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### Sovereignty Considerations and Social Change in the Wake of India's Recent Sodomy Cases

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## SOVEREIGNTY CONSIDERATIONS AND SOCIAL CHANGE IN THE WAKE OF INDIA'S RECENT SODOMY CASES

Deepa Das Acevedo\*

*American constitutional law scholars have long questioned whether courts can really drive social reform, and this position remains largely unchallenged even in the wake of recent landmark decisions affecting the LGBT community. In contrast, court watchers in India—spurred by developments in a special type of legal action developed in the late 1970s known as “public interest litigation,” or “PIL”—have only recently begun questioning the judiciary’s ability to promote progressive social change. Indian scholarship on this point has veered between despair that PIL cases no longer reliably produce good outcomes for India’s most disadvantaged, and optimism that public interest litigation can be returned to its glory days of heroic judicial intervention. And no pair of cases so nicely captures this dichotomy as the 2009 decision in Naz Foundation, which decriminalized sodomy, and the 2012 decision in Suresh Kumar Koushal, which overruled Naz. This paper uses public interest litigation and India’s recent sodomy cases to demonstrate that the relationship between state actors (like courts) and society is often far less stable than the democratic ideal of “citizen sovereignty” would suggest.*

*I argue, first, that supporters of public interest litigation should neither give up on PIL suits as a means of effecting social reform nor imagine that PIL suits can ever reliably produce desirable outcomes. As a type of legal action, public interest litigation simply cannot be reverse engineered in this way. But second, I reinterpret the documented and widely critiqued shift in PIL cases from protecting fundamental rights during the 1970s and ‘80s to protecting the interests of advantaged litigants in the 1990s and 2000s. While earlier PIL cases reflect the Indian Constitution’s commitment to government-led social reform and the sharing of sovereignty between citizens and the state, contemporary PIL cases reflect the Constitution’s commitment to an agency theory of sovereignty whereby government merely acts on behalf of citizens. Because neither vision of sovereignty is paramount over the long run, shifts in public interest litigation reflect the productive and dynamic equilibrium between the two.*

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INTRODUCTION

The idea of legal liberalism—that courts can be the means of progressive social change—has been on something of a roller-coaster ride in the United States. Scholars documenting the ups and downs of this journey usually begin with the rise of legal realism toward the end of the nineteenth century and the subsequent development of legal process theory, then focus on the Warren Court and the Supreme Court’s conservative turn in the 1970s and 1980s, and usually taper off around the rise of neo-republican theory in the 1980s and 90s.<sup>1</sup> Most recently, *Obergefell*<sup>2</sup> and its precursors have prompted some commentators—usually critics<sup>3</sup>—to argue that the Court is once again acting as an agent of social change, although this view has been rejected by other commentators across the political

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<sup>1</sup> On the definition of legal liberalism, see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2 (1996) (calling it “trust in the potential of courts, particularly the Supreme Court, to bring about ‘those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, *policy chance with nationwide impact*”).

<sup>2</sup> *Obergefell v. Hodges*, 576 U.S. \_\_ (2015). See also KALMAN, *supra* note 1, at 88 (noting that “by 1980, legal liberalism was feeble”).

<sup>3</sup> See, e.g., David Upham, *Symposium: A tremendous defeat for “We the People” and our posterity*, SCOTUSblog (Jun. 26, 2015, 4:26 PM), <http://www.scotusblog.com/2015/06/symposium-a-tremendous-defeat-for-we-the-people-and-our-posterity/> (arguing that “it [cannot] plausibly be said that the people at large have generally demanded today’s result. As the Court noted, the states and the people remain deeply divided”).

spectrum.<sup>4</sup> For the most part, American legal liberalism has been having a rough time of it for around three decades.

Of course, whether or not courts can—and should—be agents of social reform is hardly a uniquely American debate. Similar conversations occur among scholars of Israeli law in regards to the successfulness and desirability of “values-based” judging.<sup>5</sup> They are also common among Canadian *Charter* scholars on either side of the “court-party thesis,” according to which citizen interest groups drive judicial interpretation of the *Charter* and “judges drive the *Charter*, not *vice versa*.”<sup>6</sup>

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<sup>4</sup> See generally GERALD N. ROSENBERG, 2 THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2008). See also Stephen M. Feldman, (Same) Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process (with an Emphasis on *Obergefell v. Hodges*), 24 WM. & MARY BILL OF RTS. J. 341, 351 (2015) (“Supreme Court decisions, including *Obergefell*, do not wield sufficient power to change society independently of other societal and cultural forces.”); Kyle C. Velte, *Obergefell’s Expressive Promise*, 6 HOUSTON L. REV. OFF REC. 157, 161 (2015–16) (“Because *Obergefell’s* holding—“[t]he nugget that will have binding precedential effect”—is narrow, it will not regulate behavior outside of marriage. It will not prohibit discrimination against LGBT individuals in other contexts. Thus, the promise that *Obergefell* holds to effect broad, positive change—to propel the law toward formal equality—is in its expressive power.”); Ilya Shapiro, *Introduction*, 2014–15 CATO SUP. CT. REV. 1, 9 (2014–15) (arguing that “The result [in *Obergefell*] was wholly expected given the rapid shifts in popular opinion on the subject, as well as the Court’s ruling on the Defense of Marriage Act two years ago in *United States v. Windsor*”).

<sup>5</sup> On “values-based judging,” see, e.g., MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL 38 (2011) (critically describing the “courts as agents of liberal values”); Aharon Barak, *The Role of the Supreme Court in a Democracy*, 33 ISR. L. REV. 1, 3 (1999) (“In the creation of judicial law—a product of judicial discretion—the judge gives expression to the basic values of the legal system... The values which direct the judge... are not the results of public-opinion surveys, nor of populism which sweeps the masses... Indeed, when society is not faithful to itself, the judge is not obliged to give expression to the fleeting winds of the hour”). On the role of courts in effecting social change, compare Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 46–47 (Fac. Scholarship Series, Paper No. 3692, 2002) (arguing, in contrast to ROSENBERG, THE HOLLOW HOPE (2008) that “I do not claim that the court can cure every ill of society, nor do I claim that it can be the primary agent for social change”) (emphasis mine) with Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216, 233 (1999) (arguing, in agreement with ROSENBERG, THE HOLLOW HOPE, that “courts have neither purses nor swords ... they must rely on the cooperation and the good will of the other powers to positively implement their decisions. When such cooperation is not forthcoming, the court’s decision remains ineffective”).

<sup>6</sup> See, e.g., Lise Gotell, Book Review, 9 QUEEN’S L. J. 843, 896 (2005) (reviewing CHRISTOPHER P. MANFREDI, FEMINIST ACTIVISM IN THE SUPREME COURT: LEGAL MOBILIZATION AND THE WOMEN’S LEGAL EDUCATION AND ACTION FUND (2004) and noting that Manfredi acknowledges that “there is no necessary

Like the United States, India is experiencing something of a downward adjustment in the way scholars, lawyers, and judges think of court-driven progressive change, but the context and implications of this shift are hugely and necessarily distinct. Let's begin with some constitutional prose. Comparative analyses of the Indian and American constitutions have usually characterized the former as "militant" and the latter as "acquiescent" in terms of the relationship they envision between the state and society.<sup>7</sup> In this narrative, India's founding document sets up a state that seeks to reform society by challenging old practices and affirming new rights. Conversely, the American Constitution seeks merely to preserve the status quo and establish negative rights in the mode of classical liberalism.<sup>8</sup> Unsurprisingly, then, signs that legal liberalism may be on the wane carry a different and arguably a more dispiriting significance in India.

To be sure, there are great problems with this way of talking about constitutions in general and about the Indian Constitution in particular.<sup>9</sup> An important goal of this paper is to add one more data point in support of the argument that Indian constitutional jurisprudence actually and appropriately reflects a "dynamic equilibrium" between two very different visions of state-society relations, rather than being straightforwardly committed to state-led reform.<sup>10</sup> Each of these visions of state-society relations corresponds to an understanding of how sovereignty works in a democracy. Some elements of the Indian Constitution reflect a fairly conventional

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connection between favourable legal change, positive policy consequences, social conditions and movement building" and that "[d]rawing on Rosenberg's work, Manfredi complicates his doctrinal analysis of feminist influence by analyzing litigation and legal decisions as part of a broader process of social and political mobilization"); F.L. Morton, *The Charter Revolution and the Court Party*, 30 OSGOODE HALL L. J. 627, 630 (1992).

<sup>7</sup> GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY 216 (2010).

<sup>8</sup> *But see* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (arguing that the U.S. Constitution was not primarily influenced by negative rights in the classical liberal mode and that the status quo the revolutionaries were seeking to preserve was an older, non-property-based conception of Englishmen's rights).

<sup>9</sup> *See, e.g.*, PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS 203 (1993) ("The state was connected to the people-nation not simply through the procedural forms of representative government; it also acquired its representativeness by directing a program of economic development on behalf of the nation... The two connections did not necessarily have the same implications for a state trying to determine how to use its sovereign powers").

<sup>10</sup> Deepa Das Acevedo, *Temples, Courts, and Dynamic Equilibrium in the Indian Constitution*, 64 AM. J. COMP. L. \_\_ (2016).

“agency” view of governmental authority,<sup>11</sup> while others envision such an active or “militant” role for government that it is difficult to view the state as merely the agent of the sovereign people.<sup>12</sup> Since neither of these visions of sovereignty is—or is meant to be—paramount over the long run, they exist in a perpetual and dynamic equilibrium with one another. Part III will briefly describe these two visions and explain how they are borne up by the specific aspect of Indian law, public interest litigation, that’s at issue here.

A second reason why a decline in legal liberalism has different implications for India is that the history of *court*-driven change (rather than merely *state* or *law*-driven change) as well as the public reception of such change have been markedly different there.<sup>13</sup> While Indian courts have always had an important role in advancing and upholding progressive policies, they have been especially prominent since the rise of public interest litigation in the 1970s. Unlike in the United States, where “public interest law” refers to any legal work or advocacy done for the greater good or for those who cannot afford representation,<sup>14</sup> Indian “public interest litigation” (PIL) is a distinct way of articulating a legal complaint, much like filing an individual civil suit is different from filing a class action or an administrative grievance.<sup>15</sup> Framing a complaint as a PIL suit allows petitioners to

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<sup>11</sup> Das Acevedo, *supra* note 10, at \_\_ (describing how many contract theories of democracy view sovereignty “like an object whose ownership can’t really be shared” but which needs to be delegated from “the people” to their representatives for the purposes of effective governance).

<sup>12</sup> Das Acevedo, *supra* note 10, at \_\_ (arguing that the Indian Constitution “envisions a state with huge independent discretion to control social ordering” and that “[h]aving that kind of discretion baked right into one’s constitutional cake means that sovereignty *can’t* wholly owned by citizens: it has to be shared by both citizens and the state”).

<sup>13</sup> See, e.g., K.G. Balakrishnan, Chief Justice of India, Fifteenth Annual Lecture at the Singapore Academy of Law (Oct. 8, 2008) (on file with author):

The main rationale for ‘judicial activism’ in India lies in the highly unequal social profile of our population, where judges must take proactive steps to protect the interests of those who do not have a voice in the political system and do not have the means or information to move the Courts. This places the Indian Courts in a very different social role as compared to several developed nations where directions given by ‘unelected judges’ are often viewed as unjustified restraints on the will of the majority.

<sup>14</sup> See, e.g., *What is Public Interest Law?*, HLS.HARVARD.EDU, <http://hls.harvard.edu/dept/opia/what-is-public-interest-law/> (last visited Jan. 31, 2016) (defining public interest law by practice setting, work type, and issue area, among other things).

<sup>15</sup> On public interest litigation *see generally*, Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE 159 (B.N.

avoid traditional standing requirements (like personal harm) and briefing requirements (like the submission of formal writ petitions) in the interests of removing barriers to justice for the most disadvantaged.<sup>16</sup> Additionally, courts hearing PIL suits often act as quasi-arbitrators, conduct independent fact-finding, and require periodic progress reports from the parties.<sup>17</sup> And not infrequently, courts *themselves* instigate PIL “suits” by taking *suo motu* cognizance of specific issues.<sup>18</sup>

Given these striking features and the stack of extremely progressive PIL cases that were decided early on—as well as a growing sense that India’s executive and legislative branches are incapable of governing—it’s no wonder that public interest litigation is increasingly viewed as a crucial tool for a Court focused on “good governance.”<sup>19</sup> Simultaneously, however, PIL cases have become a popular tool for petitioners pursuing urban, middle-class, or socially conservative ends—so much so, in fact, that contemporary

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Kirpal et. al. eds., 2000); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495 (1989); Rajeev Dhavan, *Whose Law, Whose Interest*, in PUBLIC INTEREST LAW (Jeremy Cooper & Rajeev Dhavan eds., 1986); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

<sup>16</sup> On standing, see Upendra Baxi v. State of Uttar Pradesh and Another, 2 S.C.C. 308 (1983) (an early classic in public interest litigation that featured a famous law professor petitioning on behalf of the residents of a women’s home). On briefing, see Khatri v. State of Bihar, 1981 A.I.R. (S.C.) 928, 1 S.C.C. 623 (another benchmark case, in which a lawyer forwarded a newspaper article detailing prison abuses to the Supreme Court and the Court treated the article as a writ petition). *Khatri* and its companion cases at 1 S.C.C. 627 and 1 S.C.C. 635 are collectively known as the “Bhagalpur Blinding Cases” and gave rise to what is commonly known in India as “epistolary jurisdiction.” Susan D. Susman, *Distant Voices in the Court of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT’L L. J. 54, 58 n. 3 (1994-95).

<sup>17</sup> See, e.g., Rural Litigation and Entitlement Kendra v. Uttar Pradesh, A.I.R. 1988 S.C. 2187 in which the Court appointed expert committees to determine whether mining in the Doon Valley had adverse environmental impact *and also* created a monitoring committee which continued to oversee “quarrying and mining operations in the Valley even more than a decade after the final disposal of the case in 1988”). Videh Upadhyay, *Changing Judicial Power: Courts on Infrastructure Projects and Environment*, 35 ECON. & POL. WKLY 3789, 3790 (2000).

<sup>18</sup> Marc Galanter & Vasujith Ram, *Suo Moto Intervention and the Indian Judiciary* (Sept. 25, 2015) (unpublished manuscript) (on file with author).

<sup>19</sup> Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 4 (2009) (discussing the “Court’s development of two new tools—the basic structure doctrine and its expanded right to life jurisprudence—to address...apparent failings of representative governance”).

scholarship on public interest litigation is overwhelmingly preoccupied with asking if this much beloved hallmark of Indian jurisprudence can be saved or even defended.<sup>20</sup>

Few cases better reflect the shifting tone of public interest litigation and of legal liberalism in India than the 2009 opinion in *Naz Foundation*<sup>21</sup> that decriminalized sodomy and the 2013 *Koushal*<sup>22</sup> decision that reversed *Naz*. Both were PIL suits; the first was filed in the Delhi High Court by an NGO focusing on HIV/AIDS and sexual health issues, while the second was filed in the Supreme Court by lead petitioners described as “citizens of India who believe they have the moral responsibility and duty in protecting cultural values of Indian society.”<sup>23</sup> Read together, *Naz* and *Koushal* express the primary argument of this paper—at once narrow and extremely contentious (at least among scholars of Indian law)—that public interest litigation can never reliably advance certain kinds of progressive outcomes.

To be perfectly clear, I am not just saying that PIL cases *have* increasingly produced outcomes favoring advantaged litigants. This descriptive argument has already been made, with excellent empirical support and in many different areas of the law, by several lawyers and legal academics.<sup>24</sup> Nor am I advocating any particular way of “fixing”

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<sup>20</sup> Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107 (B.N. Kirpal et al eds., 2008); Balakrishnan Rajagopal, *Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 18 HUM. RTS REV. 157, 158 (2007) (arguing that “the Court’s activism increasingly manifests several biases – in favor of the state and development, in favor of the rich and against workers, in favor of the urban middle-class and against rural farmers”); SHOBHA AGGARWAL, THE PUBLIC INTEREST LITIGATION HOAX: TRUTH BEFORE THE NATION: A CITIZEN’S REPORT ON HOW PIL FAILS TO PROVIDE JUSTICE TO THOSE WHO NEED IT MOST (2005) (arguing that public interest litigation has faltered because of the Supreme Court’s shift away from principles of “natural justice”); Prashant Bhushan, *Supreme Court and PIL: Changing Perspectives Under Liberalisation*, 39 ECON. & POL. WKLY 18 (2004)

<sup>21</sup> *Naz Foundation v. Government of NCT of Delhi*, Writ Petition (Civil) No.7455 of 2001 (henceforth *Naz*).

<sup>22</sup> *Suresh Kumar Koushal v. Naz Foundation*, Civil Appeal No. 10972 of 2013 (henceforth *Koushal*).

<sup>23</sup> *Id.* at 15.

<sup>24</sup> Varun Gauri & Poorvi Chitalkar, *The Distributional Impact of Public Interest Litigation in the Indian Supreme Court—an Update* (unpublished conference paper) (Sept. 25, 2015) (on file with author); Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?*, World Bank Pol’y Rsrch Working Paper 5109 (Nov. 2009) (on file with author); SHYLASHRI SHANKAR, *SCALING JUSTICE: INDIA’S SUPREME COURT, ANTI-TERROR LAWS, AND SOCIAL RIGHTS* (2009); Rakesh Shukla, *Rights of the Poor: An Overview of Supreme Court*, 41 ECON. & POL. WEEKLY 3755 (2006).



public interest litigation such that it returns to its early focus on removing barriers to justice, expanding or enforcing constitutional rights, and resolving group-based disadvantages. Packing the Indian Supreme Court with 1980s-style activist justices or urging sitting justices to abandon their “command-and-control” model of case management for a more “facilitative” one are, I think, equally unrealistic options and unlikely to restore public interest litigation’s focus on the country’s most marginalized citizens.<sup>25</sup> Indeed, if the *only* thing that will resuscitate the worth of public interest litigation is the kind of rights-enforcing opinions common during the first 10–15 years of PIL history (perhaps augmented by the lessons in alternative dispute resolution learned since then), I am quite doubtful there is anything we can concertedly do.

But this—despite the heartbreaking outcome in *Koushal*—may not be as bad as it sounds. For one thing, a few recent opinions suggest that public interest litigation isn’t, in a purely consequentialist sense, already a lost cause.<sup>26</sup> More importantly, the kind of court-driven progressive social reform captured in the early PIL cases, vital and thrilling as it is, is only half the story of democratic governance in India. Even *state*-driven reform, however rights-enhancing it may be, does not so define Indian democracy that the periodic (or even somewhat frequent) failure of PIL cases to achieve progressive outcomes spells decay and doom. Rather, it is the dynamic interplay between a fairly conventional, citizen-sovereignty vision of democratic government and a more unusual support for state- (and court-) led reform that gives Indian democracy the flexibility it needs to survive over the long run.

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<sup>25</sup> Arun K. Thiruvengadam, *Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India*, in TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA 519, 522 (Oscar Vilhena et al. eds., 2013); Arun K. Thiruvengadam, *Revisiting The Role of the Judiciary in Plural Societies (1987): A Quarter-Century Retrospective on Public Interest Litigation in India and the Global South*, in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 341, 362-65 (Sunil Khilnani et al. eds., 2013).

<sup>26</sup> See, e.g., National Legal Services Authority v. Union of India, Writ Petition (Civil) No. 604 of 2013 (Apr. 15, 2014), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41411> (establishing legal recognition for a “third gender” and directing national and state governments to create reservations for third gender individuals in educational institutions and public employment); and Peoples Union for Civil Liberties v. Union of India & Others, Writ Petition (Civil) No. 196 of 2001 (Nov. 28, 2001), available at <http://www.righttofoodindia.org/orders/nov28.html> (requiring state governments to provide every child attending a government or government-aided primary school with a free, cooked midday meal).

Because public interest litigation is this paper's window into the relationship between courts, social change, and sovereignty, Part I overviews the belief in the ameliorative potential of PIL suits as well as recent disillusionment on that front. Part II zeroes in on *Naz* and *Koushal*, spending some time on the reasoning in each case as well as paying special attention to the kind of "public morality" envisioned in each decision. Part III briefly summarizes the idea of *dynamic equilibrium* as a theory of constitutional identity and design before exploring how the overall changes in PIL outcomes (discussed in Part I) and the specific outcomes in *Naz* and *Koushal* (discussed in Part II) exemplify that structure. For the legal liberals among us, describing Indian constitutional jurisprudence and public interest litigation this way should be both reassuring and worrisome: PIL cases may not be failing progressives as much as is commonly feared, but they were never meant to be sure-fire tools of reform either.

## I. PUBLIC CONFUSION OVER PUBLIC INTEREST LITIGATION

Indian lawyers and law scholars generally describe the initial period of Supreme Court PIL suits—roughly, the late 1970s through early 1990s—in the language of heroic judicial intervention.<sup>27</sup> A former Chief Justice of the Supreme Court called it "a potent weapon" and an example of how "[j]udicial creativity... has enabled realisation of the promise of socio-economic justice made in the Preamble to the Constitution of India."<sup>28</sup> A Supreme Court attorney described public interest litigation as the product of "two justices... [who] recognised the possibility of providing access to justice to the

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<sup>27</sup> The Indian Supreme Court is a court of original jurisdiction for plaintiffs who assert fundamental rights violations. CONSTITUTION OF INDIA, Part III: Fundamental Rights, art. 32(1). It's also generally believed that public interest litigation as a means of vindicating fundamental rights conforms to Article 39(A), located in the non-justiciable "Directive Principles" section of the Constitution. CONSTITUTION OF INDIA, Part IV: Directive Principles of State Policy, art. 39(A). ("The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."). Although PIL suits can also be heard by High Courts and many important PIL cases have been decided by High Courts, scholarly debates over public interest litigation have overwhelmingly focused on the Supreme Court.

<sup>28</sup> Justice Dr A.S. Anand, *Judicial Review – Judicial Activism – Need for Caution*, in LAW & JUSTICE: AN ANTHOLOGY 383 (Soli J. Sorabjee ed., 2004).

poor and the exploited people by relaxing the rules of standing.”<sup>29</sup> And this sentiment is not unwarranted: early PIL cases forced negligent town councils to provide slum dwellers with basic sanitation facilities, released individuals whose pre-trial detentions exceeded the maximum penalty for their alleged crimes, and compensated women raped by on-duty Indian soldiers.<sup>30</sup> In other words, public interest litigation has unarguably been thought of as a vehicle for advancing equality and affirmative rights, and in many instances it’s—also unarguably—been successful in this mission.

Besides raw outcomes, the good vibes surrounding public interest litigation also emanate from a sense that the Supreme Court only devised the approach (and PIL petitioners only continue to use it) out of sheer necessity. Governmental malfunction is a longstanding theme in Indian politics, especially at the federal level. Indeed, “malfunction” is a kind of extreme euphemism for much of what happens in New Delhi: 34% of sitting Lok Sabha members face criminal charges,<sup>31</sup> the last ten years alone have seen a number of scandals with price tags between USD \$30–40 billion a piece,<sup>32</sup> and the current Prime Minister was under criminal investigation as late as 2012 in connection with the mass killing of Muslims in his state during his chief ministership.<sup>33</sup> In 2015, India ranked #76 on

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<sup>29</sup> Jasper Vikas George, *Public Interest Litigation: Social Change and Public Interest Litigation in India*, NGOSINDIA.COM (Aug. 3, 2005), [http://www.ngosindia.com/resources/pil\\_sc.php](http://www.ngosindia.com/resources/pil_sc.php).

<sup>30</sup> *Ratlam Municipality v. Vardhichand*, AIR 1980 SC 1622; *Hussainara Khatoon v. State of Bihar (I to VI)* 1 SCC 81 (1980); *Delhi Domestic Working Women’s Forum v. Union of India*, 1 SCC 14 (1995).

<sup>31</sup> The Lok Sabha is the lower house of Parliament. Rukmini S., *16th Lok Sabha will be richest, have most MPs with criminal charges*, THE HINDU (May 19, 2014), <http://www.thehindu.com/news/national/16th-lok-sabha-will-be-richest-have-most-mps-with-criminal-charges/article6022513.ece> (noting that this represents an increase from 30% in 2009 and 24% in 2004).

<sup>32</sup> Beina Xu, *Governance in India: Corruption*, COUNCIL ON FOREIGN RELATIONS (Sept. 4, 2014), <http://www.cfr.org/corruption-and-bribery/governance-india-corruption/p31823> (describing, among others, the 2010-11 “Telecom” scandal with an estimated governmental cost of \$39 billion, and the 2012 “Coalgate” scandal with an estimated cost of \$34 billion).

<sup>33</sup> For an overview of the court cases and investigations that was written before Narendra Modi became Prime Minister see Anonymous, *India: A Decade on, Gujarat Justice Incomplete*, HUMAN RIGHTS WATCH (Feb. 24, 2012), <https://www.hrw.org/news/2012/02/24/india-decade-gujarat-justice-incomplete>. For an account of investigation efforts that have taken place since Modi took office, and of the harassment endured by the investigators, see David Barstow, *Longtime Critic of Modi is Now a Target*, NYTIMES.COM (Aug. 19, 2015),

Transparency International's Corruption Perception Index (between Burkina Faso and Thailand), which is actually an improvement over its 2013 performance (#94).<sup>34</sup> Matters had reached such a peak by early 2011 that an activist named Anna Hazare gained significant political traction for the idea of a "people's ombudsman" with independent prosecutorial authority and police powers over virtually the entire federal government (the bill, fittingly, got stuck in Parliament).<sup>35</sup> There's even a small but identifiable genre of anti-corruption cinema that is equal parts fantasy and self-flagellation.<sup>36</sup>

All of this has rather understandably fed into strong support for public interest litigation. While the federal judiciary's halo has lately gotten a bit tarnished, the courts still enjoy a reputation for intent and efficacy that vastly outstrips anything the executive or legislative branches could hope for.<sup>37</sup> This reputational advantage, combined with the very real failures of the other branches and the very real success of early PIL cases, has led supporters of public interest litigation to argue that the courts merely step in to put right the wrongs committed by other branches.<sup>38</sup> Some commentators

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<http://www.nytimes.com/2015/08/20/world/asia/teesta-setalvad-modi-india.html>.

<sup>34</sup> Transparency International, CORRUPTION PERCEPTIONS INDEX 2015, <http://www.transparency.org/cpi2015#downloads> (last visited Feb. 20, 2016); Xu, *supra* note 32 (citing Transparency International's 2013 Corruption Perceptions Index).

<sup>35</sup> See, e.g., Sumanta Banerjee, *Anna Hazare, Civil Society, and the State*, 46 ECON. & POL. WEEKLY 12 (2011).

<sup>36</sup> For a tiny slice of this genre See, e.g., INDIAN (Sri Surya Movies 1996) and MUTHALVAN (S Pictures 1999) (both Tamil) as well as RANG DE BASANTI (Rakeysh Omprakash Mehra Pictures 2006), NO ONE KILLED JESSICA (UTV Spotboy 2011), and SATYAGRAHA (Prakash Jha Productions 2013) (all Hindi, with SATYAGRAHA being explicitly inspired by Anna Hazare).

<sup>37</sup> The federal judiciary did not always enjoy such high esteem—indeed, the development of public interest litigation was closely tied to the courts' fall from grace during Indira Gandhi's Emergency of 1975–77. Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice*, in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 157 (S.K. Verma & Kusum eds., 2000). And the judiciary's reputation has suffered a bit recently thanks to allegations of corrupt personal finances, case-fixing, and irregular promotion practices. See Manoj Mitta, *A few just men who raised the bar*, TIMES OF INDIA (May 16, 2010), <http://timesofindia.indiatimes.com/home/sunday-toi/special-report/A-few-just-men-who-raised-the-bar/articleshow/5936089.cms>; Shoma Chaudhry, *Half of the Last 16 Chief Justices Were Corrupt*, TEHELKA.COM (Sept. 5, 2009), [http://www.tehelka.com/story\\_main42.asp?filename=Ne050909half\\_of.asp](http://www.tehelka.com/story_main42.asp?filename=Ne050909half_of.asp).

<sup>38</sup> Gobind Das, *The Supreme Court: An Overview*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 17 (B.N. Kirpal et al eds., 2008) ("Faced with a liberal and enlightened executive it sought to cooperate with

even maintain that given certain procedural aspects of public interest litigation (non-adversarial engagement, ongoing investigation, periodic reporting), courts are actually compensating for the lack of a “genuine deliberative forum” in the legislature.<sup>39</sup> At the very least, many supporters of public interest litigation suggest that the other branches’ failure to realize the substantive ends of democracy makes them no *more* representative as institutions than the unelected but populist judiciary.<sup>40</sup> In other words, the classic and still dominant view is that public interest litigation is good on both principled and consequentialist grounds.

Recently, however, the veneer has started to peel. Several commentators argue that public interest litigation simply doesn’t protect disadvantaged citizens the way it used to.<sup>41</sup> For one thing, there have been a series of landmark cases whose outcomes favored corporate or urban middle-class interests over those of more vulnerable populations: the “dam” cases, in which thousands of tribal and poor rural communities were displaced to further development projects; the “relocation” cases, in which polluting industries (and the migrant workers who depended on them) were moved outside city limits; and the “gentrification” cases, in which thousands (sometimes hundreds of thousands) of low-income residents and slum dwellers were evicted from their homes pursuant to urban beautification projects.<sup>42</sup> The language of these newer decisions has been harsher,

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it, confronted with an aggressive and bellicose one the courts stepped aside, and when the executive was weak or negligent the courts were obliged to step in to ensure that the needs of the people were met.”).

<sup>39</sup> Arun K. Thiruvengadam, Evaluating contemporary criticisms of ‘Public Interest Litigation’: A progressive conception of the role of a Judge 31-33 (2009) (unpublished manuscript, on file with author); SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 149 (2008).

<sup>40</sup> Madhav Godbole, *Good Governance: A Distant Dream*, 39 ECONOMIC AND POLITICAL WEEKLY 1103 (2004); Soli Sorabjee, *The Ideal Remedy: A Valediction, in THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM* 209 (Pran Chopra ed. 2006) (“You may say that this is not the function of the court. But look at [it] in the larger context. Look at the relief that it has provided to this neglected segment of humanity... I would say that with all its deficiencies, the Supreme Court has been the protector of the Fundamental Rights of the people.”).

<sup>41</sup> For criticisms of the “conservative” turn in public interest litigation, *see generally*, Surya Deva, *Public Interest Litigation in India: A Critical Review*, 28 CIV. JUST. Q. 19 (2009); *Shubbankar Dam, Vineet Narain v. Union of India: A Court of Law and Not Justice: Is the Indian Supreme Court Bound by the Indian Constitution?*, 2005 PUB. L. 239 (2005).

<sup>42</sup> For a discussion of these case types, *see generally*, Thiruvengadam, *Swallowing a Bitter PIL?*, *supra* note 25; Gautam Bhan, “*This is no longer the city I once knew*”:

too. In the gentrification cases, for instance, individuals who used to be “pavement dwellers” became “encroacher[s]” and their presence on public lands went from symbolizing *their* necessity and the *state’s* failure to *their* thievery and opportunism relative to upstanding, pay-your-own-way homeowners.<sup>43</sup>

Lest they be accused of cherry-picking, critics of current PIL jurisprudence also point to preliminary quantitative studies that suggest these landmark disappointments are representative rather than anomalous outcomes.<sup>44</sup> When it comes to PIL cases dealing with Fundamental Rights claims, it seems that “claimants from advantaged classes have higher win rates than claimants not from advantaged classes”—and, moreover, that the disparity between win rates has been increasing over time.<sup>45</sup> To be sure, there are problems with relying on quantitative studies to show change over time in PIL jurisprudence: early PIL cases are harder to access and classify, while self-selection out of the court system may mean that decreasing win rates reflect declining merit rather than changing judicial sympathies.<sup>46</sup> But the quantitative analyses of public interest litigation are rapidly closing in on these issues and the prognosis still does not

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*Evictions, the urban poor, and the right to the city in millennial Delhi*, 21 ENV'T & URBANIZATION 127, 134 (2009) (noting that the 2004 Pushta eviction in Delhi displaced nearly 150,000 people).

<sup>43</sup> Bhan, *supra* note 42, at 134-35 (comparing language from early PIL displacement cases with language in comparable cases from 2000 onwards).

<sup>44</sup> Gauri, *Public Interest Litigation in India*, *supra* note 24; SHANKAR, SCALING JUSTICE, *supra* note 24; Shukla, *Rights of the Poor*, *supra* note 24.

<sup>45</sup> Gauri, *supra* note 24, at 13:

...advantaged class claimants had a 73% probability of winning a Fundamental Rights claim for cases in which an order or decision was rendered from years 2000-2008, whereas the win rate for claimants not from advantaged classes for the same years was 47%. For the 1990s, rates were 68% and 47%, respectively. But in the years prior to 1990, claimants not from advantaged classes enjoyed higher success rates than those from advantaged classes. The differences for the 1990s and 2000s are significantly different from each other, based on a simple chi-square test and a simple probit estimation

<sup>46</sup> Jayanth K. Krishnan, *Social Policy Advocacy and the Role of the Courts in India*, 21 AM. ASIAN REV. 91 (2003) (arguing that social policy advocates who work on behalf of marginalized communities are less and less likely to use the courts because the judiciary is so backlogged). It's unclear whether the change in PIL cases is due to transformation in the type of case brought or type of case won, or both—or a change in the reporting and categorizing practices of the Court. *See, e.g.*, Gauri, *Public Interest Litigation in India*, *supra* note 24, at 8 (“there appears to have been a change in the nature of issues being brought to the Court through PILs”) and at 5 (stating that the “apparent increase in the share of advantaged litigants” may be “an artifact of a change in reporting practices on the part of the Court”).

look good.

All of this is to say that whether one considers case studies or sky view analysis even *supporters* of public interest litigation tend to feel that “the Supreme Court in the 1990s and in the current decade[s] is refusing to enforce rights which the Court of the 1980s would have.”<sup>47</sup> The successful PIL petitioner today is increasingly likely to be a middle-class individual speaking up on her own behalf about the state’s failures in areas like corruption, pollution, and gender equality.<sup>48</sup> These are all worthwhile issues and they are in keeping with the Court’s broader shift towards a “good governance” role.<sup>49</sup> Still, they are a far cry from the concerns of migrant and bonded laborers, child workers, incarcerated under-trials, slum dwellers, and wards of state who were the targets of early era PIL cases, and whose problems by and large still need addressing.<sup>50</sup> It is increasingly *not* the case that public interest litigation is a “last resort for the oppressed and the bewildered.”<sup>51</sup>

Unsurprisingly, then, current conversations about public interest litigation are preoccupied with how to regroup and reverse course. One suggestion has been that judges should step back from the “command and control” model of judicial proceedings that has come to characterize PIL cases over the last two decades and adopt a more “facilitative” role—or, in American legal lingo, that judges should function as mediators when they hear PIL suits.<sup>52</sup> Another idea is that the Supreme Court should “evolve a set of guidelines for restrained and responsible PIL” so that the process regains legitimacy and the outcomes are more mindful of third-party effects on marginalized communities.<sup>53</sup>

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<sup>47</sup> Thiruvengadam, *supra* note 25, at 522.

<sup>48</sup> S. Muralidhar, *Public Interest Litigation*, 33-34 ANN. SURVEY INDIAN L. 525, 563 (1997-98) (“The cases that were taken up for detailed consideration by the courts [and decided in 1997-98] reflected a perceptible shift to issues concerning governance.”).

<sup>49</sup> Robinson, *supra* note 19, at 2 (arguing that the Court has justified its development of Basic Structure Doctrine and a broad right to life jurisprudence “with not only a wide reading of the Indian Constitution, but also an appeal to broad, almost metaphysical, principles of “civilization” or good governance.”)

<sup>50</sup> See Usha Ramanathan, *Of Judicial Power*, FRONTLINE.IN (Mar. 16–29, 2002), <http://www.frontline.in/static/html/fl1906/19060300.htm>.

<sup>51</sup> State of Rajasthan v. Union of India, 3 S.C.C. 634, 670 (1979), *cited in* Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness, and Sustainability*, 19 J. ENVTL L. 293 (2007).

<sup>52</sup> Thiruvengadam, *supra* note 25.

<sup>53</sup> Rajamani, *supra* note 51, at 321.

The very idea of “fixing” public interest litigation suggests that it can be refashioned in such a way as to once more reliably produce the kind of progressive results achieved during its introductory phase. Of course, few if any current commentators would argue that public interest litigation, even if properly reformed, would *inevitably* produce progressive results and some are actively opposed to the idea.<sup>54</sup> (I say *current* commentators because this was and perhaps continues to be a popular view among an older generation of lawyers and legal scholars.<sup>55</sup>) But even trying to fix public interest litigation to produce *mostly* progressive reforms is like trying to read only half the Indian Constitution, and it deserves a similar response: that’s just not how it works.

This is not to say that I’m advocating the other extreme—abandoning public interest litigation as a hopelessly lost cause—which some commentators have proposed and which particularly upsetting outcomes like the one in *Koushal* might tempt us to do.<sup>56</sup> That’s as dispiriting and unnecessary as some of the proposals to fix public interest litigation are logistically and politically unrealistic. But before we get to what the shift in PIL jurisprudence *really* tells us about Indian law and governance going forward, it’s worth considering the stakes a little more deeply. What do the arguments for or against public interest litigation tell us about law and democracy in India? How can such a miniscule body of case law (PIL suits account for less than 0.5% of the Supreme Court’s docket<sup>57</sup>) not

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<sup>54</sup> Thiruvengadam, *supra* note 25, at 525 (criticizing Upendra Baxi for seemingly suggesting that “the text of the Indian Constitution inexorably points to progressive ends, ignoring the reality that there can be several conflicting interpretations of what exactly the constitutional values are and, more importantly, how they are to be achieved”).

<sup>55</sup> Sorabjee, *supra* note 40, at 209 (admonishing readers to “criticize [public interest litigation] when it goes wrong” but “not question the premise on which it works”); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 126 (1985) (arguing that public interest litigation “symbolizes the politics of liberation”).

<sup>56</sup> See, e.g., Nivedita Menon, *Environment and the Will to Rule: The Supreme Court and Public Interest Litigation in the 1990s*, in THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA (Mayur Suresh & Siddharth Narrain, eds., 2014); Aditya Nigam, *Embedded Judiciary: Or the Judicial State of Exception?*, in THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA (Mayur Suresh & Siddharth Narrain, eds., 2014).

<sup>57</sup> Gauri, *supra* note 24, at 10 (arguing that “on average, some 0.4% of ‘cases’ before the Court involve PILs”); Nick Robinson, *Too Many Cases*, 26 FRONTLINE 1 (Jan. 3-16, 2009),

<http://www.hinduonnet.com/fline/fl2601/stories/200901162>



only speak to profoundly important aspects of social life but to the very foundation of democratic governance? For these questions and more, we need to take a brief detour into the recent Delhi High Court and Supreme Court decisions on sodomy.

## II. *NAZ* AND *KOUSHAL*

*Naz* and *Koushal* are big cases, widely discussed. Commentary and scholarship on the two decisions is understandably vast in India but the cases' influence has by no means been geographically limited. In the U.S., for instance, the *New York Times* greeted *Naz* with an op-ed triumphantly announcing that an "Indian Court Overturns Gay Sex Ban."<sup>58</sup> Similarly, in the 26 months since *Koushal* was handed down, 13 articles and notes discussing it have been published in *American* law journals (to say nothing of Indian or international law journals).<sup>59</sup> And across continents and publication venues, the reviews uniformly celebrate *Naz* and excoriate *Koushal*. This section is not directed towards challenging that assessment: if there is nothing to like in *Koushal's* substantive outcome there is considerably less to applaud in what passes for judicial reasoning in the opinion. Moreover, the reasoning in either case is not especially relevant to the larger arguments of this paper concerning shifts in public interest litigation and dynamic equilibrium in the Indian Constitution. But because it is impossible to discuss a case without actually discussing the case, this section will first briefly overview the facts and arguments in *Naz* and *Koushal* before placing the decisions in the broader context of PIL jurisprudence.

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60108100.htm (arguing that "contrary to popular belief... [PILs] have one of the court's lowest acceptance rates" and observing that in 2006 "the [C]ourt received almost 20,000 letter or postcard petitions... that could be considered as PIL" but that "only 243 of these 20,000 pleas were even placed before the judges to be considered for admission (out of which only a small fraction then made it to regular hearing)").

<sup>58</sup> Heather Timmons & Hari Kumar, *Indian Court Overturns Gay Sex Ban*, NYTIMES.COM (July 2, 2009), [http://www.nytimes.com/2009/07/03/world/asia/03india.html?\\_r=0](http://www.nytimes.com/2009/07/03/world/asia/03india.html?_r=0).

<sup>59</sup> These results are based on search of the legal database LexisAdvance using the following string: "Naz Foundation" narrowed by Secondary Materials search within "Koushal" (Feb. 21, 2016).

#### A. Public Morality, Constitutional Morality, and Feigned Deference

The named petitioner in *Naz Foundation v. Gov't of NCT of Delhi* was an NGO that concentrates on HIV/AIDS awareness and support in India.<sup>60</sup> The Foundation filed a PIL petition to have § 377 of the Indian Penal Code read down because the Foundation's work with men who have sex with men (MSM) suggested that the criminalization of sodomy makes MSM reluctant to cooperate with HIV/AIDS efforts.<sup>61</sup> Other petitioners joined the effort, including the national Ministry of Health and Welfare and an umbrella group called "Voices Against § 377 IPC."<sup>62</sup> The respondents included the Ministry of Home Affairs as well as an activist organization called the Joint Action Council Kannur (JACK) and a private individual named B.K. Singhal.<sup>63</sup>

The *Naz* petitioners challenged the constitutionality of § 377 under Article 14 (equal protection), Article 15 (prohibition of, among other things, sex discrimination), 19 (free speech and expression), and Article 21 (protection of life and personal liberty).<sup>64</sup> They also argued that the Indian Penal Code's condemnation of homosexuality was outdated and not in keeping with Indian culture.<sup>65</sup> But rather than ask for the provision to be struck down entirely, the petitioners asked that § 377 be read down to only criminalize penile-non-vaginal sex when it is non-consensual or involves a minor.<sup>66</sup>

For the most part, the Delhi High Court hung its hat on three constitutional arguments. First, the court held that the Indian Constitution indirectly supports a fundamental right to privacy that is linked to persons not places, as well as a right to a *dignified* life, and

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<sup>60</sup> NAZ INDIA, <http://nazindia.org> (last visited Feb. 25, 2016).

<sup>61</sup> *Naz Foundation*, Writ Petition (Civil) No. 7455 (2001), at 6.

<sup>62</sup> *Id.* at 13, 17.

<sup>63</sup> *Id.* at 10-13, 21. JACK campaigns against recognition of any causal connection between HIV and AIDS, as well as against the use of anti-retroviral drugs. Anju Singh, *Making Waves, Changing Tides: The Story of Joint Action Council Kannur (JACK), India*, FREEREPUBLIC.COM (Nov. 13, 2001), <http://www.freerepublic.com/focus/news/569758/posts>. The late B.P. Singhal was a former Director General of Police and Rajya Sabha member for the right-wing Bharatiya Janata Party. Shivam Vij, *BP Singhal: "I don't have any problem with homosexuals. Do you?"* KAFILA (July 9, 2009), <http://kafila.org/2009/07/09/bp-singhal-i-dont-have-any-problem-with-homosexuals-do-you/>.

<sup>64</sup> *Naz Foundation*, Writ Petition (Civil) No. 7455 (2001), at 2.

<sup>65</sup> *Id.* at 27, 75-76.

<sup>66</sup> *Id.* at 10 (submitting that "that there is a case for consensual sexual intercourse (of the kind mentioned above; i.e. homosexual) between two willing adults in privacy to be saved and excepted from the penal provision contained in Section 377 IPC").

that both rights require protection for private consensual sex acts between adults (the Article 21 argument). Second, it held that even if § 377 reflects popular morality concerning sodomy, popular morality alone does not constitute the kind of compelling state interest that's required to restrict a fundamental right (the Article 14 argument). And third, the court held that "sex" includes "sexual orientation" for the purposes of equal protection analysis (the Article 15 argument). The decision also touched on several other issues—for instance, the High Court's privacy reasoning was tied to arguments about autonomy and substantive due process, while its "compelling state interest" analysis relied heavily on U.S. jurisprudence on strict scrutiny.

Many commentators praised the High Court's argument that expressions of public morality via the law are still subject to an overarching "constitutional morality."<sup>67</sup> Others emphasized the expansion of "sex" to include "sexual orientation,"<sup>68</sup> while still others called *Naz*'s subtle re-reading of privacy protection its "most attractive feature."<sup>69</sup> It's worth noting that there are a decent number of problems with the legal analysis in *Naz* and that not all of the arguments that could have been made were made (or at least, not all of them were made well).<sup>70</sup> But overall, both the outcome and the reasoning have been widely celebrated.

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<sup>67</sup> Gautam Bhatia, *The Unbearable Wrongness of Koushal vs Naz*, OUTLOOK (Dec. 11, 2013), <http://www.outlookindia.com/website/story/the-unbearable-wrongness-of-koushal-vs-naz/288823>; Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgement*, 2 NAT'L U. JURID. STUD. 445 (2009). See also Martha C. Nussbaum, *Disgust or Equality? Sexual Orientation and Indian Law*, 6 INDIAN J. L. & SOC'Y (forthcoming 2016), at 21 ("given that the claim of public morality is the central such claim, showing that the interest in criminalising consensual gay sex acts is actually motivated by disgust and stigma helps to establish the constitutional unsuitability of the interest, in a nation committee to equality") (on file with author).

<sup>68</sup> Bret Boyce, *Sexuality and Gender Identity Under the Constitution of India*, 18 J. GENDER RACE & JUST. 1, 39 (2015).

<sup>69</sup> Vikram Raghavan, *Navigating the Noteworthy and the Nebulous in Naz Foundation*, 2 NAT'L U. JURID. STUD. 396, 403 (2009).

<sup>70</sup> 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 et al. eds., 2004) (critiquing the use of privacy arguments for the purposes of advancing gender justice), cited in Raghavan, *supra* note 69, at 405; Pritam Baruah, *Logic and Coherence in Naz Foundation: The Arguments of Non-Discrimination, Privacy, and Dignity*, 2 NAT'L U. JURID. STUD. 504 (2009) (arguing that the cases cited by the Court do not support the idea that sex discrimination encompasses sexual orientation discrimination, and that *Naz* inadequately defined the concepts of privacy and autonomy).

Conversely, *Suresh Kumar Koushal v. Naz Foundation* has inspired little besides anger and ridicule. The named petitioner, an astrologer, filed one of the many PIL suits challenging *Naz* on broadly religious or cultural grounds that were eventually consolidated for consideration by the Supreme Court.<sup>71</sup> The actual petitioners in *Koushal* included several “public spirited” individuals (including B.P. Singhal of *Naz* fame), two small political parties, a Keralite church alliance, JACK (also a *Naz* participant), the All India Muslim Personal Law Board, and a government entity called the Delhi Commission for the Protection of Child Rights.<sup>72</sup>

The *Koushal* petitioners argued, among other things, that the High Court’s findings of fact as to the harms caused by § 377 were insufficient—in other words, that there wasn’t enough proof that the provision discouraged people from seeking HIV/AIDS support *or* that it caused privacy or dignity harms.<sup>73</sup> They also challenged *Naz*’s holding that § 377 discriminates against homosexuals as a class and that sex discrimination encompasses sexual orientation discrimination.<sup>74</sup> Several petitioners also made variants of a claim that the High Court had violated the separation of powers by failing to defer to the will of Parliament and, by extension, to the existence of a public morality that condemns same-sex acts.<sup>75</sup>

There’s not much in the way of original reasoning in *Koushal*,<sup>76</sup> but subsequent commentators have teased out the following arguments from Justice Singhvi’s decidedly minimalist analysis: (1) § 377’s prohibition of sodomy is presumptively constitutional because the Indian Penal Code was duly enacted (in 1860) and remains unamended; (2) this presumption of constitutionality stands because the High Court did not establish that sufficiently severe harms are inflicted upon sufficiently numerous people in the course of “valid” efforts to enforce the provision; (3) people who engage in carnal intercourse against “against the order of

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<sup>71</sup> *Koushal*, Civil Appeal No. 10972 (2013), at 15-20.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 21-22.

<sup>74</sup> *Koushal*, Civil Appeal No. 10972 (2013), at 21-23.

<sup>75</sup> *Id.* at 26 (argument by the All India Muslim Personal Law Board (AIMPLB) that “so long as the law stands on the statute book, there was a constitutional presumption in its favour”); *id.* at 25 (argument by the Kranthikari Manuvadi Morcha Party that “the matter should have been left to Parliament to decide as to what is moral and what is immoral and whether the section in question should be retained in the statute book”).

<sup>76</sup> Nussbaum, *supra* note 67, at 24 (observing that “[a]s for law, there is almost nothing there”).

nature” are a different class such that different laws can be applied against them without constitutional difficulty.

Needless to say, there are problems with this—*not* because there was no plausible argument to be made for reversing the Delhi High Court, but because *Koushal* contained virtually no argument at all. Most of the Supreme Court’s review of *Naṛ* is perplexing or just plain wrong, so that all that is seemingly left coherent in *Koushal* is the bare argument of judicial deference to legislative acts. Deference, of course, is a perfectly legitimate ground for declining to invalidate a law even in the relatively deference-thin context of the Indian federal judiciary. But in the absence of any real attempt to grapple with the issues (and the presence of page after page of block quotations cribbed from other judges’ efforts at grappling), the *Koushal* Court’s deference appears to be nothing so much as a small and rather transparent fig leaf.

Having said all this, my intent is not to demonstrate why *Koushal* is a bad decision since it has been pretty thoroughly picked apart by many excellent commentators. Indeed, for our purposes, *Naṛ* and *Koushal* are interesting *not* because they are exemplars of legal reasoning or the lack thereof, but because they exemplify different trends in public interest litigation. To see why, we need to step back from the opinions and focus instead on the litigants and issues.

## B. Competing Public Interests

Detached from § 377 and the criminalization of sodomy, *Naṛ* and *Koushal* are easily recognizable as examples of “classic” and “contemporary” PIL suits. Consider the moving parties: *Naṛ* was brought by a coalition of progressive-minded civil society actors and sympathetic government subsidiaries, while *Koushal* was brought by a coalition of individual litigants and community organizations—religious rather than residential, perhaps, but community organizations nonetheless.<sup>77</sup> Or take the underlying goals of the suits

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<sup>77</sup> See, e.g., *Almitra H. Patel v. Union of India*, 2 S.C.C. 416 (1998) (asking the Court to require the Delhi government to address air and water pollution caused by untreated solid wastes); *Bangalore Medical Trust v. B. S Muddappa*, A.I.R. 1991 S.C. 1902 (regarding the State of Karnataka’s decision to lease land intended for a public park to a company for the purpose of building a nursing home). The latter opinion really demonstrates the turn to middle-class interests and a vision of the state as agent rather than sovereign: “...in a democratic set up the people or community being sovereign, the exercise of discretion must be guided by the inherent philosophy that the exerciser of discretion is accountable for his action...” and “[p]ublic park as a place reserved for beauty and recreation is associated with

according to the moving parties (rather than according to the courts). The original writ petition submitted by the Naz Foundation in 2001 repeatedly references social attitudes and affirmative rights—“self-respect and dignity” on the one hand, and “doctrinaire and outmoded conception[s] of sexual relations” on the other.<sup>78</sup> Conversely, the key *Koushal* petitioners explained their motivations primarily using the language of religious or cultural protection and judicial deference.<sup>79</sup> And finally, remember for whom the moving parties were acting: marginalized and scorned minorities in *Naz*, versus themselves and similarly situated citizens in *Koushal*.

Seen in this light, *Naz* is clearly the archetype of the classic PIL suit in which philanthropic third-parties fight to change Indian society by defending or expanding the rights of disadvantaged groups. And just as surely—though perhaps not as clearly—*Koushal* is emblematic of a more contemporary PIL suit in which parties who are actually motivated by a sense of personal harm fight to hold the state up to its obligations as the agent of a sovereign, rights-bearing democratic citizenry.

Interestingly, and despite their focus on religious and cultural protection, there’s no reason to think the *Koushal* petitioners drew on

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growth of the concept of equality and recognition of importance of common man.” *Bangalore Medical Trust*, A.I.R. 1991 S.C. 1902, at 109.

<sup>78</sup> *Naz Foundation*, Writ Petition (Civil) No. 7455 (2001), at 6 (“unless the self-respect and dignity of sexuality minorities is restored by doing away with discriminatory laws such as Section 377, it will not be possible to promote HIV/AIDS prevention”), and at 12 (“Section 377 is indeed based upon a doctrinaire and outmoded conception of sexual relations, which has later been used to legitimize discrimination against sexuality minorities”) available at <http://www.lawyerscollective.org/vulnerable-communities/lgbt/section-377.html> (last visited Feb. 24, 2016).

<sup>79</sup> See, e.g., the argument of the Trust God Missionaries, *Koushal*, Civil Appeal No. 10972 (2013), at 25 (“if the declaration made by the High Court is approved, then India’s social structure and the institution of marriage will be detrimentally affected and young persons will be tempted towards homosexual activities”); the argument of the AIMPLB, *id.* at 26 (“[c]ourts, by their very nature, should not undertake the task of legislating”); Some of the *Koushal* petitioners also appealed to child protection and the non-absolute nature of all rights: see the argument of Suresh Kumar Koushal, *id.* at 27 (“all fundamental rights operate in a square of reasonable restrictions”); Pallavi Polanki, *Why Delhi Child Rights Commission Opposed Decriminalization of Gay Sex*, FIRSTPOST.COM (Dec. 14, 2013), <http://www.firstpost.com/india/why-delhi-child-rights-commission-opposed-decriminalisation-of-gay-sex-1286883.html> (observing that “[i]n the last 150 years, there have been only 200 cases where this section has been effectively applied,” that “[a]ll those cases applied to sodomy and in more than 90 per cent of the cases, the victims were minors,” before concluding that “the application of the Section 377 was to protect victims”).

§ 295(A) of the Indian Penal Code.<sup>80</sup> To be sure, § 295(A) punishes “deliberate and malicious” action that offends religious beliefs—it would translate to something like a *criminal* charge of intentional infliction of emotional distress (for religion) in the American context—and it seems ludicrous to think of Naz Foundation members being imprisoned or otherwise subject to criminal liability for their advocacy and social work.<sup>81</sup> But there remains a troubling potential for overlap between § 295(A) and § 377 as against LGBT individuals, so that (especially given the wide and frequently specious net cast by the *Koushal* petitioners and Court) an argument combining the two IPC sections wouldn’t have seemed wholly out of place.

It’s true that *Koushal* stands somewhat apart from the new model of PIL suits inasmuch as it focuses on religion, culture, and morality claims rather than on economic or good governance demands. But this difference does not fundamentally change the fact that *Koushal*, like many of the contemporary PIL suits decried by court-watchers and legal scholars, emphasizes the state’s duty to be a good agent (meaning a good agent of the petitioners) rather than a good reformer. While it’s always risky to indulge in post-facto speculation regarding litigation strategies, the most plausible explanation for the fact that *Koushal* omitted any § 295(A) arguments might simply be that petitioners and judges alike recognized the approach’s political weakness, or that the credibility of PIL suits depends on the petitioners’ ability to demonstrate that they “have *no* personal, political or financial interest of any kind in the public interest litigation brought.”<sup>82</sup>

It also doesn’t matter that the outcome sought by the *Koushal* petitioners may be fundamentally distasteful in a way that preferring parks over nursing homes is not. The fact that *Koushal* stands apart from many other “contemporary” PIL suits (to say nothing of “classic” ones) in its espousal of a social conservative rather than a neo-liberal morality just goes to show that public interest litigation is incapable of returning consistently progressive or even consistently *non*-progressive results. Indeed, this point is being made with growing frequency by the commentators discussed in Part I. But what *isn’t*

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<sup>80</sup> Indian Penal Code (Act No. 45 of 1860), § 295–298 (prohibiting harms to religious sentiments under various circumstances). The *Koushal* opinion itself makes no reference to § 295, and this element of the statute does not seem to figure in public conversations (including those emphasizing the petitioners’ point of view).

<sup>81</sup> Naz Foundation, after all, would not even be in a position analogous to the doctors in *Griswold* who were subject to criminal liability for prescribing contraceptives. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>82</sup> Susman, *supra* note 16, at 70 (emphasis mine).

being said is that—notwithstanding specific outcomes like *Naṣ* and *Koushal*—the fact that public interest litigation gets deployed to inconsistent ends is a reflection of something fundamental and fundamentally *good* in the Indian Constitution.

### III. DYNAMIC EQUILIBRIUM IN PUBLIC INTEREST LITIGATION

If *Naṣ* and *Koushal* represent the great divide that supporters of public interest litigation are anxious to address, why does this leave us with anything save a whole lot of bad? After all, Indian law and politics are strikingly concerned with social uplift.<sup>83</sup> Why *isn't* it cause for disappointment when a once-celebrated path to progressive ends turns out to lead elsewhere as well? The answer is simply that Indian law and politics—we can even go so far as to say Indian constitutionalism and democracy—were never meant to *exclusively* pursue aspirational goals. That they are meant to pursue such goals is beyond question. Nevertheless, as I've argued elsewhere, this support for government-driven societal reform coexists with contrasting (and constitutionally defined) political values.<sup>84</sup> Indian jurisprudence, including public interest litigation, properly reflects the constant recalibration between these different visions of state-society relations.

Briefly put, the two underlying impulses in this constitutionally enshrined dynamic equilibrium correspond to two understandings of democratic sovereignty. On the one hand, the Indian Constitution is “first and foremost a social document” and a “majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement.”<sup>85</sup> In this “militant” vision of democratic ordering, the state exercises far more

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<sup>83</sup> See, e.g., the comment of a prominent Supreme Court advocate that the “Constitution of India is very much focused on social change. And so we as citizens, as lawyers, whenever we look at a program or whenever we criticize a program, we have this one test in front of us: how is it going to advance social justice?” Indira Jaising, Case in Point: Challenges to Rule of Law and Gender Equality Globally (Feb. 16, 2016, at 19:32-48), <http://caseinpoint.org/live/news/5879-challenges-to-rule-of-law-and-gender-equality#.VtH6h0tSxuZ>.

<sup>84</sup> Das Acevedo, *Temples, Courts, supra* note 10; Deepa Das Acevedo, *Celibate Gods and “Essential Practices” Jurisprudence at Sabarimala, 1991-2011*, in FILING RELIGION: STATE, HINDUISM, AND COURTS OF LAW 101 (Daniella Berti et al, eds., 2016); Deepa Das Acevedo, Religion, Law, and the Making of a Liberal Indian State ch. 1 (2013) (Ph.D. dissertation, The University of Chicago) (on file with author).

<sup>85</sup> GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 50 (1999).



than the discretionary authority we might ordinarily expect of an agent or representative—for example, it can regulate anything touching the “secular aspects of religion.” (It can also regulate a great deal touching the *religious* aspects of religion, but that’s beyond the scope of this paper.)

Indeed, many of the Constitution’s provisions and the practices they give rise to reflect an explicitly articulated worry that Indian citizens are not yet capable of fully exercising their authority as democratic sovereigns. Take, for example, the concerns of some drafters—eventually reflected in constitutional prose—that unlimited individual freedoms would hamper the state’s ability to reform society.<sup>86</sup> Or consider Justice Bhagwati’s worry that the average Indian’s religious beliefs would, if unchecked and unchanged, encourage a whole host of violent and discriminatory practices.<sup>87</sup> (It’s worth noting that Bhagwati was one of the Supreme Court justices who created public interest litigation.) Basic structure doctrine too reflects a mistrust of untrammelled popular democracy, inasmuch as it places the undefined “essential features” of the Constitution beyond parliamentary revision (although admittedly India’s founding document is far more open to amendment than its un-entrenched American counterpart).<sup>88</sup>

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<sup>86</sup> *Id.* at 64 (describing Amrit Kaur and A.K. Ayyar’s views that the freedom of religion and equality before the law should be worded so that they did not interfere with the state’s mission to transform social relations). See also Sathe, who writes that “Many Indian leaders who had made sacrifices for national independence were of the view that the legislature should be supreme... However this view was not unanimously accepted. Persons representing the minorities were apprehensive of the majoritarian rule implicit in such an arrangement. They wanted greater say for the courts.” SATHE, *supra* note 7, at 3

<sup>87</sup> P.N. Bhagwati, *Religion and Secularism Under the Indian Constitution*, in RELIGION AND LAW IN INDEPENDENT INDIA 35, 43 (Robert D. Baird, ed., 2005) (stating that India’s constitutional framers “knew that, left to itself, religion could permit orthodox men to burn widows alive on the piers [sic] of their deceased husbands... could encourage and in its own subtle ways, even coerce indulgence in social evils like child marriage or even crimes like human sacrifice or it could consign women to the perpetual fate of devadasis or relegate large sections of humanity to the sub-human status of untouchability and inferiority”).

<sup>88</sup> The basic structure doctrine was first announced in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461. For a useful overview of *Kesavananda* and the basic structure doctrine, see David Gwynn Morgan, *The Indian ‘Essential Features’ Case*, 30 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 2 (1981), and Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the ‘Basic Structure’*, in INDIA’S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 179 (Zoya Hasan et al eds., 2005). For a more detailed study see SUDHIR

In light of all this, any suggestion that Indian democracy is straightforwardly founded on the idea of citizen sovereignty has more holes than Swiss cheese. It is *not* merely that India, like all countries, operates under a de facto arrangement whereby “elites, not masses, govern.”<sup>89</sup> It is that the Indian state is *meant* to have a share in sovereign authority so that it can do more than just realize specific goods set out in advance by the people being governed. And it is in exactly this spirit that classic PIL petitioners and courts set out to improve the lives of India’s most marginalized citizens.

On the other hand, it would also be incorrect to say that a more conventional understanding of democratic sovereignty as *citizen-sovereignty* finds no place in Indian constitutional law or practice. The Indian Constitution guards against incursions into the private lives of individuals by allowing for classically liberal protections like “freedom of conscience and free profession, practice and propagation of religion.”<sup>90</sup> B.N. Rau famously campaigned against including a (substantive) due process clause in the Constitution after his conversations with James Bradley Thayer and Felix Frankfurter led him to believe it would be an undemocratic check on the legislative process (although this “check” was eventually introduced by none other than Justice Bhagwati in *Maneka Gandhi v. Union of India*).<sup>91</sup> Above all else, though, the drafters of the Constitution were “intellectually committed to the liberal democratic tradition” *and* the idea that individual adult suffrage as the basis of political life was the “*sine qua non* of independence.”<sup>92</sup>

It is probably harder to recognize this vision of undivided citizen sovereignty in contemporary public interest litigation than it is to see shared sovereignty in classic PIL cases—and it’s also risky to even indirectly imply that citizen sovereignty naturally fits with social conservatism or neo-liberal politics. I am only making the first of

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KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).

<sup>89</sup> THOMAS R. DYE & HARMON ZIEGLER, 14 THE IRONY OF DEMOCRACY: AN UNCOMMON INTRODUCTION TO AMERICAN POLITICS 1 (14<sup>th</sup> ed. 2008).

<sup>90</sup> CONSTITUTION OF INDIA, Part III: Fundamental Rights, art. 25.

<sup>91</sup> A.I.R. 1978 S.C. 597. Abhinav Chandrachud, *Of Constitutional “Due Process,”* THEHINDU.COM (May 24, 2010), <http://www.thehindu.com/opinion/op-ed/of-constitutional-due-process/article436586.ece>. For a discussion of Thayer and Frankfurter’s influence on Rau, see Arvind Elangovan, *A Constitutional Imagination of India: Sir Benegal Narsing Rau Amidst the Retreat of Liberal Idealism, 1910-1950*, at 21 (Ph.D. dissertation, The University of Chicago); AUSTIN, *supra* note 85, at 103.

<sup>92</sup> *Id.* at 41, 46

these arguments, namely, that contemporary public interest cases align with liberal democratic ideas of statehood and personhood as these are broadly and conventionally understood. For example, PIL petitioners who argue for the municipal maintenance of “common spaces” rely on a view of the individual-in-society, with all its accompanying baggage about public/private divides, that is decidedly and classically liberal.<sup>93</sup> PIL petitioners who argue for transparency and accountability in governance rely on a view of sovereign delegation and agency theory that is decidedly and classically democratic.<sup>94</sup> And, whatever their particular merits or appeal, PIL petitioners who argue for the preservation of religious and cultural mores—at least, for their preservation until the legislature says otherwise—are relying on liberal democratic conceptions of society and sovereignty that also have a place in India’s founding document.

#### CONCLUSION

Saying that *Naz* and *Koushal* and public interest litigation all reflect a dynamic equilibrium between different visions of sovereignty does not by itself establish that having such a dynamic equilibrium is good. Nor, for that matter, does it give us much of an idea as to how we should proceed—with *Koushal*, with public interest litigation, or with understanding Indian constitutional law more generally. So far I have been concerned with making an interpretive argument about processes at various levels of law in India, but let me close with a few thoughts on what this argument does and does not mean for the way forward.

First, it most certainly does not mean that progressives should like *Koushal* or that we should stop fighting for broadly left-center causes. It also does not mean that anyone should denigrate or de-emphasize the very real, very aspirational elements of the Indian Constitution and of democracy in India. But it *does* mean that progressives shouldn’t respond to the so-called “conservative turn” in public interest litigation by throwing up our hands or by

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<sup>93</sup> *Olga Tellis v. Bombay Municipal Corporation*, 1985 S.C.C. (3) 545.

<sup>94</sup> *See, e.g., Vineet Narain v. Union of India*, (1988) 1 S.C.C. 226 (concerning the Central Bureau of Investigation’s failure to investigate evidence suggesting that high-ranking politicians and bureaucrats were trading government contracts for bribes); *Common Cause v. Union of India*, (1996) 6 S.C.C. 530 (concerning allegations that the Minister of State for Petroleum and Gas had improperly allotted petrol pump and gas agencies to government officials or their relatives).

scrambling for newer, better fixes. Public interest litigation can't be "fixed," if fixing it means ensuring that it only produces progressive outcomes, any more than we can "fix" the Indian Constitution. And honestly, it *shouldn't* be fixed in this way. The great good sense of Indian constitutional law has been its flexibility; its incorporation of all kinds of legal traditions in the nation's charter, its catholicism in selecting mechanisms and sources and analytic rubrics when interpreting that charter, and its willingness to rewrite the charter with the benefit of lessons learned. The dynamic equilibrium between different visions of sovereign authority that I have described elsewhere and the particular manifestation of that dynamic in public interest litigation that I have described here is just one more example of the flexibility that has served India more than tolerably well for nearly seventy years.