

NATURAL JUSTICE THEORY: WHAT IT MEANS FOR THE RIGHT TO PRIVACY AND LGBT RIGHTS IN INDIA

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Abstract

This paper analyzes two landmark judgments on the right to privacy and LGBTQ+ rights in India. Both of these judgments form part of the same picture, the article analyses these judgments and their decision-making approach in light of natural justice theory. The Supreme Court's recognition of the right to privacy paves way for the protection of LGBT rights in India. The cumulative effect of the two judgments under analysis demonstrate the need for an expansive interpretation of fundamental and natural rights using natural justice theory.

Keywords: LGBTQ+, International Covenant on Civil and Political Rights, Universal Declaration of Human Rights, All India Reporter, Supreme Court Cases.

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LA TEORÍA DE LA JUSTICIA NATURAL: QUÉ SIGNIFICA PARA EL DERECHO A LA PRIVACIDAD Y LOS DERECHOS DE LAS PERSONAS LGBTI EN LA INDIA.

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Resumen

Este artículo analiza dos sentencias emblemáticas sobre el derecho a la privacidad y la despenalización de las relaciones sexuales consensuadas entre personas del mismo sexo en la India. Ambas sentencias hacen parte de una tendencia, que este artículo expone a través del análisis de las sentencias y su argumentación a la luz de la teoría de la justicia natural. El reconocimiento del derecho a la privacidad de la Corte Suprema allana el camino para la protección de los derechos de las personas LGBTI en la India. El efecto cumulativo de las dos sentencias demuestra la necesidad de una interpretación amplia de los derechos fundamentales y naturales a través de la teoría de la justicia natural.

Palabras claves: LGBTQ+, Pacto Internacional de Derechos Civiles y Políticos, Declaración Universal de Derechos Humanos, Reporte All India, Casos de la Corte Suprema de la India.

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TEORIA DA JUSTIÇA NATURAL: O QUE SIGNIFICA PARA O DIREITO À PRIVACIDADE E PARA OS DIREITOS DAS PESSOAS LGBTI NA ÍNDIA

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Resumo

Este artigo analisa duas sentenças emblemáticas sobre o direito à privacidade e a despenalização das relações sexuais consensuais entre pessoas do mesmo sexo na Índia. Ambas as sentenças fazem parte de uma tendência que este artigo expõe por meio da análise de sentenças e sua argumentação à luz da teoria da justiça natural. O reconhecimento do direito à privacidade pela Suprema Corte abre caminho para a proteção dos direitos das pessoas LGBTI nesse país. O efeito cumulativo das duas sentenças demonstra a necessidade de uma interpretação ampla dos direitos fundamentais e naturais mediante a teoria da justiça natural.

Palavras-chave: LGBTQ+, Pacto Internacional de Direitos Civis e Políticos, Declaração Universal de Direitos Humanos, Relatório *All India*, Casos da Suprema Corte da Índia.

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Introduction

The largest democracy in the world has recently spoken on an issue that affects all of us, as 20th century constitutions did not generally specifically address the right to privacy, and those that did could not develop this right as applied to the context of people's needs in a 21st century networked society.¹ The Supreme Court of India has taken a momentous step, which legal societies around the world will likely view with significant importance. In its 9-judge bench judgment, the Supreme Court unanimously held the right to privacy is a fundamental right, but the merits on which the Court reached this conclusion are equally as important as the decision itself. The Court used reasoning different from previous cases, and overruled judgments that had guided its perspective since the question of privacy first reached the Court. This judgment overruled those in *Kharak Singh v. State of Uttar Pradesh*² and *M.P. Sharma v. Satish Chandra*,³ and for this reason the Court's reasoning in this case should be analyzed.

This article makes use of secondary and descriptive sources for its analysis, based on a doctrinal method of research. These sources include online versions of books, cases, and commentary by renowned authors and government appointed committees, among others. This article considers the right to privacy as an implicit, fundamental right under the Indian Constitution. Two landmark judgments the Supreme Court of India issued in a two-year period recognized the right to privacy and decriminalized consensual homosexual sex in India. This article argues that these two cases illustrate how the recognition of the right to privacy paved the way for the protection of LGBT people's rights.

The right to privacy as a natural right

Natural rights are rights that stem from the nature of human beings and depend upon his personality.⁴ They are distinguished from positive laws created through legislation, thus, one may infer the Constitution does not create these rights, but merely recognizes them, which explains their name as pre-constitutional rights.

¹ Mishi Choudhary, "Press Release Supreme Court holds that right to privacy is a Fundamental Right", last visited on (Feb. 3, 2018, 10:14 AM), <https://sflc.in/press-release-supreme-court-holds-that-right-to-privacy-is-a-fundamental-right>.

² *Kharak Singh v. State of Uttar Pradesh*, 1963 AIR 1295, 1964 SCR (1) 332 (India).

³ *M.P. Sharma v. Satish Chandra*, 1954 AIR 300, 1954 SCR 1077.

⁴ Paul R. Abramson, Steven D. Pinkerton, Mark Huppín, *Sexual Rights in America: The Ninth Amendment and the Pursuit of Happiness*, 230.

The right to privacy is a natural right,⁵ concomitant of the right of the individual to exercise control over his personality. Cases such as *Wolf v. Colorado*⁶ in the *United States* and *Murray v. Big Pictures*⁷ in the *United Kingdom*, recognize that encroachments on a person's private life is deleterious to his or her physical happiness and health and erodes his or her natural rights. This is as true for an Indian citizen as it is for an American or British one. Thus, recognizing the right to privacy as a natural fundamental right is essential for the protection of other natural rights.

A person's house is his castle;⁸ it is his rampart against encroachment on his personal liberty. In *Wolf v. Colorado*,⁹ Justice Frankfurter highlighted the importance of the security of one's privacy against arbitrary intrusion by the police. This could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect his or her personal liberty. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy, thus eroding his natural rights.

Protection of natural rights lies in part III of the Constitution of India, which has been referred to as the core of the constitution, as this part contains legal protections for core values, including natural rights.¹⁰ Two elements provide for the contents of natural justice: international commitments and universal moral agreements.¹¹ Two recognized universal moral agreements States have the duty to protect include the dignity and autonomy of the person.

One cannot protect the dignity of an individual without protecting his or her right to privacy. In the case of *National Legal Service Authority v. Union of India*,¹² the Supreme Court defined the dignity of an individual as encompassing the right of an individual to develop to the full extent of his or her potential, which in turn

⁵ Justice K S Puttaswamy (Retd.) v. Union of India, (Writ Petition Number 494 of 2012).

⁶ *Wolf v. Colorado*, 338 U.S. 25 (more) 69 S. Ct. 1359; 93 L. Ed. 1782; 1949 U.S. LEXIS 2079.

⁷ *Murray v. Big pictures*, 2008] EWCA Civ 446; [2008] 3 WLR 1360; [2008] EMLR 399; [2008] EHRR 736; [2008] 2 FLR 599; [2008] HRLR 33; [2008] UKHRR 736

⁸ *Peter Semayne v Richard Gresham*, All ER Rep 62; 5 Co Rep 91 a; Cro Eliz 908; Moore KB 668; Yelv 29 77 ER 194.

⁹ *Wolf v. Colorado*, 338 U.S. 25. (1949)

¹⁰ For an in-depth account of the higher-law background of the Constitution and its influence on Madison, as well as his view of the judiciary, see Dorn (1988).

¹¹ Charles Ricketts, *The Principle And Essential Elements Of Natural Justice – Its Historical Perspective And Role Of the Judiciary*, 23.

¹² *National Legal Service Authority v. Union of India*, [(2014) 5 SCC 438].

requires autonomy over fundamental personal choices and the dissemination of personal information. As this autonomy may be infringed in the absence of the right to privacy, the Supreme Court provided for the protection of personal information through the right to privacy in order to protect the right of individuals to their dignity.

The drafters of the Constitution intended this document to protect the right to privacy. Some have argued the failure to expressly include this right in the Constitution indicates the drafters rejected privacy as a right. This argument merits closer consideration. Constituent assembly debates from March 17, 1947¹³ reflect proposals for the protection of an individual's correspondence and search and seizures, which did not form part of the final document. However, one may not conclude from this absence that the constituent assembly rejected the whole notion of the right to privacy as a fundamental right.

The doctrine of living constitutionalism is particularly relevant on this topic, as privacy is a concept that manifests differently in different ages. Article 368 of the Constitution provides for constitutional amendments, which evidences the drafters' intention to make the Constitution a living document. Moreover, the theory of original intent supports the idea that the framers' intention was for the Constitution to evolve to meet the changing needs of the present and future.¹⁴ This is particularly relevant in an age where technology reshapes our fundamental understanding of information, knowledge, and human relationships in a way that was unknown even in the recent past. The significance of a dynamic element such as privacy fluctuates overtime; while privacy could be considered a hoax on the powers of the welfare state during the 1950s, today, when human understanding is shaped from information available online, the value of privacy cannot be understated.

In light of these concepts, judges interpreting the constitution must leave open the path for future generations to respond to challenges to privacy that cannot be foreseen today.

¹³ Constituent Assembly Debates Vol. 3, Wednesday March 17 1947.

¹⁴ State of west Bengal v. Anwar Ali Sarkar, 1952 AIR 75, 1952 SCR 284; Union of India v. Naveen Jindal (SC)-2004-1-48 decided on January 23, 2014.

The right to privacy as a condition for the exercise of other textually guaranteed fundamental rights

The right to privacy must also be considered a fundamental right because it is essential to the enjoyment of other recognized fundamental rights and any diminution in the protection of the right to privacy will weaken these rights.

The American and Irish constitutions, on which the Indian Constitution heavily borrowed in developing its fundamental rights, did not explicitly guarantee the right to privacy of their citizens. In both cases, the highest courts in each country found that their respective constitutions protected the right to privacy as a fundamental right, based on the logic that other textually guaranteed rights would be ineffective without the right to privacy. The Indian Supreme Court followed this logic when determining part III of the Indian Constitution protects the right to privacy. The Court held the right to privacy is a necessary condition for the exercise of freedoms guaranteed under article 19. The freedom of speech and expression is always dependent on one's capacity to think, read, and write in private, hence the right to privacy of communications is an essential component of the freedom of speech and expression.¹⁵

The right to settle and move freely throughout the territory of India as provided in article 19(1)(d) and (e) of the Constitution requires the right to privacy.¹⁶ The U.S. Supreme Court recognized as much in the *Wolf* case,¹⁷ as did British courts in *Semayne v. Richard Gresham*,¹⁸ which includes the British legal maxim "the house of everyone is to him a castle or fortress." Thus, dicta in the *Semayne* case recognized the extension of individual independence from the state to the house in which one resides, and supports the argument that article 20(3) of the Constitution requires the right to privacy for active enjoyment in the individual's home.

Justice Subba Rao recognized the importance of this in his dissent in the *Kharak* case,¹⁹ in which he observed the following:

¹⁵ Life Insurance Corporation V. Prof. Manubhai D Shah 1993 AIR 171, 1992 SCR (3) 595.

¹⁶ Kharak Singh v. St. of U.P. 1963 AIR 1295.

¹⁷ Wolf v. Colorado, 338 U.S. 25 (more) 69 S. Ct. 1359.

¹⁸ Peter Semayne v Richard Gresham All ER Rep 62;5 Co Rep 91 a; Cro Eliz 908; Moore KB 668; Yelv 29 77 ER 194.

¹⁹ Kharak Singh v. State of U.P 1963 AIR 1295, 1964 SCR (1) 332.

How could a movement under the scrutinizing gaze of the policemen be described as a free movement? The whole country is his jail... the petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted

This text argues that the right to privacy is a necessary condition for the exercise of the right to move freely throughout the territory of India. Additionally, the right of every religious denomination to maintain institutions for religious and charitable purposes, to manage its own affairs and to own and administer property acquired for such purposes as established in article 26 also requires privacy, in the sense of non-interference from the State.

An additional fundamental right that requires the right to privacy for its effective guarantee is the right to freedom of association. In the case of *NAACP v. Alabama*,²⁰ the U.S. Supreme Court determined the right to freedom of association is rendered useless without the right to privacy. The value of such rights remains the same regardless of the country in which one is located. Therefore, the right to privacy is implicit in article 21 of the Indian Constitution, as it flows directly from the right to personal liberty. Although the Indian Constitution does not textually guarantee the right to privacy, in the case of *Unnikrishnan v. State of Andhra Pradesh*,²¹ the Supreme Court affirmed this right is protected under the right to life enshrined in article 21 of the Constitution. In *Kharak Singh*, the Court determined the sanctity of the home and protection against unauthorised intrusion to be an integral element of “ordered liberty.” This is comprised in ‘personal liberty’ guaranteed by article 21.

Samuel D. Warren and Louis Brandeis²² argued that the law has evolved to incorporate the right to privacy within the right to life. This article coined the term “right to privacy” and led to the debate regarding the inclusion of this right in the U.S. and later Indian Constitutions. As legal rights expanded, the right to life had “come to mean the right to enjoy life – the right to be let alone.” The jurists elaborated that the ‘right to be let alone’ thus represented a manifestation of ‘an inviolate personality,’ a core of freedom and liberty from which the human being must be free from intrusion.

²⁰ *NAACP v. Alabama*, 357 U.S. 449 (more) 78 S. Ct. 1163; 2 L. Ed. 2d 1488; 1958 U.S. LEXIS 1802

²¹ *Unnikrishnan v. State of Andhra Pradesh* 1993 AIR 2178, 1993 SCR (1) 594

²² Harvard Law Review, “The Right to Privacy” (15 December 1890).

In *Kharak Singh*, the Court invalidated nighttime domiciliary authorized by regulation 236(b) of the Uttar Pradesh Police Regulation.²³ The Court determined this regulation to be an intrusion into the privacy of individuals, which violated the right to personal liberty. The Court has recognized that an intrusion of privacy violates article 21 of the Constitution to such an extent that the Court determined a right to privacy is embedded in this article.

The Court also referred to the U.S. case *Munn v. Illinois*²⁴ in *Kharak Singh*, where it was brought to notice that the term right to 'life' does not mean merely human existence but can be extended to include various complementary rights. The Court followed this logic to argue that while the Indian Constitution does not expressly recognize the right to privacy, other expressly protected rights may include this right. Although the first case is from the United States, the word "life" in article 21 of the Indian Constitution has the same significance as that the provisions of the fundamental rights section of the Indian Constitution were borrowed from its American counterpart. Hence, as in the United States, various fundamental rights would be meaningless without an effective right to privacy.

India's international commitments

The recognition of the right to privacy as a fundamental right is a part of India's commitment to the global human rights regime. According to article 51(c) of the Constitution,²⁵ the State has an obligation to respect international treaties and obligations to which it has acceded. Article 253 of the Constitution,²⁶ read with entry 14 of the union list in the 7th schedule of the Constitution,²⁷ gives the State the power to make any law to implement international law or treaty obligations.

²³ Uttar Pradesh Police Regulation, Regulation 236(b).

²⁴ *Munn v. Illinois*, 94 U.S. 113 (1876).

²⁵ Central Government Act, Article 51(c) Constitution of India which reads as "foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration PART IVA FUNDAMENTAL DUTIES".

²⁶ Central Government Act, Article 253 Constitution of India which reads as "Legislation for giving effect to international agreements Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body".

²⁷ Union List, 7th schedule Constitution of India, entry 14th which reads as "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries".

To this end, article 12 of the Universal Declaration of Human Rights (UDHR) provides that no one shall be subject to arbitrary interference with his privacy.²⁸

Art.12: no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the International Covenant on Civil and Political Rights (hereinafter, ICCPR) also requires States to respect and protect their citizens' right to privacy. This article provides

the obligation imposed by this article requires the state to adopt legislative and other measures to give effect to the prohibition against such interference and attacks as well as to the protection of the right.

The ICCPR²⁹ creates an obligation for States to respect, protect and fulfill its norms. The duty of a State to respect the right mandates that it must not violate the right. The duty to protect the right means the government must protect it against any interference, even by private parties. India is a signatory to both treaties and has filed no reservations against the provisions regarding the right to privacy, unlike its reservations filed against articles 1, 9, and 13 of the ICCPR. Thus, India has an obligation to respect, protect, and fulfill the right to privacy.

There is no contradiction between the international obligations India has assumed and its Constitution. There is no inconsistency between Indian laws that would lead to its courts' refusal to presume privacy to be a fundamental right. By contrast, our constitutional provisions must be read and interpreted in a manner that ensures their conformity with the global human regime.³⁰

According to the Supreme Court in the case of *Vishakha v. State of Rajasthan*,³¹ if there is no existing domestic law on a given topic, the Court must use international laws and treaty obligations to interpret constitutional provisions. In the *Vishakha* case, in the absence of a law on the right to privacy, the Court referred to the relevant

²⁸ Universal Declaration of Human Rights, 1948.

²⁹ International Covenant on Civil and Political Rights, 1966.

³⁰ Article 51(c) of Indian Constitution, 1950.

³¹ *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241; AIR 1997 SC. 3011.

articles of the UDHR and ICCPR to interpret the provisions of the Constitution and find an implicit right to privacy in article 21.

In the *Vishakha* case there is no contradiction between India's international obligations and its Constitution. India is a responsible member of the international community, and thus its courts must adopt interpretations consistent with India's international commitments, in particular where its constitutional and statutory mandates indicate no deviation. In fact, the enactment of the 1993 Human Rights Act³² indicates the country's willingness to adopt human rights and follow the obligations of the international human rights regime.

The state of privacy recognition in India is highly dependent upon the judicial discretion of the court which is made evident after the changing stand of the supreme court. However, India's international commitments require codified laws to ensure the protection of privacy. Thus, judicial discretion must cede to a codified protection of the right to privacy, which recognizes the fundamental nature of said right at the constitutional level.

In the case of *Puttaswamy v. Union of India*,³³ the Supreme Court did take the drastic step of overruling the *Kharak Singh* and *M.P. Sharma* cases. The legal community expected and awaited an overruling of these two cases, given the inconsistencies between the two cases. The cases of *Kharak Singh* and *M.P. Sharma* are based on the doctrine elaborated in the case of *A.K. Gopalan v. State of Madras*³⁴. This doctrine considered fundamental rights to be watertight compartments and rejected the possibility of multiple fundamental rights overlapping. This doctrine views each fundamental right as a distinct protection, and this view was important for the Court's reasoning and conclusions in both cases. However, two future cases overruled this doctrine: *Rustom Cooper v. Union of India*³⁵ and *Maneka Gandhi v. Union of India*.³⁶ Thus in the post-*Maneka Gandhi* era, courts may not use the doctrine the Court adopted in *A.K. Gopalan* to argue against a constitutional right to privacy. For this reason, the legal community expected the *Kharak Singh* and *M.P. Sharma* cases to be overruled.

³² Protection of Human Rights Act, 1993, Acts of the Parliament of India, 28th January 1993.

³³ *Ibid.*

³⁴ *A.K. Gopalan v. State of Madras*, 1950 AIR 27, 1950 SCR 88.

³⁵ *Rustom Cooper v. Union of India*, 1970 AIR 564, 1970 SCR (3) 530.

³⁶ *Maneka Gandhi v. Union of India*, 1978 AIR 597, 1978 SCR (2) 621

In the *Kharak Singh* case, the Court found regulation 236(b) of the Uttar Pradesh Police Regulation to be unconstitutional. The court had no ground other than a right to privacy upon which to strike down domiciliary visits. While doing so, the Court cited American judgments that recognized privacy as a fundamental right and is the jurisprudential foundation for the right to privacy in the United States. However, in *Kharak Singh*, the Court eventually concluded the Indian Constitution did not include a right to privacy. Thus, the judgment in *Kharak Singh* is internally inconsistent and does not provide a strong justification for denying the existence of a right to privacy in the country.

This brings us to the case of *M.P. Sharma*. In this case, the Court did not rule the right to privacy did not exist in India, but merely pointed out that the Indian Constitution text analogous to the Fourth Amendment of the United States Constitution. In this case, the Court incorrectly assumed the Fourth Amendment³⁷ as the only source of the right to privacy in the U.S. Constitution. As the Indian Constitution does not contain analogous text, the Court determined the Indian Constitution did not contain a right to privacy. However, in the trio cases of *Griswold v. Connecticut*,³⁸ *Roe v. Wade*,³⁹ and *Eisenstadt v. Baird*,⁴⁰ the United States Supreme Court elaborated certain elements of the right to privacy not grounded in the Fourth Amendment. Thus, evidently the right to privacy can exist independently of the Fourth Amendment, and as such, this right can also exist in the Indian Constitution, which illustrates the flaw in the Court's reasoning in *M.P. Sharma*. Thus, *Kharak Singh* and *M.P. Sharma* were precedent waiting to be overruled and the Supreme Court's judgment in the *Puttaswamy* case followed the existing thread of jurisprudence set in *Govind v. State of Madhya Pradesh*⁴¹ and forty years of judgments that affirmed the existence of a constitutional right to privacy. Hence, the Court's decision in *Puttaswamy* comes as a necessary step to recognize the right to privacy and affirm the jurisprudence delivered in *Govind* and four decades of judgments.

³⁷ U.S. Constitution Amendment IV, which reads as [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

³⁸ *Griswold v. Connecticut*, 381 U.S. 479 (more) 85 S. Ct. 1678; 14 L. Ed. 2d 510; 1965 U.S. LEXIS 2282.

³⁹ *Roe v. Wade*, 410 U.S. 113 (more) 93 S. Ct. 705; 35 L. Ed. 2d 147; 1973 U.S. LEXIS 159.

⁴⁰ *Eisenstadt v. Baird*, 405 U.S. 438 (more) 92 S. Ct. 1029; 31 L. Ed. 2d 349; 1972 U.S. LEXIS 145.

⁴¹ *Govind v. State of Madhya Pradesh & Anr.* 1975 AIR 1378, 1975 SCR (3) 946.

Right to privacy paves the way for LGBTQ rights in India

An unrelated aspect but which is intricately related to the evolution of the Constitutional Jurisprudence on the right to privacy finds reflection in a two-judge bench decision of the Supreme Court in *Suresh Kumar Koushal v. NAZ Foundation*.⁴² This case reached the Supreme Court on appeal from the Delhi High Court,⁴³ which found Indian Penal Code (hereinafter, IPC) section 377 violated articles 14, 15 and 21 of the Constitution. IPC section 377 criminalized private, consensual sexual acts between adults. The Delhi High Court clarified that IPC Section 377 continued to apply to non-consensual penile, non-vaginal sex and penile non-vaginal sex involving minors. The Delhi High Court reasoned that section 377 constituted an infringement of individuals' rights to privacy and liberty.

The Delhi High Court considered:

...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 the legitimate goals that he or she may set. In the Indian Constitution, the right to live with dignity and the right to privacy both are recognized as dimensions of article 21....⁴⁴

As a result, as IPC section 377 denied individuals of their right to dignity and criminalized their sexuality or sexual orientation, the Court found this Section to violated article 21 of the Constitution. In doing so, the Delhi High Court followed global trends regarding the protection of privacy and dignity and the rights of homosexuals, including decisions like *James Obergefell v. Richard Hodges, Director, Ohio Department of Health*⁴⁵ from the U.S. Supreme Court, and *Minister of Home Affairs v. Fourie*⁴⁶ from the Constitutional Court of South Africa and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),⁴⁷ also in South Africa, and *Hamalaiene v. Finland* in the European Court of Human Rights.

⁴² Suresh Kumar Koushal v. NAZ Foundation Civil Appeal No. 10972 OF 2013.

⁴³ Naz Foundation v. Government of NCT, 2010 Cri LJ 94.

⁴⁴ Ibid, at page 9

⁴⁵ James Obergefell v. Richard Hodges, Director, Ohio Department of Health, 192 L. Ed. 2d 609; 83 U.S.L.W. 4592; 25 Fla. L. Weekly Fed. S 472; 2015 WL 2473451; 2015 U.S. LEXIS 4250; 2015 BL 204553

⁴⁶ Minister of Home Affairs v. Fourie, ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

⁴⁷ Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 2002, Acts of the Parliament, 2002 (South Africa).

Through these aforementioned cases, The Delhi High Court established that the rights of homosexual individuals are implicit within the term dignity and right to life. The Court concluded IPC section 377 violated fundamental rights under articles 14, 15 and 21. Section 377 also constituted discrimination on the grounds of sexual orientation, which article 15 outlaws. As a result, the Court struck down section 377 as applied to private, consensual sexual acts between adults.

The case reached the Supreme Court of India, where Justice Singhvi, speaking for the bench, overruled the High Court of Delhi's decision. The Supreme Court disagreed with the lower court's judgment for the following reasons:

the High Court overlooked that a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgender and in last more than 150 years less than 200 persons have been prosecuted under section 377 IPC and this cannot be made sound basis for declaring that section ultra vires the provision of articles 14,15 and 21 of the Constitution⁴⁸

This observation and logic is flawed and contrary to established principles of judicial discipline and institutional integrity. The Supreme Court continued:

in its anxiety to protect the so-called rights of LGBT people and to declare that section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian Legislature.⁴⁹

Neither of the above reasons can be regarded as a valid constitutional basis for disregarding a claim based on privacy under article 21 of the Constitution. That "a miniscule fraction of country's population constitutes lesbian gays, bisexuals or transgender" people is not a legitimate basis upon which to deny that population their right to privacy. The guarantee of constitutional rights does not depend upon the majority favorably regarding their exercise. Lack of popular acceptance does not provide a valid basis to disregard constitutionally protected rights.⁵⁰

⁴⁸ Sourabh Koushal v. NAZ foundation at page 69-70 (paragraph 66).

⁴⁹ Ibid.

⁵⁰ Justice K S Puttaswamy (Retd.) v. Union of India, (Writ Petition Number 494 of 2012).

In a democratic country founded on the rule of law, the rights of minorities are as sacred as those of other citizens to protect their freedom and liberties. Sexual orientation is an essential attribute of privacy.⁵¹ Equality demands equal protection for the sexual orientation of an individual. The right to privacy and the protection of sexual orientation lie at the core of fundamental rights guaranteed under articles 14, 15 and 21 of the Constitution. Discrimination against individuals on the basis of their sexual orientation is deeply offensive to their rights to privacy and dignity, as well as their feelings of self-worth.

The Court's expression "in its anxiety to protect the so-called rights of LGBT persons" is offensive and goes against established constitutional principles. It is inappropriate to call the rights of LGBT people as "so-called rights." Their rights are not dubious, but are real rights founded on sound constitutional doctrines which inhere in their right to life and personal liberty. The sexual orientation of an individual is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination. It is evident that people with diverse sexual orientations do not present any psychological impairment or deficiency that would justify the application of a law distinct from what applies to those with a heterosexual sexual orientation and criminalize their sexual actions.

The Supreme Court's decision in *Suresh Kumar Koushal* presents a *de minimis rationale* logical fallacy when it asserts there have been only two hundred prosecutions for violating section 377. The *de minimis* hypothesis is misplaced, as the invasion of a fundamental right is not rendered tolerable when a few, as opposed to many, are subjected to hostile treatment and the violation of their natural rights. These acts of discrimination against individuals is constitutionally impermissible because of the effect they have on the exercise of the fundamental rights the Constitution of India guarantees these individuals.

Hence, the Supreme Court's rationale that prosecution of a few does not constitute a violation is flawed and cannot be accepted. Consequently, the Supreme Court's decision to overrule the Delhi High Court and reinstate IPC section 377 is not a good ruling. The Court's reasoning is not tenable; nor is it sufficient to deny citizens their right to privacy and to non-discrimination based on their sexual orientation. The ruling has ignored the rightful consideration of law and thus reached the incorrect conclusion of upholding IPC section 377. By contrast, the decision

⁵¹ Justice K S Puttaswamy (Retd.) v. Union of India, (Writ Petition Number 494 of 2012).

includes the right to privacy as a fundamental constitutional right. The Delhi High Court has corrected the long-standing mistake made by the Delhi High Court and has incorporated the right to consensual, private, homosexual sex under the right to privacy. The cumulative effect of the two judgments demonstrates the need for an expansive interpretation of fundamental and natural rights through the process of natural justice theory.

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