

# JUDICIAL INTERPRETATION OF ARTICLE 21 IN THE *NAZ FOUNDATION* CASE: PRIVACY - A MORAL RIGHT OR A CREATURE OF AN AMORAL CONSTITUTION?

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*This paper is an appraisal of the interpretation of the law of precedent, international human rights law and morality put forth by the landmark judgment of **Naz Foundation** in the context of the homosexuals' right to privacy. First, this paper will summarize the judicial history of the 'right to privacy' in India and proceed to argue that the current interpretation of the law as stated by the Supreme Court previously in **Kharak Singh's** case is inaccurate. Second, it will examine the validity of certain sources which the Delhi High Court believes reflect India's obligations under international human rights law. Third, the paper presents a brief overview of the cases from foreign jurisdictions quoted in the **Naz Foundation** and proceeds to critically examine the relevance of the quotations therein. Finally, the paper attempts to delve into the analysis of 'public morality' as distinguished from 'private/individual morality', and examine the practical application and consequences of the analysis of these concepts by the High Court. Then, it humbly attempts to further such analysis with the help of certain scholarly opinion evolved in the context of a similar debate in Britain after the publication of the Wolfenden Committee report in 1957.*

## I. INTRODUCTION

The Delhi High Court's recent decision in *Naz Foundation v. NCT of Delhi*<sup>1</sup> (hereinafter "*Naz Foundation*") has been widely hailed by the media as a legal and moral victory for the Lesbian Gay Bisexual Transgender (hereinafter "LGBT") community in India. While the result of the judgment is the subject of a

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<sup>1</sup> (2009) 160 DLT 277; W.P. (C) No.7455/2001 of 2009 (Delhi HC).

larger social debate, the analysis employed by the Hon'ble Court is an equally debatable matter involving pressing questions of law and morality. It is the humble aim of this paper to further the latter debate by bringing to sharp focus the interpretation and subsequent expansion of the ambit of Article 21 in the *Naz Foundation*<sup>2</sup> case.

The paper will focus on three major areas – first, the doctrine of privacy, as developed by the law of precedent in India; second, the use of international human rights treaties, associated soft-law and the use of foreign case-law in interpreting Article 21 and third, 'public morality' as a 'compelling state interest' in abridging the right to privacy and the supremacy of 'constitutional morality'.

## II. RIGHT TO PRIVACY UNDER INDIAN CONSTITUTIONAL LAW

The *Naz Foundation*<sup>3</sup> case in its attempt to carve out a right to privacy under Article 21 of the Constitution has interpreted various judgments of the Hon'ble Supreme Court of India in order to ascertain the existing constitutional guarantees of privacy. The interpretations made by the Hon'ble High Court are summarized and critiqued below to conclude that no separate and independent right of privacy, which is delinked from the context of liberty, exists under the Constitution of India.

*Kharak Singh v. State of Uttar Pradesh*<sup>4</sup>: The *Naz Foundation* case rightly states that the majority judgment in *Kharak Singh's* case did not decide the case on the basis of whether the 'domiciliary visits' in question violated the fundamental right to privacy under Article 21.<sup>5</sup> It also correctly states the position taken by Subba Rao J (minority opinion) in stating that there was a fundamental right to privacy implicit under the right to 'liberty'. But the judgment, surprisingly, goes on to state that "[i]n effect, all the seven learned Judges held that the 'right to privacy' was part of the right to 'life' in Article 21".<sup>6</sup> It was indeed explicitly stated by Ayyangar, J. who spoke for the majority that—[t]he right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded, is not an infringement of a fundamental right guaranteed by Part III.<sup>7</sup>

Justice Ayyangar, in fact, characterizes the right to privacy as a common law right that derives from an English Common Law maxim, which asserts that

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<sup>2</sup> *Supra* note 1.

<sup>3</sup> *Supra* note 1.

<sup>4</sup> AIR 1963 SC 1295.

<sup>5</sup> *Supra* note 1.

<sup>6</sup> *Supra* note 1, ¶ 45.

<sup>7</sup> *Supra* note 4.

“every man’s house is his castle”.<sup>8</sup> He locates this right in the expression of ‘liberty’ in Article 21.<sup>9</sup> Thus a majority comprising of six judges of the Apex Court has held that right to privacy is not a guaranteed fundamental right in itself but is merely a facet of ‘liberty’ as contained in Article 21. Consequently, the ambit of the doctrine of privacy recognized in India is to be determined in context of this interpretation of ‘liberty’. Hence, it is clear that the Apex Court rejected the adoption of an absolute doctrine of privacy as elucidated by Subba Rao J.

*Gobind v. State of Madhya Pradesh*<sup>10</sup>: Next, the *Naz Foundation* judgment cites *Gobind v. State of Madhya Pradesh*<sup>11</sup>, again, a case that dealt with the validity of certain regulations authorizing domiciliary surveillance by the Police of the residences of habitual criminals. While *Naz Foundation* correctly interprets the law with respect to the holding that the right to privacy will have to go through a process of case-by-case development, it errs in believing that the judgement recognised a fundamental right to privacy when it laid down the requirement of proving a ‘compelling state interest’ for laws infringing Article 21.<sup>12</sup> Justice Mathew was merely illustrating a *hypothetical situation* to explain the ambit of the test of ‘compelling state interest’ where he assumed for a moment that a fundamental right to privacy existed and he went on to show that even in such situations, the test would be applicable.<sup>13</sup> Indeed, the fact that the judgment in *Gobind* also cites the portion of majority opinion of *Kharak Singh* quoted above dispels any doubts that it wrongly interpreted the law.

The *Naz Foundation* judgment then cites *R. Rajagopal v. State of Tamil Nadu*<sup>14</sup> and *District Registrar and Collector, Hyderabad and another v. Canara Bank and another*<sup>15</sup>, both of which are decisions of two-judge benches that have held that the right to privacy is implicit in Article 21 of the Constitution. The use of words like ‘implied’<sup>16</sup> and use of expressions like “it is the right to be left

<sup>8</sup> Semayne’s case (1604) 5 Coke 91: 1 Sm. L.C. 104 as cited by Ayyangar, J. in *supra* note 4.

<sup>9</sup> *Supra* note 4.

<sup>10</sup> AIR 1975 SC 1375.

<sup>11</sup> *Supra* note 10.

<sup>12</sup> *Supra* note 1, ¶ 37.

<sup>13</sup> *Supra* note 10, ¶¶ 22, 28 : “If the Court does find that the claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test....Therefore, *even assuming* that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right to privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.” (Emphasis supplied). Clearly, Justice Mathew was merely illustrating the applicability of a compelling state interest test and not applying it to the case at hand.

<sup>14</sup> (1994) 6 SCC 632.

<sup>15</sup> (2005) 1 SCC 496.

<sup>16</sup> *Supra* note 15, ¶ 39.

alone',<sup>17</sup> which may not convey the meaning and scope of the right clearly in an attempt describe the right to privacy in the above judgements has led to ambiguity in determining the correct expanse of the right under the Constitution of India. It is argued by us that the understanding of the 'right to privacy' in these cases is that of a common law right which is restricted to the confines of liberty as held in *Kharak Singh*, a constitutional bench judgment of the Supreme Court. An interpretation of these judgments, which have all been delivered by smaller benches, in the *Naz Foundation* decision lends the 'right to privacy' the status of an independent right, as though to incorporate and include all the connotations of privacy. Such an interpretation would make the judgments *per incuriam Kharak Singh* to that extent, due to the larger bench in the latter case.<sup>18</sup>

Thus, we argue that that there is no independent constitutionally guaranteed fundamental right to privacy under Article 21 of the Constitution and that the *Naz Foundation* judgment has given an unduly broad ambit to the right of privacy. The judgement goes so far as to hold that the sphere of privacy allows persons to develop human relations without interference from the outside community or from the State.<sup>19</sup> It is our argument that the doctrine of privacy in India has to be interpreted within the limited context of the meaning of 'personal liberty' in Article 21 and not as a separate and independent right which may incorporate broader meanings of privacy.

### III. USE OF INTERNATIONAL HUMAN RIGHTS LAW IN INTERPRETING THE AMBIT OF PART III OF THE CONSTITUTION

International law becomes implementable through the municipal courts of India largely by virtue of Articles 51 and 372 of the Indian Constitution. Article 372 provides for the application of accepted norms of international law prevalent immediately before the commencement of the Constitution of India insofar as such norms are not inconsistent with the Constitution. Such inconsistency may be with respect to individual Articles<sup>20</sup> or the 'basic features' of the Constitution.<sup>21</sup> Article 13 (1) is an additional ground to invalidate the application of afore-mentioned norms provided that such a norm is inconsistent with the provisions of Part III of the Constitution (Fundamental Rights).<sup>22</sup>

<sup>17</sup> *Supra* note 14, ¶ 26.

<sup>18</sup> *Lily Thomas v. Union of India*, AIR 2000 SC 1650, ¶ 56; *S. H. Rangappa v. State of Karnataka*, (2002) 1 SCC 538, ¶ 11.

<sup>19</sup> *Supra* note 1, ¶ 48.

<sup>20</sup> *State of West Bengal v. Corporation of Calcutta*, AIR 1967 SC 997.

<sup>21</sup> *His Holiness Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1462.

<sup>22</sup> Article 13(3)(a) specifies that 'law' includes, *inter alia*, "custom or usage having in the territory of India the force of law". Further, the definition of 'Indian law' under Section 3(29) of the General Clauses Act, 1897, includes all acts and rules made by the Parliament of the United Kingdom and *other law in force in India*.

Next, the constitutional responsibility of the Indian Courts with respect to the application of norms of international law that have emerged subsequent to the commencement of the Constitution emanate from Article 51. This Article is a Directive Principle of State Policy which mandates the state to endeavor to, *inter alia*, “foster respect for international law and treaty obligations in dealings of organized peoples with one another”.<sup>23</sup> Since India is party to the Statute of the International Court of Justice, it is necessary to interpret the term ‘international law’ in accordance with Article 38(1) of the Statute.<sup>24</sup> The term ‘peoples’ includes individuals who have *jus standi* in international law in accordance with the functions they perform under applicable norms of international law such as human rights law.<sup>25</sup>

Consequently, the municipal courts of India must take note of the existing norms of international human rights. This has been affirmed by the Supreme Court of India<sup>26</sup> which has also held that there is a need to evolve and adopt “principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy.”<sup>27</sup>

However, while evolving such principles of interpretation, the courts must take into account the fact that under the Indian Constitution, it is the Union Executive that has been vested with the unfettered authority to enter into international treaties.<sup>28</sup> Further, in those cases where such treaties affect the rights of Indian citizens, it is the Parliament that bears the responsibility of implementing such treaties through an enabling act<sup>29</sup>. It has indeed been pointed out by Justice A. S. Anand that the courts must act with due circumspection while reading into municipal law the provisions of international instruments.<sup>30</sup> When the parliament

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<sup>23</sup> The Constitution of India, 1950, Article 51(3).

<sup>24</sup> This is to avoid absurdity and to harmoniously construct the principle laid out in The Constitution of India 1950, Article 51(c).

<sup>25</sup> Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), 1949 ICJ Rep. 174; Ahmadou Sadiou Diallo Case (Republic of Guinea v. Democratic Republic of Congo) 2007 ICJ Rep, ¶ 39.

<sup>26</sup> Ajay Hasia v. Khalid Mujib, AIR 1986 SC 487 at 493; M.C. Mehta v. Union of India, AIR 1987 SC 1086.

<sup>27</sup> UPSE Board v. Hari Shankar, AIR 1979 SC 65 at 69.

<sup>28</sup> Articles 53(1) and 73(1) of the Constitution of India, 1950.

<sup>29</sup> Article 253 of the Constitution of India, 1950; Jolly George Verghese v. Bank of Cochin AIR 1980 SC 470, 474, *per* Krishna Iyer J.; Birma v. State of Rajasthan AIR 1951 Raj. 127.

<sup>30</sup> A. S. Anand, J., *The Domestic Application of International Human Rights Norms*, DEVELOPING HUMAN RIGHTS JURISPRUDENCE, VOL. 8: EIGHTH JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS, BANGALORE (December 27-30, 1998, Commonwealth Secretariat 2001) available at [http://www.humanrightsinitiative.org/jc/papers/jc\\_2004/supplementary\\_papers/anand.pdf](http://www.humanrightsinitiative.org/jc/papers/jc_2004/supplementary_papers/anand.pdf) (Last visited on August 30, 2009).

itself has not seen fit to incorporate the provisions of an international convention into domestic law, judicial activism must not become a backdoor for importing an unincorporated convention into municipal law.<sup>31</sup>

Thus, it is clear that while the courts have the liberty, nay, duty to further the implementation of India's international obligations, it cannot assume obligations that have been neither accepted by the Executive nor ratified by the Parliament.

The Hon'ble High Court in the *Naz Foundation*<sup>32</sup> judgment has held that there exists a significant practice related to "United Nations sponsored human rights treaties, such as the International Covenant on Civil and Political Rights (*hereinafter* "ICCPR") and in international human rights law in general in support of the proposition that consensual homosexual acts are protected under the right to privacy."<sup>33</sup> In support of this assertion, the Hon'ble High Court has relied upon an opinion tendered by the Human Rights Committee (*hereinafter* "HRC"),<sup>34</sup> the 'Yogyakarta principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity'<sup>35</sup> and a statement presented before the General Assembly.<sup>36</sup> We argue that none of these documents either individually or collectively amount to established treaty practice or an accepted norm of customary international law.

First, the ICCPR does not explicitly confer upon the HRC the power to make binding interpretations of the treaty. The state parties to the ICCPR have not subsequently conferred such a power upon the HRC either.<sup>37</sup> There is, in fact, some practice to the contrary.<sup>38</sup> While it is true that the findings of the HRC may generate "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" which may subsequently become a binding interpretation of the treaty,<sup>39</sup> no such practice in the wake of

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<sup>31</sup> *Id.*, 14. According to Malcolm Shaw, 'dualism' in international law emphasises that international law and municipal law exist separately and do not have an impact or overrule each other. Any change to be effected in the domestic system to fulfill an international obligation can be done only through legislative change. See MALCOLM SHAW, INTERNATIONAL LAW (2002).

<sup>32</sup> *Supra* note 1.

<sup>33</sup> *Supra* note 1, ¶ 42.

<sup>34</sup> *Toonen v. Australia* CCPR/C/ 50/D/488/1992, March 31, 1994, ¶ 55.

<sup>35</sup> *Supra* note 1, ¶ 43.

<sup>36</sup> *Supra* note 1, ¶ 59 .

<sup>37</sup> *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies* (International Human Rights Law and Practice, International Law Association Conference, Berlin, 2004), ¶ 18, available at <http://www.ila-hq.org/download.cfm/docid/3B0BF58A-C096-4113-830E8E1B5BC6DEC5> (Last visited on August 30, 2009).

<sup>38</sup> D. Shelton, *State Practice on Reservations to Human Rights Treaties*, (1983) 1 CAN. HUM. RTS. YB. 205.

<sup>39</sup> *Supra* note 17, ¶ 19.

*Toonen v. Australia*<sup>40</sup> has been evidenced in the judgment. Thus, in the absence of such state practice, the opinion of the HRC alone cannot constitute a source of international law.

Second, the ‘Yogyakarta principles’ are, in the Court’s own words, principles drafted by ‘a group of human rights experts’.<sup>41</sup> While these principles might be “intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity”,<sup>42</sup> their validity as a source of international human rights law falls to be determined by their acceptance by states as a norm of customary international law. The Court points to the fact that 30 States made positive interventions on sexual orientation and gender identity issues, with seven States specifically referring to the Yogyakarta Principles.<sup>43</sup> The Court further relies on a statement presented to the United Nations General Assembly on December 18, 2008 endorsed by 66 states<sup>44</sup> (including the 30 states previously mentioned in the case). This is presumably, in the view of the Hon’ble High Court, sufficient practice to prove the existence of an accepted norm of customary international law in favour of the right to privacy for homosexuals.

Sufficient state practice for the formation of a new rule of customary international law requires the existence of state practice that is “both extensive and virtually uniform in the sense of the provision invoked.”<sup>45</sup> In this regard, one must recollect that a *note verbale* dated December 19, 2008 was addressed to the secretary general on behalf of 59 nations affirming that the notions of ‘sexual orientation’ and ‘gender identity’ should not be linked to existing human rights instruments.<sup>46</sup> The states also affirmed that it is a misinterpretation of the Universal Declaration of Human Rights and international treaties to include such notions that were never articulated or agreed by the general membership and the intent of the drafters and the signatories and undermine the entire human rights framework. The note also re-affirmed the Member states’ right enshrined in Article 29 of the Universal Declaration of Human Rights to enact laws that meet “just requirements of morality, public order and the general welfare in a democratic society”.

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<sup>40</sup> *Supra* note 31.

<sup>41</sup> *Supra* note 1, ¶ 43.

<sup>42</sup> *Id.*, 25.

<sup>43</sup> *Supra* note 25.

<sup>44</sup> *Supra* note 1, ¶ 43.

<sup>45</sup> North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark), 1969 ICJ Rep. 4.

<sup>46</sup> *Note verbale* from the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General, U.N. Doc. A/63/663 (December 19, 2008).

Furthermore, it is necessary for instances of state conduct inconsistent with a given rule of customary international law to have been treated as breaches of that rule and not as indications of the recognition of a new rule.<sup>47</sup> Here, it is pertinent to note the reaction of states such as Belarus whose representative has been reported to have stated that:

“[T]he issue of sexual orientation and gender identity was sensitive in nature, complex and varied, and should not, therefore, be considered hastily. A prudent and considered approach was most necessary in such a situation.”<sup>48</sup>

Thus, the documents relied upon by the Hon’ble High Court are insufficient evidence of an accepted norm of International Human Rights law.

The *Naz Foundation* judgment’s extensive reliance on foreign case-law without adequate explanation as to the context of the quoted cases makes it hard to fathom the reasoning employed by the Hon’ble High Court. Hon’ble Chief Justice K. G. Balakrishnan delivered a speech in North Western University of Law where he expressed his concerns about the reliance of judges on foreign cases while dealing with the expansion of rights provided for in our Constitution.<sup>49</sup> One of his major concerns was that if judges are allowed to freely rely on foreign precedents, there is a tendency to arbitrarily cite decisions favourable to their personal viewpoints. In such a scenario Justice Balakrishnan believes Judges would indulge in ‘cherry-picking’ to justify their decisions rather than engaging in a rigorous inquiry of domestic precedents. This would dilute the discipline and rigour expected of a judge who would employ principles of *stare decisis*.

Keeping these concerns in mind and the growing use of foreign precedents in Indian cases Justice Balakrishnan stated that foreign law and precedents should not be referred to in an undisciplined manner. Despite the immense constitutional experience in other countries which add depth to the adjudication of domestic constitutional questions a great level of caution should be taken against giving undue weight to precedents decided in entirely different socio-political settings. This is especially true when we resort to American cases that deal with the expansion of fundamental rights and the subsequent importing of their limitations.

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<sup>47</sup> Nicaragua v. United States, 1986 ICJ Rep. 14.

<sup>48</sup> General Assembly adopts 52 resolutions, 6 decisions recommended by third committee on wide range of human rights, social, humanitarian issues, G. A. Res. 10801 (December 18, 2008), available at <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm> (Last visited on August 30, 2009).

<sup>49</sup> K. G. Balakrishnan, Chief Justice of India, Keynote Address at the Northwestern University of Law (October 28, 2008).



#### IV. 'PUBLIC MORALITY' AS A 'COMPELLING STATE INTEREST' IN ABRIDGING THE RIGHT TO PRIVACY AND THE SUPREMACY OF 'CONSTITUTIONAL MORALITY'

The learned Additional Solicitor General (*hereinafter* "ASG") in his submissions in the *Naz Foundation* case contended, on the basis of the findings of the 42<sup>nd</sup> Law Commission Report, stated that Indian society at large disapproved of homosexuality.<sup>50</sup> This disapproval was strong enough to justify it being treated as a criminal offence even where the adults indulge in it privately. He also contended that Section 377 of the Indian Penal Code (*hereinafter* "IPC") was responding to the values and morals of the time in the Indian Society. The latter contention was swiftly shot down by the court by drawing the learned ASG's attention to a statement made to the contrary by the learned Solicitor General of India at the Periodic Review before the United Nations Human Rights Council.<sup>51</sup> The Court after addressing the submissions made on the right to health proceeded to formulate and address the question of whether enforcement of 'public morality' can amount to a 'compelling state interest' that justifies the invasion, through Section 377 of the IPC, of the right to privacy of homosexuals. The Hon'ble High Court correctly noted that this question was left unanswered in *Kharak Singh v. State of Uttar Pradesh*.<sup>52</sup>

The court, in the process of answering this question, has placed reliance upon several judgments from various jurisdictions including its own. A brief analysis of the judgments used by the Hon'ble High Court is as follows:

Justice Lahoti's view in *District Registrar & Collector, Hyderabad v. Canara Bank*<sup>53</sup> is relied upon where the latter referred to observations of Stevens, J. in *Thornburgh v. American College of O and G*<sup>54</sup>, that "the concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole" and *Lawrence v. Texas*<sup>55</sup> which held that homosexuals have a right to liberty under the Due Process Clause that gives them the full right to engage in their conduct without intervention of the government. It has already been submitted earlier in this paper that the right to privacy in India is not as wide as the right under the American Constitution.

Next, the case quoted from the Wolfenden Committee report (a 1957 report commissioned by the government of UK that eventually led to the repeal of homosexuality as an offence) which analyses, inter alia, the role played by criminal law in the UK and concluded that in a great majority of the member States of the

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<sup>50</sup> *Supra* note 1, ¶ 12.

<sup>51</sup> *Supra* note 1, ¶ 84.

<sup>52</sup> AIR 1968 SC 1068.

<sup>53</sup> 2005 (1) SCC 496.

<sup>54</sup> 476 US 747 (1986).

<sup>55</sup> 539 US 558 (2003).

Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied and that there is no compelling social need for the enforcement of the homosexuality laws.<sup>56</sup>

On this point it is necessary to note that the evidence on record as to the social reaction of Indians towards homosexuality is conflicting in nature. There is the 42<sup>nd</sup> Law Commission Report stating that homosexuality is disapproved of in Indian society<sup>57</sup> and the petitioners own submission of a number of documents, affidavits, reports of independent agencies and judgments of various courts that demonstrate the widespread abuse of Section 377, IPC for brutalizing LGBT community persons,<sup>58</sup> which is definitely an indicator of the deep rooted disapproval of homosexuality in India. However, the petitioner had also submitted that the Indian society is vibrant, diverse and democratic and that homosexuals have significant support in the population.<sup>59</sup> Thus, the answer to whether or not the society approves of homosexuality is still unclear.

The Court has further contemplated a situation where the question must be answered when there is public disapproval of homosexuality. On this question the Court held that:

“Thus *popular morality* or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. *Popular morality*, as distinct from a *constitutional morality* derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of ‘morality’ that can pass the test of *compelling state interest*, it must be ‘constitutional’ morality and not public morality. The Constitutional values that constitute the ‘constitutional morality’ spoken of in the above quote are the constitutional mandates of creating a society where all persons would be equally free from coercion or restriction by the state, or by society privately.”<sup>60</sup> (Emphasis supplied)

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<sup>56</sup> *Supra* note 1, ¶ 77.

<sup>57</sup> LAW COMMISSION OF INDIA, 42<sup>nd</sup> Report, INDIAN PENAL CODE, 280-281, ¶¶ 16.124 - 16.125 (stating that conflicting replies were received by the Law Commission to a questionnaire which had two questions on § 377- firstly, whether unnatural offences should be punishable at all, and if yes, to the extent of the heavy sentences as stipulated in that section, and secondly, whether exception should be made in cases of acts done in private between consenting adults. Whereas the Commission had received some views to the effect that homosexual acts in private between consenting adults should not be treated as offences, it stated that a larger number of people were in support of retaining the section, even in respect of homosexual acts in private between consenting adults, albeit with a lesser punishment).

<sup>58</sup> *Id.*, ¶ 74.

<sup>59</sup> *Id.*, ¶ 24.

<sup>60</sup> *Id.*, ¶ 79.

It was also held that the Constitution recognizes and protects diversity and to stigmatize or to criminalize homosexuals only on account of their sexual orientation would be against the constitutional morality. The Court has relied upon an admirably precise decision of the Constitutional Court of South Africa in *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*.<sup>61</sup>

“A state that recognizes difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil.... The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.”

While this is a commendable and perfectly legal distinction to make, it poses an inherent problem in that it offers no system by which constitutional morality and constitutional values can be adapted to changing needs of the state without conflating it with perceptions of public morality. This requirement of adapting the constitutional values to suit the need of the hour was eloquently set out in *M. Nagraj v. Union of India*<sup>62</sup> where the Apex Court held that:

“Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.” (Emphasis supplied)

In this context where there exists an unbreakable link between constitutional and public morality, it is suggested by us that the solution to this

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<sup>61</sup> 1998 (12) BCLR 1517 (CC).

<sup>62</sup> (2006) 8 SCC 212. An example of a constitutional value which has been reinterpreted over the years is ‘socialism’. The development of the constitutional doctrine of socialism in context of changing government policy can be seen upon a perusal of certain cases. See *Akadashi Padhan v. State of Orissa*, AIR 1963 SC 1047; *Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd.*, AIR 1983 SC 239; *BALCO Employees Union (Regd.) v. Union of India*, AIR 2002 SC 350.

problem lies in an assessment of whether the indicator of public morality on homosexuality can be considered to be a *valid moral position*. Dworkin's theory is relevant in this regard as it was formulated in a context where Devlin had argued that every society has the right to 'follow its own lights', where one would merely rely on the consensus of the community at large.<sup>63</sup> This would be akin to the result provided by invoking a more simplistic version of public morality. However, Dworkin uses the example of two people (*hereinafter* A and B) voting in an election in which a homosexual is one of the candidates. If A has to convince B to vote against the homosexual candidate, the former has to produce some reasons to the latter in order to convince him. Such a reason need not be a moral theory or a principle but an aspect of homosexuality that moves A to believe it to be immoral. However, *the reasons given must be free from prejudice, personal emotional reaction, reliance on facts that are false and implausible and should not be a mere repetition of others' belief*. It is only when such a moral position is ascertained to exist across the board in a society that a *valid moral consensus* is reached. Such a consensus, it is submitted, cannot and should not be ignored by the Courts and the Legislature for purposes of enforcement.

It is argued that such a test could be used by the Courts as a tool in resolving the debates relating to the definition of public morality. Further, there is a pressing need to make the content and interpretation of constitutional morality a subject of contemporary legal debate. In conclusion, one recalls the words of Bhagwati, J., regarding the Courts' role in interpreting the Constitution:

“When the Court is interpreting the Constitution and the law, it is not open to all judges to do what they like. The judge is not like a knight in armour free to roam where he wills. There are *inbuilt restraints* which keep the judges from straying away from their proper judicial function. In the first place, the judges are obliged to give *reasons justifying their decisions, which reasons must satisfy not only the judges but also the critics and the jurists, nay the society itself.*”<sup>64</sup> (Emphasis supplied)

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<sup>63</sup> Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966). The phrase 'follow its own lights' refers to Lord Devlin's argument that legislators' decision on a moral issue must be based on a consensus of the moral position of the community at large, thus enabling the community to 'follow its own lights'. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 253 (1977).

<sup>64</sup> P. N. Bhagwati, J., *The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint* in *DEVELOPING HUMAN RIGHTS JURISPRUDENCE, VOL. 5: FIFTH JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS* (Oxford, September 21-23, 1992) available at [http://www.humanrightsinitiative.org/jc/papers/jc\\_2004/supplementary\\_papers/bhagwati.pdf](http://www.humanrightsinitiative.org/jc/papers/jc_2004/supplementary_papers/bhagwati.pdf) (Last visited on August 30, 2009).