



Sexual Privacy and Autonomy in India within the Constitutional Premise: Manifestations and Implications

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Abstract

The Supreme Court of India has daringly created the right to privacy as an inherent attribute of the personal liberty of an individual springing from within Article 21 of the Indian Constitution. Privacy happens to be of an extremely wide connotation, encompassing within its fold innumerable liberties which one may like to enjoy without unnecessary state interference. Sexual orientations, preferences and practices falls within the realm of the private life of the individuals and owing to the fact of the existence of a fundamental right to privacy, individuals are supposed to be left free within their domain. The Indian society is quite a conservatismist when it comes to exercising and pursuing sexual liberty and sex. Here, it is deemed to be an activity happening only within the ties of marriage between the spouses and that too in the 'order of nature'. It is however, pertinent that the individuals of such a society, if given a choice or a right to break the shackles of such sexual rigors may well assert their sexual orientations and preferences in any manner that suits both the parties involved, with consent. If that happens, the society is bound to witness 'deterioration' as far as its inherent morality and values are concerned; this is likely to affect the interpersonal relations as well as the marital relations between the spouses. The implication of the judicial birth of the right to privacy has been manifest in the apex court decriminalizing carnal intercourse between consenting adults against the order of nature as well as in decriminalizing consensual sexual relations between people outside the marriage, thereby, establishing an inherent right of sexual privacy and autonomy. The trend as has been currently witnessed goes against the sentiments of the Indian society and is bound to create ripples, therein and cause broken relations in the long run all in the name of sexual prerogatives. As far as the enforceability of such a right is concerned, it is practically not possible to guarantee the right to sexual privacy to the individuals and it is furthermore bound to create claims of varying degrees resulting in unnecessary controversies and litigations.

Part I

Right to Privacy: Every citizen in India is guaranteed¹ the right to life and personal liberty as a fundamental right under the auspices of the Constitution of India. The entitlement has been subject to continual expansions by the Constitutional Courts to make the right dynamic, meaningful and effective with the contemporary changes in the society. The Supreme Court of India has infused life and spirit in the allied contours of life and personal liberty through several of its rulings with that in *Justice K.S. Puttaswamy (Retd.) v Union of India*² is one of the most prominent feathers in the cap. Herein, the apex court has endorsed the entitlement of an individual to a private space

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¹ The Constitution of India, art. 32.

² AIR 2017 SC 4161.



around him in several matters including personal intimacies as well as sexual orientation, holding privacy to be a constitutionally protected right under Article 21 of the Constitution³. It has enjoined any invasion of privacy of an individual without crossing the three-fold threshold of firstly the existence of a law to do so, secondly, the purpose of the state is causing the violation of privacy and lastly, a rational nexus between such purpose and the means adopted by the state to achieve them.

Privacy and Sexual Autonomy: The apex court, after judicially endorsing the inherent right of privacy as a constitutionally protected and fundamental right has gone ahead to materialize it by granting sexual autonomy to the individuals of the age of consent⁴ in the realm of consensual sexual affairs including extramarital affairs⁵ and homosexual orientations.⁶ The stage has, thereby been set to permit substantive leeway as far as the personal choices and preferences of the individuals in matters of sexual orientation are concerned in substantive defiance of the prevalent social norms or taboos. The State owing to the privacy jurisprudence has been mandated to keep itself distant from any sort of policing in the personal and private realm of the individuals. It, however, needs to be critically evaluated whether the Indian society is ready and responsive to welcome the birth of this new right and to further embrace the other ‘rights’ that would emerge out of that by necessary implication.

It is pertinent to note that the privacy jurisprudence evolved in India at a gradual pace over the years from an alleged intrusion into privacy in the year 1954 by the state action of search and seizure of the records of a company⁷ to eventually the enunciation of the right to sexual privacy as a fundamental right in a matter pertaining to the validity of Aadhar cards in the year 2017, thereby traversing huge contours in the scope of privacy. The apex court has attended to variant causes of action viz., police surveillance, domiciliary visits, phone tapping, etc., throughout these years and

³The Constitution of India, art. 21.

⁴ The Indian Penal Code, 1860 (Act 45 of 1860), s.375.

⁵ *Joseph Shine v Union of India* 2018 SCC Online SC 1676.

⁶ *Navej Singh Johar and Others v Union of India* 2018 SCC Online SC 1350.

⁷ *M P Sharma v Satish Chandra, District Magistrate, Delhi* (1954) SCR 1077



thus, allegedly infringing the privacy of persons in question before finally endorsing claim to privacy as a fundamental right springing from Article 21 of the Constitution of India.

SC Ruling in *Justice K.S. Puttaswamy (Retd.) v Union of India*: The apex court, through its ruling in *Justice K.S. Puttaswamy (Retd.) v Union of India*⁸ has reinforced the right to privacy to be a constitutionally protected right. The significance of apex court's judgement is manifest in privacy jurisprudence since it has dwelt upon various aspects of the right as enumerated underneath in absolutely clear and unequivocal terms.

- 1) **Constitutional Backing:** Privacy has been held to be an intrinsic element of the right to life and personal liberty under Article 21 of the Constitution of India and as a constitutional value⁹ that stands embodied in the fundamental freedoms enshrined in Part III of the Constitution.¹⁰ Privacy has been declared to be a necessary condition precedent to the enjoyment of any of the guarantees in Part III. It has been clarified that the right to privacy may be situated not only in Article 21 but also simultaneously in any of the other guarantees in Part. III, holding Articles 19(1), 20(3), 25, 28, and 29 all to be rights that help up in making the exercise of privacy meaningful.¹¹
- 2) **Essential Attribute of Privacy:** The Court has elaborated an essential ingredient of privacy of an individual. The Court has ruled that privacy connotes the effective guarantee of internal freedom in which to think.¹² It has been held that the various “thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations.”¹³ It has been clarified that in such a zone of privacy, an individual is not to be judged by others. It has been held that privacy happens to be such a virtue which “enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity.”¹⁴ The Court has ruled that privacy is an “intrinsic recognition of

⁸ *Supra* note 2.

⁹ A.A. Maudidi, *Human Rights in Islam* 27 (1982).

¹⁰ *Justice K.S. Puttaswamy (Retd.) v Union of India* AIR 2017 SC 4161, Para 183 at 4312.

¹¹ *Supra* note 10 at 4345.

¹² *Id.* at 4341.

¹³ *Id.* See Para 168.

¹⁴ *Id.*



heterogeneity of the right of the individual to stand against the tide of conformity in creating a zone of solitude.”¹⁵ The court has gone ahead to categorically emphasize that the “intersection between one’s mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right and the freedom of self-determination.”¹⁶ It has been reiterated by the court that “Privacy at a subjective level is a reflection of those areas where individual desires to be let alone.”¹⁷

- 3) **Scope of Privacy:** The Bench has ruled that “Privacy at a descriptive level postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.”¹⁸ It has been said to “include at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Personal choices governing a way of life are intrinsic to privacy.”¹⁹
- 4) **The extent of Right:** The Court, while commenting upon the protection to the right to privacy has categorically ruled that “while the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas privacy is not lost or surrendered merely because the individual is in a public space.”²⁰
- 5) **State Obligation:** The court, while delineating the role of the state in recognizing/protecting the right to privacy has ruled that privacy contains positive as well as negative content. The negative content, according to the court, “restrains the state from committing an intrusion upon the life and personal liberty of a citizen.”²¹ On the other hand, its positive content imposes an “obligation on the state to take all necessary measures to protect the privacy of the individual.”²² As far as the State’s power of imposing restraints on the privacy of individuals is concerned, it has been laid down that there must be a law in existence to impose restrictions, a legitimate state aims behind such law and then means

¹⁵ *Id.*

¹⁶ *Id.* at 4306.

¹⁷ *Id.* at 4307

¹⁸ *Id.* at 4315.

¹⁹ *Id.* at 4315.

²⁰ *Id.* at 4315

²¹ *Id.* at 4315.

²² *Id.* at 4315.



which are adopted by the legislature must be proportional to the object and needs to be sought to be fulfilled by law.²³

It is thus, the Supreme Court has crafted the privacy law for India in the changing perspective of contemporary times. It has created a ‘personal space’ around the individuals to think, decide and act in any manner that suits them without being bothered about the societal ideal of homogeneity but of course, subject to certain riders. It has allowed the individual to remain ‘alone’ and not be bothered about any third-party interventions (including unwarranted state interventions as well) in matters personal and private to him.

Part II

Implications of Privacy Rights in India: It is humbly submitted that the verdict has created a ‘blanket’ permission to the individuals and that too like a fundamental right to follow their ‘instinct’ and ‘impulse’ in ‘private’ matters which is bound to create a lot of new demands from the citizenry. It is further submitted that such an endorsement of a privacy claim when stretched to sexual autonomy is all the more bound to create claims which may run contrary to cultural, societal and other norms. It is thus, that the declaration of the “right to privacy” as a fundamental right is set with formidable difficulties in the practical go. Anyhow, the judgment has been hailed in privacy jurisprudence in various quarters. The direct impact of this ruling has been witnessed in a series of subsequent rulings delivered by the apex court.

SC Ruling in *Navtej Singh Johar v Union of India*: It is pertinent to note that soon after the privacy verdict, the apex court came up with its ruling in *Navtej Singh Johar v Union of India*²⁴ where writ petitions had been filed for seeking a declaration that the ‘right to sexuality’ and ‘right to choose of a sexual partner’ was a part of ‘life’ guaranteed under Article 21 of the Indian Constitution. It was also one of the contentions that Section 377 of the Indian Penal Code, 1860 did have a ‘chilling effect on the freedom of speech and expression under Article 19(1)(a) of the Constitution of India of all including the persons belonging to LGBT Community since their

²³ *Id* at 4311.

²⁴ 2018 SCC Online SC 1350.



expression of their sexual identity and orientation gets hampered. The Bench did come up with several findings of significant value in the light of the right to privacy.

Liberty to pursue sexual variances: The court has provided a leeway to the consenting individuals to indulge in sex in a manner that goes as per their choice. Thereby, diffusing the dichotomy between ‘sex as per the order of nature’ and ‘sex against the order of nature’. The Court has specifically ruled that

“With the passage of time and evolution of the society, procreation is not the only reason for which people choose to come together, have live-in relationships, perform coitus or even marry. It is the freedom of choice of two consenting adults to perform sex for procreation or otherwise and if their choice is that of later, it cannot be said to be against the order of nature. Sex, if performed differently as per the choice of consenting adults, does not per se make it against the order of nature.”²⁵

The Court has elaborately commented upon the nature and scope of Sexual Liberty that ought to be there with every individual. It has been stated that

“An individual’s sexuality cannot be put into boxes or compartmentalized; it should rather be viewed as fluid, granting the individual the freedom to ascertain her desires and proclivities. The self-determination of sexual orientation is an exercise of autonomy. Sexuality cannot be construed as something the State has the prerogative to legitimize only in the form of rigid marital procreational sex. The Constitution protects the fluidities of sexual experience. It leaves it to the consenting adults to find fulfilment in their relationship in a diversity of cultures, among plural ways of life and in infinite shades of love and longing.”²⁶

Constitutionality of Section 377, I.P.C: The Court has ruled out any infirmity in a judgment delivered by the Delhi High Court whereby it had decriminalized consensual sexual relationship between consenting adults and has in effect restored that order. It has declared that “Section 377

²⁵ *Ibid*, Per Justice Dipak Misra, CJI Para 230/231.

²⁶ *Id* at 478.



of IPC, so far as it penalizes any consensual relationship between two adults, be it homosexuals (man and man), heterosexuals (man and a woman) or lesbians (woman and a woman) cannot be regarded as constitutional.”²⁷

Privacy, Self Determination & Sexual Orientation: The Court has read the faculty of determination of sexual orientation to be necessarily residing within the realm of individual’s privacy. It has categorically ruled that

“Within the compartment of privacy, individual autonomy has a significant space. Autonomy is individualistic. It is expressive of self-determination and such self-determination includes sexual orientation and declaration of sexual identity. Such orientation or choice that reflects an individual ‘s autonomy is innate to him/her. It is an inalienable part of his/her identity. The said identity under the constitutional scheme does not accept any interference as long as its expression is not against decency or morality.”²⁸

It is thus , that a right of Sexual Privacy has been created by the Supreme Court of India out of the right to privacy earlier created and endorsed by it. The Court has ruled that such a right happens to be of the nature of a natural right that requires protection. It has been said that

“It is imperative to widen the scope of the right to privacy to incorporate a right to ‘sexual privacy. Emanating from the inalienable right to privacy, the right to sexual privacy must be granted the sanctity of a natural right and be protected under the Constitution as fundamental to liberty and as a soulmate of dignity.”²⁹

Obligations of the State: The Supreme Court has ruled that the recognition of the right of self-determination with the individuals pertaining to sexual autonomy needs to be guarded by the State. It has ruled that “Sexual orientation implies negative and positive obligations on the State. It not

²⁷ *Id.*,267/268.

²⁸ *Navtej Singh Johar v Union of India* 2018 SCC Online SC 1350.

²⁹ *Id* at Para 468.



only requires the State not to discriminate but also calls for the State to recognize rights which bring true fulfilment to a same-sex relationship.”³⁰

It is thus, that there has been an express recognition of the individual’s right to exercise sexual autonomy as encompassed within the right to privacy which, in turn springs from the right to life and personal liberty envisioned under the Constitution of India. There now happens to be no reservation over one's indulgence in carnal intercourse against the “order of nature” with any man or woman with his/her consent. It has also been ruled by the Court that the State cannot circumscribe sex into a typical-rigid marital procreational sex and must therefore let the individual pursue his course of action which suits and appeals to him. It is thus, that one is now free to move out of the marriage (marital sex) and have sex with either a male or a female with his/her consent going with ‘any’ order of nature, the same being his/her prerogative.

It is humbly submitted at this juncture that the contemporary era is witnessing a rights’-based jurisprudence whereby claims of certain people on certain issues get ripened into judicially enforceable or constitutionally protected rights which development has far-reaching and unpredictable implications. Earlier, if I, as a married person, had a desire to indulge in carnal intercourse with another consenting friend of mine of the same sex³¹. I would have either not pursued it or would have pursued it undercover due to probably the presence of a deterrent law. However, now with the evolution and expansion of privacy rights, my mindset and psychology are bound to change as far as my desire(s) are concerned.

SC Ruling in *Joseph Shine v Union of India*: The implication of endorsement of privacy rights by the apex court has come to be seen again in *Joseph Shine v Union of India*.³² The Court has endorsed the fact that the jurisprudential trend started by the apex court in the realm of privacy has to be taken into account while dealing with the issue of adultery. The Court has categorically declared in its ruling that “With the societal changes and more so when the rights are expanded by the Court in respect of certain aspects having regard to the reflective perception of the organic and

³⁰ *Id* at Para 561.6/561.7.

³¹ Adulterous relationship shall be covered in the paper, distinctively, at a later stage.

³² 2018 SC Online SC 1676.



living Constitution, it is not apposite to have a flexible stand on the foundation that the concept of certainty of law should be allowed to prevail and govern.”³³ The court has categorically stated that any attempt to invade the privacy of an individual must satisfy the three-layered requisites as laid down by it in K.S. Puttaswamy³⁴ viz., legality, need and proportionality between the object of the law and the means adopted by the state to achieve that.³⁵

It is pertinent to note that the Supreme Court in the aforesaid matter has declared³⁶ Section 497³⁷ of the Indian Penal Code to be unconstitutional, finding it to be violative of Articles 14, 15, and 21 of the Indian Constitution. Additionally, the court has also declared Section 198(2) of the Code of Criminal Procedure, in its application to the offense of adultery to be unconstitutional³⁸. The Court has pressed, between the available options for criminalizing³⁹ or decriminalizing the act of adultery, the latter one, believing that “the autonomy of the individual to make his or her choices concerning his/her sexuality in the most intimate spaces of life and should be protected from public censure through criminal sanction.”⁴⁰ The response of the Court comes emphatically with total disregard of the Malimath Committee findings and report⁴¹ as well as the 42nd Report of the Law Commission of India⁴² along with its ruling in Sowmithri Vishnu⁴³, speaking of retention of criminality attached to the section in question as well as attaching the element of culpability to the wife too in the adulterous relation. The Court has come down upon the unwarranted role of the State in such matters where the individual autonomy to pursue personal choices ought to prevail,⁴⁴ holding that intervention of the state armed with penal powers may be justified⁴⁵ only when the

³³ *Id.*

³⁴ *Supra* note 8.

³⁵ *Supra* note 33, Para 306.

³⁶ *Id.*, Para 313.

³⁷ Section 497, Indian Penal Code, 1860.

³⁸ *Sowmithri Vishnu, V. Rewathi and W. Kalyani.*

³⁹ One view of dealing with adultery is that “It violates the sanctity of marriage and breaks the right of a spouse to marital fidelity of his/her partner. It impacts society as it breaks the fundamental unit of the family, causing injury not only to the spouses of the adulterer and the adulteress, it impacts the growth and well-being of the children, the family and society in general and therefore must be subject to penal consequences.” *See* Para 307

⁴⁰ *Supra* note 32, Para 307.

⁴¹ March, 2003.

⁴² June, 1971.

⁴³ *Sowmithri Vishnu* as cited in *Joseph Shine*, at Para 17.

⁴⁴ *Supra* note 32.

⁴⁵ *Id.* at Para 310.



society tends to be affected by the conduct in question. It is to be noted that the Court, nonetheless, without any reservation, did hold sexual infidelity to be morally wrong.⁴⁶

Applying the findings of the apex court in *Navej Singh* in the space of sexual autonomy, the room is set to grant complete liberty to consenting adults of any societal positioning⁴⁷ in pursuing sex; It was categorically stated therein that

“The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an in-segregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archaic stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercise his/her liberty even though the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.”⁴⁸

Access to Pornography in Private after the creation of Right to Privacy: In the realm of privacy Jurisprudence, the State is seen to have come up with a stand that appears opposed to the spirit of privacy as created and sustained by the active Indian Judiciary. It is to be seen that the government of the day has, through policy orientations, as well as because of judicial decision(s), caused substantive restraints upon an individual’s access (in private) to sexually explicit content available online through various sites on the internet, thereby, intruding into his sphere of life. The state, somehow feels justified to intrude in the personal choice of the people in question by causing a ban to be imposed⁴⁹ upon multiple websites that have been exhibiting pornographic material. It is manifest that the action of the State has resulted in curtailing an individual’s choice of enjoying access to something (in private) that was deemed to be pleasure-giving without triggering any nuisance to the others. The dual perception of the state in the arena of private space of the

⁴⁶ *Id* at Para 309.

⁴⁷ Inclusive of Incestuous relations, too.

⁴⁸ Justice Dipak Misra in *Navej Singh Johar* as cited in Para 230, *Joseph Shine*.

⁴⁹ *In Re In the matter of, Incidence of Gang Rape in a Boarding School, situated in Bhauwala, District Dehradun v. State of Uttarakhand and others*. Writ Petition (PIL) No. 158 of 2018 before Uttarakhand High Court.



individuals when it comes to sexual orientation is not palatable at all and needs to be addressed with precision. The action of the government virtually defies the observation of the apex court in *Joseph Shine* in which it was emphatically stated that “the element of public censure, visiting the delinquent with penal consequences, and overriding individual rights, would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required where an offense is punishable with imprisonment.”⁵⁰ It is pertinent to note that it was further held in the matter that the Court needed to “follow the minimalist approach in the criminalization of offenses, keeping in view the respect for the autonomy of the individual to make his/her personal choices.”⁵¹ The State is, seen hopping un-guided from a ‘liberal’ stand, advocating for individual freedoms to that of a ‘conservationist’ stand and supporting the state’s coercive powers to curb individual freedoms in different phases of opinion-making related to the same issue of sexual choices and autonomy.

It is additionally significant to note that the apex court speaking through its nine Judge Bench in *Justice K.S. Puttaswamy (Retd.) v Union of India* had clearly laid down the contours of privacy of an individual stating that

“Privacy is concomitant of right of an individual to exercise control over his or her personality. Privacy is [a] constitutionally protected right which emerges primarily from guarantee of life and personal liberty under Article 21 of the Constitution...Privacy includes at its core preservation of personal intimacies, the sanctity of family life, marriage, procreation, home, and sexual orientation. privacy safeguards individual autonomy and recognizes the ability of an individual to control vital aspects of his or her life. Personal choices governing the way of life are intrinsic to privacy.”⁵²

It was further held that “An invasion of life or personal liberty must meet the three-fold requirement of legality which postulates the existence of law, need and defined in terms of legitimate state aim; and proportionality which ensures rational nexus between objects and means

⁵⁰ *Supra* note 32.

⁵¹ *Id* at Para 311.

⁵² *Supra* note 2.



adopted to achieve then.”⁵³ The Indian Supreme Court has expounded the privacy rights under the influence of American Jurisprudence, the philosophy and whereof lies in the protection of ‘people’ and not ‘places. It is humbly submitted that in the case of state-imposed riders on access to pornography, since the access is being made in the private realm, the question of actionable injury to others does not at all arise. Further, if it is ‘presumed’ that the impact of access to pornography (in the private realm) may corrupt the minds of people with such access and which in turn may trigger criminal (related to sex-oriented crimes) tendencies in those people, it is submitted that the same probability is a bit too far stretched.

Utilitarianism of Sexual Privacy in India! A Myth or Reality: It is thus, the stage is set for the testing of the utility of the right to sexual autonomy and privacy in the Indian subsoil. It is pertinent to acknowledge that the Indian State⁵⁴, throughout, has been particularly conscious of the public morality and sensitivities of the public, by and large. It needs to be seen whether the State must enter into the private space around the individuals and further whether the State can actively and indiscriminately protect the space around the individuals in terms of autonomy related to sexual orientations and allied matters. The sensitivity of the society and citizenry in matters related to the sanctity of marital ties as well as the reluctance of the Indian society to be ‘liberated’ in the name of sexual activities cannot and should not be ignored or discarded, all in the name of personal liberty. Additionally, the act of imitating a different culture and applying the same blindly to another culture, without appreciating the fabric of the society in question might tend to be reflected as a progressive stand but is sure to receive a cold response from within the society. It is humbly reiterated that the implementation of the right to privacy, having been carved within the premise

⁵³ *Id.*

⁵⁴ The Indian State has, fundamentally, been quite conservationist while dealing with liberties related to expressions in context of sexual desires and interests while direct or remote. E.g., The Indecent Representation of Women (Prohibition) Act, 1986 under Section 2 c. is concerned about any indecent representation of women with a tendency “to deprave, corrupt or injure the public morality or morals.”

Similarly, under Section 18 (c), the Sea Customs Act, 1878, there has been imposed a prohibition on bringing “any obscene book, pamphlet, paper, drawing; painting, representation, figure or article” within India through land or sea. Further, Section 3 (c), the Dramatic Performances Act, 1876 confers powers upon the government to prohibit “any play, pantomime or other drama...likely to deprave and corrupt persons present at the performance.”

Also, the Cinematograph Act, 1956 through Section 5 B talks of non-certification of films for public exhibition if they go against decency or morality of the society.



of “personal liberty”, is set with formidable difficulties. It is felt that the earlier stand of the Supreme Court of India in not upgrading privacy to be an actionable right within the contours of Article 21 was the right stand, wherein the Court had been dealing with issues at hand piecemeal and on case-to-case basis viz., the issue of domiciliary visit or phone tapping, etc., without actually creating a determinative right like the current one. It has to be sincerely acknowledged that If the State finds it not to be in a position to offer a guarantee to the enjoyment of the right of privacy in sexual matters, the very creation of such a right under the auspices of personal liberty within Article 21 of the Indian Constitution stands questionable since there lies no point in merely creating a right on paper without having the means and will to enforce it and effectuate the same.