LECTURE V
RELATIONSHIPS RECOGNITION

The Right to Marry

By virtue of the recent decision of the Supreme Court of India in *Koushal v Naz Foundation*[1], India is a long way from affording basic legal recognition to the long-term personal relationships of its LGBT population. If the sexual acts of that population, even when private, and between consenting adults, are treated as seriously criminal in the law and liable to persecution, it may seem pointless, and even absurdly academic, to explore what is happening on this topic in other countries.

However, in this Fifth Lecture, I will demonstrate that legal developments on this subject are occurring in many countries at a speed that only twenty years ago, would have been regarded as unthinkable. It is therefore appropriate for lawyers to inform themselves of what is happening elsewhere. It is the lesson of progress in all matters involving formerly despised minorities, that knowledge, familiarly and understanding are the best antidotes to prejudice, hostility and animosity. That is the spirit in which I approach the subject of the legal recognition of the personal relationships of LGBT people – an idea that will one day be realised in India.

The freedom to form intimate personal and sexual relationships and to confirm them by marriage, usually celebrated in a public way before an official designated by the State, has long been recognized as one of the important rights essential to the pursuit of happiness by most people. This was the view of the United States Supreme Court in 1967 when it struck down state laws in that country that forbade the marriage of people of different races[2]. In doing so, the Supreme Court required the State of Virginia to recognize the marriage of Richard and Mildred Loving, a white man and a black woman. Theirs was a union that, to many Americans at the time, was unnatural,

[1] *Suresh Kumar Koushal, Naz Foundation and Ors* (unreported, Supreme Court of India, 11 December 2013, Civil Appeal, 15436 of 2009)
[2] *Loving v Virginia* 388 US 1 (1967).

outrageous and contrary to religious understanding. Legal recognition of same-sex relationships is seen by many around the world today as similarly unacceptable and objectionable.

As a matter of history, same-sex unions have plenty of precedents. Reflecting an apparent acceptance of same-sex relations, there are noted examples dating back to Roman times. One was the marriage of the Roman Emperor Nero to Sporus, a male, in a public ceremony celebrated amidst extravagant festivities in Rome[3]. I realize that Nero's personal life is not necessarily the best recommendation that can be offered for consideration of relationship recognition for sexual minorities in the contemporary world. Afterall, many romans held him responsible for the Great Fire that destroyed most of Rome in 64 A.D. However, at least his marriage shows that the facility was available long ago and to people in prominent positions, to whom no shame appears to have attached. And it was apparently accepted by society without demur.

Other examples of same-sex unions exist in other societies, right up to the present day. I will not dwell on these, but instead I will focus on the evolution of modern laws recognizing same-sex relationships, and on their implications for a modern society and its laws.

A Wave of Relationship Recognition Laws

At the start of the twenty first century in 2001, not one jurisdiction in the world recognized same-sex marriage. Yet just thirteen years later, same-sex marriage has been legalised in eighteen countries, and in many sub national jurisdictions. This number is growing every year. In 2013 alone, no fewer than five countries enacted same-sex marriage laws: Brazil, France, New Zealand, Uruguay and England and Wales (the UK law will come into effect in 2014). In the United States, the Supreme Court in 2013 opened the door to federal recognition of same-sex marriage. It declined to disturb a Californian federal District Court ruling that a state statutory ban on same-sex marriage was unconstitutional. This made California the thirteenth state in the US to

[3] Suetonius, *Nero* 28; Dio Cassius, *Epitome* 62.28

recognize same-sex marriage. Just ten years earlier, not a single state of the United States had done so. In the first weeks of 2014, Scotland became the latest country to vote in favour of providing the facility by overwhelming vote in the Scottish Assembly. In other jurisdictions, the issue is working its way through legislatures and courts.

Given the generally slow pace as which legal change on such controversial topics typically occurs, the development is extraordinary for what it says not only on this topic but concerning the power of ideas and values in the contemporary global community. European countries drove change at first. However, much recent momentum has come from other parts of the globe. Same-sex marriage is legal in one country in Africa (South Africa); in North America, South America, Europe, and Australasia (New Zealand). Asia may soon witness change, with legislation pending in India's neighbour Nepal and, reportedly, under consideration in Thailand and Vietnam.

It is also worth noting that legislation to permit same-sex marriage has been enacted not only in legally secular societies, (such as Canada and Sweden), but also by traditionally religious countries, such as Spain, Portugal, Brazil and Uruguay as well as in two sub-national jurisdictions of Mexico. Poland is shortly to consider legislation for civil unions for LGBT people. Even Ireland witnessed a unanimous legislature endorsement of civil unions by the Dáil in 2011. Ireland is to conduct a referendum in 2015, thought to be necessary to extend this right to "marriage" between same-sex couples.

An even larger number of jurisdictions have legislated to recognize same-sex relationships in ways other than marriage. These relationships have been called variously, "civil unions", "registered partnerships", "domestic partnerships", "registered relationships" and other terms. They represent an attempt by the state to recognise same-sex relationships, without opening to same-sex couples the traditional civil status ("marriage") that already exists in the law for the purpose of recognizing and upholding long term (heterosexual) relationships.

Civil Partnership Laws – The First Wave

How did this extraordinary legislative movement come about? In 1989, a few weeks before the fall of the Berlin Wall, Denmark began an "opening up" process. On 1 October 1989, the modern world's first same-sex union law came into force. The 'registered partnerships' that the Danish law introduced conferred on its participants virtually all the legal and financial rights and obligations of marriage.

This legislation, like other civil union legislation, was born of a desire to ensure that LGBT citizens were in respect of their civil rights not disadvantaged by comparison with heterosexual citizens. Civil unions were predicated on the basis of equal access by all citizens (or in some case permanent residents) to the rights and institutions of the civil law.

Other countries, such as France, the Netherlands and Germany quickly followed Denmark with laws that sought to ensure that LGBT citizens could formally register their partnerships, and thus access various legal benefits and obligations offered to all other citizens. In Germany, the *Life Partnership Act* of 2001 sought to extend the majority of the rights of married couples to same-sex couples. In a number of rulings, the Federal Constitutional Court of Germany has extended the applications of this Act.

This wave of law-making, happening at much the same time in so many countries on different continents, has been driven in part by the rapid growth in the number of people prepared to 'come out' as a member of one of the sexual minorities. Estimates suggest that somewhere between 2 and 10 per cent of any adult population in every country are LGBT identifying, probably about 4-5 percent exclusively so life-long[4].

Of course, the number of people who are open about their sexuality is typically lower than this, reflecting the varying levels of societal acceptance of

[4] An average of several estimates for the US indicates that 3.8% of the population identify as gay. http://articles.washingtonpost.com/2011-04-08/opinions/35230940_1_gay-community-gay-activists-lgbt-people. Of course, some people who are LBGTI do not so identify for a multitude of reasons.

homosexuality and hostility toward LGBT people. This varies by country, and by generation, as homosexuality becomes increasingly accepted and understood. In Australia, the national census reveals that same-sex relationships are sixteen times more prevalent among young adults than those over 65.[5] Around the world, we have seen an openly lesbian Prime Minister (Icelandic Prime Minister Johanna Siguroardottir). Also gay Prime Ministers of Belgium and Luxembourg. And the sister of the Australian Prime Minister (the Hon. Tony Abbott), who opposes marriage equality actively supports marriage equality with her partner and they have expressed a desire for marriage themselves. An international cricket hero (the former English wicket keeper Steve Davis) and of course numerous other public figures, including well-known Indian author Vikram Seth and the Australian and United States gold medalists in Olympic diving –Greg Lagounis (1984, 1988) and Matthew Mitcham (2008) [6] have been open about their sexuality.

As recently as 2000, these changes were scarcely imaginable. Gay relationships were viewed by many as furtive and shameful. Which in November 1999, France introduced a *Pacte civil de solidarité* in order to extend 'couple rights' to homosexuals, this arrangement was also open to opposite-sex couples. They soon overtook the number of same-sex couples entering into such unions[7]. This law passed with relatively little controversy in France. Then, in 2013, France moved to legislate to introduce 'gay marriage'. This brought virtually no additional legal benefits that did not already exist for same-sex couples, beyond the right to use the word 'marriage'. From the perspective of substantive LGBT rights, it was a relatively modest extension. Yet it caused much controversy in France. Protests involving hundreds of

[5] Australian Bureau of Statistics (2012) Same-sex Couple Families ABS 2071.0. Young adults are defined as 15-24 years.
[6] Greg Louganis, winner of gold medals in consecutive Olympic Games, repeatedly declared that the policy of "Don't ask, Don't tell" was unconstitutional in the United States. He announced his engagement to his partner Johnny Chaillot in June 2013 and they were married in October 2013.
[7] Indeed, by 2012, 94% of civil solidarity pacts were between opposite-sex couples http://www.liberation.fr/societe/2012/07/18/il-n-y-a-pas-de-mariage-homosexuel-il-y-a-un-mariage-pour-tous_Austr
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thousands of anti-gay marriage protestors assembled in the streets. Some demonstrations had to be broken up by tear gas used by riot police.[8]

A somewhat similar course of events occurred in the United Kingdom. The *Civil Partnership Act* 2004 (UK), which granted same-sex couples the same rights and responsibilities as marriage, had been passed with relative ease during the Labor Government, led by the Rt. Hon. Tony Blair. However, when in 2013 the Conservative Government led by Rt. Hon. David Cameron sought to 'upgrade' the civil union legislation by proposing a *Marriage (Same Sex Couples) Bill* 2013 (UK), to allow the union to be called a "marriage", there was vocal opposition. The Government faced a backbench revolt. However, eventually the Bill was quite easily passed in both chambers of the United Kingdom Parliament, with cross party support. It becomes law in 2014.

Why did this arguably minor semantic alteration cause such turmoil in Britain and France (but less elsewhere)? In my opinion this was probably because the concept of a same-sex marriage is not viewed simply as an extension of a civil union. The status of each relationship is distinct, both in its appeal and implications. Marriage commonly appeals to different motivations, including amongst those who argue in favour of gay relationship laws.

Legal recognition of relationships was not a priority for the early pioneers of equal rights for LGBT people. Other issues such as decriminalization of sexual acts and combating harassment and discrimination having economic consequences were more pressing priorities. Those who identified as 'homosexual' did not necessarily seek social acceptance. Nor did they necessarily want to be absorbed into the mainstream. Recognition of their relationships by the government and society was not urgent, if desired at all. Even today many older gay people, at least in Australia, remain ambivalent about the prospect. Instead, in the matter of relationship rights, LGBT people fought for equal rights, such as visitation rights to their partners in hospitals, or equal treatment in relation to deceased estates or pension benefits.

[8] Police tear-gas anti-gay marriage protesters in Paris *Daily Telegraph, 25 March 2013*

These rights have largely been won in many Western countries, either in conjunction with, or separately from civil unions. However, this has not satisfied the new wave of younger LGBT advocates of equality and their supporters. They are now demanding the right for their long term personal relationships to be formalized and to be referred to, and recognised as, “marriages”. Their motivations are often different from those who had earlier advocated civil unions.

Marriage – The Second Wave

The opening up of “marriage” to same sex couples does not involve a demand for recognition of the special circumstances of homosexuals, as their predecessors had done. Quite the opposite. They are fighting to rejoin the mainstream and to be accepted into their society’s existing institutions. The drive for homosexual citizens to embrace the principles of commitment, loyalty and fidelity through marriage is essentially a conservative one. The British Prime Minster David Cameron recognized this when he remarked: “I don’t support gay marriage in spite of being a Conservative, I support it because I am a Conservative”. Not all avowedly conservative politicians view the issue of same sex marriage this way. The new Prime Minister of Australia, who is socially conservative, is opposed to any such change. Such is his opposition that he has not, to this time, even permitted a free vote (according to conscience) or proposed legislation which has been common in Australian Legislatures in the past on such issues.

The issue remains a divisive one in many countries. Civil partnerships require only that a society recognise the existence in fact of sexual minorities who will form personal relationships. They create a simple legislative instrument to afford them ‘equal protection’ under the law. Marriage is different. It means the acceptance by society of the legitimacy of same-sex relationships. In effect, it involves the invitation of homosexuals into one of society’s most meaningful emotionally-charged institutions of society and one which, for some married people, involves religious or sacramental qualities which they are unwilling to share with their LGBT fellow citizens. This unwillingness

stems, in the case of some religious people, from a conclusion, traced to religious scripture, that homosexual acts and those who engage in them, are an "abomination" in the eye of God so that they are not worthy to enjoy a "God-given" relationship, basically meant to encourage procreation and stable nuclear families.[9]

Today's LGBT activists in many countries of Europe, the Americas and Australia, commonly seek to use marriage legislation to advocate the normality of homosexuality. They see being excluded from one civil legal status of "marriage" as akin to being excluded from the mainstream of their society. According to this view, civil unions are 'second-class marriages' – a form of matrimonial apartheid. The act of distinguishing the form of union that one group of citizens may enjoy as compared to another is, by its nature, unfair, unnecessary and (in some jurisdictions) viewed as unconstitutional.

In other words, whereas the fight for civil partnerships or unions is a fight for equal legal rights, the fight for marriage equality is a fight for social acceptance. US President Obama alluded to this distinction when he applauded the United States Supreme Court's decision in June 2013 to strike down the *Defense of Marriage Act* (DOMA) of the United States Congress.[10] This had prohibited the federal government from recognizing same-sex marriages. President Obama said:

> This was discrimination enshrined in law. It treated loving, committed gay and lesbian couples as a separate and lesser class of people. The Supreme Court has righted that wrong, and our country is better off for it….This ruling is a victory for couples who have long fought for equal treatment under the law; for children whose parents' marriages will now be recognized, rightly, as

[9] *Genesis,* 13,13. Some argue, in the particular case of marriage, by reference to the Biblical injunction that man "shall leave his father and his mother and shall cleave unto his wife and they shall be one flesh" *Genisis* 2, 24.
[10] *United States v Windsor* 570 US1 (2013). Decision of 26 June 2013.

> legitimate; for families that, at long last, will get the respect and protection they deserve[11]

Opposition to Same-Sex Marriage

The path to legalizing gay marriage has not been straightforward. The growing profile of same-sex partnerships and unions energised lawmakers in many jurisdictions to legislate in the opposite direction so as to impede – and as they hoped halt – the moves to marriage equality and the risks that independent courts might uphold that right. Many sub national and national jurisdictions legislated explicitly to exclude homosexuals from the institution of "marriage". Some countries are still enacting such exclusionary laws (such as Hungary), even as other countries are holding such laws to be constitutionally invalid because inflicting impermissible inequality and discrimination upon one category of citizens (such as the United States).

Typically, the legislation that forbade access to marriage for LGBT people and denied local recognition of such 'marriages' as had been celebrated elsewhere, was justified in one of three ways: that marriage has always been between a man and a woman; that same-sex marriage offends religious sensibilities; or that same-sex marriage represents the start of a slippery slope leading to other 'undesirable' forms of marriage. In Australia, the spectre of a marriage of three or more persons or the marriage of siblings or even marriage of human beings to favoured animals or motor vehicles has been mentioned as the logical end-point of allowing same-sex marriage.

The first of these arguments is less an argument than it is a statement of fact (and an increasingly incorrect one). The definitions of "marriage" have been changed on numerous occasions in the past. The most obvious of these has been the extension of marriage to persons who were previously denied the right, such as slaves and couples of different races.

[11] Statement by US President Obama, June 26 2013. See: http://www.whitehouse.gov/blog/2013/06/26/supreme-court-strikes-down-defense-marriage-act

The second argument holds little weight (or should do so) in countries where church and state are constitutionally separated. In law, marriage is a civil institution. People apply for a marriage certificate, or a divorce order, from the state, not from a church. Of course, religious institutions and personnel may in some (mainly English-speaking) countries officiate in marriage ceremonies. There is no suggestion that they should be legally required to officiate in ceremonies of same-sex couples if they do not wish to do so. In Australia, fewer than one in three marriages is now conducted by a religious official[12]. So to allow a religious argument to deny some citizens access to the legal status of marriage appears unconvincing, as well as constitutionally dubious.

The third argument – that if same-sex marriage is allowed, individuals will seek to enter into marriages with multiple people, with children, close relatives, or animals, or even their car – is disingenuous. It involves an appeal to a fictitious bogey man. None of these horror stories has come to pass in the many and varied jurisdictions that now recognise same-sex marriage of adult couples, otherwise disqualified because of their sexual orientation or gender identity.

Support for same-sex marriage among the broader population varies by country. Still, it is substantial and growing at least in the countries where it is now available and the false fears have not been fulfilled. A poll in March 2012 carried out by *The Times* newspaper in London showed that 65% of the population in the United Kingdom supports same-sex marriage[13]. Studies have shown this figure to be variously 81% in Sweden[14], 65% in Australia[15], 61% in Ireland,[16] 53% in the United States[17], 31% in India[18] and 24% in

[12] Bible Society. http://www.biblesociety.org.au/news/weddings-on-the-increase-but-not-in-churches
[13] Populus. http://ukpollingreport.co.uk/blog/archives/6524
[14] Ipsos. http://www.ipsos-na.com/download/pr.aspx?id=12795. See also Sörgjerd *Reconstructing Marriage,* intersentia Cambridge 2012 – a review of developments in Sweden, The Netherlands and Spain.
[15] *Sydney Morning Herald*. http://www.smh.com.au/federal-politics/federal-election-2013/gay-marriage-support-up-but-it-wont-change-poll-20130824-2si1q.html
[16] *Irish Independent*. http://www.pinknews.co.uk/2011/02/24/most-irish-people-support-gay-marriage-poll-says/
[17] Gallup. http://www.gallup.com/poll/147662/First-Time-Majority-Americans-Favor-Legal-Gay-Marriage.aspx

Japan[19]. It is hard to imagine any support anywhere for the notion that people might marry their pets. Opening marriage to GLBT people means simply that any other wider proposal would have to be won or lost on its own merits.

Fear of same-sex marriage has defeated such legislation even in traditionally liberal countries. In Australia, the federal Government presented the *Marriage Amendment Bill* in 2004, the purpose of which was to prevent same-sex marriage. This was enacted by the Australian Federal Parliament. Two years later, the Australian Capital Territory sought to introduce same-sex civil unions. This statute was disallowed by the conservative Howard Government in 2006, and again in 2009, when the Australian Capital Territory Legislative Assembly dropped the nomenclature of "civil union" in favour of "civil partnership". On this second attempt the Territory legislation was disallowed in the Federal Parliament on the initiative of the social democratic Rudd Government following an electoral promise. More recently, in October 2013, the Australian Capital Territory legislature enacted a Bill permitting same-sex "marriage" so described. In doing so, it relied expressly upon the 2004 amendment to the federal *Marriage Act*, contending that, because marriage in Australia was now defined at the federal level as being confined to a man and a woman, there could be no conflict between the federal *Marriage Act* and a Territory law covering the *separate* constitutional subject of same-sex marriage.

The new conservative government elected in Australia in September 2013 challenged the third initiative of the Australian Capital Territory legislature. The challenge was heard by the High Court of Australia. In December 2013 that court decided the challenged under the Australian Constitution.[20] On 12 December 2013 it invalidated the Territory law. It held that the 2006 federal Act, properly characterized, had not omitted to operate in respect of same-sex

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[18] Voice of India poll (SMS GupShup). http://cherrygrrl.com/31-of-indians-support-same-sex-marriage-according-to-voice-of-india-poll-from-sms-gupshup-8000-surveyed/

[19] Ipsos. http://www.ipsos-na.com/download/pr.aspx?id=12795

[20] *The Commonwealth v Australian Capital Territory* (2013) 88 ALJR 118 (HCA, 12 December 2013). However, the Court rejected an argument that, because the "marriage" power had been adopted in 1900 it was confined to availability to opposite-sex couples. See *ibid* 126 [38]. Any law for same-sex marriage must be enacted by the Australian Federal Parliament.

marriages. It had effectively prohibited them under the federal power to make nation-wide laws in Australia with respect to "marriage". Accordingly, a Territory law could only be validly enacted if the federal Act were amended, which the present Federal Government – commending a majority in the lower house of the Australian Parliament - opposes. Attempts to secure passage of marriage equality laws through the Australian Federal Parliament and the Parliament of New South Wales failed in 2013.

Relevance for India?

I referred at the start of this lecture to *Loving v Virginia*[21], the United States Supreme Court decision that struck down laws prohibiting interracial marriage in the United States of America in 1967. At the time of this decision, that seems so appropriate in today's eyes, the Court's holding was quite unpopular. In fact, 73% of Americans surveyed at the time by the Gallup Poll disapproved of interracial marriage.[22] They disagreed with the decision upholding the availability of marriage to those couples who were personally unconcerned by the race of their chosen spouse. A majority of the population *was* concerned and viewed miscegenation with distaste, even horror.

In *Loving* – truly a well-named case- popular opinion did not guide the courts. The United States Supreme Court held that, whatever people thought of interracial marriage, it was unconstitutional to deny it to a group of citizens purely because their particular human characteristics (race or skin colour) were different. Such laws would now be viewed by most people as archaic, shameful or even difficult to believe[23].

It is not a great leap from this analogy to conclude that marriage should not be denied to GLBT people either. From amid the public demonstrations and political scrapping a simple legal consideration shines through: No compelling state interest justifies denying same-sex couples the fundamental right to

[21] 388 US 1 (1967).
[22] Gallup (1968), referenced in USA Today. http://usatoday30.usatoday.com/news/nation/2011-08-17-race-poll-inside_n.htm
[23] Federal Judge Vaughn Walker, *Perry v Schwarzenegger*, 704 F Supp 2d 921 (N.D. Calif, 2010) 570 US 1 (2013).

marry.[24] The arguments advanced to resist opening up the facility are basically traditionalist, religious, immaterial or reflecting a distaste about the very existence of members of sexual minorities in society and an unwillingness to accord their claims to loving relationships the dignity of formal legal recognition – certainly if that recognition claims the name of "marriage".

As I mentioned in the first lecture, I have lived with my partner Johan van Vloten, for 45 years: from 11 February 1969. Necessarily, we have lived without benefit of marriage or formal relationship recognition in the law. He has supported me throughout my public life and also in my private life. He is accepted by my family as our relationship was, in their lifetimes, by our parents. Our relationship has been a great blessing – physical, spiritual and intellectual. After such a very long relationship, we do not ourselves personally feel a special need for formal public recognition. Our love and companionship has been tested over time and sometimes in circumstances of adversity and hostility. However, we both certainly believe that the legal status of marriage should be available to us, if we should so decide. And to the younger LGBT people who feel the need of public affirmation and family and community acceptance. As family, friends, colleagues, neighbours and others get used to the actualities of life, the hostility to marriage equality for LGBT people will probably reduce and acceptance will increase. That has been the history of humanity's triumph over other forms of visceral prejudice. Often that prejudice has been supported by religious people.

Yet do any of these developments and ideas have relevance for India? The level of support for the availability of same-sex marriage or other relationship recognition in India is reportedly very low. India is the world's most populous electoral democracy. Asking for principled leadership from politicians on this issue seems at first to be a pipe dream. Especially so because the legislature in India could not even be persuaded to introduce (still less consider and enact) reform of section 377 of the *Indian Penal Code* 1861, with its *criminal* sanctions against consenting adult, private sexual activity. In the end, it was

[24] This last phrase was used by Judge Walker when he ruled that Proposition 8, which prevented same-sex marriage in California, was unconstitutional

left to the courts of India in *Koushal*, rather than the legislature, to address the reform of a criminal statute that reflects the Christian values of British India at the time it was enacted, not the religious or other values of Indian society itself. Now, by this recent decision of the Supreme Court, the courts have washed their hands of the aspirations of this minority and the injustices and inequalities towards it that exists in the law of India.

The failure, so far, of the law in India and in other countries in Asia, to join the moves to relationship recognition on other continents is a source of discouragement. The laws of Asia and the Pacific on these subjects remain resolutely unchanged (except in New Zealand). So do the laws of Africa (except in South Africa where marriage equality was upheld by the courts and strongly supported by Nelson Mandela).

Still, it would be a bold person who would predict that the world-wide wave of law-making on marriage relationships of LGBT people will never reach India. There is no force in this world so powerful as an idea whose time has come. Clearly, the time has not yet come for India. One reason for delivering these Tagore Lectures and for choosing the topic that I have, and opening the window on my own life, has been to offer a gift that is essential to progress and enlightenment in this field of law: new ideas and new perceptions that appeal to the human instinct for equality for all and injustice towards none.

The key to these lectures is knowledge, understanding and empathy. Just as it was earlier in respect of prejudice and discrimination on the grounds of race, skin colour, gender and caste. And recognition of the role of love in underpinning universal human rights for all people, everywhere.