Forbidden love: but for how long?

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Abstract

"No government has the right to tell its citizens when or whom to love. The only queer people are those who don't love anybody." - Rita Mae Brown, Gay Olympics, 1982

Ever since the AIDS Bhedbhav Virodhi Andolan's first movement to decriminalize homosexuality started in 1994, the issue has been surrounded by disputes in the country. This was followed by the constant attempts made by ***Naz Foundation (Naz Foundation v. State of N.C.T. of Delhi)***[3] to secure the rights of the sexual and gender minorities. It has taken legal initiative to exclude 'consensual, adult and same-sex activity' from the purview of Sec 377 of Indian Penal Code[4] (IPC).

States' preoccupation with sexuality is discernible everywhere. Resentfully, India has taken its stand for criminalization of non-heterosexual activity. Thus, overtime, serious concerns have been raised regarding the step-motherly treatment, given to these so-called minorities, by both the legislature and the judiciary of the country. On one hand, where the courts have been liberal in recognizing and upholding a variety of rights to citizens, a little has changed in the realm of homosexuals' rights. The judges in their separate judgments have given their insights in the case of ***Suresh Koushal*** (hereinafter referred to as Koushal),[5] having recriminalized homosexuality. However, with the historic nine-bench judgment, of K.S. Puttaswamy vs. Union of India (hereinafter referred to as Puttaswamy),[6] right to privacy has now been recognized as a fundamental right under right to life and personal liberty as per Article 21. It has gone a long way in realizing the dream of an unbiased country for Lesbian, Gay, Bisexual, Transgender (LGBT) community.

The present paper has thus, attempts to exhibit the effects, the privacy judgment has made on gay rights, by a detailed scrutiny of four parameters namely 'Dignity', 'Decisional

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[3] Naz Foundation *v.* Govt. of NCT of Delhi, (2010) Cri. L.J. 94.
[4] Indian Penal Code, 1860, No.45, Acts of Legislative Council, 1860.
[5] Suresh Koushal *v.* Naz Foundation, (2014) 1 S.C.C. 1(India).
[6] K.S. Puttaswamy *v.* Union of India, Writ Petition (Civil) No. 494 of 2012.

Autonomy', 'Prohibition on State's Obligation' and 'Constitutional Morality', along with an international perspective focusing on major countries around the world.

Keywords – Sexual Orientation, Fundamental Rights, LGBT Community, Equality and Privacy, Homosexuality decriminalisation.

Impact of K.S. Puttaswamy on Suresh Koushal

Regardless of the fact that the "Supreme Court changes its mind frequently, often holding that its own previous judgments are no longer good law, what is rare for the Court is to reverse itself in a case where the correctness of a prior judgment was not at issue."[7] For this reason, the plurality opinions of judges on Koushal in Puttaswamy is important as it paves the way for subsequent cases on decriminalizing homosexuality as an offence. To substantiate it with a proper rationale, the authors have bifurcated the reasoning into the following four standpoints:

Right to dignity

The Constitution is to "be read and interpreted in the light of the grand and noble vision expressed in the Preamble."[8] Nani Palkhivala has referred Preamble as the 'identity card of the Constitution'.[9] The Preamble expressly assured "dignity of the individual and therefore the cherished human values as the means of ensuring his full development and evolution."[10] The right to dignity forms "an essential part of our Constitutional culture which seeks to ensure the full development and evolution of persons and includes expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings."[11] Privacy and dignity of human life have "always been considered a fundamental right of every human being" like other Constitutional values.[12] The underpinnings of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article.19) and in the right to life and personal liberty (Article 21). Every individual has dignity on his very existence. If dignity or honor vanishes, what remains of life?[13] The SC has held in a catena of

[7] Gautam Bhatia, *The Supreme Court's Right to Privacy Judgment – V: Privacy and Decisional Autonomy*, Live Law, http://www.livelaw.in/supreme-courts-right-privacy-judgment-v-privacy-decisional-autonomy/.
[8] Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225 (India).
[9] M LAXMIKANT, INDIAN POLITY 4.1 (4th ed. 2015).
[10] Kharak Singh v. State of UP, A.I.R. 1963 S.C. 1295 ¶347-348 (India).
[11] Francis Coralie Mullin v. UT of Delhi, (1981) 1 S.C.C. 608 (India).
[12] Ramlila Maidan v. Home Secretary, UoI (2012) 5 SCC 1.
[13] Khedat Mazdoor Chetna Sangath v. State of MP, (1994) 6 S.C.C 260 (India).

cases[14] that life doesn't include mere animal existence[15] but something more than that which makes it worth living.

To live, is to live with dignity, and privacy ensures the "fulfillment of dignity and is a core value which the protection of life and liberty is intended to achieve."[16] In Naz Foundation, the court held that "Sec 377 denies a person's dignity and criminalises his or her core identity solely on account of his or her sexuality and thus violates Article 21."[17]

This was, however, overturned by SC stating that the same "cannot be applied blindfolded for deciding the Constitutionality of the law enacted by the legislature."[18] Yet its reasoning was found to be flawed in the present case. That's because, "discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual."[19] Doing away with the infamous "so-called rights" as propounded by Singhvi J., Chandrachud J. suggests that "their rights are not illusionary but are real, founded on sound Constitutional doctrine."[20] Doing the same is an assault to their dignity itself.[21]

Right to Decisional Autonomy

Dignity emphasizes on the 'autonomy of private will' and the 'freedom of choice and actions' a person is assured of. Decisional autonomy comprehends "intimate personal choices such as those governing reproduction as well as choices expressed such as faith and informational control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person." An individual expresses himself and his personality in his ability to make decisions, specifically on matters related to his intimate choices.[22]

A question that now comes to mind is with regard to the limits to which decisional autonomy of an individual is permissible. A conflict of interest between individual autonomy and authority of the State comes into picture. It has been aptly written, "recognizing a zone of privacy is but an acknowledgement that each individual must be entitled to chart and pursue the course of development of personality".[23] "Only that part of the conduct of anyone, for

[14] *Supra* note 9, Olga Tellis v. Bombay Municipal Corporation, A.I.R. 1986 S.C. 180 (India).
[15] Sunil Batra v. Delhi Admin, A.I.R. 1978 S.C. 1675 (India).
[16] Chandrachud J. *supra* note 4 ¶107.
[17] *Id.*
[18] *Supra* note 1.
[19] *Supra* note 14 at P. 126.
[20] *Id.* at P. 127.
[21] Chai R. Feldblum, *Moral Conflict & Liberty: Gay Rights & Religion*, 72 BROOKLYN L.J. 61, 106 (2006).
[22] *Supra* note 14 P. 141.
[23] *Id.* P. 168.

which he is amenable to society, is that which concerns others." As long as one's decisions are restricted to himself and does not cause any impediment to others' rights, state cannot be expected to exercise any authority whatsoever. "Private intimacy and autonomy establishes and nurtures human relationships without interference from the outside community."[24]

Chelameswar J., while enumerating three aspects to privacy, mentions 'intimate decisions' as an important facet, which means "autonomy with respect to the most personal life choices."[25] The same was also discussed in Naz Foundation. Light is also thrown on the fact that governments have always tried to condition the minds of their subjects "by screening the source of information or prescribing the penalties for making choices which governments do not approve."[26] When an attempt to achieve such conditioning is made, heterogeneity is destroyed and it creates a state of terror for those who do not abide what is 'mainstream'. States' preoccupation with sexuality are everywhere in evidence.[27] For recognizing the freedom of certain individuals, such as with regard to appearance and apparel, it needn't be necessarily protected under Article 25. It is further asserted that no one would want to be dictated by the State as to whom should people be "associated with in their personal, social or political life". Whereas social and political lives are concerned, they're guaranteed under Article 19(1)(c), personal association however, was still doubtful until Puttaswamy where the same was termed as one of the most intimate decisions. "One's sexuality is at the core of his area of private intimacy."[28] Each one of us in society "irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects."[29]

Freedom of choice has also been emphasized by the court. "The freedom to associate must necessarily be the freedom to associate with those of one's choice common objectives".[30] Nariman J., suggested, "privacy of choice, which protects an individual's autonomy over fundamental personal choice" and further went on to relate it with democracy by stating that "the core value of nation would be hollow unless persons in a democracy are able to develop fully in order to make informed choices for themselves which affect their daily lives and choice of how they are to be governed."[31] Dignity encompasses "the right of an individual to

[24] *Supra* note 1.
[25] Chelameswar J. *supra* note 4 P. 36.
[26] Bijoe Emmanuel v. State of Kerala, (1986) 3 S.C.C. 615 (India).
[27] JYOTI PURI, SEXUAL STATE 24 (Duke University Press ed.) (2016).
[28] *Supra* note 1.
[29] *Supra* note 14 P. 157.
[30] Bobde J., *supra* note 4 P. 31.
[31] Nariman J., *supra* note 4 P. 81,82.

develop to his full potential which can only be achieved if he has autonomy over fundamental personal choices and control dissemination of personal information."[32] Balance between "transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have far reaching impact on his or her dignity."[33]

Kaul J. has clearly emphasized on the fact that it is "undesirable to ignore an individual's wishes without a compelling state interest and the privacy of the home, inter alia, must protect the sexual orientation which are all important aspects to dignity."[34]

Prohibition on State's obligation

Chandrachud J. describes privacy as of two types- positive and negative.[35] Where negative rights to privacy prohibits a State from intruding into the personal lives of people which define their personal identity such as sexuality, religion and political, positive rights to privacy imposes an obligation on the State, at the same time, to remove the obstacles for an autonomous shaping of individual identities. Thus, it is State's duty to protect an individual's privacy from any unwanted intrusion, from others and from the State itself. The obligation is not restricted to private space only, but public places as well which is important with respect to LGBT community as they are at a greater risk when suffering at the hands of police officials in public space.

No fundamental right is absolute and reasonable restrictions always exist. Even in this case, the court has laid down that restrictions must be a "just, fair and reasonable standard" as per Article 21 along with 'compelling state interest'. The right to privacy and the protection of sexual orientation lies "at the core of the fundamental rights guaranteed by Article 14, 15 and 21."[36] With the privacy judgment now preventing unwanted intrusion in the private space, there is little scope for the State to justify its interest in invading someone else's bedroom terming it a reasonable restriction.[37]

'Life' within the meaning of Art 21 is "not confined to the integrity of the physical body."[38] An individual cannot be "compelled to do or forbear anything, by the state, because it will be

[32] *Id.* P. 85.
[33] S.C. AoR Assn. v. UoI, (2016) 5 S.C.C. 600 P. 953.
[34] Kaul J., *supra* note 4 P. 78.
[35] *Supra* note 14 P. 158.
[36] *Supra* note 1.
[37] The Wire Staff, *Right to Privacy Judgment Makes Section 377 Very Hard to Defend, Says Judge Who Read It Down*, THE WIRE, (Aug. 25, 2017), https://thewire.in/170810/ap-shah-377-right-to-privacy/.
[38] *Supra* note 14 P. 106.

better for him to do so, because, in the opinion of others, to do so would be wise, or even right."[39]

Constitutional Morality

Analytical school provides for a complete separation between morality and law. The legal system is made watertight against all ideological intrusion and all problems are concluded in terms of legal logic.[40] The difference between social desirability and logical necessity must be taken into account. Legal positivism involves nothing more than there is no necessary connection between law and morality. The thinkers propounded the "distinction between expositorial and censorial jurisprudence i.e. the difference between law, what it is and what it ought to be."[41] According to Austin and Bentham; "Laws, even though morally outrageous, were still laws."[42] A law changes morality when it changes people's behavior or attitude towards a thing or when it changes how they 'ought' to think.[43]

Since privacy enables an individual to preserve his beliefs, thoughts and expression even though they stand against the tide of general acceptance, the State is responsible for continued exercise of such right. With respect to the LGBT community, their sexual orientation, beliefs, thoughts and expressions run contrary to popular belief. In the previous cases of Naz Foundation and Koushal, the State stood against decriminalization of Sec 377, citing public morality as an impediment for the society might not approve of the same. But this cannot be a reason to deny them the purest of rights i.e. the right to love. This is where the concept of Constitutional morality comes to picture. It has been rightly mentioned that "the sole purpose of elevating certain right to the status of Fundamental rights against sex discrimination is to prevent behavior that treats people differently for reasons of not being in conformity with generalization concerning 'normal' or 'natural' gender roles."[44] A modern democracy, "while based on the principle of majority rule, implicitly recognizes the need to protect the fundamental rights of those who may dissent or deviate from other majoritarian

[39] JOHN STUART MILL, ON LIBERTY & OTHER THINGS (Batoche Books) (1859).
[40] W. FRIEDMANN, LEGAL THEORY 289 (5th ed. 1967).
[41] Nikhil Kumar Singal, *Naz Foundation v. Govt. of NCT of Delhi — A Critique*, EASTERN BOOK COMPANY, 1 (May 2011), http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=21220.
[42] *Id.*
[43] Kenworthey Bilz & Janice Nadler, *Law Psychology & Morality*, 50 PSYCHOL LEARN MOTIV 101, 103 (2009).
[44] See *supra* note 25 at 133.

view."[45] At the level of social body, sexuality stages our anxieties about morality and beliefs about the natural dimorphism of humans, and the gendered essence of humans.[46] Because of "lack of scientific understanding of different variations of orientation, even advanced societies have had to declassify 'homosexuality' from being a mental disorder and now it is understood as a development occasioned by evolution, partial conditioning and genetic reasons."[47] Popular opinion is an inadequate reason to curtail the rights of dignity, autonomy and privacy. "If there is any type of 'morality' that can pass the test of compelling state interest, it must be Constitutional morality" as has been insisted by Dr. Ambedkar in the Constituent Assembly.[48]

In Koushal, Singhvi J. has pointed out that only a miniscule population consists of LGBT community as less than 200 prosecutions have taken place in the last 150 years. The numbers for Sec 377 are also going unreported under crimes by penal code, perhaps because sexual activity is mostly consensual and therefore not registering statistically.[49]

International scenario

In comparison to the Indian standpoint, the international viewpoint is discussed below:

United States of America

Before analysing America's approach, the authors would like to bring in focus, what Granville Austin, an American historian, in his book "The Indian Constitution – Cornerstone of a Nation", has to say about Indian approach. According to him, "these fundamental rights were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India." However, "Section 377 IPC grossly violates their right to privacy and liberty embodied in Article 21 insofar as it criminalises consensual sexual acts between adults in private."[50]

Chandrachud J.[51] initiated the discussion of the American approach, in the light of views given by James Madison[52], Samuel D Warren & Louis Brandeis[53], Thomas Cooley[54], Roscoe

[45] *Id.* at 134.
[46] *Id.* at 41.
[47] Report of the Chairman on Amendments to Criminal Law (Chairman, Justice J.S. Verma), 2012, 51.
[48] *Supra* note 25 at 144.
[49] *Supra* note 25 at 42.
[50] *Supra* note 1 P. 52.
[51] *Supra* note 4.
[52] *Supra* note 14, *Id*. P. 33.

Pound[55], Edwin W Patterson[56] and Ronald Dworkin[57]. The view in common provided the following essential points:

1. "The intensity and complexity of life, attendant upon advancing civilization and evolution of technology, have rendered necessary some retreat from the world, a core of freedom and liberty from which the human being had to be free from intrusion." Thus, reflecting upon the inviolable nature of the human personality. "As legal rights were broadened, the right to life had come to mean the right to enjoy life - the right to be let alone where thoughts, emotions, and sensations demanded legal recognition."[58]

2. "The natural rights are not bestowed by the state and they survive the social compact. They exist equally in the individual irrespective of class or strata, gender or orientation."[59] It thus, "makes sense to say, that a man has a fundamental right against the Government. If the Government does not take rights seriously, then it does not take law seriously either."[60]

American privacy jurisprudence shows that "even though there is no explicit mention of the word 'privacy' in the Constitution, the courts of the country have not only recognised the right to privacy under various amendments of the Constitution but also progressively extended the ambit of protection." Having located the right to privacy in the 'person' and not in a 'place', "it has developed to shield various private aspects of a person's life from interference by the state such as conscience, sexuality, marriage, individual beliefs, other social groups, etc."[61]

Thus, upto thirty American judgments, as early as Boyd v. United States'[62] case of 1886, to Obergefell v. Hodges'[63]case of 2015, were duly explored in the Puttaswamy. The following points extracted from these judgments are thus important for the concerned issue:

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[53] *Id.* P.34, 35.
[54] *Id.* P. 36.
[55] *Id.* P. 42.
[56] *Id.* P. 43, 44.
[57] *Id.* P. 46.
[58] *Supra* note 51.
[59] *Supra* note 54.
[60] *Supra* note 55.
[61] *Supra* note 14 P. 134.
[62] 116 US 66 (1886).
[63] S*upra* note 60, 576 US __ (2015).

1. "Right to privacy only included those personal rights that were 'fundamental' or 'implicit in the concept of ordered liberty' such as 'most intimate of human activities and relationships, the personal intimacies of the home, the family, marriage, procreation, etc.' "[64]

2. "In *Lawrence v. Texas*,[65] the Court in a 6:3 decision struck down the sodomy law, making same-sex sexual activity legal in every state and territory of the United States. The Court overturned its previous ruling on the same issue in the 1986 case, *Bowers v. Hardwick*[66], where it upheld a challenged Georgia statute and did not find a Constitutional protection of sexual privacy. Justice Anthony Kennedy wrote the majority opinion and held that:"

   "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime… It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter… The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[67]

3. "In Obergefell v. Hodges[68], the Court held in a 5:4 decision that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy authored the majority opinion as:"
   "Indeed, the Court has noted it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[69]

South Africa

Section 14 of the Bill of Rights present in the Constitution of the South Africa[70] enshrines the right to privacy. With regard to the concerned matter in issue, the authors can extract the

[64] Burger C.J., s*upra* note 4 P. 134, Paris Adult Theatre I v. Slaton, 413 US 49 (1973).
[65] Anthony Kenedy J., s*upra* note 4 P. 134, 539 US 558 (2003).
[66] S*upra* note 4 P. 134, 478 U.S. 186 (1986).
[67] *Supra* note 65.
[68] *Supra* note 62.
[69] *Id.*
[70] Bill of Rights in the Constitution of the Republic of South Africa, 1996.

following jurisprudential position, from the analysis of over five South African cases on privacy, made by the Puttaswamy:

1. "In the context of privacy it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community."[71]
2. "The more intimate that information, the more important it is in fostering privacy, dignity and autonomy that an individual makes the primary decision whether to release the information."[72]
3. In National Coalition for Gay and Lesbian Equality v. Minister of Justice,[73] the following sub-points, were stated to upheld "that the common law offence of sodomy, is inconsistent with the Constitution":

Scope of Privacy

"Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy…"[74]

Interrelation between Equality and Privacy

"…equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality."[75]

[71] Ackermann J., *supra* note 4 pg.134, Bernstein v. Bester, 1996 (2) S.A. 751 (C.C.).
[72] Madala J., *supra* note 4 pg.134, NM v. Smith, 2007 (5) S.A. 250 (C.C.).
[73] Ackermann J., *supra* note 4 pg.134, 1999 (1) S.A. 6 (C.C.).
[74] *Id.*
[75] *Id.*

"The motif which links and unites equality and privacy, and which runs right through the protections offered by the Bill of Rights, is dignity."[76]

Scope of Autonomy

"Autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state. What is crucial is the nature of the activity, not its site. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. …It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves."[77]

4. In Minister of Home Affairs v. Fourie[78], the Constitutional Court unanimously upheld the right to marry of same-sex couples and ruled that:

"Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state." "Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law…this being a decision entirely within their protected sphere of freedom and privacy…"[79]

United Kingdom

From 17th century's *Peter Semayne v. Richard Gresham*[80] case to 21st century's PJS v. News Group Newspapers Ltd.[81], the privacy jurisprudence of upto twenty English cases was analysed in Puttaswamy.

It also discussed, the concept of privacy given by varied British philosophers, like John Stuart Mill[82], John Austin[83], William Blackstone[84] wherein the basic contention given in general

[76] *Id.*
[77] *Id.*
[78] Sachs J., *supra* note 4 pg.134, 2006 (1) S.A. 524 (C.C.).
[79] *Id.*
[80] Sir Edward Coke J., *supra* note 4 pg.134, 77 E.R. 194.
[81] Lord Mance, *supra* note 4 pg.134, (2016) U.K.S.C. 26.
[82] *Supra* note 37.
[83] *Supra* note 14 pg.32.
[84] *Id.*, pg.30.

was, "personal liberty and security are absolute rights which were vested in the individual by the immutable laws of nature."[85] "Over himself, over his own body and mind, the individual is sovereign."[86] "It is a simple reflection of the common view that one person should so far as possible be entitled to tell another person to mind his own business."[87]

In 1950's, following a campaign of arrests of non-heterosexual persons, the government appointed a 'Committee on Homosexual Offences and Prostitution'. The report of this committee stated:

"…homosexual behaviour between consenting adults in private should no longer be a criminal offence."[88]

"The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others… It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour."[89]

In the report's acceptance and pursuance, the Sexual Offences Act, 1967 was enacted. Then, the Sexual Offences Act, 2003 was enacted, which repealed all earlier conflicting legislation and re-drafted sexual offences in a gender neutral manner. Finally, the Civil Partnership Act[90] and the Equality Act (Sexual Orientation) Regulations[91] , "gave same-sex couples the same rights and responsibilities as a civil marriage."[92]

Scotland & Ireland

In 1981, the continued criminalisation of homosexuality was challenged in Dudgeon v. United Kingdom[93]. Interestingly, Dudgeon was decided on the ground that the continued illegality of homosexuality violated the petitioner's right to privacy. The ECHR found that

[85] *Id.,* pg.40.
[86] *Id*., pg.31, *supra* note 37.
[87] Lord Mustil, s*upra* note 4 pg.134, R v. Director of Serious Fraud Office, ex parte Smith, (1993) A.C. 1.
[88] Bhairav Acharya, *Privacy, Autonomy, and Sexual Choice: The Common Law Recognition of Homosexuality*, CIS,
[89] *Id.*
[90] The Civil Partnership Act, 2004 (c. 33).
[91] Equality Act (Sexual Orientation) Regulations, 2007 (2007 No. 1263).
[92] *Supra* note 87.
[93] (1981) 4 E.H.R.R. 149.

"…moral attitudes towards male homosexuality…cannot…warrant interfering with the applicant's private life…"[94]

Japan

Japan has always been relatively open about gay relationships and there are even specific fields in which homosexuality was known, accepted, understood and even praised: such like, the military, the clergy, and the theatre.[95]

In 2015, the government also came up with a system of 'citizen identification' which gave all the citizens and foreign residents a 12 digit 'My Number', aiming at making administration more systematic and social welfare benefits more efficient.[96]

Conclusion

Michael D. Kirby J., in his book "Sexual Orientation & Gender Identity" – 'A New Province of Law For India' concludes the lecture by stating, "Until SC changes its mind or until the legislature of Indian reverse the timidity and indifference that they have shown in removing the barriers to progress and equality presented by Sec 377, the gateway to progress is effectively closed and barred. One day the Supreme Court will catch up. But when will that be?"[97] It seems that the time has come for the court to catch up, as the stage is already set, with right to privacy now being declared a fundamental right. The plurality opinion of court in Puttaswamy will be a great positive in the cause. If rape laws are meant to protect, the anti-sodomy law is meant to punish. Whereas rape law refers to violations involving "sexual intercourse", the anti-sodomy law uses the language of "carnal intercourse against the order of nature to create a tautology between unnatural sexual practices and criminality."[98] As a democracy, we have progressed a lot. Barring sexual freedom LGBT community has more rights today than it used to have three-four decades ago. Treating them equally in other fields and not letting them indulging into sexual activities is like preaching the concept of 'love the sinner but hate the sin' where they are entertained in the society as long as they don't indulge into 'sinful' sexual activities. Consequently, "the identity of a gay person does not disappear

[94] *Id.*
[95] Aliasis, *Being Gay in Japan: The Ups and Downs*, https://pairedlife.com/dating/Being-Gay-in-Japan#.
[96] FP Staff, *Supreme Court decision on Right to Privacy today: How other countries across the world treat their citizens' data*, http://www.firstpost.com/india/right-to-privacy-and-governance-how-other-countries-across-the-world-treat-their-citizens-data-3829423.html.
[97] Michael D. Kirby, Sexual Orientation & Gender Identity - A New Province of Law For India 163-164 (Universal Law Publishing).
[98] *Supra* note 25 at 50.

simply because you have not been able to engage in the conduct of having sex with your same-sex partner over one weekend but it would be foolish to imagine that one's identity as a gay person would have any real meaning if one was consistently precluded from having sex with one's same-sex partner."[99]

It is when the legislatures fail to address the issue with the required seriousness even after the same had been recommended by the law commission in its 172nd report by voting against the bill introduced by Shashi Tharoor and laughing it off. Judiciary must not shrug off its shoulders to the plight of LGBT community. It being the guardian of the Constitution must take it upon itself to give them their right to love which has been long overdue. The same shall be in the interest of justice as well.

"Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest." -John Stuart Mill, quoted by Bobde J. in Puttaswamy para 27.

[99] *Supra* note 19 at 61.