SEXUAL ORIENTATION & GENDER IDENTITY
- A NEW PROVINCE OF LAW FOR INDIA

TAGORE LECTURES 2013

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On the very eve of the delivery of these lectures, the Supreme Court of India in the *Koushal* appeal, reversed the Delhi High Court decision in *Naz Foundation*. The timing of the Supreme Court's decision rendered my chosen themes unexpectedly controversial; but also particularly timely in India. It required substantial re-writing of the lectures to take into account the new decision. This renders these 2013 Tagore Lectures completely up to date and, I hope, a useful contribution to the consideration by India of the path that lies ahead.

The responsibility for the selection, content and form of these Lectures is, mine alone.

I thank Mr Anjun Dan and his assistants in the University of Calcutta for the smooth organisation of the 2013 Lectures. And also my Personal Assistant, Sarah Conquest, for her painstaking preparation of the manuscript. Finally, I thank my long-time partner, Johan van Vloten, for his good humour, tolerance and forbearance. These are the qualities in humanity to which these lectures should most appeal.

Sydney, Australia
December 20, 2013 Michael Kirby

CONTENTS

Lecture I	Introduction
Lecture II	Science of Sexual Variation
Lecture III	Criminal Law: The Gateway
Lecture IV	Anti-Discrimination, Employment and Other Law
Lecture V	Relationships Recognition
Lecture VI	International Responses

LECTURE I
INTRODUCTION

Life's Unpredictable Journey

Any journey in life is full of unexpected interruptions and obstacles. In 1962, as a university student, I made my first visit to India. I came again in 1970 and 1974, each for a period of 4 months with my partner Johan van Vloten. I have never since been able to shake off my love of India. At the close of 1974 on my return to Australia, I was appointed to the Australian judiciary. So my visits became rarer and briefer. Now I return to deliver the 2013 series in this oldest and most prestigious collection. Months earlier, I had chosen the theme of sexuality and gender identity. Little did I imagine how, by chance, my topic would suddenly become so timely.

The week in which these Lectures were delivered in Kolkata witnessed three moments of sadness and disappointment for lesbian, gay, bisexual, transgender and other sexual minorities (LGBT):

* In Johannesburg, South Africa a great friend and supporter of LGBT people, Nelson Mandela, died. He was finally laid to rest just before my Lectures began, on 15 December 2013. This great man, sometimes compared to M.K. Gandhi, was a powerful supporter of law reform affecting gay people. The only criticism I saw expressed of him in the last week was in a religious blog condemning the Pope for sending condolences upon his death – precisely because he had been a supporter of gay rights and women's entitlement to control abortion decisions. LGBT people worldwide are still mourning his loss.
* In Canberra, Australia, the Federal Supreme Court (the High Court of Australia) on 13 December 2013, unanimously invalidated a law of the Australian Capital Territory legislature, providing for same-sex marriage. The court's decision[1] (by no means unexpected) held that the Territory law was incompatible with an earlier 2006 Act of the Federal Parliament defining 'marriage' under federal law as confined to that union of a man and a woman. It rejected the argument that the constitutional paramountcy clause was not engaged because that federal law had amounted to an

[1] *The Commonwealth v Australian Capital Territory* (2014) 88 ALJR 118 (HCA).

abandonment of the subject of same-sex marriage. Many same-sex couples who had been married in the weeks before the decision, and their supporters, were saddened and disappointed by this re-affirmation of the second-class legal status of LGBT citizens in Australia. At the moment, the door of marriage is closed to them.

* In New Delhi, India on 11 December 2013, the Supreme Court allowed an appeal in *Koushal v Naz Foundation*[2] against orders of the Delhi High Court made in July 2009.[3] The High Court's orders had declared that section 377 of the *Indian Penal Code* 1860 (IPC) was constitutionally invalid. The Supreme Court, in effect, re-criminalised homosexual acts even when they occurred in private between consenting adults. The decision caused "dismay" to the United Nations High Commissioner for Human Rights (Ms Navi Pillay). It surprised and distressed numberless LGBT people in India, and their friends. Yet it also gained some supporters, including a number in high political positions. I myself heard the news of the Supreme Court decision in the Palais Wilson in Geneva, where I was working on issues of human rights in the Democratic People's Republic of Korea (North Korea). Within hours, we also heard the news of the death by execution after a hurried military trial, of the second most powerful person in that country, Jang Song-thaek. This is *not* the way India resolves serious constitutional questions or large controversial issues. It does so by invoking elected legislatures and independent courts. These Lectures will show, respectfully that the Supreme Court ruling is out of harmony with the flow of judicial decisions and legislative reforms that it is my purpose to describe. In India, as in Britain and Australia, we do not resolve important arguments with a bullet. We do so with rational argument, information and persuasion. That is the objective of these Lectures

A New Province Of Law?

Have you not heard his silent steps?
He comes, comes, ever comes.
Every moment and every age,
Every day and every night
He comes, comes, ever comes.

…

[2] *Koushal v Naz Foundation* (unreported) Supreme Court of India, 11 December 2013 ("Koushal").
[3] *Naz Foundation v Delhi* [2009] 4 LRC 828 (Delhi HC).

In the rainy gloom of July nights on the thundering chariot of clouds,
He comes, comes, ever comes.
In sorrow after sorrow it is his steps that press upon my heart,
And it is the golden touch of his feet that makes my joy to shine.[4]

Rabindranath Tagore

Rightly, the Tagore family are celebrated by this series of lectures, established in 1870 to honour Prassana Coomar Tagore, lawyer, educator, lawmaker and patron of the arts. The most famous member of the family is Rabindranath Tagore, Nobel Laureate for Literature: polymath, visionary and one of the greatest poets, both in the Bengali and English languages.

Tagore's poem displays a sense of movement and urgency. Taken from the *Gitanjali*, it indicates a fast trajectory towards new times and new experiences, motivated by love. It is therefore apt to the subject of these lectures, addressed as they are to the law's response to sexual minorities.

In India and elsewhere, these minorities look to the law for support and protection. In the past, such attention has not been forthcoming. But the last decade of world history, in particular, has witnessed extraordinary changes in the applicable law. These changes are beginning to challenge India. These lectures are designed to paint a portrait of an important new development in the law. It has been a tradition of the Tagore Lectures that they look forward. On the topic of sexuality, Indian law has so far, largely been inert. The thesis of these lectures is that a process of change has commenced. A new province of law comes, comes, ever comes.

Lawyers and judges in India, in particular, need to be aware of these developments. They need to understand the changes and even to contribute to them. A minority that, until recently, was hated, excoriated and penalized is now asserting itself and demanding equal rights in the law as in society. India, a land of astonishing diversity, has given protection to many minorities. It has learned from past experience the dangers of stamping inequality

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[4] Rabindranath Tagore *Gitanjali – Song Offerings,* Number 45.

and inferiority upon people by reference to indelible features of their lives: whether their race, gender, caste or other status.

Now, India faces the new appeal of minorities who claim to suffer inequality and discrimination by reason of their sexual orientation and gender identity. These lectures seek to explain how the new demands have come about; how they have been justified in fact and in law; how equivalent demands have been addressed in other countries from which India can learn; and how the international community, often with India's participation, is now taking bold steps to correct ancient wrongs.

These Tagore Lectures may cause discomfort, puzzlement, doubt and hesitation in some quarters. Yet I hope that, by their end, they will have demonstrated the importance of their subject and the utility of addressing it in an institution such as the University of Calcutta. If intellectual leaders, in distinguished and independent seats of learning, do not study and analyse such topics, the result is an impoverishment of the people.

The Naz Foundation Case
The Background and Occasion

Scientific research (which I will describe in my second lecture[5]) has tended to show that a small but persistent minority in every society exhibits a sexual orientation or gender identity different from the majority. These discoveries of science have attracted an increasing interest on the part of civil society in the laws which have traditionally disadvantaged those in the relevant minority groups.

So long as it was believed that human beings were universally and "naturally" born to desire sexual and connected emotional relations only with persons of the opposite sex ("hetero") and that this was what nature or God had imprinted on the human species, the imposition of criminal laws and various forms of legal and social discrimination against minorities not conforming to the norm could perhaps be understood. Because a common (although by no means universal) outcome of sexual activity between opposite sex couples was the birth of children, essential to the continuation of the human species and of the nations and societies

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[5] See Lecture II.

made up by them, different forms of minority sexual activity could be regarded as "perverse", "unnatural", "pointless", "self-destructive" and "anti-social".

Passages in the ancient scriptures of many of the world's religions reflected this mode of thinking. Changes in thinking only really came about in the 19th and 20th centuries. They did so as the sciences of psychology and sociology developed, merging ultimately into a new science of sexology. So long as dogmatic insistence on received religious beliefs, attributed to a Divine will, ruled the world, such questioning could be proscribed, even punished, certainly ignores.

It was the trail-blazing research of Charles Darwin and his contemporaries that, by propounding a theory of evolution of the species (including human beings), cast doubt on several propositions in scripture, at least as literally understood.[6] Darwin's insistence on careful empirical research ultimately led to significant investigations that I will mention. These raised questions concerning the extent and features of variations in human sexuality; the characteristics of the minorities exhibiting such variations; the existence of apparently loving relationships reflecting characteristics similar to those found amongst heterosexuals; and the absence of apparent mental disorder or dysfunction amongst those concerned. It was the advent of this empirical research that ultimately led individuals and civil society organisations aware of them, to propound the need for law reform; for the repeal of criminal sanctions; for the removal of discriminatory laws; and for the education of the community to correct the binary assumptions upon which the earlier beliefs had been based.

It was the initiatives of individuals and civil society in the United Kingdom and other countries that led to the repeal of the criminal laws that had targeted sexual activities involving same-sex people whose sexual orientation was same-sex attracted.[7] A wave of legislative reform thus began in a number of democracies, commencing relevantly with the amendments to the criminal law enacted in the Britain in 1967.[8] Because the criminal laws that had re-enforced religious and other hostility towards sexual minorities had been a particular feature of English law, exported to its large overseas empire, it was inevitable that

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[6] Charles Darwin, *On the Origin of Species* (1859).

[7] See Lecture III.

[8] *Sexual Offences Act* 1967 (UK). The Act was based upon Private Members' Bills. The UK Government at the time believed that the British Parliament and people were 'not ready' for the reform and failed to support it. The equivalent French laws had been repealed in 1793 following amendments adopted during the French Revolution.

the debates and changes belatedly adopted in the United Kingdom should influence other countries whose legal systems were based on, or influenced by, the common law of England.

India, because of its own colonial past, was one such country influenced by the law of England.[9] However, whereas in the settler dominions of the former British Empire the old laws have been substantially repealed by democratic legislatures, in the countries of the "new Commonwealth" (including India) the legislatures proved unwilling and reluctant to embrace the wave of reform. Typically, the growing scientific knowledge was ignored or rejected, frequently in the name of traditional culture or religious beliefs.

The result of this vacuum in institutional law reform was increasing argument addressed both to the legislatures and more recently to the courts. Although many suggestions were made for law reform in recent decades (including by the Indian Law Commission and in a noted public letter signed by such Indian luminaries as Amartya Sen and Soli Sorabjee) and despite the importance of reform for the Indian strategy on HIV/AIDS, no legislative change to s 377 of the *Indian Penal Code* was forthcoming. It was for that reason that reformers and civil society, turned to the courts.

The Naz Foundation Litigation

The background to the *Naz Foundation Case* began with the establishment of the Naz Foundation itself in 1994 and to the formation of the Lawyers' Collective in Bombay in 1979. The latter, created by lawyers Anand Grover and Indira Jaising, became involved in many test cases on behalf of the poor. One such case, in 1988, introduced the Lawyers' Collective to the legal problems created by the arrival of a dangerous new epidemic Acquired Immune Deficiency Syndrome (AIDS) caused, in turn, by the Human Immunodeficiency Virus (HIV).

The first case, in what became an important series, involved a challenge to a draconian detention law enacted in Goa to respond to AIDS and HIV.[10] The case was followed by

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[9] The *Indian Penal Code* (IPC) was almost entirely the work of Thomas Babington Macaulay. He had been appointed chairman of the first Indian Law Commission in 1835 and Law Member of the Supreme Council of India, 1833-37. The IPC was his first effort at codification, suggested by himself. The draft was finished by June 1837. It was not enacted until 1860, coming into force in January 1862, with some modifications of the original draft. It "reproduces the spirit of the law of England" (J.F. Stephen). A.W.B. Simpson (ed.) *Biographical Dictionary of the Common Law*, Butterworths, London, 1984, 330 at 331.

[10] *Lucy D'Souza v State of Goa* (1990) MhLJ 713.

many others in which the Lawyers' Collective appeared for clients vulnerable to, or infected with, HIV and AIDS, including sex workers and persons in the sexual minorities. As well, lawyers working for the Collective gained much experience in challenging the discriminatory operation of legislation as it impinged on the lives of people who were infected by HIV (and thus HIV positive). These people included many homosexual and bisexual men and transgender people, including *hijras* and *kothi*.

In the last decade of the 20th century, the Lawyers' Collective invited Justice Edwin Cameron (then a judge of the South African Court of Appeal) and me (then a Justice of the High Court of Australia) to participate in a series of judicial workshops conducted successively in Mumbai, Ahmedabad, Delhi, Kochi, Bangalore and Kolkata.[11] At one of these workshops, inaugurated by Justice J.S. Verma, former Chief Justice of India, Edwin Cameron revealed that he was himself both homosexual and HIV positive. The effect on the audience was electric. His courage and dignity attracted respect. At the end of the session, Justice Verma publically embraced Justice Cameron in a spontaneous gesture of solidarity and appreciation for his sharing his knowledge and experience of the epidemic with judicial colleagues in India.

Much attention was paid during the judicial workshops to the HIV/AIDS paradox. Without a vaccine or a cure, according to the experience of countries that had been affected by HIV at an earlier stage, the most effective strategy to contain the epidemic was not criminalisation and punishment of those infected or at risk but the removal of punitive and discriminatory laws likely to alienate minorities at risk, effectively depriving them of access to knowledge about measures for their self-protection.

The Naz Foundation (India) Trust is a non-governmental organisation that works in the area of HIV/AIDS and sexual health. It is based in New Delhi. As the new century dawned in India and as the dangers of HIV/AIDS for the sub-continent became more apparent, the Lawyers' Collective established a branch office of its own in New Delhi. It offered expert legal expertise to the Naz Foundation on its programme involving marginalized populations in India, including sexual minorities in need of medical and legal support. The two organisations were natural allies because, by the time of the creation of the Naz

[11] A. Grover, *History of the Lawyers Collective,* unpublished, 2010.

Foundation, the Lawyers' Collective had created an HIV/AIDS Unit. Amongst the fine advocates, who took part in the work of this unit with the founders were Dr Mandeep Dhaliwal and Mr Vivek Divan. They now work in New York for the United Nations Development Programme (UNDP). Dr Dhaliwal is the Director of UNDP's HIV strategy. Both of them helped to initiate the UNDP Global Commission on HIV and the Law to which I was appointed in 2011. In 2012, that body made important recommendations for the repeal of laws that criminalise members of sexual minorities in nearly 80 countries of the world.[12]

So it was that the Naz Foundation issued a writ petition out of the Delhi High Court challenging the constitutional validity of s 377 of the *Indian Penal Code* (IPC). The leading advocate who appeared for the petitioner was Anand Grover. The petition alleged that the impugned section was invalid because it violated articles 14, 15 and 21 of the *Constitution of India* (1950). A number of respondents were named in the petition including the Union of India, the Government of the National Government Territory of Delhi, the Police Commissioner, and the National AIDS Control Organisation of India. The grounds for the argument of invalidity were that s 377, by invading the most private consensual activities of adult citizens, was contrary to the protections of life, dignity, autonomy and privacy provided by Article 21 of the Constitution; violated the constitutional guarantee of equality under Article 14 of the Constitution; and infringed Article 15 because sexual orientation was a ground analogous to sex, a protected category under the Constitution of India.

The petition was upheld[13]. In July 2009, a declaration was made by the Delhi High Court that s 377 IPC, so far as it criminalised consensual sexual acts of adults in private, breached articles 14, 15 and 21 of the Constitution. Although the section could arguably be sustained as lawful so far as it protected underage or non-consensual conduct, it was invalid so far as it purported to apply to adult, consenting conduct occurring in private. The Court held that the provision should therefore be read down so as to be confined in its operation to its constitutionally permitted ambit. In reaching this conclusion the Delhi High Court was unanimous. The opinion of the Court was given by Chief Justice A.P. Shah and Justice Muralidhar.

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[12] United Nations Development Programme (UNDP), Global Commission on HIV and the Law, *Risks, Rights & Health* (UNDP, New York, 2012), 44 [3.3].

[13] *Naz Foundation v Delhi and Ors* [2009] 4 LRC 838 at 893 [127] ff. The litigation had a curious history. In September 2004 the Delhi High Court had earlier struck out the petition on the basis of a lack of standing of the applicant. In December 2004, the Supreme Court of India decided to hear an interlocutory appeal. April 2006, the Supreme Court set aside the order of the Delhi High Court and remitted the matter to be reconsidered, as it then was.

At the close of their reasons, the judges made certain observations addressed to the underlying principles and character of the *Constitution of India*: [14]

> "If there is one constitutional tenet that can be said to be an underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This court believes that Indian Constitution reflects this value deeply engrained in the Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing the role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracized.
>
> Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination. This was 'spirit behind the resolution' of which Nehru spoke so passionately. In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LBGTs are. It cannot be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality that will foster the dignity of every individual."

Critical Responses to the Naz Decision

Inevitably, there were critics of the decision of the Delhi High Court. Thus, Professor Mahendra P. Singh expressed doubt as to whether the legal issue identified in the *Naz Foundation Case* "deserves so much prominence in the present stage of our society as it has received". [15] He went on:

> "… Homosexuality could very well have a low priority, especially [because]… hardly anybody is prosecuted… Even if the criminalization provision of our law has a chilling effect on homosexuality… it is doubtful that in our present day society these activities need to be made so sacrosanct as, for example, freedom of speech…"

Other commentators, whilst welcoming the conclusion and broad thrust of the reasoning of the Delhi High Court, voiced doubts about particular doctrinal aspects of the Delhi Court's

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[14] *Naz Foundation* [2009] 4 LRC 838 at 895 [130] – [131].

[15] M.P. Singh, "Decriminalization of Homosexuality and the Constitution" (2009) 2 *NUJS L Rev* 361 at 362-3.

opinion. Some critics expressed the hope that the Supreme Court of India would vindicate the commitment demonstrated by the judges in *Naz Foundation* to their pluralistic view of the Constitution whilst, at the same time, choosing (as they put it) to "strengthen some of the weaker arguments that the decision adopts ".[16] In particular, the suggestion of equivalence between the provisions forbidding *se*x-based discrimination and discrimination on the ground of *sexual orientation* was strongly questioned.[17] Other critics of the reasoning took the Delhi High Court to task for leaving in place the statutory label that "non-harmful sexual preferences [are] "unnatural'".[18] Those of this view challenged the British-derived colonial description of homosexual sexual acts as contrary to the "order of nature". They pointed to the fact that, in India, the *Kama Sutra* "describes more than 50 different ways of love making and noted:[19]

> "If variety is sought in all the arts and amusements, such as archery and others, how much more should it be sought after in the art of love."

The Naz Decision is Welcomed and Accepted

As against the critics, the decision of the Delhi High Court was broadly welcomed in the national and international media. *The Hindu* declared it a "landmark judgment". It recorded that "gays present in the courtroom hailed the judgment and greeted one another with hugs".[20] *The Indian Express* declared that the Delhi High Court had expanded "the scope of an Indian citizen's rights by equating 'sexual orientation' with the constitutionally identified protected identities of gender, caste, religion and race."[21] That newspaper asserted that "The verdict… marks the end of a colonial legacy. Section 377… reflected the social mores of Victorian England. Britain herself has long since decriminalized homosexuality. … The verdict will also make it easier to provide medical treatment to gays, many of whom are at high risk of HIV/AIDS". That newspaper also drew attention (as did the Court) to a curious paradox revealed in the case. Whereas the Union Health Ministry

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[16] See e.g. Vikram Raghavan, "Navigating the Noteworthy Nabulus in *Naz Foundation*" (2009) 2 *NUJLS L Rev* 397; Saptarshi Mandal, 'Right to Privacy' in *Naz Foundation*: a Counter-Hetronormative Critique (2009) 2 *NUJS L Rev* 397 at 525.

[17] Pritam Baruah, "Logic and Coherence in *Naz Foundation:* the Arguments of Non-Discrimination, Privacy and Dignity" (2009) 2 *NUJS L Rev* 397 at 504, 525.

[18] S. Basheer, S. Mukherjee and K. Nair, "Section 377 'The Order of Nature': Nurturing 'Indeterminacy' in the Law?" (2009) 2 *NUJS L Rev* 431 at 443.

[19] Ibid, 437.

[20] N. Kumar 'Delhi HC Strikes Down Section 377 of IPC', *The Hindu,* 3 July 2009, 1.

[21] V. Sitapati, "Sexual Equality", *The Indian Express,* 3 July 2009, 1.

and the National AIDS Control Organisation had supported the Naz Foundation's arguments, the Home Ministry had opposed the move.

Time, the international news magazine, declared that the Delhi Court had "with one sweeping judgment… [shaken] off a stubborn piece of colonial baggage and may have added momentum to a broader regional movement for gay rights".[22] An article in *The Times of India* declared that the decision involved "a giant, albeit belated, step towards globalization… It is the biggest victory yet for gay rights and a major milestone in the country's social evolution. India becomes the 127th country to take the guilt out of homosexuality."[23] This article also suggested that the Government of India would have been "secretly relieved as the HC has spared it a politically difficult decision."

Ultimately, an appeal against the orders of the Delhi High Court was lodged in the Supreme Court of India by a person, reportedly an astrologer, who had not been a party in the Delhi High Court.[24] The Government of India itself did not file any appeal against the judgment of the Delhi High Court. An affidavit by Mr R.K. Singh,[25] Home Secretary in the Union Ministry of Home Affairs, pointed out that the cabinet in the Union Government had accepted the recommendation that it appear to assist the Supreme Court; but not to challenge the legal correctness of the decision. In short, the Government of India was content to allow the decision of the Delhi High Court to stand.

The appeal, supported mainly by religious organisations, was then listed before the Divisional Bench of the Supreme Court of India for hearing. The hearing took place between 13 February and 27 March 2012. The Bench for the appeal was constituted by Justice G.S. Singhvi and Justice S.J. Mukhopadhaya. Mr Grover defended the decision of the Delhi High Court. He was supported by a number of leading counsel, including Mr Fali S. Nariman, dozens of advocates. Mr Nariman appeared on behalf of the parents of LGBT persons. Whilst acknowledging the wealth of overseas jurisprudence on which the Delhi Court had relied in reaching its conclusion, Mr Nariman emphasised the history of the provisions of the IPC in India and the cases in which the section had been applied. Picking up one of the points that had been made in the scholarly criticism of the reasoning of the

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[22] Jyoti Tihottam, "India's Historic Ruling on Gay Rights", 2 July 2009, 15.
[23] Manoj Mitta and Smriti Singh, 'In Landmark Ruling Delhi HC Says Homosexuality is Not a Crime", 2 July 2009.
[24] *Suresh Kumar Koushal v Naz Foundation and Ors*, proceedings in the Supreme Court as yet undecided.
[25] Affidavit of R.K. Singh in Supreme Court of India, dated 1 March 2012.

Delhi High Court, Mr Nariman submitted that the law in s 377 IPC was impermissibly vague and, as such, without more, violated the *Indian Constitution*.[26] Specifically, he suggested that the term “against the order of nature” was impermissibly unclear and that the section could be struck down on that ground.

Many of the appellants who argued against the correctness of the decision of the Delhi High Court reflected the type of reasoning that had appeared in the earlier decision of the Supreme Court of the United States in *Bowers v Hardwick.*[27] That reasoning had laid emphasis upon the common appearance of the proscription of homosexuality in the scriptures of a number of religions, including Christianity and Islam, declaring that homosexual acts were ‘unnatural’ and contrary to religious law. If such acts had been prohibited by major world religions [most of them operating in India] for so long, how could it be said that the charge of being ‘against the order of nature’ was impermissibly vague? Or that the provision was incompatible with the Indian constitutional norms written against the background of the long existence of the offence?

The Supreme Court decision in Koushal

The Supreme Court of India reserved its decision for nearly 2 years. The judgment was delayed until the eve of the retirement of one of the two participating Justices. If it were to be given, it could be delayed no longer. It was announced in New Delhi on 11 December 2013. By one of those ironies of timing, this was one day after World Human Rights Day, which falls on 10 December. That had been the day, in 1948, when the world (including the newly independent India) had voted without dissent in the General Assembly of the United Nations to endorse the *Universal Declaration of Human Rights*. The first article of that Declaration states that every human being is “born free and equal in dignity and rights”. Somewhere over the Eastern Pacific, beyond the International Date Line, World Human Rights Day 2013 was ebbing to its close on 10 December 2013 when the *Koushal* decision was announced in India.

The structure of the Supreme Court decision is orthodox. The reasons of the Court are given by Justice G.S. Singhvi and signed by both participating Justices. To an outsider it

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[26] Invoking *K.A. Abbas v Union of India* (1970) 2 SCC 780.

[27] 478 US 186 (1986) considered in *Naz Foundation* [2009] 4 LRC 838 at 861 [41]. *Bowers* was later overruled in *Lawrence v Texas* 539 US 558 (2003), USSC. See Lecture III

may seem curious that a very important, and original, constitutional question should be decided by only two members of the 27 member apex Court. However, many important decisions in India are made by the court similarly constituted. And the Naz Foundation and its allies elected not to challenge the make up of the Court for the appeal. Doubtless, they wished to avoid offending the Justices assigned to the case in case they might reject an application to enlarge the Bench. In retrospect, this appears to have been a tactical error. The antiquity of the law in question, the long and repeated failure of the legislative branch to act and the millions of citizens affected by the outcome would objectively have warranted a larger Bench.

The first 20 pages of the 97 page *Koushal* opinion collect the facts. The outline of the arguments of the parties and interveners cover the next 20 pages. A curious feature of these arguments was the division (noted earlier in the Delhi High Court) between the submissions of the Home Ministry (by affidavit), concluding that there was no error in the High Court, and some of the arguments of the Additional Solicitor-General, as *amicus curiae*, suggesting that, the matter should have been left to the legislature – a submission that plainly influenced the Court on the ultimate outcome. (see paras 21-22).

The Court appeared to accept that many Indians were affected by the terms of s 377 IPC (a serious underestimate of men who have sex with men (MSM) of 12.4 lakhs, appears at para 23) and that sexual orientation was no longer viewed as a mental illness. But ten more pages were devoted to the general presumption of constitutional validity. This principle states a rule of judicial restraint that many final and constitutional courts respect; but which they must sometimes override when countervailing constitutional norms so require. This section of the reasons is followed by an extensive part of the reasons dealing with the history of the offence as provided in section 377 both in England and in India, including in colonial days. The precursors to section 377 are traced in India back to 1828 and to a law of the East India Company (para 37). The antecedents demonstrate that section 377 was never enacted by an Indian legislature but by the British Governor-General in Council (cf. para 52).

Successive reports of the Indian Law Commission recommending reduction of the maximum sentence and then deletion of the section as it applied to consenting adults are then noted. There is also a review of the buggery cases coming before higher courts in

India. This brings the reasons to the critical point on page 77, as to whether the Delhi High Court had been constitutionally authorized to rule as it had. Much stress was placed on the fact that there have been very few prosecutions (para 43); that the legislature could amend the law; but had failed to do so; that India is (self-evidently) a diverse society, different from any which had decided cases on the sodomy offence cited by the Delhi High Court; and that risks of blackmail and police abuse were no necessary reflection on the validity of the section (para 51). The analysis of the legal doctrine on Articles 14, 15 and 21 of the *Indian Constitution* that followed was extremely brief. The stated conclusion was "the competent legislature shall be free to consider the desirability and propriety of deleting the section".

In effect, the essential reasoning of the Supreme Court of India on its justification for overruling the Delhi High Court was confined to 10-15 pages of the decision. The orders of the Delhi High Court were overruled. The constitutional validity of section 377 of the IPC was upheld. The section was revived in full force as applicable to more than a billion people living in India. The "unnatural offences" thereupon entered into a second life. Not because of an imperial *fiat* but because of the orders of democratic India's highest court.

The Naz Foundation Case: The Future?

Section 377 IPC in India, and equivalent and derivative forms in other former British colonies have been described as an "unnatural afterlife of British colonialism" [28]

In the opinion of Professor Douglas Sanders, it is the growing application and authority of international human rights law that has made criminal provisions such as s 377 IPC now appear particularly harsh, unscientific and inappropriate in the modern age.[29] Whilst there is "a larger agenda than simply decriminalisation", Professor Sanders and many others have pointed out that "criminal prohibitions, even if unenforced, are barriers to progress on these other issues generally [although] fortunately, the prohibitions are disappearing." The fact that the legislature could, if it chose, change the law expressed in the section seems an immaterial reason to withhold constitutional protection to a minority, if such protection is otherwise applicable. After all, the Indian legislature has had plenty of time to act in such a way; but has failed to do so. In modern democracies courts exist to protect the

[28] D.E. Sanders '377 and the Unnatural Afterlife of British Colonialism in Asia' (2009) 4 *Asia Journal of Comparative Law* 1.

[29] Ibid, 140. See also Human Rights Watch, *This Alien Legacy* 2008, New York.

fundamental rights of minorities when legislatures fail to act. That is not necessarily an excess of power on the part of courts. It is precisely how they are supposed to operate. By definition, if legislatures act and bring the law into line with constitutional norms and thereby defending universal human rights, there is no need to invoke the court's jurisdiction at all. Legislative inactivity was a reason for action. It was the problem. It was not the only solution.

Language and Structure of these Lectures

In these lectures I will, at different times, refer to members of the sexual minorities in different ways.[30] Thus, I will refer to them, where relevant, as:

> *Homosexual*: People of either gender who are attracted, sexually, emotionally and in relationships, to persons of the same sex.
>
> *Bisexual:* Women who are attracted to both sexes; men who are attracted to both sexes.
>
> *Lesbian:* Women who are attracted to women.
>
> *Gay:* Men who are attracted to men, although this term is sometimes also used generically for all same-sex attracted persons.
>
> *Gender identity:* A phenomenon distinct from sexual orientation which refers to whether a person identifies as male or female. This identity may exist whether there is "conformity or non-conformity" between their physical or biological or birth sex and their psychological sex and the way they express it through physical characteristics, appearance and conduct. It applies whether, in the Indian sub-continent, they identify as *hijra* or *kothi* or by another name.
>
> *Intersex:* Persons who are born with a chromosomal pattern or physical characteristics that do not clearly fall on one side or the other of a binary male-female line.

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[30] C R. Wintemute, "Same-Sex Love and the Indian Penal Code 377: An Important Human Rights Issue for India" (2011) 4 *JUJS L Rev* 31 at 33-34.

LGBT or LGBTIQ: Lesbian, Gay, Bisexual, Transsexual, Intersex and Queer minorities. The word 'Queer' is sometimes used generically, usually by younger people, to include the members of all of the sexual minorities. I usually avoid this expression because of its pejorative overtones within an audience unfamiliar with the expression. However, it is spreading and, amongst the young is often seen as an instance of taking possession of a pejorative word in order to remove its sting.

MSM: Men who have sex with men. This expression is common in United Nations circles. It refers solely to physical, sexual activity by men with men. The expression is used on the basis that, in some countries – including India – some men may engage in sexual acts with their own sex although not identifying as homosexual or even accepting a romantic or relationship emotion.

These lectures will continue with Lecture II on "Science and Sexual Variation".

That topic will be followed by Lecture III on "Sexuality and the Criminal Law". This, in turn, will be followed by Lecture IV on "Anti-Discrimination, Employment and other Law".

In the fifth Lecture (V), I will deal with new developments in the law concerning relationships recognition. After its decision in the *Naz Foundation Case*, one of the criticisms directed at the Delhi High Court, wrongly, was that it would be followed by many marriages of LGBT people in India. The Chief Justice of India at the time (Chief Justice Balakrishnan) insisted that such uniformed views were merely a reason to educate the public about what the *Naz* decision did, and did not, hold.

In the last Lecture, (VI), I will describe international responses to the legal issues of sexual orientation and gender diversity and the applicable developments of international law, particularly the international law of human rights.

Coming Out – Australia and India

Like it or not, this is now an area of the law, and of modern society, which is moving fast and evidencing itself in many countries. India is a country with a large educated section of its population. It has a capacity to send spacecraft to Mars. On sexuality, it has the benefit

of leadership. This is offered by many people who, in former times, would have held their tongues.

In my own case, in 1999, when I was a Justice of the High Court of Australia, I decided to be completely open about the topic and disclose my own homosexuality. I only intrude this personal note in these Lectures because I believe that, in the past, LGBT people have conspired in their own discrimination and inequality. They have done so by remaining silent and thereby promoting the myth that they do not exist. Or constitute trivial numbers. Honestly and candour will promote and hasten change. Long before 1999, I was and candid with my family, colleagues, friends and in various civil society organisations. But in 1999 I told the whole world.

A recent news report shows that this is a course of conduct that is happening now in many countries. Including in India. The report concerned a distinguished psychiatrist, born and educated in India.[31] I refer to Dr Dinesh Bhugra. Dr Bhugra was educated at the Mukand Lal Secondary School and the Armed Forces Medical College at Pune University. He there took degrees in medicine and surgery and later acquired a post-doctoral degree in psychiatry from the University of London. Such was his distinction in practice that he was elected President and Dean of the Royal College of Psychiatrists of the United Kingdom. In November 2013, he was elected President of the World Psychiatric Association for 2014-17. His recorded recreations include Bollywood films.

Upon his election as President of the world body of psychiatrists, Dr Bhugra shared with his fellow members and wider audience his sexual orientation as a gay man. He declared that previously "being gay was an important part of me, but a private part". He described growing up in Yumuna Nagar in Northern India. He explained what it was like for him, not having a word for his intense and inner-most feelings. When he came to the United Kingdom for training, he realised that his sexual orientation gave meaning to "how I felt". He met his partner, Michael, with whom he has lived for 30 years; just as I have lived with my partner Johan van Vloten for 45 years.

[31] Patrick Strudwick, "Dinesh Bhugra: Psychiatry Needs a Broader Focus" *The Guardian* (UK) 27 November 2013, 5.

Under the protection of the law in the United Kingdom, Dr Bhugra came out to friends, family and colleagues. He described how his father at first ‘freaked out completely’. His mother was ‘really pragmatic’ and merely asked ‘who is going to look after you in your old age?’ He is the first homosexual president of the World Psychiatric Association. But he is not the first gay president of a medical association. That distinction belongs to the current President of the Word Organisation of Family Doctors - Professor Michael Kidd of Australia. There are gay presidents of legal associations. There are LGBT judges, lawyers and street sweepers.

So this is the reality of our world. It is a reality that demands, and will achieve, law reform and social reform. It is a reality to which these Tagore Lectures will introduce those who come upon them and who have, so far, been separated from scientific truth, the actuality of human existence, the applicable principles of human rights and rules of domestic and international law.

> *He comes, comes, ever comes*
> *Every moment and every age,*
> *Every day and every night,*
> *He comes, comes, ever comes.*