

# READING SWARAJ INTO ARTICLE 15: A NEW DEAL FOR ALL MINORITIES

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*The recent judgement of the Delhi High Court in the **Naz Foundation** case goes beyond merely decriminalising homosexuality. The progressive reinterpretation of Article 15 of the Constitution has brought out its distinct character, which has for long been buried under Article 14 and the general promise of equality it offers. Four key innovations have been introduced by this reformulation of Article 15, which are likely to give unparalleled protection to all minorities from discrimination. These innovations are 1) the introduction of 'strict scrutiny' to review protection under Article 15, 2) the understanding that not only the specified grounds but also grounds analogous to them are to be protected, 3) protection against discrimination not only from the state but also private parties and 4) protection from not only direct but also indirect discrimination. The author argues that locating of the right against discrimination in the bedrock of Swaraj or personal autonomy is the crucial tool for justifying the introduction of these innovations. The author concludes that this innovative reinterpretation of Article 15 is likely to give greater credence to antidiscrimination law in the country, bolstering it further which is likely to benefit all minorities - thus reaffirming the counter-majoritarian role of the judiciary.*

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## I. INTRODUCTION

“Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation’s passion.”

(Pandit Jawaharlal Nehru, as quoted in *Naz Foundation* case)<sup>1</sup>

The brouhaha over it notwithstanding, the least surprising thing about the Delhi High Court’s verdict in *Naz Foundation v Union of India* is the result of the case: that law has no business in the bedroom of consenting adults engaging in an activity that harms no one.<sup>2</sup> Even the mere words of Article 14 (right to equality) and Article 21 (right to life and liberty, which has been read to include the right to privacy) of the Constitution and existing jurisprudence under these Articles would have sufficed to reach this result. When faced with this issue, constitutional courts worldwide have almost invariably given the same answer.<sup>3</sup> Given the liberal, secular and egalitarian Constitution of India, it is the opposite result that would have surprised constitutional lawyers. The magic of the human spirit and of a nation’s passion lie not so much in the result of the judgment (welcome though it is) as in its progressive reinterpretation of certain constitutional provisions, especially that of Article 15, even though it was not strictly necessary to reach this result. In this article, I will show that *Naz Foundation*, by granting unprecedented constitutional protection, represents a new deal for all minorities. It may be noted that I use the term ‘minorities’ interchangeably with all vulnerable groups i.e.

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<sup>1</sup> *Naz Foundation v. Government of NCT of Delhi, W.P. (C) No. 7455/2001; 160 (2009) DLT 277, ¶ 129.*

<sup>2</sup> The High Court read down section 377 of the Indian Penal Code 1860 to exclude private consensual sex between adults from its ambit. Section 377 reads thus: “Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.” See Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, December 17, 2008, available at <http://www.hrw.org/en/reports/2008/12/17/alien-legacy-0> (last visited September 1, 2009) (for a historical account of the provision). See Alexander Bubb, *Blustering Sahibs and Section 377*, 44 (35) ECONOMIC AND POLITICAL WEEKLY 25 (2009) (for a review of the report).

<sup>3</sup> See *Dudgeon v. United Kingdom*, (1981) 4 E.H.R.R. 149 (European Court of Human Rights); *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (UN Human Rights Committee); *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (Constitutional Court of South Africa); *McCoskar v. The State*, [2005] F.J.H.C. 500 (High Court of Fiji); *Leung T.C. William Roy v. Secretary for Justice*, [2006] HKEC 578 (High Court of Hong Kong); *Sunil Babu Pant v. Government of Nepal*, Writ No. 917 of the year 2064 (BS) (2007) (Supreme Court of Nepal). The US Supreme Court overruled an earlier decision to hold that criminalisation of consensual homosexual acts is unconstitutional—*Lawrence v. Texas*, 539 US 558 2472 (123 S Ct 2472). The sole surviving exception appears to be the judgment of the Supreme Court of Zimbabwe in *Banana v. State*, 8 B.H.R.C. 345 (2000) where a majority of three judges to two upheld the constitutionality of an anti-sodomy law.

groups whose members' autonomy is compromised owing to their membership of the group. Apart from numerical strength, other facets of vulnerability include political vulnerability (often disclosed by the level of representation in political institutions), social vulnerability (indicated by the degree of social prejudice and negative stereotypes prevalent against a group) and economic vulnerability (inferred from wealth, income, land and house ownership, occupation, education and other material indicators). A person need not check all these boxes—vulnerability even in a single dimension can be debilitating. In contemporary India - Muslims, women, tribals, *hijras*, *dalits*, people from the North-Eastern states, gays and disabled persons are minorities in this sense.

Article 15<sup>4</sup> prohibits discrimination on grounds such as religion, race, caste and sex. Until recently it had remained a largely sterile provision, subsumed entirely by the general guarantee of equality under Article 14<sup>5</sup> and rarely given the distinct importance that it deserves. Four key innovations under Article 15 in this judgment have given it a new lease of life:

- (i) Reading in of unspecified 'analogous' grounds into Article 15;
- (ii) Requirement of strict judicial scrutiny of any laws infringing upon Article 15;
- (iii) Extension of the protection of the Article to discrimination by private bodies ('horizontal effect'); and

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<sup>4</sup> Article 15, Constitution of India states –

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
  - (a) access to shops, public restaurants, hotels and places of public entertainment; or
  - (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
- (3) Nothing in this article shall prevent the State from making any special provision for women and children.
- (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
- (5) Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.”

<sup>5</sup> Article 14, Constitution of India states – “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

- (iv) Substantive protection from discrimination with the prohibition of indirect discrimination and harassment.

These innovations will provide unprecedented constitutional protection from discrimination to all minorities. As the subsequent discussions will clarify, *Naz Foundation* certainly did not pioneer all of these ideas. Most of them have their roots in precedents set by the Supreme Court and other High Courts. But the Naz Court did recognise the common thread running through these precedents, pulled these progressive strands together, labelled them with terminology consistent with comparative jurisprudence and anchored them to the principled bedrock of personal autonomy. Surely all of this qualifies as ‘innovation’. Section II of this article discusses the normative demands of *swaraj* or personal autonomy, in the context of the right to freedom from discrimination contained in Article 15. Sections III to VI discuss the aforementioned innovations respectively. The emerging robust antidiscrimination jurisprudence is an assertion of the classical judicial role as a counter-majoritarian institution, which is briefly explained in section VII.

## II. SWARAJ: THE FOUNDATIONAL PRINCIPLE BEHIND ARTICLE 15

Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him.... Will it restore him to a control over his own life and destiny? In other words, will it lead to *swaraj* for the hungry and spiritually starving millions?<sup>6</sup>

*Swaraj* inspired the freedom struggle against colonial rule and is a foundational principle of our Constitution. Gandhian *swaraj* is a versatile ideal: it ‘marries ethics, metaphysics and politics. It also draws on both Indian and western traditions of thought.’<sup>7</sup> In its political (and economic) dimensions, it includes ideals such as sovereignty, national self-rule and individual autonomy. While national self-rule was, by and large, achieved with independence from colonial government in 1947, the struggle to guarantee *swaraj* to individuals continues. Much of Parts III and IV of the Constitution can be viewed as means to achieve the goal of restoring to an individual ‘a control over his own life and destiny’. This dimension of *swaraj* is well-described by Joseph Raz, who uses comparable words to suggest that “The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.”<sup>8</sup> Autonomy is a matter of degree. Significantly autonomous persons “are not merely rational agents who can choose between options after evaluating relevant information, but agents who can in addition adopt personal

<sup>6</sup> Gandhi’s Talisman, PYARELAL, MAHATMA GANDHI: LAST PHASE Vol. II, 65 (1958).

<sup>7</sup> Ananya Vajpeyi, *Notes on Swaraj*, SEMINAR, September 2009, 601.

<sup>8</sup> J. RAZ, *THE MORALITY OF FREEDOM* 369 (1986).

projects, develop relationships, and accept commitments to causes, through which their personal integrity and sense of dignity and self-respect are made concrete.”<sup>9</sup> Autonomous beings have an adequate range of valuable life options available to them. The primary duty of the state is to secure *swaraj* for all its citizens. Systematic discrimination diminishes the quality of our lives by denying us access to an adequate range of valuable options, in all the things that matter most for our lives: housing, jobs, education, healthcare and partners. Another dimension of Gandhian *swaraj* as well as Razian autonomy is a *prioritisation* of the claims of those in greatest need—i.e. those who have the least control over their lives and destinies. These will often be groups disadvantaged on the basis of their race, sex, caste, language, sexual orientation, class etc. These disadvantaged minorities have the first claim to a state’s resources.

The High Court in *Naz Foundation* recognised the importance of this principle in our constitutional scheme and held that ‘personal autonomy is inherent in the grounds mentioned in Article 15’.<sup>10</sup> In doing so, the Court was merely following the precedent set in the *Anuj Garg case*<sup>11</sup>, where the Supreme Court held the value that underpins article 15’s prohibition on sex discrimination to be the right to autonomy and self-determination. Amongst the grounds mentioned therein, race, caste, sex and place of birth are grounds over which most of us do not have any effective control. On the other hand, religion is a fundamental choice, also protected by other constitutional rights [such as article 25]. These two strands inherent in the grounds in Article 15, namely *immutable status* and *fundamental choice*, share a common foundation in personal autonomy. It is perhaps best to quote John Gardner to explain this point:

Discrimination on the basis of our *immutable status* tends to deny us [an autonomous] life. Its result is that our further choices are constrained not mainly by our own choices, but by the choices of others. Because these choices of others are based on our immutable status, our own choices can make no difference to them. .... And discrimination on the ground of *fundamental choices* can be wrongful by the same token. To lead an autonomous life we need an adequate range of valuable options throughout that life.... there are some particular valuable options that each of us should have irrespective of our other choices. Where a particular choice is a choice between valuable options which ought to be available to people whatever else they may choose, it is a fundamental choice. Where there is discrimination against people based on their fundamental choices it tends to skew those choices by making one or more of the valuable

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<sup>9</sup> *Id.*, 154.

<sup>10</sup> *Supra* note 1, ¶ 112.

<sup>11</sup> *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1, ¶ 33, 41. Again, ¶ 45 – “personal freedom is a fundamental tenet”

options from which they must choose more painful or burdensome than others.<sup>12</sup>

This common foundation also suggests that something like paedophilia will never become a protected ground because it violates the autonomy of others (i.e. children). Immutable status and fundamental choice were drawn from comparative jurisprudence and explicitly recognised in *Naz Foundation* as factors affecting personal autonomy.<sup>13</sup> Grounding the right against discrimination in personal autonomy is crucial to justify the four innovations that followed. Before we move on to consider them, it must be remembered that immutable status and fundamental choice are only shorthand tools to determine whether personal autonomy is involved. There may be cases where neither of these categories is satisfied, and yet personal autonomy may be in question. Dogmatic application of these tools may create rigid boxes of personal identity which may exclude those who don't fit in, a concern queer rights activists are only too familiar with. In particular, the phrase 'immutable status' has an unhappy history of being seen as opposed to, rather than complimentary to, fundamental choice. It has been used in some US decisions to deny protection by saying that a given characteristic is not immutable. Rehnquist J, for example, held that citizenship is different from "condition such as illegitimacy, national origin, or race, which cannot be altered by an individual ... There is nothing in the record indicating that their status as aliens cannot be changed by their affirmative acts".<sup>14</sup> What he did not ask was whether a choice of citizenship amounts to a fundamental choice an individual is entitled to make in keeping with her personal autonomy. It may be that it isn't, but the judge wrongly believed that mutability of the characteristic was sufficient reason to dispose of the case. Attempt must be made in difficult cases to answer the question directly—does discrimination on this ground have the potential to impair the personal autonomy of an individual? The answer, in the context of sexual orientation and gender identity, has widely been held to be in the affirmative.<sup>15</sup>

### III. WHO IS PROTECTED? ANALOGOUS GROUNDS

Suggesting that the grounds in Article 15 are bound by a common thread (personal autonomy) gives rise to a problem. Article 15 has a closed list of five specified grounds—religion, race, caste, sex and place of birth. But surely there are other grounds, such as HIV-status, pregnancy, gender identity, language, sexual orientation, disability etc., which are also effectively immutable or entail a fundamental choice. Until now, discrimination on the basis of these unspecified analogous grounds

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<sup>12</sup> J. Gardner, *On the Ground of Her Sex(Uality)*, (1998) 18 OXFORD JOURNAL OF LEGAL STUDIES 167, 170-1(Emphases added).

<sup>13</sup> *Supra* note 1, ¶ 102-3.

<sup>14</sup> *Sugarman v. Dougall (per Justice Rehnquist) (dissenting)*, 413 US 634, 657, 93 S.Ct. 2861, 2865 (1973).

<sup>15</sup> *See generally*, R. WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER* (1995).

has been challenged under Article 14, often successfully.<sup>16</sup> However, with the ruling that a restriction of the right under Article 15 will be subject to a higher ‘strict scrutiny’ standard (rather than the ‘differential scrutiny’ that is conducted under Article 14),<sup>17</sup> it may make a difference to the outcome of some cases whether it falls under Article 15 or merely Article 14. To resolve this anomaly, the Delhi High Court ruled that the heightened protection of strict scrutiny under Article 15 will also be available to those grounds “that are not specified in Article 15 but are analogous to those specified therein ... those which have the potential to impair the personal autonomy of an individual.”<sup>18</sup> Therefore, even though grounds such as disability and pregnancy are not specified in Article 15, they now have its protection. Notice that the High Court had already held that ‘sex’, a specified ground, includes ‘sexual orientation’,<sup>19</sup> and that “discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalisations about the conduct of either sex.”<sup>20</sup> Thus, section 377 discriminated on the ground of sex itself. Opening up the scope of Article 15 to other analogous grounds (like disability) was not critical for the result of the case. Yet, given this ruling, all autonomy-related grounds can now claim the special protection of Article 15.

Admittedly, such a reading is difficult to sustain if one adopts a strictly textual approach to constitutional interpretation. The Naz court drew upon the well-settled doctrine of Indian constitutional law that the appropriate method of constitutional interpretation is *purposive*, rather than strict textualism or originalism.<sup>21</sup> As the Court rightly held, “[P]ersonal autonomy is inherent in the grounds in Article 15. The grounds that are not specified in Article 15 but are analogous to those specified therein, will be those which have the potential to impair the personal autonomy of an individual.”<sup>22</sup> As an exercise of purposive interpretation, this reading is justified.

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<sup>16</sup> See, e.g., *Ranjit Kuman Rajak v. State Bank of India*, 2009 (5) BomCR227, for disability discrimination; and *MX v. ZY*, AIR 1997 Bom 406 for HIV-status discrimination.

<sup>17</sup> See *infra*, Part IV.

<sup>18</sup> *Supra* note 1, ¶112.

<sup>19</sup> *Id.*, ¶¶ 100, 104.

<sup>20</sup> *Id.*, ¶ 99.

<sup>21</sup> *Id.*, ¶ 114, “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 the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems.” *Maneka Gandhi v. Union of India*, AIR 1978 SC 587 was a watershed case in this regard, followed subsequently by numerous other cases. See also AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2005). On originalism, see D.J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* (2005).

<sup>22</sup> *Supra* note 1, ¶ 112.

#### IV. HOW MUCH PROTECTION? STRICT SCRUTINY

The second key aspect of the judgment is the reaffirmation of ‘strict scrutiny’ as the appropriate standard of review under Article 15. Strict scrutiny is an extremely demanding standard which requires the court to presume that a discriminatory law is invalid, unless the State can prove that the impugned law was enacted in the pursuit of a compelling state interest, with minimal interference with the right in question, in the absence of any alternative, and was proportionate.<sup>23</sup> Until recently, all that the state needed to prove is that the discrimination was ‘reasonable’ under Article 14, which is a relatively hands-off standard of review.<sup>24</sup> Traditionally, the test employed for deciding whether there is any discrimination on a specified ground under article 15 has been exactly the same for an unspecified ground under article 14, i.e. to see whether the classification made on the said ground satisfies the reasonableness review. There was no special status given to discrimination on Article 15 grounds like sex or caste.

This situation appeared to change with the Supreme Court decision in *Anuj Garg*, which applied strict scrutiny to a law that discriminated on the grounds of sex.<sup>25</sup> This should have been a clear precedent for the High Court to follow, except for another Supreme Court judgment in *Ashoka Thakur* which refused to apply strict scrutiny to an affirmative action measure challenged as discriminatory on the basis of caste.<sup>26</sup> *Garg* was decided after the conclusion of hearings in *Thakur* but before the judgment was delivered in the latter, so neither court had the benefit of reading the other judgment. The legal position after these seemingly conflicting decisions was unclear. The *Naz* court rightly held that:

On a harmonious construction of the two judgments, the Supreme Court must be interpreted to have laid down that the principle of ‘strict scrutiny’ would not apply to affirmative action under Article 15(5) but a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.<sup>27</sup>

Indeed, the Supreme Court itself tried to clear the air on the issue in a case decided subsequent to *Naz Foundation* by reading *Thakur*’s refusal to apply strict scrutiny narrowly.<sup>28</sup> Some questions remain on the implications of strict

<sup>23</sup> For a detailed exploration of the strict scrutiny debate in the Indian context, see Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement*, 50(2) JOURNAL OF INDIAN LAW INSTITUTE 177 (2008).

<sup>24</sup> A reasonableness test usually requires a demonstration of an intelligible differentia in the classification, and a rational nexus between the classification and the object sought to be achieved.

<sup>25</sup> *Supra* note 11, ¶ 47, 50.

<sup>26</sup> *Ashoka Thakur v. Union of India*, (2008) 6 SCC 1.

<sup>27</sup> *Supra* note 1, ¶ 111.

<sup>28</sup> *Subhash Chandra v. Delhi Subordinate Services Selection Board*, (2009) 11 SCALE 278, ¶ 43.



scrutiny on personal laws. The matter is only of tangential relevance in this article, but a quick observation is merited. Many aspects of personal laws will not survive even the deferential reasonableness review under Article 14. However, a regrettable line of precedents suggests that at least some aspects of personal laws are immune from a constitutional challenge.<sup>29</sup> Unless these precedents are overruled, personal laws cannot be subjected to the review of reasonableness, much less strict scrutiny.<sup>30</sup>

This diversion aside, it may be noted that the discussion on strict scrutiny was not important for the result in this case. The *Naz* Court was clear that, “A provision of law branding one section of people as criminal based wholly on the State’s moral disapproval of that class goes counter to the equality guaranteed under Articles 14 and 15 under any standard of review.”<sup>31</sup> Thus, even the differential ‘reasonableness review’ would have sufficed. The main benefit of this higher standard of review will be reaped in future cases by all vulnerable minorities.

## V. PROTECTION FROM WHOM? HORIZONTAL EFFECT

The third important constitutional innovation under Article 15 is the pronouncement by the High Court that it provides protection from discrimination perpetuated not only by the state (‘vertical’ effect) but also by private bodies (‘horizontal’ effect):

Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.<sup>32</sup>

As the Court rightly suggests, the seeds of horizontal application of rights lie in the words of Article 15(2) itself, which reads “No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to- (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing *ghats*, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.” Indeed, even though the *Naz* Court does not cite it explicitly, horizontal effect of Article 15 was already established by the Supreme Court in *Vishaka v State of*

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<sup>29</sup> *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84; endorsed by the Supreme Court in *Ahmedabad Women’s Action Group v. Union of India*, (1997) 3 SCC 573.

<sup>30</sup> See generally A.M. BHATTACHARJEE, *MATRIMONIAL LAWS AND THE CONSTITUTION* (1996); Tarunabh Khaitan, *Personal Laws and the Constitution – the Judicial Dilemma*, 14(4) CENTRAL INDIA LAW QUARTERLY 521 (2001).

<sup>31</sup> *Supra* note 1, ¶ 113.

<sup>32</sup> *Id.*, ¶ 104.

*Rajasthan*.<sup>33</sup> The case involved a class action against sexual harassment of women in the work place. Faced with a legislative vacuum, the Court laid down guidelines to deal with sexual harassment in the work place, which applied to public as well as private employers, effectively giving horizontal effect to the right to be free from harassment.<sup>34</sup>

Horizontal effect of fundamental rights makes people nervous, for reasons normative as well as pragmatic. Normatively, it is one thing to say that the state shall not discriminate, quite another to suggest that a private individual shall not discriminate.<sup>35</sup> A democratic state has the burden of being able to justify all its actions, and therefore very stringent antidiscrimination obligations can be imposed on the state. An individual, however, herself is a bearer of rights. Any restriction on her, including the demand that she should refrain from discriminating, requires justification. In relatively public aspects of life, such as housing, employment, health, education, access to goods and services etc., such a justification is forthcoming.<sup>36</sup> However, there will be some aspects of individual conduct, say the choice of friends and partners, which must be out of bounds for law, howsoever reprehensible we may find the idea of refusing to make friends with people of a certain caste or religion.

The normative worry is relatively easier to take care of by imposing appropriate limits to the scope of antidiscrimination law in its application to private persons. The second, pragmatic worry about horizontal effect is this: constitutional courts tend to have limited jurisdictions to keep their case-load manageable. Under Articles 32 and 226 of the Constitution, one can directly approach the Supreme Court or a High Court for the violation of any fundamental right. Now, if there is a fundamental right against discrimination by a private person, there is a danger of the constitutional courts being swamped by complaints. Thus we meet the infamous ‘floodgates’ argument—that giving horizontal effect to fundamental rights will open the floodgates to an amount of litigation our courts are ill-equipped to handle.

This worry, however, is misplaced. It assumes that *direct* horizontal effect is the only way to give horizontal effect to a right—i.e. “an independent cause of action against private parties for breach of constitutionally protected rights”.<sup>37</sup> However, several fundamental rights, such as the right to education or the right to information, need a specialised enforcement mechanism set-up by a

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<sup>33</sup> *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

<sup>34</sup> *Id.*, ¶ 16.

<sup>35</sup> See Nicholas Bamforth, *The Public Law-Private Law Divide: A Comparative And Philosophical Approach* in ADMINISTRATIVE LAW FACING THE FUTURE : OLD CONSTRAINTS AND NEW HORIZONS (1997).

<sup>36</sup> See generally *supra* note 12.

<sup>37</sup> Murray Hunt, *The “horizontal effect” of the Human Rights Act*, PUBLIC LAW 423, 428 (1998).

statute.<sup>38</sup> In the absence of such statutory framework a constitutional court could wear its law-making hat and give *indirect* horizontal effect to the right. This merely requires that “the judiciary ought to apply and develop principles of common law in a manner consistent with the fundamental values enshrined in the constitution.”<sup>39</sup> Indeed, this is exactly what the Supreme Court did with regard to sexual harassment in *Vishaka*. Similarly, in the case of *In re Destruction of Public and Private Properties*<sup>40</sup>, the Supreme Court created a tort of destruction of public and private property, giving indirect horizontal effect to the fundamental rights involved. It follows, therefore, that if a litigant approaches a constitutional court complaining of discrimination by a private housing society on the grounds of religion and no legislation exists to deal with the issue (as was the case in *Zoroastrian Co-operative Housing Society v. District Registrar*),<sup>41</sup> the appropriate judicial response would have been to give indirect horizontal effect to the right against discrimination and recognise a tort against discrimination. The Supreme Court’s dismissal of the petition in *Zoroastrian Society* case was therefore wrong.<sup>42</sup> *Vishaka* and *In Re Destruction* cases suggest that indirect horizontal effect is already a part of our constitutional jurisprudence. *Naz Foundation* only makes this explicit, even though the case was strictly concerned with vertical discrimination.

## VI. SUBSTANTIVE PROTECTION—INDIRECT DISCRIMINATION AND HARASSMENT

Finally, the judgment recognises that discrimination includes not just direct discrimination, but also indirect discrimination and harassment.<sup>43</sup> Direct discrimination occurs when a provision unfairly differentiates on the basis of a protected ground on the face of it. Indirect discrimination occurs when a superficially non-discriminatory measure has a disproportionate impact on a

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<sup>38</sup> See, e.g., Right to Information Act, 2005 and Right to Education Act, 2009. Indeed, a Bill to set up an Equal Opportunity Commission to tackle horizontal discrimination is already under consideration. See generally Madhava Menon, *Equal Opportunity Commission: What, Why and How?*, 2008, available at [http://minorityaffairs.gov.in/newsite/reports/eoc\\_wwh/eoc\\_wwh.pdf](http://minorityaffairs.gov.in/newsite/reports/eoc_wwh/eoc_wwh.pdf) (Last visited on September 1, 2009) (submitted to the Ministry of Minority Affairs, Government of India); Tarunabh Khaitan, *Transcending Reservations — A Paradigm Shift in the Debate on Equality*, 43 (38) ECONOMIC AND POLITICAL WEEKLY 8 (2008).

<sup>39</sup> *Supra note 37*, 430. See also, N. Bamforth, The True “Horizontal Effect” of the Human Rights Act 1998, (2001) 117 LAW QUARTERLY REVIEW 34; N. Bamforth, *A Constitutional Basis for Anti-discrimination Protection?*, (2003) 119 LAW QUARTERLY REVIEW 215; N. BAMFORTH, M. MALIK AND C. O’CINNEIDE, DISCRIMINATION LAW: THEORY AND CONTEXT (TEXT AND MATERIALS) 9 (2008).

<sup>40</sup> *In re Destruction of Public and Private Properties*, (2009) 5 SCC 212.

<sup>41</sup> *Zoroastrian Co-operative Housing Society v. District Registrar*, AIR 2005 SC 2306.

<sup>42</sup> See generally Tarunabh Khaitan, *Discrimination by Housing Societies: Possible Legal Responses*, *Indian Muslims*, December 17, 2008 available at <http://indianmuslims.in/discrimination-by-housing-societies-possible-legal-responses/>.

<sup>43</sup> *Supra note 1*, ¶ 93. *Direct* and *indirect* discrimination should not be confused with *direct* and *indirect* horizontal effect.

vulnerable group. Indirect discrimination was clearly at issue in *Naz Foundation*. On the face of it, section 377 outlawed all sex that wasn't peno-vaginal. It therefore criminalised anal and oral sex between heterosexual couples as much as it did between homosexual couples. Despite this facial neutrality, the impact of criminalisation largely affected gay couples alone because all the sex acts they can possibly perform are non-peno-vaginal. Thus, section 377 discriminated indirectly against gay couples. The petitioners in the case had also made out a strong case of harassment of gays, lesbians and especially *hijras* by police as well as *goondas*.<sup>44</sup>

This recognition of indirect discrimination and harassment is a move away from a formal guarantee of non-discrimination to a more substantive protection of personal autonomy. After all, it matters little to the victim what form discrimination takes—all three forms can be equally debilitating. Several other examples of indirect discrimination can be noticed in the Indian context. A housing society that only lets to vegetarians disproportionately impacts upon certain religious and caste groups. Under the interpretation of Article 15 in *Naz Foundation*, such indirect discrimination will be unconstitutional. Another example can be seen in the recent case of *National Insurance Co Ltd v. Deepika*.<sup>45</sup> In this case relating to accident insurance claims, a legal provision provided that income of a non-earning spouse is to be calculated as one third of the earning spouse. The judge lamented the fact that this provision did not take into account the economic worth of the homemaker, who is usually a woman.<sup>46</sup> Again, we are faced with an example of a facially-neutral law which disproportionately affects one group (in this case, women). Thus, the move towards a substantive protection of personal autonomy by prohibiting not just direct discrimination but also indirect discrimination and harassment is welcome. Any legislation giving effect to the right against discrimination must incorporate this development.<sup>47</sup>

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<sup>44</sup> *Id.*, ¶¶ 21-22. See also *PUCL Report on the Human Rights Violations against Sexual Minorities in India, 2001* available at <http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf> (Last visited November 1, 2009) and *PUCL Report on Human Rights Violations against the Transgender Community, 2003* available at <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html> (last visited November 1, 2009).

<sup>45</sup> *National Insurance Co Ltd v. Deepika*, CMA Nos. 3049, 3050 and 3775 of 2004 and 605 of 2007.

<sup>46</sup> *Id.*, ¶ 10. This case has echoes of the landmark decision of the House of Lords in *White v. White*, [2000] UKHL 54, ¶ 25 where the court moved away from need-based settlement towards 'equality of division' and 'absence of discrimination' in divorce proceedings.

<sup>47</sup> This demand is echoed by the Centre for the Study of Social Exclusion in its *Open Letter to the Minister of Minority Affairs on the Equal Opportunity Commission Bill*, available at [http://www.nls.ac.in/csse/E\\_O\\_C.htm](http://www.nls.ac.in/csse/E_O_C.htm) (Last visited on September 15, 2009).

## VII. SEPARATION OF POWERS AND THE PROPER JUDICIAL ROLE

Since antidiscrimination laws are usually relied upon by minorities, a final word on the counter-majoritarian role of the judiciary espoused in *Naz Foundation* is useful. 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. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly.”<sup>48</sup>

This is the classic formulation of the role of courts as counter-majoritarian institutions which have a special role in protecting vulnerable groups.<sup>49</sup> It was famously expressed in *Carolene Products*, where Justice Stone of the US Supreme Court said that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>50</sup> This counter-majoritarian theme in *Naz Foundation* was borrowed from *Anuj Garg*, where the Supreme Court had expressed a similar sentiment:

“[T]he issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.”<sup>51</sup>

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<sup>48</sup> *Supra* note 1, ¶ 79.

<sup>49</sup> See generally J.H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>50</sup> *United States v. Carolene Products*, 304 US 144, 153, 58 S.Ct. 778, 784 (1938), fn 4.

<sup>51</sup> *Supra* note 11, ¶ 39.

At least three cases since *Naz Foundation* have reaffirmed this counter-majoritarian role of the judiciary: *Santosh Bariyar v. State of Maharashtra*,<sup>52</sup> *Influence Lifestyle Stores v. Government of Tamil Nadu*,<sup>53</sup> and *CPIO, Supreme Court v. Subhash Chandra Agarwal*.<sup>54</sup>

## VIII. CONCLUSION

The *Naz* court has invoked the *swaraj*-driven spirit of the Constitution and crafted a remarkably progressive jurisprudence on antidiscrimination law. Article 15 is set to become one of the key constitutional guarantors of personal autonomy for vulnerable minorities. It may seem that this judgment does not obviously benefit Hemanshu, who is Hindu, English-educated, Male, Able-bodied, North-Indian, Straight, Hindi-speaking and Upper-caste. But should Hemanshu lose his legs in an accident, or get posted in a non-Hindi speaking/non-Hindu-majority area, he too will be protected. The Court has recognised that pluralist societies rarely have permanent majorities or minorities. The Constitution stands for the principle of minority protection, whoever they might happen to be.

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<sup>52</sup> *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, ¶ 89: “The constitutional role of the judiciary also mandates taking a perspective on individual rights at a higher pedestal than majoritarian aspirations. To that extent we play a countermajoritarian role.”

<sup>53</sup> *Influence Lifestyle Stores v. Government of Tamil Nadu*, C.S.NO.251 OF 2009 (Madras High Court), ¶ 41 available at [http://docs.google.com/View?id=dg5pxzvr\\_544q42v6g2](http://docs.google.com/View?id=dg5pxzvr_544q42v6g2) (Last visited on November 1, 2009): “It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.”

<sup>54</sup> W.P. (C) 288/2009 (Delhi High Court), ¶ 44, available at <http://judicialreforms.org/files/Asset%20declaration%20judgement.pdf> (Last visited on September 1, 2009): “[J]udges do not decide cases by dictates of popularly held notions of right and wrong. Indeed a crucial part of the judge’s mandate is to uphold those fundamental values upon which society organizes itself; here, if the judge were to follow transient ‘popular’ notions of justice, the guarantees of individual freedoms, entrenched in the Constitution, would be rendered meaningless.”