

LECTURE IV

ANTI-DISCRIMINATION, EMPLOYMENT AND OTHER LAW

The Gateway: Lifting the Criminal Status

The effort to secure equal legal rights for LGBT people began with an assault on the most invasive incursions into their lives, namely by the sodomy laws which criminalized a key characteristic of their identity their relationships and their dignity by controlling their sexual conduct even where adult, consensual and in private. The struggle to overturn these statutes continues in many countries. They now include unexpectedly India, following the decision of the Supreme Court in 2013 in the *Koushal* appeal. In India, these laws are relics of a controlling cast of mind that existed towards sexual minorities from the time of foreign colonial rule.

It was inevitable that reformers should focus on repealing the sodomy laws first. While these laws remained in effect, even where spasmodically enforced, changes in many other aspects of life were impracticable. Any attempt at establishing a personal life, as heterosexuals would understand that notion, risked violence arrest, blackmail, prosecution and imprisonment. The outlawing of specified sexual acts did not physically affect all GLBT persons. As with heterosexual couples, the repertoire of sexual acts are as diverse and varied as those described in the *Karma Sutra* and portrayed in the carved figures and drawings in the Ajanta and Ellora caves. Yet it is difficult in some jurisdictions even to campaign for law reform whilst criminal and other prohibitory statutes stand at the gateway. Effectively LGBT people and their friends must lift the burden of this type of statute before they can make any more comprehensive legal progress. This is why the recent decision in India is so disappointing to those who see India as a modern nation protective of the rights of its diverse people.

Ultimately, the struggle for equal rights for sexual minorities draws on broad legal principles, universal concepts employed by disadvantaged and minority groups the world over in their efforts to obtain just treatment from the state, the community and fellow citizens. The jurisprudence of homosexual rights in many countries now focuses

various substantive civil rights guaranteed by the United States Constitution. In *Lawrence v. Texas* (2003),³ a decision of the United States Supreme Court, references to privacy arose within this broader context of due process. The court held that the “Petitioners’ right to liberty under the Due Process Clause gives them the full right to engage in private conduct without government intervention”.

In Canada, the *Canadian Charter of Rights and Freedoms* (1982) does not specifically include sexual orientation as a protected category in its provisions on equality before the law (Section 15). It there lists only “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁴ However, in *Andrews v. Law Society of British Columbia* (1989), the Supreme Court of Canada held that the Section 15 protections were not limited to the enumerated grounds. It declared that “the grounds of discrimination enumerated in s. 15(1) were not exhaustive. Grounds analogous to those enumerated were also covered. ...”⁵ *The Andrews Case* dealt with discrimination on the basis of citizenship status (a non-citizen resident wished to practise law in British Columbia). However, in *Egan v. Canada* (1995), the “analogous grounds” doctrine was quickly extended to LGBT Canadians when the Supreme Court ruled that “sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.”⁶

The Constitution of India, adopted in 1950, likewise does not include specific provisions relating to sexual orientation or gender identity. However it contains a highly detailed enumeration of civil rights, including broad guarantees of “equality before the law” and the “equal protection of the laws” (Sec. 14). It also provides that “No person shall be deprived of his life or personal liberty except according to procedure established by law”

³ *Lawrence v. Texas*. 539 US 558 (2003). <http://www.law.cornell.edu/supct/html/02-102.ZS.html>

⁴ *Constitution Act, 1982, Part I: Canadian Charter of Rights and Freedoms*. 1982.

⁵ *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

<http://www.canlii.org/en/ca/scc/doc/1989/1989canlii2/1989canlii2.html>

⁶ *Egan v. Canada*, [1995] 2 SCR 513. <http://www.canlii.org/en/ca/scc/doc/1995/1995canlii98/1995canlii98.html>

(Sec. 21). The Constitution also prohibits discrimination on the grounds of “sex” (Sec. 15)⁷.

In *Naz Foundation v. Union of India* (2009),⁸ the High Court of Delhi invalidated in part Section 377 of the *Indian Penal Code* (1861), which constituted India’s sodomy law. The Court ruled that Section 377 violated the equality rights of LGBT Indians, and also amounted to sex discrimination as prohibited by Article 15. The Court also invoked Article 21, reasoning that section 377 denied LGBT Indians the right to form personal relationships, whereas the constitutional right to privacy “allows persons to develop human relations without interference from the outside community or from the State.” The Supreme Court of India in *Koushal* reversed these conclusions so that, for the time being, the Indian criminal provisions are recognised as valid and effective. This decision disappointed LGBT people in India and beyond. However, it will also discourage advocates for sexual minorities in other countries, many of which, in colonial times, received provisions equivalent to section 377 IPC that timid or indifferent legislatures have been unwilling to repeal.

For example, a Botswana gay rights group sued that country’s government, challenging its refusal to register their organization under Botswana’s *Societies Act*, claiming that the refusal violated their constitutional rights to equal protection of the law and freedom of association⁹. In Belize, a local group has filed a suit in the Supreme Court of Judicature challenging the validity of that country’s sodomy laws (Section 53 of the local penal code)¹⁰. In Jamaica, activists challenged local sodomy laws before the Inter-American Commission on Human Rights, which has non-binding jurisdiction over the

⁷ *Constitution of India*. 1950. Ministry of Law and Justice of India. <http://lawmin.nic.in/coi/coiason29july08.pdf>

⁸ *Naz Foundation v. Union of India and Ors*, [2009] 4LRC 838 (Delhi High Court)

⁹ Ontebetse, Khonani. 2013. “Gays enlist Dow to sue govt for non-recognition.” Gaborone, Bostwana: *Sunday Standard*, April 7, 2013. <http://www.sundaystandard.info/article.php?NewsID=16588&GroupID=1>

¹⁰ Bowcott, Owen. 2013. “Belize gay rights activist in court battle to end homophobic colonial era laws. The Guardian, May 2, 2013 <http://www.theguardian.com/world/2013/may/02/belize-gay-rights-supreme-court>

law in that island nation¹¹. Other sodomy laws survive – Article 377 remains in effect, in identical form, in Pakistan,¹² Bangladesh,¹³ Malaysia and Singapore.

Specific Constitutional Guarantees

The post-Apartheid South African Constitution, adopted in 1996, was the first specifically to forbid discrimination on the grounds of “sexual orientation”. Chapter 2, Section 9 (3) provides that “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ... sexual orientation.” Section 9(4) requires national legislation to give effect to the protections afforded in the preceding clause¹⁴. The language in Chapter 2 reflected a nearly identical clause in South Africa’s interim constitution that had been adopted in 1993¹⁵. Adoption of that provision in the new Constitution has been supported by the South African leader Nelson Mandela. He supported the reversal of inequality against LGBT citizens, having himself tasted the bitter dregs of laws that imposed inequality of some citizens on the grounds of immutable features of their nature.

The Constitutional Court of South Africa, itself a product of the post-Apartheid constitutions, has ruled on the applicability of Section 9 to LGBT citizens on a number of occasions. For example, in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*¹⁶, the Court concluded that the common-law offence of sodomy was incompatible with the constitutional provision. It found that there was no justification for treating sex between two consenting males differently from sexual relations between any other two consenting adults, which were not criminalized by the law.

¹¹ Bowcott, Owen and Maya Wolfe-Robinson. 2012. “Gay Jamaicans launch legal action over island’s homophobic laws.” *The Guardian*, October 26, 2012. <http://www.theguardian.com/world/2012/oct/26/jamaica-gay-rights-homophobic-laws?INTCMP=SRCH&guni=Article:in%20body%20link>

¹² *Pakistan Penal Code*. 1861. <http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html>

¹³ *The Penal Code, 1860*. 1860. https://www.unodc.org/tldb/pdf/Bangladesh_Penal_Code_1860_Full_text.pdf

¹⁴ *The Constitution of the Republic of South Africa*, 4th ed. 2006. Cape Town: Juta & Co

¹⁵ *Constitution of the Republic of South Africa Act 200 of 1993*. South Africa Government Information. <http://www.info.gov.za/documents/constitution/93cons.htm#SECTION8>

¹⁶ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)

Other recently adopted national constitutions contain explicit protections for LGBT citizens. Thus, Section 38 (2) of the 1997 Constitution of Fiji included ‘sexual orientation’ in its equality provisions. It also established a right of “personal privacy” (Section 37).¹⁷ In 2005, the High Court of Fiji invoked these provisions. It struck down that country’s colonial-era sodomy laws (found in Articles 175 and 177 of the *Penal Code*)¹⁸. The 1997 Constitution was abrogated in 2009 (Fiji has been under military rule since December 2006). However, the Attorney-General of Fiji stated in April 2013 that the foreshadowed new constitution of the Fiji Islands would not permit discrimination on the grounds of ‘sexual preference’.¹⁹

Ecuador adopted a new national constitution in 2008. It states, in Article 11, that “No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, *gender identity*, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, *sexual orientation*, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights.”²⁰

The 2009 Constitution of Bolivia likewise classifies “sexual orientation” and “gender identity” as protected classes (Art. 14).²¹ Both constitutions bar same-sex marriage, although Ecuador’s Constitution provides for civil unions. The 2008 Constitution of

¹⁷ *Constitution Amendment Act 1997* (Constitution of Fiji). International Constitutional Law Project. <http://www.servat.unibe.ch/icl/fj00000.html>

¹⁸ *McCoskar v The State* [2005] FJHC 500. <http://www.pacii.org/fj/cases/FJHC/2005/500.html>

¹⁹ Repeka Nasiko. 2013. “Hate Speech Not Allowed.” *The Fiji Times*, April 17, 2013. <http://www.fjtimes.com/story.aspx?id=231254>

²⁰ *Constitution of Ecuador*. 2008. (English translation.) *Political Database of the Americas*. Washington, D.C.: University of Georgetown. <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>

²¹ *Constitution of Bolivia*. 2009. *Political Database of the Americas*. Washington, D.C.: University of Georgetown. <http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia09.html>

Kosovo, part of the former Yugoslavia, also lists “sexual orientation” as a protected constitutional category (Article 24)²².

This said, other recent national constitutions have sometimes deliberately excluded protections for LGBT persons. For example Article XV of the 2012 Constitution of Hungary excludes “sexual orientation” and “gender identity” from the list of protected classes. Article L(1) further establishes that “Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision and the family as the basis of the nation’s survival”.²³

The 2010 Constitution of Kenya contains no reference to “sexual orientation”, while similarly banning same-sex marriage. However, it does include language which might be interpreted favourably in future jurisprudence. For example, section 28 proclaims that “Every person has inherent dignity and the right to have that dignity respected and protected”²⁴. Dignity is a concept that is contained in the opening preambular statement of the *Universal Declaration of Human Rights* (1948). It is sometimes postulated as the basic foundation that upholds the right of every person to equal treatment by, and non-discrimination in, the law.

General legal principles have sometimes been employed to read LGBT protections even into recently drafted constitutions that lack them in express terms. Thus Nepal has recently passed through a prolonged period of provisional government and constitutional debate since the overthrow of the country’s monarchy in 2006. In a December 2007 decision, the Supreme Court of Nepal cited the fundamental rights granted under Article 12 of the country’s Interim Constitution and “international human rights treaties in which Nepal is a party.” It stated that these fundamental rights could not be denied to LGBTI persons, who, despite constituting a “third sex,” were still

²² *Constitution of the Republic of Kosovo*. 2008. Office of the Prime Minister of the Republic of Kosovo. <http://www.kryeministri-ks.net/repository/docs/ConstitutionIKosovo.pdf>

²³ *Constitution of Hungary*. 2012. http://www.kormany.hu/download/2/ab/30000/Alap_angol.pdf

²⁴ *Constitution of Kenya*. 2010.

fundamentally Nepali citizens²⁵. The court cited Article 12's provisions for "a liberty of enjoying own identity irrespective of one's sex" as broad enough to extend to the protection of LGBT citizens. The reasons evidenced a resonance with the decision of the Delhi High Court in the *Naz Foundation Case*. However, such reasoning has not, so far, attracted the approval of the Supreme Court of India. Some passages in the reasoning of the Supreme Court of India in the *Koushal Case* appear sceptical; if not hostile, towards the LGBT minority.

Regional Law: The European Courts

Although there is no regional instrument of human rights law for India or Australia, either for Asia or Oceania, most parts of the world today – in Europe, the Americas and Africa – have regional commissions and courts to investigate human rights abuses and sometimes to decide contested cases including about LGBT rights. The European Court of Human Rights has played a key role in extending protections to LGBT citizens. It overturned sodomy laws in Northern Ireland in *Dudgeon v. United Kingdom* (1981)²⁶ and in Ireland in *Norris v. Ireland* (1988)²⁷. In both cases, it relied on Article 8 of the European Convention of Human Rights, which deals with privacy. A decade later, the ECtHR struck down the United Kingdom's ban on gays and lesbians serving in the armed forces (*Smith and Grady v. United Kingdom* (1999)).²⁸ There have been other earlier and later cases that concern equality of rights for LGTB people in Europe.

The ECtHR is an organ of the Council of Europe, not of the European Union (EU). EU law has not always protected LGBT persons. In *Grant v. South West Trains Ltd* (1998)²⁹, the European Court of Justice (ECJ) ruled that the Union "has not as yet adopted rules providing" for the equal treatment of same-sex and opposite-sex de facto relationships. Ms Grant had sued her employer because she was unable to obtain

²⁵ Blue Diamond Society. 2007 "Supreme Court Decision – Summary Note." <http://www.bds.org.np/decision.html>

²⁶ (1982) 4 HRR 149; referred to in *Naz Foundation* [2009] 4 LRC 838 at 865 [53].

²⁷ (1991) 13 EHRR 186 referred to in *Naz Foundation* [2009] 4 LRC 838 at 865 [53] See also the reference to *Modinos v Cyprus* (1994) 16 EHRR 485, *ibid* 866 [14].

²⁸ (1999) 29 EHRR 493.

²⁹ C-249/96 - *Grant v South-West Trains Ltd* [1998] 1 CR 449 [35]. Contrast *Fitzpatrick v Sterling Housing Association Ltd* [2001] AC 27 at 34-40 (HL). See Lad Lester of Herne Hill, Lad Pannick and J Herberg (eds.) *Human Rights Law and Practice*. LexisNexis, London, 2009, 401 [4.8.48].

concessionary train tickets for her female partner, while a male partner would have been able to do so as would a male employee in respect of a female spouse or partner. The Court ruled that the discrimination which Ms Grant faced was not “sex discrimination” covered by Article 119 of the Treaty establishing the European Community. The judges treated the case as dealing only with the recognition of de facto relationships, a subject which was not within the EU’s competence. In *P v. S. and Cornwall County Council* The European Court of Justice (ECJ) later ruled that gender identity was protected under provisions against sex discrimination, as provided for by Article 1(1) of the Council Directive 76/207/EEC³⁰. The narrow view adopted concerning the ambit of anti-discrimination law as it affected LGBT people has moved on in Europe since the decision in *Grant*.

The Treaty on the Functioning of the European Union (the *Lisbon Treaty*) commits the European Union to upholding a *Charter of Fundamental Rights*, adopted in 2000. Article 21 of that Charter declares that “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited”³¹ Accordingly, an express provision addressed to prohibiting discrimination on the ground of sexual orientation, now obviates the need, in the European Union, to conceptualize discrimination arising substantially on the basis of *sexuality* as discrimination on the ground of *sex*.³²

Time does not permit an examination of the jurisprudence of the Inter American Court of Human Rights and the African Court of Human and Peoples Rights. This will be referred to later in these Lectures. Enough has been said to show that, in transnational as well as national jurisprudence, many judicial decisions have been reached in the past 20 years that advance the rights of LGTI citizens and their partners and secure equality for them in respect of a variety of legal entitlements.

³⁰ Gabriel N. Toggenburg, 2008. “‘LGBT’ go Luxembourg: on the stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice.” *European Law Reporter*, 5/2008.

³¹ Evelyn Ellis and Philippa Watson. 2012. *EU Anti-Discrimination Law*. Oxford: Oxford University Press

³² See *Toonen v Australia*, decision of the UNHRC infra and *Naz Foundation* [2009] 4 LRC 838 at 884 [99].

Statutory Enactments

Australian Legislation

In addition to judicial decisions based on constitutional, legislative and treaty provisions, many jurisdictions have begun to enact protective legislation protective of LGBT people. Thus, in the Australian, State of New South Wales, the *Anti-Discrimination Act 1977* (NSW), as amended in 1982³³, prohibits discrimination on the grounds of homosexuality or transgender status in employment, provision of goods and services, education and accommodation³⁴. Other Australian states and territories have enacted similar legislation (for example, the *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* in Victoria, and the *Anti-Discrimination Act 1998* in Tasmania).

Federal anti-discrimination law in Australia has also developed during the past 20 years. In response to the decision of the Human Rights Committee of the United Nations in the *Toonen* case, the Australian Federal Parliament enacted the *Human Rights (Sexual Conduct) Act 1994* (Aust.). This provided a federal statutory basis for a right of privacy in sexual relations, and effectively nullified the last remaining Australian state sodomy law (in Tasmania). The Keating Labor Government in Australia framed the law as protecting a universal right of sexual privacy for all people, rather than the specific rights of gays to pursue what were described as “private choices.”³⁵ This cautious approach may have seemed offensive to some LGBT citizens. However, it succeeded in attracting support for the law from conservative members of the Opposition parties. In the result, the law was enacted by an overwhelming vote of the Australian Federal Parliament.

Prior to 2013, Australian federal law did not have an equivalent to the Anti-discrimination statutes in force in most Australian states. Australia has a national human

³³ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*. Oxford: Oxford University Press, 1990.

³⁴ *Anti-Discrimination Act 1977* (NSW). Australasian Legal Information Institute. http://www.austlii.edu.au/au/legis/nsw/consol_act/aa1977204/

³⁵ Carl F. Stychin, 1998 *A Nation By Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights*. Philadelphia: Temple University Press.

rights commission, established by a 1986 statute. However, although from 1989 the Commission's charter listed "sexual preference" as a protected category³⁶, there was no specific statutory protection for LGBT people as such. In 2007, the Australian Human Rights and Equal Opportunities Commission produced a comprehensive report describing 58 areas where same-sex de facto couples suffered legal discrimination when compared with heterosexual couples. In 2008, the Australian Federal Parliament enacted a package of laws requiring the equal treatment of same-sex de facto couples. This law included the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008 (Aust.)*.³⁷ That statute extended equal rights in pensions and similar payments to LGBT couples. The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 (Aust.)*³⁸, provided equal treatment for de facto same-sex couples in dozens of other areas of Australian Federal law.

The *Fair Work Act 2009 (Aust.)*³⁹, is a federal statute in Australia that regulates industrial relations, wages and conditions in employment. It was expanded to specifically protect employees, jobseekers and contractors from "adverse action" as a result of "sexual preference." These protections were confined to employment and related matters. They did not apply to discrimination more generally. However in 2013 a comprehensive federal law was enacted in Australia covering discrimination generally on the grounds of sexual orientation, gender identity, and intersex status. This Act amended the existing *Sex Discrimination Act 1984 (Aust.)*. The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Aust.)* became law in mid-2013⁴⁰. By this law, Australia became the first nation to extend

³⁶ Australian Human Rights Commission. "Federal Discrimination Law." <http://www.humanrights.gov.au/federal-discrimination-law-chapter-1-introduction#fnB7>

³⁷ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008 (Aust.)*. <http://www.comlaw.gov.au/Details/C2008A00134>

³⁸ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 (Aust.)* <http://www.comlaw.gov.au/Details/C2008B00213>

³⁹ ComLaw. 2013. *Fair Work Act 2009*. Commonwealth of Australia. <http://www.comlaw.gov.au/Details/C2013C00391>

⁴⁰ The House of Representatives of the Parliament of Australia. 2013. *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Aust): Explanatory Memorandum*.

general legal protections to intersex persons. Perhaps drawing from the *Toonen* precedent, the explanatory memorandum,⁴¹ supporting the Bill, drew upon international human rights law as the inspiration for the 2013 Act. It cited the “equality and anti-discrimination provisions” of the ICCPR (Articles 2 and 26) and the *International Covenant on Economic, Social and Cultural Rights* (Article 2(2)) in support of the policy expressed in the new legislation.

United States and United Kingdom Legislation

The 2013 Australian Act just mentioned covers the areas of employment and superannuation (private pensions); commission agents; contract workers; [business] partnerships; qualifying bodies; registered organizations under the *Fair Work Act*; employment agencies; education; goods, services and facilities; accommodation; land; clubs; and the administration of Federal laws and programs. This broad operation contrasts with the much narrower focus of the long-proposed and long-frustrated *Employment Non-Discrimination Act* (ENDA) law in the United States Congress. The Bill for that Act deals only with employers, training programs and labor organizations in the United States⁴². The current Bill in the United States House of Representatives covers “sexual orientation” and “gender identity”, but not intersex persons. Previous proposals sometimes excluded “gender identity” as a protected category.

A number of states of the United States and local governments have adopted laws protecting gays and lesbians from discrimination and a smaller number (eg New York State) have laws protecting the rights of transgender persons. However, ENDA has been blocked in the United States Congress since the mid-1990s by opposition from members of the Republican Party. The recent change of Federal government in Australia may also raise the possibility of the reopening of some of the federal legislation enacted in Australia in 2013, before the election of the conservative parties in the September 2013. Thus, a possible amendment to restore an exemption from the

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5026_em_s_1fcd9245-33ff-4b3a-81b9-7fdc7eb91b9b%22

⁴¹ Ibid.

⁴² *Employment Non-Discrimination Act of 2013* (US). H.R. 1755. <http://thomas.loc.gov/cgi-bin/query/F?c113:1:./temp/~c113sMIYv4:e8647>:

non-discrimination requirement previously applicable to religious organisations providing aged care facilities to LGBT people has been raised.

The United Kingdom *Equality Act* 2010 (UK)⁴³ (which does not apply in Northern Ireland) lists “sexual orientation” and “gender reassignment” (not gender identity or intersex status) as “protected characteristics.” The *Equality Act* applies to employment, premises, public facilities, education, association and occupational pension schemes.

New Zealand Law

The New Zealand *Human Rights Act* 1993 (NZ) also includes “sexual orientation” as a prohibited reason for discrimination (Section 21 (1) (m)). The Act covers employment, the provision of goods and services, access to public amenities, education, land, housing, training, professional associations and pensions⁴⁴. The *Human Rights Act* does not explicitly cover “gender identity”. However, the Acting Solicitor-General of New Zealand issued an opinion in 2006 stating that the government considered transgender persons to be protected under the *Human Rights Act’s* prohibition on sex discrimination. In support, he drew on the United Kingdom, European and Canadian precedents⁴⁵. The New Zealand Human Rights Commission has also expressed its view that “gender identity” is a protected category in New Zealand law⁴⁶. The treatment of “sexual orientation” and “gender identity” or “intersex status”) as falling under the prohibition of discrimination on the grounds of “sex” fits comfortably with the reasoning of the United Nations Human Rights Committee in the *Toonen Case* and with the reasoning of the Delhi High Court in *Naz Foundation*. Inferentially, the same approach was not favoured by the Supreme Court of India in the *Koushal* appeal.

⁴³ *Equality Act 2010*. 2010 (UK) c. 15. <http://www.legislation.gov.uk/ukpga/2010/15/contents>

⁴⁴ *New Zealand Human Rights Act 1993*(NZ).
<http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html>

⁴⁵ Gwyn, Cheryl. 2006. *Human Rights (Gender Identity) Amendment Bill*. ATT 395/9. Wellington, New Zealand: Crown Law Office. <http://www.beehive.govt.nz/Documents/Files/SG%20Opinion%2020Aug%202006.pdf>

⁴⁶ New Zealand Human Rights Commission. 2013. “Sexual Orientation and Gender Identity.”
<http://www.hrc.co.nz/human-rights-environment/sexual-orientation-and-gender-identity>

Conclusion

The march towards equality in the law for LGBT people has not yet become a global one. Nevertheless, in many countries it has gathered pace. It is part of a wider project to extend the promises of liberal democracy, and the rule of law, to many minority groups that share basic features of indelible nature. This approach proceeds from the same legal premises of equality before the law, the right to freedom of association and privacy rights that all persons, of whatever race, gender, creed, sexual orientation, or gender identity rely upon. The protection of liberty and the pursuit of justice are common obligations of judges and lawyers in every country.

If I have not included in this lecture reference to Indian legislation to protect LGBT people, it is because such legislation is, so far, difficult or impossible to find, at least in respect of express provisions. Indian legislatures, federal and state, have been extremely reticent to enter upon this field to protect the basic rights to equality of all citizens, including LGBT citizens. It is when legislatures fail vulnerable minorities that judges, courts and lawyers in modern democracies have their own distinctive constitutional role to play. The fact that a discriminatory law may not always be enforced or that the legislature could, within its powers, remove the discrimination, is not normally cited as a reason as to why judges and the courts should fail to discharge their own separate and important constitutional responsibilities.

In the *Report of the Committee on Amendments to Criminal Law* (the Verma Committee), written in part in response to the shocking case of gang rape in Delhi in 2012, wise and far reaching recommendations were offered:⁴⁷

... [O]ur society has the need to recognise different sexual orientations [as] a human reality. In addition to homosexuality, bisexuality and lesbianism, there also exists the transgender community. In view of the lack of scientific understanding of different

⁴⁷ *Report of the Committee on Amendments to Criminal Law* (Chairman, Justice J.S. Verma), 2012, pp 51, 55, 406. (2012, New Delhi).

variations of orientation, even advanced societies have had to first declassify 'homosexuality' from being a mental disorder and now it is understood as a... development occasioned by evolution, partial conditioning and... genetic reasons. Further, we are clear that article 15(c) of the Constitution of India uses the word "sex" as including sexual orientation... The Constitution enables change of beliefs, greater understanding and is also an equally guaranteed instrument to secure the rights of sexually despised minorities. ... Children need to be able to access informed, non-prejudiced sources on sexuality... collaborating with LGBT activists is a beginning to understanding different sexuality experiences.

The Verma Committee was chaired by the Hon. J.S. Verma, a greatly respected Justice, and later Chief Justice, of the Supreme Court of India. It also included a past Solicitor-General of India, Senior Advocate Gopal Subramaniam. It embraced the notion that the constitutional prohibition in India on discrimination on the grounds of "sex" extended to a prohibition on discrimination on grounds of sexual orientation (and by inference, gender identity). It perceived the Constitution of India as a source of protection for the rights of "sexually despised minorities", separate from, and additional to, any that legislatures might enact for those in need. Legislatures, as the Verma Committee knew, sometimes fails to safeguard the rights of such minorities.

This was the version of the law and the Constitution expressed in the Delhi High Court in the *Naz Foundation Case*. It was not, however the view adopted by the Supreme Court of India in its decision in *Koushal*. Until the Supreme Court of India changes its mind or until the legislatures of India reverse the timidity and indifference that they have shown in removing the barriers to progress and equality presented by section 377 of the IPC, the gateway to progress is effectively closed and barred. The purpose of this lecture has been to show that much is happening in other countries in the many nooks and crannies of the law governing LGBT people. One day the Supreme Court of India will catch up. But when will that be?

