Privacy, Autonomy, and Sexual Choice:
The Common Law Recognition of Homosexuality

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Preliminary

In the last few decades, all major common law jurisdictions have decriminalised non-procreative sex – oral and anal sex (sodomy) – to allow private, consensual, and non-commercial homosexual intercourse. Anti-sodomy statutes across the world, often drafted in the same anachronistic vein as section 377 of the Indian Penal Code, 1860 ("IPC"), have either been repealed or struck down on the grounds that they invade individual privacy and are detrimentally discriminative against homosexual people.

This is not an examination of India's laws against homosexuality, it does not review the Supreme Court of India's judgment in *Suresh Koushal* v. *Naz Foundation* (2014) 1 SCC 1 nor the Delhi High Court's judgment in *Naz Foundation* v. *Government of NCT Delhi* 2009 (160) DLT 277, which the former overturned – in my view, wrongly. This note simply provides a legal history of the decriminalisation of non-procreative sexual activity in the United Kingdom and the United States. Same-sex marriage is also not examined.

<u>In the United Kingdom</u>

The Wolfenden Report

In England, following a campaign of arrests of non-heterosexual persons and subsequent protests in the 1950s, the government responded to public dissatisfaction by appointing the Departmental Committee on Homosexual Offences and Prostitution chaired by John Frederick Wolfenden. The report of this committee ("Wolfenden Report") was published in 1957 and recommended that:

> "*…homosexual behaviour between consenting adults in private should no longer be a criminal offence.*"

The Report further observed that it was not the function of a State to punitively scrutinise the private lives of its citizens:

> "*(T)he law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others… It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour.*"

The Sexual Offences Act, 1967

The Wolfenden Report was accepted and, in its pursuance, the Sexual Offences Act, 1967 was enacted to, for the first time in common law jurisdictions, partially decriminalise homosexual activity – described in English law as 'buggery' or anal sex between males. Section 1(1) of the original Sexual Offences Act, as notified on 27 July 1967 stated –

> "*Notwithstanding any statutory or common law provision, but subject to the provisions of the next following section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years.*"

A 'homosexual act' was defined in section 1(7) as –

> "*For the purposes of this section a man shall be treated as doing a homosexual act if, and only if, he commits buggery with another man or commits an act of gross indecency with another man or is a party to the commission by a man of such an act.*"

The meaning of 'private' was also set forth rather strictly in section 1(2) –

> "*An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done –*
> *(a) when more than two persons take part or are present; or*
> *(b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise.*"

Hence, by 1967, English law permitted:

– as between two men,
– both twenty-one years or older,
– anal sex (buggery),
– and other sexual activity ("gross indecency")
– if, and only if, a strict prescription of privacy was maintained,
– that excluded even a non-participating third party from being present,
– and restricted the traditional conception of public space to exclude even lavatories.

However, the benefit of Section 1 of the Sexual Offences Act, 1967 did not extend beyond England and Wales; to mentally unsound persons; members of the armed forces; merchant ships; and, members of merchant ships whether on land or otherwise.

Developments in Scotland and Northern Ireland

Over the years, the restrictions in the original Sexual Offences Act, 1967 were lifted. In 1980, the Criminal Justice (Scotland) Act, 1980 partially decriminalised homosexual activity in

Scotland on the same lines that the Act of 1967 did for England and Wales. One year later, in 1981, an Irishman Jeffrey Dudgeon successfully challenged the continued criminalisation of homosexuality in Northern Ireland before the European Court of Human Rights ("ECHR") in the case of *Dudgeon* v. *United Kingdom* (1981) 4 EHRR 149. Interestingly, *Dudgeon* was not decided on the basis of detrimental discrimination or inequality, but on the ground that the continued illegality of homosexuality violated the petitioner's right to privacy guaranteed by Article 8 of the 1950 European Convention on Human Rights ("European Convention"). In a 15-4 majority judgement, the ECHR found that "*...moral attitudes towards male homosexuality…cannot…warrant interfering with the applicant's private life…*" Following *Dudgeon*, the Homosexual Offences (Northern Ireland) Order, 1982 came into effect; and with it, brought some semblance of uniformity in the sodomy laws of the United Kingdom.

Equalising the age of consent

However, protests continued against the unequal age of consent required for consensual homosexual sex (21 years) as opposed to that for heterosexual sex (16 years). In 1979, a government policy advisory recommended that the age of consent for homosexual sex be reduced to 18 years – two years older than that for heterosexual sex, but was never acted upon. In 1994, an attempt to statutorily equalise the age of consent at 16 years was defeated in the largely conservative House of Commons although a separate legislative proposal to reduce it to 18 years was carried and enacted under the Criminal Justice and Public Order Act, 1994. Following this, the unequal ages of consent forced a challenge against UK law in the ECHR in 1994; four years later, in *Sutherland* v. *United Kingdom* [1998] EHRLR 117, the ECHR found that the unequal age of consent violated Articles 8 and 14 of the European Convention – relating to privacy and discrimination. *Sutherland* was significant in two ways – it forced the British government to once again introduce legislation to equalise the ages of consent; and, significantly, it affirmed a homosexual human right on the ground of anti-discrimination (as opposed to privacy).

To meet its European Convention commitments, the House of Commons passed, in June 1998, a bill for an equal age of sexual consent but it was rejected by the more conservative House of Lords. In December 1998, the government reintroduced the equal age of consent legislation which again passed the House of Commons and was defeated in the House of Lords. Finally, in 1999, the government invoked the statutory superiority of the House of Commons, reintroduced for the third time the legislation, passed it unilaterally to result in the enactment of the Sexual Offences (Amendment) Act, 2000 that equalised the age of sexual consent for both heterosexuals and homosexuals at 16 years of age.

Uniformity of equality

However, by this time, different UK jurisdictions observed separate legislations regarding homosexual activity. The privacy conditions stipulated in the original Sexual Offences Act, 1967 remained, although they had been subject to varied interpretation by English courts. To resolve this, the UK Parliament enacted the Sexual Offences Act, 2003 which repealed all

earlier conflicting legislation, removed the strict privacy conditions attached to homosexual activity and re-drafted sexual offences in a gender neutral manner. A year later, the Civil Partnership Act, 2004 gave same-sex couples the same rights and responsibilities as a civil marriage. And, in 2007, the Equality Act (Sexual Orientation) Regulations came into force to prohibit general discrimination against homosexual persons in the same manner as such prohibition exists in respect of grounds of race, religion, disability, sex and so on.

<u>In the United States</u>

Diversity of state laws

Sodomy laws in the United States of America have followed a different trajectory. A different political and legal system leaves individual US States with wide powers to draft and follow their own constitutions and laws. Accordingly, by 1961 all US States had their own individual anti-sodomy laws, with different definitions of sodomy and homosexuality. In 1962, Illinois became the first US State to repeal its anti-sodomy law. Many States followed suit over the next decades including Connecticut (1971); Colorado and Oregon (1972); Delaware, Hawaii and North Dakota (1973); Ohio (1974); New Hampshire and New Mexico (1975); California, Maine, Washington and West Virginia (1976); Indiana, South Dakota, Wyoming and Vermont (1977); Iowa and Nebraska (1978); New Jersey (1979); Alaska (1980); and, Wisconsin (1983).

Bowers v. *Hardwick*

However, not all States repealed their anti-sodomy laws. Georgia was one such State that retained a statutory bar to any oral or anal sex between any persons of any sex contained in Georgia Code Annotated §16-6-2 (1984) ("Georgia statute") which provided, in pertinent part, as follows:

> "*(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another…*
> *(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years*"

In 1982, a police officer arrested Michael Hardwick in his bedroom for sodomy, an offence which carried a prison sentence of up to twenty years. His case went all the way up to the US Supreme Court which, in 1986, pronounced its judgement in *Bowers* v. *Hardwick* 478 US 186 (1986). Although the Georgia statute was framed broadly to include even heterosexual sodomy (anal or oral sex between a man and a woman or two women) within its ambit of prohibited activity, the Court chose to frame the issue at hand rather narrowly. Justice Byron White, speaking for the majority, observed at the outset –

> "*This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or*

> *desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy…*"

Privacy and autonomy

Interestingly, Hardwick's case against the Georgia statute was not grounded on an equality-discrimination argument (since the Georgia statute prohibited even heterosexual sodomy but was only enforced against homosexuals) but on a privacy argument that sought to privilege and immunise private consensual non-commercial sexual conduct from intrusive State intervention. To support this privacy claim, a long line of cases was relied upon that restricted the State's ability to intervene in, and so upheld the sanctity of, the home, marriage, procreation, contraception, child rearing and so on [See, *Carey* v. *Population Services* 431 US 678 (1977), *Pierce* v. *Society of Sisters* 268 US 510 (1925) and *Meyer* v. *Nebraska* 262 US 390 (1923) on child rearing and education; *Prince* v. *Massachusetts* 321 US 158 (1944) on family relationships; *Skinner* v. *Oklahoma ex rel. Williamson* 316 US 535 (1942) on procreation; *Loving* v. *Virginia* 388 US 1 (1967) on marriage; *Griswold* v. *Connecticut* 381 US 479 (1965) and *Eisenstadt* v. *Baird* 405 US 438 (1972) on contraception; and *Roe* v. *Wade* 410 US 113 (1973) on abortion]. Further, the Court was pressed to declare a fundamental right to consensual homosexual sodomy by reading it into the Due Process clause of the Fourteenth Amendment to the US Constitution.

The 9-judges Court split 5-4 down the middle to rule against all of Hardwick's propositions and uphold the constitutionality of the Georgia statute. The Court's majority agreed that cases cited by Hardwick had indeed evolved a right to privacy, but disagreed that this privacy extended to homosexual persons since "*(n)o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated…*". In essence, the Court's majority held that homosexuality was distinct from procreative human sexual behaviour; that homosexual sex could, by virtue of this distinction, be separately categorised and discriminated against; and, hence, homosexual sex did not qualify for the benefit of intimate privacy protection that was available to heterosexuals. What reason did the Court give to support this discrimination? Justice White speaking for the majority gives us a clue: "*Proscriptions against that* (homosexual) *conduct have ancient roots.*" Justice White was joined in his majority judgement by Chief Justice Burger, Justice Powell, Justice Rehnquist and Justice O'Connor. His rationale was underscored by Chief Justice Burger who also wrote a short concurring opinion wherein he claimed:

> "*Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature,"*

and "a crime not fit to be named." ... To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."

The majority's "wilful blindness": Blackmun's dissent

The Court's dissenting opinion was delivered by Justice Blackmun, in which Justice Brennan, Justice Marshall and Justice Stevens joined. At the outset, the Justice Blackmun disagreed with the issue that was framed by the majority led by Justice White: "*This case is* (not) *about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare…*" and further pointed out that the Georgia statute proscribed not just homosexual sodomy, but oral or anal sex committed by any two persons: "*…the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used.*". When considering the issue of privacy for intimate sexual conduct, Justice Blackmun criticised the findings of the majority: "*Only the most wilful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality…*" And when dealing with the 'historical morality' argument that was advanced by Chief Justice Burger, the minority observed:

> "*The assertion that "traditional Judeo-Christian values proscribe" the conduct involved cannot provide an adequate justification for* (§)*16-6-2* (of the Georgia Statute)*. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.*"

The states respond, privacy is upheld

Bowers was argued and decided over five years in the 1980s. At the time, the USA was witnessing a neo-conservative wave in its society and government, which was headed by a republican conservative. The HIV/AIDS issue had achieved neither the domestic nor international proportions it now occupies and the linkages between HIV/AIDS, homosexuality and the right to health were still unclear. In the years after *Bowers*, several more US States repealed their sodomy laws.

In some US States, sodomy laws that were not legislatively repealed were judicially struck down. In 1998, the Georgia State Supreme Court, in *Powell* v. *State of Georgia* S98A0755, 270 Ga. 327, 510 S.E. 2d 18 (1998), heard a challenge to the same sodomy provision of the Georgia statute that was upheld in by the US Supreme Court in *Bowers*. In a complete departure from the US Supreme Court's findings, the Georgia Supreme Court first considered whether the Georgia statute violated individual privacy: "*It is clear from the right of privacy appellate jurisprudence…that the "right to be let alone" guaranteed by the Georgia*

Constitution is far more extensive that the right of privacy protected by the U.S. Constitution…"

Having established that an individual right to privacy existed to protect private consensual sodomy, the Georgia Court then considered whether there was a 'legitimate State interest' that justified the State's restriction of this right. The justifications that were offered by the State included the possibility of child sexual abuse, prostitution and moral degradation of society. The Court found that there already were a number of legal provisions to deter and punish rape, child abuse, trafficking, prostitution and public indecency. Hence: "*In light of the existence of these statutes, the sodomy statute's raison d' etre can only be to regulate the private sexual conduct of consenting adults, something which Georgians' right of privacy puts beyond the bounds of government regulation.*" By a 2-1 decision, Chief Justice Benham leading the majority, the Georgia Supreme Court struck down the Georgia statute for arbitrarily violating the privacy of individuals. Interestingly, the subjects of the dispute were not homosexual, but two heterosexual adults – a man and a woman. Similar cases where a US State's sodomy laws were judicially struck down include:

- *Campbell* v. *Sundquist* 926 S.W.2d 250 (1996) – [Tennessee – by the Tennessee Court of Appeals on privacy violation; appeal to the State Supreme Court expressly denied].
- *Commonwealth* v. *Bonadio* 415 A.2d 47 (1980) – [Pennsylvania – by the Pennsylvania Supreme Court on both equality and privacy violations];
- *Doe* v. *Ventura* MC 01-489, 2001 WL 543734 (2001) – [Minnesota – by the Hennepin County District Judge on privacy violation; no appellate challenge];
- *Gryczan* v. *Montana* 942 P.2d 112 (1997) – [Montana – by the Montana Supreme Court on privacy violation];
- *Jegley* v. *Picado* 80 S.W.3d 332 (2001) – [Arkansas – by the Arkansas Supreme Court, on privacy violation];
- *Kentucky* v. *Wasson* 842 S.W.2d 487 (1992) [Kentucky – by the Kentucky Supreme Court on both equality and privacy violations];
- *Massachusetts* v. *Balthazar* 366 Mass. 298, 318 NE2d 478 (1974) and *GLAD* v. *Attorney General* 436 Mass. 132, 763 NE2d 38 (2002) – [Massachusetts – by the Superior Judicial Court on privacy violation];
- *People* v. *Onofre* 51 NY 2d 476 (1980) [New York – by the New York Court of Appeals on privacy violation]; and,

- *Williams* v. *Glendenning* No. 98036031/CL-1059 (1999) – [Maryland – by the Baltimore City Circuit Court on both privacy and equality violations; no appellate challenge].

Lawrence v. *Texas*

These developments made for an uneven field in the matter of legality of homosexual sex with the sodomy laws of most States being repealed by their State legislatures or subject to State judicial invalidation, while the sodomy laws of the remaining States were retained under the shade of constitutional protection afforded by *Bowers*. Texas was one such State which maintained an anti-sodomy law contained in Texas Penal Code Annotated § 21.06(a) (2003) ("Texas statute") which criminalised sexual intercourse between two people of the same sex. In 1998, the Texas statute was invoked to arrest two men engaged in private, consensual, non-commercial sodomy. They subsequently challenged the constitutionality of the Texas statute, their case reaching the US Supreme Court. In 2003, the US Supreme Court, in *Lawrence* v. *Texas* 539 US 558 (2003) pronounced on the validity of the Texas statute. Interestingly, while the issue under consideration was identical to that decided in *Bowers*, the Court this time around was presented with detailed arguments on the equality-discrimination aspect of same-sex sodomy laws – which the *Bowers* Court majority did not consider. The Court split 6-3; the majority struck down the Texas statute. Justice Kennedy, speaking for himself and 4 other judges of the majority, found instant fault with the *Bowers* Court for framing the issue in question before it as simply whether homosexuals had a fundamental right to engage in sodomy.

Privacy, intimacy, home

This mistake, Justice Kennedy claimed, "*...discloses the Court's own failure… To say that the issue in* Bowers *was simply the right to engage in certain sexual conduct demeans…the individual...just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. Their penalties and purposes* (of the laws involved)…*have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.*" Justice Kennedy, joined by Justice Stevens, Justice Souter, Justice Ginsburg and Justice Breyer, found that the Texas statute violated the right to privacy granted by the Due Process clause of the US Constitution:

> "*The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."*" [The quote is c.f. *Planned Parenthood of Southeastern Pa.* v. *Casey* 505 US 833 (1992)]

Imposed morality is defeated

With the privacy argument established as controlling, Justice Kennedy went to some length to refute the 'historical morality' argument that was put forward in *Bowers* by then Chief Justice Burger: "*At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter… The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.*" To illustrate these other authorities, Justice Kennedy references the ECHR's decision in *Dudgeon supra* which was reached five years before *Bowers*: "*Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision* (Dudgeon) *is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.*".

The Court then affirmed that morality could not be a compelling ground to infringe upon a fundamental right: "*Our obligation is to define the liberty of all, not to mandate our own moral code*". The lone remaining judge of the majority, Justice O'Connor, based her decision not on the right to privacy but on equality-discrimination considerations. Interestingly, Justice O'Connor sat on the *Bowers* Court and ruled with the majority in that case. Basing her decision on equal protection grounds allowed her to concur with the majority in *Lawrence* but not overturn her earlier position in *Bowers* which had rejected a right to privacy claim. It also enabled her to strike down the Texas statute while not conceding homosexuality as a constitutionally guaranteed private liberty. There were three dissenters: The chief dissent was delivered by Justice Scalia, in which he was joined by Chief Justice Rehnquist and Justice Thomas. *Bowers* was not merely distinguished by the majority, it was overruled:

"Bowers *was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.* Bowers *v.* Hardwick *should be and now is overruled.*"