Queer Rights and the Puttaswamy Judgment

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The Puttaswamy judgment is a significant development for the future of legal interventions involving sexual minorities. When it comes to the constitutional challenge of Section 377, the judgment’s acknowledgement of the “chilling effect” vis-à-vis constitutional rights and repudiation of the de minimis rule as it pertains to constitutional harms is crucial in challenging the Supreme Court’s decision in the Suresh Kumar Koushal case.

The queer movement in India has had an uneasy relationship with the concept of privacy, harking back to the constitutional challenge to Section 377 of the Indian Penal Code. The Naz Foundation’s petition arguing for the reading down of this section was originally filed before the Delhi High Court in 2001. Amongst the divided civil society responses included a critique of the petition’s reliance on the right to privacy as a basis for limiting state interference into the lives of queer persons. As Naisargi Dave (2012) notes in her account of the debates that emerged around the filing of the petition, the issue for many queer activists at the moment was the use of a privacy argument that would be rendered meaningless for many individuals who did not have the privilege of a private space. For many lesbian women, the question of a private space was impossible; for the numerous men who did find a sexual space in public spaces like parks, the privacy argument actively perpetuated stigma against them. Privacy, in this instance, created tiers of reputable and disreputable sex, protecting acts behind closed doors while otherwise heightening vulnerabilities.

The Delhi High Court’s Naz Foundation decision further muddled the waters on this count. The court’s elaboration of the right to privacy includes examining the concepts of both zonal as well as decisional privacy. The latter dealt with persons and not places, implying that the right to privacy protected the autonomy of private will, and not merely a claim to space from state intervention (Naz Foundation v Government of National Capital Territory of Delhi 2009: para 47). This commitment to a broad articulation of privacy is not visible in the actual declaration of the court, which only protects consensual sexual acts between adults “in private.” The court’s refusal to provide a blanket reading down of Section 377 was particularly curious, given that any act of public indecency would in any case be regulated by relevant provisions in the Indian Penal Code.

In either event, whether in private or public, acts of queer intimacy were effectively recriminalised following a Supreme Court verdict in 2013 (Suresh Kumar Koushal v Naz Foundation 2014). The Court’s rejection of the constitutional right to privacy as it pertained to Section 377 was particularly attenuated, given how it otherwise went into a detailed recounting of the constitutional jurisprudence on the evolution of the right. After multiple paragraphs on the vital significance of the right, the Court dismissed the argument by stating that even if Section 377 has been used to perpetrate harassment, blackmail, and/or torture of persons belonging to the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community, “this treatment is neither mandated by the section nor condoned by it and the mere fact that the section is mixed by police authorities and others is not a reflection of the vires of the section.”

The judgment in K Puttaswamy v Union of India (2017) opens out the discussion on the intersection of privacy and the rights of queer persons along multiple grounds. This article will look in particular at two scenarios: first, how the decision impacts the continuing challenge to Section 377, and second, how the decision might speak to challenges faced by queer individuals beyond the specific threat of criminality.

Challenge to Section 377

Justice Chandrachud’s opinion in the Puttaswamy judgment features a section titled “discordant notes.” The section features two Supreme Court decisions: the first being the judgment in Additional District Magistrate, Jabalpur v S S Shukla (1976) decision which infamously upheld the denial of basic fundamental rights during the imposition of Emergency. The habeas corpus decision, as it is also referred to, is considered one of the most shameful passages in the court’s history. The second case featured in this section...
The Koushal case. On a purely discursive level, the Puttaswamy judgment is a stinging repudiation of the decision by the Court: in placing it within this frame, it acknowledges the gravity of re-
criminalising millions of queer persons in the country. It then goes on to reject the Koushal judgment’s rhetoric of the “so-called” rights of LGBTQ persons. Instead, Justice Chandrachud finds that sexual orientation is an essential attribute of the right to privacy.

Subsequently, it is in the specific chal-
cenges to the Koushal judgment’s rejection of queer citizenship that the Puttaswamy bench provides significant arguments relevant to the continuing chal-
cenge to the constitutionality of Section 377. Following the Koushal decision, a review petition on the matter was dismissed, following which a curative peti-
tion was filed. In February 2016, a three-
judge bench of the Court held that the matter would be heard before a constitu-
tion bench of the Court. This potentially expands the grounds under which Section 377 can be challenged, beyond the limited scope of a curative petition, which needs more specific and articulate grounds for challenge.

To these grounds, Justice Chandra-
cudh’s decision has added, to start with, a rejection of the de minimis rationale of the Koushal judgment. In its deliberations on the impact of the law, the Koushal decision asserted that there had only been 200 prosecutions under the law since its inception in 1860. The Puttaswamy decision notes that the de minimis hypothesis is misplaced as the invasion of a fundamental right is not rendered tolerable when a few as oppo-
sed to a large number of persons are sub-
ject to hostile treatment. It then goes on to explain that such acts of hostile discrimination are constitutionally im-
permissible because of the chilling effect that they have on the exercise of funda-
mental rights in the first place.

This acknowledgement is crucial at two levels:

First, it is extremely difficult to prove and establish claims of actual prosecu-
tions under Section 377 when it comes to consensual sex. The National Crime Records Bureau (NCRB), which produces annual reports providing a range of information on criminal cases under selected provisions and statutes, began compiling information on Section 377 in 2014. The statistics released the follow-

year indicate that 1,347 complaints were filed under Section 377 across the country (NCRB 2015). However, since consent is irrelevant under the section, mere information about the number of cases filed does not give us a real picture about the extent of its use against con-
senting adults.

Further, an analysis of first informa-
tion reports (FIRs) conducted by Jyoti Puri (2016) in Delhi indicates that the vast majority of registered cases involve non-consensual sex. An International Commission of Jurists (ICJ 2017) report does a similar analysis on FIRs from Har-
yana, reporting similar findings. The re-
port looks at the text of the FIR to find that, in some cases, there is an ambigu-
ity in the reported facts where the FIR is filed by a third party. This individual is often the father of the victim; what is curious is that the complainant here notes that the accused “ne galat kaam kiya mere bete ke saath” (did a wrong deed with my son). The wrong here points more towards the moral wrong of the homosexual encounter as opposed to the wrong of a lack of consent. What this also means, however, is that it is difficult to bring instances of consensual sexual encounters prosecuted under Section 377 before a court of law. In noting, then, that a low number of prosecutions is not pertinent to a determination of a constitutional violation, the Puttaswamy decision goes a long way towards allevi-
ating this particular concern.

Second, the chilling effect argument allows the Court to take cognisance of the space where the real impact of 377 lies: at the level of persecution and the denial of access to justice. As Christo-
pher Leslie (2000) notes, there is often a three-part syllogism when it comes to anti-sodomy laws: first, that sodomy laws are unenforced; second, that unenforced laws are harmless; and thus, third, that sodomy laws are harmless. The real im-
 pact of the law, he argues, is in the indi-
rect effect it has in creating a hostile en-
vironment for LGBTQ individuals (Leslie 2000: 103). The persecution principle takes off from this idea, that through creating a class of unapprehended felons in terms of LGBTQ individuals, Section 377 legitimises discriminatory and vio-
 lent treatment. Indeed, arguments to es-
 tablish the same were presented before the Koushal bench. As the judges note, there were a range of affidavits placed before them, by queer persons, as well as their parents, testifying to the impact of the law in their daily lives. This was supplemented by evidence from the Na-
tional Legal Services Authority relating to the impact of criminalisation on men who have sex with men particularly in public spaces. This evidence was largely disregarded by the Court, based on their argument that such treatment was neither mandated nor condoned by the section.

Beyond Section 377

The conclusion of Justice Chandrachud’s opinion goes on to hold that privacy in-
cludes, at its core, the preservation of personal intimacies and sexual orienta-
tion. The Court further notes that the right to privacy recognises personal choices governing a way of life, that it is not lost or surrendered merely because an individual is in a public space. This articulation allows us to imagine a range of future possibilities as far as the inter-
section of rights of queer persons and the right to privacy is concerned.

First, looking at the question of self-
 identification and legal gender recogni-
tion: the Supreme Court’s decision in National Legal Services Authority (NLSA) v Union of India (2014) stands as the most significant intervention in the legal re-
gime relating to transgender rights. The case has become the reference point for just about every kind of intervention re-
lating to transgender rights that has fol-
lowed. At the heart of the judgment is the Court’s understanding that gender is an integral part of a person’s identity, and that the recognition of self-defined gender identity is part of the fundamental right to dignity. The Court goes on to hold that every person may identify as either male, female or third gender, regardless of the gender assigned to them at birth, without any kind of requirement for
medical intervention. Self-identification was understood as the principle governing legal gender recognition: if a person identified as a particular gender, they were not required to further take refuge under medical authority.

As has turned out, this self-identification principle has gone largely ignored in practice. For one, there are no uniform processes for gender change when it comes to different identity documents, such as the voter 10 or the driving licence. More worryingly, medical intervention is still often mandated. The passport office, for instance, requires certification from the hospital where a person underwent “sex change operation” to support a request for change in sex.1 This violation of the self-identification principle in the NALSA case now finds even stronger support in the Puttaswamy verdict’s articulation of privacy as safeguarding individual autonomy and encapsulating the ability of the individual to control vital aspects of their life. This understanding would frame gender identity as a personal choice, one that is tied to an individual’s dignity, with any attempt to place it under unreasonable administrative barriers, such as medical intervention, clearly becoming a privacy violation.

Second, looking at the habeas corpus cases, one finds that in many cases of runaway queer lovers, families are often able to force them to return through the filing of habeas corpus petitions. The families file the petition asking for the person in question to be produced before a court, following which the court mandates the police to seek and produce the said person. Multiple accounts abound of persons who express the intent to leave their family being challenged by a sitting judge in an open court and remanded to a government shelter home to “rethink” their choice (Arasu and Thangarajah 2012). The ICJ (2017) report notes, in particular detail, a case where an adult lesbian woman was produced in court following a habeas corpus petition, where the judge asked her if she wanted to stay with her family or her partner. Even when she clearly stated she wanted to be with her partner, the judge sent her to a shelter home. Ultimately, the woman agreed to remain with her family over indefinite detention in a shelter home.

Proceedings in these kinds of habeas corpus petitions are illustrative of the widespread discretion that courts have to interfere with personal decisions that queer persons take regarding whom and where they want to live. The Puttaswamy decision offers us a forceful constitutional articulation that could be used to challenge this denial of autonomy.

Finally, circling back to an idea that I began by flagging through the concerns expressed by queer activists: What does it mean to hold a privacy right in a public space? Angel Gonzalez’s poem “Inventory of Places Propitious for Love” (2013) begins by simply noting: “there aren’t many.” When he goes on to detail the potential places, he finds they are not simply dictated by the confines of architecture and geography, but other factors such as the seasons and the weather; the ways in which spring calibrates intimacy differently from autumn. The other determinant of the “propitious place,” according to Gonzalez:

there are bylaws, too proscribing caresses (with exemptions made
for particular epidermal areas
—of no interest—in children, dogs and other animals)
and “not touching, danger of ignominy”

”can be read on a thousand gazes.

The hostile gaze of the public space allows us to think about the ways in which public spaces can be made safer for people who bear physical markers of gender nonconformity. Whether it is public transport or an establishment space, in what way could this articulation of privacy protect or provide a remedy when queer individuals are harassed for expressing their identity in a public space?

The NALSA judgment noted how gender identity is expressed by an individual’s behaviour and presentation, which the state cannot then prohibit, restrict or interfere with. The Puttaswamy mandate might push us to think about how the state must proactively ensure that public spaces are rendered more safe and accessible, where it is not merely the state refraining from persecution, but
rather promoting a broader protection and respect of individual privacy and autonomy.

NOTE
1 See the passport application form instruction booklet (http://www.passportindia.gov.in/App- pOnlineProject/pdf/ApplicationformInstructionBooklet-V3.0.pdf).

REFERENCES


Queen Empress v Khairati (1884): ILR, All, 6, p 204.