THE INDIAN SUPREME COURT RULING IN
KOUSHAL V. NAZ: JUDICIAL DEFERENCE
OR JUDICIAL ABDICATION?

SUJITHA SUBRAMANIAN*

ABSTRACT

In the December 2013 Koushal v. Naz ruling, the Supreme Court of India reversed a lower court judgment and reaffirmed the constitutional validity of Section 377 of the Indian Penal Code, which, among other things, criminalizes homosexuality in India. The Supreme Court maintained that Section 377 applies to specific sexual acts, irrespective of gender or sexual orientation, and does not infringe the constitutional provisions of Article 21 (protection of life and liberty), Article 14 (equality), and Article 15 (prohibition against discrimination). Crucially, the Supreme Court of India exercised “judicial self-restraint” on the basis that the pre-Independence colonial legislation represented the “will of the people.” This approach of conservative judicial positivism marks a sharp departure from the Supreme Court of India’s “hyper-activist” character.

This Article examines the contextual background of the Supreme Court ruling and argues that Koushal v. Naz serves as an illustration of “judicial abdication” rather than “judicial deference.” Whilst commentators have so far focused on the judiciary’s failure to apply its constitutional mandate to substantively protect fundamental rights, this Article focuses on judicial decision-making. The Article argues that the Supreme Court’s failure in Koushal v. Naz to articulate its legal reasoning is acute and foundational and constitutes a considerable vacuum in judicial logic. Despite its ninety-eight-page-long verbose ruling, the magnitude of the Supreme Court’s “incoherent-reasoning” leaves the court vulnerable to accusations of being influenced by non-legal factors. Consequently, the Article argues that the ruling in Koushal v. Naz exemplifies the need for legal discourse to continue initial but fragmented attempts to systematically study judicial decision making in India in a manner that incorporates methodologies that go beyond traditional models of judicial reasoning.

* Lecturer in Law, University of Bristol, U.K. University of East Anglia; Ph.D. 2011, Aberdeen University; L.L.M 2003, University of Madras; B.A., B.L. 2000. The author would like to thank Professor Julian Rivers, Professor Paula Giliker, Professor Achilles Skordas, Professor Mahendra Pal Singh, Professor Hugh Corder and Professor Steven Greer for their valuable and positive comments. The author has also had limited, but focused discussion of this Article with members from the Alternative Law Forum, Bangalore.
I. INTRODUCTION

In December 2013, the Supreme Court of India in Suresh Kumar Koushal v. Naz Foundation (Koushal v. Naz) upheld the constitutional validity of Section 377 of the Indian Penal Code (IPC), which punishes anyone who voluntarily has “carnal intercourse against the order of nature with any man, woman or animal” with imprisonment for up to life.\(^1\) Koushal v. Naz overruled Naz Foundation v. Government of NCT of Delhi (Naz v. Delhi), where the Delhi High Court held Section 377 to be unconstitutional to the extent that it criminalizes consensual sexual acts between adults in private.\(^2\) By overruling Naz v. Delhi, the Supreme Court’s judgment in Koushal v. Naz attracted global media attention, as the decision was perceived to recriminalize homosexuality in India.\(^3\)

Though the prohibition in Section 377 appears to apply to anyone, irrespective of gender or sexual orientation, the Delhi High Court in Naz v. Delhi found that Section 377 had a disproportionate impact on the lesbian, gay, bisexual, and transgender (LGBT) community.\(^4\) Without annulling Section 377, Naz v. Delhi “read down” the penal provision to exclude from its ambit consensual private sexual behavior by adults on the basis that it grossly violates constitutional provisions that prohibit discrimination (Article 15) and that guarantee the right to equality (Article 14) and the right to life and liberty (Article 21).\(^5\) Hailed as a verdict that “[stands] out

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5. Section 377 was not repealed as it served to fill the lacuna in Indian rape law to protect children. Recent progressive amendments to rape law in India include Criminal Law (Amendment) Act, 2013 and Protection of Children Against Sexual Offences Act, 2012. Note that marital rape is not covered under the current definition of rape in India, though Section 377 may provide some form of relief in certain cases of marital rape.
in the judicial annals of this country," the precedent set by Naz v. Delhi, though limited by territorial jurisdiction, encouraged gay people to “come out of the closet” and openly live together in conservative Indian society. However, certain individuals and religious organizations that were not party to the original Naz v. Delhi suit filed an appeal in the Supreme Court of India, against the Delhi High Court ruling on the basis that the ruling promotes the “social evil” of homosexuality.9

Though the Supreme Court of India did not comment on the fears of the appellants in Koushal v. Naz that the Delhi High Court ruling promotes the social evil of homosexuality, it nevertheless overruled Naz v. Delhi on the basis that Section 377 represents the “will of the people.”10 Chiding the Delhi High Court for its “anxiety” to protect the “so-called rights” of a “miniscule fraction” of the Indian population (in reference to homosexual persons),11 the Supreme Court maintained that the penal provision merely regulates certain sexual conduct regardless of gender identity and sexual orientation.12 Thus, according to the Supreme Court, the constitutional provisions of India that prohibit discrimination and guarantee the right to equality and the right to life and liberty do not apply to the examination of Section 377.13

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9. Koushal v. Naz, (2014) 1 S.C.C. 1 (India) § 16.17. Note that the government that was the respondent in the Naz v. Delhi suit had refrained from filing the appeal.

10. Id. § 28.

11. Id. §§ 43, 52.

12. See id. § 38.

13. Id.
The Supreme Court of India felt bound to exercise judicial restraint, despite the fact that Section 377 originated in Britain’s colonial legacy. The Supreme Court noted that though Section 377 was enacted about one hundred and sixty years ago, the penal provision represents the will of the people, as Parliament actively chose to retain Section 377 in its current form. The Supreme Court arrived at this conclusion on the basis that no changes have been made to Section 377, even though Indian Parliament has amended the IPC over thirty times since independence in 1947 and the adoption of the IPC in 1950. Moreover, Parliament has not acted on the 2002 decision of the Law Commission of India’s recommendation to delete the penal provision. Thus, the Supreme Court applied the principle of “presumption of constitutionality” and observed that it must uphold the constitutionality of Section 377 in order to maintain “separation of powers . . . out of a sense of deference to the value of democracy that parliamentary acts embody.”

One can compellingly argue that the objectives of Section 377 were unjustified at the time of enactment because its inherent violation of fundamental rights “exceeds the limits of legislative supremacy.” However, it must be conceded that the concept of judicial deference and the value of affirming a separation of power could provide some degree of normative validation to the *Koushal v. Naz* ruling. Furthermore, jurisprudence generally endorses

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17. *See id.*


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structures, environments, or incentives that promote judicial deference and enable the maintenance of separation of power as it dilutes the potential for judges to exercise political, ideological, or any other form of explicit or implicit bias. As such, even though the Constitution of India explicitly provides for “judicial review” with regard to fundamental rights, the Supreme Court’s application of judicial self-restraint is in line with judicial reforms.

The Supreme Court does not frame Koushal v. Naz within a socially and morally conservative context, based, for instance, on Indian religious values or social customs. However, it has rightly attracted severe criticism for holding that “harassment, blackmail and torture on certain persons, especially those belonging to the LGBT community” may be “a relevant factor for the Legislature to consider while judging the desirability of amending Section 377 IPC.” By focusing on concept of judicial deference, the Supreme Court in Koushal v. Naz fails to substantively address the tension between Section 377 and Articles 21, 14, and 15 of the Constitution of India that prohibit discrimination and guarantee equality and the right to life and liberty. Indeed, the key feature of Koushal v. Naz is the Supreme Court’s stoic refusal to provide a substantive position on the constitutional validity of Section 377. Furthermore, the Supreme Court fails to comment on the findings of the Delhi High Court that Section 377 “denies a person’s dignity and criminalises his or her core identity solely on account of his or her sexuality,” thus affecting a gay person’s “right to full personhood.” It also does not comment on the Delhi High Court's

28. Id.
finding that criminalizing same-sex conduct has the consequence of “entrenching stigma and encouraging discrimination in different spheres of life” and that “enforcement of Section 377 IPC contributes adversely” to the implementation of HIV/AIDS prevention policies.

On the very date that the Court delivered the Koushal v. Naz decision, the lead judge of the two-member panel, Justice Singhvi, stated, “To all those criticizing my judgment on homosexuality, I’ll say read my judgment first.” This was a rather spirited response given the general difficulty in discerning the Supreme Court’s views of Section 377’s constitutionality. Very little of the Koushal v. Naz decision is in the Supreme Court’s own words—and much of the judgment is a cacophony of precedents, some of which appear to have been chosen at random, as they are sometimes inconsistent or even contradictory. Thus, not only does the Supreme Court fail to exercise its mandate to protect the constitutional rights of its citizens, it fails to articulate a plausible justification or reasoning to validate its findings. Indeed, the ninety-eight-page-long verbose judgment is overwhelmed by copious extracts and citations from various source materials, and the Supreme Court does not provide clarity by consolidating the legal principles raised by precedents. Instead of restraining itself to briefly conveying its deference to the wisdom of the legislature, for no discernable reason, the Supreme Court appears to have felt the urge to provide an incoherent ruling amounting to several pages of judicial nothingness.

It is beyond the scope of this Article to take a position for, or against, judicial activism. However, it is important to note that for over three decades the Indian judiciary has consistently argued in favor of judicial intervention to achieve social justice, promote civil liberties, and furthermore, “to recognise and enforce rights for the most disadvantaged sections in society.” Indeed, the Supreme Court...
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Court of India is recognized as “extraordinarily powerful,”34 as it adjudicates the validity of constitutional amendments in accordance with the basic structure of the Indian Constitution35 which remains undefined, thus allowing it to use liberal interpretations to address the “apparent failings of representative governance.”36 As such, the Supreme Court of India is generally seen as a “significant institution of governance,”37 where “judges are guilty of both populism and adventurism,”38 and one that behaves as an “interim Parliament,”39 to an extent that that the former Indian Prime Minister, Manmohan Singh, explicitly cautioned the courts for moving beyond judicial activism to “judicial over-reach.”40 Indeed, the current Indian Prime Minister, Narendra Modi, advised the


36. Nick Robinson, Expanding Justiciaries: India and the Rise of the Good Governance Court, 8 Wash. U. Global Stud. L. Rev. 1, 4 (2009); Upendra Baxi, Who bothers About the Supreme Court: The Problem of Impact of Judicial Decisions, 24 J. Indian L. Inst. 848, 849 (1982) (pointing out that legislative reversal of judicial decisions in other mature democracies has not called into question the independence of the judiciary or judicial review and that the “frequency of constitutional amendments seeking to nullify the impact of judicial decisions is somewhat distinctive to India”).

37. Manoj Mate, Public Interest Litigation and the Transformation of the Supreme Court of India, in Consequential Courts: Judicial Roles in Global Perspective 286 (Diana Kapiszewski et al. eds., 2014).


40. Press Release, Gov’t of India Prime Minister’s Office, PM’s Address at the Conference of Chief Ministers & Chief Justices of High Courts 3 (Apr. 8, 2007), available at http://pib.nic.in/newsite/erelease.aspx?relid=26694; see also Sudhanshu Ranjan, Justice, Judicacy and Democracy in India: Breaches and Boundaries 1 (2012) (explaining concerns about judicial overreach in the nineties); Sri Somnath Chatterjee, Former Speaker, Lok Sabha, Separation of Powers and Judicial Activism (Apr. 25, 2013), in 2013 AIR J. 97, 99 (expressing concern about the Supreme Court’s involvement in lawmaking).
judiciary to guard itself against being influenced by “five-star activists.”

The two-judge bench in *Koushal v. Naz*—Justice G.S. Singhvi and Justice S.J. Mukhopadhaya—are not known to be constitutional conservatives, as both have handed down activist decisions that stretch the scope of judicial powers. Indeed, Justice Singhvi, the lead author of the *Koushal v. Naz* ruling, previously ruled in the controversial 2G Spectrum case as follows:

“[W]hen it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in [the] larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond recognized parameters.”

In his speeches outside the Supreme Court, Justice Singhvi has criticized politicians for using the term “judicial overreach.” Highlighting judgments that expanded fundamental rights and pointing to landmark judicial observations that led to public interest-centric legislation, Justice Singhvi has argued that if the “legislature and executive do their job properly, there is no question of [the] judiciary taking cognizance on public-centric issues.” Similarly, Justice Mukhopadhaya has also adopted decisions going


45. *Id.*
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beyond judicial parameters in an attempt to capture “public sentiment.”

Given the general hyperactivist nature of the Indian judiciary and the activist background of the individual judges, it becomes necessary to scratch the surface of the court’s “judicial self-restraint” position taken in Koushal v. Naz. This Article concentrates on judicial decision making and argues that the Supreme Court’s departure from “hyper-activism” to “judicial self-restraint” without adequate legal reasoning demonstrates a pick-and-choose attitude with regard to judicial reticence, leaving the Supreme Court of India vulnerable to criticism.

This Article contends that the judicial “reasoning” in Koushal v. Naz cannot be rationally arrived at, if examined within the framework of the traditional legal model which posits that courts decide disputes “in light of the facts of the case vis-à-vis precedent, the plain meaning of the Constitution and statutes, and the intent of the framers.” The general weaknesses in Koushal v. Naz’s substantive reasoning are acute and foundational to the extent that the ruling constitutes a considerable vacuum in judicial logic. Consequently, by weaving together the internal and external factors connected to and influencing Koushal v. Naz, this Article argues that


47. See infra Part IV.

48. Kunal Majumder, India’s Hyperactive Judiciary, FRIDAY TIMES (Feb. 11, 2012), available at http://www.thefridaytimes.com/beta2/tft/article.php?issue=20120210&page=7. Justice Katju is one of the few judges who openly advocates for judicial restraint, but he has refined his position, stating: “Judicial legislation is to some extent unavoidable in the modern era for two reasons: (1) Since modern society is dynamic, the legislative cannot possibly conceive of, and cater to, all the developments which may take place in the future. Hence there will be gaps in the statutory law which have to be filled in by judges (2) The Legislature may often be unwilling or incapable of making a modern law which is of pressing need, and then this job has sometimes to be done by the court.” Justice Markandey Katju, Separation of Powers, Judicial Review and Judicial Activism (Oct. 24, 2013), available at http://justicekatju.blogspot.co.uk/2013/10/separation-of-powers-judicial-review.html; see also Ayyar, supra note 34, at 197–204; S.P. Sathe, Judicial Activism: The Indian Experience, 6 WASH. U. J. LAW & POL’Y 30 (2001).

the ruling illustrates “judicial abdication” \(^{50}\)—rather than judicial deference.

Substantial literature on judicial politics exists, mainly in the United States but also in Europe, that examines the strategic engagement between the judiciary and the political environment and which challenges the prevalent traditional legal model suggesting that judges merely find or interpret law. \(^{51}\) For example, the attitudinal model of judicial decision making posits that a court decides disputes “in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.” \(^{52}\) The attitudinal model has gained traction within legal discourse following the slow but robust development of the empirical legal methodology \(^{53}\) used within a framework called the “new legal realism.” \(^{54}\) New legal realists derive “testable hypotheses” \(^{55}\) from large-scale quantitative data sets \(^{56}\) that analyze facts and judicial outcomes to understand

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50. Judicial abdication generally appears within the context of rulings with potential foreign policy implications. See Thomas Franck, Political Questions, Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? (2012). However, judicial abdication has also been mentioned within the context of constitutional rights. See Abigail Alliance, Better Access v. Von Eschenbach, 495 F.3d 695, 722 (D.C. Cir. 2007) (Rogers, J., dissenting) (“To deny the constitutional importance of the right to life and to attempt to preserve life is to move from judicial modesty to judicial abdication.”); Upendra Baxi, Preface, in S.P. Sathe, Judicial Activism in India xx–xxi (2002) (“The constitutionally parasitic ideology of the contemporaneous dominant ruling elite presents the worst possible challenge to the future of the still nascent Indian judicial activism.”).


55. Miles & Sunstein, supra note 23, at 831.

56. See Karl Llewellyn, Some Realism About Realism: Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931).
the source of judicial decisions. Thus, legal scholars have begun engaging in a shift away from traditional ex post evaluation and critical analysis of judicial decisions towards embracing the discourse within other disciplines that are more willing to potentially engage in ex ante evaluation of judicial decision making based on behavior or nonlegal factors.

This Article, however, does not maintain that the application of potentially nonlegal factors in judicial decision making necessarily constitutes an “indictment of the judiciary’s intentions” or that it is irregular. Instead, it claims that *Koushal v. Naz* exemplifies the need for academics to systematically engage in wider research that incorporates new legal realism and furthermore captures the methodologies applied within the attitudinal model. Use of the attitudinal model of judicial decision making has the potential to commence a change in the nature of legal discourse, particularly in India. This conclusion supplements the existing but fragmented sociology, economics, and political science literature within the Indian context that suggest that the Supreme Court decisions may not necessarily be based entirely or effectively on doctrinal logic.

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57. See [*id.]; see also Miles & Sunstein, supra note 23, at 831.


The Article adopts the following structure. Part II sets the scene for the legal analysis of Koushal v. Naz. It recounts India’s historical tolerance to homoeroticism, draws attention to sexual conservatism in Indian society, and finally discusses the reasoning adopted by the Delhi High Court in Naz v. Delhi.62 Part III provides evidence of the disjointed and evasive attempt by the Supreme Court of India to provide judicial justification for overruling Naz v. Delhi. It examines the reasoning in Koushal v. Naz but limits itself to commenting on the material literally covered in the ruling without focusing on the constitutional arguments that the Supreme Court failed to examine. Part III adopts a structure that follows the pagination of the judgment (from page forty-six onwards)63 in order to highlight the magnitude of the incoherent reasoning. Part IV then weaves together the key arguments in the Article and highlights the untainted image of the Supreme Court of India64 in comparison to other Indian institutions that the Indian public perceives as corrupt. Given the quality of the decision’s reasoning, the Article argues that the institutional integrity of the Supreme Court of India stands exposed as the court has made itself vulnerable to accusations of prejudice and bias.65 The ruling exemplifies the need to continue the initial, but fragmented attempts to systematically study judicial decision making in India that incorporates methodologies that go beyond traditional models of judicial reasoning. Thereafter, in Part V, the Article presents concluding remarks.

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63. The ruling merely re-states the parties’ arguments until page forty-six.


II. THE CONTEXTUAL BACKGROUND TO SECTION 377

A. Same-Sex Love in India and the Enactment of Section 377

Several scholars contend that same-sex love in Indian history was treated “often in a non-judgmental and even celebratory manner.”66 Yet, others point out that nonnormative sexual “misbehaviour” appears to have been merely “tolerated,” so long as it existed outside of certain castes and/or classes classified as a “higher” order.67 There is, however, no doubt that the discourse around same-sex relations remained politically charged, as evidenced from the dual narratives of history and sexuality in ancient India seen in different authoritative translations of the classical Kamasutra text. For instance, Jyoti Puri maintains that while Burton’s The Kamasutra of Vatsayana (1883)68 presents homosexuality as a celebration of various forms of eroticism, Upadhyaya’s Kamasutra of Vatsayana: Complete Translation from the Original Sanskrit (1961)69 provides an interpretation that merely accommodates homosexuality within a framework of norms that regulate sexual behaviour that occurs within social hierarchies.70 Puri argues that Burton’s translation is a text written in the context of “potential emancipation of sexually deprived middle- and upper-class women in Victorian England,” while Upadhyaya’s “literal rendition of the original” aimed to produce a “systematic classification of the ‘science of the erotics’”—thus creating “not two different versions of a translation but two significantly different narratives on same-sex

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68. Burton is widely associated with the publication of the English translation to Kamasutra in 1883, with his biographer, Edward Rice claiming that Burton “discovered” Kamasutra. See Edward Rice, Captain Sir Richard Francis Burton: The Secret Agent Who Made the Pilgrimage to Mecca, Discovered the Kama Sutra, and Brought the Arabian Nights to the West 4 (1990).


70. See Puri, supra note 67, at 624 (arguing that the significant differences between the two texts “believe the possibility that these are mere translations of the putative original. That these texts are not translations, but interpretations that are shaped by their historical, cultural, and political context is clear when a closer comparison of the two Kamasutras is undertaken.” [emphasis in original]). See also Daud Ali, Rethinking the History of the Kama World in Early India, 38 J. INDIAN PHIL. 1, 1–13 (2011).
sexual relations, gender, class, and sexuality.” 71 Despite the presence of differing narratives of sexuality, it remains clear that homeroticism may not have been negatively perceived during India’s ancient and medieval cultural history, and that it almost certainly did not invite severe criminal sanctions. 72 Indeed, scholars maintain that homophobia appears to have been “virulent in, and perhaps even unique to, Western cultures,” 73 and that western religious ideology played an important role in the “process of institutionalizing homophobia” within India. 74

With the lifting of the ban on Christian missionaries following the Charter Act of 1813, purity campaigners from Britain argued that India offered “libertine abundant and varied sexual experiences” to the British, who “debase[d] themselves, their Christian faith and the prestige of their nation.” 75 When the Charter Act of 1833 renewed the East India Company’s privileges in India, it made fundamental changes to the nature, scope, and system of administration by centralizing its functions across the country. 76 Lord Thomas Macaulay, who was appointed as the first law member of the Governor-General of India’s legislative council, was instrumental in producing a draft compilation of the first original 77 and comprehensive criminal legislation in the British Empire enti-

77. Macaulay did not draft the Indian Penal Code (IPC) as a “digest of any existing system.” See Barry Wright, Macaulay’s Indian Penal Code: Historical Context and Originating Principles, in CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE 19–22 (Wing-Cheong Chan et al. eds., 2011).
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tled, “The Indian Penal Code” (IPC) in 1837. Although Britain failed to codify criminal legislation in the United Kingdom during the same period that Macaulay worked on the IPC, the “colonial codifiers radically transformed the Indian legal landscape in a fashion that outlasted the end of empire.” The IPC, as it stands now, was considerably amended at the time of its enactment in 1860 to the language as it stands now and Section 377 reads as:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

Despite Macaulay’s conviction that a good code must possess the qualities of precision and comprehension, the draft IPC did not define “unnatural offences,” as Macaulay felt it “desirable that as little as possible should be said [of this] odious class of offence.” The provision was introduced because “native cultures” were not seen as doing enough to punish “perverse” sexual activity, thus encouraging British homosexuals to view India as a safe haven.


82. C.H. Cameron & D. Elliott, The Indian Penal Code as Originally Framed in 1837 § 361 (1888). See also An Act for Improving the Administration of Criminal Justice in the East Indies, 1828, 9 Geo. 4, c. 74, § 63 (Eng.) (setting the punishment for “buggery” as death).


from punishments enforced in Britain. Criminal provisions against “unnatural offences” were thus introduced to “inculcate European morality into resistant masses,” with the intent to protect Europeans in the colonies from this “special Oriental vice.” Following independence in 1947, Indian courts began to use Section 377 to penalize paedophilia and sexual violence not amounting to rape, as defined under Section 375 of the IPC. Thus, the operation of Section 377 was effectively entrenched, even though “carnal intercourse” was not fully defined and the scope of this provision included private consensual sexual behaviour between adults. Although British Parliament decriminalized homosexuality in 1967, it was too late to influence its former colony to adopt this progressive move.

B. The Legal Challenge Against Section 377

Lesbian, gay, bisexual, and transgender (LGBT) activism in India is “intimately linked to HIV/AIDS funding,” and came into existence “piggy-backing on the AIDS crisis.” When the presence

85. See James, supra note 75, at 212–14.
87. British administrators thought that early marriage influenced homosexuality in India, but they acknowledged that the schools, seminaries, and colleges for boys in England were also “infected” with this “immorality.” See Kenneth Ballhatchet, Race, Sex and Class Under the Raj: Imperial Attitudes and Policies and Their Critics, 1793–1905 120 (1980) (citing correspondence from Lord Hamilton, Secretary of State for India from 1895 to 1903, to Lord Curzon, Viceroy of India from 1899 to 1905).
88. See Swati Deshpande, Section 377: Men Worry About Being Framed by Women, Times of India (Dec. 17, 2013) (referring to Section 377 being used by ex-girlfriends who feels cheated by unfaithful boyfriends).
90. More than half of the countries that currently criminalize “carnal intercourse against the order of nature” obtained this provision from their British rulers. Human Rights Watch, supra note 84, at 83.
of the AIDS virus in India was first noted in 1986, the government’s initial response was insouciant, mired by ignorance-yielding, uninformed policymaking. The general view was that India, being a family-centric society, did not have to fear from this “foreign disease.” Erratic statements by government officials (“[I]n India, AIDS is not sexually transmitted.”) prompted the World Bank to make their 1991 HIV/AIDS loan to India, conditional on nongovernmental organizations (NGOs) implementing awareness programs. Even so, about forty percent of the World Bank funds were underspent by 1999. The lack of interest in issues raised by LGBT rights groups, especially with regard to the protests against the police’s abusive use of Section 377 to harass the LGBT community, resulted in the awareness programs focusing primarily on HIV transmission through blood transfusions, even though only seven percent of HIV cases were attributed to blood transfusions.

93. The first case of the AIDS virus in India occurred five years after the first identified AIDS case in Los Angeles. See Mead Over et al., HIV/AIDS Treatment and Prevention in India: Modeling the Costs and Consequences 9 (2004).

94. Avtar Singh Paintal, a physiologist and the director general of the Indian Council for Medical Research, the Government’s top medical research body, stated “This is a totally foreign disease, and the only way to stop its spread is to stop sexual contacts between Indians and foreigners.” See Suparna Bhaskaran, Made in India: Decolonizations, Queer Sexualities, Trans/National Projects 77 (2004); Sanjoy Hazarika, To Fight AIDS, Indian Urges Ban on Sex With Foreigners, N.Y. Times (June 15, 1988), http://www.nytimes.com/1988/06/15/world/to-fight-aids-indian-urges-ban-on-sex-with-foreigners.html. AIDS/HIV policy was focused on screening foreigners, mainly international students. See V. Sithan-Nan Immoral Traffic: Prostitution in India 49 (2006); see also Sheila Tefft, India Accused of Bias on AIDS, Chi. Trib. (Mar. 3, 1987), http://articles.chicagotribune.com/1987-03-03/news/8701170377_1_africans-aids-antibodies-foreign-students.


97. Id.


99. The choice to focus the funds in this manner negatively impacted other high-risk populations, including gay persons. For discussion, see Siddharth Dube, Sex, Lies, and AIDS 18–19 (2000); Arvind Singh & Everett M. Rogers, Combating AIDS: Communication Strategies in Action 47–62 (2003); Rebecca M. Young & Ilan H. Meyer, The Trouble with ‘MSM’ and ‘WSW’: Erasure of the Sexual Minority Person in Public Health Discourse, 95 Am. J.
In 1994, the inspector general of prisons for Delhi refused to subscribe to recommendation by medical units to supply condoms to the male inmates of Tihar Jail as this “western solution” had the potential to increase homosexual behavior, thereby “abetting a criminal act.” Only following the AIDS-related death of a Tihar inmate in 1994 did an NGO called AIDS Bhedbhav Virodhi Andolan (ABVA), file the first legal challenge against Section 377—a Public Interest Litigation (PIL) in the Delhi High Court. The NGO’s lawyers recall the difficulty in dealing with the “uncomfortable” issue, as judges found discussing homosexuality “deeply embarrassing.” Though the NGO framed the legal issues, the case languished in the court for about seven years before coming up for a hearing, and by this time, the NGO’s volunteers no longer worked together, resulting in the court dismissing the petition by default.

In 2001, the Lucknow police raided the offices of some NGOs including Naz Foundation International, seized HIV/AIDS promotion materials on the basis that they were “pornographic,” and imprisoned some of the NGO personnel for forty-seven days.
Naz Foundation argued that this incident clearly indicated that work associated with HIV/AIDS is “irrevocably linked to issues of deviant sexuality” and constitutes a “direct outcome of the existence of Section 377.” Following further reports of police harassment across India, Naz Foundation filed a PIL challenging the constitutional validity of Section 377 in the Delhi High Court. In September 2004, the Delhi High Court dismissed the petition on the basis that the petitioners did not have locus standi, and the court held that it would not entertain a petition that merely represented an “academic challenge” to a legislative provision’s constitutionality. On appeal, the Supreme Court remitted the petition back to the Delhi High Court for a fresh decision based on substantive consideration.

With the support of further documentary evidence presented by Voices Against Section 377, Naz Foundation argued that Section 377 served “as a weapon for police abuse; detaining and questioning, extortion, harassment, forced sex, payment of hush money.” Naz Foundation argued that Section 377 perpetuated negative and discriminatory beliefs against sexual minorities to the extent that it crippled HIV/AIDS prevention efforts. The government did not

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110. The right of a party to appear and to be heard before court. See BLACK’S LAW DICTIONARY 1084 (10th ed. 2014) “a place of standing’ . . . The right to bring an action or to be heard in a given forum.”
114. Naz v. Delhi, (2009) 160 D.L.T. 277 (Del) § 7; see also Koushal v. Naz, (2014) 1 S.C.C. 1 (India) § 3(ii) (‘[T]he section serves as a weapon for police abuse in the form of detention, questioning, extortion, harassment, forced sex, payment of hush money[.]’).
have a clear position in its reply to the petition with different ministries taking contradictory positions on Section 377. While the Health Ministry supported Naz Foundation’s petition,\(^{116}\) the Home Affairs Ministry argued that sexual mores in foreign countries cannot justify decriminalization of an “abhorrent” behavior, as “Indian society is yet to demonstrate readiness or willingness to show greater tolerance to practices of homosexuality.”\(^{117}\)

C. *The Delhi High Court Ruling in Naz Foundation v. Delhi*

The Delhi High Court acknowledged the position taken by the government that the judiciary should ordinarily defer to the wisdom of the legislature while exercising judicial review.\(^{118}\) However, the court also maintained that the degree of deference depends on the subject matter.\(^{119}\) Asserting that there is “no conflict between human rights and the democratic principles,”\(^{120}\) the Delhi High Court stated that where “constitutionally entrenched human rights” are concerned, courts are obliged whilst discharging their own sovereign jurisdiction “to give considerably less deference to the legislature than would otherwise be the case.”\(^{121}\)

Reiterating that the right to privacy and dignity are extensions of the right to life, the Delhi High Court referred to literature,\(^{122}\) international provisions,\(^{123}\) and a number of precedents\(^ {124}\) to find

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\(^{116}\) See id. § 11.

\(^{117}\) Id. §§ 12–13; § 24(ii).

\(^{118}\) See id. § 118.

\(^{119}\) See id. § 125.

\(^{120}\) Id. § 119 (citing R. (Alconbury Ltd.) v. Env’t Sec’y, (2001) 2 W.L.R. 1389)).

\(^{121}\) Naz v. Delhi, (2009) 160 D.L.T. 277 (Del) § 119; see also State of Madras v. V.G. Row, (1952) 3 S.C.R. 597, 605 (India) (explaining that if the legislation violated a fundamental right, the court would have to strike it down “in discharge of a duty plainly laid upon the courts by the Constitution”); Peerless General Finance Investment Co. Ltd. v. Reserve Bank of India, (1992) 2 S.C.C. 343, 387 (India) (“The court must lift the veil of the form and appearance to discover the true character and the nature of the legislation, and every endeavor should be made to have the efficacy of fundamental right maintained.”).


\(^{124}\) Such precedents include Rajagopal v. Tamil Nadu, (1994) 6 S.C.C. 652 (India) (explaining that Article 21 ensures the right to be left alone); Francis Coralie Mullin v. Admin., (1981) 2 S.C.R. 516 (India); Prem Shankar Shukla v. Delhi Admin., (1980) 3 S.C.R. 855 (India); Gobind v. MP (1975) 2 S.C.C. 148 (India) (holding that the court must deny privacy/dignity where a superior countervailing interest or compelling state interest exist); Kharak Singh v. U.P., (1964) 1 S.C.R. 332 (India) (stating that the right to privacy is traced from the right to life); Naz v. Delhi, (2009) 160 D.L.T. 277 (Del) §§ 25–38. In addition to national precedent, the High Court cited extensively to the decision of other
that people have the right to develop relationships without interference from the outside community or from the State. The Delhi High Court asserted that the value of “inclusiveness” is the underlying theme of the Constitution of India, and that the judiciary must protect the counter-majoritarian safeguards enumerated within its provisions. The Delhi High Court also found that sexual orientation is a ground analogous to sex and, hence, constitutional provisions prohibiting discrimination on the basis of sexual orientation remain relevant. Finally, the Delhi High Court referred to a number of primary and secondary materials to declare that the branding of one section of people as criminal, based wholly on the state’s moral disapproval of that class, runs counter to the equality principles guaranteed under the Constitution of India.


126. Id. §§ 120, 125, 131; see Maneka Gandhi v. Union of India, (1978) (2) S.C.R. 621 § 81 (India) (“The compulsion of constitutional humanism and the assumption of full faith in life and liberty cannot be so futile or fragmentary that any transient legislative majority in tantrums against any minority by three quick readings of a Bill with the requisite quorum can prescribe any unreasonable modality and thereby sterilise the grandiloquent mandate.”).

127. See Naz v. Delhi, (2009) 160 D.L.T. 277 (Del) §§ 103–04. The High Court also referred to the precedent of other countries to support this. Id. (citing Prinsloo v. Van Der Linde (1997) 3 SA (CC) at 1012 (S. Afr.); Harksen v. Lane (1998) 1 SA (CC) at 300 (S. Afr.)).

lar disapproval of its citizens. The Delhi High Court found Section 377 to be arbitrary, nonproportional, and unreasonable, as its objectives were “irrational, unjust and unfair.” Consequently, the Delhi High Court rejected the rationale of promotion of majoritarian sexual morality on the basis that Section 377 sought to enforce Victorian notions of sexual morality and lacked compelling state interest. The Delhi High Court declared that criminalizing homosexuality condemned in perpetuity a sizable section of society and forced them to live their lives “in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery.” Referring to the various affidavits filed by Naz Foundation and others, the Delhi High Court noted that if the government does not enforce Section 377 against homosexuals as was asserted, then the provision is not essential for the protection of morals or public health and, consequently, should fail the reasonableness test.

The Delhi High Court referred to changes in mental health manuals as evidence that there exists “almost unanimous medical and psychiatric opinion that homosexuality is not a disease or a disorder and is just another expression of human sexuality.” Declaring that a bill of rights does not confer fundamental human rights but merely confirms their existence, the Delhi High Court held that Section 377 violates constitutional provisions. Commentators commended the Delhi High Court judgment for stretching constitutional principles, such as the right to privacy and the right to dignity in order to protect the human rights of homosex-

130. See Ajay Hasia v. Khalid Mujib Schravardi, (1981) 1 S.C.C. 722, 740 (India) (holding that Article 14 strikes at arbitrariness as it necessarily involves negation of equality; Where an Act is arbitrary, it is implicit in it that the Act is unequal both according to political logic and constitutional law and therefore violates Article 14).
133. Id. §§ 51–52.
136. Id. § 67 (Delhi High Court points out that homosexuality was removed from the “Diagnostic and Statistical Manual of Mental Disorder” in 1973 and from the World Health Organization’s “International Classification of Diseases-10 Classification of Mental and Behavioural Disorders” in 1992.)
137. See Naz v. Delhi, (2009) 160 D.L.T. 277 (Del) §§ 47, 94, 104, 72, 126. The Delhi High Court deemed it unnecessary to deal with Article 19(a)-(d) without any substantive reasoning. See id. § 126.
ual persons. Though the Government of India had taken contrary positions as a party to the *Naz v. Delhi* case, the then law minister applauded the “well-researched and well-documented” verdict, admitted that state agencies misused Section 377 against the LGBT community, and furthermore, made it clear that it would not appeal the Delhi High Court ruling.

However, an amalgamation of otherwise unconnected individuals and organizations filed an appeal against the Delhi High Court ruling to the Supreme Court of India. The lead petitioner, S.K. Koushal is an astrologer, and other individuals include well-known figures, such as B.P. Singhal (a religious ideologue and member of parliament), Bhim Singh (J&K National Panthers Party, Senior Executive Member of the Supreme Court Bar Association, and once described by former Chief Justice Bhagwati as an “indomitable crusader for truth and justice”), and S.K. Tijaraawala (spokesperson of yoga guru, Baba Ramdev). The organizations that joined the appeal petition along with Koushal and others, included the All India Muslim Personal Law Board, an amalgamation of otherwise unconnected individuals and organizations filed an appeal against the Delhi High Court ruling to the Supreme Court of India.

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141. See Sangeeta Barooah Pisharoty, *It is Like Reversing the Motion of the Earth*, HINDU (Dec. 21, 2013) (Interview with Koushal).


Trust God Ministry, Joint Action Council Kannur, the Tamilnadu Muslim Munnetra Kazhagam, Raza Academy, Krantikari Manuwadi Morcha Party, All India Muslim Personal Law Board, Apostolic Churches Alliance, and Sanatan Dharam Pratinidhi Sabha. Only one governmental body—the Delhi Commission for Protection of Child Rights—joined the appeal petition as appellant.
III. THE SUPREME COURT RULING ON SECTION 377 IN KOUSHAL V. NAZ

A. Presumption of Constitutionality of Preconstitutional Law and its Relation to the "Will of the People"

The first substantive finding in *Koushal v. Naz* concerns the scope of judicial review. Beginning on page forty-six, the judgment states that though Section 377 is preconstitutional, the Supreme Court has a “constitutional duty” to “test the laws of the land on the touchstone of the Constitution.”¹⁵⁷ Despite upholding that the “power of judicial review over legislations is plenary,”¹⁵⁸ the Supreme Court relied on the doctrine of separation of powers and the “presumption of constitutionality” principle, to hold that it felt bound to exercise judicial self-restraint “out of a sense of deference to the value of democracy that parliamentary acts embody.”¹⁵⁹ The following paragraphs examine the three precedents that allowed the Supreme Court to arrive at this substantive finding.

The court relies on a 1958 Supreme Court of India case, *Ram Krishna Dalmia v. Tendolkar*,¹⁶⁰ to point out that a presumption in favor of constitutionality “always” exists.¹⁶¹ First, *Koushal v. Naz* can be distinguished from *Tendolkar* as the latter refers to postconstitutional legislation, rather than preconstitutional legislation such as Section 377, which is about one hundred and sixty years old. Secondly, *Tendolkar* clarifies the limitation to the presumption of constitutionality by stating that the doctrine “cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.”¹⁶² Finally and ironically, *Tendolkar* held that a single individual may be treated as a class by himself, contrary to the court’s statements in *Koushal v. Naz*, where the Supreme Court not only refuses to treat the LGBT community as a class, but also admonishes the Delhi High Court for seeking to protect the “so-called rights” of a “minuscule fraction of the country’s population.”¹⁶³

¹⁵⁸. *Id.* § 26.
¹⁵⁹. *Id.* § 26.
The second precedent referred to by the Supreme Court has no citation or case name, but the cut-and-pasted material appears to have been taken from *John Vallamattom v. Union of India*.\(^{164}\) Surprisingly, the paragraph chosen from *Vallamattom* by the Supreme Court undermines and contradicts the very argument the court attempts to make in *Koushal v. Naz*. In *Vallamattom*, the Supreme Court refers to Article 372 of the Constitution of India as follows:

> [Article 372] *per force does not make a pre-constitutional statutory provision to be constitutional.* It merely makes a provision for the applicability and enforceability of preconstitutional laws subject of course to the provisions of the Constitution and until they are altered, repealed or amended by a competent legislature or other competent authorities.\(^{165}\)

This statement does not indicate that the presumption of constitutionality is unconditional for preconstitutional legislation and that the judiciary must therefore engage in self-restraint. On the contrary, the Constitution of India envisages that not only the legislature but also “other competent authorities” can alter, repeal, or amend preconstitutional laws found to be unconstitutional.\(^{166}\)

The third precedent that the court relies on is *Anuj Garg v. Hotel Assn. of India* decided in 2008.\(^{167}\) Similar to *Vallammatom*, this case demonstrates a successful challenge to preconstitutional legislation. Strangely, the paragraph chosen from *Anuj Garg* by the Supreme Court in *Koushal v. Naz* states that a challenge to the validity of a preconstitutional legislation is “permissible in law”—a position contrary to the Supreme Court’s finding in *Koushal v. Naz*.\(^{168}\) *Anuj Garg* further argues that while a statute “could have been held valid . . . keeping in view the societal conditions of those times,”\(^{169}\) changes occurring “both in the domestic and also international arena,”\(^{170}\) could result in a court declaring such a preconstitutional law invalid at a later period.\(^{171}\) Once again, the Supreme Court does not justify its reliance on this decision to support its

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164. *See generally* *John Vallamattom v. Union of India*, (2003) 6 S.C.C. 611 (India) (holding that a preconstitutional legislation that voided deathbed bequests by Indian Christians for charity or religious purposes was successfully challenged and is unconstitutional). *Koushal v. Naz*, (2014) 1 S.C.C. 1 (India) § 32.

165. *Vallamattom*, *supra* note 164 (emphasis added).

166. *India Const.* art. 372 (emphasis added).


168. *Id.* § 7.

169. *Id.* (emphasis added).


claim concerning the presumptive constitutionality of preconstitutional legislation.

On the other hand, Anuj Garg and other cases such as Peerless General Finance,\textsuperscript{172} have held that in assessing the constitutional validity of a statute, the court must consider its “effect or impact.”\textsuperscript{173} The Supreme Court does not take this into account in Koushal v. Naz, as it categorically refuses to examine the effect of Section 377 on the LGBT community on the basis that the “so-called rights” of a “minuscule fraction” of the population cannot trump the “will of the people.”\textsuperscript{174}

In the paragraph following the discussion on Anuj Garg, the Supreme Court in Koushal v. Naz, albeit correctly, clarifies that a law that may have been constitutional at the time of its enactment, may over time be considered unconstitutional.\textsuperscript{175} The Supreme Court goes on to illustrate this point by referring once again to Vallamattom (this time with the necessary citation) where the Supreme Court had held in 2003 that, “The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute effected by passage of time.”\textsuperscript{176} Once again, this precedent appears to support the position that Section 377 can now be safely deemed unconstitutional given the passage of time. But the Supreme Court arrives at the following conclusion:

“[By taking into account] the changing legal scenario and having regard to the Declaration on the Right to Development adopted by the World Conference on Human Rights, . . . [i]t is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation.”\textsuperscript{177}

What is the connection between the Declaration of the Right to Development adopted by the World Conference on Human Rights and the presumption of constitutionality—not to mention Section 377?

\begin{footnotes}
173. \textit{Id.} § 48; Anuj Garg, \textit{supra} note 167, § 46.
175. \textit{Id.} § 27 (referencing Vallamattom, \textit{supra} note 164).
176. Vallamattom, \textit{supra} note 164.
\end{footnotes}
The confusion stems from the fact that the Supreme Court's judgment in *Koushal v. Naz* indiscriminately cuts and pastes a substantial paragraph of *Anuj Garg* (§ 7), which refers to *Vallamattom*, yet the Supreme Court fails to distinguish this quotation in its conclusion. Though it initially appears that the Supreme Court used two separate precedents, in reality, it uses only one, wrongly quoted precedent. Confusingly, at page fifty-four of the judgment, the quotation from *Anuj Garg* is followed by a new subheading entitled “Presumption of Constitutionality,” the topic already under discussion. The subtitle enables the Supreme Court to make an abrupt finding that the presumption of constitutionality extends to preconstitutional legislation without indicating how it reached this conclusion.

The Supreme Court’s judgment in *Koushal v. Naz* thereupon proposes that legislative inaction is a manifestation of the “will of the people”—presumably on the basis that legislation can be made through an “active omission to legislate.” The Supreme Court declares that “if no amendment is made to a particular law, it may represent a decision that the Legislature has taken to leave the law as it is and this decision is no different from a decision to amend and change the law or enact a new law.” Hence, according to the Supreme Court, the provision can be presumed to be constitutional. The Supreme Court points out that even though Parliament made approximately thirty amendments to the IPC since its adoption in 1950, Parliament did not see fit to alter Section 377. In addition, the Supreme Court notes that the 172nd Law Commission Report specifically recommended deletion of Section 377—something that Indian Parliament has not implemented. However, two questions remain unclarified or ignored. First, what messages does the government send when it takes an active decision not to

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178. *Id.* § 28.
181. *Id.* § 28.
182. *Id.* § 32. Indeed, Parliament made the most recent change to the IPC in 2013, and though the amendments specifically dealt with the IPC’s chapter on sexual offences, it did not alter, amend, or delete Section 377. The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).
challenge the decision of the Delhi High Court in *Naz v. Delhi*, and when it authorizes its chief legal officer, the Attorney-General of India, to *actively* seek judicial review rather than defend Indian laws against legal challenges? Secondly, does legislation enacted by the British, prior to Indian independence, truly represent the “will of the people of India through the Parliament,” given that Section 377 is not the only preconstitutional legislation challenged in the courts?

The Supreme Court devotes the next eight pages of *Koushal v. Naz* (pages 55–62) to copious extracts from precedents covering issues, such as the doctrine of severability. Without exploring these precedents or providing any rationale, the Supreme Court abruptly concludes that “unless a clear constitutional violation is proved, this Court is not empowered to *strike down a law* merely by virtue of its falling into disuse or the perception of the society having changed as regards the legitimacy of its purpose and its need.” This statement is surprising because the issue at hand was the need to “read down” the law—not to “strike” it down. One must note that the Delhi High Court in *Naz v. Delhi* only found Section 377 violative of the Constitution of India insofar as it criminalized consensual sexual acts of adults in private. In any case, towards the end of the incoherent discussion that is mostly represented by the indiscriminate use of a number of precedents without any explanation or consolidation, the Supreme Court acknowledges that the presumption of constitutionality does not in itself make a law immune from constitutional challenge. However, the Supreme Court also maintains that Parliament is “undisputedly the representative body of the people of India” and hence, Parliament’s decision to retain Section 377 “guided” the judiciary’s understanding of the “character, scope, ambit and import of the legislation.”

184. M.P. Singh, supra note 22 (arguing that it implies the government’s lack of confidence in itself wherein it expects the courts to do what the Constitution of India assigns to the people’s representatives).


186. Under this doctrine, impugning part of statute does not necessarily invalidate the rest of it. See id. § 29.


188. See id. § 32.

189. Id. § 33.
The Supreme Court devotes the next fifteen pages (pages 62–77) of the *Koushal v. Naz* judgment to defining “carnal intercourse,” by trawling through the legislative history of Section 377 and the various Indian High Court judgments previously applying it. This part of the ruling suffers from two key problems. First, it is not quite clear why the Supreme Court engages in an examination of the history of sodomy legislation when it already took the position that it is not for the judiciary to legislate. In any case, having decided that it would engage in such a discussion, it is not clear why the Supreme Court ignores the literature presented by the respondents and the attorney general which sought to establish the legitimacy of homoeroticism in Hindu and Muslim culture in India for two millennia. Instead, the Supreme Court discusses the history of same-sex sexual relations in Britain in as early as 1290, when the ecclesiastical courts of England sentenced “sodomites” to being burnt or buried alive. The Supreme Court goes on to discuss British Parliament’s introduction of “buggery” as an offense established by Henry VIII following the split from the Roman Catholic Church in the sixteenth century and enforced by secular courts. Furthermore, the Supreme Court points to the

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190. See id. §§ 34–36.
193. See generally An Act for the Punishment of the Vice of Buggery, 1533, 25 Hen. 8, c. 6 (defining buggery as an unnatural sexual act against the will of God and man); Douglas E. Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 ASIAN J. COMP. L. 163 (2009) (discussing buggery act); Stephen, supra note 192, at 436 (discussing how offense of buggery was enforced by secular courts). In 1828, the buggery act was replaced by the Offences Against the Person Act and the Criminal Law (India) Act, Offences Against the Person Act, 1828, 9 Geo. 4, § 15; Criminal Law (India) Act, 1828, 9 Geo. 4, § 63.
United Kingdom’s 1861 Offences Against the Person Act, which abolished the death penalty for sodomy and buggery and substituted it with prison terms ranging from ten years to life imprisonment.\textsuperscript{194} Though the Supreme Court refers to the period when Section 377 was introduced into Indian criminal law,\textsuperscript{195} it remains unclear why the Supreme Court in \textit{Koushal v. Naz} felt it relevant to examine the historical treatment of sodomy in Britain yet ignore the historical treatment of same-sex relations in the kingdoms and principalities of historical India.

Following an examination of the various cases in which the penal provision was used to secure a conviction,\textsuperscript{196} the Supreme Court reaches the conclusion that all cases relate to “non-consensual and markedly coercive situations” where the “keenness of the [High] court[s] in bringing justice to the victims who were either women or children cannot be discounted.”\textsuperscript{197} Why did the Supreme Court feel it necessary to rehash and provide extracts of several judgments covering rape (“markedly coercive situations”) or pedophilia? This remains confusing as the Supreme Court finishes the discussion with the following statement: “[N]o uniform test can be culled out to classify acts as “carnal intercourse against the order of nature.”\textsuperscript{198} Whilst this statement in itself is accurate, it is not clear why the Supreme Court undertakes the meticulous task of comprehensively compiling a list of rape and pedophilia cases covered by Section 377 without arriving at any conclusion as to the definition of “carnal intercourse against the order of nature.” On the other hand, the Supreme Court makes it clear that it does not feel inclined to compile a list of carnal acts, as this would amount to a “difficult” task.\textsuperscript{199} Finally, the Supreme Court held that Section 377 applies irrespective of age and consent.\textsuperscript{200} Oddly, this question was not in dispute, and would be relevant only if the

\begin{itemize}
\item \textsuperscript{194} Offences Against the Person Act, 1861, 24 & 25 Vict. c. 100, § 61 (Eng.); The Criminal Law (Amendment) Act, 1885, 48 & 48 Vict. c. 69, § 11 (Eng.) (“gross indecency” covers any sexual act between men). The last known execution for buggery in England took place in 1836. Hyde, supra note 192, at 142; See also \textit{History of Homosexuality in Europe and America} 132 (Wayne R. Dykes & Stephen Donaldson eds., 1992); E. Coke, \textit{Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown, and Criminal Cases} (first pub:1644); For discussion on Coke, see JN Katz \textit{Gay/Lesbian Almanac} (Harper & Row, 1983) 88–89.
\item \textsuperscript{195} Koushal v. Naz, (2014) 1 S.C.C. 1 (India) § 37.
\item \textsuperscript{196} \textit{Id.} § 38.
\item \textsuperscript{197} \textit{Id.}
\item \textsuperscript{198} \textit{Id.}
\item \textsuperscript{199} \textit{Id.} § 38 onwards.
\item \textsuperscript{200} \textit{Id.}
\end{itemize}
Supreme Court had explored whether or not Section 377 should apply irrespective of age and consent.

C. No “Factual Foundation” to the Allegation of Discrimination Against the LGBT Community

After considering the definition of ‘carnal intercourse’, the Supreme Court queries whether the Delhi High Court was “justified in entertaining [a] challenge to [Section] 377,” as Naz Foundation had “not laid [a] factual foundation to support its challenge.” Without any context or explanation, the Supreme Court immediately refers to an irrelevant and arguably bizarre extract from *Southern Petrochemical Industries v. Electricity Inspector*, which the Supreme Court appears to have chosen at random with no link whatsoever to the issue in question. Following the extract from *Southern Petrochemical Industries v. Electricity Inspector*, the Supreme Court goes on to consider an extract from another precedent—*Seema Silk and Saree v. Directorate of Enforcement*—and oddly makes an indirect reference once again to *Southern Petrochemical*, in which the relevant court stated that “in the absence of such factual foundation . . . no case has been made out.” Neither the extract, nor the finding, provides any clue as to the context or the implications of *Southern Petrochemical* on the *Koushal v. Naz* ruling. This Article therefore specifically examines *Southern Petrochemical* and *Seema Silk and Sarees* in order to illustrate the illogical and irrational reasoning in *Koushal v. Naz*.

In *Southern Petrochemical*, the Supreme Court rejected the contention of the appellant that a specific statute violated the equality clause as found in Article 14 of the Constitution of India on the following basis:

“[T]he issue that the . . . Act is in violation of the equality clause contained in Article 14 of the Constitution of India was not raised before the High Court. Only in one of the civil appeals, prayer was made for urging additional ground and the same having been directed, additional ground has been taken to urge the said question. A ground taken, however, must be based on a factual founda-

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201. Id. § 39.
203. *Seema Silk and Saree v. Directorate of Enforcement*, (2008) 5 S.C.C. 580 (India). It is not clear why the supreme court did not directly quote *Southern Petrochemical*, especially since they referenced that case in the previous paragraph.
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tion. For attracting Article 14, necessary facts were required to be pleaded. The foundational facts as to how Section 14 of the . . . Act would be discriminatory in nature have not been stated at all. The Government . . . has also not been given any opportunity to meet the said contention.

“[I]t is now trite that such factual foundation, unless is apparent from the statute, itself, cannot be permitted to be raised and that too for the first time before this Court.”

In Seema Silk and Sarees (2008), the Supreme Court rejected the contentions of the appellant on the basis that they did not place any foundational facts on record.205 The court referred to the magnitude of the appellants’ failure by pointing out that they had “not annexed even a copy of writ petition,” the rejection of which the appellant was appealing.206 This amounted to a complete failure on the part of the appellant to raise a plea before the appeal court.

Both Southern Petrochemical and Seema Silk and Sarees were not applicable to the current case as the respondents had presented to the Delhi High Court and to the Supreme Court, extensive documentation of various human rights abuses such as instances of police arrest, custodial torture, and prosecution on false charges against the LGBT community.207 The petition by Voices Against 377 comprised of statements from victims, family members of LGBT persons and various LGBT rights groups.208 It is therefore not clear how the Supreme Court could rely on either Seema Silk and Sarees or Southern Petrochemical and, without further ado, make the extraordinary finding that the Naz Foundation’s 107-page petition was “singularly laconic,” giving only “brief detail of the work being done by it for HIV prevention [and] miserably failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the State agencies towards sexual minorities and consequential denial of basis human rights to them.”209


206. Id. § 13.


208. Background of 377 Case, supra note 207; Naz v. Delhi, (2009) 160 D.L.T. 277 (Del) § 50 (Here the Delhi High Court notes that “There is extensive material placed on the record in the form of affidavits, authoritative reports by well-known agencies and judgments that testify to a widespread use of Section 377 IPC to brutalise MSM and gay community.”).

of Southern Petrochemical and Seema Silk and Sarees, the Supreme Court arrives at an arbitrary conclusion that Naz Foundation’s evidence remains “wholly insufficient for recording a finding” that the LGBT community is “being subjected to discriminatory treatment either by State or its agencies or [even] the society.” This is despite the fact that in the introduction to the Koushal v. Naz decision, the Supreme Court itself notes that “there have been documented instances of harassment and abuse.”

It remains totally unclear why the Supreme Court focuses on the so-called “singularly laconic” failings of “respondent no. 1” in this case, Naz Foundation—and fail to mention the presence of any of the materials presented by other respondents in the case. Suffice it is to state that the Supreme Court appears to have referred to Seema Silk and Sarees and Southern Petrochemical, not because these cases have any relevance to the instant issue, or could contribute substantively to its ruling on Section 377, but merely because these case-laws contains the terminology “factual foundation.” Thereafter, the Supreme Court moves on to tackle the issue of right to equality.

D. Right to Equality and Its Connection to Section 377

One of the findings in Koushal v. Naz is that the constitutional provisions of Article 14 (equality) will not apply to Section 377. According to the Supreme Court, two relevant classes of persons exist: those who indulge in carnal intercourse against the order of nature and those who indulge in carnal intercourse in the ordinary course. If indeed there are two distinguishable classes of persons, then, according to established principles, the law “can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience . . . but the classification should never be arbitrary, artificial or evasive.” So, how did the
Supreme Court in *Koushal v. Naz* arrive at the conclusion that it can distinction between the two classes of persons? The court begins by providing a cut-and-paste extract from a precedent, *Re: Special Courts Bill, 1978,* which begins at page eighty of *Koushal v. Naz* and ends abruptly on page eighty-two. Despite occupying three pages of the *Koushal v. Naz* judgment, the Supreme Court does not consolidate its thinking or provide any qualitative assessment of the *Re: Special Courts Bill, 1978* material, and it leaves the reader without any understanding of the judicial logic or reasoning on how the extract applies to Section 377.

Immediately following the introduction of this decontextualized material from *Re: Special Courts Bill, 1978,* the Supreme Court makes the following observation: “Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes.” This statement constitutes the crux of the court’s finding that Article 14 does not apply to the case. It appears that the Supreme Court is driving home the point that it would be inappropriate to judge the treatment of two different classes of persons using the same criterion of equality. The problem with this conclusion is that the Supreme Court does not provide any method or clarification on how to differentiate between these two classes of persons. For instance, not only does the Supreme Court fail to provide a definition for “carnal intercourse in the ordinary course,” but it clarifies that it is unable to delineate, draw out the scope of, or make a list of sexual acts, considered as “carnal intercourse against the order of nature.”

Nevertheless, the *Koushal v. Naz* decision continues to state those who indulge in carnal intercourse against the order of nature “cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification.” Why? Well, the Supreme Court explains: “What Section 377 does is merely . . . define the particular offence and prescribe punishment for the same.” In other words, *Koushal v. Naz* states that equality principles do not apply to Section 377 because it does not target LGBT persons and only refers to sexual acts indulged in by two classes of persons (as noted from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.”)

215. *Id.*
217. *See id.* § 38.
218. *Id.* § 42.
219. *Id.*
above, these two classes are indistinguishable from one another). Incredibly, *Koushal v. Naz* attempts to argue that the inability to distinguish these two classes of persons does not pose a problem because “while analysing a provision the vagaries of language must be borne in mind and prior application of the law must be considered.”

To establish the point described above, *Koushal v. Naz* provides extracts from two precedents: *AK Roy and others v. Union of India and others* and *Abbas v. Union of India*. Although the extract from *AK Roy* maintains that the fundamental concept in criminal law is that crimes should be “defined with appropriate definiteness,” it acknowledges that the “use of language carries with it the inconvenience of the imperfections of language.”223 How does this finding apply to the idea that two classes of persons can be distinguished based on sexual behaviour even though it remains impossible to identify which of these sexual acts constitute behavior “against the order of nature?”

The *Koushal v. Naz* bench thereupon moves to an extract from *Abbas* which states that if an offense cannot be defined—and it prima facie takes away an individual’s guaranteed freedom, as the uncertainty in the language of the law brings with it the probability of its misuse—then the law must be “held to offend the Constitution.”224 Surely, the finding in *Koushal v. Naz* is contrary to the observation of the *Abbas* court? So, why or how does *Koushal v. Naz* court connect the observations from *Abbas* to its own conclusions? This remains unclear because, once again, the Supreme Court does not provide any explanation beyond the extract in question.

Interestingly, in the midst of its rather sparse discussion on Article 14 and the article’s connection to Section 377, the Supreme Court provides a hint of its mindset when it admonishes the Delhi High Court for overlooking the fact that only a “miniscule fraction” of the country’s population constitutes the LGBT community.225 Without providing any context, the Supreme Court notes that two hundred reported cases of prosecution under Section 377 over the statute’s long history constitutes too low a number to make it “a sound basis” for declaring the provision’s unconstitu-

220. *Id.* § 44.
tionality. This finding of *Koushal v. Naz* appears to validate a majoritarian position previously rejected by the Delhi High Court in *Naz v. Delhi*, through reliance on cases such as *Modinos v. Cyprus*, where the European Court of Human Rights held that maintaining a “consistent policy” of not bringing prosecutions does not substitute for a full repeal of a law that violates the right to privacy.

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**E. Right to Life and Liberty and its Connection to Section 377**

At page eighty-five of *Koushal v. Naz*, the court begins a discussion on Article 21 of the Constitution of India concerning the right to life and liberty by littering the space with extracts from several precedents. As in the case elsewhere, the court does not consolidate any of the material in a manner that clarifies its relevance for the instant case. For instance, an extract is taken from *Maneka Gandhi v. Union of India* (purportedly to cover the requirement of substantive due process, notions of legitimate state interest, and the principle of proportionality), another from *Kharak Singh* and *Gobind* (arguing that the right to privacy has been read into Article 21’s right to life provision), another from *Suchita Srivastava* (dealing with bodily integrity and the right to sexual choices), a further extract from *Mr. X v. Hospital Z* (dealing with the right to privacy); and another from *Francis Coralie Mullin* (arguing that Article 21 recognizes the right to live with dignity). However, it remains unclear if the Supreme Court drew any conclusions from any of these precedents as the court leaves no hint of judicial reasoning as to how, why, and in what manner issues of life, liberty, privacy, or dignity connect to Section 377 or the LGBT community generally.

Seven pages of extracts later, at page ninety-one, the Supreme Court declares that the mere fact that police authorities and state agencies misuse Section 377 does not reflect the legislative provision’s constitutional validity, as the provision does not mandate or condone such treatment. The court thereupon helpfully provides an extensive extract (pages 91–93) from *Sushil Kumar Sharma*...
v. Union of India, where the court observed that the legislature must take into account the misuse of a legislative provision whilst deciding to amend or repeal the provision. While the court makes a fair point, this holds true only where a court indeed finds the legislative provision valid, constitutional, and intravires. The court in Sushil Kumar Sharma also makes this clear when it observes that “the principle appears to be well settled that if a statutory provision is otherwise intra-vires, constitutional and valid, mere possibility of abuse of power in a given case would not make it objectionable, ultra-vires or unconstitutional.” This means that the Supreme Court in Koushal v. Naz finds Section 377 unobjectionable, intravires, and constitutional, which in itself would not pose an issue if the Supreme Court had also given reasons to demonstrate how it arrives at this conclusion.

The Supreme Court admonishes the Delhi High Court for extensively relying on the judgments of other jurisdictions to arrive at its finding that Section 377 violates the right to life and liberty provided under Article 21 of the Constitution of India. The Supreme Court also accuses the Delhi High Court’s decision in Naz v. Delhi as it extended the right to life to concepts of the right to privacy, autonomy, and dignity, and for being motivated by an “anxiety to protect the so-called rights” of LGBT persons. To illustrate the risks of using comparative jurisprudence without adequate reflection, the Supreme Court cites three precedents—Jagmohan Singh v. State of UP, State of Madras v. VG Row, and Surendra Pal v. Saraswati Arora.

In Jagmohan Singh, petitioners challenged capital punishment by submitting various studies by western scholars showing the ineffectiveness of the death penalty in crime prevention or reduction. The Supreme Court rejected this argument on the basis that it had “grave doubts about the expediency of transplanting Western experience in our country.” Quite apart from the fact that the case does not prohibit the use of international law principles or com-

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235. Id. § 15.
237. Id. § 52.
240. Id. §§ 13, 14; see also Shatrughan Chauhan v. Union of India, (2014) 3 S.C.C. 1 (India).
parative jurisprudence, the Supreme Court in *Koushal v. Naz* fails to highlight that Article 21 of the Constitution of India explicitly permits “life to be deprived in accordance with procedures prescribed by law.”\(^{241}\) No such similar prohibition against homosexuality exists in the Constitution of India. Yet, the Supreme Court cites *Jagmohan Singh* in *Koushal v. Naz* without providing context, rationale, or reasons.\(^{242}\)

The Supreme Court’s reference to the *VG Row* precedent is even more disturbing as the material extracted from this case has no relevance to the use of comparative jurisprudence, international principles, or western experience. So how can one explain its citation? The clue lies in the last six lines of the extract which, though contained with quotation marks, do not appear in the *VG Row* case at all but actually happen to come from *Jagmohan Singh*.\(^{243}\) One can assume that the Supreme Court in *Koushal v. Naz* inadvertently quoted more material than necessary from *Jagmohan Singh* to emphasise its displeasure with the use of comparative jurisprudence. However, by making small changes to the beginning of the paragraph, the Supreme Court inadvertently misleads the reader into thinking that *VG Row* provides a second precedent. This again constitutes another clear example of a cut-and-paste job gone wrong.

Finally, the Supreme Court in *Koushal v. Naz* extracts about a one-and-a-half-page excerpt of the *Surendra Pal* ruling, even though this case does not necessarily lay down specific rules against the use of comparative jurisprudence.\(^{244}\) Once again, the Supreme Court does not provide any discussion on this precedent. What proves even more troubling, however, is that the Supreme Court does not confine its criticism to new interpretations adopted by the Delhi High Court, some of which were supported by persuasive foreign authorities, but takes a position that rejects the use of comparative jurisprudence in Indian courts.\(^{245}\) For instance, though the Supreme Court concedes that foreign judgments “shed considera-
ble light on various aspects of [LGBT rights] and are informative in relation to the plight of sexual minorities,” it qualifies this statement by observing that these foreign judgments “cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.”

One should note that unlike the United States, which is “famously resistant to comparative constitutional arguments,” the use of comparative material is a long-standing feature of Indian constitutional interpretation and has occurred since the Supreme Court’s inception. Indeed, it is well recognized that the Supreme Court uses international and comparative materials as “part of creative strategies to read in previously unenumerated norms into the ‘protection of life and liberty’ guaranteed under Art. 21 of the Indian Constitution.”

IV. A CASE OF JUDICIAL ABDICATION?

Following independence, the Supreme Court initially behaved as a “technocratic court,” and was hesitant to engage in judicial review, perhaps due to the fact that it was “still under the influence of the colonial jurisprudence.” During its “slow and imperceptible evolution from [a] positivist to activist court,” the Supreme Court reached its lowest point of credibility when it

247. Sujit Choudhry, How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights and Dialogical Interpretation, in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 53 (Sunil Khilnani et al. eds., 2012). For a broad discussion, see Vicki Jackson, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2013); Antonin Scalia, Commentary, 40 St. Louis U. L.J. 1119 (1996).
250. Sathe, supra note 34, at 4, 5 (describing a technocratic court as instituting a narrow or strict interpretation of law as opposed to the liberal interpretation of constitutional provisions).
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acceded to the authoritarian government that declared a state of emergency from 1975–1977. Seeking to reclaim its credibility following the “judicial surrender,” the Supreme Court took a series of unprecedented and far-reaching initiatives that liberalized PIL procedures and adopted unique innovations with a view to engaging in “participative justice.” The Supreme Court viewed PIL as an endeavor to counter “state repression, governmental lawlessness, administrative deviance, and exploitation of disadvantaged groups and denial to them of their rights and entitlements.”

Unlike PIL in other countries, the Indian courts began to allow informality in procedure. It began to entertain letters or telegrams written to the judges or court as PIL petitions, take *suo moto* cognizance of matters, relax rules of *locus standi*, and develop new forms of reliefs and remedies with the view to do justice. The PIL extended the scope of justiciability, resulting in a form of judicial decision making that went beyond compelling the state to do or not do what was legally provided, and which thereby encroached upon policymaking and good governance.

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255. *Id.* (describing the *Jabalpur* case as an instance where the supreme court “completely surrendered itself before the hegemonic executive”).


259. Suo moto actions are those where a judge may issue public interest proceedings on his own accord.

260. Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 Ws. Inst. L. J. 37, 58–75 (1994) (discussing how action can be brought by public-spirited persons, such as activists, journalists, academics, or lawyers on behalf of a victim). *See* S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149 (India) § 13 (recognizing *locus standi* of bar associations to file writ to challenge executive’s policy of arbitrarily transfer of high court judges).


in which the court assumed features of the executive and the legislature to fill in a “governance vacuum,” such as granting the right to free elementary education, creating a policy against child labor and bonded labor, providing access to clean air and related environmental pollution issues, framing guidelines and mechanisms of redress to deal with sexual harassment in workplaces, and even issuing orders on the conduct of military operations in Kashmir, to mention but a few. Justifying these judicial incursions, Chief Justice K.G. Balakrishnan observed, as follows:

“In many instances, the Supreme Court has faced criticism for ‘usurping’ the power of the executive. However, what is most often overlooked by all critics is the fact that where is the man to go, when the executive fails to perform its duties properly? . . . It is often argued that the Supreme Court should maintain restraint and should not violate the legitimate limits in the exercise of powers. However, this argument fails to recognize the constant failures of the governance taking place at the hands of other organs of State and that it is the function of the Court to check, balance and correct any failure arising out of any other State organ. It is improper, therefore, to accuse the Court of taking unfair advantage of this instrument to further any vested interest.”


263. Robinson, supra note 36, at 41.


270. K.G. Balakrishnan, Chief Justice of India, Inaugural Address at Kerala Legislative Assembly Golden Jubilee Celebrations 2007–2008 Seminar on “Legislature, Executive and
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The activist role taken by the Indian judiciary has resulted in a persistent struggle between the various organs of the state, resulting in the creation of the classic circular battle of judicialization of politics and politicization of the judiciary.271 Scholars variously describe the Supreme Court of India as “a devise of engineering social change,”272 and as a “centre of political power . . . because it can influence the agenda of political action.”273 The consequence of this struggle can be noted from the continuous debate on the appropriate authority that can appoint and transfer judges.274 In August 2014, the Indian Parliament passed two new pieces of legislation designed to give the executive a direct role in appointing and transferring judges to the Supreme Court and the twenty-four high courts.275 While this move by the executive faced little opposition in both houses of Parliament, it received disapproval from the judiciary.276 The Supreme Court will almost certainly review the

275. INDIA CONST. Bill No. 97 of 2014, amended by The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, http://www.prsindia.org/uploads/media/constitution%20121st/121st%20%28A%29%20Bill.%202014.pdf (which set up the National Judicial Appointments Commission, a constitutional body comprised of the three most senior judges, the law minister, and two eminent persons appointed by a panel comprised of the chief justice, the prime minister, and the opposition leader); The National Judicial Appointments Commission Bill No. 96 of 2014, introduced in the Lok Sabha on Nov. 8, 2014, http://www.prsindia.org/uploads/media/national%20judicial/National%20Judicial%20Appointment%20Bill.%202014.pdf (which set up the procedure for the appointment and transfer of judges).
legislation, once in effect, as it dramatically changes the collegium system wherein the judiciary had over time gained primacy over judicial appointments.

Though there has been a gradual slowdown in PILs in recent years, it remains clear that by deferring constitutionality issues to Parliament, the Supreme Court in *Koushal v. Naz* fails to act as the guardian of the constitution and sharply departs from its activist disposition. In addition, it thoroughly fails to engage with the issues in *Koushal v. Naz*, and it merely litters its ruling with broad-based discussions on principles of constitutional rights without revealing its own views on why it is constitutionally valid for the state to criminalize private consensual sexual activities between adults. Lacking any substantive justification, *Koushal v. Naz* simply appears arbitrary and discriminatory, when it dismissively refers to the “miniscule fraction” of the individuals affected by Section 377. At a time when rule-of-law countries around the world are debating the topic of gay marriage, the Supreme Court of India ironically, on the day after the celebration of International Human Rights Day, reintroduces the crudest form of discrimination and exclusion of sexual minorities—the criminalization of their identity and lifestyles.

The Supreme Court, however, offers a parting reassurance to the respondents that the competent legislature “shall be free to consider the desirability and propriety” of Section 377 and “amend the same as per the suggestion made by the Attorney General.” Interestingly, *Koushal v. Naz* records Attorney General Vahanvathi’s intervention as that of an amicus, prompting him to issue a media briefing explaining that he formally represented the government’s position. The Supreme Court’s confusion may stem

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278. *Id.*

279. SP Gupta v. Union of India, A.I.R. 1982 S.C. 149 (India) § 13; Supreme Court Advocates on Record Association v. Union of India, 1993(4) S.C.C. 441 (India); Special Reference 1 of 1998 (7) S.C.C. 739 (India).


283. *Id.* § 21.

from the contradictory positions that different governmental ministries took with regard to Section 377 before both the Delhi High Court in Naz v. Delhi and the Supreme Court in Koushal v. Naz. \(^{285}\) Initially, the Additional Solicitor-General of India, P.P. Malhotra, argued that homosexuality was both immoral and against the country’s cultural practices, and that it results in increased risk of diseases. \(^{286}\) Following media outcry, the government dispatched another Additional Solicitor-General of India, Mohan Jain, to retract Malhotra’s position. \(^{287}\) Additional Solicitor-General Jain further clarified that the government does not consider the Delhi High Court’s ruling in Naz v. Delhi to be “legally erroneous.” \(^{288}\) The Supreme Court thereupon summoned the Attorney General of India, Vahanvathi, to explain the government’s position. \(^{289}\) Vahanvathi clarified that Malhotra was not briefed by the government in a timely manner and went further to provide arguments in favour of respondent position. \(^{290}\) He did not, however, provide an explanation as to why the legislature would not change the law if it felt that Section 377 outlived its original objectives.

Though Vahanvathi clarified that the Indian government approved the findings in Naz v. Delhi, the Supreme Court in Koushal v. Naz tossed the responsibility to protect constitutional rights back to a parliament that had so far demonstrably failed to amend or repeal Section 377. It is an interesting question as to why the Supreme Court felt it necessary to draft a ninety-eight-page-

\[^{285}\] The Ministry of Health opposed Section 377, whilst the Ministry of Home Affairs supported the provision before the Delhi High Court. See Naz v. Delhi, (2009) 160 D.L.T. 277 (Del) §§ 11, 60. However, in the supreme court appeal, the Delhi Commission for Protection of Child Rights supported Section 377, whilst the attorney general argued that the government had no objections to the Delhi High Court ruling which reads down Section 377. Koushal v. Naz, (2014) 1 S.C.C. 1 (India) §§ 16.1, 21.


\[^{289}\] Danish Sheikh, The Road to Decriminalization: Litigating India’s Anti-Sodomy Law, 16 Yale Hum. RTS. & DEV. L. J. 124 (2014).

\[^{290}\] See Vahanvathi, supra note 284.
long ruling merely to state that parliament must do its job without providing any logic or rationale to the constitutional validity of Section 377. Given that most of the material in the decision was cut-and-paste work with hardly any consolidation of relevant issues, one may be sympathetic to the explanation that the quality of ruling may have been affected by time constraints. This is because, the decision came on December 11, 2013, which also happened to the date of retirement of Justice Singhvi, the lead author in the Koushal v. Naz ruling and it is quite possible that the decision was written in hurry. This, however, does not explain why the court left the ruling pending for more about twenty months after the parties finished presenting their final arguments in April 2012.291

Another potential reason for the Supreme Court’s comprehensive failure to provide any reasoning may stem from its inability to empathize with gay rights. Unofficial hearing transcripts show Justice Singhvi stating that he does not “know any gay person.”292 A parallel scenario can be drawn with the jurisprudence on gay rights in the United States. In 1986, Justice Powell, who held the swing vote, voted with the majority in Bowers v. Hardwick, the 1986 U.S. Supreme Court case where it was held in a 5-4 decision that the U.S. Constitution does not confer “a fundamental right to engage in homosexual sodomy.”293 The ruling was overturned by the U.S. Supreme Court in the 2003 Lawrence v. Texas case, with Justice Kennedy stating that, “Bowers was not correct when it was decided, and it is not correct today.”294 Various documents have since emerged revealing a conversation that Justice Powell Jr. had with his gay clerk, Carter Chinnis Jr.,295 in which Powell mentioned that he did not believe he had “ever met a homosexual.”296 Following his retirement, Justice Powell has admitted that he had viewed the Bow-

ers case as “frivolous,” and he has since then recognized that he “probably made a mistake.” Commentators have argued that the awareness and personal experiences of gay rights movements “greatly influences people’s perception of homosexuality,” and that Justice Powell may have cast his vote differently in the Bowers case, if he was aware of the fact that several of his law clerks, including Chinnis, were homosexual persons.

Interestingly, Justice Singhvi, in an off-hand comment during the Koushal v. Naz proceedings, observed the potential for prejudice to play a role in judicial decision making. He states, “In India, we don’t analyse judgment against judges – we would find bias in 50% of our judgment. All of us have certain notions. You can call them prejudices.” Despite this statement and despite further support from literature examining how culture can bias perception in judicial decision making, one must approach with trepidation the suggestion that prejudice may have played a role in Koushal v. Naz. However, seen through the lens of the Supreme Court of India’s hyper activist nature, the court exposes itself to legitimate criticism by its failure to provide substantive justification for denying constitutional rights of LGBT persons in Koushal v. Naz. Even if the Supreme Court had used the excuse of social or moral conservatism within Indian society to deny LGBT persons their constitutional and human rights, it would have only faced the argument that it had engaged in a poor reading of the constitutional values and that the rationality of its legal reasoning is weak. Instead, the Koushal v. Naz ruling suffers from serious structural problems, including a deficient understanding and implementa-


300. Unofficial Transcripts of Koushal, supra note 292, at 77.

tion of fundamental legal principles. The high degree of internal incoherency in the decision and the stark failure to follow the broader principles of judicial decision making exposes the Supreme Court, not only to reproach that it lacked impartiality, but even worse, makes the court vulnerable to criticism that it suffers from potential normative bias. The Supreme Court could have effectively insulated itself from potential criticism in *Koushal v. Naz* by appointing a constitutional bench comprising of a minimum of five judges as mandated by Article 145(3) of the Constitution of India as the case involved a "substantial question of law." In all probability, the matter was adjudicated by a two-judge bench due to logistical problems caused by the large number of cases handled by the Supreme Court (64,330 as of April 2014), not to mention the lack of definition on what would constitute a substantial question of constitutional law that would require a constitutional bench.

V. CONCLUDING REMARKS

The weaknesses in the court’s legal reasoning makes it appear as though the judiciary took an opportunistic stand of loyalty to the doctrine of judicial deference in an effort to disguise its complicity with the Indian Parliament stand that have protected majoritarian sensibilities at the expense of minorities. A quick overview of parliamentarian reactions to *Koushal v. Naz* shows the Congress Party, which was the party leading a coalition government at the time of the ruling, expressing liberal views. However, because

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302. *India Const.* art. 145(3): The minimum number of Judges "who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five . . . ."


305. A large section of India, including right and left wing thinkers, and conservatives and progressives, oppose homosexual behavior to the extent that they are willing to support a legislation that criminalizes personal identity. Balasubrahmanyan, *supra* note 98, at 257–58.

306. For example, Rahul Ghandi, the Congress Party vice-president, stated that sexual identity is a matter of “personal freedom.” *Rahul Gandhi on Section 377: This Country is Known for it’s Freedom of Expression*, YouTube, https://www.youtube.com/watch?v=8K7ciHfJNg; See also Sonia Kapil, *Chidambaram Come Out Against SC Order on Section 377*, CNN-IBN (Dec. 12, 2013), http://ibnlive.in.com/news/sonia-sibal-chidambaram-come-out-again-against-sc-order-on-section-377/439173-37-64.html where Sonia Ghandi, the Congress Party president, states that the Indian culture “has always been inclusive and tolerant.” Kapil Sibal, the then law
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The Koushal v. Naz ruling came at a time when political parties were beginning to campaign for the May 2014 national elections, one must treat such liberal views with scepticism. The scepticism against Congress Party’s liberal views, gains credence when it is noted that the party that held power for the majority of the years following Indian independence, had not seen it fit to amend Section 377, even when they held full majority in the parliament. Having said that, following the Koushal v. Naz ruling, the coalition government led by the Congress Party instructed the National Crime Records Bureau, the country’s central repository for tabulating data related to criminal incidents, to collate data relating to offenses recorded under Section 377. Collection and processing of relevant data, including the compiling and analysis of crime statistics within the LGBT community, could provide future impetus to decriminalize homosexuality and evolve appropriate strategies to enable social cohesion and integration between India’s diverse communities.

The LGBT community had a renewed cause for hope in the judiciary when the Supreme Court of India had recently recognized in the National Legal Services Authority v. Union of India (Nalsa) judgment that transgender and transsexual persons have the right of self-identity, resulting in the creation of a legally recognized “third and justice minister from the Congress Party maintained that India must “decriminalise adult consensual relationships.” P. Chidambaram, the then finance minister from the Congress Party, stated that the “wrong” ruling takes India “back to 1860.” Smaller parties that expressed support include the Aam Aadmi Party, which believes that “Section 377 violates the human rights of . . . individuals. . . . goes against the liberal values of our Constitution, and the spirit of our times.” Aam Aadmi Party’s Statement on Supreme Court Judgement Upholding Section 377, AAM AADMI PARTY, http://www.aamaadmiparty.org/news/aam-aadmi-partys-statement-on-supreme-court-judgement-upholding-section-377; CPI (M) leader Brinda Karat also expressed support of homosexuality rights, stating that “the SC order is wrong. Sexual relations which are consensual cannot be criminal.” Brinda Karat, CPI(M) on Why Section 377 of Indian Penal Code Should be Amended, YOUTUBE, https://www.youtube.com/watch?v=pBJaByKW-A, and Trinamool Party leader Derek O’Brien stated that he is “very disappointed” with Koushal v. Naz on a personal level, Section 377 Verdict: We Have Gone Back to 1860, Says Finance Minister P Chidambaram, NDTV (Dec. 12, 2013), http://www.ndtv.com/who-said-what/section-377-verdict-we-have-gone-back-to-1860-says-finance-minister-p-chidambaram-544169.


In *Nalsar*, which the court decided over four months after deciding *Koushal v. Naz*, the Supreme Court found that “[Section] 377, though associated with specific sexual acts, highlighted certain identities, . . . and was used as an instrument of harassment and physical abuse against Hijras and transgender persons.”

Unfortunately, the Supreme Court in *Nalsar* explicitly refused to express an opinion on *Koushal v. Naz*, or deal with Section 377, thus leaving the legally protected third gender to remain sexless for fear of criminal prosecution.

The Supreme Court of India is however, currently considering a “curative petition” against the *Koushal v. Naz* ruling. A curative petition aims to serve as the last judicial resort for redress of grievances, as it allows the Supreme Court of India to reconsider its own judgment and order. Prior to the curative petition, the Supreme Court had, without providing any substantive reasoning, already rejected two review petitions filed in December 2013 by the respondents seeking judicial re-examination of the *Koushal v. Naz* ruling. If the curative petition fails, the Bharatiya Janata Party which is now heading the Indian government, is unlikely to amend or delete Section 377 in Parliament, as it is a conservative party...

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309. NaLSA, supra note 211.
310. Hijras broadly refers to transsexual people.
311. NaLSA, supra note 211, § 17.
312. Id. § 18.
314. *India Const.* art. 32; *Supreme Court of India: Practice and Procedure – A Handbook of Information* 17 (3d ed., 2010). The concept of curative petition was devised in 2002 (Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 S.C.C. 388 (India)) with the intent to prevent abuse of the judicial process and to cure any gross miscarriage of justice.
315. *India Const.* art. 137; *Supreme Court Rules 1966*, Part VIII, Order XL; see also *SC Manual of Office Procedure on Judicial Side* at 28.
316. Indian Supreme Court, Civil Appellate Jurisdiction, Review Petition 41-55/2014 in Civil Appeal no. 10972-10985 of 2013 (Jan. 28, 2014); Review Petition 197, 198, 202, 211, 219, 22/2014 in Civil Appeal no. 10972 of 2013 (Jan. 28, 2014); Review Petition 222-233/2014 in Civil Appeal no. 10972-10974, 10976-10981, 10984-10986/f 2013 (Jan. 28, 2014). The order of the above-mentioned Review Petition merely states, “We have gone through the Review Petitions and the connected papers. We see no reason to interfere with the order impugned. The Review Petitions are, accordingly, dismissed.”
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with Hindutva\textsuperscript{317} leanings.\textsuperscript{318} Should this happen, the “world’s largest democracy”\textsuperscript{319} would be failing to protect its LGBT community in the foreseeable future.

\textsuperscript{317} The meaning of the term ‘hindutva’ has been highly controversial after the Supreme Court of India equated ‘hinduism’ with hindutva’, and it was held to mean the “way of life of the Indian people.” Manohar Joshi v. Nitin Patil, (1996) 1 S.C.C. 160 (India). See also Ramesh Prabhoo v. Prabhakar Kunte, (1996) 1 S.C.C. 130 (India). After eighteen years, the supreme court reconstituted a seven-judge bench to review the judgment. See AG Noorani, \textit{Supreme Court and Hindutva}, FRONTLINE (July 2, 2014); Anil Nauriya, \textit{The Hindutva Judgments: A Warning Signal}, \textit{31(1) ECO. & POL. WKLY.} 10 (1996); see also Brenda Crossman & Ratna Kapur, \textit{Secularism’s Last Sigh?: Hindutva and the (Mis) Rule of Law} (2002).


\textsuperscript{319} Press Release, Office of the Press Sec’y, \textit{Remarks by President Obama in Address to the People of India}, New Delhi, India (Jan. 26, 2015).
Similarly, leaders in Europe, Britain and the United States have provided mystifyingly tepid responses to the recriminalization of homosexuality in India. This hesitant western response is in sharp contrast with the manner in which countries have roundly condemned Russia’s “gay propaganda” laws, even though these laws are mild in impact compared with the Indian parallel. Simply put, far more confusing than the Supreme Court’s lack of reasoning in \textit{Koushal v. Naz} is the liberal west’s lack of a strong response to the ruling.


