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CONSENSUAL HOMOSEXUALITY AND THE INDIAN PENAL CODE: SOME REFLECTIONS ON INTERPLAY OF LAW AND MORALITY

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I Introduction

THE INDIAN Penal Code, 1860[1] (IPC), is the major substantive criminal law of India. The IPC is influenced, *inter alia*, by the then prevailing socio-moral-ethos and socio-cultural values and beliefs as understood and perceived by its British architects. They included in the code the 'human conduct' that, in their opinion, is inimical and menace to their consciously recognized Indian social ethos, interests and values. The drafters of the Code, in fact, took the then prevailing English criminal law alone, and not considered either the Hindu or the Mohammedan penal laws that were operative in the British India on the eve of the making of the Penal Code, as a basis of the IPC.[2] It is modeled on the English criminal law. Nevertheless, the fact that the IPC is one of the least amended laws in the post-independent India stands a testimony of 'understanding' and 'visionary outlook' of the drafters of the Indian 'social setting', ethos and values that need to be preserved through criminal law.

The framers of the Code, obviously, relying upon the then prevailing sexual mores and the common law offence of buggery, decided to criminalize 'carnal intercourse against the order of nature' and to subject its perpetrators to imprisonment for life or for a term up to ten years with fine.[3]

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1. Act No. XLV of 1860. It was brought into force from January 1, 1862.
2. See, G C Rankin, The Indian Penal Code, 60 *LQR* 37 (1944) and A C Patra, "Historical Introduction to the Indian Penal Code," in KN Chandrasekharan Pillai & Shabistan Aquil (eds.), *Essays on the Indian Penal Code*, 33-43 (ILI, Delhi, 2000). 'The Indian Penal Code', observed by Sir James Fitzjames Stephen, 'may be described as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India'. See, Sir James Fitzjames Stephen, III *A History of the Criminal Law of England* 300 (Burt Franklin, New York, 1883).
3. S. 377, The Indian Penal Code, 1860. The drafters even retained the caption (i.e., 'unnatural offence') of the common law offence for the offence created under s. 377 of the Indian Penal Code.

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Rationale and propriety of 'unnatural offences', including buggery and bestiality, criminalized under section 377 of the Code has always been doubted. Gays and lesbians' rights activists have been vocal in assailing it, *inter alia*, on the ground that it unreasonably restricts their sexual autonomy and orientation, brings them stigma, social as well as legal, for their 'choice' and subjects them to social ignominy and contempt.

Recently, on August 9, 2008, the controversy is rekindled when the Union health and family welfare minister, addressing the international AIDS conference convened at Mexico, proposed decriminalization of the anti-homosexuality law in India. Section 377 of the IPC, he felt, has been impending India's fight against the deadly HIV/AIDS as gay carriers of the virus are denied of proper medical treatment. Its decriminalization, the minister opined, will help to give better treatment of HIV/AIDS among men who have sex with men (MSMs) and thereby to contain the epidemic within this community.[4]

This proposal, plausibly, prompted Naz Foundation, a NGO, to file a PIL in the Delhi High Court, *inter alia*, challenging constitutional *vires* of section 377 of the Code and urging it to (at least) tone it down, through judicial interpretation of section 377, to decriminalize consensual sex between consenting adults in private. It contended that section 377, being violative, on the ground of morality, of the right to equality guaranteed under the Constitution, is unconstitutional.

The central health ministry supports the contention of the Naz Foundation and asserts that the solicited decriminalization will help voluntary organizations working among HIV/AIDS patients to fight against the killer-disease among homosexuals. Interestingly, the central home ministry opposes the proposal for decriminalization of consensual sexual act between two consenting adults in private. It contends that the anti-sodomy law does not deserve decriminalization as it is against the prevailing sexual mores in India and is a 'reflection of a perversion mind'. Such a move, it pleads, will boost sexual delinquent behavior.[5]

4. *Times of India* (New Delhi), 9 August 2008. The National Aids Control Organization (NACO), in its affidavit, filed on behalf of the Union health and family welfare ministry, in the Delhi High Court stressed decriminalization of sex between two consenting adults in private. See, *The Hindu* (Hyderabad), 17 October 2008. The NACO has estimated that India is home to 2.5 Million MSMs of which 1,00,000 are at high risk of contracting HIV due to multi-partner and commercial sexual practices. More than 15% of MSMs are infected with the deadly virus. [See, *Times of India* (New Delhi), 9 August 2008.] According to American Foundation for AIDS Research (AMFAR), MSMs are 19 times more likely to be infected with HIV than the general population. [See, *Times of India* (New Delhi), October 1, 2008.]

5. *The Hindu* (Hyderabad), 29 September 2008.

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The ongoing legal battle in the Delhi High Court for decriminalization of section 377 and the conflicting stands taken by two central ministries, the health ministry and the home ministry, have indeed a motivation for the article. This article is written from merely an academic point of view and in no way reflecting, even remotely, on the contesting arguments of the parties to the writ petition and merits thereof, or outcome of the petition. It intends to look into interplay of law and morality in (im)propriety of (de)criminalization of 'carnal intercourse against the order of nature' under the Indian Penal Code (IPC). The article tries to highlight the interplay of legal and ethical contours of the law relating to 'unnatural offences' codified under section 377 of the Penal Code. After giving a brief legislative framework of the section 377 of the IPC, the article traces its roots in the British criminal law, recalls some of the pertinent legal and ethical aspects of 'unnatural' sexual act, and delves into interplay of legal and ethical mores of homosexuality and its (de)criminalization. In this backdrop, the article also peeps into theoretical premise for, and legal standing of, section 377 of the Penal Code in curtailing the so-called 'sexual autonomy' and 'sexual orientation' of homosexuals.

II 'Carnal intercourse against the order of nature' in India: A broad legislative paradigm

As stated earlier, section 377 of the IPC makes any carnal intercourse against the order of nature an offence and subjects its perpetrator to imprisonment for life or for a term up to 10 years. It reads:

> *Unnatural offences*- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.
>
> *Explanation*- Penetration is sufficient to constitute the carnal intercourse to the offence described in this section.

A plain reading of section 377 reveals that carnal intercourse against the order of nature[6] coupled with penetration is the gist of the offence. To be more precise, provisions of section 377 come into play when a person accused of 'unnatural offence' (i) had carnal intercourse with man, woman

6. Roots of s. 377, IPC, are biblical and based on the principle that sexual activity is for procreation only. Any sexual act, therefore, not fitting that role is considered unnatural and against the order of nature. In *Khanu* v. *Emperor*, AIR 1925 Sind 286 the Supreme Court of India observed that 'the natural object of carnal intercourse is that there should be possibility of conception of human beings'.

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or animal; (ii) such an intercourse was against the order of nature; and (iii) such an act was done voluntarily by the person accused of the offence.

However, the terms 'carnal intercourse against the order of nature with any man, woman or animal' and 'penetration', which are not defined under the Penal Code, as perceived by the judiciary in India, are of wide amplitude. These terms read together, ostensibly, take into their ambit a variety of 'unnatural' sexual acts. They are: (i) a (un)consensual sexual relation between two males,[7] (ii) a (un)consensual anal intercourse between a man and a woman[8] (including that between a husband and wife),[9] (iii) (mutual) masturbation[10] between partners (of same or different sex) of an act of sexual gratification, (iv) inter-femoral (thigh) sex[11] between two males or a man and a woman, (v) oral sex between persons of same sex[12] or of opposite sex[13] (including a husband and wife)[14], and (vi) bestiality.[15] In other words, any (un)consensual penile-anal, penile-oral and penile-animal penetration, howsoever minimal it be, amounts to 'unnatural' 'carnal intercourse' under section 377. It prohibits and penalizes sexual conduct between persons of same sex (gays), (in)voluntary 'unnatural' sexual relation between persons of opposite sex (anal, oral or inter-femoral), and bestiality. Section 377 of the Penal Code, in fact, corresponds to the (then) offence

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7. See, *DP Minwalla* v. *Emperor,* AIR 1935 Sind 78; *Lohana Vasntlal Devchand* v. *State*, 1968 Cri LJ 1277 (Guj); *Raju* v. *State of Haryana,* 1998 Cri LJ 2587 (P&H); *Kishan Lal* v. *State of Rajasthan,*1998 Cri LJ 4508 (Raj); *Mihir* v. *State of Orissa*, 1992 Cri LJ 488 (Ori); *Mohan Ojha* v. *State of Bihar*, 2002 Cri LJ 3344 (Pat); *Fazal Rab Choudhary* v. *State of Bihar*, AIR 1998 SC 323 and *Kailash @ Kala* v. *State of Haryana*, 2004 Cri LJ 310 (P&H).

8. *Sukhdeo Singh* v. *State of Rajasthan*, 2002 Cri LJ 1975 (Raj) and *State of Kerala* v. *Kurissum Moottil Antony*, (2007) 1 SCC 627.

9. *Grace Jeyramani* v. *EP Peter*, AIR 1982 Kant 46 and *Bini T. John* v. *Saji Kuruvila*, AIR 1997 Ker 247.

10. *Brother John Antony* v. *State*, 1992 Cri LJ 1352 at 1359 (Mad).

11. *State of Kerala* v. *K Govindan*, 1969 Cri LJ 818 at 823 (Ker) and *Brother John Antony* v. *State*, *ibid*.

12. *Khanu* v. *Emperor, supra* note 6; *Brother John Antony* v. *State*, *ibid*, at 1359; *Lohana Vasntlal Devchand* v. *State*, *supra* note 8. In this case, the Gujarat High Court observed that 'sexual perversity' is the condemnation of unnatural conduct performed for the purpose of sexual satisfaction both of the active and passive partners. Any person participating in the act of copulating the mouth of one person with the sexual organ of another is guilty of the offence.

13. *Calvin Francis* v. *State of Orissa*, (1992) 2 Crimes 455 (Ori); *Smt. Sudesh Jhaku* v. *K C J & Ors.*, 1998 Cri LJ 2428 (Del) and *Kartar Singh* v. *State*, 1993 Cri LJ 1483 (Del). But see, *Government* v. *Bapoji Bhatt*, 1884 (7) Mysore LR 280.

14. *Bini T. John* v. *Saji Kuruvila*, *supra* note 9 and *Grace Jeyramani* v. *EP Peter*, *supra* note 9.

15. *Khandu* v. *Emperor,* AIR 1934 Lah 261, wherein sexual intercourse per nose with a bullock was held 'unnatural' sex within the meaning of s. 377 IPC.

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of buggery and of bestiality known to the English criminal law.

It is also important to note a few distinct aspects of unnatural sexual acts criminalized under the IPC. Firstly, 'unnatural' sexual offence is a consensual sexual act between its players, active or passive. Secondly, penetration, by virtue of explanation appended to section 377, as in the case of rape, is required to constitute the unnatural 'carnal intercourse'.[16] It means that this offence can be committed by a man against a man or a woman or an animal if he penetrates an orifice of his victim. Thirdly, both the players, perpetrator and the consenting party, of a consensual sexual act attract criminal liability. Fourthly, a court, like in rape cases, is not required to seek, as a rule, corroboration for testimony of a victim of unnatural offences, if it is reliable and cogent, for holding a person criminally responsible for it.[17] Fifthly, the offence of unnatural offence is cognizable, non-bailable, non-compoundable and triable by magistrate of the first class.[18]

Section 377, thus, *inter alia*, prohibits a consensual homosexual act between two adults even if it is done in private. It treats such a carnal intercourse 'unnatural'. It does not even spare a passive player in such an unnatural sexual act as she abets the crime.

Gays, lesbians, and their activists not only condemn the legislative intervention but also feel that it illegally curtails their privacy and sexual 'choice' and 'autonomy'. Naz Foundation, a NGO, supporting their cause, has assailed constitutional validity of section 377 of the Code and urged the Delhi High Court to tone it down by excluding from its purview homosexuality between two consenting adults in private.

III Consensual Homosexuality in private: The post - IPC legislative change in the land of its origin

Criminalization of homosexuality in India in the 19th century, through section 377 of the Penal Code, is ostensibly influenced by the then prevailing 'sexual mores' peeped and perceived through 'alien lenses' of its 'British' drafters and by the then common law against buggery.

Against this backdrop, it will be interesting, rather pertinent, to note legislative changes that occurred in the anti-buggery law in the UK in the post-IPC period to perceive and appreciate section 377 of the Penal Code in the right perspective.

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16. *G D Ghadge* v. *State of Maharashtra*, 1980 Cri LJ 1380 (Bom).

17. *State of Kerala* v. *Kurissum Moottil Antony*, *supra* note 8. Also see, *Abdul Salam* v. *State*, 2005 DLT 336 (*obiter*).

18. See, The First Schedule, The Code of Criminal Procedure, 1973 (Act 2 of 1974).

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On the eve of making of the IPC, the common law perceived 'intercourse *per anum* by a man with a man or woman (including his wife) irrespective of consent or of age of the parties or intercourse *per anum* or *per vaginum* by a man or a woman with an animal' as 'buggery' and subjected its perpetrator(s) to life imprisonment.[19] Buggery was punishable irrespective of the age of the parties thereto, their consent therefor, and whether it was committed in private or public. However, subsequently, sodomy and bestiality were together described in section 61 of the Offences Against the Person Act, 1861 as the abominable crime of buggery.[20] Section 61 of the Act of 1861 was subsequently repealed and replaced by section 12 of the Sexual Offences Act, 1956. Section 12 (1) of the Act of 1956 provided:

> *Unnatural Offence* -[21] It is an offence for a person to commit buggery with another person or with an animal.[22]

However, the move for changes in the law relating to homosexuality in the UK was triggered in 1954 when the home secretary appointed the Committee on Homosexual Offences and Prostitution, headed by Sir John F Wolfenden, (hereinafter referred to as the Wolfenden Committee) to recommend reforms in the law relating to homosexuality and prostitution.

The Wolfenden Committee drew heavily upon two traditional 'liberal'

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19. Sir James Fitzjames Stephen formulated the common law offence of buggery as: 'Every one commits the felony called sodomy, and is liable upon conviction thereof to imprisonment for life, who (a) carnally knows any animal; or (b) being a male, carnally knows any man or any woman *per anum*. Any person above the age of 14 years who permits himself or herself to be so carnally known as aforesaid is a principal in the first degree in the said felony.' [See, Sir James Fitzjames Stephen, *A Digest of Criminal Law* 221 (Sweet & Maxwell, London, 1950) (hereinafter referred to as the *Digest*]. He classified sodomy and bestiality as crimes against morality.

Prior to the 16th century, homosexuality was as an ecclesiastical offence, governed in all aspects by the ecclesiastical courts. During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the 1533 Act of Henry VIII, the first English statute that criminalized homosexual behavior, referred to it as buggery. The penalty for this most heinous offence was death, which lasted, at least formally, until the 19th century.

20. S. 61 of the Act of 1861 stated : 'Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable at the discretion of the Court to be kept in penal servitude for life, or for any term not less than ten years'.

21. Blackstone described 'the infamous crime against nature' as an offence 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.' See, William Blackstone, 4 *Commentaries on the Laws of England* 215 (17th ed., 1830).

22. The punishment provided by s. 10 of the Act for the unnatural offence was imprisonment for life.

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concepts in its approach to the problem at hand. It adopted the Benthamite principle that there are 'changing concepts of taste and morality', i.e., a positive belief that morality changes with time and within different cultures. It also relied upon Millsian doctrine that legal intervention in private life is only ever justified in order to prevent harm to others.

John Stuart Mill in his *On Liberty*, [23] delving into the nature and limits of the state power that can be legitimately exercised in a civilized society over an individual against his will, observed:[24]

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he does otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

The Wolfenden Committee, seeking support from the Mill's thesis,[25] argued, in its report submitted in september 1957 to the home secretary,[26] that the purpose of criminal law is: (i) to protect individuals from 'offensive and injurious' matters, (ii) to protect them from 'corruption and corruption, and (iii) to 'preserve public order and decency'. Based on this functional premise of criminal law, it formulated operational orbit of the criminal law in the area of homosexuality. Articulating it's 'own formulation of the function of criminal law' relating to homosexuality and prostitution, the

23. John Stuart Mill, *On Liberty* (Parker, London, 1859).

24. John Stuart Mill, *On Liberty* 9 (Hackett Publishing Company, Cambridge, 1978). For a strong critique of the Mill's thesis by Justice Stephen see, James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Smith Elgard & Co., London, 1874).

25. See, HLA Hart, *Law, Liberty, and Morality* 14 (Oxford University Press, 1963).

26. HMSO, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd. 247, London, 1957).

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Committee observed:

> [I]ts function, as we see it, is to preserve public order and decency, to protect the citizens 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 criminal law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purposes we have outlined. It follows that we do not believe it to be a function of the law to attempt to cover all the fields of sexual behavior. Certain forms of criminal behavior are regarded by many as sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition; and such actions may be reprobated on these grounds.[27]

Placing reliance on its formulation of the functional orbit of criminal law, the Committee argued that consensual homosexual act between consenting adults in private does not fit into theoretical as well as operational paradigm of criminal law as it is neither 'offensive or injurious' to others nor does it involve 'exploitation and corruption' of a 'specially vulnerable', 'weak' or 'inexperienced' individual. A consensual homosexual act in between private harms no one. It merely falls in the sphere of private immorality. The Committee, almost in a tone similar to that of John Stuart Mill, stressed that society and the law need to give importance to individual freedom of choice and action in matters of private morality. Criminal law, therefore, has not to equate crime with sin. The Committee asserted that 'there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.[28] It is not the business of criminal law to enter into the domain of private lives of citizens and to enforce standards of morality in sexual behavior by going beyond its (criminal law) legitimate purposes. Such a legislative restriction, in its perception, amounts to an unauthorized intervention in the individuals' free choice of sexual enjoyment and privacy. 'It', the Committee stressed, 'is not proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good'.[29] The Committee, therefore, asserted that homosexuality behavior between

27. *Id*. paras 13 & 14.
28. *Id*. para 61. Emphasis supplied.
29. *Id*. para 52.

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consenting adults in private should be kept outside the purview of criminal law. It does not have any 'business' to enter into 'a realm of private morality'. The Committee, with only one dissenter, recommended that 'homosexual behavior between consenting adults in private should no longer be a criminal offence'.[30]

The home secretary, however, did not accept the Committee's recommendation for decriminalization of consensual homosexuality between adults in private. Nevertheless, the formulations of role of criminal law in the matters of sexual (im)morality and recommendation have attracted a good deal of attention, positive as well as negative. The British Parliament, however, after a decade, through the Sexual Offences Act, 1967, gave legislative effect to the Wolfenden Committee's recommendation of decriminalization of consensual homosexuality between adults in private. Section 12 (1) of the Act of 1967 now reads:

> (1) It is an offence for a person to commit buggery with another person otherwise than in the circumstances described in subsection (1A) or (1AA) below or with an animal.
>
> (1A) the circumstances first referred to in subsection (1) are that the act of buggery takes place in private and both the parties have attained the age of sixteen.[31]
>
> (1AA) the other circumstances so referred to are that the person is under the age of sixteen and the other person has attained that age
>
> (1B) An act of buggery by one man with another shall not be treated as taking place in private if it takes place- (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.
>
> (1C) in any proceedings against a person for buggery with another person it shall be for the prosecutor to prove that the act of buggery took place otherwise than in private or that parties to it had not attained the age of sixteen.

Buggery, by virtue of section 12 (1) of the Sexual Offences Act 1967, is not an offence in the Britain if: (i) it is done in private, (ii) the parties thereto have consented therefor, and (iii) the parties have attained the age of sixteen. A consensual homosexual act between consenting adults in

30. *Id*. para 62.

31. Originally, the age of consent stipulated under the Act of 1967 was 21 years (as suggested by the Wolfenden Committee). The Criminal Justice and Public Order Act of 1994 (the 1994 Act) reduced it to 18 years. Subsequently in 2000, it was further reduced to 16 years by the Sexual Offences (Amendment) Act, 2000.

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private, thus, is effaced from the UK, the land of origin of homosexuality as an (unnatural) offence in the Indian Penal Code.

However, the Wolfenden Committee's recommendation for decriminalization of consensual adult homosexuality in private and the principle and rationale (loaded with the idea that in a free society a person's morals should be his own affair and thereby intermixing of criminal law with moral law and of crime with sin) of the recommendation reignited debate between Lord Devlin, a believer in legal moralism, and Professor HLA Hart, a liberal theorist and defender of the Millian 'harm to others' principle. These distinguished jurists delved into, and debated on, the interplay of law and morality *vis-à-vis* homosexuality. Criminal law's functional paradigm outlined by the Wolfenden Committee also furnished a logical premise for gays and their rights activists to plead for decriminalization of homosexuality on the ground that sexual autonomy and choice of homosexuals needs to be respected by law and society. Such a legislative move, they argue and believe, will ensure the exercise of their 'sexual freedom' without any fear of prosecution and the consequential indignation and stigma-legal as well as social.

IV Consensual adult homosexuality in private – interplay of law and morality

The Wolfenden Committee's functional paradigm of criminal law as well as the rationale [premised on (im)morality of homosexual behavior and on (im)morality of criminal law in interfering with sexual autonomy of players in homosexual acts in private] for its recommendation for decriminalization of consensual homosexual act in private triggered debate between Lord Patrick Devlin, a distinguished jurist, and Professor HLA Hart, a legal philosopher of repute, among others,[32] on the operational orbits of criminal law and of moral law and their interplay in the sphere of sexual morality.

Lord Patrick Devlin, in the Second Maacabaean Lecture in Jurisprudence delivered to the British Academy on March 18, 1959[33] after the Wolfenden Committee Report came out in September 1957, assailed the Mill's thesis and the Wolfenden Committee's formulation of criminal law *vis-à-vis* private (im)morality. He observed:

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32. See, Ronald Dworkin, "Lord Devlin and the Enforcement of Morals," 75 (6) *Yale LJ* 986 (1966).

33. Printed in the *Proceedings of the British Academy*, vol. xlv, under the title 'The Enforcement of Morals'. Later on reprinted, along with other essays, in Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965).

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> — [W]hat has hitherto been accepted as the basis of the criminal law and that is that there are certain standards of behavior or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured but against society as a whole. — [I]f the criminal law were to be reformed so as to eliminate from it everything that was not designed to preserve order and decency or to protect citizens (including the protection of youth from corruption), it would overturn a fundamental principle. It would also end a number of specific crimes. Euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, dueling, abortion, incest between brother and sister, are all acts which can be done in private and without offence to others and need not involve the corruption or exploitation of others. Many people think that the law on some of these subjects is in need of reform, but no one hitherto has gone so far as to suggest that they should all be left outside the criminal law as matters of private morality. They can be brought within it only as a matter of moral principle. It must be remembered also that although there is much immorality that is not punished by the law, there is none that is condoned by the law. — I think it is clear that the criminal law as we know it is based upon moral principle. [34]

With convincing reasons and apt concrete examples, he argued that society, not an individual, has the right to pass judgments in the matters of morals and it has the right to use criminal law to enforce those moral judgments. Asserting that 'society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist', he argued that some kind of shared morality, i.e., some common agreement about what is right and what is wrong, which operates as one of the 'invisible' bonds that keep the society intact, is necessary for the social existence. If social mores, i.e., ideas about the way its members should behave and govern their lives, are not enforced, the society, he argued, will 'disintegrate' from within. The loosening of moral bonds is often the first stage of disintegration. He, therefore, argued that criminal law has legitimate claim not only to speak about morality and immorality but is also concerned with immorality. The society has a right to preserve, through the weapon of criminal law and its sanctions, its moral code for the social existence.[35] He argued that 'the suppression of vice (like homosexuality) is as much the

34. *Id.* at 6-7.
35. *Id.* at 8-14.

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law's business as the suppression of subversive activities'.[36] If society hates homosexuality, it is justified in outlawing it. Society has a right to punish homosexuality if its members strongly disapprove it, even though it has no effects that can be deemed 'injurious' to others. He asserted that in a number of crimes criminal law's 'function is simply to enforce a moral principle and nothing else'. [37] He also failed to see any 'theoretical limits' on the state's power 'to legislate against immorality'.[38]

Professor HLA Hart, however, in a series of lectures delivered at Stanford University in 1962, [39] addressed the question of the enforcement of morals through criminal law.[40] In the course of his lectures, he disapproved the Lord Devlin's thesis that 'enforcement of morals' through criminal law is necessary for the 'preservation of society' and the society has 'right' to do so. He argued that it is indeed absurd to believe that everything that society views profoundly immoral and disgusting threatens the social existence. It depends upon the 'nature' and characteristics of the 'society' and of the 'moral principles' it wants to 'preserve'.[41] Supporting the Wolfenden Committee's stand, he argued that the Lord Devlin's assertion that immorality jeopardizes or weakens society, in the absence of empirical evidence, is a mere *a priori* assumption. Lord Devlin, Prof HLA Hart argued, has failed to demonstrate, with empiricism, that deviation from accepted sexual morals, even by adults in private, is something that threatens the existence of society. 'It is of course clear (and one of the oldest insights of political theory)', he observed, 'that society could not exist without a morality which mirrored and supplemented the law's proscription of conduct injurious to other. But there is again no evidence to support and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society'. It is indeed absurd, he emphasized, to enforce any deviation from society's shared morality merely on the apprehension that such a deviation threatens the social existence. Prof HLA Hart, with assertion equal that of Lord Devlin, claimed that

36. *Id.* at 13-14.

37. *Id.* at 7. Emphasis is authors.

38. *Id.* at 14.

39. HLA Hart, *Law, Liberty, and Morality*, *supra* note 25.

40. The questions he formulated and addressed to were: Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally punishable to enforce morality as such?. And ought immorality as such to be a crime?

41. In this context he argued: 'if a society were mainly devoted to the cruel persecution of a racial or religious minority, or if the steps to be taken included hideous tortures, it is arguable that what Lord Devlin terms the 'disintegration' of such a society would be morally better than its continued existence, and steps ought not to be taken to preserve it'. See, 'Lecture I: The Legal Enforcement of Morality'.

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criminal law has nothing to do with morals and it, in fact, has to hands-off when it comes to the enforcement of (im)moral principles.[42] He asserted that 'no one should think even when popular morality is supported by an overwhelming majority or marked by widespread intolerance, indignation, and disgust that loyalty to democratic principles require him to admit that its imposition on minority is justified'.[43]

The Devlin-Hart debate over the legal enforcement of morality, which emerged into familiar arguments—the legal moralism and the harm-to-others' principle,[44] is not merely of academic interest. It indeed leads to two conflicting paradigms and justifications for criminalization of homosexuality, including homosexual act between consenting adults in private. The first theoretical paradigm allows and justifies legislative interference against homosexuality the moment it is perceived as 'immoral'. No other justification, except immorality *per se*, for legislative interference in the so-called 'sexual autonomy' is necessary. While, the latter approach does not allow legislature to legislate against homosexuality merely on the ground that it is 'immoral' or society condemns it. It can legislate against homosexuality, if it, in a convincing way, causes 'harm to others', is 'injurious or offensive to others', or leads to 'exploitation or corruption of others'.

However, it is difficult to say, with precision, as to whether the law against homosexuality articulated in section 377 of the Penal Code is premised on the legal moralism, advocated by Stephen J (and Lord Devlin), or the harm to others' principle, propounded by John Stuart Mill (and Prof HLA Hart). The fifth and the fourteenth Law Commissions of India, headed by former judges of the Supreme Court of India and composed of well-

42. HLA Hart, *Law, Liberty, and Morality*, *supra* note 25, at 51.

43. See, 'Lecture III: Moral Populism and Democracy'.

44. The Devlin-Hart debate, in fact, replicated, in many ways, the earlier debate between John Stuart Mill (in *On Liberty*) and Lord James Fitzjames Stephen (in *Liberty, Equality, Fraternity*). There is great 'similarity in the general tone and sometimes in the detail of the arguments' advanced by Lord Devlin with that of Lord James Fitzjames Stephen. [See, HLA Hart, *Law, Liberty, and Morality*, *supra* note 25, at 16.] Lord Devlin conceded that there was 'great similarity' between Lord James Fitzjames Stephen's view and his on the principles that should affect the use of the criminal law for the enforcement of morals. Nevertheless, he pleaded that at the time of he delivered the Maccabaean lecture he 'did not then know that the same ground had already been covered' by Lord James Fitzjames Stephen. [See, *Supra* note 34, at vii.] Lord Devlin, returning Hart's observation almost in same coins, also noted the similarity between HLA Hart, John Stuart Mill and the Wolfenden Committee. Referring to the Wolfenden Committee Report, Lord Devlin observed that 'the use of the [harm] principle observed by HLA Hart (in his *Law, Liberty, and Morality*) is 'strikingly similar' to Mill's doctrine (in *On Liberty*). [See, *Supra* note 33, at 105.]

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known experts in law, which, on reference from the Government of India, respectively in the latter half (1971) [45] and at the end of the twentieth century (1997),[46] undertook a comprehensive review of the IPC, however, did not delve deep into the complex interplay of morals *vis-à-vis* legal intervention against adult consensual homosexual behavior in private. The fifth Law Commission merely took note of the stand of the Wolfenden Committee that consensual homosexuality between consenting adults in private, being a matter of private immorality, be decriminalized, as it is not the law's business to enter into the matters of private immorality.[47] Recalling the inconclusive end of the debate sparked off by the Wolfenden Committee, the fifth Law Commission believed that disapproval of homosexuality by the Indian community justifies section 377, the law against homosexuality, in the Penal Code.[48] While the fourteenth Law Commission preferred to endorse the proposals for reform suggested by the fifth Law Commission and to add a few more suggestions to it without examining (im)moral contours of the anti-homosexuality law.[49]

The fifth Law Commission, which for the first time, undertook a comprehensive review of the more than a century old IPC, sought 'informed public opinion' on (de)criminalization of homosexuality and the punishment provided therefor, and decriminalization of consensual sexual act between adults in private for suggesting reforms in the provisions of section 377 of the Penal Code. The questions included in its questionnaire read: (i) should unnatural offences be punishable at all, or with heavy sentences as provided in section 377?, and (ii) should exception be made for cases where the offence consists of acts done in private between consenting adults?[50] The Commission received conflicting and indecisive 'informed public opinion' from the respondents who chose to respond to its questionnaire. Majority of the respondents favored retention of section 377 in the Penal Code. However, some of the respondents felt that homosexual acts between consenting adults in private need not be treated as offences, but others thought that consensual homosexuality in private, being 'abominable and loathsome which tend to make men and women depraved', need to be punished 'in all circumstances'. Nevertheless, there seemed to be general

45. Law Commission of India, *Forty- Second Report: The Indian Penal Code* (Government of India, 1971).
46. Law Commission of India, *One Hundred and Fifty-Sixth Report: The Indian Penal Code* (Government of India, 1997).
47. See, *Supra* note 46, para 16.125.
48. *Id*. para 16.126.
49. See, *Supra* note 46, vol. I, para 9.51.
50. *Supra* note 45, para 16.124.

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feeling among the respondents that the punishment provided in section 377 is 'unduly harsh and quite unrealistic'.[51] Recalling the functional orbit of criminal law outlined by the Wolfenden Committee and the proposition stressed by it that it is not the business of criminal law to enforce notions of private morality as well as the view of (unnamed) distinguished thinkers emphasizing the need to preserve the society's cherished beliefs through criminal law, the Law Commission observed:[52]

> There are, however, a few sound reasons for retaining the existing law in India. First, it cannot be disputed that homo-sexual acts and tendencies on the part of one spouse may affect the married life and happiness of the other spouse, and from this point of view, making the acts punishable by law has a social justification. Secondly, even assuming that acts done in private with consent do not in themselves constitute a serious evil, there is a risk involved in repealing legislation which has been in force for a long time. The position might be different if we were merely refraining from legislating about a type of private conduct whose suitability for punishment is in dispute, but we are not legislating on a blank slate. Ultimately, the answer to the question whether homosexual acts ought to be punished depends on the view one takes of the relationship of criminal law to morals. The debate on the subject, sparked off by the Report of the Wolfenden Committee, has not yet come to an end. There will always be two views on the question how far it is the business of criminal law to enforce notions of private morality. If one shares the reasoning of the Committee, namely, that there is a sphere of private morality in which criminal law has no business, then the answer is clear, but it is well known that there are distinguished thinkers who take a different view, emphasizing the need for preserving the society's cherished beliefs.

With this reasoning and implicitly following the line of argument of Lord Devlin that criminal law is justified in enforcing morals, the Law Commission recommended retention of homosexuality (including homosexual act between consenting adults in private) in the Penal Code. It opined:

> It appears to us that, in this highly controversial field, the only safe guide is what would be acceptable to the community. We are inclined to think that Indian society, by and large, dis-approves of homosexuality and this disapproval is strong enough to justify it

51. *Ibid*.
52. *Id.* para 16.126.

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> being treated as a criminal offence even where adults indulge in it in private.[53]

However, the Commission felt that the punishment (life imprisonment or imprisonment of either description for a term up to ten years) provided for 'unnatural offences' in section 377 of Code is 'very harsh' and 'unrealistic'. It recommended scaling down of the punishment to imprisonment for a term up to two years, or fine or both. However, it recommended a comparatively longer term of imprisonment (up to seven years) for such an unnatural sexual assault on a minor girl or boy by an adult. Its proposed section 377 read as: h

> 377. *Buggery*. - Whoever voluntarily has carnal intercourse against the order of nature with any man or woman shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;
>
> and where such offence is committed by a person over eighteen years of age with a person under that age, the imprisonment may extend to seven years.
>
> *Explanation*. - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.[54]

It is pertinent to note that the Indian Penal Code (Amendment) Bill, 1978, through its clause 160, sought to substitute the existing section 377 by new section 377 drafted on the lines suggested by the fifth Law Commission. However, clause 160, like other clauses of the Bill, could not become effective as the Amendment Bill, though passed by the Rajya Sabha, lapsed due to the dissolution of the Lok Sabha in 1980.

The fourteenth Law Commission, with a view to suggesting reforms in the Penal Code, undertook a comprehensive review in 1997 of the IPC. It sought public opinion about: (i) the clause 160 of the Amendment Bill of 1978, (iii) mandatory minimum punishment for unnatural sexual assault by an adult on a minor girl or boy, and (iii) retention in section 377 of consensual sexual act between consenting adults in private. The question formulated for the purpose read as:[55]

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53. *Ibid*.

54. *Id*. para 16.127. Believing bestiality as a pathological manifestation of the perpetrator, it recommended its decriminalization.

55. See, Annexure I: Questionnaire on the Indian Penal Code, 1860 (question 84), Law Commission of India, *One Hundred and Fifty-Sixth Report: The Indian Penal Code*, *supra* note 46, vol. II.

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Section 377 : Unnatural Offences.

(a) Do you agree that the following clause 160 of the Amendment Bill be substituted for section 377 as suggested by the Law Commission in its 42nd Report —

(b) Do you agree that a minimum punishment of imprisonment not less than ten years be prescribed where the offence is committed by an adult on minors?

(c) Should consensual adult homosexuality remain as an offence under IPC?

Most of the persons, including the State Law Commissions, supported all the three issues indicated in the question. They have shown their concurrence to the proposal that homosexual acts between consenting adults should continue to be an offence under section 377 of the Penal Code. However, women organizations suggested that the word 'unnatural' from the marginal note of the section be deleted and bestiality, like in the original section, should be included in section 377.[56]

The Fourteenth Law Commission, placing its reliance on the feedback to its questionnaire, endorsed the fifth Law Commission's proposal for reform and the consequential clause 160 of the 1978 Amendment Bill. However, recalling the growing incidence of unnatural sexual assaults on minor children, it recommended that a mandatory minimum sentence of imprisonment for a term not less than two years (which may extend to seven years) be provided for unnatural sexual assault on a minor person. It accordingly recommended that words '*the imprisonment may extend to seven years*', appearing in unnumbered paragraph 2 of the above recommended section 377, be substituted by the words '*he shall be punished with imprisonment of either description for a term which shall not be less than two years but may extend to seven years and fine*'. Nevertheless, the Commission proposed that a court, for adequate special reasons to be recorded in the judgment, be allowed to reduce the recommended mandatory minimum sentence.[57]

Thus, both the Law Commissions, it seems, were influenced by the Lord Devlin's assertion that immorality *per se* empowers a state to legislate against it, when they did not favor decriminalization of homosexuality, including homosexual acts between consenting adults in private. The

56. See, Annexure III: Response Received on the Questionnaire on the Indian Penal Code, 1860, Law Commission of India, *One Hundred and Fifty-Sixth Report: The Indian Penal Code*, *ibid*.

57. *Supra* note 49.

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Commissions merely recommended lenient punishment for it. Nevertheless, they suggested decriminalization of bestiality.

However, a careful reading of the paragraph quoted above from the forty second Law Commission report highlighting the reasons that prompted the fifth Law Commission to recommend retention of consensual homosexuality between adults in private, also gives an impression that the Law Commission also took into account the 'harm to others' principle while recommending retention of homosexuality, including adult consensual homosexuality. Homo-sexual acts and tendencies on the part of one spouse, it apprehended, may have adverse effects on the married life and happiness of the other spouse. Homosexuality, consensual or non-consensual, is a potential threat to the family institution. Hence, retention of homosexuality in the IPC, as claimed by the Law Commission, has 'a social justification'. However, one may, like HLA Hart, argue that the 'threat' perceived by the Law Commission is merely an assumption as it is not supported by facts. Nevertheless, in this context it becomes imperative to recall the Lord Devlin's three assertions, namely, immorality, for the purpose of law, is what every right minded person is presumed to consider to be immoral; every immoral act is harmful, and it is impossible to set theoretical limits to the power of the state to legislate against immorality. Probably, these assertions lie at the heart of the Law Commission's recommendations for retention in the IPC of section 377.

V 'Sexual autonomy'- legislative intervention: Logic and reservations

A careful reading in a breath of Lord Devlin's *Enforcement of Morals* and Professor HLA Hart's *Law, Liberty, and Morality*, reveals two conflicting bases and rationale for legislative intervention and the enforcement through criminal law of immoral acts or sins. Lord Devlin asserts that merely public condemnation and disapproval of an act is enough for criminal law to legislate against it. While, Professor HLA Hart pleads that legislative intervention based on mere social disapproval of an act is unjustified, unless it is shown that the socially disapproved act is 'injurious to others'. To put it in the present context, if a society hates and disapproves homosexuality, it is justified in outlawing it and forcing homosexuals to choose between the miseries of frustration and prosecution by the state. Such a legislative intervention is justified in the name of preservation of society. Society, and not the homosexuals, has the right to decide what is 'right' and 'wrong' for them even though the society is not injured by the vice. Professor Hart, however, feels that such a legislative measure amounts to an unjustified interference with the homosexuals' private lives, as the

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law has 'no business' to enter into the 'realm of private morality'. This assertion, in ultimate analysis, leads to a proposition that adults have an unbridled autonomy to opt for, and to get indulged into, sexual activity—natural or unnatural—of their choice and society has to respect their 'choice' and 'autonomy'.

The Naz Foundation, which has recently assailed in the Delhi High Court the constitutional validity of section 377 of the Penal Code that criminalizes (un)consensual homosexuality as 'unnatural offence' in India, in ultimate analysis, doubts legal moralism, on which section 377 legislating against buggery, including homosexuality between consenting adults in private, and the recommendations of the fifth and the fourteenth Law Commissions for its retention (though with lesser punitive sanction) in the IPC, as a sound justification for curtailing consensual adult homosexuality in private. It believes that section 377 is unjustifiably curtailing sexual autonomy and choice of homosexuals. In other words, Naz believes that the IPC, through section 377, to borrow the formulation of the Wolfenden Committee's assertion (supported by Professor HLA Hart), has 'no business' to enter into the realm of private sexual immorality of homosexuals, unless their behavior is deemed to be 'injurious to others'. It, therefore, seeks judicial intervention to recognize 'sexual autonomy' and 'privacy' of consensual adult players in homosexual activity in private.

In fact, the tone and tenor of arguments of Naz lead to two very interesting queries that deserve our attention. Firstly, can the so-called 'sexual autonomy', including the freedom to be a player, active or passive, in a consensual adult homosexuality in private, be read under any of the 'fundamental rights' guaranteed under the Constitution of India and thereby to hold section 377 of the IPC unconstitutional, or to, at least, make consensual homosexuality between adults in private a legally permissive act? Secondly, can a mere presumed belief of the legislature that homosexuality, even though it does not inexcusably inflict or threaten substantial harm to individual, social institution or public interest, is immoral and unacceptable be assumed a 'rational basis' for criminalizing homosexuality, including consensual homosexuality between adults in private, and thereby to justifiably curtailing the so-called sexual freedom? Let us, in brief, delve into these queries.

(i) Do homosexuals have the fundamental right to engage in consensual homosexuality in private and thereby to constitutionally insulate it from the state intervention and proscription or to invalidate the anti-homosexuality law?

The Constitution of India not only guarantees a set of fundamental

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rights[58] but also accords them constitutional supremacy. By virtue of article 13 of the Constitution, any pre-Constitution as well as post-Constitution law that is inconsistent with any of the fundamental rights becomes unconstitutional and thereby void. In fact, clause (2) of article 13 of the Constitution mandates the 'state' not to 'make any law' which takes away or abridges the fundamental rights and makes a law contravening any of these rights unconstitutional and void.[59] Article 13 mandates the judiciary, especially the higher judiciary, as the guardian and protector of these fundamental rights, to ensure that no statute or statutory provision infringes any of the fundamental rights and to declare such a law or its provision unconstitutional and void.

The Constitution has also devised a mechanism for the effective enforcement of these fundamental rights. Article 32 guarantees the fundamental right to move the Supreme Court, the highest court of the land, for the enforcement of a fundamental right and mandates the apex court to issue appropriate direction, order or writ, for the enforcement of the fundamental right. Article 226, *inter alia,* also empowers the high court of a state to issue an appropriate direction, order or writ against 'any person, authority or government' for the enforcement of the fundamental rights. [60]

A close look at the fundamental rights guaranteed under the Constitution, in the backdrop of their hitherto judicially recognized contours, one may plausibly (but arguably) believe that the so-called sexual autonomy or choice can be perceived as one of the contours of the fundamental right to life and personal liberty guaranteed under article 21 of the Constitution. Article 21, which reads: 'No person shall be deprived of his life or personal liberty except according to procedure established by law', assures to a person that

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58. Part III (arts. 12-51) guarantees a cluster of fundamental rights grouped in seven heads. They are: (i) Right to Equality (arts. 19-22); (ii) Right to Freedoms (arts. 19-22); (iii) Right against Exploitation (arts. 23 & 24); (iv) Right to Freedom of Religion (arts. 25-28); (v) Cultural and Educational Rights (arts. 29 & 30); (vi) Right to Property (arts. 30-A & 31-A-31-C), and (vii) Right to Constitutional Remedies (arts. 32-35).

59. Material part of art. 13 says: '(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, shall be void. (2) The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of contravention, be void.'

60. The constitutional nature of art. 32 and of art. 226, which are couched in almost identical phraseology, is of worth noting. The former, unlike art. 226, is a fundamental right. Hence, it provides for a speedier remedy to an individual for violation of his fundamental rights from the highest court of land as a matter of fundamental right.

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(s)he will not be deprived of 'life' and 'personal liberty' except according to 'procedure established by law'. All the three key expressions, namely, 'life', 'personal liberty', and 'procedure established by law' used in article 21, have received a very expansive interpretation to make the fundamental right to life and personal liberty more effective and meaningful. The expression 'right to life', which meant something more than mere animal existence, includes in it the 'right to live with human dignity and all that goes with it'. And 'inhibition against the deprivation of life extends to all those limits and by which life is enjoyed.'[61] The term 'personal liberty', as perceived by higher courts, is of wide amplitude. It brings into its fold all the varieties of rights that go to make up the 'personal liberties' of a man.[62] While the phrase 'procedure established by law', contemplated under article 21, for depriving a person of his right to life or personal liberty must be 'right, just and fair' and 'not fanciful or oppressive'.[63] It must not be 'capricious, arbitrary, unfair or unreasonable'. Unjust or unfair procedure established by law, in the circumstances of a case, for depriving a person of his life or personal liberty attracts the vice of unreasonableness and thereby vitiates not only the 'law' that prescribes such a procedure but also the consequential action taken thereunder.[64]

In fact, article 21 'embodies a constitutional value of supreme importance in a democratic society'[65] and is 'the procedural *magna carta* protective of life and liberty'.[66] It, as it stands today, corresponds to the due process clause of the Fifth Amendment of the US Constitution, which,

61. See, *Francis Coralie* v. *Union Territory of Delhi*, AIR 1981SC 746; *P Rathinam* v. *Union of India*, AIR 1994 SC 1844 and *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180.

62. See, *Kharak Singh* v. *State of UP*, AIR 1963 SC 1295; *Francis Coralie* v. *Union Territory of Delhi, ibid*, and *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

63. *Maneka Gandhi* v. *Union of India*, *ibid*, and *Kartar Singh* v. *State of Punjab*, (1994)3 SCC 569.

64. *Olga Tellis* v. *Bombay Municipal Corporation*, *supra* note 61. The Supreme Court declared ss. 303 and 309 of the Penal Code, respectively providing for mandatory imposition of death sentence on a life convict, if he commits murder and criminalizing attempt to commit suicide, as unconstitutional for being violative of the spirit and tenor of art. 21 of the Constitution. See, *Mithu* v. *State of Punjab,* AIR 1983 SC 473, and *P Rathinam* v. *Union of India* (*supra* note 61). However, the constitutional invalidity of s. 309 lived for short time until a Full Bench of the apex court, through *Gian Kaur* v. *State of Punjab,* AIR 1996 SC 946 reversed the *P Rathinam* dictum. For comments, see K I Vibhute, "The Right to Die and Chance to Live - A Fundamental Right in India: Some Critical Reflections", 24 *Indian Bar Review* 65-96 (1997).

65. Per Bhagwati J, in *Francis Coralie* v. *Union Territory of Delhi*, *supra* note 61, at 752.

66. Per Krishna Iyer J, in *PSR Sadhanatham* v. *Arunachalam*, AIR 1980 SC 856.

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inter alia, lays down that 'no person shall be deprived of his life, liberty or property, without due process of law'.[67] The word 'due' in the clause is interpreted to mean 'just, proper or reasonable'. The courts in the USA, by relying on the due process clause, can declare a law unconstitutional if does not accord to the notions of what is 'just' and 'fair' in the circumstances.

Article 21, as a result of creative judicial interpretation by the Indian higher judiciary, has been a productive source of several fundamental rights. A few prominent among them are: the right to clean and healthy environment, the right to livelihood, the right to shelter, the right to medical care, the right to education, the right against custodial violence, the right to live with dignity, and the right to privacy.[68]

The right to privacy, i.e., the 'right to be let alone', according to the Supreme Court, 'is implicit in the right to life and personal liberty guaranteed under article 21 of the Constitution and it has acquired the status of fundamental right even though it is not expressly enumerated in Part III of the Constitution'.[69] It is one of the penumbral rights of article 21. Every person has a right to safeguard his privacy. The Supreme Court, has made it very clear that it does not have any 'hesitation in holding that right to privacy is a part of the right to life and personal liberty enshrined under article 21 of the Constitution' and that it 'cannot be curtailed except according to procedure established by law'. [70]

However, the right to privacy, as culled out by the Supreme Court from article 21 of the Constitution, does not have fixed connotations. In fact,

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67. *Maneka Gandhi* v. *Union of India*, *supra* note 63, at 1165.

68. For further details, see, H M Seervai, II *Constitutional Law of India* (Tripathi, 1991), and M P Jain, *Indian Constitutional Law* 1121-1142 (LexisNexis Butterworths, Wadhawa, Nagpur, 2008).

69. See, *R Rajagopal* v. *State of TN*, AIR 1995 SC 264, para 9. Also see, *Govind* v. *State of Madhya Pradesh,* AIR 1975 SC 1378, wherein the Supreme Court has observed that the right to privacy as a fundamental right has 'emanated' from arts. 19 (1) (a), 19(1) (d), and 21 of the Constitution. [at 1385]. However, its origin can be traced in the minority opinion of Justice Subba Rao in *Kharak Singh* v. *State of UP*, *supra* note 62. He, unlike the majority of the judges participated in the decision, inferred the right to privacy from the expression 'personal liberty' used in article 21. His Lordship observed: 'The right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life —.We would therefore define the right to personal liberty in art .21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly or indirectly brought about by calculated measures.' [at p 1306].

70. *People's Union for Civil Liberties* v. *Union of India*, AIR 1997 SC 568, para 18.

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the Supreme Court has declined to define 'privacy' by saying that it, 'as a concept' is 'too broad and moralistic to define it judicially.'[71] Therefore, judicial response to the question as to whether right to privacy can be claimed by a petitioner or has been violated in a given situation would depend on the facts and circumstances of a case at hand. The concept of privacy as well as the right to privacy is still in the process evolution.

In the backdrop of the evolving connotation of the right to privacy, adult consensual homosexuals, nevertheless, may advance an argument that their 'sexual freedom and preference' (for homosexual behavior in private) is an integral part of their right to privacy and no one is allowed to invade it. Section 377 of the Penal Code, criminalizing homosexuality, therefore, unjustifiably interferes with their right to privacy.[72]

However, the right to privacy, as stressed by the Supreme Court, is not absolute. Reasonable restrictions can be imposed on the right to privacy 'on the basis of compelling public interest'. Stressing the point the Supreme Court observed:[73]

> Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest.

Public morality, i.e. morality understood by the people as a whole, though varies from society to society and time to time depending on the standards of morals prevailing in the contemporary society, could be perceived as one of the 'compelling public interests' for curtailing the right to privacy.[74] The right to privacy, including the right to sexual freedom and choice, even assuming that it comes within the purview of article 21, allows the state, through legislation, to impose restrictions premised on morality.[75] In other words, (sexual) morality has some say in consensual adult homosexuality.

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71. *Id*. para 19.

72. The point is moot. One may possibly imply that sexual autonomy of consensual adult homosexuals goes along with their 'dignified life' guaranteed under art 21 of the Constitution. However, it is left to the ingenuity of the courts to explore this concept in the Indian social context.

73. *Govind* v. *State of Madhya Pradesh*, *supra* note 69, para 31. Also see, *Sharaa* v. *Dharmpal*, AIR 2003 SC 3450, para 58.

74. See, *Dr. Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte*, AIR 1996 SC 1113; *Mr 'X'* v. *Hospital 'Z'*, AIR 1999 SC 495 and *Brijgopal Denga* v. *State of Madhya Pradesh*, AIR 1979 MP 173.

75. It is, nevertheless, pertinent to note that the petitioner challenging constitutional validity of a Statute or a statutory provision being violative of art. 21 of the Constitution, as a rule, requires to prove that the impugned law takes away his right assured under art. 21. Thereafter, it is for the state to show the impugned law is justified as the

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One may, in the light of preceding paragraphs and the absence of any judicial dictum or indication that consensual homosexuality in private is a part of the right to privacy,[76] assert that article 21 of the Constitution in no way confers on adults a fundamental right to engage into consensual sodomy in private. Homosexuals do not have 'the right to be let alone' and of intimate association with a person of same sex as a part of their right to privacy. Even if they, for the sake of the argument, have the right to do so, the prevalent sexual mores justify curtailment of their right to privacy. Further, the right to sexual autonomy and to an intimate association, as a contour of the right to privacy, cannot be conferred only on adult consensual homosexuals. In the light of the right to equality guaranteed under article 14 of the Constitution, it would be difficult, to sustain its constitutional validity and to invent convincing criteria and norms to deny (immoral) adult incestuous persons and adulterous spouses the so-called 'right to be let alone' and to have intimate association in private, like homosexuals, with their partners.[77] Such a move, in the present submission, would not only give a serious blow to the prevailing sexual morals that have laid a sound foundation for the family and marriage institutions to stand on but would also be, in due course of time, prove disastrous for, and inimical to, these social institutions.

In this context, it is pertinent to recall ruling of the US Supreme Court in *Bowers* v. *Hardwick*. [78] Hardwick, who was found engaged in his bedroom

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procedure prescribed thereunder for abridging the right is just, fair and reasonable. See, *Bachan Sing* v. *State of Punjab*, AIR 1980 SC 898. Also see, *Deena* v. *Union of India*, AIR 1983 SC 1155.

76. The apex court has indicated that the right to privacy of a person is extended, *inter alia*, 'to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education'. See, *Govind* v. *State of Madhya Pradesh*, *supra* note 69 (para 24), and *R Rajagopal* v. *State of TN*, *supra* note 69 (para 28).

77. For example, the US Supreme Court has declared $ 21.06(a) of the Texas Penal Code of 2003, which penalized 'deviational sexual intercourse, namely anal sex with another man, as unconstitutional for being violative of the Equal Protection Clause, which is identical with art 14 of the Indian Constitution. $ 21.06(a) provided: 'A person commits an offence if he engages in deviate sexual intercourse with another individual of the same sex.' $ 21.01 (1) of Penal Code defined 'deviate sexual intercourse' to mean '(a) any contact between any part of the genitals of one person and the mouth or anus of another person; or (b) the penetration of genitals or the anus of another person with an object'. The Supreme Court declared the provision *ultra vires* to the Constitution as it, by criminalizing homosexual sodomy, but not heterosexual sodomy, goes against the Equal Protection Clause. It treats the same conduct differently based solely on the gender of the participants. See, *Lawrence* v. *Texas*, 539 US 558 (2003). Reprinted in, Franklin E Zimring & Bernard E Harcourt, *Criminal Law and the Regulation of Vice* 138 (Thomson/West, St Paul, MN, 2007).

78. 478 US 186 (1986). Reprinted in, Franklin E Zimring & Bernard E Harcourt, *Criminal Law and the Regulation of Vice*, *id*. at 116-129.

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in intimate sexual conduct with another man with his consent and a practicing homosexual, challenged the constitutionality of the Georgia penal statute that criminalizes adult consensual homosexuality.[79] He asserted that his homosexual conduct and intimate association with a consenting adult in private was, by virtue of due process clause of the Fifth Amendment, the part of his liberty and thereby was beyond the state intervention. Contrary to the assertion of Hardwick, Supreme Court refused to hold that adults do, under the due process clause of the Fifth Amendment, which is identical to article 21 of the Indian Constitution, have the fundamental right to engage in acts of consensual sodomy in private. The Supreme Court, therefore, declined to declare the anti-sodomy penal law of Georgia, which, in spirit and tenor, is identical to section 377 of the IPC, as unconstitutional. The Court failed to see any constitutional rationale and reason for announcing that adults have 'a fundamental right to engage in homosexual sodomy'. It declined to 'take a more expansive view' of its authority to 'discover new fundamental rights imbedded in the due process clause'. Justifying the Court's stand, White J, speaking for the Supreme Court, observed:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. — There should be, therefore, great resistance to expand the substantive reach of those [Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.[80]

Burger CJ, concurring with the Court's opinion, also ruled that 'in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy' and there is 'nothing in the Constitution depriving a State of the power to enact' the anti-sodomy statute. 'To hold that the act

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79. $ 16-6-2 of the Georgia Code Ann. of 1984 provides: '(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 —.'

$ 16-6-2 amended $ 26-5901 of the Georgia Criminal Code of 1933 that defined sodomy as 'the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman'.

80. Franklin E Zimring & Bernard E Harcourt, *Criminal Law and the Regulation of Vice*, *supra* note 77 at 119.

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of homosexual sodomy is somehow protected as a fundamental right', he observed, 'would be to cast aside millennia of moral teaching'.[81]

(ii) Can mere immoral character of an act, in the opinion of legislature, be a rational basis for, or legitimate state interest in, criminalization of consensual adult homosexuality in private?

The approach and the answer to the first question, in fact, determines the way in which the instant question needs to be approached and answered. If society does not recognize the so-called sexual autonomy of adults to engage in consensual sodomy in private but condemns it as an immoral act, the society has the right to use penal law and its sanction to enforce it. In other words, society has the legitimate right to enforce its sexual mores, of course, against the will of the individuals, though in minority, those prefer to indulge into behavior contrary to these sexual mores. The society, which disapproves homosexuality, including consensual adult sodomy in private and perceives it as 'unnatural', is justified to curtail it through anti-homosexuality penal law. It has legitimate claim in denying, through legal fiat, personal 'sexual preferences' to homosexuality to heterosexuality. It has the right to 'prevent' them from indulging into homosexuality, including consensual adult sodomy in private. Mere social disapproval of a human conduct that goes against the prevailing social norms, thus, amounts to a 'rational basis' for criminalizing the vice. No further rationale be legitimately sought from the society for criminalizing an immoral human conduct.[82]

In this context, it is of worth to recall assertions of Lord Devlin that criminal law, in a number of crimes, 'simply enforces a moral principle and nothing else'[83] and 'society has the right to legislate against immorality'[84] as well as to 'use law' to 'preserve morality in the same way as it uses it to safeguard anything else that is essential for its existence'.[85]

The Constitution of India authorizes the Parliament to put reasonable

81. *Id*. at 120. But see, *Lawrence* v. *Texas*, 539 US 558 (2003), wherein the US Supreme Court ruled that the right to liberty under the Due Process clause gives adult homosexuals the full right to engage in their homosexual conduct without State intervention. See, Franklin E Zimring & Bernard E Harcourt, *Criminal Law and the Regulation of Vice*, *supra* note 77, at 146.

82. In *Anil Kumar Sheel* v. *Principal, Madan Mohan Malviya Engineering College*, AIR 1991 All 120, the Allahabad High Court has observed that unnatural offence incorporated in the IPC is primarily a matter of morality and State is much concerned with the behavior and moral involved therein. (See, para 15).

83. Patrick Devlin, *The Enforcement of Morals*, *supra* note 33, at 7.

84. *Id*. at 11.

85. *Ibid*.

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restrictions, through law, on some of the fundamental freedoms and rights on the ground, *inter alia*, of morality.[86] In *Ranjit D Udeshi* v. *State of Maharashtra*,[87] in which the constitutional validity of section 292 of the IPC (dealing with sale of obscene materials) was challenged on the ground that it is violative of the right to freedom of speech and expression guaranteed under article 19 of the Constitution, the Supreme Court ruled:

> — [I]t can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. —This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292 of the Penal Code manifestly embodies such a restriction because the law against obscenity, —, seeks no more than to promote public decency and morality. — Section 292, Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Article 19.[88]

In this context it is pertinent to recall that the US Supreme Court in *Bowers* v. *Hardwick*[89] categorically ruled that condemnation by society of an act as immoral is 'a sufficient reason' for a state to ban it. Rejecting assertion of Hardwick that presumed belief of a majority of the electorates (of Georgia) that sodomy between consenting adults in private is 'immoral and unacceptable' cannot be a 'rational basis' for supporting the anti-sodomy law, the Supreme Court observed:

> The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. —[R]espondent — insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws — should invalidated on this basis.[90]

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86. See, art. 19 (2) & (4). The term 'morality' does not have a fixed meaning for ideas about morality vary from society to society and from time to time depending on the standards of morals prevailing in the contemporary society. The term 'morality' in art. 19(4) has broad connotation. It not merely refers to sexual morality but also to public morality as understood by the people as a whole. See, *Dr. Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte*, *supra* note 74.
87. AIR 1965 SC 881.
88. *Id*. paras 8-9.
89. *Supra* note 78.
90. S*upra* note 77, at 120.

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However, it needs to emphasize here that the lawmaker, while legislating against immorality, as suggested by Lord Devlin,[91] has to keep a set of 'elastic principles' in mind. He is not expected to legislate against an immoral act simply because majority dislikes it. For ascertaining the moral judgments of society, the lawmaker should not count the heads but should rely upon what is acceptable to a so-called 'right-minded person' or 'reasonable man', or 'man in the Clapham omnibus'. Moral judgment of society must be something about which any twelve men or women selected at random, after discussion, unanimously consider to be immoral. For legislating against immorality, there must exist a real, not a manufactured, feeling of reprobation and disgust. Both, the law-maker and the society, are required to show respect to privacy of an individual as he is not expected 'to surrender to the judgment of society the whole conduct of his life' though every immoral act is capable of affecting the society injuriously. There must be tolerance of the maximum individual freedom that is consistent with the integrity of society. Society should not bring an immoral act within the purview of criminal law unless it goes beyond the limits of social tolerance.

VI Conclusion

Traditionally, criminal law, *inter alia*, has been showing its deep concern for sexual mores and values. The existence of a set of sexual crimes, such as incest, sodomy, bestiality, obscenity and pornography, in a majority of penal laws in vogue is indeed a testimony of the interplay of criminal law and morality and of the fact that prevailing sexual *mores* and values play a significant role in (de)criminalization of sexual morality. The very conception of sexual crime depends upon the views about sexual behavior generally held in the society.

The Indian Penal Code is not an exception to the rule. It prohibits homosexuality, including consensual homosexuality between consenting adults in private, and bestiality as 'unnatural' sexual acts because they, in ultimate analysis, go against the socially approved sexual mores and values.[92]

91. S*upra* note 33, at 16-20.

92. It is interesting to note that Penal Codes of almost all the countries in the South-East Asia and Africa, some of which are modeled on the IPC, with slightest modifications in phraseology and penal sanctions, prohibit homosexuality, including adult consensual homosexuality in private. For example, see the Penal Codes of: Bangladesh, Bhutan, Brunei, Malaysia, Maldives, Myanmar, Pakistan, Qatar, Saudi Arabia, Singapore, Sri Lanka, United Arab Emirates, Yemen, Algeria, Botswana, Cameron, Comoros, Djibouti, Ethiopia, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Libya, Malawi, Mauritania, Morocco, Mozambique, Nigeria, Senegal, Somalia, Sudan, Swaziland, Tanzania, Tunisia, Uganda, and Zimbabwe.

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The Code believes that it is pragmatically unacceptable for a penal law to be a mere helpless onlooker and to 'hands off' when it comes to the enforcement of sexual mores and to allow individuals, with impunity, to get indulged into, in spite of social disapproval and ignominy, sodomy merely on the ground that they, by virtue of their sexual autonomy, are entitled to have their 'sexual choice and preference' and the society is expected to 'respect' their 'choice and preference'. However, it is undeniable that moral judgments of the society, though vary, in form as well as in contents, from generation to generation and time to time, play significant role in (de)criminalization of sexual offences as well as in drawing permissible orbits of 'individual autonomy' in sexual misbehavior.[93] Interplay of criminal law and morality in the crystallization of sexual mores and the consequential sexual crimes can hardly be avoided. A penal law needs to balance between collective judgment about sexual morality and individual autonomy in sexual behavior. Sexual (im)morality and social tolerance shift with times and values attached to sexual (mis)behavior and individual autonomy.

Homosexuality, including consensual homosexuality between adults in private, Indian jurists and laymen believe, deserves to be a 'criminal wrong' under the IPC until the Indian society perceives it a 'moral wrong', though these notions of 'right' and 'wrong' are not based upon any specific truth, but solely upon the perception of moment, and are totally transient in the eye of the beholder-the legislature.

93. A comparative look at the approach of the penal laws of the European countries and of some of the American states that have decriminalized consensual homosexuality in private and that of the majority of the Afro-Asian states that are still clinching to the criminalization of homosexuality, including adult consensual homosexuality in private, unequivocally discloses such a variance in moral stands and values attached to homosexuality.

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