).

sexual diversity (and homosexuality in particular) was Arthur Schopenhauer, a German philosopher.

Schopenhauer's generation and circumstances make his contribution, to what we would now describe as subject of gender studies, doubly remarkable. No one in western countries had written about minority sexualities in a professionally serious manner since the Ancient Greeks and Romans. What is specially interesting, is the debt that Schopenhauer acknowledged to the Hindu and Buddhist religions. That predated, by over a hundred years, the writings of early twentieth century Western devotees of Eastern mysticism, and twentieth century engagement with Indian theosophy. Much later, in the 1960s, the well regarded British musical group The Beatles, did much to popularize Indian spirituality in the West. But it was Schopenhauer, in the early nineteenth Century, who confided to his notebook: "I confess that I do not believe my teachings could ever have come about until the Upanishads, Plato and Kant were able simultaneously to cast their rays into [my] mind."¹⁸

Today Schopenhauer's explanation of homosexuality can be seen as an early, flawed, yet still important, hypothesis. It was offered in an appendix to a chapter of the second volume of his influential work, *The World as Will and Representation*. The chapter was headed "The Metaphysics of Sexual Love". In 1859, at the age of 71, Schopenhauer added an appendix, entirely devoted to male homosexuality. In this he wrote that:

Considered in itself, pederasty appears to be a monstrosity, not merely contrary to nature, but in the highest degree repulsive and abominable...But if we turn to experience, we find the opposite; we see this vice fully in vogue and frequently practised at all times and in all countries of the world.¹⁹

¹⁸ *Manuscript Remains*, trans. E.F.J. Payne (1988) Oxford, Berg, vol. I at 467. An extended discussion of Schopenhauer and Buddhism occurs in B. Magee, *Schopenhauer*, revised edition (1997) New York, Oxford University Press, ch 15.

¹⁹ A. Schopenhauer, *The World as Will and Representation* (1818), trans. E.F.J. Payne (1958), New York, Dover, vol. II, at 561.

After citing examples from the Greeks, the Romans, the Gauls, the Chinese, the Hindus, and the Muslims, many of whose cultures made no special attempt to conceal sexual variations still less to condemn or punish them, Schopenhauer concluded that

The universal nature and persistent ineradicability of the thing show that it arises in some way from human nature itself...That something so thoroughly contrary to nature, indeed going against nature in a matter of the greatest importance and concern for her, should arise from nature herself is such an unheard-of paradox, that its explanation confronts us as a difficult problem.²⁰

Schopenhauer's postulated resolution of this paradox was simple. To procreate either too early or too late in life was bound, he thought, to lead to children who are "weak, dull, sickly, wretched and short-lived." The adolescent and the elderly therefore have to be restrained from producing offspring. Nature achieves this objective by introducing, at precisely these points in life, homosexual inclinations. Far from the homosexual inclination being unnatural or perverse, Schopenhauer's thesis was that it was planted in the human species by Nature herself as a moderating or diverting inclination. This was the way Schopenhauer resolved his "difficult problem".

From Havelock Ellis to Sigmund Freud

Schopenhauer's views lifted homosexuality in mid-19th Century Germany out of obscurity into serious study and debate. This attempted to disentangle the subject from a web of visceral distaste and religious horror. It was not the perversion of a depraved human being, but a naturally-occurring variation intended to serve a function in the regulation of the species. Schopenhauer was, of course, still partly a victim of his own prejudices. Nevertheless, his effort was courageous and unflinching. It set an example for others who were to follow.

²⁰ A. Schopenhauer, *The World as Will and Representation* (1818) trans. E.F.J. Payne (1958) New York, Dover, vol. ii, at 562.

Amongst the followers were the early scientists of sexology, Ulrichs, Hirschfeld and Havelock Ellis. They were the first analysts to argue that homosexuality was an innate predisposition that could be interpreted as a kind of “third sex”. This view inaugurated a *medical* opinion that helped to detach homosexuality from the perspective that it was evil or criminal.²¹ In fact, at about this time, physicians in Europe began to oppose criminalization of homosexual conduct and to advocate the understanding of homosexuality as an illness, something if possible to be cured. For example Richard Krafft-Ebing, another German, described homosexuality not as a moral vice or criminal deviance, but as symptomatic of what he suggested was a kind of illness.²² In a world that proclaimed the capacity of human ingenuity and inventiveness to overcome a vast variety of unwanted physical and mental conditions, this transition in thinking quickly became popular. It remains widespread to this day. It has given rise to so-called “cures” for homosexual, bisexual and transgender inclinations and to the modern “reparative” therapies. This became the twentieth century response to sexual variations. It seemed specially apt to the age of antibiotics, vaccines and miracle cures.

However, in a letter to the worried mother of a young man who was homosexual, Sigmund Freud, the founder of psychoanalysis, wrote:

I gather from your letter that your son is a homosexual...Homosexuality is assuredly no advantage, but it is nothing to be ashamed of. No vice, no degradation, it cannot be classified as an illness...Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to persecute homosexuality as a crime, and cruelty too....²³

²¹ R.C. Friedman & J.I. Downey, *Sexual Orientation and Psychoanalysis* (2002) New York, Columbia University Press, at 173.

²² R.C. Friedman & J.I. Downey, *Sexual Orientation and Psychoanalysis* (2002) New York, Columbia University Press, at 174.

²³ Quoted in R.C. Friedman & J.I. Downey, *Sexual Orientation and Psychoanalysis* (2002) New York, Columbia University Press, at 288.

As much as Freud may have wanted to expunge the pathological aura surrounding homosexuality, it was largely because of him—and his clinical description of homosexuality as an arrested psychosexual development—that the conception of minority sexual orientation and gender identities as pathologies and neuroses persisted for so long. The corollary of thinking in terms of illness was the propensity to believe that there must be a cure. This hope fuelled a fruitless search that continued for decades and is still advocated by some religious people today, although by fewer and fewer experts in psychology and medical practice. For example, the reported comments of Cardinal F.S. Aguilar, Archbishop of Pamplona can be quoted:

“In many cases it... is possible to recover and become normal with the right treatment.”²⁴

As recently as 2012, the world’s largest “ex-gay” organisation, *Exodus International*—an organisation dedicated to conversion therapies inspired by Christian ideologues in the United States of America—has seen its president, Alan Chambers, formally renounce the organisation’s long-held position that homosexuality can be cured.²⁵ Mr Chambers, who himself identifies as ex-gay and is married with two children, confessed that he still feels strong same-sex desires. This is so despite intensive therapy and religious devotion.²⁶ If sexual orientation and gender identity can ever be “cured”, it seems now to be clear that the “cure” is rarely if ever successful, virtually always incomplete, painful and frustrating for all concerned. It is a false hope and as futile as it would be to “cure” heterosexuality amongst those oriented that way.

²⁴ Reported in Spanish and international media, on 29 January 2014. The archbishop made the point plain by pointing out the fact that he had high blood pressure and was obliged to take medication for the condition.

²⁵ See the report of this in The Conversation, <<http://theconversation.com/gay-cure-renounced-by-worlds-largest-ex-gay-group-8456>>.

²⁶ See <<http://exodusinternational.org/2012/06/alan-chambers-opening-night-general-session-made-for-more/>>.

From Kinsey to the WHO Classification

It was after the publication of Alfred Kinsey's reports on human sexuality in 1948 and 1953,²⁷ that the notion of homosexuality as a mental illness came under intense critical scrutiny within the broader scientific community. It would take some time, for the last outposts of the medical model to be dismantled. For most of the twentieth century, homosexuality was regarded as deviant and pathological. However, ultimately, in 1973, the Board of Trustees of the American Psychiatric Association removed homosexuality from the catalogue of official mental disorders in the second edition of the *Diagnostic and Statistical Manual*. The manual itself explained this decision as follows:

The crucial issue in determining whether or not homosexuality should be regarded as a mental disorder is...its consequences and the definition of mental disorder. A significant proportion of homosexuals are apparently satisfied with their sexual orientation, show no significant signs of manifest psychopathology...and are able to function socially and occupationally with no impairment. If one uses the criterion of distress or disability, homosexuality is not a mental disorder. If one uses the criterion of disadvantage, it is not at all clear that homosexuality is a disadvantage in all cultures or subcultures.

In 1990 the World Health Organization (WHO) followed this move, by removing homosexuality from its *International Classification of Diseases* (ICD-10). The dangers of medicalising individual sexual identity, in the light of what science has now revealed, were explained by Professor Dennis Altman, a respected Australian social scientist:

If one accepts homosexuality as a sickness or a pathology, one is hardly likely to see legal or social restraints as oppressive, any more than one sees those suffering from tuberculosis or syphilis as oppressed when a certain degree of compulsion attends their treatment.²⁸

²⁷ A. Kinsey, et. al., *Sexual Behaviour in the Human Male* (1948) Philadelphia, Saunders; *Sexual Behaviour in the Human Female* (1953) Philadelphia, Saunders.

²⁸ D. Altman, *Coming Out in the Seventies* (1980) Ringwood, Penguin, at 116.

Contemporary research in brain science, genetics, neuroendocrinology and psychology all seems to converge towards a conclusion that sexuality in human beings is not a matter of choice. It appears to be neurobiologically determined prenatally, without parent or offspring having anything to contribute consciously. Facile theories about overbearing mothers and detached fathers have had to give way to hard scientific evidence that increasingly concludes that such suppositions are self-serving concoctions, wishful or naïve. The biochemical sciences are delivering new and dramatic insights into the sexual nature of our species. The demolition of the superstitions and prejudices of the past inevitably and properly have consequences for the law.

Of course, many observers of the debates about the “cause” or “causes” of human sexual orientation and gender identity question the utility and legitimacy of pursuing the subject at all. They argue that, if this is how human beings *are* and how they feel at peace with themselves, the rest of the world should accept the fact, mind their own business and remove their oppressive and discriminatory laws. Yet because newcomers, at least, to the puzzles presented by sexual minorities will continue to ask the question “why”, I will persist just a little longer into the labyrinth of science. We live in an age of scientific rationality. At the very least, understanding what science has to teach may settle the fears and doubts of many and divert good religious people, in particular, to a fresh examination of their beliefs, so far as these are still hostile to LGBT people.

Genes, Hormones & Prenatal Environment

Genes & Hormones

According to recent scientific research, genes and hormones both seem to play a part in the determination of sexual orientation and gender identity in the prenatal environment. To all intents and purposes, an individual’s sexual orientation or gender identity must be considered as physiologically restricted to certain options before birth. I choose these words carefully, for science does not allow us to say dogmatically that homosexuality or gender identity is *entirely* determined prenatally. Only that the genetic and hormonal

environment of the foetus limits the options in each case. In some very few cases post birth environment or experience may have played a role. But sexual orientation and gender identity are not a “lifestyle” or individual choice – at least for all but the tiniest proportion of LGBT people. A purely genetic account of sexuality would be reductionistic in the extreme. We are not, after all, dealing here with phenotypic expression of the kind involved in simple allelomorphic variation.

“Homosexuality,” “bisexuality” and “heterosexuality” are socially constructed terms with socially invested meanings and nuances. Nature *is what it is*. It is we humans who endeavor to classify, or carve it up, with names and labels that match our perceived social requirements, prejudices and preferences. It is therefore important to emphasise that, when we speak of “genes”, we should not be misled into thinking that there is one single gene (or set of genes) that constitute the entire explanation for human sexuality or gender identity. Homosexuality and transsexuality no less than heterosexuality are very likely to have multifarious markers and determinants.

At a purely genetic level, sexual orientation and gender identity are likely to be a polygenic phenomenon. There is no one “cause”, as indeed there is no one “cause” of heterosexuality. There are only complex interplays of hormones, genes and social experiences that coalesce with established statistical regularity. Certainly, we are dealing with systemic interactions, not simply mechanical “effect follows cause.”

It happens that about 3% or 4% of the human population identifies (at least to itself) as exclusively homosexual.²⁹ A larger, global survey might show this percentage to be understated. Kinsey’s reports gave currency to a figure of 10%; although he too found that exclusive life-long identification as homosexual constituted about 4% of the cohort of the United States population that he interviewed. So let us agree on an approximate half way

²⁹ S. Michaels, “The prevalence of Homosexuality in the United States” in R. P. Cabaj & T.S. Stein, eds., *Textbook of Homosexuality and Mental Health* (1996) Washington, D.C., American Psychiatric, at 43-63.

point in these figures, say 5%. This makes homosexuality “a minority but perfectly natural characteristic on the human spectrum of sexuality.”³⁰ Clearly, a figure like 4 or 5% indicates a minority. But it is by no means biologically insignificant. It is far too large to be merely a biostatistical error or anomaly. Nature gets things wrong sometimes. However, not in proportions or numbers like 5%. A true biostatistical anomaly would be less than 1% and probably closer to less than 0.1%.³¹ In any case, the fact that a trait is a minority one at 4 or 5% does not say anything about its value or moral propriety. The same can be said of hair colour, for example. ‘Red’ hair is not common amongst Anglo-Celts. It is extremely rare amongst Indians, except those who use henna dye. However, discrimination on that ground would be absurd. It would be affront to both reason and to our sense of human decency.

Left-handedness is the same. In fact, left-handedness is particularly apt as an illustration of the situation confronting homosexuals. The technical term for left-handedness is “sinistrality.” It is estimated that about 10% or 11% of the world’s population is sinistral.³² If we are asked whether people are born sinistral, or alternatively develop sinistrality in their early childhood years, we would have to give an answer similar to the one suggested in respect of homosexuality. There appears to be a strong genetic component. But heritability accounts for only some of the phenomenon, leaving the rest to be explained by hormonal, environmental and other factors.

Despite this, references in Scripture suggest that the left side is less favoured by “God and more by the Devil. Yet who would outlaw or discriminate against left-handedness? In my family, my brother Donald is left-handed. As a boy at school in Australia teachers tried to get him to switch to writing with his right hand. Ostensibly, this was done to prevent him smudging the ink used with

³⁰ J. S. Spong, *Living in Sin? A Bishop Rethinks Human Sexuality* (1988) New York, HarperCollins, at 198.

³¹ For a fascinating exploratory discussion of diversity in biological systems, see B. Bagemihl, *Biological Exuberance: Animal Homosexuality and Natural Diversity* (1999) New York, St Martin’s Press, at 244-255.

³² See the entry on “handedness” in Wikipedia at <http://en.wikipedia.org/wiki/Handedness#Genetic_factors>.

pen nibs in those far off days. When my mother intervened in protest, Donald was allowed to revert to writing in a way that was comfortable to him. But is there something about sexuality and gender identity that is more explosive and threatening than hair colour and left handedness?

The genetic-based research that exists derives mainly from the study of twins. Concordance rates for homosexuality among *monozygotic* (i.e. “identical”) twins, i.e. those with identical genetic profiles at conception, being derived from the same ovum) tend to be higher than for *dizygotic* (otherwise known as “fraternal” twins, i.e. those who are genetically distinct at conception, siblings who simply happen to be born at the same time).³³ These results suggest at least *some* genetic contribution to sexual orientation. More research is needed to confirm this. On the other hand, the genetic evidence from similar studies shows fairly conclusively that gender nonconformity and homosexuality do correlate, and (though less conclusively) that gender nonconformity traits are heritable.³⁴

Prenatal Androgenisation

Hormonal influences are also important in accounting for sexual diversity amongst humans. It appears that the amount of prenatal androgenisation that occurs *in utero*—the amount of androgen which reaches the hypothalamus from the fetal gonads (basically the gamete-producing sex organs)—may actually change the structure of the hypothalamus, which is the nodal point for much neuroendocrinal activity in the autonomic nervous system. Androgen secretion means that the hypothalamus will develop masculine sex organs and encourage typically male behaviour. The absence, or diminution, of androgen typically produces the reverse outcome. Although the studies consistent with these findings have largely been conducted in non-human animals, there is some support for their extension into human beings. Further research into these results is necessary. However, I mention them to

³³ J.M. Bailey, R.C. Pillard, “A Genetic Study of Male Sexual Orientation” (1991) *Archives of General Psychiatry* 48: 1089-1097.

³⁴ J.M. Bailey, M.P. Dunne & N.G. Martin, “Genetic and Environmental Influences on Sexual Orientation and its Correlates in an Australian Twin Sample” (2000) *Journal of Personality and Social Psychology* 78: 524-536.

emphasise the multifactorial complexity of the physiology of sexual diversity in human beings.

It is possible that “most males on a gay developmental track are not exposed to the prenatal organizational effects of androgen in the same way as those on a heterosexual developmental track.”³⁵ The accuracy of this hypothesis is not known for certain. But if it is true, it should not be taken as indicative that homosexual men have some sort of androgen “deficit.” That would be to introduce a loaded vocabulary and bias into what should be a scientific discussion concerned neutrally with a scientific question of aetiology. It could set scientists once again searching for a cure – perhaps a well-targeted androgen supplement during pregnancy, which assumes that such “naturally occurring” sexual variations must be stamped out. Whether human males “should” have more androgen, when the effects of not having a biostatistically prevalent amount of exposure leads to same-sex orientation, is not something which science can dictate. Nature does not care one way or the other whether 4 or 5% of human males have less androgen exposure prenatally than the other 96% (allowing also for bisexuality and shades of grey). With statistics at the level of 4 or 5% in nature one can fairly conclude that nature intended it to be so. If we take sides with nature at all, and argue, in effect, that nature is clearly “speaking to us” through its percentages of this or that phenomenon, telling us that this or that occurrence is “natural” or “normal,” surely we can equally side with nature when she speaks softly through somewhat smaller percentages of human beings who manifest a minority sexual orientation or gender identity.

The work of biologists and evolutionary theorists is continuing to redefine the orthodox terms of sexual selection theory and the standard Darwinian account of sexuality. Joan Roughgarden, Professor of Biological Sciences at Stanford University in the United States, commands attention and respect.³⁶ Her laboratory has reported on detailed evidence that suggest that homosexuality

³⁵ R.C. Friedman & J.I. Downey, *Sexual Orientation and Psychoanalysis* (2002) New York, Columbia University Press, at 83.

³⁶ J. Roughgarden, *Evolution's Rainbow: Diversity, Gender, and Sexuality in Nature and People* (2004, 2009), Berkeley, University of California Press.

is found in similar statistical percentages in other higher mammals when compared to its presence in human beings.³⁷

With all this new scientific information, it is no wonder that, in the end, the *Diagnostic and Statistical Manual* felt compelled to drop homosexuality as a mental disorder. Millions of people worldwide, living ordinary lives, cannot be classified as mentally ill just because they manifest a minority sexual orientation or gender identity. It is in the nature of scientific practice to revise and restate theories when they are in need of reformulation. And to discard them when they are no longer successful in explaining the best data to be accounted for. Curiously, one relevant mental illness is still found in the WHO classification having a connection with homosexuality. The symptoms of this condition manifest themselves, essentially, as internalized homophobia, or the anxieties that the patient has when his or her idealized self-image is contradicted by the direction of the patient's sexual interest. The *Diagnostic and Statistical Manual* had previously listed "ego-dystonic homosexuality" as a category of mental illness. This was removed in 1987. It now includes "sexual disorder not otherwise specified," presenting with symptoms such as persistent distress about one's own sexual orientation.

The Medical Council of India uses the WHO classification. This indicates that, for its part, the Indian medical establishment accepts the understanding that it is *guilt, emotional suffering* and *self-loathing* that is pathologically significant; not homosexuality or gender identity, as such. Self-loathing and the loathing by others because of a naturally occurring variation in the human species is something that it is within our society's powers both to help to prevent and, in due course, to eradicate.

India and a the Return to its Own Values

In the reasons of Chief Justice A.P. Shah and Justice Muralidhar in the *Naz Foundation Case*³⁸, having dealt with the meaning and operation of section

³⁷ See also an account of the earlier empirical work in J. Durden-Smith & D. de Simone, *Sex and the Brain* (1983) New York, Arbor House, at 101.

³⁸ *Naz* [2009] 4 LRC 838.

377 of the *Indian Penal Code*, the judges cited, with apparent approval, how it was that India, a predominantly non-Christian country, came to embrace criminalisation of, and hostility towards, homosexuals. How did this happen in the land of the *Kama Sutra* and of Buddhist and Hindu tolerance of sexual diversity? The judges quoted a statement by the Solicitor-General of India, responding to the Universal Periodic Review of India's treatment of GLBT minorities before the United Nations Human Rights Council:

In 1860, when we got the *Indian Penal Code* [It] brought in the concept of “sexual offences against the order of nature”. Now, in India we didn't have this concept... It was essentially a Western concept which has remained over the years. Now, homosexuality is not defined in the *Indian Penal Code* and it will be a matter of great argument whether it is “against the order of nature: In the light of developments in science, India can return to its own traditions, as the *Naz Foundation Case* permitted it to do.³⁹

India's own traditions happen to be more harmonious with the advancing discoveries of science and the supervening developments of human rights and other law since the British imposed their religious notions on local criminal laws after 1828. In Lecture III, I will address the impediments to progress in human understanding and acceptance that arise from the criminal laws that enshrine earlier appreciation of religious texts. Earlier understandings are now challenged by the lessons that science teaches us about sexual orientation and gender identity.

The same point was made by Leila Seth, returned Judge, scholar, citizen of India and mother of three sons, the eldest of whom is Vikram, a noted writer who is gay. Her major legal criticism of the *Koushal Case* is that it failed to address the Section 15 arguments under the Indian Constitution. But she adds:

³⁹ Referring to *Naz Foundation* [2009] 4 LRC 838 at 878 [8].

“Rather than following medical, biological, and psychological evidence, which shows 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.”

Here we stand at the gateway to progress. It is the gateway because, whilst the criminal laws in India and elsewhere remain unchanged, much irrational hostility and injustice will be inflicted. Injustices will follow which defy science and conflict with universal human rights. Saying this is not to question the authority of the decision of the Supreme Court of India in the *Koushal Case*⁴⁰. It is authoritative and currently states the law of India unless that law is changed either by judicial or legislative process. However, India is a free country. By its institutions it can re-express its law. The next Lecture will argue that, in the case of the IPC s 377, it should do so.

⁴⁰ Supreme Court of India, unreported, 11 December 2013.