

# LOGIC AND COHERENCE IN NAZ FOUNDATION: THE ARGUMENTS OF NON- DISCRIMINATION, PRIVACY, AND DIGNITY

Pritam Baruah\*

*In this paper I evaluate three arguments of the Delhi High Court's decision in the Naz Foundation case. First is the argument that sexual orientation is analogous to 'sex' in Article 15 of the constitution. I term this argument 'the sex-based' argument and argue that though it is logically sound, it is not supported by the judgments that the court cites; nor thus the court properly lay out the exact nature of this powerful argument. I further argue that the 'sex-based argument' should be employed along with the 'common thread' argument which is supported by the text of the judgment and is also desirable in the light of the argument acting as a precedent for interpreting Article 15 of the Constitution. The second argument I examine is that of the right to privacy and autonomy. Here I argue that the decision has enriched the discussions on the right to privacy in India, but at the same time has committed us to pursuing a notion of privacy based on personhood, which at present has very little specific content. I also argue that the court has used the concepts of privacy and autonomy without adequately clarifying their meaning. Instead it grounds them in a concept of human dignity, which again is a highly contested concept, with many accusing it to be a place holder at best. This takes me to the third argument of the court, which is on human dignity. Here I try and briefly demonstrate the problems associated with the use of this concept. In spite of this I argue that the process of reasoning followed by the court is compatible with principles of adjudication which are well founded in legal theory. I focus particularly on the ideas of coherence in adjudication and the nature of judicial law making.*

## I. INTRODUCTION

This paper concerns itself with the ideas of non-discrimination, privacy and dignity in the context of (de)criminalization of consensual homosexual practices

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\* Assistant Professor of Law, W.B. National University of Juridical Sciences, Kolkata; B.A., B.L. (Hons.), NALSAR University of Law, Hyderabad; BCL, University of Oxford. I thank Ms. Shayonee Dasgupta for valuable research assistance and helpful comments on some of the ideas in this paper. Responsibility for the ideas expressed and any mistakes are entirely mine.

in India. In spite of this being its central project, a reference to the philosophy of crime and punishment is warranted at the outset to introduce the paper's central arguments. This is because issues of (de)criminalization lie primarily in the province of the philosophy of crime and punishment. They raise troubling questions of what qualifies to be a crime, what justifies punishment and which acts are punishable. These issues are especially thorny when there is disagreement about the moral status of the acts concerned. Many philosophers have struggled to sort out these issues based on singular justifications<sup>1</sup>, while others have suggested a hybrid approach to understand the institution of punishment and answer the different questions that it raises.<sup>2</sup> In spite of the many attempts, each instance of criminalization remains a morally disturbing question for those who are prepared to subject morality to reason based interrogation. Homosexuality is one such instance.

(De)Criminalization also raises questions regarding the limits of the criminal law. Philosophical literature in this regard spans across Mill's harm principle and its various accounts, particularly that of HLA Hart<sup>3</sup>, and accounts of personal autonomy which restrict the means that the state can employ to achieve its goals.<sup>4</sup> Any argument for (de)criminalization has to necessarily engage with this body of literature in order to be fair and compelling. Interestingly, with the exception of a few cases<sup>5</sup>, most constitutional courts across common law jurisdictions have decriminalized consensual homosexual practices on grounds other than those of the limits of criminal law or the justifications for punishment. Rather, courts have relied on constitutional values of liberty, privacy, equality, non-discrimination and human dignity to invalidate laws which criminalized consensual homosexual activity. The decision in *Naz Foundation v. Government of NCT of Delhi*<sup>6</sup> (hereinafter "*Naz Foundation*") predominantly follows this line of argument.

In spite of recognizing the central role of the philosophy of crime and punishment in the debate on (de)criminalization of homosexuality, this paper focuses on the constitutional aspects of its decriminalization in India. It does so because the constitutional aspects feature prominently in the *Naz Foundation* judgment, the reasoning of which is the focus of this paper. I will also indicate at places that the reasons which inform the judgment, particularly those regarding the right to

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<sup>1</sup> The prominent theories being retribution, consequentialist theories, contractarianism and expressivist and communicative theories.

<sup>2</sup> H.L.A.Hart, *Prolegomenon to the Principles of Punishment* in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (H.L.A.Hart & John E. Gardener eds., 2008).

<sup>3</sup> H.L.A HART, LAW, LIBERTY, AND MORALITY (1963).

<sup>4</sup> For a mapping of the various arguments in this regard see John Stanto-Ife, *Limits of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY available at <http://plato.stanford.edu/entries/law-limits/> (Last visited on August 30, 2009).

<sup>5</sup> *Lawrence v. Texas* 539 US 55 (2003). Other cases refer to arguments in the realm of criminal law but do not strike down use them as operative reasons, see *Dudgeon v. United Kingdom* (1982) 4 E.H.R.R. 149.

<sup>6</sup> W.P. (C) No. 7455/2001, 160 (2009) DLT 277.

privacy, are in many respects similar to the reasons which prevail in the debates on public morality, private morality and the limits of the criminal law. Thus, reliance on constitutional arguments may not necessarily exclude the reasons which apply in the realm of criminal law.

I also recognize the fact that the course of a judgment in adversarial adjudication is controlled largely by the submissions made by the parties and the institutional history of a particular jurisdiction.<sup>7</sup> This may have limited the reliance on the philosophy of crime and punishment in the *Naz Foundation* decision. One can see good reason for not relying on such reasons as they are often based on pure moral reasoning. Moral reasoning, without being tempered by institutional history, is a privilege that the process of legislation enjoys. This privilege carries with it the burden and an obligation to rely on well justified moral reasons, which must be discharged at appropriate times by any legislature to be a legitimate legislative authority.<sup>8</sup> The failure to discharge this obligation at appropriate times warrants determination of many issues through adjudication. In such cases judges retrieve the moral reasons which apply, by carving out paths through institutional texts and history, wherever that is possible. The burden of reasoning on the basis of institutional texts and history may thus excuse the decision in *Naz Foundation* for not relying on the philosophy of crime and punishment.

Given these caveats, I proceed to the central project of this paper, which is to evaluate three arguments of the *Naz Foundation* decision. First is the argument that sexual orientation is analogous to 'sex' in Article 15 of the constitution. I term this argument 'the sex-based' argument and argue that though it is logically sound, it is not supported by the judgments that the court cites; nor does the court properly lay out the exact nature of this powerful argument. I further argue that the 'sex-based argument' should be employed along with the 'common thread' argument which is supported by the text of the judgment and is also desirable in the light of the argument acting as a precedent for interpreting Article 15 of the Indian Constitution.

The second argument I examine is that of the right to privacy and autonomy. Here I argue that the decision has enriched the discussions on the right to privacy in India, but at the same time has committed us to pursuing a notion of privacy based on personhood, which at present has very little specific content. I also argue that the court has used the concepts of privacy and autonomy without adequately clarifying their meaning. Instead it grounds them in a concept of human dignity, which again is a highly contested concept, with many accusing it to be a

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<sup>7</sup> I use the term institutional history in the sense that Dworkin uses it in RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977).

<sup>8</sup> I use the terms 'legitimate' and 'authority' to convey Joseph Raz's account of a 'legitimate authority'. For accounts of legitimate authority see JOSEPH RAZ, *AUTHORITY OF LAW* 3-33 (1979), Joseph Raz, *Authority, Law and Morality* in JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* (2001) and Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 *MINN. L. REV.* 1003 (2006).

place holder at best. This takes me to the third argument of the court, which is on human dignity. Here I try and briefly demonstrate the problems associated with the use of this concept. In spite of this I argue that the process of reasoning followed by the court is compatible with principles of adjudication which are well founded in legal theory. I focus particularly on the ideas of coherence in adjudication and the nature of judicial law making.

There are two central aspects of the decision which I chose to leave out in order for the contents of the paper to be of manageable proportions. These aspects are those of the doctrine of equality and the standard of scrutiny. Though I believe that the court has made its moves in the right direction in both these aspects<sup>9</sup>, I have chosen only to comment upon the non-discrimination aspect of equality.

## II. NON-DISCRIMINATION AND THE CRITERIA FOR ANALOGOUS GROUNDS: THE 'SEX-BASED' ARGUMENT

Article 15(1) of the Constitution of India prohibits discrimination on certain specified grounds.<sup>10</sup> A literal reading of the provision suggests that the prohibited grounds listed in it are exhaustive. Unlike the non-discrimination clause in the South African Constitution, its Indian counterpart does not explicitly state these grounds to be only indicative.<sup>11</sup> It might seem that the Indian constitution does not leave any space for subsequent developments in knowledge and understanding to add to the prohibited grounds. In such a situation, if one wished to argue that grounds other than those specified in Article 15(1) were also prohibited grounds of discrimination, then there could be at least three avenues available to them. First, that Article 15 (1) does not exhaust the constitutional prohibition against non-discrimination. This avenue is consistent with decisions of the Supreme Court which have held Art 15 to be a *facet* of the Right to Equality under Article 14.<sup>12</sup> Second, one could argue that the meaning of the words used in the specified grounds in Art 15(1) included the new ground which is being argued for. Third, that the words used to specify the grounds in Article 15 were instances of a particular value which was the common thread running across them. Thus, any new ground which the common thread could justify was necessarily a part of the

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<sup>9</sup> See Tarunabh Khaitan, *Beyond Reasonableness- A Rigorous Standard of Review for Article 15 Infringement*, 50 JOURNAL OF INDIAN LAW INSTITUTE 177 (2008) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1246892](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1246892) (giving arguments which support the courts conclusions and reasons on these aspects).

<sup>10</sup> Article 15(1) states: "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.-(1) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

<sup>11</sup> § 9(3) of the South African Constitution states: The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

<sup>12</sup> State of Kerala v. N.M. Thomas (1976) 1 S.C.R. 906.

Article if one were to get its real *sense*. The *Naz Foundation* decision clearly takes the first avenue. More interestingly, the decision also takes recourse to a hybrid of the second and third avenues. I will focus on this hybrid avenue as it involves a novel approach to argue for un-enumerated grounds under Article 15.

In following the hybrid avenue, the court has held that sexual orientation is analogous to the word 'sex' in Article 15. The word analogous means similarity in attributes.<sup>13</sup> Thus it remained on the court's part to demonstrate the similarity in attributes between sex and sexual orientation in the context of prohibition of unfair discrimination. The court relied on three kinds of sources to demonstrate this similarity, which I argue, do not justify the court's conclusion.<sup>14</sup>

### A. THE HUMAN RIGHTS COMMITTEE

First, it relied on the opinion of the Human Rights Committee in *Toonen v. Australia*<sup>15</sup> where it was held that the word 'sex' in Article 2 of the ICCPR included sexual orientation. The text of the Committee's opinion however, does not demonstrate any reasoning which justifies such a relationship between sex and sexual orientation. Thus unless the opinion of the Committee is an authoritatively binding legal source, there seems to be no reason which persuades the court to arrive at a conclusion which established the analogous relation

### B. THE ARGUMENT FROM DISADVANTAGE

The second source the court relies on is two decisions of the Supreme Court of Canada. It relies on *Vriend v. Alberta*<sup>16</sup> to indicate that it was the 'historical, economic and political disadvantage suffered by homosexuals' and the emerging consensus in the legislature and judicial decisions, that made a case for including sexual orientation in the grounds listed in Section 15(1) of the Canadian Charter of Rights and Freedoms.<sup>17</sup> The decision in *Vriend* however, does not hold that sexual orientation is analogous to sex. Rather, it holds that sexual orientation is analogous to the other specified grounds in Section 15(1) of the charter.<sup>18</sup> The other grounds

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<sup>13</sup> THE SHORTER OXFORD ENGLISH DICTIONARY (1993) defines 'Analogy' as "3.Equivalence or likeness of relations; agreement, parallelism; a similarity...6. *Logic. Resemblance of relations or attributes forming a ground of reasoning; the process of reasoning from parallel cases* Analogous is defined as "Having analogy, similar in certain attributes, circumstances, relations, or uses; parallel".

<sup>14</sup> These sources are found in ¶¶ 99-104 of the judgment.

<sup>15</sup> No.488/1992 March 31, 1994.

<sup>16</sup> [1998] 1 S.C.R. 493.

<sup>17</sup> § 15 (1) of the Canadian Charter reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

<sup>18</sup> *Vriend v. Alberta*, *supra* note 16, ¶ 67-74.

are race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Unlike in *Naz Foundation*, *Vriend* had the benefit of an institutional history which had done the ground work for including analogous grounds in section 15(1).<sup>19</sup> Though there is more to be said about *Vriend's* version of what justifies section 15 (1) itself, for the present purposes it is enough to indicate that it chose to read sexual orientation as analogous to the other grounds in section 15 (1) as opposed to 'sex' alone.

The *Naz Foundation* judgment highlighted the aspect of historical, economic and political disadvantage, which is arguably common to the most of the other grounds in Article 15 (1) of the constitution particularly, race, sex, caste, and religion. Yet it chose to include sexual orientation only on the basis of the word sex alone.

### C. THE IMMUTABILITY ARGUMENT

The judgment also referred to *Corbiere v. Canada*<sup>20</sup> to indicate that the common factor running through the grounds enumerated in Section 15(1) of the Canadian Charter was the fact that "they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity."<sup>21</sup> *Corbiere* further held that the criteria used to identify analogous grounds were characteristics which were immutable e.g. race, or constructively immutable like religion. These are characteristics "that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law".<sup>22</sup> *Corbiere* further holds that immutability and constructive immutability were central to the explanation of why other common factors like adverse impacts on discrete and insular minorities and historical disadvantage were relevant for identifying analogous grounds.<sup>23</sup>

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<sup>19</sup> The decision in *Vriend* refers to at least the following three cases which have used the language of analogous grounds. At ¶ 73 it refers to *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 which summarized the approach to § 15 (1) in the following manner: "While this Court has not adopted a uniform approach to § 15(1), there is broad agreement on the general analytic framework; see *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at ¶ 62, *Miron, supra*, and *Egan, supra*. A person claiming a violation of § 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in § 15(1) or *one analogous thereto*." (emphasis supplied).

<sup>20</sup> [1999] 2 S.C.R. 203.

<sup>21</sup> *Id.*, ¶ 13.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Reliance on *Corbiere* also fails to explain the special relationship between sexual orientation and sex. If the two were (constructively) immutable characteristics, then so were the other grounds enumerated in Article 15(1). Race, caste, place of birth and sex could be justifiably classified as immutable, while religion could be classified as being constructively immutable. Why draw a special relationship between the two, when the sources relied on demonstrate that the common attributes identified run through all the grounds in Article 15? The court answers this question but not without referring to the third source which again fails to justify the exclusive relationship between sex and sexual orientation.

#### D. THE ARGUMENT FROM DIGNITY

The court relies on two decisions of the South African Constitutional Court<sup>24</sup> which hold that the unspecified/analogous grounds would be those which are based on attributes and characteristics attaching to people, discrimination on the basis of which would impair their fundamental dignity as human beings.<sup>25</sup> The reliance on human dignity is not peculiar to the South African decisions. The Supreme Court of Canada too assigns a role to human dignity in the identification of analogous grounds.<sup>26</sup> Putting the issues related to the concept of dignity aside for the moment, it would be fairly coherent to argue that the common thread between the specified and analogous grounds is that they are immutable and constructively immutable characteristics, discrimination on the basis of which would violate human dignity. I will refer to this argument as 'the common thread argument'. However, *Naz Foundation* does not argue on these lines in spite of citing the sources that argue so. Rather the argument it accepts is that discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments about either sex.<sup>27</sup> This is a standalone argument for sexual orientation being analogous to sex, and is distinct from the arguments relied on by the Canadian and South African cases. The argument is not unknown to the discourse on sexual orientation and human rights.<sup>28</sup> Its central claim is that sexual orientation

<sup>24</sup> *Prinsloo v. Van Der Linde* 1997 (3) S.A. 1012 (CC), *Harksen v. Lane* 1998 (1) SA 300 (CC).

<sup>25</sup> *Naz Foundation*, ¶ 103.

<sup>26</sup> This is done by holding that § 15 (1) is a step towards recognition of the principle of human dignity. In *Vriend* the court held: "67. ...When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of § 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian..."

<sup>27</sup> *Naz Foundation*, ¶ 99.

<sup>28</sup> See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U.L. REV. 197 (1994) ¶ 208-214 and ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONSTITUTION, AND THE CANADIAN CHARTER* (1995) (for statements of the argument that discrimination against

discrimination is a type of sex discrimination and “thus its wrongfulness is parasitic on the wrongfulness of sex discrimination”<sup>29</sup>. I shall refer to this argument as ‘the sex-based argument’.<sup>30</sup>

John Gardner points out a logical flaw in the sex-based argument and also an undesirable consequence that it leads to. The logical flaw arises from the fact that most jurisdictions, including India prohibit discrimination *on the grounds* of sex.<sup>31</sup> The italicized words are of significance as they indicate that the sex of the victim of discrimination should be an operative reason for being discriminated against as opposed to an auxiliary reason or any other reason that may feature in the discriminators reasoning.<sup>32</sup> Gardner’s argument points out that it is incorrect to say that discriminators discriminate against homosexuals because they are men, women or transgendered persons (on the grounds of sex), rather they discriminate because the victims are homosexuals (on the grounds of sexuality). Failure to recognize this fact leads to the undesirable consequence that discrimination on the basis of sexuality is not recognized in its own right as a prohibited ground of discrimination.

Gardner’s criticism of the sex-based argument is rooted in the need to satisfy conditions posed by concepts used in criminal law. In the present context the concept being intention. That is why he argues that ‘on the grounds of’ means that the ground should be reflected in the reasoning of the discriminator. Further, the ground should be the operative reason as opposed to an auxiliary one. On this reasoning, for sex discrimination to occur, the discriminator should have primarily relied on the victim’s sex to discriminate. This line of argument would be justified when an anti-discrimination statute prescribes punishment, as the strict requirement would restrict the breadth of the criminal provision. In non-criminal contexts however, one could question the assumption that the strict standards of criminal law should be applied to understand what ‘on the grounds of’ means. In such contexts, could it not be argued that if one were to demonstrate that every case of discrimination based on sexual orientation *also* necessarily involves sex based

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homosexuals is also a case of sex based discrimination). Wintemute’s argument has been analyzed and criticized in John Gardner, *On the Ground of her (Sex)uality*, 18 OXFORD J. LEGAL STUD. 167 (1998). See Robert Wintemute, *Recognizing New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MOD. L. REV. 335 (1997) ¶ 344-348 (for a restatement of the argument on the basis of comparators).

<sup>29</sup> *Id.*, 179.

<sup>30</sup> I shall not elaborate on the sex-based argument. For my purposes I accept the argument in form that Robert Wintemute and Andrew Koppelman have advanced.

<sup>31</sup> Though Gardner for the most part considers cases where there is discrimination by individual discriminators, e.g., employers, I shall use the same argument in the context of discriminatory laws like § 377 of the Indian Penal Code. I do so because the issue involved in both cases is that of identifying the grounds on which discrimination takes place.

<sup>32</sup> See Gardner, *supra* note 28, 180 (discussing a brief account of operative reasons). See JOSEPH RAZ, *PRACTICAL REASONS AND NORMS* (1999) (giving a detailed account of what is meant by operative and auxiliary reasons).

discrimination, then the requirement of 'on the grounds of' is satisfied. In other words, even if the discriminator's operative reason for discrimination is sexual-orientation; the fact that each case of such discrimination involves sex based discrimination would amount to discrimination 'on the grounds of sex'. Let me call this argument the *incidental discrimination argument*.

The incidental discrimination argument is one limb of the sex-based argument. This is because the sex-based argument offers us at least two reasons to treat sexual-orientation discrimination as sex based discrimination. First, assuming that sexual orientation discrimination is a special kind of discrimination, every case of such discrimination is *also* sex based discrimination. In non-criminal contexts therefore, it is not relevant whether the discriminator had sexual-orientation in mind at the time of discriminating. The fact that there was discrimination which involved sex-based discrimination is enough to prohibit or remedy such discrimination. The prohibition does not require the fact that the grounds of discrimination are intentional. It is enough if those grounds are involved in the case of discrimination, though unintentionally. This is the incidental discrimination limb.

The second reason is that sexual orientation is itself a sex based criterion. "The difference between a gay or bisexual man and a heterosexual woman can be restated as one between a 'same-sex attracted man' and an 'opposite sex attracted woman'."<sup>33</sup> On this logic one could argue that every case of discrimination based on sexual orientation is actually a case of sex-based discrimination as sexual orientation is a sex based concept. Thus a discriminator who thinks that it is discriminating on the basis of sexual orientation is mistaken and there should be no reason to factor in this mistake while deciding whether the case is of sex-based discrimination or not. The logic of this argument appears to be sound. It strikes at the root of Gardner's argument which takes sexuality/sexual-orientation to be an independent category not dependent on sex. Once this category is broken down to demonstrate that it is a sex based category, any discrimination on that ground would also be sex-based discrimination.

Both limbs of the sex-based argument are compelling with regard to the fact that there can be no discrimination based on sexual-orientation which is not based on judgments about sex and sex roles. However, this argument may not force us to accept the fact that sexual orientation was always envisaged to be sex based discrimination. Except for one known case<sup>34</sup>, there seem to be no other case where judges have accepted this argument. Moreover the fact that laws prohibiting homosexual activity and laws prohibiting sex-based discrimination have co-existed, clearly indicates that sex-based discrimination did not envisage sexual-orientation based discrimination to be included. This means that it is subsequent rigorous analysis which has shed new light to the effect that every case of discrimination based on sexual orientation involves sex-based discrimination.

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<sup>33</sup> See Wintemute, *supra* note 28, ¶ 346.

<sup>34</sup> Baehr v. Lewin 852 P.2d 44 (Haw. 1993).

This however, should not lead us to believe that the law cannot be interpreted to be so prospectively. With the benefit of better analytical arguments, a court can surely interpret the law in a manner which is superior in logic than earlier interpretations. But again, logical superiority and analytical clarity may not be the only reason why courts may choose one option to the exclusion of others. I offer a brief argument in this regard stating that though the sex-based argument is logically sound; relying upon it exclusively would amount to an undesirable precedent in the context of Article 15 of the Indian Constitution. Any future court should however be sensitive to the immense potential of this argument to prohibit discrimination against gays and lesbians.

Robert Wintemute, a proponent of the sex-based argument, argues that discrimination based on sexual orientation is not *only* sex based discrimination. Rather he argues that it is *also* and *simultaneously* sex-based discrimination. This position leaves it open for one to recognize that sexual-orientation has by itself become a socially constructed category. Moreover, it is a category on the basis of which many have developed a sense of identity. If the idea of sexual orientation clearly connotes everything that certain-kinds of sex based discrimination connote, then recognizing it as a prohibited ground for discrimination is desirable. This would not deny the logic of the sex-based argument; rather it would make clear that sexual orientation is another glaring basis of unfair discrimination which human societies have engaged in. It contains all those attributes which run common to the other prohibited grounds in Article 15. It also reaffirms the belief of homosexuals that the constitution protects their identity expressly and accepts the fact that there are no sound reasons which justify that certain sex based attractions are better than others.

Lastly, given the reasoning and materials relied on by the decision in *Naz Foundation*, the common thread argument should be taken to be the central argument with regard to discrimination. This is irrespective of the fact that the sex-based argument is alone enough to justify the conclusions of the decision that consensual homosexual activity is a prohibited ground of discrimination under Article 15. However, employing the sex-based argument alone may turn out to be a precedent which creates barriers to the inclusion of other prohibited grounds in the future. Using it as the central argument to include sexual orientation makes it possible to argue that any other ground to be included in the future should be analogously related to one of the specified grounds in the same manner as sexual orientation is related to sex. This conclusion can be avoided by reading paragraphs 99-104 of the *Naz Foundation* decision in the light of the precedents that it uses. The court first sets out the sex-based argument as the petitioner's argument. It then cites the Canadian and South African cases to identify the 'common thread argument' and *not* the sex-based argument. It then concludes at paragraph 104 that sexual orientation is analogous to sex and thus is a prohibited ground under Article 15. It can be reasonably concluded from this analysis that the court relied on both the 'common thread' and 'sex-based' arguments to arrive at its conclusion. Saying that sexual orientation is analogous to sex is not to say that it is not analogous to the other grounds. Read in this manner, the decision would cohere

better with its other parts which base themselves on constitutional values which can justify inclusive readings of constitutional provisions.

### III. THE PRIVACY ARGUMENT: A PROXY FOR OTHER VALUES?

The Court in *Naz Foundation* used the concepts of autonomy, privacy and dignity together, without clearly explaining the relationship between them.<sup>35</sup> To clearly explain such a relationship would undoubtedly be a herculean task, and perhaps is a preoccupation of philosophers rather than judges. Perhaps one should not burden judges with the obligation of using such concepts only after having figured out a grand theory which explains every instance of their use. Perhaps judicial doctrine is best developed one case at a time, in an incremental manner.<sup>36</sup> It is not my intention here to deal with the vast literature which interrogates the proper way of adjudicating. My modest effort is to show that the Court's explanation of these concepts, particularly privacy, is just one of the many ways of looking at them accompanied by its own summits and pitfalls.

In the initial parts of the judgment, the court clubs together its discussion on dignity, autonomy and privacy.<sup>37</sup> It then branches out to more specific discussions about privacy and dignity rights.<sup>38</sup> While dealing with privacy, the court relies on decisions from the United States and South Africa which highlight different conceptions of the right to privacy, each of which could on its own support a conclusion that interference with one's sexuality violates the right to privacy.

The court first relies on decisions from the United States to show that the right to privacy means the right to be let alone.<sup>39</sup> It then relies on *Bowers v. Hardwick*<sup>40</sup> (Justice Blackmun's dissent), *Paris Adult Theatre I v. Slaton*<sup>41</sup> and *National Coalition for Gay and Lesbian Equality v. Minister of Justice*<sup>42</sup> to demonstrate that the right to be left alone was not merely a negative right but implied the more substantive right to private intimacy and autonomy. In explaining

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<sup>35</sup> Starting from the heading of ¶ 25 and at least till ¶ 40, the court uses the three concepts in a manner which indicates that they are closely related.

<sup>36</sup> See Jeff A. King, *Institutional Approaches to Judicial Restraint*, 28 OXFORD J. LEGAL STUD. 409 (2008) (discussing arguments which support such a view).

<sup>37</sup> *Supra* note 35 and accompanying text.

<sup>38</sup> *Id.*, ¶¶ 25 - 60 are entirely devoted to such discussions.

<sup>39</sup> The Court refers to Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). It also cites *Gobind v. State of MP* (1975) 2 SCC 148 and *R. Rajagopal v. State of T.N.* (1994) 6 SCC 632 as precedents which support this view.

<sup>40</sup> 478 US186 (1986).

<sup>41</sup> 413 US 49 (1973).

<sup>42</sup> 1998 (12) B.C.L.R 1517 (CC).

the full ambit of this right, the court makes two more significant moves. First, it refers to *Roe v. Wade*<sup>43</sup> and *Planned Parenthood v. Casey*<sup>44</sup> to introduce the idea of full personhood in understanding privacy. Second, it takes recourse to the idea of identity to understand privacy.<sup>45</sup> Thus, we see that the court involves a number of important ideas in explaining what the right to privacy means and how it protects consensual homosexual activity from being criminalized. This strategy of the court, as I will shortly argue, adds substance to the law of privacy in India. At the same time it poses challenges for judges to defend a particular approach to privacy and provides the material for legal scholars to work out the relationship between liberty, dignity, privacy and autonomy. Before proceeding to the reasons for this argument, let me first draw attention to the court's conclusions on the right to privacy, and point out a few implications that it has.

The court concludes that the right to privacy means<sup>46</sup>:

- a. The right of the individual to develop human relations without interference from the outside community or the state (the non-interference argument).
- b. Allowing the individual to exercise autonomy by which the individual may attain full personhood by fulfilling legitimate goals that one may set for oneself (the personhood and autonomy argument).
- c. It protects the core identity and dignity of the individual (the dignity argument).

The above formulation seems to leave out a number of ideas which were earlier referred to by the court in the various quotes that it used. To be fair to the judgment and the quotes, one might read the non-interference argument above to include the ideas of the 'right to be let alone' and the protection of a private intimate sphere. The personhood and autonomy argument clearly includes the idea of full personhood and the ability to choose from legitimate options in life. The third argument would require a clear understanding of the idea of dignity before it can be used to define privacy.<sup>47</sup>

If the ideas identified above are what the court offers to understand the right to privacy, then it has certainly gone a long way from the narrow idea of

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<sup>43</sup> 410 US 113 (1973).

<sup>44</sup> 505 US 833 (1992).

<sup>45</sup> *Naz Foundation*, ¶¶ 42-48.

<sup>46</sup> The conclusions of the court are found in ¶ 48 of the judgment. I have tried to cull out those ideas from the paragraph which are relevant to understanding privacy. This is not to say that they exclusively relate to privacy. These components overlap with the components of the right to dignity, which too, the court refers to in the same paragraph.

<sup>47</sup> I examine this idea in the next section of this paper.

the right to be let alone. It has enriched the discussions on the right to privacy in India with new ideas from across jurisdictions. However, since these ideas come from an authoritative source which is binding, and affects the lives of individuals in society, it is necessary that they be clear in their application as far as possible. The ideas that the court uses should not be a ready proxy for any conclusion that a particular court may wish to arrive at. This demands a closer examination of the ideas employed by the court.

### A. THE RIGHT TO BE LET ALONE: A PLACEHOLDER?

On a closer examination of the reasoning of the court, it is possible to argue that each of the ideas employed by the court have a distinctive character with entirely different connotations, though not independent of each other.<sup>48</sup> The idea of the right to be let alone is *prima facie* a negative one. It prescribes non-interference, but does not provide any guidance as to what is to be not interfered with.<sup>49</sup> Neither does it provide any guidance as to how privacy is to be construed when it conflicts with other values like free speech, law enforcement and security of others.<sup>50</sup> If privacy speaks of a sacrosanct sphere which is to be left alone, then such a sphere needs to be identifiable. The idea of the right to be let alone however, does not provide any pointers for such identification, rather it assumes that there is such a sphere.<sup>51</sup> This leaves privacy to be a place holder, free to be filled up by, *inter alia*, intuitions of judges.

The US Supreme Court adopted the 'right to be let alone' path in *Katz v. United States*<sup>52</sup> which followed Justice Brandeis's minority opinion in *Olmstead v. United States*<sup>53</sup>. It however, avoided the place holder trap in later decisions by holding that the right to be let alone is not merely a negative right, but is a right to full personhood. The idea of personhood finds mention in Justice Blackmun's dissent in *Bowers* and becomes the majority's opinion in *Roe* and *Casey*. The court in *Naz Foundation* adopts this notion of full personhood. But what is the logical relationship between personhood and the right to be let alone? It is one

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<sup>48</sup> See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002) (Solove gives an interesting treatment of the different conceptions of privacy. Solove lists six such conceptions: The right to be let alone, limited access to the self, secrecy, control over personal information, personhood (which includes individuality, dignity and autonomy) and intimacy. He argues that none of these provide a successful account of privacy as they are based on a particular manner of conceptualization, which he calls the traditional manner. Solove gives a pragmatic account of privacy based on Wittgenstein's idea of family resemblances. I do not comment on Solove's account here, but only borrow his categorization of the different conceptions of privacy).

<sup>49</sup> *Id.*, 1101.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, 1100 (For an account of how Warren and Brandeis steer clear of these criticisms).

<sup>52</sup> 389 US 347 (1967).

<sup>53</sup> 277 US 438 (1928).

thing to say that the two are related, it is quite another thing to show how they are related. Another pertinent question which arises is: if the right to be let alone means non-interference in a core private sphere, and personhood is a part of this private sphere, then what is the content of personhood and what are the other components of this private sphere? The court provides some headway in answering these questions.

### *B. THE RIGHT TO PERSONHOOD AND AUTONOMY*

The idea of full personhood is construed by the court to be the reason which warrants non-interference. It is a move towards defining the nature of the private sphere which the right to privacy protects. According to the court the private sphere should be such, which "...allows persons to develop human relations without interference..."<sup>54</sup> This seems to be a reasonably clear guideline of what constitutes the private sphere which is not to be interfered with. At least some of the features of this sphere should be those which allow persons to develop human relations freely, probably because it helps them attain full personhood. This means that developing human relations is a value that is to be protected for the purposes of achieving full personhood and privacy means that there shall be no interference with actions which promote such a value. But where does this value of forming human relationships stem from? It may be a desirable value, but for purposes of constitutional adjudication, the value must stem from some constitutional source. The concept of privacy does not provide any guidance here as without the right to personhood, it only meant a right to be let alone. The idea of personhood gives substantive meaning to privacy and hence it cannot be logically argued that it is privacy which is the source of the idea of personhood.

One may here argue that one of the sources from which this value might arise is the right to liberty in Article 21 of the Indian Constitution. The Court refers to liberty in its discussion of privacy and notes that the Supreme Court of India recognised in *Kharak Singh* that the right to privacy was a part of the right to liberty in Article 21. However, the court later abandons the term liberty and uses autonomy to characterise privacy. It holds that the "exercise of autonomy enables an individual to attain fulfilment, grow in self-esteem and form relationships of his or her choice and fulfil all legitimate goals that he or she may set."<sup>55</sup> This formulation again adds substance to what the right to privacy means by chalking out its purpose. The court seems to be arguing that the sphere which is protected is one which enables a person to flourish fully.<sup>56</sup> To do so, a person must be in a position to exercise autonomy. But again one would ask where the value of autonomy stems from and what does it mean?

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<sup>54</sup> *Naz Foundation*, ¶ 48.

<sup>55</sup> *Id.*

<sup>56</sup> I take it to be that phrases like "flourish fully" and "attain self fulfilment" are synonymous to the idea of attaining full personhood.

In reply one could argue that in the context of the Indian Constitution, autonomy too stems from the right to liberty. This could be justified on the ground that one of the central features of autonomy is the liberty to pursue goals that one sets for oneself. There are other important features of autonomy too, e.g., the ability to choose from various valuable options.<sup>57</sup> In the context of the issues in the *Naz Foundation* case however, it would suffice to look at the aspect of the ability to pursue valuable goals alone.<sup>58</sup> If one were to accept the argument that the right to liberty required the ability to set and pursue goals, then at least two further questions could arise. The first is an academic question of whether persons are non autonomous if they do not choose to set and fulfil goals which would take them towards self fulfilment? The second is a question more relevant to the issues in the case: whether autonomy requires that people can pursue any and every goal that they like? In other words, what is a permissible exercise of autonomy and when can ones autonomy be restricted?

An answer to the first question is provided by Joseph Raz when he draws a distinction between autonomy and self realization.<sup>59</sup> He argues that a person is autonomous if he can either choose a life of self-realisation or reject it. A person might choose to not exploit ones abilities to the fullest extent even though one had the opportunity to do so. This seems to be a reasonably acceptable distinction to draw. To put it in terms of the discussion on privacy, autonomy would require that a person could choose to lead a life which would help one attain ones full personhood or not. This would add to our identification of what the private sphere protected by the right to privacy is. It would now include the values which help achieve full personhood like forming human relationships, and autonomy in the sense that a person is autonomous to choose to pursue such values. The protection of privacy would now be available to argue that the state could not restrict the autonomy of a person to form human relationships which is a value that enables a person to attain full personhood, nor could the state coerce a person to pursue such values. The idea of autonomy entails that the opportunity to pursue such values is available to a person, and a person has the liberty to pursue them or not.

The answer to the first question indicates that the courts reliance on the ideas of liberty, autonomy and personhood are not unjustified in the context of privacy. It is just that the judgment leaves it for others to figure out a coherent and plausible manner in which these ideas could be understood with some amount of logical and philosophical rigour.

This leaves the second question to be considered as to whether autonomy requires that people can pursue any and every goal they desire. The discussion on privacy above could provide partial answers to this question. A plausible answer could be that in the context of privacy, one has the autonomy to pursue those goals

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<sup>57</sup> See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369-399 (1986) (giving a plausible account of the features of autonomy).

<sup>58</sup> A fair examination of the other aspects would require us to look at the kinds and range of valuable options that should be available in order to have autonomy.

<sup>59</sup> RAZ, *supra* note 57, 375.

which enables one to attain full personhood. One of the facets of personhood is the freedom to develop human relationships. Thus, one has the autonomy to develop human relationships freely. Here the logical progression could stop and it may be argued that for the purposes of determining whether the right to develop sexual relationships is protected by privacy, the discussion above would suffice. However since the court's decision will be treated as a precedent by other courts deciding other instances of privacy, it is necessary that further questions which generally apply to privacy be answered to some extent. Thus one may ask the following questions: Surely, if autonomy is a protected value, then there must be other purposes for which autonomy can be exercised apart from achieving full personhood? It cannot be that developing human relationships freely is the only content of the idea of personhood which in turn is the only constituent of autonomy? Do autonomy and personhood have any other content? If there are no answers to these questions, then the idea of personhood can be argued to be a place holder, which judges would fill up with content at different points of time.

The court in Naz foundation fortunately provides some answers to these questions. It holds that those features which comprise the dignity of a person are constitutionally protected. The court also holds that one can exercise autonomy as it "enables an individual to ...fulfil all *legitimate* goals that he or she may set"<sup>60</sup> (emphasis supplied). Thus, individuals are autonomous to pursue only legitimate goals. Reference to legitimate goals and human dignity warrants at least a preliminary enquiry into their contents. The court does not explain further what the legitimate goals of the individual are, but does explain what human dignity means.

#### IV. THE PROBLEMS WITH HUMAN DIGNITY

Unlike the ideas of privacy, personhood and autonomy the idea of human dignity finds mention in the text of the constitution of India<sup>61</sup>. The idea also finds mention in many decisions of the Supreme Court of India and constitutional courts of other jurisdictions.<sup>62</sup> Some of these decisions have attempted at providing some broad outlines of the concept. The Court in Naz Foundation quotes from such cases, mostly Indian<sup>63</sup> and Canadian.<sup>64</sup> From the portions of the precedents that it relies on, at least four important components of human dignity can be culled out<sup>65</sup>:

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<sup>60</sup> *Naz Foundation*, ¶ 48.

<sup>61</sup> Constitution of India, Preamble.

<sup>62</sup> Prominent amongst them being, Canada, South Africa, United States of America and Germany. See Christopher McCrudden, *Human Dignity and the Judicial Interpretation of Human Rights*, 19 E.J.I.L. (2008) 655 available at [www.ssrn.com/abstract=1162024](http://www.ssrn.com/abstract=1162024) (discussing major cases which use the idea of human dignity and the differences in their approaches).

<sup>63</sup> The prominent Indian decision being *Francis Coraile Mullin v. Administrator, Union Territory of Delhi and others* (1981) 1 SCC 308.

<sup>64</sup> *Law v. Canada (Ministry of Employment and Immigration)* [1999] 1 S.C.R. 497; *Egan v. Canada* [1995] 2 S.C.R. 213.

<sup>65</sup> *Naz Foundation*, ¶ 26-28.

1. Physical and spiritual integrity of the human being.
2. Autonomy of the private will and a person's freedom of choice and action
3. Features that go along with human dignity. This includes, at the minimum, the bare necessities of life, freedom to express oneself and move about freely and mingle with fellow beings.<sup>66</sup>
4. Human dignity means that an individual *or group* feels self respect and self worth. It is harmed when people are treated unfairly based on personal traits or circumstances which do not relate to individual needs capacities and merits. It increases when people are treated in a manner sensitive to their needs capacities and merits.<sup>67</sup>

These components of human dignity provide some indication of what the concept stands for. We could club the ideas in 1, 2 and parts of 4 above under the umbrella of self worth. A notion of dignity as self worth is based on the Kantian notion of dignity: an individual should be treated as an end and not as a means to an end.<sup>68</sup> Apart from this core idea there seems to be little that the court's formulation of human dignity can contribute towards explaining the ambit of the term.<sup>69</sup>

If we look at the other components of dignity above, (2) speaks of autonomy and freedom. We saw in the previous section that the form and limits of autonomy were unclear and the court seems to have taken recourse to the idea of dignity and legitimate goals to add some content to autonomy.<sup>70</sup> A closer look at (4) poses more questions than it answers. Here dignity is not only of the individual but also of a group. This would mean that the ideas of autonomy and self worth apply to both individuals and groups. Such an argument could pose serious questions when dignity is used in the context of an individual's rights against a group or community. This would also have implications on the right to privacy of an individual against the community unless there is further clarification on what is the scope of these two dignities.<sup>71</sup>

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<sup>66</sup> See Francis Coraile Mullin, *supra* note 63.

<sup>67</sup> *Law v. Canada*, *supra* note 64.

<sup>68</sup> See McCrudden, *supra* note 62, 5-7 (discussing Kant's conception and its criticisms briefly).

<sup>69</sup> See McCrudden, *supra* note 62 (giving an elaborate and forceful formulation of this argument). See Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 E.J.I.L. (2008) 931 (replying to the central argument of McCrudden).

<sup>70</sup> Though the court does not make this move in express terms, the text of the decision is clear on the fact that the court does not describe autonomy to mean anything more than the exercise of autonomy to achieve full personhood and fulfill legitimate goals. This point is made together with the use of the concept of dignity. See *Naz Foundation* ¶ 48.

<sup>71</sup> See McCrudden, *supra* note 62, 57-61 (Arguments on the aspect of individual and community dignity have been made by McCrudden demonstrating how there are serious differences between the approach of different jurisdictions in this regard).

Apart from the lack of clarity on the above issues, yet another question plagues the use of human dignity in adjudication. Is dignity a value which informs different parts of our constitution, or is it a specific right which can be enforced? In terms of the decision in *Mullin*, there is a right to live with human dignity in India. This right seems to include many of the other fundamental rights e.g., the right to freedom of movement, right to freedom of expression, the right to livelihood and the right to form human relationships.<sup>72</sup> This formulation of the right to human dignity does not seem to add any new content to it except for some already existing fundamental rights. To accept that there is a right to human dignity will carry along with it the burden of providing a coherent doctrine of human dignity. This is required if we claim to adhere to even a minimalist conception of the rule of law, which requires that there be certainty about what the law is. The demand for a coherent doctrine is also necessary for other courts to use the idea of human dignity with some amount of clarity.

In spite of the lack of clarity on human dignity, there is one particular argument based on the idea which seems to be clear and coherent for the purpose of decriminalisation of consensual homosexual relations. The argument takes its roots in the fourth component of human dignity listed above. This is the argument that one's self worth is violated when one is treated on the basis of traits and characteristics which have no relation to individual needs, capacities and merits. If an individual is treated in a manner which is derogatory, for no justifiable reason which can relate that treatment to the individual, then it can be argued that such treatment is unfair and hurts one's self respect and self worth. This argument has been used by the court not only in explaining what dignity means, but also to justify the "common thread argument" on non-discrimination. In the context of non-discrimination this argument could take the following form: Discriminating against someone on the basis of immutable and constructively immutable grounds is an instance of treating a person on the basis of traits which have no relation to ones needs, capacities and merits. Thus, such discrimination hurts the dignity (self-worth and self respect) of the individual.

It immediately becomes clear that the argument above is not necessary to be made in order to hold that criminalisation of consensual homosexual acts is unconstitutional. The common thread argument is in itself sufficient to arrive at a conclusion that sexual orientation is included under the prohibited grounds of discrimination in Article 15. The confusion about dignity could thus have been avoided.

## V. CONCLUSION

In this paper I have argued for stronger foundations of the ideas of non-discrimination, privacy and human dignity used by the court in *Naz Foundation*. Though my arguments do not build up to one central argument, there is one tenor

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<sup>72</sup> See Francis Coraile, *supra* note 63, ¶ 8.

common to all sections of the paper. This being the lack of logical consistency and doctrinal rigour in the manner that Indian courts have dealt with important ideas in constitutional law. In this paper I have pointed out three. The reasons for this may be many. Anyone who is aware of the workload of Indian constitutional courts would know that the number of cases that they have to deal with is not comparable to their counterparts in other jurisdictions like Canada, Germany, United States and South Africa. This might have a bearing on the nature of our decisions, especially when they involve broad philosophical concepts like dignity, personhood or equality. Apart from the number of cases which impacts the time available for each case, it is also important to examine whether issues of such nature should be dealt with by judges who also have to deal with innumerable cases not involving constitutional law at the same time as constitutional cases. Cases involving serious constitutional issues may require a court which is dedicated to constitutional issues and which is properly equipped with time, resources and personnel to deal with them.

On the substantive arguments made in this paper, there are two concluding remarks which I think are important to make. The first is with regard to the ideas of coherence and judicial law making. The second is with respect to the use of the term constitutional morality by the court.

The idea of coherence is not a sound one to rely on when we seek to examine whether we are justified in holding certain beliefs. This is because it is difficult to argue that we are justified in holding certain beliefs just because they cohere well with other beliefs that we hold. What if the other beliefs that we held were incorrect? Coherence in such a situation would only lead us to further wrong beliefs. This argument against coherence however does not squarely apply to adjudication. If we believe that the ideals in our constitutional and legal texts as well as past decisions are desirable, then arguing that ideas coherent with them are also desirable may not be a bad argument to make after all. Coherence in this sense has long been used by common law courts.<sup>73</sup> One reason justifying such use is the fact that the words in the texts of legal instruments are a proxy for certain ideas which they stand for. If courts are able to correctly capture the ideas which such words refer to, then they are justified in adding to the texts. One certain way in which it can be tested whether courts have captured the correct idea is to see whether the idea can justify the other words in the text and past decisions.<sup>74</sup> The court in *Naz Foundation* has followed this well travelled path by demonstrating that the idea of immutability and constructive immutability are common to the grounds in Article 15 and since sexual orientation is an immutable characteristic, it should be provided the protection of Article 15.

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<sup>73</sup> See generally NEIL MCCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1994) (giving a compelling account of such use).

<sup>74</sup> This is a very short summarization of accounts of adjudication given by Ronald Dworkin and Neil McCormick. Though both agree in this part of their account, they differ in the claims that they make about judicial law making. See McCormick, *supra* note 73, 152-228 and RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977).

This coherence based method can very well be called judicial law making. That does not go to say that it is the same as legislation. Judicial law making has to satisfy the demands of legal reasoning<sup>75</sup> and justify itself in the light of institutional history.<sup>76</sup> Legislation may choose to do so or not. Therefore, there is a clear distinction between judicial law making and legislating. Critics who confuse between the two should pay attention to this distinction. In spite of the many criticisms that I have levied, the decision in *Naz Foundation* is sensitive to this distinction and thus discharges adequately the burden of justifying institutional history. It also engages in a fair bit of legal reasoning in the process.

Apart from judicial law making, some concerns remain about the use of the term ‘constitutional morality’ in the judgment. The court uses this term in the course of arguing that popular morality is not a basis for restricting fundamental rights.<sup>77</sup> It goes on to argue that if there is any morality which can form a compelling state interest then it must be constitutional morality.<sup>78</sup> The court defines constitutional morality to be one which is based on constitutional values.<sup>79</sup> It may be argued that the idea of constitutional morality has no specific content and is again a place holder which creates a large space for discretion. This argument however is implausible. By constitutional morality the court seems to be referring to a morality which is justified by constitutional values. This at once places the burden of coherence and institutional history on any court which wishes to provide further content to the term. Any component of constitutional morality must be justifiable on the basis of values which are coherent with the text of the constitution and valid past decisions. Thus, the reference to the idea of constitutional morality means no more than fidelity to the constitutional text and values.

The idea of constitutional morality however, has a role to play in the light of the argument that homosexuality is against the order of nature. The court has demonstrated that there is no concrete scientific data which proves that homosexual behaviour is a disease or aberration. Rather a lot of data points towards homosexuality being natural! In the face of no definite scientific evidence, the only legitimate recourse for a constitutional court is to rely on the constitution and constitutional materials and not on what is thought to be correct on other grounds like religion or personal beliefs. This brings the debate back strongly into the ambit of constitutional values like equality, privacy and dignity, which is what the court did.

Hopefully, the Supreme Court of India will vindicate the commitment shown to the constitution by the Delhi High Court in *Naz Foundation*. It might also choose to strengthen some of the weaker arguments that the decision adopts.

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<sup>75</sup> I take ‘legal reasoning’ in its literal sense: logical reasoning based on legal materials.

<sup>76</sup> John Gardner, *Legal Positivism: 5 ½ Myths*, 46 AMERICAN JOURNAL OF JURISPRUDENCE, 199 (2001).

<sup>77</sup> *Naz Foundation*, ¶ 79.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*