

# NAVIGATING THE NOTEWORTHY AND NEBULOUS IN NAZ FOUNDATION

Vikram Raghavan\*

*The paper is an exhaustive critique of the **Naz Foundation** judgment – besides a comprehensive evaluation of the Court’s treatment of applicable constitutional rights and doctrines, such as the right to privacy, equality, constitutional morality, severability and many others, it also makes interesting observations on the style in which the judgment has been written, and the Court’s treatment of legal sources, such as legislative history, prior decisions and foreign materials, some of which are characterised as ‘soft’ law. The judgment’s remarks on the statements of the Prime Minister and the health minister on Section 377 and the citation of a webcast reflect a modernising approach to the treatment of legal sources. On substantive legal aspects, the boldest advance of the judgment is quite clearly its invocation of substantive due process reasoning to test legality under Article 21, which may carry it a step further than **Maneka** itself. Second, the Court has accepted the possibility of implied desuetude of a statutory provision, which is an interesting point and could therefore be raised more strongly in appeal. Third, the author points out that recourse to a privacy-based argument may well be insufficient to protect the rights of gays in India, as for them the ‘private’ arena is often a shared public place. Fourth, the Court has not made observations on the ‘personal liberty’ aspect of Article 21, a step it*

---

\* Contributor, Law and Other Things, a blog accessible at <http://www.lawandotherthings.blogspot.com>. This article is for Kavya Mathias, my niece and godchild, whose antics and innocent patois constantly entertain us. I’m very grateful to Michael Gee, Anil Kalhan, Sunil Khilnani, Arvind Narrain, Frank Pasquale, Arun Thiruvengadam, V. Venkatesan, and Ben Yong for their comments and insights. This article is written entirely in my personal capacity. It does not reflect the views or policies of my employer, the World Bank Group.

*could have taken. The author suggests that the Court could have used the ‘new equality’ doctrine of arbitrariness under Article 14, which would be more in line with Indian constitutional jurisprudence, instead of using the more stringent test of strict scrutiny, which may not be legally sustainable. The author concludes that such an elaborate effort by the Delhi High Court affirms its position as one of the most important constitutional courts in the country, which has used innovative methods to push the boundaries of existing jurisprudence.\*\**

## I. INTRODUCTION

Few, if any, cases have been so closely followed, and their judgments as keenly awaited, as *Naz Foundation v. Government of the NCT*<sup>1</sup> (hereinafter “*Naz Foundation*”). The verdict was eagerly anticipated, not just by lawyers and commentators, but also by activists and a broad cross-section of ordinary people.<sup>2</sup> Acutely aware of the case’s importance, Chief Justice A.P. Shah and Justice S. Murlidhar of the Delhi High Court did not disappoint. Their stirring conclusion that Section 377 is unconstitutional for criminalizing consensual adult sex is set within the elegant tapestry of an aesthetically spun judgment exquisitely embroidered with careful reasoning and copious citations. The *Naz Foundation* bench displayed great courage and craftsmanship in fashioning a historic decision heard loud and clear, not only in India, but across the world.

*Naz Foundation*’s beauty is that it skillfully mixes originalism, rarely invoked by Indian courts, with pragmatism in constitutional interpretation. It is a product of considerable strategizing, deep thinking, and extensive research. At the same time, the judges display great humanism, sensitivity, and empathy — qualities so rarely on display in Blackstonian legal monasteries. The decision’s artful prose, which seems almost poetic in several places, is tempered by a subtle undercurrent of judicial humility and modesty. Its cadences bear the nostalgic influences of Chinnappa Reddy’s compassion and Bhagwati’s powerful argumentation without the distraction of Krishna Iyer’s bombast.

At its core, *Naz Foundation* is an emphatic reiteration of the vision of India’s founders to establish a catholic, inclusive, and tolerant republic. Mindful of

---

\*\* Abstract supplied by the Editors.

<sup>1</sup> W.P. (C) No.7455/2001 of 2009 (Delhi HC); (2009) 160 DLT 277. Paragraph references to *Naz Foundation* in this article from the decision’s electronic version on the Delhi High Court’s website.

<sup>2</sup> See Kajal Bharadwaj, *Reforming Macaulay*, ASIAN AGE, July 5, 2009 (describing the eagerness and anxiety with which activists awaited the judgment).

the bitter and shameful legacies of Indian history, the founders were especially unwilling to countenance social exclusion. This is evident from, among other things, the unprecedented constitutional prohibition on “untouchability” in Article 17.<sup>3</sup> Without explicitly saying so, *Naz Foundation* extends the command of Article 17 to abolish new avatars of disability based on sexual identity. And in so doing, decision is a reminder that the Indian constitution is a vibrant, living document, and its broad protections must be dynamically interpreted to new situations and challenges.

Symbolically as well as substantively, *Naz Foundation* constitutes a radical change in Indian constitutional jurisprudence. It fundamentally alters the relationship between a large disenfranchised, yet mostly silent and dispersed, minority and the hegemonic state. For this reason, it genuinely qualifies for that often gratuitously misused epithet of legal writing: “a landmark judgment.” Yet, like all landmark judgments, *Naz Foundation* has its strengths, weaknesses, and controversial points. To crudely adopt local imagery, the decision embodies the Red Fort’s majesty and rampart grandeur as well as Old Delhi’s confusing maze of crowded bazaars, streets, and alleys. In assessing this bewildering landscape, I will marvel at *Naz Foundation*’s monumental achievements as well as analyze its not-so glamorous elements.<sup>4</sup>

## II. STRUCTURAL AND TECHNICAL ASPECTS

As a threshold matter, a few technical quibbles about *Naz Foundation*’s format and style. Almost nineteen pages of the opinion’s electronic version contain a rambling regurgitation of counsels’ legal arguments. This section was included because the bench uncritically adopted that standard template for Indian judgments, which insists on an elaborate summary of arguments before the issues are discussed. Such summaries are invariably tedious to read and can be misleading since they are largely constructed from the judges’ notes and recollections of counsels’ submissions during oral arguments. Most serious readers of judicial decisions readily ignore such summaries, and most probably did so with *Naz Foundation*.

Second, although the opinion is divided into convenient headings to facilitate easy reading, each heading has the same font with no numbering scheme or outline to indicate how one relates to another. This makes it difficult to identify where one section ends and the other begins. Moreover, the text is so evenly formatted that, in many places, it is hard to determine whether a sentence represents the bench’s own words or is a verbatim quote from another authority.

---

<sup>3</sup> It is interesting that the term “untouchability” is left undefined by the Constitution. See generally, MARC GALANTER, *THE ABOLITION OF DISABILITIES — UNTOUCHABILITY AND THE LAW IN THE UNTOUCHABLES IN CONTEMPORARY INDIA* 227, 243 (J. Michael Mahar ed., 1972). In the absence of any textual evidence, it is difficult to argue that Article 17 targets only caste-based disabilities or exclusion. See A.M. BHATTACHARJEE, *EQUALITY, LIBERTY, AND PROPERTY* 5 (1997).

<sup>4</sup> At the same time, I should emphasize that this article does not purport to discuss every facet of *Naz Foundation*, such as its observations on the right to health, due to space and thematic limitations.

Third, the decision suffers from some taxonomical confusion about what to call those with same-sex attraction. Discussing the petitioners' standing in an early section, the judgment refers to Naz Foundation's work with the "gay community or individuals described as 'men who have sex with men.'" <sup>5</sup> It then proceeds to state that, "for sake of convenient reference," it would use the expressions "homosexuals" or "gay persons" or "gay community." Now, it does not seem particularly convenient to substitute three terms for two. But, more importantly, where do these definitions leave lesbians, bisexuals, and transgendered persons? Are they subsumed within "homosexuals" or "gay persons"? And what about those men who aren't conventionally bisexual or homosexual, and yet, aren't straight either because they have casual sex with men? Are they to be regarded as homosexuals or gay persons under the High Court's definition? <sup>6</sup>

Fourth, as the bench correctly notes a "rather peculiar feature" of the case involved the Home Ministry and Health Ministry filing separate and contradictory affidavits, even though they are both Central Government agencies. <sup>7</sup> Yet, the judgment goes on to accept the Home Ministry's affidavit and arguments as the Union of India's position without providing any explanation for doing so. The choice may have been obvious to the court, but it should have been revealed to the general public.

### III. RELIANCE ON LEGISLATIVE HISTORY, PRIOR DECISIONS, AND FOREIGN MATERIALS

The introductory part of the judgment includes a brief section on Section 377's legal history. This section is largely taken from Naz Foundation's original writ petition with one important omission. <sup>8</sup> The judgment pointedly ignores a critical paragraph in which the Foundation argued that the enactment of Section 377 "was contrary to then existing Indian traditions, which did not treat sodomy as a crime." <sup>9</sup> Perhaps, the judges felt that an examination of this issue would take them down the slippery road of interpreting religious and spiritual sources — a journey fraught with potential for controversy, as Chief Justice Chandrachud discovered after his *Shah Bano* decision. <sup>10</sup> It would have also required the judges

---

<sup>5</sup> *Naz Foundation*, *supra* note 1, ¶ 6.

<sup>6</sup> The confusion over nomenclature is further compounded in subsequent parts of the judgment that simply ignore the earlier definitions. For instance, paragraph 50 refers to the "MSM and [the] gay community," and paragraph 52 mentions "MSM," "lesbians," and "transgenders," while paragraph 61 reverts to the phrase "MSM and [the] gay community."

<sup>7</sup> *Naz Foundation*, *supra* note 1, ¶ 7.

<sup>8</sup> Petition of the Naz Foundation (*hereinafter* "Naz Foundation Petition") filed in *Naz Foundation v. Government of NCT, W.P.(C) No. 7455 of 2001 (Delhi HC)*, ¶¶ 21-24.

<sup>9</sup> This paragraph was based on an important collection of essays on same-sex attraction. See RUTH VANITA AND SALEEM KIDWAI, *SAME-SEX LOVE IN INDIA: READINGS FROM LITERATURE AND HISTORY* (2001).

<sup>10</sup> See *Mohammed Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945: (1985) 2 SCC 556.

to accept, deny, or at least comment on the petitioners' loaded submission that Section 377 was based on "traditional Judeo-Christian moral and ethical standards." Accepting such a submission, even if substantiated by historical evidence, could have made *Naz Foundation* appear unnecessarily divisive.<sup>11</sup>

Laconically observing that the "Penal Code was drafted by Macaulay and introduced in 1861 in British India," the judgment fails to mention anything about the statute's colorful legislative history. For instance, it could have referred to Macaulay's decision to refrain from appending any guidance notes or illustrations to Section 377 disregarding the practice he followed for other provisions of the Penal Code.<sup>12</sup> The bench could have also included, if it was so inclined, other historical nuggets, such as the fact that repeat offenders under Section 377 could be whipped under the now-repealed Whipping Act (No. 6 of 1864) in addition to being imprisoned. In this respect, *Naz Foundation* is disappointing for an inquiry into Section 377's Victorian background and its anachronistic assumptions about sexuality would have been especially useful to assessing the statute's relevance, if any, in contemporary times.<sup>13</sup>

*Naz Foundation's* discussion of Section 377's case-law is incomplete. Although the judgment briefly discusses the leading cases, it does not tell us whether all or any of them involved same-sex conduct. Instead, after discussing their underlying holdings, *Naz Foundation* argues that the "tests" for attracting Section 377 have changed from "the non procreative to imitative to sexual perversity."<sup>14</sup> If *Naz Foundation* intended to use the term "tests" as a moniker for "standards," the parenthetical information it supplies about each of the cases aren't particularly helpful. The parentheticals imply that courts have produced varying assessments about Section 377's objective or intent. They do not reveal the existence of shifting standards for sustaining a conviction.

Reflecting the Indian judiciary's growing cosmopolitanism, *Naz Foundation* cites a large number of international and comparative constitutional

---

<sup>11</sup> In this respect, *Naz* is strikingly different from other substantive due-process cases, such as *Rathinam*, its closest relative in some respects. In articulating a right to die under the Constitution, Justice Hansaria cited several religious and spiritual sources and pointed out that Mahatma Gandhi and Acharya Vinobe Bhave undertook fasts unto death. See *P. Rathinam and Nagbhusan Patnaik v. Union of India* AIR 1994 SC 1844: (1994) 3 SCC 394, ¶ 66, 79-81. By contrast, *Naz* is content with citing only the secular icons of our past, Nehru and Ambedkar. Their personal views on homosexuality remain publicly unknown, but their political philosophy would appear to tolerate it.

<sup>12</sup> Macaulay was apparently motivated by his puritanical belief that Section 377 involved "an odious class of offences [about which] as little as possible should be said." See Sonia K. Katyal, *Sexuality and Sovereignty: the Global Limits and Possibilities of Lawrence*, 14 WILLIAM AND MARY BILL OF RIGHTS L.J. 1429, 1452 (2006).

<sup>13</sup> On this score, *Naz Foundation* stands in stark contrast to *Lawrence*, a case that *Naz Foundation* relies on extensively, which contained an extensive discussion of legal history. See *Lawrence v. Texas*, 539 US 558, 568-571 (2003).

<sup>14</sup> *Naz Foundation*, *supra* note 1, ¶ 4.

sources. However, unlike other contemporary decisions, the foreign citations in *Naz Foundation* are not just ornaments or serial lights that make the decision sparkle.<sup>15</sup> Rather, *Naz Foundation* is among a handful of recent Indian decisions that actually rely on foreign precedents to shape an imaginative outcome relevant to the local context. *Naz Foundation*'s foreign references include materials from the usual suspects, the United States and the United Kingdom, as well as decisions from unlikely places, such as Hong Kong, Fiji, and Nepal. Those latter decisions are particularly important because they remind the cynic that gay rights aren't some luxurious Western construct. Moreover, the reference dates of various online sources cited in *Naz Foundation* reveal that the judges continued to research the issues long after the case had been reserved for judgment. Yet, precisely because it includes so much material, *Naz Foundation* appears like an over-decked Christmas tree with decorations obscuring most of the green representing its own holdings. In some places, *Naz Foundation* seems like the work of magpies: no shred of information seems to be too obscure for inclusion in its great kitchen sink of ideas. It is surely the Indian first case to actually cite a webcast!

A fairly unique dimension to *Naz Foundation* is that it takes cognizance of general statements by the prime minister, health minister, and solicitor general about Section 377 and men having sex with men. It suggests that those statements represent the government's position on the subject even though they were not made in or with respect to the *Naz Foundation* proceedings. In so doing, *Naz Foundation* formulates an estoppel-like doctrine that regards statements of high constitutional functionaries as unilateral declarations of government policy.<sup>16</sup> *Naz Foundation* also relies on several international "soft-law" sources, such as the "Yogyakarta Principles," and the "London Declaration of Principles on Equality" to argue that there is an emerging norm of international law on sexual orientation. Yet, as appealing as these principles might be, they lack the "bite" of "hard" international law for they have been adopted by very few states.<sup>17</sup> They are not general principles of international law, much less are they statements of customary international law.

#### IV. A RIGHT TO PRIVACY UNFURLED AND UNHINGED

*Naz Foundation* dodges through the Supreme Court's line of inconsistent decisions on privacy to forcefully assert that the Constitution protects

---

<sup>15</sup> See Adam M. Smith, *Making Itself at Home — Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218 (2006) (giving an extensive critique of the Supreme Court's use of foreign law).

<sup>16</sup> In the *Nuclear Tests Case*, the International Court of Justice concluded that the French President's statements on atmospheric nuclear tests in the Pacific could establish an international legal obligation for France. See *Nuclear Tests (Australia v. France)*, 1974 ICJ 253; *Nuclear Tests (New Zealand v. France)*, 1974 ICJ 457.

<sup>17</sup> For a more elaborate discussion on this point, see Bhargav Joshi and Neha Mary Koshy, *Judicial Interpretation of Article 21 in the Naz Foundation Case: Privacy — A Moral Right or a Creature of an Amoral Constitution*, Part III in this issue.

a fundamental right to privacy. That by itself would have been a noteworthy constitutional milestone. But *Naz Foundation* travels much further. It unhinges privacy from its traditional moorings by insisting that privacy is linked to “persons” and not places. In so doing, *Naz Foundation* articulates a unique non-spatial and portable understanding of privacy that extends beyond the home, bedroom, (or, perhaps, in this case, the closet).<sup>18</sup> This subtle, but skilful, piece of legal reasoning is *Naz Foundation*’s most attractive feature. Notwithstanding what happens on appeal, it is this feature of *Naz Foundation* that will ensure that it is frequently cited for many years to come before courts and in classrooms. Even so, *Naz Foundation*’s constitutional analysis is suboptimal and that its lofty holding on privacy is significantly undercut by the actual relief it offers.

*Naz Foundation*’s section on privacy opens with its discussion of the Supreme Court’s decision in *Kharak Singh*.<sup>19</sup> In that case, the Court struck down a state regulation, which permitted police surveillance of a criminal suspect. Speaking for the majority, Justice Ayyangar held that “the right to privacy is not a guaranteed right under our constitution.”<sup>20</sup> Yet, he found the regulation unconstitutional for violating what he considered to be a “common law right to privacy.”<sup>21</sup> Justice Ayyangar suggested that this common-law right could be derived from the phrase “personal liberty.” But he was unwilling to concede that it was a fundamental right. In a separate opinion, Justice Subba Rao emphatically argued that the Constitution does protect a fundamental right to privacy as an essential ingredient of personal liberty under Article 21.<sup>22</sup>

After a perfunctory review of *Kharak Singh*’s key holdings, *Naz Foundation* inaccurately reports that the *Kharak Singh* majority “did not go into the question” whether the police surveillance “violated the right to privacy.” Even more puzzling is *Naz Foundation*’s blithe observation, after referring to Justice Subba Rao’s separate opinion, that: “in effect, all seven learned judges [in *Kharak Singh*] held that ‘right to privacy’ was part of the ‘right to life’ in Article 21.”<sup>23</sup> The High Court does not explain the basis for this sweeping finding, and even the most liberal reading of *Kharak Singh* does not support such a conclusion.<sup>24</sup> *Naz Foundation* appears to have simply lifted this sentence, without proper attribution, from the Supreme Court’s embarrassingly bad decision in *Canara Bank*.

---

<sup>18</sup> *Naz Foundation* relied on the Supreme Court’s opinion in *Canara Bank* for this proposition. See *District Registrar and Collector v. Canara Bank*, (2005) 1 SCC 496. *Canara Bank*, in turn, relied on the U.S. Supreme Court’s decision in *Katz v. United States*, (1967) 389 US 347. *Id.*, ¶ 29.

<sup>19</sup> *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295.

<sup>20</sup> *Id.*, ¶ 19.

<sup>21</sup> *Id.*

<sup>22</sup> See M.C. Setalvad, *The Indian Constitution: 1950-1965* 64 (1967) (arguing that Justice Subba Rao actually dissented in the case).

<sup>23</sup> *Naz Foundation*, *supra* note 1, ¶ 35.

<sup>24</sup> See BHATTACHARJEE, *supra* note 3, 107-112 (*Kharak Singh* does not support a penumbral right to privacy in the Constitution).

*Naz Foundation* then discusses *Gobind*,<sup>25</sup> Justice Mathew's maverick decision in which he moved *Kharak Singh*'s goalposts on privacy much farther than even Justice Subba Rao.<sup>26</sup> Adopting Justice Douglas's reasoning from the *Griswold* decision,<sup>27</sup> Justice Mathew argued that right to privacy could be derived from a number of specified rights and the totality of the constitutional scheme. In other words, he found that the right to privacy was a derivative or penumbral right that emanated from the shadows cast by other fundamental rights, including the freedoms of speech and movement in Article 19. Justice Mathew's discovery of a penumbral right to privacy has been subsequently criticized by commentators.<sup>28</sup> Perhaps, anticipating that criticism, Justice Mathew included a cautionary note that the right to privacy "will have to go through a process of case-by-case development."<sup>29</sup> This cautionary note was emphatically reiterated in *Rajagopal*, the Supreme Court's next major decision on privacy, and repeated in *Naz Foundation*. Curiously, however, *Naz Foundation* omits any mention of the cautionary note when discussing *Rajagopal*, focusing instead on the decision's core holding that privacy is implicit in Article 21.

*Naz Foundation* then arrives at *Canara Bank*. In that Supreme Court decision, after a breezy survey of *Kharak Singh* and other precedents, Justice Lahoti concluded that the right to privacy has been accepted as "implicit in our Constitution." *Naz Foundation* happily adopts this conclusion and the rest of *Canara Bank*'s shoddy analysis. While it is certainly true that *Canara Bank* was binding precedent, *Naz Foundation* could have undertaken a more rigorous privacy analysis without simply cutting and pasting from *Canara Bank*. This is not unreasonable to demand from a bench, which demonstrates great skill in cherry-picking among conflicting Supreme Court decisions, regarding the strict-scrutiny test discussed below.

After holding that the Constitution protects a fundamental right to privacy, *Naz Foundation* proceeds to articulate the delocalized understanding of privacy discussed earlier. It then poignantly recognizes that "[a] person cannot leave behind his sense of gender or sexual orientation at home."<sup>30</sup> It then

<sup>25</sup> *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148. For criticism of *Gobind*, see Martha Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 59 (2001) (judgment was a needless invocation of privacy and has patriarchal overtones) cf. Fali S. Nariman, *The Right to be Let Alone – A Fundamental Right*, 17 INDIAN ADVOCATE 80, 81 (1977) (privacy rose Phoenix-like from the ashes in *Gobind*).

<sup>26</sup> For a favorable review, see Arun K. Thiruvengadam, *The Common Illumination of our House?: Foreign Judicial Decisions and Competing Approaches to Constitutional Adjudication*, 200-206 (unpublished J.S.D. dissertation submitted to New York University School of Law) (November 2006).

<sup>27</sup> *Griswold v. Connecticut*, 381 US 479. In this case, the U.S. Supreme Court invalidated a statute that prohibited contraceptive use because it violated the "right to marital privacy." Although such a right is not expressed recognized in the American Constitution, Justice Douglas located it in the "penumbras" and "emanations" of other constitutional guarantees.

<sup>28</sup> See, e.g., BHATTACHARJEE, *supra* note 3.

<sup>29</sup> *Gobind*, *supra* note 25, ¶ 28.

<sup>30</sup> *Naz Foundation*, *supra* note 1, ¶ 47. It is unclear, however, whether this sentence is the High Court's own words or simply a quote from another source.

intriguingly adds: “privacy allows persons to develop human relations without *interference from the outside community or from the State*” (emphasis added). This proposition is overbroad, and its inclusion was both gratuitous and distracting. Can anyone reasonably argue, especially in the Indian context, that the state must forbear from regulating all forms of human relations? After all, even the most ardent libertarian would concede that the state can and must act to prevent minors from being exploited by adults. And what if the human relations in a private space result in non-consensual sexual intercourse, domestic violence, or marital rape? Surely, the state can step in to regulate such behavior?

*Naz Foundation*’s substantive commentary on privacy ends with the observation that Section 377 denies a gay person a right to full-personhood, which is implicit under Article 21 of the Constitution. Presumably, this is because Section 377 violates the penumbral fundamental right to privacy. Yet, the thickness of this important conclusion is substantially undercut by the decision’s operative conclusion.<sup>31</sup> According to that conclusion, Section 377 is unconstitutional “insofar as it criminalises consensual sexual acts of adults *in private*” (emphasis added). One cynical, but plausible, way to interpret this conclusion is that, in reality, *Naz Foundation* only prohibits prosecutions of sexual acts between consenting adults in a private dwelling or establishment. Under this interpretation, Section 377 may still be freely applied to prosecute “non-private” conduct between adults in a public place. Such a result would be particularly unfortunate because most documented instances of police intimidation and harassment of gays, including the celebrated case of the Lucknow Four, involve conduct in public parks.

In some sense, the substantial disconnect between *Naz Foundation* soaring rhetoric on the concept of privacy and its parsimonious operative finding regarding Section 377 illustrates the limitations of using privacy as a doctrine to challenge morality-based legislation.<sup>32</sup> At first blush, privacy is a convenient and tempting shield to prevent the government from intruding into gays’ bedrooms. But it does not protect them when they leave their homes and affirm their bonds (even in the most benign manner) in public. Relying on privacy can be especially problematic in the Indian context because the “private” of many Indian gays is often a shared public space. Fearful of family censure, neighborhood condemnation, and the absence of a completely private dwelling, many gays are forced to bond in long shadows or dark corners of parks and beaches.<sup>33</sup> For them, *Naz Foundation*’s operative conclusion does not seem to be a particularly liberating and emancipating holding.

---

<sup>31</sup> *Naz Foundation*, *supra* note 1, ¶ 132.

<sup>32</sup> For an extensive critique of privacy as a means to advance gender justice, see MARTHA NUSSBAUM, *SEX EQUALITY, LIBERTY, AND PRIVACY: A COMPARATIVE APPROACH TO THE FEMINIST CRITIQUE IN INDIA’S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES* 242 (Zoya Hassan, E. Sridharan & R. Sudarshan eds., 2004).

<sup>33</sup> There is also a class dimension to linking same-sex conduct with privacy. Those with no homes or who are unable to use their homes are denied the ability to meaningfully engage in such conduct. See NUSSBAUM, *supra* note 32 at 257.

## V. A BOLD REPRISE OF SUBSTANTIVE DUE PROCESS

By declaring that the Constitution protects a fundamental right to privacy and invoking it to partially invalidate Section 377, *Naz Foundation* stages a dramatic revival of substantive due-process reasoning. Perhaps, in this respect, *Naz Foundation* is the Son or Daughter of *Maneka*<sup>34</sup> because the former is an unmistakable progeny of the latter. After all, it was in *Maneka* that the Supreme Court, fighting the real and imagined ghosts of *Gopalan*,<sup>35</sup> endorsed the use of substantive due process to embellish the Constitution's fundamental rights and freedoms. An American doctrine, substantive due process is invoked by courts to expand existing textual provisions to accommodate new and unenumerated rights.<sup>36</sup> In the thirty-two years since *Maneka* was handed down, the Supreme Court has expanded the scope of Article 21 to include a whole host of new rights, such as education, health, and shelter, in cases such as *Unnikrishnan*.<sup>37</sup> However, most of those "new" rights are socio-economic in nature and already find expression in one form or the other among the Constitution's Directive Principles. Moreover, the underlying cases (with the exception of *Unnikrishnan*) in which these rights were "discovered" did not require the courts to set aside or invalidate any central or state statutes.

If *Naz Foundation* remains undisturbed or is affirmed by the Supreme Court, it will be only the third time, by my reckoning, that an Indian court has used substantive due-process reasoning to invalidate a statute for transgressing a penumbral fundamental right. The only other decisions to use substantive due process in this manner are *Mithu*,<sup>38</sup> where the Supreme Court struck down mandatory death sentences under Section 303 of the Penal Code for life convicts who commit murder, and *Canara Bank*, where the Court invalidated an Andhra Pradesh statute for violating banking secrecy.<sup>39</sup> This is certainly a major development for Indian courts have generally avoided the use of substantive due process to invalidate legislative enactments.<sup>40</sup>

---

<sup>34</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 598.

<sup>35</sup> *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27: (1950) 1 SCR 88.

<sup>36</sup> For an incisive reading of *Maneka* and its treatment of due process, see David G. Barnum, *Article 21 and Policy Making Role of Courts in India: An American Perspective*, 30 (1) JOURNAL OF THE INDIAN LAW INSTITUTE 19, 31 (1988).

<sup>37</sup> *J.P. Unnikrishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178: (1993) 1 SCC 645.

<sup>38</sup> AIR 1983 SC 473.

<sup>39</sup> *Rathinam* also invoked substantive due-process to invalidate the Penal Code's proscription of suicide attempts. However, *Rathinam* was later overruled by a constitution bench in *Gian Kaur v. State of Punjab*, (1996) 2 SCC 648. On *Rathinam*'s use of substantive due process, see B.B. Pande, *Right to Life or Death? For Bharat Both Cannot be 'Right'*, (1994) 4 SCC 19 (J.).

<sup>40</sup> See T.N. Andhyarujina, *Evolution of Due Process of Law by the Supreme Court* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 193, 210 (B.N. Kirpal, et al. eds., 2000). One is un-persuaded by M.P. Singh's argument, in a companion article to this one, that *Maneka* dealt only with procedural, and not substantive, dimensions of due

## VI. DIGNITY AND AUTONOMY

*Naz Foundation's* emphasis on recognizing individual dignity and the autonomy of personal choice and action is an important constitutional outcome.<sup>41</sup> Moreover, by reprising *Gobind's* link between privacy and dignity and joining them at the hip, the High Court created a pair of Siamese twins on whose broad shoulders rest its findings regarding the unconstitutionality of Section 377. However, the High Court's discussion of dignity seems hurried and incomplete. For instance, *Naz Foundation* could have reflected a bit more on the reference in the Constitution's preamble to the "dignity of the individual" a phrase borrowed directly from the Irish Constitution. It is also surprising that *Naz Foundation* does not cite *Kharak Singh* in its dignity discussion for it was that case that first established a direct link between privacy and individual dignity.<sup>42</sup> So profound was *Kharak Singh's* linkage between privacy and dignity that it was subsequently reproduced in full as a block quote in *Gobind*. Yet, *Naz Foundation* curiously omits any reference to it.

It is also a bit of a puzzle why *Naz Foundation* did not utilize the solid hook of "personal liberty" in Article 21 to hang its holding on personal autonomy. Although Justice Ayyangar was unprepared to articulate a fundamental right to privacy in *Kharak Singh*, he profoundly expanded the scope of personal liberty protected by the Constitution. In attempting to overcome the dubious legacy of *Gopalan*, Justice Ayyangar held that personal liberty was a "compendious term," which included within itself all varieties of personal liberties other than those already enumerated in Article 19 (1). In other words, personal liberty in Article 21 includes all those residual liberties that aren't specifically protected by the Constitution's textual guarantees, notably those in Article 19.

---

process, and that consequently, a court cannot examine whether the substance of a law is just, fair, and reasonable. Singh's warped understanding of *Maneka* resembles a traffic light of two colors: green representing a narrow procedural fairness inquiry and red prohibiting everything else. My own preference is to regard *Maneka* as the "Mona Lisa" of our jurisprudence. It's hard to tell whether she's sardonically smiling, winking, or displaying some other emotion. See M.P. Singh, *Decriminalisation of Homosexuality and the Constitution* in this issue.

Indeed, *Maneka's* leading opinions authored by Justices Bhagwati and Krishna Iyer can support, and have supported, a variety of interpretations. It is true that, as Professor Singh points out, that A.K. Roy offers a restrictive reading of *Maneka*. See A.K. Roy v. Union of India, AIR 1982 SC 710. That is somewhat ironic because A.K. Roy is hardly a proud moment in India's constitutional history. The Court simply capitulated on the issue of preventive detention completely unchastened by the Emergency experience. Moreover, A.K. Roy was a five-judge bench and of inferior strength to the seven-member panel in *Maneka*. It was structurally incapable of radically reinterpreting *Maneka*. And other subsequent decisions have interpreted *Maneka* as permitting both procedural and substantive due-process reasoning. See, e.g., *Bombay Dyeing v. Bombay Environmental Action Group*, AIR 2006 SC 1489: (2006) 3 SCC 434 ¶ 157 (Article 21 does not only refer to the necessity to comply with procedural requirements, but also substantive rights of a citizen).

<sup>41</sup> *Naz Foundation*, *supra* note 1, ¶ 26.

<sup>42</sup> *Kharak Singh*, *supra* note 19, ¶ 15.

Relying on *Kharak Singh*, the Court in *Satwant Singh*<sup>43</sup> went even further and held that liberty under the Indian Constitution “bears the same comprehensive meaning” as is given to that term by the Fifth and Fourteenth Amendments to the United States Constitution.<sup>44</sup> If *Satwant Singh* is correct, then it is legitimate to adopt the U.S. Supreme Court’s decisions on the meaning of liberty. One of those decisions is *Casey*,<sup>45</sup> where the Supreme Court recognized that liberty includes a right to bodily integrity. In other words, persons have a protected right to retain control over their bodies without governmental interference.<sup>46</sup> This would appear to be a more practical manifestation of *Naz Foundation*’s personal autonomy principle, and one that is founded on a much stronger basis in Article 21.

## VII. THE “COMPELLING STATE INTEREST” STANDARD

According to *Naz Foundation*, any law, which infringes the conjoint fundamental right to dignity-privacy, must satisfy a “compelling state interest” in order to survive. It correctly attributes this standard to Justice Mathew’s opinion in *Gobind*. It then travels beyond *Gobind* to argue that the enforcement of public morality is not a compelling state interest to justify invading the privacy of adult homosexuals engaged in consensual sex.<sup>47</sup> To paraphrase Justice Mathew’s own words in *Kesavananda*, “I have tried, like Jacob of the Old Testament, to wrestle all the night with the angel,”<sup>48</sup> namely, why *Naz Foundation* relied on the absence of a “compelling state interest” to partially invalidate Section 377. One can hardly quarrel with *Naz Foundation*’s general proposition that enforcement of morality is not a compelling state interest, much less an important or even a marginal interest. However, *Naz Foundation*’s use of “compelling state interest” was neither necessary nor consistent with the arc of Indian precedent. It is true that Justice Mathew first proposed and used the “compelling state interest” standard in *Gobind* to determine whether the regulations at issue in that case passed constitutional muster. But his example has rarely been followed in any subsequent cases.

It should be pointed out that the “compelling state interest” standard, which Justice Mathew enthusiastically adopted in *Gobind*, is part of the U.S. Supreme Court’s strict-scrutiny test to screen restrictions on fundamental rights. That test was judicially developed largely because the American Constitution provides little textual guidance on what restrictions can be imposed on fundamental

<sup>43</sup> *Satwant Singh Sawhney v. Assistant Passport Officer*, AIR 1967 SC 1836.

<sup>44</sup> *Id.*, ¶ 51.

<sup>45</sup> *Planned Parenthood v. Casey*, 505 US 833 (1992).

<sup>46</sup> Richard Mohr, *The Shag-A-Delic Supreme Court: “Anal Sex,” “Mystery,” “Destiny,” and the “Transcendent” in Lawrence v. Texas*, 10 CARDOZO WOMEN’S L.J. 365, 380-381 (2004) (arguing that *Lawrence* should have adopted *Casey*’s bodily control principle because such control is part and parcel of human agency).

<sup>47</sup> *Naz Foundation*, *supra* note 1, ¶ 75.

<sup>48</sup> *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461, ¶ 1761.

rights. In India, the situation is rather different because the Constitution has “in-house” rules consisting of specific grounds on which “reasonable” restrictions can be imposed on most fundamental rights. It is one thing to refer to foreign precedents to expand the meaning of a fundamental right. It is quite another to borrow standards for how that right can be restricted from another jurisdiction with a very different analytical frameworks for resolving constitutional questions.<sup>49</sup>

Aside from *Gobind*, it is difficult to find any major decision that either affirms or applies the “compelling state interest” standard. Rather, as *Naz Foundation*, itself, acknowledges, after *Maneka*, any interference with life or personal liberty “must be right and just and fair and not arbitrary, fanciful, or oppressive.”<sup>50</sup> This “just, fair, and reasonable” standard has been the generally applicable benchmark to assess governmental action for the past three decades now. One way to reconcile the apparent internal contradiction in *Naz Foundation* would be to apply both *Maneka* and *Gobind* together. In other words, every governmental action that violates a fundamental right must henceforth satisfy *Maneka*’s test of “just, fair, and reasonable” as well as *Gobind*’s requirement of furthering a “compelling state interest.” If this interpretation of *Naz Foundation* is correct, *Naz Foundation* effects a rather radical restatement of our constitutional law. Another way to resolve this conundrum would be to apply the *Gobind* + *Maneka* formula only to restrictions on penumbral rights, which are not expressly recognized in the constitutional text. Restrictions on codified rights, on the other hand, would only have to meet the *Maneka* standard of reasonableness. This solution would imply a higher constitutional bar for actions affecting penumbral rights than those actions affecting textual rights. Such an outcome would be irrational since penumbral rights are, in fact, derivatives of textual rights, and do not behoove greater protection.

## VIII. CONSTITUTIONAL MORALITY

Even the most cynical reviewer of *Naz Foundation* will marvel at the way in which the bench rebutted the government’s argument that Section 377 is a legitimate manifestation of morality. Rejecting respondents’ contention that public disapproval reflects an underlying moral condemnation of homosexuality, *Naz Foundation* brilliantly posits that it is “constitutional morality” rather than popular morality that is the controlling benchmark.<sup>51</sup> The idea of a controlling

---

<sup>49</sup> In fairness to the *Naz Foundation* bench, Justice Mathew was a fairly consistent advocate for applying varying standards of judicial review depending on the subject involved. For instance, in *State of Gujarat v. Ambica Mills*, AIR 1974 SC 1300, he argued that laws regulating economic activity should “be viewed differently” from laws that concern freedom of speech and religion, voting, procreation, or criminal procedure. He would defer to legislative wisdom on economic laws and exercise greater vigilance in other areas. Of course, Justice Mathew’s deference on economic matters was in the context of India’s flirtation with socialism during the 1970s.

<sup>50</sup> *Naz Foundation*, *supra* note 1, ¶ 25.

<sup>51</sup> Petitioner’s counsel must share the credit for this innovative formulation inspired by a South African constitutional decision. But the *Naz Foundation* bench placed the formulation

“constitutional morality” is a logical extension of the bench’s secular approach to constitutional adjudication, discussed earlier. Moreover, *Naz Foundation* adroitly redirects the morality argument back at the government by deftly reasoning that stigmatizing and criminalizing homosexuals is against constitutional morality.

Although *Naz Foundation*’s substitution of constitutional morality for popular morality is an impressive restatement of constitutional doctrine, it is hardly a silver bullet for constitutional adjudication. One only has to consider the spaghetti bowl of inconsistent Supreme Court decisions regarding the constitutional status of liquor trade.<sup>52</sup> Some of India’s most enlightened justices have tied themselves up in knots over this issue largely because of its underlying moral implications. It is also important to clarify that *Naz Foundation* does not outlaw all forms of morality-based legislation or governmental action. Rather, the decision suggests that mere public disapproval of a practice or behavior is an inadequate reason to restrict it.

## IX. IMPLIED DESUETUDE OF SECTION 377

A key element of the Additional Solicitor General’s defense of Section 377 was that the provision was hardly ever enforced against gays. *Naz Foundation* initially rejected this contention as contrary to evidence and testimony proffered by the petitioner.<sup>53</sup> But, later in its opinion, the High Court returns to the argument, only to turn tables on the government.

“In fact, the admitted case of the Union of India that Section 377 IPC has generally been used in cases of sexual abuse or child

---

on a much firmer pedestal by shrewdly invoking that indisputable subaltern icon, B.R. Ambedkar. *Naz Foundation* cites Ambedkar’s speech to the Constituent Assembly in November 1948 in which he extolled the need for greater constitutional morality. What *Naz Foundation* fails to mention is that Ambedkar’s discussion of constitutional morality had nothing to do with fundamental rights or civil liberties. Rather, Ambedkar was defending the Assembly’s heavy borrowing from the Government of India Act 1935 for what he called “details of administration.” See VII CONSTITUENT ASSEMBLY DEBATES 38. In fact, Ambedkar may have quite possibly been using the term “constitutional morality” to refer to unwritten constitutional conventions and rules in the manner that the English legal historian, Maitland, used that term. See F. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 398 (1965) (describing constitutional conventions as “rules of constitutional morality”).

<sup>52</sup> See generally Arvind Datar, *Privilege, Police Power And Res Extra Commmercium – Glaring Conceptual Errors*, 21 NATIONAL LAW SCHOOL OF INDIA REVIEW 133 (2009).

<sup>53</sup> *Naz Foundation*, *supra* note 1, ¶ 74. There is another important, but unaddressed, reason for not accepting the Additional Solicitor General’s argument. Under our federal scheme of governance, it is the state governments that control police and law-enforcement agencies and make decisions about criminal prosecutions. The Central Government has very little direct role in determining whether or not to prosecute a case under Section 377. The Additional Solicitor General was not representing any state in the *Naz Foundation* proceedings; in fact, the states were not even parties to the case. Consequently, the High Court could not have relied on the Additional Solicitor General’s statement regarding the enforcement of Section 377 because he lacked the authority to make it.

abuse, and conversely that it has hardly ever been used in cases of consenting adults, shows that criminalization of adult same-sex conduct does not serve any public interest.”<sup>54</sup>

*Naz Foundation* reasons that, if Section 377 has not been used to prosecute adult same-sex conduct, why should such conduct continue to be proscribed. In other words, if a statutory provision has fallen into disuse, why bother maintaining it? Although *Naz Foundation* does not refer to it, there is an old common-law doctrine called “desuetude” that supports this reasoning.<sup>55</sup> This doctrine has, in fact, been recognized by the Indian Supreme Court in *Municipal Corporation v. Bharat Forge*.<sup>56</sup> After discussing the scope of the doctrine in English law, the Court ruled:

“Though in India the doctrine of desuetude does not appear to have been used so far to hold that any statute has stood repealed because of this process, we find no objection in principle to apply this doctrine to our statutes as well. This is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead a contrary practice being in use, he is still required to act as per the “dead letter.” We would think it would advance the cause of justice to accept the application of doctrine of desuetude in our country also. Our soil is ready to accept this principle; indeed, there is need for its implantation, because persons residing in free India, who have assured fundamental rights including what has been stated in Article 21, must be protected from their being, say, prosecuted and punished for violation of a law which has become “dead letter.” A new path is, therefore, required to be laid and trodden.”

It is unclear why the petitioners did not use desuetude as a ground to attack Section 377. Perhaps, it was because petitioners were not confident that they could satisfy all the elements of the doctrine. In fact, Justice Murlidhar apparently explored the idea that Section 377 suffers from desuetude during oral argument.<sup>57</sup> But for whatever reason the issue never made it to the opinion.

For desuetude to exist, the statute in question must have been in disuse for a substantial period of time and some contrary practice must have evolved during this period. One could argue that these elements are satisfied with respect to Section 377 in the context of consenting same-sex adults especially if the Additional Solicitor General’s position is accepted. Finally, if the admitting bench’s

---

<sup>54</sup> *Naz Foundation*, *supra* note 1, ¶ 86.

<sup>55</sup> See Jitendra N. Bhatt, *Dynamics and Dimensions of Doctrine of Desuetude*, (2004) 4 SCC 21 (J.).

<sup>56</sup> (1995) 3 SCC 434.

<sup>57</sup> See THE RIGHT THAT DARES TO SPEAK ITS NAME 49 (Arvind Narrain and Marcus Elridge eds., 2009).

comments are any indication, the Supreme Court might be tempted to adopt a desuetude-type approach to *Naz Foundation* on appeal. Admitting the appeal from the High Court's decision, the Chief Justice of India reportedly observed that no one had been prosecuted for "gay sex" under Section 377.<sup>58</sup>

## X. THE EQUALITY DETOUR.

*Naz Foundation's* discussion of equality is its Achilles' heel. From a purely tactical perspective, it is unclear why *Naz Foundation* even bothered addressing equality. It had already determined that Section 377 violated the penumbral fundamental right of equality-dignity. That finding provided a sturdy millstone to tie and sink the unconstitutional provision. In fact, the judges declined to deal with the Foundation's argument that Section 377 violated citizens' Article 19 freedoms because they were already convinced that the provision was unconstitutional. Could not the same approach have been taken with respect to the Foundation's equality arguments?

As a textual matter, Section 377 proscribes sexual acts involving carnal intercourse that are considered "unnatural" irrespective of whether they involve same-sex or opposite sex partners. Case law under the section shows that it has been used in prosecutions involving oral sex and anal sex. There is ample evidence to suggest that anal sex is not an exclusive homosexual preserve; many heterosexual couples routinely engage in it. And oral sex is commonly practiced by both same-sex and opposite-sex partners. *Naz Foundation* readily concedes this facial neutrality of Section 377.<sup>59</sup> Even so, the bench points out, the "sexual acts, which are criminalized are associated more closely with one class of persons, namely the homosexuals as a class" (emphasis mine). To bolster its reasoning that Section 377 is hostile to gays, the bench cites Justice O'Connor's *Lawrence* opinion criticizing the underlying statute in that case for singling out homosexuals as a class. But what *Naz Foundation* fails to mention is that the *Lawrence* statute only proscribed homosexual conduct; it was even called the "Texas Homosexual Conduct Statute." This rendered it an easy target for Justice O'Connor, who wrote a narrowly tailored concurring opinion without joining the majority view.<sup>60</sup>

One entirely agrees with *Naz Foundation* that Section 377 "does end up unfairly targeting a particular community." There is no question that Section 377 has a profoundly disparate and invidious impact on gays. However, one is

---

<sup>58</sup> See *Supreme Court Takes Up Petition Against Gay Sex*, THE HINDU, July 10, 2009.

<sup>59</sup> *Naz Foundation*, *supra* note 1, ¶ 94.

<sup>60</sup> In fact, Justice O'Connor remained unrepentant for her previous opinion in *Bowers*, where the underlying statute, like Section 377, applied to both same-sex and opposite-sex conduct. See *Bowers v. Hardwick*, 478 US 186 (1986). Justice Kennedy's majority opinion in *Lawrence* did not directly address equal protection. The judge concluded that, if the Court were to hold the statute invalid under the US Constitution's equal protection clause, some might argue that a differently drawn prohibition, which targeted both same-sex and different-sex conduct, is justifiable. See *Lawrence*, 539 US 558, 575 (2003).

skeptical about whether this argument will prevail before a cynical Supreme Court bench. There do not appear to be many cases in which a facially neutral law has been successfully challenged because it is enforced in a discriminatory manner. Witness what happened in *Rathinam* with respect to Section 309 of the Penal Code, which criminalizes an attempt to commit a suicide. Initially, the Bombay High Court struck down Section 309 on the ground of equal protection. It found that the provision did not provide adequate guidance and was susceptible to arbitrary application. However, the Andhra Pradesh High Court took a contrary view. The Supreme Court agreed with the Andhra Pradesh High Court, both in *Rathinam* as well as in *Gian Kaur* (which overruled *Rathinam*). Justices in both cases rejected the challenge to Section 309 on equal protection grounds.

## XII. THE DYNAMITE AND DICTA OF NON-DISCRIMINATION

One must applaud the *Naz Foundation*'s precedent-setting conclusion that sexual orientation is a valid anti-discrimination marker under Article 15 (1).<sup>61</sup> This part of the opinion is intricately reasoned with the help of international and comparative materials. It is difficult to dispute the logical consistency in the idea that sex, as a prohibited marker, must also include the analogous ground of sexual orientation.<sup>62</sup> If this conclusion is sustained by the Supreme Court, it has the potential to fundamentally reorder the Indian legal system. If sexual orientation is now included as one of these prohibited grounds, codified personal laws, including those that define marriage as being between a man and woman, are in constitutional jeopardy. But that outcome is no

*Naz Foundation* went on a "frolic of its own" by declaring that Article 15 (2), the Constitution's public-access provision, proscribes "horizontal discrimination" on the ground of sexual orientation.<sup>63</sup> This was a completely

---

<sup>61</sup> Article 15 (1) of the Constitution makes it illegal for the State to discriminate "on grounds only" of sex, place of birth, race, caste, or religion.

<sup>62</sup> Professor M.P. Singh's attempt to disparage this outcome is difficult to fully appreciate. A careful reading of his critique reveals that he does not question the wisdom of the actual outcome. He endeavors, instead, to quarrel with *Naz Foundation*'s holding with reference to the phrase "on grounds only" in Article 15 (1). Singh argues that Section 377 does not constitute discrimination on the ground *only* of sexual orientation because it applies to all male persons irrespective of their orientation. To buttress this questionable proposition, he cites the example of sodomy in jails for men only. I am afraid that I do not understand the relevance of this odd example. Arguably, the prosecution of male prisoners only for consensual sodomy would constitute discrimination based only on their sex. See M.P. Singh, *Decriminalisation of Homosexuality and the Constitution* in this issue.

<sup>63</sup> *Naz Foundation*, *supra* note 1, ¶ 104. Article 15 (2) desegregates Indian public spaces that were historically closed to lower castes and untouchables. The article prohibits access restrictions in shops, public restaurants, hotels, and places of public entertainment based on religion, race, caste, sex, or place of birth. Article 15 (2) also forbids usage restrictions for wells, tanks, bathing ghats, roads, and places of public resort that are either maintained wholly or partly out of state funds or dedicated for the general public's use.

unnecessary observation that had nothing to do with the underlying case. It is true that gays face a great deal of harassment and discrimination in matters such as housing and employment.<sup>64</sup> But that was not the point of this case. *Naz Foundation's* writ petition principally focused on the misuse of Section 377 by law-enforcement agencies. It did not raise the issue of private discrimination by non-state actors nor was this issue addressed during oral arguments. Therefore, *Naz Foundation* misdirected itself to address a non-issue, and consequently, its observations regarding Article 15 (2) are only in the nature of *obiter dicta*.

### XIII. STRICT SCRUTINY

It is difficult to understand why *Naz Foundation* invoked the American doctrine of strict scrutiny to invalidate Section 377. As *Naz Foundation* itself admits,<sup>65</sup> the use of strict scrutiny has been decisively rejected by the Supreme Court rather recently in *Ashok Kumar Thakur*.<sup>66</sup> Yet, *Naz Foundation* insists that it can still apply strict scrutiny relying on a Supreme Court decision, *Anuj Garg*,<sup>67</sup> which predated *Ashok Kumar Thakur* and applied that standard. Adopting a “harmonious construction” of *Ashok Kumar Thakur* and *Anuj Garg*, *Naz Foundation* concludes that strict scrutiny does not apply to affirmative action, but it can be used to assess disadvantaging measures targeting a vulnerable group based on personal characteristics.

*Naz Foundation's* reasoning on this issue seems disingenuous for several reasons. First, *Anuj Garg* was a decision of a two-judge bench while *Ashok Kumar Thakur* was a constitution bench decision. Second, *Ashok Kumar Thakur* was the later decision, handed down several months after *Anuj Garg*; and ordinarily the subsequent larger bench decision should carry more weight than an earlier decision from a smaller bench. Third, there is nothing in *Ashok Kumar Thakur* to indicate that its disapproval of strict scrutiny was restricted to affirmative action. Fourth, how do we reconcile the *Naz Foundation's* cute distinction between affirmative action and other cases with *John Vallamattom*<sup>68</sup>? That 2003 Supreme Court decision did not involve affirmative action. Yet, Justice Khare, who wrote the leading judgment for the Court, expressed his skepticism about applying strict scrutiny in India.

---

<sup>64</sup> See generally *The Right that Dares to Speak its Name*, *supra* note 57, 17-18. In *Lawrence*, Justice Kennedy conceded that when homosexual conduct is made criminal by the state, that declaration in and of itself is an invitation to subject homosexuals to private discrimination. See *Lawrence*, 539 US 558 (2003).

<sup>65</sup> *Naz Foundation*, *supra* note 1, ¶ 110.

<sup>66</sup> *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

<sup>67</sup> *Anuj Garg v. Hotel Association of India And Ors*, AIR 2008 SC 663; (2008) 3 SCC 1.

<sup>68</sup> *John Vallamattom v. Union of India*, AIR 2003 SC 2902. In this case, the Court invalidated Section 118 of the Indian Succession Act, which forbade Indian Christians from making so-called death-bed charitable dispositions. Ironically, both *Anuj Garg* and *Naz Foundation* cite *John Vallamattom*, but fail to mention its position on strict scrutiny. See *Anuj Garg*, *supra* note 67, ¶ 28, 33 and *Naz Foundation*, *supra* note 1, ¶105.

One has the same concerns about using strict scrutiny with respect to equality and equal protection claims as one does about using the “compelling state interest” standard to assess penumbral right violations. The two American doctrines are, in a sense, two sides of the same coin. Strict scrutiny requires the showing of a compelling state interest in order for a suspect classification to be upheld. In fact, U.S. courts developed the strict scrutiny standard as a tool to distinguish between legitimate and illegitimate classifications. Such a standard was especially necessary because the U.S. Constitution does not contain any anti-discrimination provisions like Articles 15 and 16 of the Indian Constitution.

In contrast, the Indian Supreme Court has generally applied rational-basis review to evaluate most classifications.<sup>69</sup> From a tactical perspective, the *Naz Foundation* bench could have applied this widely accepted and uncontroverted test to Section 377 and concluded, based on the evidence, that Section 377 flunked it. This would have been a better strategy than subjecting Section 377 to a more stringent test, whose invocation is likely to be seriously disputed in the Supreme Court appeal.

#### XIV. ROYAPPA NON-ARBITRARINESS AND SECTION 377

There is one dimension of equality jurisprudence, barely discussed in *Naz Foundation*, which could be particularly useful in defending *Naz Foundation*'s findings on equality before the Supreme Court. It is the so-called “new doctrine” of equality that the Court announced in its much-cited decision, *E.P. Royappa v. Tamil Nadu*.<sup>70</sup> In that case, the Court held that “equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch.” Arbitrariness as a dimension of equality has radically transformed Indian equality jurisprudence. And despite the cavils of its critics,<sup>71</sup> *Royappa* non-arbitrariness is now a deeply embedded concept of Indian constitutional and administrative law. It has emerged as the key litmus test to evaluate all kinds of governmental action. *Royappa* non-arbitrariness is an especially potent saber, when combined with the requirement of reasonableness that *Maneka* demands of state action. As Justice Bhagwati put it, *Maneka* and *Royappa*'s key teachings of reasonableness and non-arbitrariness “pervade the entire constitutional scheme” and form a golden thread that runs through the Constitution's whole fabric.<sup>72</sup>

<sup>69</sup> See Soli J. Sorabjee, *Equality in the United States and India* in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 94, 103 (Louis Henkin & Albert J. Rosenthal eds., Columbia, 1990).

<sup>70</sup> AIR 1974 SC 555: (1974) 4 SCC 3.

<sup>71</sup> See H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 438 (1991); RATNA KAPUR & BRENDA COSSMAN, SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA 224, n. 12 (1996).

<sup>72</sup> *Ajay Hasia v. Khalid Mujib*, (1981) 2 SCR 79.

Although Section 377 is facially neutral, there is clear and convincing evidence that the provision had been used to harass and intimidate those with same-sex attraction. One reason why Section 377 has been so frequently misused is that it is unaccompanied by any textual guidance. It has no illustrations or notes like other sections of the Penal Code reflecting Macaulay's personal repugnance for what he believed was deviant behavior. Moreover, the statute's principal yardstick for culpability is the antique and opaque phrase "against the order of nature" this phrase has resulted in significantly inconsistent interpretations as the case law reveals. It also vests law-enforcement agencies with unbridled discretion, which has been seriously abused.

Taking these facts together, a persuasive argument could be made that Section 377 is both arbitrary and unreasonable and consequently unable to pass constitutional muster under the *Royappa+Maneka* formula. Indeed, the formula has been previously used by the Supreme Court to declare a Penal Code provision unconstitutional. A constitution bench in *Mithu* struck down Section 303 of the Penal Code because it was "arbitrary beyond the bounds of all reason." Interestingly, *Naz Foundation* refers to *Royappa* non-arbitrariness in its general survey of Indian equality principles.<sup>73</sup> However, *Naz Foundation* curiously refrains from invoking *Royappa* when applying those principles to Section 377, relying instead on the statute's unreasonable classification.

## XV. SEVERABILITY

*Naz Foundation's* use of the severability-in-application doctrine is certainly a creative extension of the Supreme Court's decision in *Chamarbaugwala*.<sup>74</sup> However, it is important to note that the severability rule was applied in *Chamarbaugwala* to a statute that was unconstitutional for reasons of legislative competence rather than violations of any fundamental rights. Be that as it may, *Naz Foundation* skillfully and pragmatically invoked *Chamarbaugwala* to retain Section 377 on the statute book.

## XVI. CONCLUSION

*Naz Foundation* gives new meaning to identity politics in India. Dominant political and legal conceptions of identity focus on groups traditionally knitted together by religious, caste, or linguistic ties. By acknowledging the distinct status of persons, whose only common bond is sexual orientation, and addressing them as a collective (actually using the phrase "LGBT"), *Naz Foundation* recognizes the emergence of new social identities while carefully sidestepping lingering concerns about their elite roots and urban biases.

---

<sup>73</sup> *Naz Foundation*, *supra* note 1, ¶ 89, 90.

<sup>74</sup> R.M.D. Chamarbaugwala v. Union of India, AIR 1957 SC 628. Ironically, the Court in this case advocated caution in the use of American precedents.

In so doing, *Naz Foundation*, unlike any other decision before it, has the unique potential to diminish popular, but irrational, moral condemnation of stigmatized groups.<sup>75</sup> Witness the headlines in the Indian press reporting the decision “It is ok to be Gay,” “Sexual Equality,” “Gay and Finally Legal,” and “Sexual revolution in India.” It is for this reason, perhaps, that some commentators have argued that *Naz Foundation* is India’s *Roe* moment.<sup>76</sup> Indeed, the mass publicity and fanfare heralding the decision presents a rare opportunity for activists to reshape public opinion and influence a wider social debate about gay rights.<sup>77</sup> This is especially important, as gays and other disaffected groups cannot only rely on courts to advance their civil rights agenda. They must build new political coalitions and engage the legislative process.<sup>78</sup>

Finally, the decision bolsters the Delhi High Court’s reputation for being India’s most important constitutional court apart from the Supreme Court. In recent years, the High Court has produced some innovative decisions that push the boundaries of our constitutional jurisprudence.<sup>79</sup> *Naz Foundation* is the latest milestone in the Delhi High Court’s impressive track record, and a demonstration that one does not always need to depend on the Supreme Court for constitutional salvation.

---

<sup>75</sup> Stigma against gays is widely prevalent even among urban middle classes who are considered to be socially progressive. See, e.g., *The Rainbow Schism*, HINDUSTAN TIMES, August 13, 2009 (according to a recent survey, 62 percent of respondents think homosexuality is a disease; 80 percent believe that same-sex relationships are against Indian culture and over 90 percent say they have no gay friends).

<sup>76</sup> See Lawrence Liang & Siddharth Narrain, *Striving for Magic in the City of Words*, HIMAL, August 3, 2009.

<sup>77</sup> See, e.g., Shibu Thomas & Kshitij Bisen, *Rallying to Change Mindsets, Dispel Phobia*, TIMES OF INDIA, 18 August 2009 (reporting on changing attitudes in the context of Mumbai’s gay pride parade).

<sup>78</sup> There are some encouraging signs that this is happening. See, e.g., *Transgenders to Enter Politics*, THE HINDU September 7, 2009 (group of transgender persons decide to contest elections to secure greater rights).

<sup>79</sup> Two notable gems are *Maqbool Fida Hussain v. Raj Kumar Pandey*, 2008 Cr L.J. 4107 (Del) (decrying misuse of obscenity prosecutions) and *Justice and Parents Forum for Meaningful Education v. Union of India*, AIR 2001 Del 212 (affirming constitutional rights of children and outlawing corporal punishment in Delhi schools). Chief Justice Shah and Justice Murlidhar, who comprised the *Naz Foundation* bench, also recently dismissed a petition, which wanted a reality television program for its sexual content. Refusing to take the case, the Chief Justice reportedly observed that Indian culture “is not so fragile” to be affected by a single program. See Manoj Mitta, *Moment of Truth for Moral Police?*, TIMES OF INDIA, August 2, 2009.

