

BURNISHED LAW JOURNAL**Nisha Agarwal****Symbiosis Law School, Hyderabad****THE IMPLICATIONS OF PUTTASWAMY IN QUEER RIGHTS OF
INDIA*****ABSTRACT***

Is 'Right to Privacy' a Fundamental Right? Puttaswamy's judgment has provided a better protection for the right to privacy. A new platform has been introduced for the people. We are privileged to witness a legal decision which creates a change in our Indian Constitution. However, there are certain implications on the Queer Rights in India. This article analyses the Puttaswamy judgment and the legal problem faced by the Queer people in India. It focuses on the golden triangle of the Indian Constitution with regard to the right to privacy. It elaborates the way Court agreed to reconsider its 2013 decision regarding right to privacy. It also highlights the condition of queer people within the prism of reality. This article gives a clear picture on the effectiveness of the Aadhar Scheme. It analyses whether an act done by two consenting adults is the matter of State or not. It is very crucial to understand the struggle of Right to Privacy in India.

INTRODUCTION

Privacy is an inherent human right, and a requirement for maintaining the human condition with dignity and respect. Right to privacy is a natural and inalienable right. It is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of freedom guaranteed by part III of the Indian Constitution.

Article 21 of Indian Constitution states that- No person shall be deprived of his life or personal liberty except according to a procedure established by law. In India, Right to Privacy got recognition mainly through Judicial Activism.

No definite legal definition of the term 'Privacy' is properly defined under the Indian Constitution. Till today there are lots of judgements which deals with the issue of Right to

privacy. Recently, Right to Privacy has become a fundamental right. The biggest challenge India faces with Right to Privacy is the rights for queer persons. Section 377 of Indian Penal Code poses a challenge to the Right to Privacy in India. Lots of debates and discussions are going on whether India decriminalises the rights of homosexual people in India or not. Recent Puttaswamy case has raised this issue once again. Every person has their own choice of living their life with dignity and personal liberty. It is important to provide homosexual people equal rights and status in the society in order to maintain equality and to protect them from being discarded from the society. This research paper highlights the development of Right to Privacy in India, how it evolved through an essential ingredient of Fundamental right to an essential part of Fundamental right and moreover how Judiciary is making an effort to decriminalise Section 377 of IPC. The most debated question is, while there is a Right to Life and Privacy, Is there a right of 'personal liberty'?

PRIVACY

The word privacy determines the non-intervention of secret surveillance and the protection of individual information¹. The Greek philosopher 'Aristotle' also defined privacy in his thesis. In the Constitution of India, the concept of 'privacy' has long history roots. In the case *MP Sharma v. Satish Chandra*² and *Kharak Singh v. State of UP*³ which was heard by eight and six judge bench respectively at the Supreme Court and which had struck down the plea for ruling right to privacy as a fundamental right. Another significant argument in concern with right to privacy was happened in relation to article 21 that right to life extends beyond mere animal existence. It was held that Art.21 needs to be read with other fundamental rights such as Art. 14 and 19 of the constitution. In *Maneka Gandhi v. Union of India* and *R C Cooper v Union of India* reinterpreted the article 21 broadly and declared that the expression 'personal liberty' in Art.21. It has wide amplitude and covers a variety of rights. At the end of the argument it was stated that the fact that privacy is not explicitly laid down in Indian constitution doesn't mean that right doesn't exist.

GOLDEN TRIANGLE

Art. 14, 19 and 21 are popularly known as the golden triangle of the constitution of India. These are known as triangle because they are read together and the triangle is golden because

¹ Black law dictionary 2nd edition

² (1954) SCR 1077.

³ (1964) 1 SCR 332

they are important for protection and freedom of every citizen in India and prevention of government peculiarity and arbitrary actions. These articles are so important to jurisprudence that their interconnection is rightly known as the golden triangle of the constitution of India. The provision of these articles provide certain legal rights like equal protection to every citizen before the law which purely states that law should be same for every person with some necessary restrictions.

Article 14- Equality before law – The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 19- Protection of certain rights regarding freedom of speech, etc:-

1. All citizens shall have the right-

- To freedom of speech and expression.
- To assemble peaceably and without arms;
- To form associations or unions;⁴ (or Co-operative societies)
- To move freely throughout the territory of India;
- To reside and settle in any part of the territory of India⁵

Article 21- Protection of life and personal liberty- No person shall be deprived of his life and personal liberty except according to procedure established by law.

Now it is clear that why these provisions are known as ‘golden triangle’ of the constitution of India. These rights are regarded as basic provisions for smooth running life of every citizen of India. As we know that transgender community has never got a proper gender identification in our country and they lacked the opportunities they deserve to get like all other citizens in our country. It was from the case of NALSA V Union of India, that transgender people got a recognition as the ‘third gender category’ and got a self-identification. They are restricted under Sec. 377 of IPC which results in the violation of Art. 14, 19 and 21 regarded as the golden triangle of the Indian Constitution. Right to privacy is an important right for every citizen and in case of transgender people S.377 goes against their Right to privacy. No law should govern our personal life as Privacy is a natural and inalienable right irrespective of the gender as taking a birth as a ‘third gender’ category is not an unnatural offence. It’s high time that we accept the third gender like other two genders and provide them their true Right to privacy.

⁴ Ins. By constitution (ninety- seventh amendment) Act, 2011, w.e.f. 15-2-2012.

⁵ Ins. by the constitution (forty-fourth amendment) act 1978, sec 2 w.e.f. 20.06.1979.

However, let's see how India struggled to grant Right to Privacy as a fundamental right and still struggling to decriminalise S. 377 to protect the Right to Privacy of queer people.

THE JOURNEY OF QUEER IN INDIA

Queer is an umbrella term intended to include all subsections like LGBT (lesbian, gay, bisexual, transgender) of a very diverse community. India is a south Asian country with a long and complicated history. Homosexuality can be traced during ancient India through many sources. Evidence from Arthashastra can also be found. Images on temple walls across India in the form of sculptures, painting, rock carving portray the practice of homosexuality. Many evidences from our epics like Ramayana, Mahabharata also have the encountering stories of same sex people. This practice was never considered as shame in the society. All these evidences conclude that there existed the practice of homosexuality. India is a country which is more known for its culture and history. It is in the recent times that homosexuality is being embedded as a bad practice.

Many countries came to India for its wealthy resources and to establish their colonies from all over the world and stayed. The last ones here were the British, and they stuck here in India around for over 200 years and left in 1947. The British Empire criminalize sexual activities 'against the order of nature' arguably including homosexual sexual activities, under section 377 of the Indian Penal Code in 1861, which was 150 years ago. Basically, Simon went back but still are keeping their laws. Many people believe that homosexuality is a western import, but it is actually not. Actually, homophobia is the western import as evidenced by the introduction of section 377 in not just India but several former British colonies.

Section 377⁶: "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 also be liable to fine."

The first made attempt to decriminalize the section 377 was made by Shakuntala Devi through her book called 'The World of Homosexuals'. In 1981, the all India hijra conference was called in Agra. 50,000 members of the community from all over the country attended it. In 1994, hijras were legally granted voting rights as a third sex. The first petition challenging section 377 was filed in 1994 by AIDS Bhedbhav Virodhi Andolan. This petition was eventually

⁶ Indian Penal Code, 1860

dismissed. In 1999, Kolkata was host to the first pride march to ever be organized in south Asia.

In 2001, Naz foundation (Non-governmental organization) filed a Public Interest Litigation (PIL) to challenge sec 377 in the Delhi high court. In 2009 the Delhi high court decision in Naz foundation vs. Government of NCT of Delhi⁷ found section 377 and other legal prohibitions against private, adult, consensual, and non-commercial same sex conduct to be in direct violation of fundamental rights provided by the Indian constitution. Effectively that meant that section 377 was ‘decriminalized’ but not legalized. On 11 December 2013, the SC set aside the 2009 Delhi high court order decriminalizing consensual homosexual activity. The bench of justices however noted that parliament should debate and decide on the matter. In January 2014, SC dismissed the review petition filed by central government, NGO Naz foundation and several others, against its previous verdict on Sec.377 of IPC. In explaining the ruling the bench said: ‘while reading down Sec.377 the high court noted that a minuscule fraction of the country’s population constitutes LGBT people.

In April 2014, in National Legal Services Authority vs. Union of India⁸, the supreme court of India ruled that transgender people should be treated as a third category of gender. In December 2015 a bill for the decriminalization of section 377 was introduced in parliament, but was rejected by a majority vote. At this point the UK had already passed a legislation to allow same sex marriage. The country that actually gave us section 377 has now made same sex marriage legal. Homosexuality itself has been decriminalized in the UK since 1967. In February 2016 the SC decided to review criminalization of homosexuality activity. On August 24 2017, India’s SC has given the country’s LGBT community the freedom to safely express their sexual orientation. An individual sexual orientation is protected under the country’s right to privacy law. However, the SC did not directly overturn any laws criminalizing same sex relationships. So, at this point the legislation stands in a convoluted paradox: LGBTQIA people are allowed to express their sexual orientation, but homosexual acts still remain criminalized by IPC.

India’s march forward in LGBT rights has been slow. Pride is the positive stance against discrimination and violence toward LGBT people to promote their self-affirmation, dignity, equal rights, increase their visibility as a social group, build community and celebrate diversity.

⁷ (2016) 15 SCC 619

⁸ (2014) 5 SCC 438

Pride as opposed to shame and social stigma, is the predominant outlook that most LGBT rights movements carry throughout the world.

Court decision of same sex sexual activity, marriage, recognition of couples, step child adoption and joint adoption is still pending. Adoption by transgender people is only allowed in Tamil Nadu, Kerala. Gays and lesbians are also not allowed to serve openly in the military. Right to change legal gender is only allowed in Tamil Nadu and Kerala. Commercial surrogacy for gay male couples is not allowed. All these clearly portrays the injustice to LGBT's. The structure of their rights should be amended as soon as possible to keep up the country's constitution moto.

RIGHT TO PRIVACY IN INDIA

We are privileged to witness a legal decision which creates a change in our Indian Constitution. Decisions which creates lots of discussions and which goes beyond the courtroom puts a deep impact throughout the country. Puttaswamy case was one such case which posed a challenge whether privacy is a fundamental right or not. It was indeed a great moment in Indian history where insertion of right to privacy under fundamental right came into the picture.

Retired Karnataka HC Judge, KS Puttaswamy filed a petition in 2012 against the Aadhar project. According to Puttaswamy the Aadhar scheme was going to be implemented without the law being discussed in Parliament. He felt that the executive action was not right. The citizens of India have registered themselves in the Aadhar project. They are assigned with 12 - digit number that aligns to specific biometric data like finger prints and eye scans. The main aim of Aadhar project was to maintain the personal identity and biometric information of all the citizens of India. So, J Puttaswamy filed a petition against the constitutionality of Aadhar on the grounds that it violates the right to privacy. According to him, he wanted Right to privacy as a part of Fundamental Rights but with some reasonable restrictions. However, then attorney general Mukul Rohatgi argued that right to privacy was not a constitutional law under the Indian Constitution. It was in the case of *M.P. Sharma v. Satish Chandra*⁹ and *Kharak Singh v. State of Uttar Pradesh*¹⁰ which comprised of eight judges' bench and four judges bench respectively, which held that right to privacy is not protected by the constitution. In order to address the petition filed by J Puttaswamy a five-judge bench ordered the matter to be heard by nine judge bench. The nine judges of the court gave six different opinions regarding this

⁹ (1954) SCR 1077

¹⁰ (1964) 1 SCR 332

matter. The basic concern of the petitioner was that the Indian constitution does not have an explicit privacy right. However, Article 21 of Indian constitution states that, no person shall be deprived of his life or personal liberty except according to procedure established by law.

The court held multiple views regarding right to privacy. Chandrachud J. hold that Privacy was an essential part of living a life with dignity. Right to privacy is not independent of other freedom under part III of the Indian Constitution. Dignity and privacy are connected to each other and a person cannot live a life with dignity in the absence of privacy. Privacy is an incident of fundamental freedom or liberty. It was in this case that right to privacy got a recognition in the Indian Constitution. It was made one of the Fundamental Right under Article 21 of the Indian Constitution. It was clarified that judiciary did not give a new right but extended the right which prevailed in the Indian Constitution which was related to the human dignity. The case of M.P. Sharma and Kharak Singh was overruled and right to privacy was given a recognition under the fundamental rights.

Moreover, in this particular case the Court also overruled the decision made in A.D.M.Jabalpur¹¹. This was the case during Indira Gandhi's emergency period in 1975 which was the darkest phase of Indian politics. It denied the citizens the right to approach to court to challenge detention during emergency. It went against the fundamental right of the people. Art. 21, right to life with liberty and dignity was affected after the decision of A.D.M. Jabalpur. The judgement of this case was regarded as the darkest law of the county. However, several verdicts after 1976 have impliedly overruled the decision of this case but then Justice Chandrachud overruled the decision of his father. The court seem to bury the vilest law of the country and referred Jabalpur decision to be a bad law.

Along with these two decisions made in this case, SC also challenged Sec 377 of IPC. This section deals with unnatural offences. It criminalises sexual activities 'against the order of nature', arguably including homosexual activities. From Aadhar project, SC's Privacy Judgement also gave rise to a new issue related to Sec. 377 which goes against the right to privacy.

CHALLENGE TO S.377

Queer movements in India never had an easy relation with privacy. It always challenged section 377 of IPC. Art. 14, 15 and 21 which talks about right to equality, prohibition of discrimination

¹¹ 1976 SCR 172

on grounds of religion, race, caste, sex, place of birth or any of them and protection of life and personal liberty respectively are violated when we look Section 377 of IPC. Every person has the right to live their life the way they want to. Every person has freedom of choice to choose their life in a dignified manner. Every person has the right to be treated in an equal manner without being harassed in public place. It is important to give a proper recognition to queer people in our Indian society. Queer people should have the right to live their life just like an ordinary person. They should not be treated in a wrong manner just because of a natural phenomenon. After right to privacy became a part of the fundamental right, it is a highly debated issue to decriminalise Sec. 377 of IPC. It is required to give equal rights and protection to queer people and ensure respect of individual's privacy and autonomy.

Gabriel Garcia Marquez had rightly said- 'All human beings have three lives: public, private and secret'.

The legal history of LGBT in India was never in rest. There was always an initiative to decriminalise sex with persons of the same gender. Several organisations have made efforts for decriminalisation. One such organisation was Naz Foundation which expressed their support for decriminalising homosexuality in the case of Naz Foundation v Government of National Capital Territory of Delhi.

This landmark Indian case decided by two judge bench of the Delhi High Court which held that treating consensual homosexual sex between adults as a crime is a violation of fundamental rights protected by India's Constitution. The case resulted in the decriminalisation of homosexual acts involving consenting adults throughout India. The court also held that Sec. 377 violates Art. 14 as it does not provide equal protection to homosexual people and classified them as a separate class in our society which hurts their sentiments. Art. 15 talks about discrimination of sex and it specified that it does not only specify sex but also sexual orientation. The court also mentions that it violates right to health under Art. 21 and concluded that section 377 is a hindrance to public health because it hinders HIV prevention efforts. However, the court didn't strike down Sec.377 completely but the section was declared unconstitutional. It was decriminalised and stated that judicial intervention is not required in this issue. It was later challenged in the SC of India. In 2013, Suresh Kumar Koushal filed a petition against the decision made in Naz Foundation case. In Suresh Kumar Koushal v Naz Foundation and others¹², SC overturned the Naz Foundation case and again recriminalized Sec.

¹² (2014) 1 SCC 1

377. The petitioner argued that section 377 does not classify any particular group or gender so it is not violating Art. 14, 15 and 21 of the Indian Constitution. It was also argued that the social structure and social life of the people will be affected. Finally, they submitted that it was not the task of the judiciary to legislate and they should leave this matter to the Parliament whether Sec. 377 should be made legal or not. Sadly, SC accepted and overruled the decision made in Naz Foundation case. They observed that Sec. 377 was the only law that criminalises pedophilia and crimes like sexual abuse and assault.

This decision was criticized by large group of people. Even religious organisations favoured decriminalization of homosexuality in India, first religious organisation to support LGBT rights was the Hindu Council UK and stated that, 'Hinduism does not condemn homosexuality'.¹³ Even politicians raised their voice in favour of decriminalization. Congress MP Shashi Tharoor has introduced private member's bill twice in Lok Sabha but it was never passed. Many voices were also raised within the Government. Even the finance minister, Arun Jaitley favoured decriminalization of homosexuality. However, it was in the case of Puttaswamy that this issue once again came into the picture with lots of debates and discussions throughout the country. The question which arises is that, whether Indian society accepts homosexual people without harassing them? Is our Indian society ready to change their mind set and provide a scope, platform and dignity to these people?

J Chandrachud rejected the decision made in Koushal's case after his judgement made right to privacy a fundamental right. It was purely violating Section 377. In February 2016, a three-judge bench of the court decided to hear the matter once again and expands Section 377. Puttaswamy case had a deep impact in the Indian History. A move which attempt to challenge the Aadhar project has ow taken a sudden turn. A highly important change is awaited in India. According to J Chandrachud, as individual is in public space, does not mean their personal choice would be infringed. No individual should be treated in a humiliated manner. Gender is an important part of a person's identity. A human is recognized by their gender. What if we don't recognise the third gender? What if we don't give equal opportunities and privilege to the third gender? No one wishes to take birth in the third gender. It is not in anyone's area of control. But as India being a democratic country which protects the rights of the people, it is important to protect the right of homosexual people in our country. Person's identity is a part of fundamental right to dignity. Court held that a person should be categorised under three

¹³ 3 July 2009.

gender: Female, Male and Third gender regardless of gender assigned to them at the time of their birth.

Puttaswamy has challenged the constitutionality of Sec. 377. J Chandrachud finds sexual orientation to be an essential element to the right to privacy. He argued in these two levels. Firstly, it is difficult to prove actual prosecutions under Section 377 when it comes to consensual sex. The National Crime Records Bureau have started compiling information on Sec.377 in 2014. Approximately about 1,347 complaints have been filed under Sec.377 by 2015. However, no freedom is given to an individual in the public space. Privacy of an individual is a natural, inherit and inalienable rights which cannot be infringed. It is required to maintain the human condition with utmost dignity and respect. They must have their own personal space irrespective of being in the third gender category. Secondly lots of affidavits are placed by queer people and even by their family members. The family of the queer person always fear about their future. Will India never recognise queer people like other people? Will India never provide them equal opportunity and respect in the society? Will India be successful in providing autonomy and freedom to queer people which they deserve to get?

Looking at the Habeas Corpus case, many cases of runaway queer lovers are witnessed and they are forced to return through the filing of Habeas Corpus petition. By doing so Court interferes in person's personal choice and now we can argue after the victory of Puttaswamy case which made Right to privacy a Fundamental right. It gave more strength to the issue of Sec. 377 which never got a platform to protect queer people in India. Now it became an unrest issue till it gets solved.

The most significant case which deals with the transgender rights was National Legal Service Authority (NALSA) v Union of India¹⁴. It became the reference case for all other case related to transgender people. NALSA was the petitioner and it filed a petition with an aim to provide free legal aid services to the people who are socially and economically backward. Transgender people were also regarded as socially and economically backward. They were not treated in a good manner by our society. It was an urgent need to provide a platform for them. Equal opportunities and a life with dignity and respect was required. So, NALSA filed a petition and the result turned out to be positive. In this case, SC gave recognition to the transgender people as the 'third gender' category. It was from this case that they got the right of self-identification. This was a major initiative taken by India regarding gender equality. Apart from this, Court

¹⁴ (2014) 5 SCC 438

also held that as they are regarded as the 'third gender' and are deprived of the opportunities available to other gender even transgender people are entitled to get reservations in admission to educational institutions and government jobs. This was a way of protecting the rights of the transgender people and providing them a scope for leading a life dignity and liberty.

Thus, Puttaswamy case gave rise to the issue of Sec. 377 which deprives transgender people from their right to privacy even after it being the fundamental right of India. Lots of attempts are being made to decriminalise Sec. 377. The debates and discussions regarding this are still going on. This critical issue of decriminalising Sec. 377 got a platform only after the petition filed by J Puttaswamy which is regarded to be the most effective case filed in the history of India.

CONCLUSION

This article highlights how laws are governing the personal choice of the people. IPC in India was provided by the British and still we follow the rules and regulations incorporated in it. Sec. 377 became the most controversial provision under IPC. It interferes the personal choice of the people. It violates the fundamental right to privacy and right to life. Every person has their choice to live their life with dignity and freedom as long it does not hurt the sentiments of other people living in our society. If people of male or female gender has the right to live their life to the fullest then why not people belonging to transgender community? No person is liable to take birth in transgender community. It is something natural and no one has a control over it. But it is our responsibility to provide a platform for transgender people to live their life like any other person belonging to male or female category. Sec. 377 became a way to harass sex workers and AID/HIV affected person. Surprisingly British had provided us with this provision but they have decriminalised Sec. 377 from their country. So, it's high time now that even we decriminalise Sec. 377 in India and take a step forward for a better development of our country.