Rainbow of possibilities

In the week following the Supreme Court's *Justice K.S. Puttaswamy (Retd) v. Union of India* decision, popularly **referred to as the Right to Privacy judgment**, a number of odes have been written to this momentous affirmation of core constitutional principles. Much has been made about the way in which the judgment demolishes the underlying assumptions of *Suresh Kumar Koushal v. Naz Foundation* (2013), which upheld the constitutional validity of Section 377 of the Indian Penal Code. These elements of the ruling will certainly strengthen the case for the Constitution Bench that is scheduled to sit and decide on the Koushal case. But regardless of when it is heard by the court, the Right to Privacy judgment is a victory for queer persons as well: in terms of how it challenges the language of that prior decision, and further, in how it opens out the realm of possibilities for queer rights under the law.

Looking first at the question of language: Section 377 is a vaguely worded law. The vagueness is purposeful — as Thomas Babington Macaulay once noted, the drafters of the Indian Penal Code were unwilling to insert anything into the text of the statute to promote discussion on "this revolting subject". The subject in question was, of course, same-sex intimacy. The stated offence, as it has stood for more than 150 years, is "carnal intercourse against the order of nature". Even as these words crystallise and sanction acts of homophobia and transphobia, they are, ultimately, vague.

SC verdict recognises that key elements to be worked out in data protection law, says Nandan Nilekani

The *Koushal* decision, however, was a lot less vague in its contempt for members of the LGBT community. To unambiguously say that the rights of LGBT persons are not real constitutional rights, to brush aside the numerous evidence of violations placed before the court in favour of the merely "200 reported prosecutions over 150 years": these were violent words. They hit with a greater force because of the space where they came from. The Supreme Court is the highest constitutional court of the country, an institution which is held in relative regard to the other branches of government despite its missteps. To hear these words from this court was the clearest rejection of equal citizenship that the queer community had faced.

Koushal was indeed met with overwhelming critique, from civil society as well as from representatives of a range of political parties. However, at the level of constitutional discourse, the slights it had made stood largely unanswered. A different bench of the court made a partial corrective in 2014. The *National Legal Services Authority v. Union of India* judgment, while articulating a charter of rights for transgender individuals, also noted that Section 377, though associated with certain sexual acts, effectively targeted specific identities: a finding the *Koushal* court refused to make. This implicit critique was a gentle reprimand at best.

With the Right to Privacy judgment, the court's response to *Koushal* is anything but gentle. Justice D.Y. Chandrachud's opinion, signed on by three other judges, has a section titled "Discordant notes", which places Koushal next to what the judges officially recognise as its constitutional predecessor: the *ADM Jabalpur v. S.S. Shukla* decision of 1976. The habeas corpus case, as it is also referred to, infamously upheld the denial of basic fundamental rights during the imposition of Emergency and is widely understood to be one of the most shameful passages in the court's history. To put *Koushal* in the same frame as this decision is to acknowledge the gravity of what it meant to uphold the criminalisation of millions of LGBT persons in India.

Right to privacy is "intrinsic to life and liberty," rules SC

Justice Chandrachud then takes on one of the more casually dismissive statements made in

Koushal, where Justice G.S. Singhvi referred to the “so-called rights” of LGBT persons, emphatically noting that they cannot be construed as “so-called rights” but are real rights founded on sound constitutional doctrine. The *Koushal* judgment is also called out for relegating its constitutional responsibility with the claim that LGBT persons constitute a minuscule fraction of the population. The court reminds us of its own counter-majoritarian role, noting that the guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion.

If the *Koushal* court’s violent words constituted a wound, the *Puttaswamy* court’s words are an attempt to heal those very wounds, to try and reverse some of the damage that came from this kind of judicial contempt.

At another level, the judges here don’t just challenge *Koushal*: they also allow us to imagine possibilities for queer justice beyond the limiting frame of Section 377. Even as the court does not make a holding on the constitutional validity of the section, it does find that sexual orientation is an essential attribute of privacy. The conclusion of Justice Chandrachud’s opinion goes on to hold that privacy includes at its core the preservation of personal intimacies and sexual orientation. Further, the court 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. Reading these statements together can give us a sense of some of the ways in which the judgment can be used to push for queer rights in spaces beyond decriminalisation and the **immediate threat of Section 377**.

First, to understand privacy as a recognition of personal choice allows us to think of justice for queer lovers who run away from home and are forced to return, often through the filing of habeas corpus petitions by their families. In many instances, persons who express the intent to leave their family will be challenged by a sitting judge in an open court and remanded to a government shelter home to “rethink” their choice. Proceedings in these kinds of habeas corpus petitions are illustrative of the wide discretion that courts have to interfere with personal decisions that queer persons take regarding with whom and where they want to live: the *Puttaswamy* court offers us a forceful constitutional articulation that could be used to challenge this denial of autonomy.

This articulation of privacy as personal autonomy is also what might be used in dealing with the vast number of medical professionals across the country who insist on treating homosexuality as a disease, in many instances detaining queer persons in clinics and administering treatment against their will.

Finally, a recognition that privacy is linked to autonomy and the navigation of space should allow 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, how could this articulation of privacy protect, or provide a remedy when queer individuals are harassed for expressing their identity in a public space?

With the Right to Privacy judgment, it is not just Suresh Kumar Koushal but also these varied structures supporting queer persecution that have received a significant challenge.

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The new U.S. Fed Chairman is unlikely to opt for policies that might upset the President’s plan

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