

HOMOSEXUALITY POST PUTTASWAMY JUDGEMENT - A CONSTITUTIONAL
VIOLATION OF RIGHT TO PRIVACY?

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Abstract

Homosexuality can be defined as a sexual orientation characterized by a feeling of romantic love and sexual relationship between people of same sex. Men who indulge into homosexual relationships are known as “Gay” and women with homosexual relationships are called “Lesbians”. Earlier marriage and sexual relationship laws only talked about the relationships between men and women only despite of the gender-neutral language used by the statutes. However, in recent times there have been an increase in the number of jurisdictions regarding decriminalizing homosexuality and many countries around the globe have decriminalized it. But despite the protests by groups of individuals that laws in the country regarding homosexuality are obsolete and require amendment, it remains to be an act of criminal nature in many countries.¹ These people are more likely to face discrimination, harassment, intolerance and they face from homophobia (fear of expressing themselves as homosexuals). Due to their no-validity in many countries they are denied of many legal and economic benefits like employment benefits, health benefits, rights on the death of a partner like inheritance rights etc. which heterosexual people may get. Heterosexual couples of India see homosexuals with disgust, contempt, and as degraded people. In this research paper I have focused on the discrimination faced by the homosexual couples and the position of their right to privacy in the context of *Justice K.S. Puttaswamy (Retd.) v. Union of India* judgement. I will be focusing on two theories of constitutional interpretation namely, Consequentialism and Purposive.

Consequentialist theory

Consequentialism theory holds that consequences are the ultimate basis for judgement. According to it a morally right act is the one which produces good outcome for greater good of people.² It is driven by the Utilitarian theory of Jeremy Bentham which suggests prescribes greater good for the greater number of people. It does not matter to consequentialists that how the consequences came into being, for them only the consequences must be of a moral nature.

Purposive theory

In Purposive theory courts focus more on the purpose of the law. In Purposive approach, courts use extraneous material besides just statutes like committee reports, early drafts etc. It is similar to mischief rule which was laid down in Heydon’s case. In this case the court held that,

¹ Anuradha Parasar, ‘Homosexuality in India- The Invisible Conflict’

² Consequentialism, < <https://en.wikipedia.org/wiki/Consequentialism> > accessed 21 April,2018

“The purpose of the statute was to cure a mischief resulting from a defect in the common law. Therefore, the court concluded, the remedy of the statute was limited to curing that defect. Judges are supposed to construe statutes by seeking the true intent of the makers of the Act, which is presumed to be pro bono publico, or intent for the public good.”³

Homosexuality

Section 377 of Indian Penal Code in a section mainly dealing with the homosexuality according to Indian courts. This section says that,

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[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. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”⁴

In England however, a consensual homosexuality has been decriminalized but in India consent is immaterial and courts just criminalized the offence until the passing of Puttaswamy judgement. Section 377 meant that those who practised homosexuality have to remain at the margins of the society, keeping their sexual orientation a secret from their families, being prone to blackmailing etc.⁵ Homosexual couples were blackmailed by police by a suit under Section 377.

In the case of *Fazal Rab v. State of Bihar*⁶, a man had a consensual homosexual relationship with a boy, the Supreme Court considered it to be an offence under section 377 and the man was imprisoned for committing it. Similarly, in 1994, the Inspector General of Police, Kiran Bedi refused to provide condoms to jail inmates in Delhi’s Tihar Jail and said that since section 377 makes homosexuality illegal, condoms will not be provided. To this, ABVA, a human rights activist group filed a PIL in the Delhi High Court challenging the constitutional validity of Section 377. The main issue raised by ABVA was that homosexual couples are not abnormal or immoral, and so they not be considered as criminals or be discriminated against.

³ Heydon’s case, < https://en.wikipedia.org/wiki/Heydon%27s_Case> accessed 21 April,2018

⁴ Indian Penal Code 1860, s 377

⁵ Geetanjali Misra, ‘Decriminalizing homosexuality in India’, CREA, New Delhi

⁶ *Fazal Rab v. State of Bihar* [1983] AIR 1983 SC 323

According to London Declaration 1988, the concept of human rights extends to only heterosexual couples.⁷ Criminalisation of homosexuality in India can also be due to orthodox beliefs of people who see marriage as a heterosexual institution only. People find homosexuality not only against the nature but also against their culture.⁸ Films like *'Fire'*, *'Girlfriend'* faced a massive opposition from political party Shiv Sena because these movies depicted homosexual culture in them. People see it as a disease which needs to be cured, or a crime to be punished. Due to absence of hate groups in India as in the West, the persecution of sexual minorities in India is more insidious.⁹

However, in recent times there has been a great number of protests by various NGOs, human rights activists, and various group of individuals who favour homosexuality. Organisations like Naz Foundation, ABVA, CREA are some of the most recognised organisation who took part in this movement. In the case of *Suresh Kumar Koushal v. Naz Foundation*¹⁰ where the issue was that the criminalization of consensual sexual acts of adults in private under section 377 is violative of Article 14,15 and 21, the Supreme Court said that-

“Rights of homosexuals are not “so-called” but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination.”

Right to Privacy

Right to privacy can be said to be a right which lets us maintain a domain around us which can be accessed by us only and no other people can interfere in that domain. With the help of this right we can define what parts of our domain can be accessed by others and the part where only we have access to. According to Alan Westin, *“Each individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication of himself to others, in light of the environmental conditions and social norms set by the society in which he lives.”*¹¹ Greek philosopher Aristotle also

⁷ Vimal Balasubrahmanyam, 'Gay Rights in India' [1996] PL 257

⁸ Anuradha Parasar, 'Homosexuality in India- The Invisible Conflict'

⁹ People's Union for Civil Liberties, [2001]

¹⁰ Suresh Kumar Koushal v. Naz Foundation [2014] 1 SCC 1

¹¹ Alan Westin, Privacy and Freedom (fifth edition) [1968]

distinguished between public and private realms and said that these can be regarded as the basis of restricting the government activities to only the activities falling within the public realm. Article 12 of the Universal Declaration of Human Rights, 1948 and Article 17 of the International Covenant on Civil and Political Rights (ICCPR), 1966, protect individuals from arbitrary interference in their private sphere which includes their person, family, home, reputation and honour.¹²

It is a right that guarantees dignity to the individuals which is prescribed under Art. 21 of the Indian Constitution. The concept of right to privacy in India got triggered by the Aadhar scheme of the government. It gathered individual's information and biometrics for identification purposes. Government demanded to link to almost everything like bank account, e-wallets, electricity bills, government schemes etc. This is when people felt it to be a breach of right to privacy because their personal information was now accessible to every other person. The landmark judgement dealing with right to privacy in India is *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors*. It was held by Justice D.Y. Chandrachud that,

“Life and personal liberty are inalienable to human existence... The human element in the life of the individual is integrally founded on the sanctity of life... A constitutional democracy can survive when citizens have an undiluted assurance that the rule of law will protect their rights and liberties against any invasion by the state and that judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these most precious rights.”¹³

This case made Right to Privacy to be a fundamental right under the Indian Constitution. It was after this judgement that the state was obliged by the court to put up a robust personal data protection scheme for protecting individual's private information from getting it public.

¹² Krishnadas Rajagopal, 'The lowdown on the Right to Privacy' (29 July, 2017)

< <http://www.thehindu.com/news/national/the-lowdown-on-the-right-to-privacy/article19386366.ece> > accessed 21 April, 2018

¹³ Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors [2017] writ petition (civil) no 494 of 2012

Right to Privacy and Homosexuality

Earlier homosexual couples were not supposed to be having a right to privacy which can be seen from the constant discrimination, harassment, intolerance faced by them over the decades. In the case of *Bowers v. Hardwick*¹⁴, Justice White said that no fundamental privacy right existed in homosexual sodomy and said that, “*the recognition of a fundamental right requires that the right be either deeply rooted in this nation’s history and tradition or implicit in the concept of ordered liberty.*” In India this right came into being as the result of *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors* judgement. Justice D.Y. Chandrachud while delivering the judgment held that, “*privacy is intrinsic to life, liberty, freedom and dignity and therefore is an inalienable natural right.*”¹⁵ Homosexual couples got right to privacy when the case of *Suresh Kumar Koushal v. Naz. Foundation* was decided and the rights of homosexuals were actual rights and they also want to obtain the benefits of right to privacy.

The judges seem to be adopting a purposive approach in the way that they took into consideration the purpose of the constitution. They took various articles of the constitution into consideration but mainly took into account Article 21. Article 21 of the constitution says that, “*No person shall be deprived of his life or personal liberty except according to procedure established by law*”¹⁶ Justice D.Y. Chandrachud while delivering judgement said that life and personal liberty and inalienable rights and are inseparable from dignified human existence. According to him right to privacy is an essential facet of the dignity of the human being. It assures dignity to the individuals and according to the judges liberty can be of true substance only when life is enjoyed with dignity.¹⁷ According to Justice Chandrachud, framers of the constitution attempted to translate their vision of freedom into guarantees against authoritarian behaviour and that is why they established a rule of law so that fundamental freedoms of people are not violated and the right to privacy is a subset of Article 21 in the way it gives people a dignified way to enjoy life. It was mentioned in the judgment that,

¹⁴ *Bowers v. Hardwick* [1986] 478 US 186 (1986)

¹⁵ *Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors* [2017] writ petition (civil) no 494 of 2012

¹⁶ Constitution of India 1949, Article 21

¹⁷ Key Highlights of Justice Chandrachud’s Judgement in the right to privacy case

< <https://thewire.in/law/justice-chandrachud-judgment-right-to-privacy>> accessed 22 April, 2018

*“Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution.”*¹⁸

Since it was also held in the Naz Foundation case that homosexuals also deserve right to privacy, the judges taking into consideration this judgement the judges held right to privacy an intrinsic part of life even for homosexuals. According to the judges in this case, homosexuals need not be discriminated or harassed just for their sexual orientation. They are like us and they equally deserve their right to privacy and state cannot discriminate on the basis of sexual orientation and criminalise the act. Judges in this case also took into consideration the case of *Obergefell v. Hodges*¹⁹, an American case, in which court allowed same-sex marriage, court said that,

“decriminalising consensual sexual activity between homosexuals and guaranteeing same-sex couples the right to marry indicate that the right to privacy is intrinsic to the constitutional guarantees of liberty and equal protection of laws.”

Justice Suresh Kaul in the case said that privacy is also a form of dignity, which in itself is a subset of liberty. According to this view, homosexuals also deserve a dignified life and hence a life with liberty and since privacy also comes under liberty, according to this judgement, the demand of homosexuals of right to privacy needs to be fulfilled.

Judges seem to have adopted the consequentialist approach in the way they took the actual consequences of validating the right to privacy into consideration. It is visible from the thing that when central government raised a claim that right to privacy is an elitist construct and that if common law has afforded protection to a right in some cases, it need not be constitutionally recognised as a right; Justice Chandrachud completely rejected the argument and mainly focused on the informational aspect of right to privacy, its connection with human dignity and autonomy. What he meant that since a right is recognised in some cases, it would offer greater good to the large number of people since this right is inherent in the right to life and personal

¹⁸ Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors [2017] writ petition (civil) no 494 of 2012

¹⁹ *Obergefell v. Hodges* [2015] 576 US __ (2015)

liberty as promised by Article 21. The judgement rejected the view of the centre that it was a privilege to only a few people. The judgement held that,

“It is privacy which is a powerful guarantee if the state were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well-being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals.”²⁰

Justice Chandrachud while talking about the Naz Foundation case, quoted a certain paragraph of the judgement which said that,

“ Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the ‘mainstream’. Yet in a democratic constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the constitution ”²¹

Thus, Justice Chandrachud, while delivering the judgement on behalf of other judges focused on the ultimate consequences of right to privacy and took into consideration the greater good of people because every individual has a right to keep his personal information to himself only and since it has been accepted in many common law, it should be accepted by us also because it would be accepted by people of our country also since it is an inalienable right. According to them the way through which we achieve the right to privacy does not matter which is significant when centre raised an argument that it is a common law construct and this argument was rejected by the justice. Similarly, by taking into consideration the homosexuals and their

²⁰ Key Highlights of Justice Chandrachud’s Judgement in the right to privacy case
< <https://thewire.in/law/justice-chandrachud-judgment-right-to-privacy>> accessed 22 April, 2018

²¹ Suresh Kumar Koushal v. Naz Foundation [2014] 1 SCC 1

right to privacy, he looked at the interest of more than three [3] million homosexual population of India and their good. What he approved was a moral act and not an act to be discriminated against.

Conclusion

K.S. Puttaswamy judgement is a landmark judgement in the Indian history as it brought right to privacy into being. Right to privacy is a privilege to people of the country. Although it is not yet mentioned explicitly in the constitution but the court said that dignity cannot exist without privacy and both are inalienable parts of lives, liberty of individuals. Court determined that, *“Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.”*²² Homosexuals also got the right to privacy as Justice Chandrachud talked about Naz Foundation case and according to him even homosexuals have right to privacy and the state cannot encroach upon their private sphere. Thus, it was proved that from now onwards, the state is not at the option of criminalising homosexual relationships or section 377 cannot hold homosexual couples for doing something against the order of the nature. Although the Naz Foundation case was decided earlier, but the right to privacy for homosexuals was mainly talked about in this case. However, section 377 has been constantly questioned in recent times and is asked to be repealed. For this civil rights groups have to come forward and their support is needed. Media should also show the homosexuality related issues responsibly and is required to develop an environment of tolerance, equality. Professor Shohini Ghosh in a recent debate in Delhi on section 377 said that the question has now shifted from how much has homosexuality harmed the family values to how much has section 377 harmed the homosexual people by oppressing, exploiting them.

²² Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors [2017] writ petition (civil) no 494 of 2012