RIGHT TO PRIVACY JUDGMENT: BEACON OF HOPE FOR THE RAINBOW WARRIORS

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Introduction

The recent judgment given in the Puttuswamy case has major implications for the basic human right of dignity, liberty, freedom of expression etc. The 9-judge bench of the Supreme Court has ruled that right to privacy is a fundamental and inalienable right and an intrinsic part of the right to life and liberty under the Article 21 of the constitution. The court has trumped the government's argument that privacy being so multi-faceted implicit in a diverse aspects of human life, cannot be constitutionally guaranteed since it is so broad and not fixed to any particular aspect. But the court not only provided constitutional protection to the right under article 21, it also recognizes the right extending to various other contexts arising from facets of dignity and liberty arising from the other fundamental rights guaranteed by the part III of the constitution. The judgment has mostly been appraised in the context for the consequences it will have for the government's unique identity project, AADHAR. But the influence of the case is not limited to the policy of AADHAR. Amidst the various matters likely to be affected is the section 377 of the penal code which criminalises unnatural sex and the freedom and dignity of a diverse group of sexual minorities.[*]

Justice Chandrachud's opinion in the right to privacy judgment also signed by Chief Justice of India JS Khehar, Justice RK Agrawal and Justice S Abdul Nazeer is a beacon of hope for all those who argue for a decriminalisation of gay sex and a stronger protection of the dignity of LGBTQ. The Supreme court judgment given by Justice GS Singhvi and GS Mukhopadhyay upheld section 377 which essentially criminalises sex by gays and lesbians with no consideration for their inherent right to privacy and to be left alone[†].

[*] AbhishekJha, "Explained: What The Right To Privacy Means For Section 377, Aadhaar, And More," *Youth Ki Awaaz* (blog), August 24, 2017, https://www.youthkiawaaz.com/2017/08/explained-section-377-right-to-privacy-judgment-aadhaar/.
[†] ibid

The opinion held that being a miniscule component of the population has no relation whatsoever with grant of rights and protection. If not, we should stop calling ourselves a democracy. In a democratic society, no individual or a community should be discriminated on the basis of their caste, gender, sexuality or their numbers. The makers of our constitution including Jawaharlal Nehru and Vallabhai Patel wanted constitutional protection of minorities especially when the views, beliefs of such groups don't really coincide with certain the mainstream and are more vulnerable to hate and violent subjugation. The privacy judgment comes as a streak of hope because it protects that inherent bodily integrity of the individual. Now at least there is a judicial sanction for a strong constitutional protection of right to privacy. One's sexual orientation is inseparable form one's bodily integrity and identity which cannot be the basis for discrimination in public life. No person should be insulted on the basis of their sexual identity which constitutes an attack on their self-worth and dignity. The right to privacy enables one to protect one's sense of worth. The right to privacy is a new addition to the array of rights under the fundamental rights. After the judgment in the Maneka Gandhi case, all these rights are read together and no right is placed in a watertight compartment. This enables a strong protection for the sexual minorities by reading together the rights of equality, right to privacy, right to express oneself.

Justice Chandrachud also pointed out that by terming the rights of LGBTQ community as so-called rights lends it an element of superficiality worthy of erasure. The rights of dignity, liberty inhere in each and every person and these rights cannot be viewed as requiring some extra effort and interpretation. Recognition of the right to privacy at this stage doesn't lessen its essentiality to human life. Reading the rights together makes privacy a part of liberty, of life, of expression and equal treatment requires no one's inherent rights are taken away on the basis of their identities.

But Justice Chandrachud did not really go as far as to strike down the entire Koushal judgment. He ended on the note that merely because only a few people belonging to the LGBTQ are prosecuted doesn't make the section 377 a benevolent one because the punishment of a few has a chilling effect on the effective exercise of one's right to privacy in the fulfilment of sexual orientations and hinders the entire community from free expression. This chilling effect also extends to other spaces of life which are not criminalised under section 377 and these people forced to live very desolate and secluded life.

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Although this judgment did not strike down the present position in Koushal, it did lend some credence to the efforts of many people trying to protect the rights of this 'miniscule' community. But further efforts are needed to put an end to the humiliation and suppression of the LGBTQ community by police, by the society. The Indian constitution actually has the provision to put an end to all forms of discrimination given the history of discriminating people on the basis of their caste, gender. There is need for legislation by the state proscribing all forms humiliation of LGBTQ people and a procedural law meting out punishments. Above all, the state needs to be receptive towards expressions of sexual orientation and needs to increase awareness in the society.

The 'elitist' argument in the right to privacy case

The 2017 Supreme Court judgment upholding the right to privacy brings forth a joyous moment in the legal history to forever cherish and celebrate. Amidst a flurry of judgments by the Supreme Court in the recent times restricting dignity, liberty and freedom of individuals in various ways, this decision definitely merits the title of a torch bearer for the future. The right to privacy itself affects so many aspects of one's life and is so intrinsically interlinked with other fundamental human rights that its constitutional protection holds great promise for the upholding of human dignity.

The Judgment points out that - "Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian constitution." The court dismissed the government's argument that privacy is a whole set of varied rights of various degrees for different people at different times. In tracing the evolution of privacy, the court said privacy includes right to be left alone, preservation of the core intimacies of family, marriage, reproduction, sexual orientation. It also includes protection for diversity, variability and safeguards the independence and autonomy of an individual in controlling his/her own life. The court said that right to privacy is not limited by any petty differentiation of the private/public. It is not imposed upon or governed by the norms of society. It primarily arises from the self of the individual and arises from the need for dignity and freedom of each human being. Be it a miniscule minority or a vulnerable individual, each

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person should be treated with dignity and the right of privacy should be protected irrespective of where he is.[‡]

One of the major arguments made by the government was that privacy rights were never intended by the makers to be read into the constitution as they had never included it in the constitution. The court held in essence that the "draftsmen[§]" of our constitution have always fought to protect the basic human freedoms and values of liberty and dignity. All the fundamental rights strive for the protection of the dignity and core bodily integrity of the person and only when the dignity of all individuals is protected they are said to be free and at liberty because dignity is one's core. Drawing from national and international experience, our founders always struggled to defend constitutional values against authoritarian regimes and encroachments by those in power. Privacy in all its facets protects each person against humiliation, degradation and each person's private space is determined by himself except for in cases where harm is caused to society.[**]

Over the years, the government has always argued against right to privacy being made a fundamental right because otherwise various government policies would be struck down in light of the grave damage done to individual right to privacy. The right to privacy is a negative fundamental right which seeks to limit the governmental power by circumscribing its exercise. The negative rights which mostly include civil rights are the stronghold of a French revolution-inspired democracy of the modern era and are the bulwark of constitutionalism.[††] In the present case, the Attorney-General's mainstay argument was that the right to privacy is multi-faceted and affects different people in a varying degree in different cases. The government also seemed to suggest that such an intricate cobweb of rights which are constitutive of right to privacy deters the grant of constitutional protection.[‡‡] The government has argued that not every aspect of the right to privacy is a fundamental right worthy of protection. It returned to the age-old debate of need for protecting the socio-economic rights of people under the directive principles of state policy on one hand and the constitutional guarantee of protection given to the fundamental rights. This argument was buttressed by the Addnl. Solicitor-General who argued that AADHAR provides various benefits to the poor people and the privacy concerns do not

[‡] *Justice K S Puttaswamy (Retd) v Union of India* (2015): SSC, SC, 8
[§] ibid
[**] ibid
[††] "Understanding the 'Elitist' Argument against the Fundamental Right to Privacy," Live Law, August 30, 2017, http://www.livelaw.in/understanding-elitist-argument-fundamental-right-to-privacy/.
[‡‡] Supra 3

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even arise when they have so strongly been guarded by the government in the AADHAR act and through the constitution of BN Srikrishna committee.

The government is making the assumption that there is a significant difference between the civil liberties and other socio-economic rights which can also be termed as positive rights as they act as stepping stones for people who suffer from deprivation and lack of access to basic needs.[§§] The Attorney General has argued that the right to privacy essentially flows from the right to personal liberty rather than being intrinsically linked with right to life and since right to life is important than personal liberty, there is no urgent need in a country like ours to grant right to privacy. Starting from the right to property jurisprudence in the Indian context, the government has tried to play civil liberties against fundamental rights. It is definitely reasonable to argue that in a country like India where millions of people still struggle to fulfil their basic needs, socio-economic rights are important fulfil the immediate needs of the starving poor. But that doesn't justify the complete division of right under different labels because civil liberties are indispensable for the enforcement of right to life and a person cannot just live by a minimum guarantee of health and nutritious food. He also needs the right to express himself whatever way he wants without fear of prosecution by society, government and he should have right to be free of humiliation, subjugation and live his life with dignity.[***]

The civil liberties are also an important means of protecting the socio-economic rights. Here, we can draw a contrast between India and China. The clamping of dissent and other civil rights in China has created a huge inequality between the rural countryside whose residents couldn't claim access to socio-economic rights for fulfilment of basic needs. While in India, legal instruments like the PIL have been utilised to ensure an equitable access to justice especially for those who cannot afford it. The right to privacy ensures that a person be left alone or not be harassed for his identity, economic status etc. In the Indian context, the constitutional provision against the perpetuation of untouchability and its further embodiment in legislative acts has contributed significantly to the subsidence in persecution of the lower castes. Even in the American Jurisprudence, the judiciary has not been able to ensure a seamless protection of all rights without drawing a distinction. In many cases, poor mothers are forced to divulge their private information through a mandatory review process. Other civil rights like freedom of expression, speech have enabled the voices of vulnerable people to be heard through writings,

[§§] Supra 6

[***] AgnidiptoTarafder and ArindrajitBasu, "Why India's Poor Must Have a Right to Privacy," *The Wire* (blog), August 16, 2017, https://thewire.in/168175/indias-poor-must-right-privacy/.

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movies etc. Only with the guarantee of such civil rights, will their economic status also change for the better. There is an intimate connection between poverty, economic disability and the lack of access to civil rights like dignity, freedom of expression, speech etc[†††]. The court in the present case held against the argument that privacy is a privilege of the few by invoking Amartya Sen's writings in "the idea of Justice" and "the country of Young boys" where he argues that development can be approved only when it leads to people's freedoms.[‡‡‡]

The government has asserted that the right to privacy had been kept out of the constitution when originally made for a reason. But that argument falls in the face of the history of Judicial activism in India wherein the courts have read in various rights not originally mentioned in the constitution like the right to a clean environment, freedom of press mentioned in the constitution. Especially, post-Maneka, the court has started interpreting the article 21 widely as the terms 'life' and 'liberty' are organic and ever evolving.

Evolution of right to privacy

To understand the jurisprudence on the right to privacy, we need to trace the history of judicial pronouncements on the right. Starting with a local British court upholding a pardanashin woman's right to freely access her balcony without any fear of neighbourhood gaze, the right to privacy has been read into the constitution as part of the 'personal liberty' of a person.[§§§] But there has always been a conflict between the right to privacy and the government's attempt to deny its status as a right itself or restrict it for purposes of security, law and order or societal welfare.

Before the Maneka Gandhi case, the court judgments have been marred by a very literal and narrow construction of the rights. The court were very diffident in analysing the aspects of a newly claimed rights on its own merit and maintaining a balance between the right and governmental restrictions rather than dismissing the right merely on the fact of there not being any explicit mention of it in the constitution. In the MP Sharma case[****], the court cited the lack of inclusion of right to privacy as the reason for not granting any protection against search and

[†††] ibid
[‡‡‡] Supra 3
[§§§] "A Brief History of the Right to Privacy," theweek.in, accessed November 12, 2017, http://www.theweek.in/content/archival/news/india/brief-history-right-to-privacy.html.
[****] 1954 SCR 1077

seizure. Nine-years later, the claim for right to privacy rose again from an alleged dacoit who was subject to various forms of surveillance. Although the court struck down allowing night visits for violation of 'personal liberty', it reaffirmed the MP Sharma case in denying the right to privacy[††††].

The Supreme Court has overruled the previous judgments of MP Sharma and Kharak Singh in the Puttuswamy Judgment and has provided judicial sanction and legitimacy to the gem-like dissents in the previous cases. The Subbarao dissent in the Kharak Singh upheld the right to privacy to be an indispensable and implicit part of personal liberty although it may not by itself be a fundamental right. [‡‡‡‡]

In the Govind v State of MP[§§§§], Mathew J has held that although right to privacy is an inherent part of the articles, 21, 14 and 19, it can be curtailed by the government in view of security of a particular place. This case marked a clear victory for the right to privacy and with the court's pronouncement in the Maneka Gandhi case has provided for a very broad reading of rights and strong protection of a layered test, the right to privacy has attained more strength. Later in the post-liberalisation era, the court upheld the constitutional status of privacy in the Rajgopal v. State of Tamil Nadu[*****] and also provided guidelines for government restriction on the right to privacy in the PUCL[†††††] case in the form of the telegraph act, 1885 and the IT act, 2000 and held that a prisoner also has a right to privacy regarding his family, marriage, children and has a right to be left alone. In the case of Rayala M Bhuvaneswari v Nagaphomender Rayala[‡‡‡‡‡], a husband was accused of tapping his wife's phone conversations to substantiate his claims in a divorce petition filed by him. The court denied the admissibility of evidence on the ground that tapping without the knowledge of the person amounts to violation of their right to privacy.

During the course of criminal investigation, various tools like narco-analysis, thermal-imaging and DNA fingerprinting are used to evince information from the accused. In the case of Directorate of revenue and Anr. V. Md. Nisar Holia, the court warned against an unnecessary and over-the-top infringement of privacy although the mere statutory provision to gather information in criminal investigation may not by itself affect the right.[§§§§§]

[††††] AIR 1963 SC 1295: (1963) 2 Cri LJ 329
[‡‡‡‡] ibid
[§§§§](1975) 2 SCC 148: 1975 SCC (Cri) 468
[*****](1994) 6 SCC 632
[†††††]AIR 1997 SC 568
[‡‡‡‡‡]AIR 1997 SC 568
[§§§§§] AIR 1999 SC 495

In the recent times, the technology has expanded beyond mere physical trespass or phone tapping. The spread of internet and the fast rates at which information is being communicated and dispersed has created a cause of concern regarding the protection of a person's private data. The concurring opinion given by Justice SK Kaul has deemed the right to privacy as a fundamental and not merely a common law right. The court went a step further in recognising the right to be forgotten. In the modern era, where internet has spread to wide corners of the globe and personal data is being freely used and transacted, a person should have the right to control his existence in the virtual space and his personal data and also the right to erase what he doesn't want to be seen any longer by others. The judgment itself is insufficient to protect the personal data. There needs to be an extensive legal framework for data protection and a need to determine what exactly the limits of one's right to be forgotten are[******]. In the recent post-truth era, the proliferation of the internet of things has affected the way the personal data is utilised. Many people provide their data in return for the service like music, movies etc. They do voluntarily exchange the information but they don't consent to the usage of the information in a way that harms their basic human rights. The phenomenon of big data has put the big corporates in a race to effective usage of data to enhance their profits. This data has been used to create a virtual space where people often see their own biased opinions getting reflected back and by this, we have lost out on the free flow of often opposing and contrasting idea. The right to privacy judgment goes far in promoting a democratic world unfettered by either technology or unseen dictatorships.

Right to privacy and LGBTQ freedom: US Jurisprudence

The right to privacy has been very important for the protection of gays and lesbians in the US. Many states in the US still criminalise gay sex and same sex marriage through the sodomy laws. For the first time, in the 1986 SC decision of Bowers v Hardwick[††††††] the issue of whether right to privacy guarantees protection to the gays and lesbians came up. Michael Hardwick was charged under Georgia's sodomy laws after the police witnessed Hardwick engaged in oral sex with another man in his house. Hardwick alleged that his arrest affected the right to privacy. Justice White refused to include a privacy analysis in the present case and said that the previous

[******]SohiniChatterjee, "In India's Right to Privacy, a Glimpse of a Right to Be Forgotten," *The Wire* (blog), August 28, 2017, https://thewire.in/171290/right-to-privacy-a-glimpse-of-a-right-to-be-forgotten/.
[††††††]478 U.S. 186 (1986)

cases protecting the right to privacy are few and far in between and they are limited in their reasoning in view of the need to maintain the stability of traditional institution of marriage. So, although right to privacy was not denied, its protection depended on what constituted private. The same-gender sex was not deemed private because it didn't fit in with the conventional definition of marriage, sexual relations. Instead of engaging with the question of whether the right to privacy protection was available, the court focused on whether homosexuals have a constitutional right to engage in unnatural sex. The court also provided that such an act was not rooted in either the country's tradition and customs nor is it accepted by ordered liberty. The judge held that since homosexuality doesn't constitute procreative sexual activity, it cannot demand the level of protection granted for the intimate activity of heterosexuals. The majority held that- "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards".[‡‡‡‡‡‡]

Justice Blackmun disagreed with the majority ruling and stated that the rule issue in this case is whether there is a right to be let alone important to maintain the dignity of the person. He argued that sexual relationship is a very sensitive and private aspect of human existence and is central to and connected with family life, community welfare. He rightly declared that merely because religion proscribes a certain kind of behaviour and interferes with it doesn't mean a secular state should follow suit. The constitution doesn't explicitly provide for a right to be let alone but this right has evolved over years through legal jurisprudence and academic debates.[§§§§§§]

Many of the US federal courts have struck down the anti-sodomy laws. In the case of Powell v state of Georgia[*******], the court held that the sodomy laws restrict the privacy rights of individuals and their intimate relations and their right to be left alone and there is also no legitimate interest of the state in restricting the private relations with so broad an interference. Justice benham struck down the statute for violation of the right to privacy. Many other states also did the same.

The Texan statute criminalising same-gender sex and was challenged by two men who were arrested under the act. The texas court struck down the act and found fault with the Bowers

[‡‡‡‡‡‡] ibid
[§§§§§§] ibid
[*******]510 S.E. 2d 18 (1998)

case for reasoning the judgment only in terms of whether a homosexual person has the right to engage in sodomy. Justice Kennedy leading the majority denied that marriage is only about the right of sexual intercourse. These penal statutes have far more consequences on the privacy, bodily integrity of individuals[†††††††]. The court stated that –

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[‡‡‡‡‡‡‡]

In the famous article 'right to privacy', Louis Brandeis and Samuel Warren argued that court shouldn't allow invasion on a person's right to be let alone[§§§§§§§]. After this, the US courts started granting explicit protection to the right to privacy as we see in the Griswold v Connecticut[********] in which the court invalidated a law which criminalised people for using contraceptives. Justice Douglas stated that there are certain penumbras in the bill of rights which that give rise to the zones of privacy and these may be implicit either the first, fourth or the ninth amendments. The concurring opinions of Justice Goldberg and Harlan firmly rooted the right to privacy in the enumerated bill of rights. In a string of cases, the court further expanded upon the right to privacy. It struck down a Virginia statute which criminalised inter-racial marriage in Loving v Bardin 1967[††††††††], a Georgia statute which made it a crime to possess pornography. In the Landmark decision of Roe v Wade[‡‡‡‡‡‡‡‡], the court upheld the individual autonomy of women to control their reproductive choices.

The discrimination against gays and lesbians is widely prevalent in American society. They are harassed in the military, they are denied the right to marry and parents loose custody of children just because they are gay. The Colorado state even passed law from barring gays and lesbians from being a part of law making laws and barred all future gay rights. Justice Evans struck this down in the landmark 1992 Romers v Evans[§§§§§§§§] case.

The grassroots gay rights movement began in the Greenwich village of New York when patrons of a gay bar called Stonewell inn fought against attempts to close it forcible. After that, the gay movement gained much momentum with 10 states banning the employment discrimination and

[†††††††]539 U.S. 558 (2003)
[‡‡‡‡‡‡‡]Southeastern Parenthood v. Casey
[§§§§§§§]Warren, Samuel and Louis Brandeis (1890): "The Right to Privacy," Vol 4, *Harvard Law Review*
[********] 381 US 479(1965)
[††††††††]388 U.S. 1 (1967)
[‡‡‡‡‡‡‡‡]410 U.S. 113 (1973)
[§§§§§§§§]"The Rights of Lesbian, Gay, Bisexual and Transgendered People," American Civil Liberties Union, accessed November 12, 2017, https://www.aclu.org/other/rights-lesbian-gay-bisexual-and-transgendered-people.

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sodomy laws now exist only in 18 states and there are increasing rate of domestic partnerships in various public and private spaces. Illinois became the first state to repeal its anti-sodomy law.[*********]

Legal evolution of LGBTQ rights in India

Homosexuality is essentially attributed to the sexual and romantic attraction a person feels for another person of his own gender and the formation of the individual identity based on that behaviour of his. It has been observed in many animal species. Although there is no definitive evidence for accurate determination of homosexuality in humans, between 2-20% of the population has been shown to have that tendency.[†††††††††] The supporters of homosexuality widely recognize the sexual orientation as something inborn and part of the immutable nature of the self and these people are more likely to show constant support to their rights. But more often than not, one's sexual orientation is also very fluid and it keeps on moving from one state to another. We cannot pin down a person's sexual orientation at one point of time as something that person has been born with. A person may have acquired such an orientation over the years and may not even die with it. What is important is that a person cannot be discriminated because of such a characteristic.

Homosexuality has never been openly advocated for in Indian society. It has always been a taboo in societal and legal terms. The Arthashastra prescribed punishments for various kinds of unnatural heterosexual activities and homosexuality was treated as a minor offence. The Manusmriti also makes mention of various homosexual practices but only as unnatural activities that should be regulated. There were punishments prescribed for various homosexual behaviours[‡‡‡‡‡‡‡‡‡]. For example, one verse prescribes the punishment of having head shaved or two fingers cut off for an older female who forces sexual relation with a younger damsel who is a virgin and another verse provides for a lesser punishment for sexual relations between two virgins. These texts are not so homophobic as they only seek to severely punish the pollution of an unmarried virgin. So, the punishment for a man raping a woman is greater than the one prescribed for sexual relation between two maidens. Sex between two non-virgin women was

[*********] ibid
[†††††††††] Arvind Kala, Invisible Minority: the unknown world of the Indian homosexual (Dynamic Books, New Delhi, 1994)
[‡‡‡‡‡‡‡‡‡] Arvindnarain, Queer: Despised Sexuality, law and Social Change (Books for Change, 2004).

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punished with a small fine while the punishment for sex between two men is bathing with clothes on, eating beef and keeping a fast.

Even in the medieval times, there are various cases of kings and nawabs maintaining a harem full of young boys point to an existing culture of Homosexuality. But the Mughal empire consolidated all the pre-existing Delhi Sultanate laws into Fatwa –e –alamgiri and prescribed a common punishment of Zina for all unnatural sex[§§§§§§§§§]. The text of a Kamasutra is revolutionary in that it mentions male and female homosexuality, group sex, sadomachosim etc. Ancient texts like Rigveda make mention of homosexuality and carvings in temples of Khajuraho and Puri depict such homosexual activities. Until a particular point of time, despite a certain kind of societal condescension, sexual relations were open and free. The colonial ingress brought with it the puritanical and Victorian ideas of sexuality which regarded sex only as a means of procreation. The IPC drafted in 1860 also reflected these ideas and homosexuality was deemed a pathological and mental health disorder rather an expression of one's sexual orientation.

In the 20th century the ideas on homosexuality started to change world over. The American Psychiatric association removed homosexuality from its psychiatric manual in 1973 and the American Psychological association did the same in 1975 and the WHO removed it from mental illness list in 1981[**********]. The watershed movement came when Vatican published a document called the 'Declaration on certain questions regarding sexual ethics'[††††††††††] in which it accepted homosexuality as something people are born with as an innate instinct.

The legalisation of same-sex marriages in South Africa in 1994 and the US SC pronouncement that no state can make any law criminalising homosexuality and many scandinavian countries also following suit put pressure on the Indian legal framework to rid of the out-dated and colonial laws. The debate on the homosexuality came to light with the enactment of sexual offences act in UK, the campaigns for gay rights in the US and also the accusations against the gay community for propagation of HIV leading to making it punishable with death.

The section 377 of the IPC has remained a ridiculous and out-dated piece of legislation. It provides legal sanction for discrimination against homosexuals and treats homosexual activity

[§§§§§§§§§]https://islamqa.info/en/20983

[**********]"Answers to Your Questions For a Better Understanding of Sexual Orientation and Homosexuality," http://www.apa.org, accessed November 12, 2017, http://www.apa.org/topics/lgbt/orientation.aspx.

[††††††††††]http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html

on the same plan as sodomy and other unnatural sex. This section further jeopardises healthy sexual relationships by failing to differentiate between consensual and forced sexual relations. In the case Fazal Roy Chaudhary v State of Bihar‡‡‡‡‡‡‡‡‡‡, two men having consensual sexual relations were criminalised under section 377. What is more appalling is that even a third party is allowed to file a suit against two consenting adults entering into sexual relations in case they are of the same gender. The army act, navy act and air force act also have provisions for punishment of same-sex relations

In the history of statute between 1860 to 1992 there were only 30 cases in the High courts and Supreme courts. The section 377 has also been used to prosecute sexual relations between women. In 1987 Tarulata underwent a female to male sex change operation and married Lila. Lila's father filed a petition for criminalisation under section 377 since Tarunlata is not a male and cannot help in recreation§§§§§§§§§. In 1992, 18 men alleged to be homosexuals were arrested in Delhi under the Delhi police act for public nuisance and in 1994 section 377 was used as a reason to not distribute condoms among the male inmates. **********

Although not many convictions were made under this act, the human rights watch said that this law has been used to harass sex workers, LGBTQ groups. Many arrests were made and police used brutal methods of torture especially with regard to the Hijras and Kothis. The PUCL also filed a report on the inhuman treatment and violation of dignity and rights against the sexual minorities. The law commission in its 172nd report argued for decriminalisation of homosexuality and repeal of section 377.

The Naz foundation has been a major advocate for LGBTQ rights. It works with the various international NGOs and organizations and also attempts to sensitise the public regarding HIV/AIDS and sexual health. One of its major campaigns has been for the repeal of the section 377. In 2006 Amartya Sen and Vikramseth and various other intellectuals wrote an open letter demanding the decriminalisation of homosexuality and in 2008 Law minister Oscar Fernandes and PM Manmohan Singh called for greater decriminalisation and liberal attitude. In the same year, the Bombay High Court Judge Bilal Nazki said that India's unnatural sex law should be reviewed. Former Indian Health Minister Anbumani Ramadoss advocated legalising

‡‡‡‡‡‡‡‡‡‡(1982) 3 SCC 9
§§§§§§§§§http://indiatoday.intoday.in/story/case-of-a-curious-marriage-in-gujarat/1/315005.html
**********http://altlawforum.org/PUBLICATIONS/PUCL%20REport%201

homosexuality in India and he campaigned for changing section 377 of the Penal Code, which makes homosexuality an unnatural act and thus illegal.

The Naz foundation filed a petition in the Delhi HC arguing that the archaic section 377 violates the articles 14, 15, 19, 21 of the Indian constitution. It said that the section 377 and the discrimination and the abuse it causes against the gays has hampered its effort at combating the spread of HIV/AIDS. The Naz foundation also enumerated right to privacy as one of the more fundamental rights of the LGBTQ community which are violated by the section 377. They argued that the right to privacy is implicit in article 21 and is protected by the constitution. While the ministry of home affairs argued that section 377 helps in acting against child sexual abuse and continues delinquent behaviour, the health ministry wanted the section to be repealed in the interests of the HIV sufferers and to stop its spread.[††††††††††]

The High court did a comprehensive analysis of the legal framework and the ground level situation in India and referred to various international judgments and legislations which has a positive impact for the LGBTQ rights in India. It held that there is no intelligible differentia in classifying certain sexual acts as perverse under section 377 because the law doesn't provide for any differentiation on the basis of consent or harm. The law in its operation was held to be unfairly targeting the LGBTQ community. Concluding its judgment, it evoked the principles of liberty, equality and principle of inclusiveness, acceptance of diversity inherent to Indian society. The court in the Naz foundation case held that-"…The sphere of privacy allows persons to develop human relations without interference from the outside community or from the State. The exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem, build relationships of his or her choice and fulfil all legitimate goals that he or she may set." To discriminate an individual solely on the basis of his sexuality was deemed violative of article 21.[‡‡‡‡‡‡‡‡‡‡]

Chandrachud's opinion and LGBTQ rights

In rectifying the mistakes of the past, the judgment expands the scope of the right to privacy to protection of the LGBTQ rights. The opinion authored by Justice Chandrachud provided a major cause of celebration as it supported the spirit of the movement by linking it with the dignity of the human being and his right to privacy.

[††††††††††] 160 Delhi Law Times 277
[‡‡‡‡‡‡‡‡‡‡] ibid

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For much of history, the right to privacy was defined in terms of the spatial property rights and a person was protected in his person, house, effects and papers. In Olmstead v US§§§§§§§§§§, it was said that privacy begins at the threshold of one's home. An alternate understanding of privacy focuses on social relationships in the society.

Another understanding deems individual as the unit and treats his autonomy and independence as most important and this reasoning underlies the judgment in the Roe v Wade case and the S. African case of Minister of Home affairs v Fourie which upheld LGBTQ rights. But privacy cannot be granted without any limits whatsoever**********. Often private relations are abusive and meaning and need state's interference to ensure dignity as in cases of marital rape.

The Puttuswamy judgment defines privacy in terms of bodily integrity, informational privacy and in terms autonomous decision making and treats the individual as a unit. The judgement provides that right to privacy if guaranteed in home and private spaces goes a long way in giving the individual the opportunity to be free, away from society's eyes, give him a sense of autonomy and control and add value to his dignity and his right to be let alone. The privacy in marital relations also ensures that individuals have autonomy over the choices they make as to whom to associate with and what kind of relations they want to have. The privacy judgement provides a new way to understand the concept of privacy in terms of relations between the individual, society and state.††††††††††††

The opinion of Chandrachud invalidates the court's reasoning in the Suresh kumar Koushal case. The Koushal case found fault with the Delhi HC's judgment in Naz and held that since the LGBTQ constitute only a very "miniscule" part of the population and even a lesser percentage among them are prosecuted under section 377 doesn't provide a good reason for its repeal. Here, first, the court completely ignored the evidence of the persistent and deep-rooted persecution, discrimination, humiliation and degradation of the LGBTQ by society, state. And the court completely ignored our freedom struggle, our constitutional history, the democratic ideals that our makers constantly fought for and their persistent effort at ensuring that all kinds of minorities are looked after in this diverse country. Especially in the context of partition, they

§§§§§§§§§§*Olmstead v United States* (1928): 277 US 438

**********_Minister of Home Affairs v Fourie_ (2006): 3 BCLR 355 (CC)

††††††††††"The Supreme Court's Right to Privacy Judgment, Making a Show: The Black Money Bill, Making a Show: The Black Money Bill, Making a Show: The Black Money Bill, Making a Show: The Black Money Bill, Making a Show: The Black Money Bill," *Economic and Political Weekly*, *Economic and Political Weekly*, *Economic and Political Weekly*, *Economic and Political Weekly*, *Economic and Political Weekly* 52, 50, 50, 50, 50, 50, no. 44, 23, 23, 23, 23, 23 (June 5, 2015): 7, 7, 7, 7, 7–8, 8, 8, 8, 8.

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wanted the Indian state to give respect to the individual while maintaining the diversity. Numbers alone don't determine whether constitutional rights should be granted. In fact, the entire basis of constitutionalism and judicial review is to provide special protection to the minorities against attempts by anyone in claiming that they are the sole representatives of the will of the people. Just the fact their lack of numbers and their varied ideology and their deviation from mainstream itself should warrant constitutional protection. Above anything, the Puttuswamy Judgment says that human dignity and privacy are attached to each person and the constitution is only protecting what is an inherent right of each individual.[‡‡‡‡‡‡‡‡‡‡‡‡]

The judgment collates the different definitions of privacy. In case of LGBTQ, the privacy is necessary to maintain the bodily integrity and no person should have the right to harm another based on what he does in his private space. Dignity itself is something private and which associates with the person's self. Protection of bodily integrity is essential to preserve the autonomy and individuality and the uniqueness of a personality. Harm to dignity and interference with privacy also affects the socio-economic status of a person. Many LGBTQ persons are denied services, discriminated against, loose their respect and status in the society and looked at as 'creeps'. The process of searching for one's sexuality by itself is a very complex and is influenced by the circumstances, the societal norms. One's sexuality is fluid but that doesn't justify discrimination based on that ever changing and fluid sexuality. Complete repression of one's sexuality may also deteriorate one's mental health.

The court also criticised the use of the term so-called rights in the Koushal Judgment. It argued that these are not any special rights claimed only by a few elite groups in the urban milieu. They are real rights which inhere in the core identity and essential personality of the person. Once there is persecution of exercise of the rights by the LGBTQ community, it also prevents the free expression of their identity. Privacy also consists of confidence in one's of being while being in public spaces. It is not restricted to either bodily integrity or mere autonomy. Privacy protects a variety of circumstances where we need our own space, where we cannot be harmed on the basis of what we do in that private space[§§§§§§§§§§§§].

Justice SK Kaul opined that sexual orientation is a part of one's private identity and dignity. He referred to the case of Mosley v New group papers, wherein the court held that there needs

[‡‡‡‡‡‡‡‡‡‡‡‡] Supra 3
[§§§§§§§§§§§§] ibid

to be careful evaluation of any the public interest arguments made by the government which don't really conflict the value of privacy itself.[**********]

Since Justice SK Kaul has concurred with Chandrachud's opinion, thereby making it the view of 5 judges in total and since the others haven't dissented with the opinion, this vie counted as coming from a full nine-judge bench. This makes it very easy in the future to overturn the decision of Suresh Kumar koushal case. Despite being a nine-judge bench the court refused to decide the constitutional validity of the section 377 since it that question was pending before another bench of the court.

Conclusion

I make a strong case for the repeal of the section 377 since it is unconstitutional and in violation of the articles 14, 15, 21 of the constitution. The right to privacy judgment has now further expedited the process of repeal. In the post-Maneka era, the SC in a string of cases has given protection to many implicit rights like the right to clean environment, rights of prisoners, rights of disabled and read then into the fundamental rights of the constitution. Many people have argued that section 377 protects children against sexual abuse and fills in the gaps in rape laws. The section 377 makes no indication as to whether it applies to consensual or non-consensual relationships, whether it only addresses non-consensual relations with minors. The enactment of POSCO has sufficiently addresses the issue of child sexual abuse and various other laws should be enacted to deal with cases of marital rape. Where there is presence of consent between adults, there is no justification to constrain the right to privacy and criminalise such acts.

The section 377 mirrors an archaic idea of sexuality and relationships. It is reflective of victorian morality and ludicrous ideas of the past. In case of India, we must say that society is a bit ahead of the law. But the presence of such a strong law prevents the free expression of identity and leads to repression of personality. This kind of ideology is doomed to the stagnant backwaters of the society. A mature democratic society like ours shouldn't fall prey to regressive opinions of a few men who cling on to the nostalgia of an imagined and puritanical land. Privacy above all heralds the coming of a new age where people can freely express

[**********] ibid

themselves. Privacy is not limited to withdrawing into one's own space. It also creates that space where one can confidently practice and express one's inner being and soul without anybody's interference.

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