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

DEEPA DAS ACEVEDO\*

**Abstract:** American constitutional law scholars have long questioned whether courts can truly drive social reform, and this uncertainty remains 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 (PIL)—have only recently begun to question 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. Perhaps no pair of cases so nicely captures this dichotomy as the 2009 decision in *Naz Foundation v. Government of NCT of Delhi*, which decriminalized sodomy, and the 2012 decision in *Koushal v. Naz Foundation*, which overruled *Naz*. This paper uses public interest litigation and India’s recent sodomy cases to demonstrate that the relationship between state actors and citizens 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 show why this unreliability is not as worrisome as it might first appear to be, by analyzing the well-documented and widely critiqued shift in PIL cases at the end of the twentieth century. 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. Neither vision of sovereignty is paramount over the long run, and 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.<sup>1</sup> 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.<sup>2</sup> They then usually focus on the Warren Court, followed by the Supreme Court’s conservative turn in the 1970s and 1980s, before tapering off around the rise of neo-republican theory in the 1980s and 90s.<sup>3</sup> More recently, *Obergefell v. Hodges*<sup>4</sup> and its precursors have prompted some commentators—usually critics<sup>5</sup>—to argue that the Court is once again acting as an agent of social change, although many others from across the ideological spectrum have rejected this view.<sup>6</sup> For the most part, American legal liberalism has been having a rough time of it for around three decades.<sup>7</sup>

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<sup>1</sup> See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2 (1996) (calling legal liberalism “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> See, e.g., *id.* at 13–22.

<sup>3</sup> See, e.g., *id.* at 8–9. For similar but non-identical accounts, see Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 68–71 (1998), and Louis Michael Seidman, *J. Skelly Wright and the Limits of Legal Liberalism*, 61 LOY. L. REV. 69, 71 (2015).

<sup>4</sup> 135 S. Ct. 2584 (2015).

<sup>5</sup> E.g., David Upham, *Symposium: A Tremendous Defeat for “We the People” and Our Posterity*, SCOTUSBLOG (June 26, 2015, 4:26 PM), <http://www.scotusblog.com/2015/06/symposium-a-tremendous-defeat-for-we-the-people-and-our-posterity/> [<https://perma.cc/29H6-BJY9>] (“[I]t [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.”).

<sup>6</sup> See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) (questioning the Supreme Court’s ability to effect widespread social change); 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 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.”); Ilya Shapiro, *Introduction*, 2015 CATO SUP. CT. REV. 1, 9–10 (“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* . . . .”); Kyle C. Velté, *Obergefell’s Expressive Promise*, 6 HOUS. L. REV.: OFF REC. 157, 161 (2015), [http://www.houstonlawreview.org/wp-content/uploads/2015/11/Velte\\_Final.pdf](http://www.houstonlawreview.org/wp-content/uploads/2015/11/Velte_Final.pdf) [<https://perma.cc/NU9E-353W>] (“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.”).

<sup>7</sup> Of course, whether courts can—and should—be agents of social reform is hardly a uniquely American debate. Similar conversations occur, for instance, among scholars of Israeli law in regard to the successfulness and desirability of values-based judging and among Canadian Charter

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. The Indian Constitution prohibits the practice of untouchability, opens Hindu temples to government oversight, grants an affirmative right to primary education, and has sixteen non-justiciable (but frequently discussed and interpreted) articles that commit the state to trying its hand at everything from minimizing economic inequality to constructing a uniform civil code that can replace religious personal laws.<sup>8</sup> Unsurprisingly, 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>9</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.<sup>10</sup> For anyone subscribing to this vision of Indian constitutionalism, signs that legal liberalism may be on the wane carry a different and arguably a more dispiriting significance in India than they would in the United States.

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scholars on either side of the court-party thesis. On values-based judging, compare MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 38 (2011) (critically describing the "courts as agents of liberal values"), with Aharon Barak, *The Role of the Supreme Court in a Democracy*, 33 *ISR. L. REV.* 1, 3–4 (1999) (arguing that "[t]he democratic character of our regime, and the social values derived from it . . . constitute a system of principles and values according to which the judge creates law. . . . The judge gives expression to all these"). On the role of courts in effecting social change in Israel, compare Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *HARV. L. REV.* 19, 46–47 (2002) (stating that while a supreme court cannot "cure every ill of society" or "be the primary agent for social change" it "has an important role in bridging the gap between law and society and in protecting the fundamental values of democracy with human rights at the center"), with Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 *ISR. L. REV.* 216, 218 (1999) ("[I]n rifted democracies [like Israel], courts should be reluctant to determine specific arrangements and priorities, especially in areas of social controversy, where the grounds of judicial action are not clear."). The court-party thesis is the idea that citizen interest groups drive judicial interpretation of the Charter and that "judges drive the Charter, not vice versa." F.L. Morton, *The Charter Revolution and the Court Party*, 30 *OSGOODE HALL L.J.* 627, 630 (1992); see also Lise Gotell, Book Review, 30 *QUEEN'S L.J.* 883, 896 (2005) (reviewing CHRISTOPHER P. MANFREDI, *FEMINIST ACTIVISM IN THE SUPREME COURT: LEGAL MOBILIZATION AND THE WOMEN'S LEGAL EDUCATION AND ACTION FUND* (2004)).

<sup>8</sup> INDIA CONST. art. 17 (prohibition of untouchability); *id.* art. 21(A) (right to education); *id.* art. 25, cl. (2)(a) (authority to regulate practices associated with religious exercise); *id.* art. 25, cl. (2)(b) (opening of Hindu institutions to all classes and sections of Hindus); *id.* art. 38(1) (minimizing economic inequality); *id.* arts. 36–51 (non-justiciable rights); *id.* art. 44 (Uniform Civil Code).

<sup>9</sup> GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 214, 216–17 (2010). Note that Jacobson acknowledges that both constitutions "contain preservative and transformative elements." *Id.* at 214.

<sup>10</sup> *Id.* at 214.

There are great problems with relying on this kind of constitutional shorthand in general and with subscribing to this characterization of the Indian Constitution in particular. An important goal of this paper is to argue 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>11</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 agency view of governmental authority,<sup>12</sup> while others envision such an active or militant role for government that it is difficult to characterize the state as merely the agent of the sovereign people.<sup>13</sup> Since neither of these visions of sovereignty is—or is meant to be—paramount over the long run, they exist in a perpetual yet 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 (as opposed to broadly state-driven change) as well as the public reception of such change have been markedly different there.<sup>14</sup> While Indian courts have always had an important role in advancing and upholding progressive policies,<sup>15</sup> they

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<sup>11</sup> Deepa Das Acevedo, *Temples, Courts, and Dynamic Equilibrium in the Indian Constitution*, 64 AM. J. COMP. L. 555 (2016).

<sup>12</sup> On the agency theory of democratic sovereignty, see, for example, *id.* at 573–74 (describing how many contract theories of democracy view sovereignty “like an object whose ownership can’t really be shared” but that needs to be delegated from “the people” to their representatives for the purposes of effective governance).

<sup>13</sup> *Id.* at 575 (“[T]he [Indian] Constitution . . . envisions a state with huge independent discretion to control social ordering . . . . Having that kind of discretion baked right into one’s constitutional cake means that sovereignty *can’t* be wholly owned by citizens: it has to be shared by both citizens and the state.”).

<sup>14</sup> See, e.g., K.G. Balakrishnan, Chief Justice of India, Fifteenth Annual Lecture at the Singapore Academy of Law: Growth of Public Interest Litigation in India (Oct. 8, 2008). The Chief Justice—speaking on legal liberalism in India—remarked:

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.

*Id.*

<sup>15</sup> Consider, for instance, the courts’ role in upholding the constitutional mandate to open Hindu temples to members of all castes. C. J. Fuller, *Hinduism and Scriptural Authority in Mod-*

have been especially prominent since the rise of public interest litigation in the 1970s.<sup>16</sup>

Unlike in the United States, where “public interest law” refers to legal work and advocacy done for the greater good or for those who cannot afford representation,<sup>17</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>18</sup> Framing a complaint as a PIL suit allows petitioners to avoid traditional standing requirements (like personal harm)<sup>19</sup> and briefing requirements (like the submission of formal writ petitions) in the interest of removing barriers to justice for the most disadvantaged.<sup>20</sup> Additionally, courts hearing PIL suits often act as quasi-arbitrators, conduct independent fact-finding, and require periodic progress reports from the parties.<sup>21</sup> And not infrequently, courts

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*ern Indian Law*, 30 COMP. STUD. SOC'Y & HIST. 225 (1988) (describing temple-entry cases in which the courts creatively interpret Hindu scriptures to show their agreement with constitutional values).

<sup>16</sup> Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THRD WORLD LEGAL STUD. 107, 107 (1985) (using the term “social action litigation”). Baxi writes:

For too long, the apex constitutional court had become “an arena of legal quibbling for men with long purses.” Now, increasingly, the Court is being identified by justices as well as people as the “last resort for the oppressed and the bewildered.” . . . The medium through which all this has happened, and is happening, is social action litigation, a distinctive by-product of the catharsis of the 1975–1976 Emergency.

*Id.* at 107–08 (footnotes omitted).

<sup>17</sup> See, e.g., *What Is Public Interest Law?*, HARV. L. SCH., <http://hls.harvard.edu/dept/opia/what-is-public-interest-law/> [<https://perma.cc/KGJ3-XVKT>] (defining public interest law by practice setting, work type, and issue area, among other things).

<sup>18</sup> See Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 497–501 (1989); Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE 159, 162–67 (B.N. Kirpal et al. eds., 2000).

<sup>19</sup> See *Baxi v. Uttar Pradesh*, (1983) 2 SCC 308 (1981) (an early classic in public interest litigation that featured a famous law professor petitioning on behalf of the residents of a women’s home).

<sup>20</sup> See *Khatri v. Bihar*, AIR 1981 SC 928 (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 *Khatri v. Bihar*, (1981) 2 SCR 408, and *Khatri v. Bihar*, (1981) 1 SCC 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. 57, 58 & n.3 (1994).

<sup>21</sup> Videh Upadhyay, *Changing Judicial Power: Courts on Infrastructure Projects and Environment*, 35 ECON. & POL. WKLY. 3789, 3790–91 (2000) (discussing the “proliferation of court-appointed committees” in PIL suits). One of Upadhyay’s examples is *Rural Litig. & Entitlement Kendra v. Uttar Pradesh*, (1985) 3 SCR 169, in which the court appointed expert committees to determine whether mining in the Doon Valley had adverse environmental impact and also created

themselves instigate PIL “suits” by taking *suo motu* cognizance of specific issues.<sup>22</sup>

Given these striking features and the stack of extremely progressive PIL cases that were decided early on—not to mention a sense that India’s executive and legislative branches are incapable of governing—it’s no wonder that public interest litigation is viewed as a crucial tool for a court focused on “good governance.”<sup>23</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 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>24</sup>

Few cases better reflect the shifting tone of public interest litigation and legal liberalism in India than the 2009 opinion in *Naz Foundation v. Government of NCT of Delhi*<sup>25</sup> that decriminalized sodomy and the 2013 *Koushal v. Naz Foundation*<sup>26</sup> decision that reversed *Naz*. *Naz* was filed in the Delhi High Court by an NGO focusing on HIV/AIDS and sexual-health issues, while *Koushal* 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 [the] cultural values of Indian society.”<sup>27</sup> Read together, *Naz* and *Koushal* express the primary argument of this paper—at

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.” Upadhyay, *supra*, at 3790.

<sup>22</sup> Marc Galanter & Vasujith Ram, *Suo Moto Intervention and the Indian Judiciary* 1, 15, 18 tbl.1, 21 tbl.2 (Sept. 25, 2015) (unpublished manuscript) (on file with author).

<sup>23</sup> See 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”).

<sup>24</sup> E.g., SHOBHA AGGARWAL, *THE PUBLIC INTEREST LITIGATION HOAX* 10–11 (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. 1770, 1774 (2004) (arguing that “it is indeed tempting to argue that the recent drawing back of the court in PIL . . . is because the court has in fact bought the ideology underlying the economic reforms” because such a “hypothesis does seem to offer the simplest explanation for the above decisions of the court”); Balakrishnan Rajagopal, *Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 8 HUM. RTS. REV. 157, 158–60, 163–64, 167 (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”).

<sup>25</sup> (2009) 160 DLT 277 (Delhi High Ct.).

<sup>26</sup> (2014) 1 SCC 1 (2013).

<sup>27</sup> *Koushal*, (2014) 1 SCC at 24; *Naz*, (2009) 160 DLT at 285.

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 arguing 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>28</sup> Nor am I advocating any particular way of “fixing” public interest litigation so 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 is unrealistic, while urging sitting justices to abandon their command-and-control model of case management for a more facilitative one may offer procedural improvements but is unlikely to restore public interest litigation’s focus on the country’s most marginalized citizens.<sup>29</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 ten to fifteen years of PIL history, I am quite doubtful that 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 examples suggest that public

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<sup>28</sup> E.g., SHYLASHRI SHANKAR, SCALING JUSTICE: INDIA’S SUPREME COURT, ANTI-TERROR LAWS, AND SOCIAL RIGHTS 144, 157 (2009) (finding that “[j]udgments after 1988 were 17 per cent less likely to favour health/education rights that [sic] those issued before 1988” and that Supreme Court judges “appointed after 1998 were 18 per cent less likely to rule in favour of the rights to health and education”); Rakesh Shukla, *Rights of the Poor: An Overview of Supreme Court*, 41 ECON. & POL. WKLY. 3755 (2006) (reviewing recent PIL cases across several areas of law); Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?* 13 (World Bank Dev. Research, Policy Research Working Paper No. 5109, 2009) (using quantitative analysis to argue that “judicial receptivity in the Supreme Court to Fundamental Rights claims made on behalf of poor and excluded individuals has declined in recent years”); Varun Gauri & Poorvi Chitalkar, *The Distributional Impact of Public Interest Litigation in the Indian Supreme Court—an Update* 1, 5–6, 8, 12 (Sept. 25–26, 2015) (conference paper) (on file with author) (arriving at a similar conclusion after examining beneficiary inequalities in recent PIL cases).

<sup>29</sup> See 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) (arguing for a more facilitative role and sketching its contents). Thiruvengadam also observes that “[s]ome [unnamed] progressives have implicitly suggested that what is required is . . . a new generation of judges in the mould of [early PIL-friendly justices] be appointed,” a suggestion he rightfully responds to by saying that “such a view is both unrealistic and problematic.” *Id.* at 357–58. See also 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, 528 (Oscar Vilhena et al. eds., 2013) [hereinafter Thiruvengadam, *Swallowing a Bitter PIL?*].



interest litigation isn't, in a consequentialist sense, already a lost cause.<sup>30</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. 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, the dynamic interplay between a fairly conventional, citizen-sovereignty vision of democratic government and a more unusual support for state- and court-led reform gives Indian democracy the flexibility it needs to survive over the long run.

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*, outlining the reasoning and the vision of state-society relations 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>31</sup> A former Chief Justice of the

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<sup>30</sup> See, e.g., Nat'l Legal Services Auth. v. Union of India, AIR 2014 SC 1863 (legally recognizing a "third gender" and directing national and state governments to create reservations for third gender individuals in educational institutions and public employment); Peoples Union for Civil Liberties v. Union of India, WP(C) No. 196/2001 (Nov. 28, 2001 interim order), <http://www.righttofoodindia.org/orders/nov28.html> [<https://perma.cc/L9VM-JY82>] (requiring state governments to provide every child attending a government or government-aided primary school with a free, cooked midday meal).

<sup>31</sup> The Indian Supreme Court is a court of original jurisdiction for plaintiffs who assert fundamental rights violations under Article 32, and has been the "pivot in the development of PIL jurisprudence in India." Shyam Divan, *Public Interest Litigation*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 662, 664 (Sujit Choudhry et al. eds., 2016). PIL suits can also be heard by High Courts under Article 226, and many important PIL cases have been decided by these courts. See INDIA CONST. art. 226. However, scholarly debates over public interest litigation have generally focused on the Supreme Court. See, e.g., Divan, *supra*.

Supreme Court called public interest litigation “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>32</sup> One of India’s most prominent legal scholars declared, during the early days of public interest litigation, that “[t]he Supreme Court of India is at long last becoming, after thirty two years of the Republic, the Supreme Court for Indians.”<sup>33</sup> And this sentiment is not unwarranted: early PIL cases forced negligent town councils to provide slum dwellers with basic sanitation facilities,<sup>34</sup> released individuals whose pre-trial detentions exceeded the maximum penalty for their alleged crimes,<sup>35</sup> and compensated women raped by on-duty Indian soldiers.<sup>36</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 has—also unarguably—been successful in this mission.

Besides raw outcomes, the good vibes surrounding public interest litigation emanate from a sense that the Supreme Court devised the approach and PIL petitioners continue to use it only 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: in 2014, thirty-four percent of sitting Lok Sabha members faced criminal charges,<sup>37</sup> the last ten years alone have seen a number of scandals with price tags between USD \$30–40 billion a piece,<sup>38</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 min-

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<sup>32</sup> A.S. Anand, *Judicial Review—Judicial Activism—Need for Caution*, in LAW & JUSTICE 377, 383 (Soli J. Sorabjee ed., 2004).

<sup>33</sup> Baxi, *supra* note 16, at 107; see also Jasper Vikas George, *Public Interest Litigation: Social Change and Public Interest Litigation in India*, NGOS INDIA (Aug. 3, 2005), [http://www.ngosindia.com/resources/pil\\_sc.php](http://www.ngosindia.com/resources/pil_sc.php) [<https://perma.cc/A9YZ-UHLP>] (calling public interest litigation the product of “two justices . . . [who] recognised the possibility of providing access to justice to the poor and the exploited people by relaxing the rules of standing”).

<sup>34</sup> *Ratlam v. Vardhichand*, (1981) 1 SCR 97, 105–06, 113 (1980).

<sup>35</sup> *Khatoon v. Bihar*, (1979) 3 SCR 169.

<sup>36</sup> *Delhi Domestic Working Women’s Forum v. Union of India*, (1994) 4 SCR Supp. 528.

<sup>37</sup> Rukmini S., *16th Lok Sabha Will Be Richest, Have Most MPs with Criminal Charges*, HINDU (May 19, 2014, 2:17 AM), <http://www.thehindu.com/news/national/16th-lok-sabha-will-be-richest-have-most-mps-with-criminal-charges/article6022513.ece> [<https://perma.cc/FV4E-CGRQ>] (noting that this represents an increase from thirty percent in 2009 and twenty-four percent in 2004). The Lok Sabha is the lower house of Parliament. See *id.*

<sup>38</sup> Beina Xu, *Governance in India: Corruption*, COUNCIL ON FOREIGN REL. (Sept. 4, 2014), <http://www.cfr.org/corruption-and-bribery/governance-india-corruption/p31823> [<https://perma.cc/F53S-W2QU>] (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).

stership.<sup>39</sup> In 2015, India ranked seventy-sixth on Transparency International's Corruption Perception Index, which is actually an improvement over its 2013 performance (ninety-fourth).<sup>40</sup> Matters had reached such a pitch by 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.<sup>41</sup> There is even a small but identifiable genre of anti-corruption cinema that is equal parts fantasy and self-flagellation.<sup>42</sup>

All of this has rather understandably fed into strong support for public interest litigation. While the federal judiciary's halo has lately become a bit tarnished, it still enjoys a reputation for good intentions and efficacy that vastly outstrips anything the executive or legislative branches could hope for.<sup>43</sup> This reputational advantage, combined with the very real failures of

<sup>39</sup> For an overview of relevant court cases and investigations that were written before Narendra Modi became Prime Minister, see *India: A Decade on, Gujarat Justice Incomplete*, HUM. RTS. WATCH (Feb. 24, 2012, 4:22 PM), <https://www.hrw.org/news/2012/02/24/india-decade-gujarat-justice-incomplete> [<https://perma.cc/3F8P-VS6G>]. 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*, N.Y. TIMES (Aug. 19, 2015), <http://www.nytimes.com/2015/08/20/world/asia/teesta-setalvad-modi-india.html> [<https://perma.cc/VVJ8-9TGM>].

<sup>40</sup> TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2015, [http://files.transparency.org/content/download/1952/12820/file/2015\\_CPI\\_ReportInfographicsZIP.zip](http://files.transparency.org/content/download/1952/12820/file/2015_CPI_ReportInfographicsZIP.zip) [<https://perma.cc/ZN3Z-X87X>]; TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2013, [http://files.transparency.org/content/download/700/3007/file/2013\\_CPIBrochure\\_EN.pdf](http://files.transparency.org/content/download/700/3007/file/2013_CPIBrochure_EN.pdf) [<https://perma.cc/7LM2-Z4Y3>]; Xu, *supra* note 38.

<sup>41</sup> See Sumanta Banerjee, *Anna Hazare, Civil Society, and the State*, 46 ECON. & POL. WKLY. 12, 12–13 (2011). Although the idea of an ombudsman (or “lokpal”) bill had surfaced regularly for decades, the bill, fittingly, always got stuck in Parliament. See Aditi Malhotra & Saptarishi Dutta, *Timeline: The Lokpal's Long Walk to Law*, WALL ST. J. (Dec. 18, 2013, 9:30 AM), <http://blogs.wsj.com/indiarealtime/2013/12/18/timeline-the-lokpals-long-walk-to-law/> [<https://perma.cc/C9YX-5XLE>]. It was eventually passed on December 18, 2013. *A to Z of Lokpal Bill: India's Answer to Fighting Corruption*, HINDUSTAN TIMES (Dec. 19, 2013, 4:07 PM), <http://www.hindustanimes.com/india/a-to-z-of-lokpal-bill-india-s-answer-to-fighting-corruption/story-C0xfOEX1vNdXgvYq8B1DFK.html> [<https://perma.cc/A2M2-5KT2>]; Malhotra & Dutta, *supra*.

<sup>42</sup> For a tiny slice of this genre, see, for example, INDIAN (Sri Surya Movies 1996); MUDHALVAN (Sri Surya Films 1999); NO ONE KILLED JESSICA (UTV Spotboy 2011); RANG DE BASANTI (ROMP 2006); SATYAGRAHA (UTV Motion Pictures 2013) (explicitly inspired by Anna Hazare).

<sup>43</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 156, 157 (S.K. Verma & Kusum eds., 2000). The judiciary's reputation has suffered a bit recently thanks to allegations of corrupt personal finances, case-fixing, and irregular promotion practices. See Shoma Chaudhry, *Half of the Last 16 Chief Justices Were Corrupt*, TEHELKA (Sept. 5, 2009), [http://www.vigilonline.com/index.php?option=com\\_content&task=view&id=1182](http://www.vigilonline.com/index.php?option=com_content&task=view&id=1182) [<https://perma.cc/A6AL-JJZ7>]; Manoj Mitta, *A Few Just Men Who Raised the Bar*, TIMES OF INDIA (May

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 right the wrongs committed by other branches.<sup>44</sup> Some commentators maintain that given certain procedural aspects of public interest litigation—non-adversarial engagement, ongoing investigation, periodic reporting—courts are in fact compensating for the lack of a “genuine deliberative forum” in the legislature.<sup>45</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>46</sup> That is to say, 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>47</sup> For one thing, there has 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

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16, 2010, 3:56 AM), <http://timesofindia.indiatimes.com/home/sunday-toi/special-report/A-few-just-men-who-raised-the-bar/articleshow/5936089.cms> [<https://perma.cc/ABY2-9ZCE>].

<sup>44</sup> Gobind Das, *The Supreme Court: An Overview*, in SUPREME BUT NOT INFALLIBLE, *supra* note 18 at 17 (“Faced with a liberal and enlightened executive it sought to cooperate with 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>45</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) (arguing that “[t]he Indian Parliament’s decline from being a genuinely deliberative forum . . . is well documented” and that “in several PILs, the Court has consciously sought to act as a deliberative forum for policy making, and . . . judges should continue to be sensitive to the need to focus upon filling the deliberative gap”).

<sup>46</sup> See, e.g., Soli Sorabjee, *The Ideal Remedy: A Valediction*, in THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM 199, 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.”). But see Shubhankar 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, 247 (“[I]t does not follow that every role assigned to the executive or the legislative branches, when not performed appropriately, must be usurped by the Supreme Court.”).

<sup>47</sup> For criticisms of the “conservative” turn in public interest litigation, see sources cited *supra* note 24. See also Shukla, *supra* note 28, at 3758 (stating that “[t]he portends for the future are ominous” because of “[d]eclining authority and erosion of the legislature and executive along with an increasingly activist judiciary favouring the haves rather than the have-nots”). For a more general critique that emphasizes docket management, selectivity, and other explanations for the declining efficacy of public interest litigation, see Surya Deva, *Public Interest Litigation in India: A Critical Review*, 28 CIV. JUST. Q. 19, 31–32 (2009).

tribal and poor rural communities were displaced to further development projects;<sup>48</sup> the “relocation” cases, in which polluting industries (and the migrant workers who depended on them) were moved outside city limits;<sup>49</sup> 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>50</sup> The language of these newer decisions has been harsher, 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 symbolizing their thievery and opportunism relative to upstanding, pay-your-own-way homeowners.<sup>51</sup>

Lest they be accused of cherry-picking, critics of current PIL jurisprudence can also point to preliminary quantitative studies that suggest these landmark disappointments are representative rather than anomalous outcomes.<sup>52</sup> When it comes to modern 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>53</sup> To be sure, there are problems with relying on quantitative studies to show change over time in PIL jurisprudence because early PIL cases are harder to access and classify and also because experienced PIL plaintiffs may be self-selecting

<sup>48</sup> *E.g.*, N.D. Jayal v. Union of India, (2003) 3 SCR 152; Tata Hous. Dev. Co. v. Goa Found., AIR 2003 SC 4238; Andolan v. Union of India, AIR 2000 SC 3751; see Thiruvengadam, *Swallowing a Bitter PIL?*, *supra* note 29, at 522.

<sup>49</sup> *E.g.*, M.C. Mehta v. Union of India, AIR 1996 SC 2231.

<sup>50</sup> *E.g.*, Patel v. Union of India, (2000) 2 SCC 166; Gautam Bhan, “This Is No Longer the City I Once Knew.” *Evictions, the Urban Poor, and the Right to the City in Millennial Delhi*, 21 ENV’T & URBANIZATION 127, 128, 135 (2009) (noting that the 2004 Pushta eviction in Delhi displaced nearly 150,000 people and discussing the shifting characterization of parties and issues). For this grouping of PIL cases, see Thiruvengadam, *Swallowing a Bitter PIL?*, *supra* note 29, at 522.

<sup>51</sup> Bhan, *supra* note 50, at 134–35 (comparing language from early PIL displacement cases with language in comparable cases from 2000 onwards).

<sup>52</sup> SHANKAR, *supra* note 28, at 129–66; Gauri, *supra* note 28, *passim*.

<sup>53</sup> Gauri, *supra* note 28, at 13. Gauri observes that:

[A]dvantaged 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

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out of the court system<sup>54</sup>—in other words, decreasing win rates may reflect declining merit rather than changing judicial sympathies.<sup>55</sup> But the quantitative analyses of public interest litigation are rapidly closing in on these issues and the prognosis still does not look good.<sup>56</sup>

All of this is to say that whether they draw on specific case studies or sky-view analyses, 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>57</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>58</sup> These are all worthwhile issues and they are in keeping with the court’s broader shift towards a “good governance” role.<sup>59</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 focal points of early PIL cases, and whose problems by and large may still need addressing.<sup>60</sup> It is increasingly *not* the

<sup>54</sup> Jayanth K. Krishnan, *Social Policy Advocacy and the Role of the Courts in India*, 21 AM. ASIAN REV. 91, 108–13 (2003) (arguing that social policy advocates who work on behalf of marginalized communities are less and less likely to use the courts because of litigation expenses, procedural complications, and docket backlog, among other reasons).

<sup>55</sup> See Gauri & Chitalkar, *supra* note 28, at 5, 8 (stating that “there appears to have been a change in the nature of issues being brought to the Court through PILs” and 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”).

<sup>56</sup> Varun Gauri’s efforts to systematically examine the perceived shift in public interest litigation have been especially productive. Over a series of papers from 2009 to 2015, Gauri (in some cases working with co-authors) has used slightly different data sets and criteria yet found, fairly consistently, that public interest litigation largely merits the criticisms levied against it. See Gauri, *supra* note 28; Varun Gauri, *Fundamental Rights and Public Interest Litigation in India: Overachieving or Underachieving?*, 1 INDIAN J.L. & ECON. 71 (2010) (largely building on the 2009 paper); Gauri & Chitalkar, *supra* note 28.

<sup>57</sup> Thiruvengadam, *Swallowing a Bitter PIL?*, *supra* note 29, at 522.

<sup>58</sup> S. Muralidhar, *Public Interest Litigation*, 33–34 ANN. SURV. 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>59</sup> Robinson, *supra* note 23, at 2 (arguing that the Supreme Court has justified its development of the Basic Structure Doctrine and a broad right to life jurisprudence with an “appeal[] not just to a broad interpretation of the Indian Constitution, but indeed to broader (almost transcendent) principles of ‘civilization’ or good governance”).

<sup>60</sup> See Usha Ramanathan, *Of Judicial Power*, FRONTLINE, Mar. 16–29, 2002, <http://www.frontline.in/static/html/fl1906/19060300.htm> [<https://perma.cc/D23E-2HTK>] (observing that “[t]he constituency of the court appeared to have changed” in the 1990s, but going on to say that “[w]hat perhaps aggravated the sense of injustice, even anger, was the characterisation of the poor as drawn by the court”).

case that public interest litigation is a “last recourse for the oppressed and the bewildered.”<sup>61</sup>

As a result of this shift, 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 language, that judges should function as mediators when hearing PIL suits.<sup>62</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 reflect greater sensitivity to potential third-party effects on marginalized communities.<sup>63</sup>

The very idea of fixing public interest litigation suggests that it can be refashioned 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, can inevitably produce progressive results.<sup>64</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.<sup>65</sup>

This is not to say that I’m advocating the other extreme—abandoning public interest litigation as a hopelessly lost cause—which particularly upsetting outcomes like the one in *Koushal* might tempt us to do.<sup>66</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 means for social justice efforts going forward, it’s worth considering the stakes a little more deeply. What do the arguments for

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<sup>61</sup> See *Rajasthan v. Union of India*, (1978) 1 SCR 1, 92 (1977).

<sup>62</sup> Thiruvengadam, *Swallowing a Bitter PIL?*, *supra* note 29, at 531.

<sup>63</sup> Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. ENVTL. L. 293, 321 (2007).

<sup>64</sup> See Thiruvengadam, *Swallowing a Bitter PIL?*, *supra* note 29, 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>65</sup> Nivedita Menon makes a similar argument about the futility of attempting to reverse-engineer public interest litigation, but for very different reasons. Nivedita Menon, *Environment and the Will to Rule: Supreme Court and Public Interest Litigation in the 1990s*, in *THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA* 59, 70, 72 (Mayur Suresh & Siddharth Narrain eds., 2014) (arguing that it is “a peculiarly liberal hangover to assume that the judiciary is a neutral institution that could render radically different effects if it followed one strategy rather than the other” and “perhaps we need to recognize that the judiciary and the law *are* the neo-liberal project”).

<sup>66</sup> See *Koushal*, (2014) 1 SCC.

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>67</sup> not 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*<sup>68</sup> and *Koushal*<sup>69</sup> 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 United States, for instance, the *New York Times* greeted *Naz* with an op-ed triumphantly announcing "Indian Court Overturns Gay Sex Ban."<sup>70</sup> Similarly, in the approximately three years since *Koushal* was handed down, more than a dozen articles and notes discussing it have been published in American law journals (to say nothing of Indian or international law journals).<sup>71</sup> Across continents and publication venues, the reviews overwhelmingly celebrate *Naz* and excoriate *Koushal*.<sup>72</sup> This section does not challenge that assess-

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<sup>67</sup> Nick Robinson, *Too Many Cases*, 26 FRONTLINE Jan. 3–16, 2009, <http://www.hinduonnet.com/fline/fl2601/stories/20090116260108100.htm> [<https://perma.cc/4YHS-NPB6>] ("Contrary to popular belief . . . [PILs] have one of the court's lowest acceptance rates . . . . In 2006, the court received almost 20,000 letter or postcard petitions . . . that could be considered as PIL. . . . [But] 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)."); Gauri, *supra* note 28, at 10 ("[O]n average, some 0.4% of 'cases' before the Court involve PILs.").

<sup>68</sup> *Naz Found. v. Gov't of NCT of Delhi*, (2009) 160 DLT 277 (Delhi High Ct.).

<sup>69</sup> *Koushal v. Naz Found.*, (2014) 1 SCC 1 (2013).

<sup>70</sup> Heather Timmons & Hari Kumar, *Indian Court Overturns Gay Sex Ban*, N.Y. TIMES (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) [<https://perma.cc/H6X3-P2HR>].

<sup>71</sup> These results are based on a search of the legal database Lexis Advance using the following string: "Naz Foundation" narrowed by Secondary Materials search within "Koushal" (Feb. 21, 2016).

<sup>72</sup> E.g. Bret Boyce, *Sexuality and Gender Identity Under the Constitution of India*, 18 J. GENDER RACE & JUST. 1, 42 (2015) ("The decision of the Supreme Court in *Koushal* is remarkably thin in legal analysis . . ."); Martha C. Nussbaum, *Disgust or Equality? Sexual Orientation and Indian Law*, 6 J. INDIAN L. & SOC'Y 1, 23 (2016) (commenting, in the course of discussing *Koushal*, that "[a]s for law, there is almost nothing there"); Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz Foundation*, 2 NUJS L. REV. 397, 398–99 (2009) (arguing that "[a]t its core, *Naz Foundation* is an emphatic reiteration of the vision of India's founders" and that "it genuinely qualifies for that often gratuitously misused epithet of legal writing: 'a landmark judgment'") [hereinafter Raghavan, *Navigating the Noteworthy*]; Sujitha Subramanian, *The Indian Supreme Court Ruling in Koushal v. Naz: Judicial Deference or Judicial Abdication?*, 47 GEO. WASH. INT'L L. REV. 711, 719 (2015) ("[T]he judicial 'reasoning' in *Koushal v. Naz* cannot be rationally arrived at"); Vikram Raghavan, *Taking Sexuality Seriously: The Supreme Court and the Koushal Case—Part I*, LAW & OTHER THINGS (Dec. 14, 2013, 8:48 AM), <https://lawandotherthings.blogspot.ca/2013/12/taking-sexuality->



ment: 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 validity of the reasoning in either *Naz* or *Koushal* 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.

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

The named petitioner in *Naz* was an NGO that concentrates on HIV/AIDS awareness and support in India.<sup>73</sup> The Foundation filed a PIL petition to have section 377 of the Indian Penal Code read down on the grounds that the criminalization of sodomy made men who have sex with men reluctant to seek HIV/AIDS support.<sup>74</sup> Others joined the effort, including the national Ministry of Health and Welfare and an umbrella group called "Voices Against § 377 IPC."<sup>75</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.P. Singhal.<sup>76</sup>

The *Naz* petitioners challenged the constitutionality of section 377 under Article 14 (equal protection), Article 15 (prohibition of, among other things, sex discrimination), Article 19 (free speech and expression), and Article 21 (protection of life and personal liberty).<sup>77</sup> They also argued that the

seriously-supreme.html [https://perma.cc/Y3VD-7LQ6] [hereinafter Raghavan, *Taking Sexuality Seriously*] ("Koushal is bad in so many ways. Where does one even begin?").

<sup>73</sup> *About Us—Naz India*, NAZ FOUND. (INDIA) TRUST, <http://nazindia.org/naz-india/> [https://perma.cc/98EW-4PY4].

<sup>74</sup> *Naz*, (2009) 160 DLT at 285.

<sup>75</sup> *Id.* at 288–89. The Ministry of Health and Welfare was named as a respondent in the *Naz* Foundation's writ petition but the ministry submitted a reply affidavit supporting the foundation. *Id.* at 288; Writ Petition at 2, 6–7, *Naz*, (2009) 160 DLT 277, <http://www.lawyerscollective.org/files/High%20Court%20Writ%20Petition.pdf> [https://perma.cc/H27F-Y7S3] [hereinafter Writ Petition]. "Voices Against § 377 IPC" is also described as a respondent in the High Court's decision but supported the *Naz* Foundation's petition. *Naz*, (2009) 160 DLT at 289–91.

<sup>76</sup> *Naz*, (2009) 160 DLT at 286, 291. 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*, FREE REPUBLIC (Nov. 13, 2001, 6:20 AM), <http://www.freerepublic.com/focus/news/569758/posts> [https://perma.cc/6WYX-H5WY]. The late B.P. Singhal was a former Director General of Police and Rajya Sabha member for the right-wing Bharatiya Janata Party. *BP Singhal Passes Away*, ORGANISER, <http://www.organiser.org/Encyc/2012/10/15/BP-Singhal-passes-away.aspx?NB=&lang=4&m1=&m2=&p1=&p2=&p3=&p4=&PageType=N> [https://perma.cc/AE99-D9G4].

<sup>77</sup> Writ Petition, *supra* note 75, at 8–11.

Indian Penal Code's condemnation of homosexuality was outdated and not in keeping with Indian culture.<sup>78</sup> But rather than ask for the provision to be struck down entirely, the petitioners asked that section 377 be read down to criminalize penile-non-vaginal sex only when it is non-consensual or involves a minor.<sup>79</sup>

In granting their petition, the Delhi High Court made several constitutional arguments. First, the court held that the Indian Constitution indirectly supports a fundamental right to privacy as well as a right to a dignified life, and that both rights require protection for private consensual sex acts between adults (the Article 21 argument).<sup>80</sup> Second, and related to this first argument, the court held that even if section 377 reflects public morality concerning sodomy, public morality alone does not constitute the kind of compelling state interest that's required to restrict a fundamental right.<sup>81</sup> Third, it held that section 377 unfairly targeted a particular community despite being facially neutral (the Article 14 argument).<sup>82</sup> And fourth, the court held that "sex" includes "sexual orientation" for the purposes of non-discrimination analysis (the Article 15 argument).<sup>83</sup>

Many commentators praised the High Court's declaration that expressions of public morality via the law are still subject to an overarching "constitutional morality."<sup>84</sup> Others admired the expansion of sex to include sexual orientation,<sup>85</sup> while still others called *Naz*'s subtle re-reading of privacy protection—namely, that privacy is linked to persons not places<sup>86</sup>—its "most attractive feature."<sup>87</sup> To be sure, *Naz* is not perfect: not all of the ar-

<sup>78</sup> *Id.* at 14 (arguing that "[i]nfluenced by Victorian campaigns for sexual purity, and based upon an essentially anti-pleasure and anti-sex bias, the British sought to rectify Indian marital, familial and sexual arrangements which they viewed as 'primitive'").

<sup>79</sup> *Id.* at 11, 69–70.

<sup>80</sup> *Naz*, (2009) 160 DLT at 293–302.

<sup>81</sup> *Id.* at 310–17. The court also made a similar argument by applying strict scrutiny. *See id.* at 323–27.

<sup>82</sup> *Id.* at 317–22.

<sup>83</sup> *Id.* at 323. As Raghavan notes, the court did not engage with the foundation's Article 19 argument. Raghavan, *Noteworthy and Nebulous*, *supra* note 72, at 412.

<sup>84</sup> *See* Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgment*, 2 NUJS L. REV. 445, 451 (2009) ("This distinction between public and constitutional morality . . . is precisely where the Constitutional importance of *Naz Foundation* lies."); *see also* Nussbaum, *supra* note 72, at 20 (stating, of *Koushal*, that "the claim of public morality is the central claim" advanced by the petitioners).

<sup>85</sup> Bret Boyce, *supra* note 72, at 39 ("In perhaps the most creative part of its opinion, the court ruled that discrimination on the basis of sexual orientation is tantamount to sex discrimination prohibited by Article 15.").

<sup>86</sup> *Naz*, (2009) 160 DLT at 300.

<sup>87</sup> Raghavan, *Navigating the Noteworthy*, *supra* note 72, at 403.

guments that could have been made were made or made well.<sup>88</sup> But overall, both the outcome and the reasoning have been widely celebrated.

Conversely, *Koushal* 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>89</sup> The actual petitioners in *Koushal* included several 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>90</sup>

The *Koushal* petitioners argued, among other things, that the High Court's findings of fact as to the harms caused by section 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>91</sup> They also challenged *Naz*'s holding that section 377 discriminates against homosexuals as a class and that sex discrimination encompasses sexual-orientation discrimination.<sup>92</sup> And 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>93</sup>

<sup>88</sup> Pritam Baruah, *Logic and Coherence in Naz Foundation: The Arguments of Non-Discrimination, Privacy, and Dignity*, 2 NUJS L. REV. 505, 511–13 (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); see also Martha C. Nussbaum, *Sex Equality, Liberty, and Privacy: A Comparative Approach to the Feminist Critique*, in INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 242 (Zoya Hasan et al. eds., 2005) (generally critiquing the use of privacy arguments for the purposes of advancing gender justice). See generally Raghavan, *Navigating the Noteworthy*, *supra* note 72 (highlighting some of the decision's shortcomings with respect to its organization, its treatment of Section 377's legislative and case law history, and its reliance on "soft law" principles, among other things); Sujit Choudhry, *How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation*, in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA, *supra* note 29, at 55 ("*Naz Foundation* has a conceptual lacuna at its very heart, created by the court's failure to justify the centrality of comparative constitutional reasoning to its judgment.").

<sup>89</sup> *Koushal*, (2014) 1 SCC at 24.

<sup>90</sup> *Id.* at 24–28. On the petitioners' claim to standing, see Raghavan, *Taking Sexuality Seriously*, *supra* note 72 ("[The *Koushal* court] seemed untroubled that a sovereign government prerogative was, in effect, being outsourced to third parties. . . . [who] had established neither their stakes nor their competence to defend Section 377.").

<sup>91</sup> *Koushal*, (2014) 1 SCC at 28–29.

<sup>92</sup> *Id.* at 31 ("Shri Huzefa Ahmadi submitted that the right to sexual orientation can always be restricted on the principles of morality and health. He referred to the Constituent Assembly Debates on Article 15 to show that the inclusion of sexual orientation in the term 'sex' was not contemplated by the Founding Fathers.").

<sup>93</sup> The Delhi Commission for the Protection of Child Rights argued that "the legislature has treated carnal intercourse against the order of nature as an offence" and that "[t]he presumption of

There's not much in the way of original reasoning in *Koushal*, but subsequent commentators have teased out the following arguments from its decidedly minimalist analysis: (1) section 377's prohibition of sodomy is presumptively constitutional because the Indian Penal Code was duly enacted (in 1860) and remains unamended on this point;<sup>94</sup> (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 (that is, non-discriminatory) efforts to enforce the provision;<sup>95</sup> (3) people who engage in carnal intercourse "against the order of nature" are a separate class such that different laws can be applied against them without constitutional difficulty.<sup>96</sup>

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 *Naz* is perplexing or just plain wrong; all that is seemingly left coherent in *Koushal* is the bare argument of judicial deference to legislative acts.<sup>97</sup> 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 because the *Koushal* court made no attempt to grapple with the issues—an absence made clear by page after page of block quotations cribbed from other judges' efforts at grappling—its deference appears to be nothing more than a small and rather transparent fig leaf.<sup>98</sup>

Having said all this, my intent is not to demonstrate why *Koushal* is a bad decision since it has been pretty thoroughly picked apart. Indeed, for our purposes, *Naz* 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.

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constitutionality is strong and the right claimed should have been directly violated by the statute." *Id.* at 30. The All India Muslim Personal Law Board (AIMPLB) argued 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." *Id.* at 32.

<sup>94</sup> Subramanian, *supra* note 72, at 714; see also Vrinda Narain, *Postcolonial Constitutionalism in India: Complexities & Contradictions*, 25 S. CAL. INTERDISC. L.J. 107, 129 (2016).

<sup>95</sup> Boyce, *supra* note 72, at 43–44; Subramanian, *supra* note 72, at 743–44.

<sup>96</sup> Boyce, *supra* note 72, at 44.

<sup>97</sup> *Id.* at 46–47; Narain, *supra* note 94, at 129; Subramanian, *supra* note 72, at 735–40.

<sup>98</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> [<https://perma.cc/U5NR-8JC6>] (arguing that "[t]o frame this as an issue of 'restraint', and argue that the Court was operating on the principle of judicial restraint is deeply misleading").

### B. Competing Public Interests

Detached from section 377 and the criminalization of sodomy, *Naz* and *Koushal* are easily recognizable as examples of “classic” and “contemporary” PIL suits. Consider the moving parties: *Naz* was brought by a coalition of progressive-minded civil society actors and sympathetic government subsidiaries,<sup>99</sup> while *Koushal* was brought by a coalition of individual litigants and community organizations—religious rather than residential, perhaps, but community organizations nonetheless.<sup>100</sup> Or take the underlying goals of the suits as they are stated by the moving parties. The original writ petition submitted by the Naz Foundation in 2001 repeatedly references affirmative rights and social attitudes—“self-respect and dignity” on the one hand, and “doctrinaire and outmoded conception[s] of sexual relations” on the other.<sup>101</sup> Conversely, the *Koushal* petitioners explained their motivations primarily using the language of religious or cultural protection and judicial deference.<sup>102</sup> And finally, remember for whom the moving parties were act-

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<sup>99</sup> On the similarity between the *Naz* petitioners and classic PIL petitioners, compare *Naz*, (2009) 160 DLT at 285, 288–91, with *Baxi v. Uttar Pradesh*, (1983) 2 SCC 308 (1981) (law professor filing a PIL case on behalf of the residents of a women’s home), and *Khatoun v. Bihar*, (1979) 3 SCR 169 (lawyer filing a writ petition on the basis of newspaper articles documenting the circumstances of accused persons awaiting trial). See also *Baxi*, *supra* note 16, at 116–17 (describing similar landmark PIL cases filed by sympathetic elite actors).

<sup>100</sup> On the similarity between the *Koushal* petitioners and contemporary PIL petitioners, compare *Koushal*, (2014) 1 SCC at 24–28, with Gautam Bhan, *The Impoverishment of Poverty: Reflections on Urban Citizenship and Inequality in Contemporary Delhi*, 26 ENV’T & URBANIZATION 547, 551, 553 (2014) (quoting *Pitampura Sudhar Samiti v. Gov’t of NCT of Delhi*, WP(C) 4215/1995 (Sept. 27, 2002) (Delhi High Ct.)) (discussing petitioners’ argument “that they [were] . . . a voluntary association of law abiding, peace-loving bonafide residents’ . . . who ha[d] . . . ‘purchased the plots and constructed their respective houses from their hard earned money’” and the court’s description of the public lands in question as having “‘been encroached by slum dwellers who have no right, title or interest in the said land and are merely trespassers’”) (citations omitted).

<sup>101</sup> Writ Petition, *supra* note 75, at 6 (“[U]nless 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 . . . .”); *id.* 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.”).

<sup>102</sup> See, e.g., *Koushal*, (2014) 1 SCC at 30–31 (“[I]f 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.”) (argument of the Trust God Missionaries); see also *id.* at 31 (“[C]ourts, by their very nature, should not undertake the task of legislating.”) (argument of the AIMPLB). Some of the *Koushal* petitioners also appealed to child protection and the non-absolute nature of all rights. See *id.* at 32 (“[A]ll fundamental rights operate in a square of reasonable restrictions.”) (argument of Suresh Kumar Koushal); Pallavi Polanki, *Why Delhi Child Rights Commission Opposed De-criminalization of Gay Sex*, FIRSTPOST (Dec. 14, 2013, 11:27 AM), <http://www.firstpost.com/india/why-delhi-child-rights-commission-opposed-de-criminalisation-of-gay-sex-1286883.html> [<https://perma.cc/W8JG-VLTR>] (“In the last 150 years, there have been only 200 cases where this section has been effectively applied. All

ing: 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 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.

It's true that *Koushal* stands somewhat apart from the new model of PIL suits inasmuch as it focuses on religious, cultural, and moral claims rather than on economic or good-governance demands.<sup>103</sup> 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 of the petitioners rather than a good reformer of society.

It also doesn't matter that the outcome sought by the *Koushal* petitioners may be fundamentally distasteful in a way that, say, preferring parks over nursing homes is not.<sup>104</sup> The fact that *Koushal* stands apart from many other

those cases applied to sodomy and in more than 90 per cent of the cases, the victims were minors. So the application of the Section 377 was to protect victims . . .”).

<sup>103</sup> Interestingly, and despite their focus on religious and cultural protection, there's no reason to think the *Koushal* petitioners drew on section 295(A) of the Indian Penal Code, which prohibits harms to religious sentiments under various circumstances. Indian Penal Code, No. 45 of 1860, PEN. CODE §§ 295–298, <http://indiacode.nic.in/fullact1.asp?tfm=186045> [<https://perma.cc/37YU-KYMD>]. The *Koushal* opinion itself makes no reference to section 295, and this element of the statute does not seem to figure in public conversations (including those emphasizing the petitioners' point of view). Perhaps this is because section 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. *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. See *Griswold v. Connecticut*, 381 U.S. 479, 480–81 (1965). While it's always risky to indulge in ex post facto speculation regarding litigation strategies, the most plausible explanation for the fact that *Koushal* omitted any section 295(A) arguments might simply be that petitioners and judges alike decided the approach would be politically unpopular, 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.” Susman, *supra* note 20, at 70 (emphasis added). Nevertheless, there remains a troubling potential for overlap between section 295(A) and section 377. Given the wide and frequently specious net cast by the *Koushal* petitioners, an argument combining the two IPC sections and applying them against LGBT individuals wouldn't have seemed wholly out of place.

<sup>104</sup> See *Bangalore Med. Tr. v. B. S. Muddappa*, (1991) 3 SCR 102, 105 (a PIL suit in which the petitioner-appellees argued that the Bangalore Development Authority wrongly allotted public land reserved for a park to a private medical trust for the construction of a nursing home). The

contemporary PIL suits—to say nothing of classic ones—in its espousal of a socially 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, variations on this point are being made with growing frequency by the commentators discussed in Part I. What isn't being said is that the fact that public interest litigation gets deployed to inconsistent ends—notwithstanding the specific outcomes in *Naz* and *Koushal*—is a reflection of something fundamental and fundamentally good in the Indian Constitution.

### III. DYNAMIC EQUILIBRIUM IN PUBLIC INTEREST LITIGATION

If *Naz*<sup>105</sup> and *Koushal*<sup>106</sup> represent the great divide in public interest litigation, why should legal liberals be anything but let down by the trajectory they see? After all, Indian law and politics are strikingly concerned with social uplift.<sup>107</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>108</sup> Indian jurisprudence, including public interest litigation, properly reflects the constant recalibration between these different visions of state-society relations.

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language of *Bangalore* nicely captures the turn to middle-class interests and a vision of the state as agent rather than sovereign: “[I]n 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 growth of the concept of equality and recognition of importance of common man.” *Id.* at 109, 144.

<sup>105</sup> *Naz Found. v. Gov't of NCT of Delhi*, (2009) 160 DLT 277 (Delhi High Ct.).

<sup>106</sup> *Koushal v. Naz Found.*, (2014) 1 SCC 1 (2013).

<sup>107</sup> See Steven Barnes, *Challenges to Rule of Law and Gender Equality Globally*, CASE IN POINT, at 19:32–48 (Feb. 16, 2016), <http://caseinpoint.org/live/news/5879-challenges-to-rule-of-law-and-gender-equality#.VtH6h0tSxuZ> [<https://perma.cc/CFY2-V6EP>] (discussion with Indira Jaising and Rangita de Silva de Alwis). Indira Jaising, a prominent Supreme Court advocate, commented: “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?” *Id.*

<sup>108</sup> Das Acevedo, *supra* note 11; Deepa Das Acevedo, Religion, Law, and the Making of a Liberal Indian State 31–80 (June 2013) (unpublished Ph.D. dissertation, The University of Chicago) (on file with author).

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 “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>109</sup> In the militant vision of democratic ordering, the state exercises far more 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.<sup>110</sup> (In practice, it also regulates a great deal touching the *religious* aspects of religion, but that’s beyond the scope of this paper.<sup>111</sup>)

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>112</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>113</sup> 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

<sup>109</sup> GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION* 50 (1966).

<sup>110</sup> INDIA CONST. art. 25(2) (“Nothing in this article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice . . . .”); see also P.N. Bhagwati, *Religion and Secularism Under the Indian Constitution*, in *RELIGION AND LAW IN INDEPENDENT INDIA* 35, 45 (Robert D. Baird ed., 2d enlarged ed. 2005) (discussing this aspect of Article 25 and stating that it “seeks to reconcile the legitimate claims of religion with the equally legitimate claims of the State which is committed to the task of creating a new social order”).

<sup>111</sup> See, for example, the discussion of temple-entry cases discussed in Fuller, *supra* note 15; see also Deepa Das Acevedo, *Secularism in the Indian Context*, 38 *LAW & SOC. INQUIRY* 138, 151–54 (2013) (discussing the Indian judiciary’s use of “internal regulation,” or a strategy whereby courts regulate religious practices using terms and sources internal to the religion itself).

<sup>112</sup> AUSTIN, *supra* note 109, 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 do not interfere with the state’s mission to transform social relations).

<sup>113</sup> Bhagwati, *supra* note 110, at 43 (“[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. It 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.”). It’s worth noting that Bhagwati was one of the Supreme Court justices who created public interest litigation.



founding document is far more open to amendment than its un-entrenched American counterpart).<sup>114</sup>

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>115</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 conventionally liberal protections like “freedom of conscience and free profession, practice and propagation of religion.”<sup>116</sup> B.N. Rau famously campaigned against including a 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.<sup>117</sup> Above all else, though, many Indians—not just the drafters of the Constitution—were “intellectually committed to the liberal democratic tradition” as well as the idea that individual adult suffrage as the basis of political life was the “*sine qua non* of independence.”<sup>118</sup>

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<sup>114</sup> See Richard Albert, *The Unamendable Core of the United States Constitution*, in *COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION* 13, 15 (András Koltay ed., 2015) (noting that “nothing in the United States Constitution is today formally unamendable”); SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA*, at xxix (2009); Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the ‘Basic Structure,’* in *INDIA’S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES* 179, 179–80, 194–96 (Zoya Hasan et al. eds., 2005); David Gwynn Morgan, *The Indian “Essential Features” Case*, 30 *INT’L & COMP. L.Q.* 307, 308 (1981). The basic structure doctrine was first announced in *Kesavananda v. Kerala*. AIR 1973 SC 1461.

<sup>115</sup> THOMAS R. DYE & HARMON ZIEGLER, *THE IRONY OF DEMOCRACY* 1 (14th ed. 2009).

<sup>116</sup> INDIA CONST. art. 25.

<sup>117</sup> Abhinav Chandrachud, *Of Constitutional ‘Due Process,’* HINDU (May 24, 2010, 12:02 AM), <http://www.thehindu.com/opinion/op-ed/of-constitutional-due-process/article436586.ece> [https://perma.cc/8S5Q-J9U9]. This “check” was eventually introduced by none other than Justice Bhagwati. See *Gandhi v. Union of India*, (1978) 2 SCR 621. For a discussion of Thayer and Frankfurter’s influence on Rau, see AUSTIN, *supra* note 109, at 103, and Arvind Elangovan, *A Constitutional Imagination of India: Sir Benegal Narsing Rau Amidst the Retreat of Liberal Idealism (1910–1950)* at 21 (Dec. 2012) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

<sup>118</sup> AUSTIN, *supra* note 109, at 41, 46.

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 imply, even indirectly, that citizen sovereignty naturally fits with social conservatism or neo-liberal politics. I am only making the first of these arguments, namely, that contemporary public interest cases often align with liberal democratic ideas of statehood and personhood as these are broadly and conventionally understood. PIL petitioners who argue for the municipal maintenance of common spaces over the rights of slum dwellers 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>119</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>120</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 shouts otherwise—are relying on liberal democratic conceptions of society and sovereignty that also have a place in India’s founding document.<sup>121</sup>

## 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.

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<sup>119</sup> See, e.g., *Samiti*, WP(C) 4215/1995; discussion *supra* note 100.

<sup>120</sup> See, e.g., *Narain v. Union of India*, (1998) 1 SCC 226, 235 (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 SCC 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).

<sup>121</sup> Again, I do not mean to say that the *Koushal* court’s *acceptance* of the deference argument was sound. As Vikram Raghavan points out, the court’s invocation of deference was inappropriate because the government had decided it “would abstain from asking the Court to revive the statute” and “even opposed a stay of the high court’s ruling while the appeals were pending before the Supreme Court”—and, moreover, that the “Attorney General explained all this to the Court in no uncertain terms.” Raghavan, *Taking Sexuality Seriously*, *supra* note 72.

First, it most certainly does not mean that progressives should applaud *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 scrambling for newer, better fixes. Public interest litigation can't be "fixed," if fixing it means ensuring that it only (or even mostly) produces progressive outcomes, any more than we can "fix" the Indian Constitution. 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.