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The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India

*Jayanth K. Krishnan**

There is a link that can be drawn between the levels of the HIV pandemic and the protection of rights of vulnerable groups. The lesson is clear. Rights are a very important part of . . . HIV prevention. They have to be part and parcel of the program of awareness and sensitization.

—Anand Grover, Lawyer and HIV Activist¹

ABSTRACT

It is believed that India will soon have the highest number of HIV/AIDS cases of any country. Some reports project that 37 million people will be infected within the next two decades. Sadly, few studies have examined the legal claims of those who suffer with this disease in this, the world's largest democracy. In this article, I systematically examine how the courts in India have responded to rights-based claims brought by people who have HIV. The conventional wisdom is that the Indian judiciary frequently protects the rights of the poor, the under-represented, and the ill. But my findings reveal that, at least for people with HIV, the courts have not extended to this group full constitutional protection. The implications of this conclusion force us to revisit whether the courts in India best safeguard the rights of others who are disadvantaged.

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1. Anand Grover, A Tryst With Dominic, Speech presented at The National Human Rights Conference On HIV/AIDS Ethics and the Law (24–25 Nov. 2000), available at <http://www.hri.ca/partners/lc/unit/AGspeech.shtml>.

TABLE OF CONTENTS

I. Introduction	792
II. Making Constitutional Claims through Public Interest Litigation	794
III. HIV Jurisprudence from the Indian Judiciary	798
A. The Dominic D'Souza Case	798
B. Beyond the D'Souza Decision: A String of Mixed Results	800
C. A Sign of Real Hope—The <i>MX</i> Case, 1997	803
D. <i>Mr. X. v. Hospital Z</i> , 1999: A Significant Step Backward	807
IV. Conclusion: Assessing the Indian Judiciary's HIV Jurisprudence	815

I. INTRODUCTION

The fourteenth international conference on AIDS concluded last year in Barcelona to a swell of prominent headlines. From this meeting the world learned of the latest developments in the fight against this devastating disease. On the bright side, experts reported on promising new advances in medical research and noted that in industrialized countries, people with AIDS are gaining greater access to health care as well as acquiring more political and legal recognition. But the optimism was clouded by a sobering reality. Forty million people today are infected with HIV, the virus known to cause AIDS.² By 2020 an estimated seventy million people are projected to die of AIDS.³ Over 90 percent of AIDS cases are in the developing world.⁴ In places like Africa and parts of Asia, poor economic conditions, a lack of political will, social intolerance, and cultural barriers are just some of the reasons why people with HIV fail to receive adequate medical care and are denied basic political and legal rights.

One country poised on the brink of HIV implosion is India. Within the next two decades, India will have the highest number of HIV cases in the

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2. Sachchindanand Jha, *\$10BN Needed Annually to Fight AIDS: UN*, TIMES OF INDIA, 8 July 2002. (HIV is short for human immunodeficiency virus, and AIDS is short for acquired immune deficiency syndrome.)
 3. United Nations, *AIDS: Report on the Global HIV/AIDS Epidemic* (2002), available at http://www.unaids.org/barcelona/presskit/embargo_html.htm.
 4. European Commission, *Making an AIDS Vaccine Available in the Developing World*, (10 May 2000), available at <http://www.iaen.org/papers/index.php?a=M>. See also one of the most informative websites on AIDS: <http://www.unaids.org>; Sachchindanand Jha, *94% AIDS Victims in Third World: W.H.O.*, TIMES OF INDIA, 9 July 2002.

world. According to one report the "United Nations estimates that if the disease is not checked, a mind-boggling 37 million people in India could be infected over the next 10 to 15 years."⁵ Even with this staggering projection, observers take solace in the belief that, at the very least, the political and legal rights of the ill (including those with HIV) are safeguarded by a special device incorporated within the judicial system. In India, any claimant may file what is called a *public interest litigation* petition directly in the country's Supreme Court when the state is charged with infringing upon a constitutionally protected fundamental right.⁶ The terms "public interest litigation" and "fundamental right" in the Indian context have particular meaning. Fundamental rights resemble several of the same rights found in the United States Constitution—including the right to equal protection. Public interest litigation refers to the process of allowing, for example, an individual with HIV to file a claim in the Supreme Court where there is an allegation of state-based discrimination.⁷ Not surprisingly, many legal and political scholars see public interest litigation as the touchstone of the Indian democratic experience.⁸ Only the fiercest of democracies would provide every individual direct access to the highest court in the land.

Yet does public interest litigation really serve the constitutional interests of those with HIV in India? As stated, the conventional wisdom is that historically disadvantaged groups,⁹ including the ill, have frequently received favorable judicial decisions from the public interest litigation process.¹⁰ This study questions this conventional wisdom by investigating the constitutional rights currently being afforded to one set of castigated

5. Bates Gill & Sarah Palmer, *The Coming AIDS Crisis in China*, N.Y. TIMES, 16 July 2001, at A15, available at <http://www.brook.edu/views/op-ed/gill/20010716.htm> (comparing the rates of HIV in China with that of India).

6. For a classic treatment of the Indian Constitution, see GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* (1966). For an updated study, see GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* (2000).

7. Courts have granted this power using Article 32 of the Constitution of India as justification. There is an extended discussion of this provision in section two.

8. For a select set of readings, see J. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561 (1985); Rajeev Dhavan, *Law as Struggle: Public Interest law in India*, 36 J. INDIAN L. INST. 302 (1994) [hereinafter Dhavan, *Law as Struggle*]; Carl Baar, *Social Action Litigation in India: The Operations and Limitations on the World's Most Active Judiciary*, 19 POL'Y STUD. J. 140 (1990); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?* 37 AM. J. COMP. L. 495 (1989).

9. The author uses the term "disadvantaged" throughout the study. By "disadvantaged," scholars who study India typically refer to those groups that have historically suffered discrimination or who have had their rights severely curtailed. These would include: lower castes, the poor, religious minorities, women, migrant laborers, those with incurable diseases, and the like.

10. See, e.g., S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* (2001). For a more mixed set of results, see MARC GALANTER, *COMPETING EQUALITIES* (1984).

minorities in India—arguably a group that needs judicial safeguarding the most, people with HIV. My findings reveal that, although these individuals are treated as the newest class of untouchables in Indian society,¹¹ the courts are unwilling to extend to them full protection under the constitution.¹² The implications of this conclusion force us to revisit whether public interest litigation has really advanced the constitutional claims of those who are disadvantaged.

Section two of this article presents the position of those who promote public interest litigation in India. This is followed by a summary of the few existing empirical studies showing how the structure of both the judicial system and the legal profession actually has inhibited public interest litigation from flourishing, which has resulted in providing various disadvantaged groups with more modest gains than what is usually portrayed. Section three discusses how the courts have treated people with HIV in India. The evidence drawn upon involves an analysis of Supreme Court and lower court cases. An examination looking at how constitutional legal developments in other parts of the world (including the United States) have seemingly influenced Indian judges in making their decisions is also considered. Section four forecasts what the outlook is for those with HIV seeking future protection from the courts. Because these individuals have not yet received full equality through litigation, I contend that we may need to reexamine whether turning to the judiciary is the most effective means of protecting the rights of other disadvantaged groups as well.

II. MAKING CONSTITUTIONAL CLAIMS THROUGH PUBLIC INTEREST LITIGATION

Perhaps the most unique feature of the Indian Constitution is Article 32. The provisions of this Article state that:

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of rights conferred by this Part is guaranteed.
- (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo*

11. See e.g., R. Devraj, *India-AIDS: HIV Creates New Untouchables in India*, INTER-PRESS NEWS SERV., 8 July 1997, available at <http://www.aegis.com/news/ips/1997/IP970704.html>; Amin Ahmed, *The New Untouchables*, REDIFF NEWS, 14 Mar. 2002, available at <http://www.rediff.com/news/2002/mar/16spec.htm>.

12. One important study that looks at a related issue in Japan is: ERIC A. FELDMAN, *THE RITUAL OF RIGHTS IN JAPAN: LAW, SOCIETY AND HEALTH POLICY* (2000) (noting that the legal mobilization of rights-groups that focus on health policy, including HIV/AIDS, has occurred in Japan despite the historical conception that citizens are less concerned with individual rights).

warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.¹³

Over time, case law has come to interpret Article 32 as allowing for ordinary citizens to petition the Supreme Court in matters where the central government is accused of infringing upon the "fundamental rights" of the constitution.¹⁴ To facilitate the use of this right, the Court accepts epistle petitions¹⁵ (letters that state a legal claim). This form of litigation has two advantages—it is simple and inexpensive. There are also lenient standing rules. Issues in front of the Court do not need to be "ripe," nor is there a sense that the Court may involve itself in actual cases and controversies.¹⁶ In addition, the constitution includes Article 226.¹⁷ Courts have interpreted this Article as giving any claimant the opportunity to file suit on behalf of the public in a state supreme court, or *High Court*, when there is a state violation of a fundamental right or a right guaranteed by statute.

It was only after Indira Gandhi lifted her Emergency Rule in 1977 that lawyers began frequently using these two Articles to engage in public interest litigation.¹⁸ This type of lawyering promoted such issues as women's rights, civil rights, civil liberties, environmental protection, and the rights of lower castes.¹⁹ During this time, the government also began funding legal

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13. INDIA CONST. art. 32 (1950). For a discussion of this provision see Jayanth K. Krishnan & Kevin den Dulk, *So Help Me God*, 30 GA. J. INT'L & COMP. L. 233, 234 (2002). See also CHARLES R. EPP, *THE RIGHTS REVOLUTION* 81–82 (1998). He notes that:

[T]he Indian Supreme Court's jurisdiction is remarkably broad. It has original jurisdiction over disputes between the national government and the states and between different states; it has appellate jurisdiction over criminal and civil cases, . . . and it has advisory jurisdiction to render its opinion on any question of law or fact referred to it by the President. The court also has special leave jurisdiction that grants it discretion to hear appeals involving "any judgment, decree, determination, sentences or order in any cause or matter . . . relating to the Armed Forces." Thus the Supreme Court may decide nearly any issue that arises in Indian politics.

14. INDIA CONST. art. 12–35. They include such provisions as: the right to equality; right to freedom of movement; right to freedom of speech and expression; the right to freedom of religion, and the like. For relevant case law, see *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149; *D.C. Wadhwa v. State of Bihar*, A.I.R. 1987 S.C. 579; *Ratlam Municipal Council v. Vardhichand*, A.I.R. 1980 S.C. 1622; *Fertilizer Corporation v. Union of India*, A.I.R. 1981 S.C. 344; *People's Union for Democratic Rights v. Union of India* A.I.R. 1982 S.C. 1473.
15. For a discussion of epistle petitions, see Baar, *supra* note 8.
16. *Id.*; Krishnan & den Dulk, *supra* note 13, at 233–34.
17. INDIA CONST. art. 226 (1950).
18. See generally Bhagwati, *supra* note 8; Dhavan, *Law as Struggle*, *supra* note 8; Baar, *supra* note 8.
19. See generally Marc Galanter, *New Patterns of Legal Services in India*, in *LAW AND SOCIETY IN MODERN INDIA* 279–95 (Rajeev Dhavan & Marc Galanter eds., 1989) [hereinafter, Galanter, *New Patterns*]; Clark D. Cunningham, *Public Interest Litigation in the Indian Supreme Court: A Study in the Light of American Experience*, 29 J. INDIAN L. INST. 494 (1987); G.L. Peiri, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT'L & COMP. L.Q. 66 (1991); S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA*, *supra*

aid programs that provided resources to public interest lawyers wishing to serve the needs of the disadvantaged.²⁰ This government support helped to spark enthusiasm from private donors, both within and outside of India. Soon there emerged several organizations that began championing legal causes in court in a deliberate, systematic manner.²¹

The main goal of these lawyers was to transform the legal profession. For too long Indian lawyers had been episodic generalists, by and large operating independently from one another. Supporters of this new legal rights movement wanted to see lawyers specialized, coordinated, and structured. Lawyers with expertise could then advocate for the disadvantaged in a more strategic and purposive manner.²²

But public interest lawyers during the 1980s were never fully successful in achieving their desired results.²³ Procedural loopholes, of which there are many within the Indian civil procedure code, prevented disputed questions of fact from being resolved.²⁴ Important court decisions were not executed and only on occasion were judgments monitored. Research that tracked two significant Supreme Court rulings during this era²⁵ (one that required workers to receive a minimum wage and the other that barred forced

note 10; S.P. Sathe, *Political Activism (II): Post-Emergency Judicial Activism: Liberty and Good Governance*, 10 INDIAN SCHOOL OF POL. ECON. 603 (1998); Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L. J. 58 (1994), Madhava Menon, *Justice Sans Lawyers: Some Indian Experiments*, 12 INDIAN BAR REV. 444 (1985).

20. For studies that show how the implementation of legal aid before the Emergency was desultory, see generally Oliver Koppell, *The Indian Lawyer as Social Innovator: Legal Aid in India*, 3 L. & Soc'y REV. 299 (1969). Among the many "populist" amendments to the Constitution enacted during the Emergency was a new Directive Principle decreeing "equal justice and free legal aid." See, e.g., INDIA CONST. 39A (1950). "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." Inserted by the Constitution (Forty-Fourth Amendment) Act, 1976 sec. 8. The Committee on Implementation of Legal Aid Schemes (CILAS) was established in 1980 by the Government of India with Supreme Court Justice (as he was then), P.C. Bhagwati as Chair of Budget Activities.

21. See, e.g., Galanter, *New Patterns*, *supra* note 19, at 279-95; Epp, *supra* note 13, at 97; D.L. Sheth & Harsh Sethi, *The NGO Sector in India: Historical Context and Current Discourse*, 2 VOLUNTAS 49 (1991), available at <http://fnf-southasia.com/cerc.htm>.

22. *Id.*

23. Marc Galanter & Jayanth K. Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in India*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Thomas Heller & Erik Jensen eds., forthcoming 2003); see generally S.K. ACARWAL, *PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE* (1985).

24. *Id.*

25. See, e.g., *Peoples' Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473; *Bandhua Morcha v. Union of India*, A.I.R. 1984 S.C. 802.

labor²⁶) found that little changed as a result of these decisions.²⁷ Most lawyers continued to work as generalists who did not specialize. These lawyers were eventually unable to follow through with commitments to their cause or commitments to the groups they represented.²⁸

The energy that sparked the public interest litigation movement during the 1980s tapered off. The once excited initiators of public interest lawyering began turning their attention to other ideas, including institution-alizing alternative dispute forums. The hope was that rather than dealing with the formal, adversarial court system, those most in need might fare better through a more conciliatory, informal process. As for using litigation to promote policy objectives, today public interest lawyering in India has returned to its old-fashion *ad hoc* character, whereby atomistic lawyers turn to the courts if and when they are able to afford it. However, one organization that represents people with HIV has attempted regularly to use the courts to advocate its cause. This group is known as the Lawyers Collective. The next section examines the recent string of HIV court cases—many of which have been brought by lawyers from this group—and evaluates the judiciary's response to such public interest litigation.

26. In the first case the Supreme Court upheld the Payment of Minimum Wage Act and further stated that any employer found guilty of not paying workers the minimum wage was in violation of Article 23 of the Constitution. Article 23, Constitution of India states that "traffic in human beings and beggars and other similar forms of forced labour are prohibited and any contraventions of this provision shall be an offence punishable in accordance with the law." A similar result occurred in the second case. This matter was brought by a lawyer-swami working with oppressed "Bonded Labourers" in the Fardiabad quarries near Delhi. The petitioners in this case sought to enforce the provisions of the Bonded Labour System (Abolition) Act of 1976, which was a piece of Emergency legislation that statutorily codified the Constitutional prohibition against forced labor.

27. See Oliver Mendelsohn, *Life and Struggle in the Stone Quarries of India: A Case-Study*, 29 J. COMMONWEALTH & COMP. POL. 43, 69 n.3 (1991) [hereinafter, Mendelsohn, *Life and Struggle*] (especially noting in the second case that although the Supreme Court's decision was "pronounced in the language of outraged morality" that the judgment itself had little impact on the actual petitioners' cause given the fact that it was handed down well after the worker's project was completed). See also a public interest law website, www.healthlibrary.com/reading/banyan2/9opressed.com (noting that the employers of these workers "quietly reverted to paying the workers paltry wages, less than the minimum, in total disregard of the Supreme Court ruling." This is a quotation from a public interest law website that tracks social action litigation in India). See ARUN SHOURIE, *COURTS AND THEIR JUDGEMENTS* 16–58 (2001). See also AGARWAL, *supra* note 23, at 10–13 (identifying several Supreme Court judges who have expressed "a not-too-friendly posture to PIL [public interest litigation]").

28. See Epp, *supra* note 13, at 97–98; Galanter, *New Patterns*, *supra* note 19, at 279–82; Smitu Kothari, *The Human Rights Movement in India: A Critical Overview*, in *RETHINKING HUMAN RIGHTS: CHALLENGES FOR THEORY AND ACTION* (Smitu Kothari & Harsh Sethi eds., 1991).

III. HIV JURISPRUDENCE FROM THE INDIAN JUDICIARY

A. The Dominic D'Souza Case

Among the first HIV cases heard by the Indian courts occurred over ten years ago. The case involved the famous HIV/AIDS activist, Dominic D'Souza. D'Souza was an employee at the World Wildlife Federation when, in 1986, he learned that he had HIV.²⁹ Fired from his job and refused treatment by medical doctors, D'Souza was soon incarcerated in a sanitarium in his home state of Goa.³⁰ State officials justified their action as serving the public interest and cited Section 53 of the 1987 Goa Public Health (Amendment) Act, which mandated that individuals who tested positive for HIV/AIDS be placed in isolation.³¹ After sixty-four days in detention a court released D'Souza, not on the basis of any illegality of the statute, but rather because the blood test given to D'Souza was deemed unreliable.³²

In 1989, Section 53 was amended and the "mandatory requirement of isolation of an AIDS patient . . . was converted into the discretionary requirement and authority of the [state's] Health Officer."³³ With the help of the Lawyers Collective, Lucy D'Souza, Dominic's mother, initiated an Article 226 lawsuit to declare Section 53 unconstitutional.³⁴ Anand Grover and G.V. Tamba, the lawyers for D'Souza, argued to the Bombay High Court that Section 53 violated the constitution's equal protection clause,³⁵ as well as the right to move freely around the country,³⁶ and the right to enjoy personal liberty.³⁷ They also claimed that Section 53 was not grounded in scientific fact, that the statute was arbitrary and capricious, and that it denied procedural due process by not allowing those detained to have a hearing.³⁸ Point-by-point, the Bombay High Court rejected each of these arguments.

29. For background on how D'Souza was fired, see Ashok Row Kavi & Dinyar Godrej, *Bigots Take the Temple*, 250 NEW INTERNATIONALIST (1993), available at <http://www.newint.org/issue250/bigots.htm>.

30. See Julie Hamblin, *People Living with HIV: The Law, Ethics and Discrimination*, Issues Paper No. 4, United Nations Development Programme (Nov. 1992) (on file with author), available at <http://www.undp.org/hiv/publications/issues/english/issue04e.htm>.

31. While the background information for this case is mentioned in Hamblin's paper (cited above), it is not discussed in the case itself. However, the statute is discussed in the case, *D'Souza v. State of Goa*, A.I.R. 1990 BOM 355, 356.

32. See Hamblin, *supra* note 30.

33. *D'Souza v. State of Goa*, A.I.R. 1990 BOM 356.

34. Note, while Goa is its own state, the Bombay High Court, which is located in the state of Maharashtra, has jurisdiction over Goa.

35. INDIA CONST. art. 14. (1950).

36. *Id.* art. 19(1)(d).

37. *Id.* art. 21.

38. *D'Souza v. State of Goa*, A.I.R. 1990 BOM 357.

The court first noted that the state could isolate someone with HIV/AIDS.³⁹ In fact, as the court stated "it may also be in the interest of an AIDS patient, because he may become desperate and lose all hopes of survival and therefore, has to be saved against himself."⁴⁰ Unfortunately, the court failed to offer data supporting its conclusion. It provided two reports, one from Brown University and the other from the Government of India, to justify its view. But upon a closer reading, neither of these studies endorsed the position the court adopted.⁴¹ Furthermore, the court in a very deprecating manner claimed that it was "too ill-equipped to doubt the correctness of the Legislative wisdom."⁴² Again nowhere does the court's decision cite evidence that the Legislature conducted investigations, held hearings, or gathered testimony from experts in the field before passing this law.

The court then addressed whether Section 53 was arbitrary. Instead of dealing with this contention, the court disregarded the arguments made by the petitioning attorneys. Reciting the various provisions of the statute, the court without explanation found no "ground for invalidating the source of the [state's] power"⁴³ to detain.

The conclusion of the court's opinion dealt with whether a hearing was required before incarcerating an HIV/AIDS patient. The court said no; Section 53 was "not procedurally unjust despite absence of pre-decisional right of hearings."⁴⁴ So long as a hearing is offered at some point—whether it is before or after a decision on detention has been made—Section 53 will be constitutional. The court also added in its conclusion that because it accepted the case under its Article 226 authority, it could not issue damages for wrongful isolation.⁴⁵ But this line of reasoning runs contrary to a 1983 Supreme Court of India case which stated that the judiciary's ability to protect the fundamental rights of a person would "be denuded of its significant content if the power . . . were limited to passing orders of release from illegal detention."⁴⁶

Some observers contend that the D'Souza case, while far from a

39. *Id.* at 358–59.

40. *Id.* at 358.

41. *Id.* The Brown study the court cites, *Managing AIDS Patients: The Health Care Professionals Survival Guide*, discusses the isolation of AIDS patients as an option only in a very limited number of cases, such as when a patient has infectious diarrhea or infectious tuberculosis. Regarding the government of India study that the court cites, there is only mention of surveillance, not the quarantining or isolation of an AIDS patient.

42. *Id.*

43. *Id.* at 360.

44. *Id.* at 361.

45. *Id.*

46. *Rudul Sah v. State of Bihar*, A.I.R. 1983 S.C. 1086, 1089.

complete victory, nevertheless provided partial gains to people with HIV.⁴⁷ After all, the mandatory detention principle of Section 53 was changed to a more discretionary system following Dominic D'Souza's court-ordered release from confinement. Moreover, the court did require that people with HIV who were detained be given a hearing at some point in the process. Regarding the first point, it is true that the language of Section 53 was changed after D'Souza's release, but recall that the judge there issued no objection to the mandatory provision within the law and instead let D'Souza free on an unrelated issue. And it was the legislature, not any court, that changed Section 53 in 1989.

In terms of the second point, what is missing from the Bombay High Court opinion is a timeframe in which a detainee is to be provided with a hearing. How long can a person with HIV be held before being heard? Given the nature of this illness, time is of the essence. Also, just three years prior to the D'Souza case, the Supreme Court of India ruled that every individual who is ill and who seeks assistance from a government physician has a constitutional right to receive medical treatment.⁴⁸ Yet no mention of this principle is cited by the Bombay High Court. Perhaps most troubling about the decision is that a true parsing of the court's language indicates that much of its ruling was based on conjecture, speculation, and very little evidence or data. This reluctance to provide equal protection to people with HIV, as we shall see, has had serious implications for others seeking to exercise their fundamental rights under the constitution.

B. Beyond the D'Souza Decision: A String of Mixed Results

One of the immense difficulties in studying Indian constitutional law is that centralized databases that claim to provide a comprehensive list of court decisions often are incomplete. In addition, Indian courts routinely issue what are called interim orders. These are temporary judgments, dealing with specific aspects of a case, which can become permanent if there is no

47. Mitu Varma, *India Health: Legal Luminaries Seek AIDS Legislation*, INTER-PRESS NEWS SERV., 21 Oct. 1997, available at <http://www.aegis.com/news/ips/1997/IP971005.html>. The Lawyers Collective, the organization that represented D'Souza sees this case still as an important decision. For the group's views on this case, see *Notable Cases*, The Lawyers Collective, available at <http://www.hri.ca/partners/lc/about/cases.shtml>.

48. *Vincent Parikulangara v. Union of India* A.I.R. 1987 S.C. 990 (noting that public medical facilities must, in emergency and non-emergency situations provide health-care for those seeking assistance); see also *Parmanand Katara v. Union of India*, A.I.R. 1989 S.C. 2039 (1989) (noting that private centers may only refuse to treat when it is a non-emergency situation). This latter case raises an important issue because the majority of people in India turn to private centers. The question is whether having HIV is considered to be an emergency, since one can possess this virus but remain asymptomatic.

appeal. Interim orders are occasionally written, but frequently are delivered orally. Even when they are written, interim orders typically are only provided to the parties. The presence of these interim orders, along with the 20,000 cases still pending at the Supreme Court level and the millions of matters unresolved in the state High Courts,⁴⁹ make it impossible for any institutional body to compile a full record of cases given the country's lack of resources.

Not surprisingly, judges sometimes neglect precedent when making decisions. Most judges do not have full-time clerks and must depend on the lawyers to provide them with relevant case law. In his landmark study of Indian affirmative action rulings, Marc Galanter found different three-judge panels of the Supreme Court failing to take into account precedent-setting judgments.⁵⁰ Another issue is that editors of case reporting companies use their discretion in selecting which cases to include in their volumes. Thus, those who study Indian constitutional law and wish to have a complete list of cases, are forced to rely on a variety of sources, including media accounts and information from a range of legal observers, as well as these incomplete case reporters. Fortunately after spending a year collecting materials and rulings on HIV legal matters, I have been able to compile what is so far the most comprehensive list of cases on the subject of HIV.

Following the *D'Souza* case a number of legal developments occurred that resulted in great public confusion. For example, some years after handing down its decision in *D'Souza*, the Bombay High Court ordered the mass arrest of hundreds of female sex workers.⁵¹ In an unpublished ruling the court cited public health reasons, particularly the fear of the mass spread of AIDS, as justification for its decision to "rescue" these women and girls.⁵² However, various human rights accounts note that many of the arrested were incarcerated, forced to undergo testing for sexually transmitted diseases, including HIV/AIDS, and brutalized by the authorities that housed them.⁵³ Those who tested positively for HIV/AIDS were either deported back to their villages (where they endured the hostility of shaming by their

49. See Bibek Debroy, *Losing a World Record*, FAR EAST. ECON. REV., 14 Feb. 2002, at 23 (noting that there are "23 million pending court cases—20,000 in the Supreme Court, 3.2 million in the High Courts and 20 million in lower or subordinate courts").

50. See generally GALANTER, *COMPETING EQUALITIES*, *supra* note 10.

51. See Yoshie Furuhashi, "Rescuing" Sex Workers, in COMPENDIUM ON CHILD PROSTITUTION (compiled by Socio-Legal Information Centre, 2000), available at <http://csf.colorado.edu/soc/m-fem/2000/msg01408.html>.

52. As stated, this is one of the cases that is unreported and unpublished. Interview with Mr. Vivek Diwan, Coordinator of the Lawyers Collective HIV/AIDS Unit (2 July 2002). See *id.*

53. See Usha Rai, *Sex Workers Narrate Harrowing Tales of Atrocities Inflicted by Guardians of Law*, in COMPENDIUM ON CHILD PROSTITUTION (compiled by Socio-Legal Information Centre, 2000), available at <http://csf.colorado.edu/soc/m-fem/2000/msg01408.html>.

community), or were left to die in detention centers.⁵⁴ Most shocking was a report from one observer who obtained this unpublished order, in which the court directed "that the raids be a regular feature"⁵⁵ of public policy until the spread of HIV/AIDS in the state decreased.

By contrast, around the same time that the Bombay Court declared this order, the Supreme Court of India issued an important public policy ruling affecting the storage of blood in the country. The case arose as a result of the public interest organization, Common Cause, filing an Article 32 petition in the Supreme Court.⁵⁶ Outraged at the inadequate maintenance of blood, Common Cause asked the Court to require an overhaul in the country's blood system.⁵⁷ To support its claim, the group cited the existence of unhygienic storage facilities, the lack of trained professionals at these blood centers, and the fact that "85 per cent of blood collected in the country is not screened for AIDS."⁵⁸

Recognizing the immediate crisis occurring within the Indian blood banks, the Court ordered governments at the central and state level, as well as the National AIDS Control Organization, the main public institution handling HIV/AIDS policy, to implement a series of changes. These included establishing councils at the national and state levels devoted to monitoring and ensuring sanitary blood transfusion services.⁵⁹ The Court also held that all blood banks must be licensed, and that there must be intensive screening of blood donations.⁶⁰ As the Court noted: "The blood trade flourishes with poor people . . . The blood banks presently thrive on bleeding 4000–5000 professional donors in 18–20 cities. The professional blood donors, which include many, are reported to be victims of ill health, low hemoglobin, and many infections"⁶¹

To end this professionalization, the Court directed the councils only to accept voluntary donations. (According to a recent report, this ruling is now

54. *Id.*; see also *Rescued Minor Sex Workers Demand Release*, TIMES OF INDIA, 14 Feb. 1996; *23 Prostitutes Escape Through a Hole in Wall*, INDIAN EXPRESS, 3 July 1996; Meena Menon, *Rehabilitation for Child Sex Workers: In the Red*, 4 HUMANScape, Jan. 1997, available at <http://www.indiawatch.org.in/eazines/humanscape/cont-j97.htm>.

55. See Furuhashi, *supra* note 51.

56. *Common Cause v. Union of India*, A.I.R. 1996 S.C. 929.

57. *Id.* at 929–30.

58. *Id.* at 930.

59. *Id.* at 933.

60. *Id.* at 932–36.

61. *Id.* at 930 (citing the report of M/s A.F. Ferguson & Co.). Although curiously the Court notes that while poverty makes these donors give blood, it is not the only reason. There is a physical "high" that a donor receives; "the blood seller enjoy[s] the dizziness due to a reduced supply." But why the Court makes such a statement or where it obtains its evidence is unclear.

being followed throughout the country.)⁶² The Court also made reference to the fact that the medical welfare of all citizens (those with good health, HIV, or otherwise) depends upon a system that is legitimate and refrains from exploiting those weakest in society. In the immediate aftermath of this decision, as shown in the next section, other courts in different HIV-related cases began to show similar concern. But this progress abruptly ended with a seminal ruling handed down by none other than the Supreme Court just three years later.

C. A Sign of Real Hope—The *MX* Case, 1997

A year after the Supreme Court's judgment in *Common Cause*, the Bombay High Court made a historic ruling in a labor law case that gave important protection to people with HIV. *MX of Bombay v. M/s ZY*⁶³ involved a casual laborer who sought employment on a full-time basis from the company for which he worked.⁶⁴ In 1990 the company told the casual laborer that he was on a list of finalists for full-time employment. First, though, the laborer needed to pass a medical exam, which he successfully completed.⁶⁵ While the laborer "was not [immediately] appointed in a regular vacancy, he was included in the select list of persons to be appointed on a regular basis."⁶⁶ In 1993 the company again requested that he seek another medical examination; after this visit the doctors detected that the laborer positively tested for HIV. Upon learning of these results, the company removed the casual laborer from full-time consideration and from his present position, even though he was asymptomatic and, according to doctors, unlikely to show signs of illness for years.⁶⁷

62. The National AIDS Control Organization (NACO) released a report detailing all the changes that have been made since the *Common Cause* ruling. Although the selling of body parts has been widely publicized in India, no mention is made of this in the report by NACO. See *Combating HIV/AIDS in India 2000–2001*, NACO, available at <http://www.naco.nic.in>. One group that has rejected the *Common Cause* ruling is the Joint Action Council Kannur (JACK). This group is quite controversial in nature and its views have been compared to that of Thabo Mbeki, the current president of South Africa. JACK has questioned the manner in which the mainstream medical community has addressed the AIDS crisis, and the group has also been skeptical of the majority of findings that report that HIV causes AIDS. JACK is a supporter of the private selling of blood and opposes most of the Indian government's AIDS policies because of the involvement of institutions, such as the World Bank, that it believes has corrupted state leaders. See literature published by JACK on file with author.

63. A.I.R. 1997 BOM 406.

64. *Id.* at 408.

65. *Id.*

66. *Id.*

67. *Id.*

The laborer unsuccessfully pleaded with the company to reconsider, noting that he was the main breadwinner in his otherwise impoverished family. He then filed a complaint with the state health services director. Using Article 226 of the Indian Constitution, he subsequently brought a public interest suit in the Bombay High Court charging that the company had violated both his fundamental right to earn a living⁶⁸ and the equal protection article of the Indian constitution.⁶⁹ In a detailed and thoughtful opinion, the Bombay Court's *MX* decision greatly advanced the rights of people with HIV in employment law matters.

The court combed through an extensive array of literature on HIV/AIDS, including reports from the World Health Organization and medical evidence from India and abroad. It also referred to two American cases, *School Board of Nassau County Florida v. Arline* and *Chalk v. U.S. District Court Central District of California*.⁷⁰ In *Arline*, a schoolteacher who was fired because of previous bouts with tuberculosis sued seeking protection under the Rehabilitation Act of 1973.⁷¹ The case reached the US Supreme Court where it was held that a federally funded state institution could not discriminate against an individual solely on the basis of one's "handicap."⁷² In *Chalk*, the Ninth Circuit Court of Appeals ruled that a kindergarten teacher with AIDS could not be removed from his position simply because of his medical condition.⁷³

Relying in part on these decisions, the Bombay High Court concluded "in the vast majority of occupations and occupational settings, work does not involve a risk of acquiring or transmitting HIV between workers, from worker to client, or from client to worker."⁷⁴ So long as an individual's HIV status does not interfere with job performance, an employer may not deem an applicant or present employee unfit for the position.⁷⁵ For employers to

68. INDIA CONST. art. 21 is cited as the basis for this claim, even though the language of Article 21 does not explicitly provide this right. Article 21 states, "No person shall be deprived of life or personal liberty except according to procedure established by law." However, in *Olga Tellis v. Bombay Municipal Corp.*, A.I.R. 1986 S.C. 180, the Supreme Court expanded Article 21 to cover the right to earn a living.

69. INDIA CONST. art. 14.

70. 480 U.S. 273 (1987); 840 F.2d 701 (9th Cir. 1988).

71. 480 U.S. 273 (1987).

72. *Id.* at 281-86 (the Court here held that having tuberculosis qualified as a handicap and remanded the case to district court for a determination of appropriate findings of fact based on medical expertise).

73. 840 F.2d 701 (1988).

74. *Mr. MX of Bombay v. M/s ZY A.I.R.* 1997 BOM at 410.

75. In *Anand Bihari v. Rajasthan S.R.T.C.*, A.I.R. 1991 S.C. 1003, the Supreme Court ruled that where an employee is deemed to be in ill-health, an employer may have the discretion to fire that employee, if the "ill-health" is adversely affecting job performance. Here, though, the Court distinguishes that case from the present one, as *MX* was deemed to be medically-fit. So even though *MX* had an incurable disease, the Court did not find him to be in "ill-health."

discriminate solely because someone has HIV “is clearly arbitrary and unreasonable and infringes the wholesome requirement of Article 14 [the equal protection clause] as well as Article 21 [the right to earn a living].”⁷⁶ The court also held: that the state is in charge of providing opportunities for people to work;⁷⁷ that the right to work is critical to the right to life;⁷⁸ and that the right to social and economic justice is a fundamental right.⁷⁹

The court ordered that the company reinstate the casual laborer to his original position and allow him to reapply for full-time employment.⁸⁰ It directed the company to pay 40,000 rupees in damages to the laborer for the time he was out of work.⁸¹ Further the court ruled that future petitioners, like this claimant, would be allowed to sue under a pseudonym in order to protect their privacy.⁸² (In reaching this specific part of its decision, the court drew upon comparative constitutional law, particularly citing a ruling from a New South Wales court that permitted a case to proceed without revealing the plaintiff’s identity.)⁸³ Given this decision, one might think that the response from HIV activists would be overwhelmingly supportive. Yet there was a more measured reaction from the organization that represented the petitioner in this case. Consider the following statement revealed in a memo from the Lawyers Collective:

Lessons Learned [from the *MX* decision]

- It is *possible* to use courts to advance the rights of persons living with HIV/AIDS (italics added).
- It is sometimes possible to go to court to fight for one’s rights without having one’s HIV status revealed publicly.
- The judiciary needs to be educated about HIV/AIDS.
- The fact that another set of judges might have decided the case quite differently highlights the need for specific legislation to protect the rights of persons living with HIV/AIDS.⁸⁴

76. *Mr. MX of Bombay v. M/s ZY A.I.R.* 1997 BOM at 430. For a discussion of how Article 21 has expanded, see *supra* note 68.

77. *Id.* at 429; see also *Bandhua Mukti Morcha v. Union of India A.I.R.* 1984 S.C. 802, 3 SCC 161.

78. *Mr. MX of Bombay v. M/s ZY A.I.R.* 1997 BOM at 429; see also *Olga Tellis v. Bombay Municipal Corp., A.I.R.* 1986 S.C. 180.

79. *Mr. MX of Bombay v. M/s ZY A.I.R.* 1997 BOM at 429; see also *C.E.S.C. Ltd & Others v. Subhash Chandra Bose & Others A.I.R.* 1992 S.C. 573.

80. *Mr. MX of Bombay v. M/s ZY A.I.R.* 1997 BOM 432.

81. This amount is the equivalent today to about \$750, but in terms of rupees it is not an insignificant sum.

82. *Mr. MX of Bombay v. M/s ZY A.I.R.* 1997 BOM 432, 414–15.

83. The New South Wales case was entitled, *DM v. TD*, 1 MLR 80 (1994).

84. Memorandum from Anand Grover and Mandeep Dhaliwal, The Lawyers Collective, Court in India Reverses Workplace Discrimination. The Lawyers Collective was the

Although this cautious optimism would prove to be clairvoyant in the years to come, following this decision others began to use public interest litigation to advance the rights of people with HIV. The nongovernmental organization, Sahara, which provides funding to hospices that care for sufferers of HIV/AIDS, sued a government hospital for refusing to treat a patient with HIV.⁸⁵ In another case, Sahara filed an action against National AIDS Control Organization (NACO), the government body in charge of AIDS policy, for not fulfilling its mission to fight this deadly virus aggressively.⁸⁶ Also, the controversial organization Joint Action Council Kannur (JACK), a group that rejects conventional studies, tests, and medical opinions on HIV/AIDS, went to court on behalf of a village that was ostracized by the government, media, and private businesses after one resident died of the disease.⁸⁷

While these cases remain under review, there were rulings that provided even more hope to those with HIV. In the northeastern state of Assam, the High Court ordered government agencies working on AIDS to act with more transparency and accountability to the public.⁸⁸ The High Court in the southern state of Kerala directed NACO to release its work and findings on AIDS to the public.⁸⁹ An interim order by the High Court in the state of West Bengal led to the Indian Navy compensating a family for a blood transfusion performed in a military hospital that resulted in the wife of a naval officer contracting AIDS.⁹⁰

To what extent the MX decision led to the filing of more cases or influenced these other judgments are open questions. But we have evidence that for the next two years the rulings from the Indian judiciary began to

organization that represented the petitioner in this case. Anand Grover was the attorney in charge of the case and Mandeep Dhaliwal was the Project Coordinator of the HIV/AIDS Unit. (Memo on file with author.)

85. There is no formal citation to these suits that are pending, but for a brief discussion of the SAHARA matter see *Human Rights and Health Matter Most When They are Most at Risk*, The Lawyers Collective, available at <http://www.hri.ca/partners/lc/unit/dialogue3.shtml>.
86. See Dev Raj, *Health-India: World Bank Funds Fail People with HIV/AIDS*, INTER-PRESS SERV., 1 Dec. 1998, available at <http://www.aegis.com/news/ips/1998/IP981201.html>.
87. See S.P. SINHA, *INDIA SITS ON AIDS BOMB* (1999); see also *id.*; Dev Raj, *Health-India: Election Fever Bypasses "HIV Village,"* INTER-PRESS SERV., 1 Mar. 1998, available at <http://www.aegis.com/news/ips/1998/IP981201.html>; Anju Singh, *Making Waves Changing Tides; The Story of the Joint Action Council Kannur (JACK), India*, 6 CONTINUUM (Summer/Autumn 2001).
88. This case is not published or reported. Author Correspondence with advocates from The Lawyers Collective, 2 July 2002 (on file with author). For a brief discussion of the court ruling, see Grover, *supra* note 1, at 4.
89. This case was brought by the Joint Action Council Kannur. For Information on this non-published order see *Studies, Projects, Campaigns, Publications*, Joint Action Council Kannur, available at <http://www.eionews.addr.com/jack/jackivity.htm>. See also, Singh, *supra* note 87.
90. For information on this non-published order, see *Notable Cases*, The Lawyers Collective, available at <http://www.hri.ca/partners/lc/about/cases.shtml>.

advance the rights of individuals afflicted with HIV. In a comparative context, the *MX* case was important for the South African Supreme Court, which, following the principles of the Bombay High Court, ruled that having HIV alone does not disqualify an individual from applying for a position as a flight attendant.⁹¹ However, to many observers the advances made in *MX* came to a screeching halt in 1999 with the Supreme Court's judgment in *Mr. X v. Hospital Z*. As a feature editorial in a moderately conservative newspaper stated, not only was the *Hospital Z* decision "disturbing" but it contributed to a "distorting of the reality of AIDS . . . [and was] grossly unjust."⁹²

D. *Mr. X v. Hospital Z*, 1999: A Significant Step Backward

The *Mr. X v. Hospital Z* case emerged with a series of events that began in 1995. Doctors in the eastern state of Nagaland recommended to a patient (who was the uncle of a state-level minister) that he travel to the southern city of Madras for a surgical operation.⁹³ A local doctor, referred to in the case as Mr. X, accompanied the patient on his journey to Madras.⁹⁴ Just prior to the operation, the doctors in Madras asked Mr. X to donate blood in case they needed it during the operation.⁹⁵ Mr. X complied, but his blood was not used; the patient was discharged and he and Mr. X returned to their home state.

A couple of months later Mr. X proposed to a Ms. Y and a wedding date was scheduled for December of 1995. However, sometime before the wedding the Nagaland state minister received a call from the hospital informing him that Mr. X was HIV positive.⁹⁶ Soon Mr. X's family, friends, and neighbors became aware of his condition; the wedding was cancelled and he was ostracized from his community.⁹⁷ Mr. X left Nagaland and took a medical position, coincidentally, in the city of Madras.⁹⁸

91. Hoffmann v. South African Airways, 2001 (1) SA 1 (CC).

92. Kalpana Kannabiran, *The Right to Life*, THE HINDU, 21 Oct 2001, available at <http://www.hinduonnet.com/thehindu/2001/10/21/stories/1321061a.htm>.

93. *Mr. X v. Hospital Z*, A.I.R. 1999 S.C. 495, 498. Actually the identity of the patient was Itokhu Yephthomi. The case makes no mention of this individual being the uncle of a state-minister. However in subsequent articles by the attorney for the petitioner, Anand Grover, the connection between the patient and the minister is established.

94. *Id.*

95. *Id.*

96. Note the case is silent as to this fact, but again the lawyer involved in the proceeding writes of this in: Anand Grover, *HIV/AIDS Persons' Right to Marry Suspended*, The Lawyers Collective, available at <http://www.hri.ca/partners/lc/unit/SCJUDGART.shtml> [hereinafter Grover, *Right to Marry*].

97. *Mr. X v. Hospital Z*, A.I.R. 1999 S.C. 498.

98. *Id.*

Mr. X subsequently filed a complaint in the National Consumer Disputes Redressal Commission, arguing that the hospital breached its duty of confidentiality when it released the information of his blood donation to a third party.⁹⁹ The Commission dismissed the petition and instructed Mr. X to litigate this matter in civil court if he wished to seek a remedy.¹⁰⁰ Mr. X then appealed this dismissal to the Indian Supreme Court. The main issue confronting the Court was whether the Commission correctly dismissed the complaint.

In an unusual move, the Court used this case to address a range of issues that Mr. X did not raise on appeal. First, rather than construing whether the Commission justifiably dismissed the original complaint, the Court began its analysis by discussing the issue of confidentiality.¹⁰¹ The Court acknowledged the sanctity that confidentiality is given in both the Hippocratic Oath and in the Indian Code of Medical Ethics. But the Court noted that the doctor-patient privilege allowed for exceptions when the "public interest would override the duty of confidentiality, particularly where there is an immediate or future health risk to others."¹⁰² Using this rationale the Court reasoned that:

[T]he proposed marriage carried with it the health risk to an identifiable person who had to be protected from being infected with the communicable disease from which the appellant suffered. The right to confidentiality, if any, vested in the appellant was not enforceable in the present situation.¹⁰³

Second, the Court disregarded the notion that Mr. X's privacy rights were violated by the disclosure of his HIV status. Citing several Indian, as well as American, cases, the Court stated that while the right of privacy is guaranteed in the constitution of India and that the fundamental rights of the constitution have "penumbral zones," limits may be placed on these rights so long as there is a compelling state interest.¹⁰⁴ Making direct reference to *Roe v. Wade* and Article 8 of the European Convention on Human Rights, the Court held that exceptions to the right of privacy were allowed when the "health or morals or . . . rights and freedom of others"¹⁰⁵ were at stake. On

99. *Id.*

100. Grover, *Right to Marry*, *supra* note 96 (noting that the hospital denied ever leaking the matter).

101. Mr. X v. Hospital Z, A.I.R. 1999 S.C. 499–500.

102. *Id.*

103. *Id.* at 500.

104. *Id.* at 500–501. The Indian cases the Court cites include: Govind v. State of Madhya Pradesh, A.I.R. 1975 S.C. 1378; Kharak Singh v. State of U.P., A.I.R. 1963 S.C. 1295; Malak Singh, State of Punjab, A.I.R. 1981 S.C. 760; R. Rajagopal v. State of Tamil Nadu, A.I.R. 1994 SCW 4420. The American cases that the Court cites include Wolf v. Colorado 338 U.S. 25 (1949).

105. Mr. X v. Hospital Z, A.I.R. 1999 S.C. 501.

this basis the Court found that no fault lay with the hospital for divulging Mr. X's status. The fiancée had a greater interest in knowing about her potential husband's medical condition than any individual claim of privacy he may make.

Third, the Court then curiously decided to discuss how the presence of a venereal disease by either the husband or wife can serve as the basis for divorce in India. In India, there currently is a system where certain family law matters of Hindus, Muslims, Parsees, and Christians are governed by the respective religious laws.¹⁰⁶ These matters include marriage, divorce, succession, and adoption.¹⁰⁷ (The administration of these personal laws in India is in the hands of state judges.)¹⁰⁸ The Court outlined how each of the religious laws allows for divorce when one party has a venereal disease.¹⁰⁹ But without explanation the Court declared that where "the law provides the 'venereal disease' as a ground for divorce . . . such a person who was suffering from that disease, even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured . . ."¹¹⁰

The Court went on to say that because Indian penal law sets forth criminal sanctions against those who knowingly spread an infection to another, a duty is created upon people like Mr. X "not to marry."¹¹¹ And perhaps most confounding were the Court's concluding remarks which stated that: "'AIDS' is the product of indisciplined sexual impulse. The impulse, being the notorious human failing if not disciplined, can afflict and overtake anyone how high soever, or for that matter how low he may be in the social strata."¹¹²

Within the HIV community, the decision by the Supreme Court came as a shock. Rather than offering a careful analysis of the case at hand, the Court used the situation to make a public policy decision that went well beyond its reach. Why the Court decided to expand its ruling so extensively is unclear. The question before the Court was very narrow, namely whether the Commission below had properly dismissed Mr. X's complaint against the hospital for revealing his HIV status to a third party. The petition never raised issues such as the right to divorce or the right to marry.¹¹³

Furthermore, the Court's characterization of AIDS as an "indisciplined

106. See Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 *Isr. L. Rev.* 101, 109 (2000) (discussing personal law in India).

107. *Id.*

108. *Id.*

109. *Mr. X v. Hospital Z*, A.I.R. 1999 S.C. 502.

110. *Id.*

111. *Id.* at 503.

112. *Id.*

113. See Grover, *Right to Marry*, *supra* note 96.

sexual impulse" ignored the complexity of the illness.¹¹⁴ While sexual intercourse is one way of transmitting the disease, there are other ways. As discussed, transmission can occur through tainted blood transfusions as well as through intravenous drug use. Also, the Court failed to grasp that simply because an individual has HIV does not necessarily mean she will exhibit signs of full-blown AIDS. The level of illness associated with HIV varies, and individuals who have the virus may be asymptomatic for years.¹¹⁵ For the highest court in the world's largest democracy to make such sweeping, ill-informed statements was at best insensitive and at worst a major disservice to the public.

The Court also trampled over the nuances inherent in the question of who has the right to marry. International law recognizes that the right to marry is a natural right guaranteed to every individual of full age. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both have provisions adopting this principle.¹¹⁶ Yet the Court in this case, with one fell swoop, held that people with HIV do not have a right to marry. The Court's stated worry was that a healthy spouse may acquire the disease from her infected husband who has failed to disclose his illness; thus, there was a public policy interest in protecting the innocent party. But this argument *presumed* wrongdoing by the petitioner and ignored the fact that there were already criminal statutes existing punishing such behavior. As the attorney for Mr. X wrote after the case, upon "confirming his HIV positive status he himself withdrew from the marriage."¹¹⁷

The Court's opinion was also inconsistent in terms of the references it made to American law. To bolster its argument that the rights of privacy and confidentiality are not absolute, the Court cited several important US court decisions, including quoting a passage from *Roe v. Wade*.¹¹⁸ But the Court's

114. For two of the most informative websites that have volumes of medical studies on HIV/AIDS, see <http://www.iaen.org> and <http://www.unaids.org>.

115. *Id.*

116. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, art. 16, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. 127 (Supp. 1949). International Covenant on Civil and Political Rights, *adopted* 19 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 23, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976). These documents are also cited in Grover, *Right to Marry*, *supra* note 96.

117. Grover, *Right to Marry*, *supra* note 96.

118. Mr. X v. Hospital Z, A.I.R. 1999 S.C. 501, citing *Roe v. Wade*, 410 U.S. 113 (1973). The Court also cites other US cases in making the point that while it believes that people with HIV should not marry, such individuals still have the right to work and enjoy government services. The Court cites: *Sch. Bd. of Nassau County, Fla. v. Arline*, 107 S.Ct. 1123 (1987); *Chalk v. U.S.D.C. C.D. Ca.*, 840 F. 2d 701 (9th Cir. 1988); *Shuttleworth v. Broward County*, 639 F.Supp. 654 (S.D. Fla. 1986); *Raytheon v. Fair Employment and Housing Commission, Estate of Chadbourne*, 261 Cal. Rptr. 197 (1989).

references to US case law were clear examples of selective citation. Missing from its analysis was a discussion of how no state in the US denies people the right to marry on the basis of HIV status. During the 1980s, over half of the American states contemplated requiring couples to submit to pre-marital HIV testing.¹¹⁹ All but two states (Illinois and Louisiana) rejected the idea, and even these two states later repealed their laws.¹²⁰ The states concluded that such testing was excessively expensive, targeted a low risk population, and came too close to breaching rights of confidentiality and privacy.¹²¹ Yet the Indian Supreme Court ignored these relevant points when rendering its decision.

There were related issues that the Court failed to consider. What if Ms. Y had consented to marrying Mr. X after learning of his condition? Is it not possible that a loving couple would still want to proceed with marriage even where one of the parties is ill? Would we say to a couple that they could not marry if the man was diagnosed with cancer? What about Article 21 of the Indian Constitution? It provides every individual with the fundamental rights of life and liberty.¹²² Why should an informed couple lose the right to choose their destinies because one of them has HIV?¹²³

This debate over "who can marry" is also of great significance in the United States. While the issue in the American context focuses not on people with HIV but rather on those who are gay, lesbian, bisexual, and transgendered (GLBT), there are noticeable parallels. In the United States the right to marry is only guaranteed for heterosexual couples of age. Almost uniformly, American courts have held that same-sex couples do not "fit within the traditional biblical and procreative goals of marriage."¹²⁴ Similarly, in barring people with HIV from marrying, the Supreme Court of India premised its argument on the belief that such a union interferes with a couple's ability to live a "healthy" and "moral" life together.¹²⁵ As the Court put it:

119. Matthew Coles, *Mandatory Pre-Marital HIV Testing: A Record of Failure*, American Civil Liberties Union AIDS Project (March 1988), available at <http://www.aclu.org>; see also MICHAEL CLOSEN, *AIDS: CASES AND MATERIALS* (1995); Michael Clozen et al., *Mandatory Premarital HIV Testing: Political Explosion of the AIDS Epidemic*, 69 TUL. L. REV. 71 (1994).

120. Coles, *supra* note 119. Texas and Missouri had what was called conditional pre-marital screening laws, but later Texas repealed its statute, and Missouri's law has not been enforced.

121. *Id.*

122. INDIA CONST. art. 21 (1950).

123. These are many of the questions raised by Grover and others who have viewed this decision skeptically. See Grover, *Right to Marry*, *supra* note 96.

124. WILLIAM ESKRIDGE, *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 9 (2002).

125. The penultimate paragraph of the Court's opinion uses these words repeatedly. See Mr. X v. Hospital Z, A.I.R. 1999 S.C. 503.

Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be a mental, psychological, and physical union. When two souls thus unite, a new soul comes into existence. That is how the life goes on and on on this planet.¹²⁶

While both legal systems have restricted who may marry, the American GLBT movement has exhibited more energy and activism in the pursuit of this cause than the HIV movement in India. William Eskridge recently traced the development of the GLBT litigation campaign. This activism emerged on the heels of the civil rights movement and sought to make claims both on equal protection and due process grounds. In its initial stages, the GLBT efforts to marry were unsuccessful in court. Because judges did not view same-sex marriage as a fundamental right, they "dared not accept these [constitutionally-based] arguments in the 1970s."¹²⁷ However as times changed and the GLBT movement "lowered their sights"¹²⁸ progress did occur. Domestic partnerships among same-sex couples started gaining acceptance in certain cities. A Hawaii court ruled that the state had to show a compelling interest for why same-sex couples could not marry.¹²⁹ And in 1999, a Vermont court held that the state constitution guaranteed same-sex couples the common protections and benefits of marriage that are provided to heterosexual couples.¹³⁰

By contrast, the HIV movement in India has not exhibited the same type of energized legal mobilization regarding this issue of marriage. Several explanations account for this lack of activism. For one thing, like most other rights-based groups in India, HIV organizations struggle for resources. Their infrastructure is weak and they have few secondary leaders or strong staff support. While there are a handful of groups that focus on litigation, most HIV organizations do not have lawyers or outside counsel ready to provide able legal assistance. Moreover, the legal profession is too fragmented to offer sustained assistance.¹³¹ Indian lawyers are typically isolated from each other, and usually they lack the skills to implement true social reform. As a result, most Indian lawyers are unable to help rights groups achieve their particular needs and demands.¹³²

The structure of the Indian courts also has hindered the legal mobilization of the HIV movement. As mentioned earlier, the Indian courts are

126. *Id.* at 502.

127. ESKRIDGE, *supra* note 124, at 9.

128. *Id.* at 12.

129. The Hawaii case was *Baehr v. Lewin*, 852 P2d. 44 (Haw. 1993). Although for a detailed critique of this case, see ESKRIDGE, *supra* note 124, at ch. 1.

130. *Baker v. State*, 744 A.2d 864 (Vt. 1999). For a discussion of how same-sex unions are treated in other nations, see ESKRIDGE, *supra* note 124, at ch. 3.

131. See Galanter, *New Patterns*, *supra* note 19, at 279-95.

132. *Id.* See also GALANTER, *COMPETING EQUALITIES*, *supra* note 10.

clogged. Although many assume that such a backlog reflects a very litigious Indian society,¹³³ in reality, it is not that the courts are constantly receiving petitions from anxious litigants, but rather that so few cases are resolved by the legal system.¹³⁴ Outdated procedural laws that allow for endless interlocutory appeals result in massive delays in judgments and contribute to the vast number of undecided cases.¹³⁵ Lawyers are paid per court appearance and thus learn to manipulate the civil and criminal codes to force cases to sit in the system for decades.¹³⁶ Most social activists, including those advocating on behalf of people with HIV, avoid a system that is fraught with delay and operates at a glacial-like pace.¹³⁷

133. This perception dates back to the time of the British. See e.g., Marc Galanter, *The Aborted Restoration of "Indigenous" Law in India*, in *LAW AND SOCIETY IN MODERN INDIA* 38–39 (Marc Galanter ed., 1989) [hereinafter Galanter, *Aborted Restoration*]. For a contemporary example, see M. Jagannadha Rao, *Need for More ADR Centres and Training for Lawyers and Personnel*, in *ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS* 103 (P.C. Rao & William Sheffield eds., 1997) (noting that "[l]ike the Americans and others, we [Indians] too are a litigious society."); Neeta Sharma, *A System that Encourages People to be Litigious*, *HINDUSTAN TIMES*, 5 July 2001 (on file with author).

134. For a detailed account of this point, see Galanter & Krishnan, *Debased Informalism*, *supra* note 23. See also Christian Wollschlager, *Exploring Global Landscapes of Litigation Rates*, in *SOZIOLOGIE DES RECHTS: FESTSCHRIFT FÜR ERHARD BLANKENBURG ZUM 60 GEBURTSTAG* (Jurgen Brand and Dieter Stempel eds., 1998). Christian Wollschlager's thirty-five country study of litigation rates between 1987 and 1996 notes that Indians ranked among one of the world's lowest (thirty-second), with an annual per capita rate of 3.5 filings per 1000 persons compared to Germany which had a per capita rate of 123 filings per 1000 persons and Sweden which had a per capita rate of 111 filings per 1000 persons. It is important to note that because no national data is available, Wollschlager relied on statistics from the state of Maharashtra. Admittedly, Maharashtra has a comparatively lower population of adults than other countries in Wollschlager's study, and several matters that are brought to various tribunals in the state were not included in the data collection. But there is no reason to think that Maharashtra is glaringly unrepresentative of India as a whole. Although not without its weaknesses the Asian Development Bank conducted a six-country study of Asian countries and found India's rate of litigation ranks near the bottom. See KATHERINA PISTOR & PHILIP A. WELLONS ET AL., *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIA ECONOMIC DEVELOPMENT 1960–1995* (1999). See also Robert Moog, *Indian Litigiousness and the Litigation Explosion*, 33 *ASIAN SURV.* 1136, 1138–39 (1993). Moog has data showing that in one of India's most populous states, Uttar Pradesh, litigation rates have declined over a thirty-year period. There is a limitation to Moog's study in that his data goes from 1951 to 1976; after this year the state of U.P. stopped keeping such records.

135. *Id.*

136. See Galanter, *New Patterns*, *supra* note 19; see also R. Dev Raj, *India: Consumer Courts Slow Down*, *INTER-PRESS SERV.* 20 Oct. 2000, available at <http://www.oneworld.org/ips2/oct/india/html> (noting that "civil litigation [is] delayed indefinitely thanks to backlogs and to smart lawyers who wear out litigants through adjournments."). Although just recently the Indian parliament passed a new civil procedure bill that is intended to reduce delays; time will only tell how effective this legislation will be. But see Barry Bearak, *In India, The Wheels of Justice Hardly Move*, *N.Y. TIMES*, 1 June 2000, at A1 (documenting how a relatively simple property law dispute between two neighbors that began in 1961, ended only after thirty-nine years of prolonged litigation—long after both parties were dead!).

137. For work that has looked at this issue empirically, see Galanter & Krishnan, *Debased Informalism*, *supra* note 23; Epp, *supra* note 13; Galanter, *New Patterns*, *supra* note 19.

A third factor impeding legal activism among the HIV sector over this issue of marriage relates to the traditional mores prevalent within Indian society. For centuries, hierarchy and caste dominated the social, political, and economic relationships among Indians. The purity, impurity, and untouchability of an individual correlated with where one stood in the caste order.¹³⁸ While today untouchability is constitutionally impermissible, caste continues to play a role in how the state crafts certain public policy decisions.¹³⁹ Caste is still an identifying characteristic among communities within civil society, as well.¹⁴⁰ With such a system in place, those with HIV neatly fill a role that was reserved for people once also believed to be sick, unclean, and beyond redemption. These societal shackles inhibit people with HIV from mobilizing and place limitations on how they express themselves.

Whether the HIV movement in India will ever fight for the right to marry like GLBT activists have in the United States remains to be seen. Two noteworthy developments occurred, however, soon after the Supreme Court decided the *Hospital Z* case. The organization Lawyers Collective, brought a case on behalf of four people affected by HIV in the Bombay High Court. Two of the petitioners with the virus wished to marry one another.¹⁴¹ The Lawyers Collective asked the Bombay High Court to set forth the exact parameters of the Supreme Court's decision in the *Hospital Z* case.¹⁴² (Interestingly, filing an "intervener," or friend of the court petition, was Flavia Agnus, a long-time women's rights activist who argued that for the protection of poorer, oppressed women, the *Hospital Z* decision should be upheld).¹⁴³ The Bombay High Court referred this matter to the Supreme

138. For a classic, but oft-criticized, work on caste see LOUIS DUMONT, *HOMO-HIERARCHUS* (1966). An equally classic work that provides wonderful background on this matter is M.N. SRINIVAS, *CASTE IN MODERN INDIA* (1962).

139. For the classic work that tackles this issue from a legal perspective, see GALANTER, *COMPETING EQUALITIES*, *supra* note 10.

140. Actually it is one's *jati*, or sub-caste, that really is used as an identifying characteristic. Caste, or what is sometimes referred to as "varna," is more of a general classification. For a rich, more modern "subaltern" literature on this subject, see PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POST-COLONIAL HISTORIES* (1993); Gyandera Pandey, *Voices from the Edge: The Struggle to Write Subaltern Histories*, 60 *ETHNOS* 223 (1995); Sajal Nag, *Peasant and the Raj: Study of a Subaltern Movement in Assam (1893-1894)*, 2 *NORTH-EAST Q.* 24-36 (1984); Elazar Barkan, *Post-anti-colonial histories: Representing the Other in Imperial Britain.*, 33 *J. BRIT. STUD.* 180 (1994); Dipesh Chakrabarty, *Minority Histories, Subaltern Pasts*, 33 *ECON. & POL. WKLY.*, 28 Feb. 1998, at 473; Ayesha Jalal, *Secularists, Subalterns and the Stigma of "Communalism": Partition Historiography Revisited*, 30 *MOD. ASIAN STUD.* 681 (1996).

141. See *A, C & Others v. Union of India*, Writ Petition No. 1322 (1999), Bombay High Court.

142. *Id.*

143. *Id.*

Court, where at the time of this writing, the case is still pending.¹⁴⁴ As the Lawyers Collective was filing this motion, a coalition of activists separately petitioned the Supreme Court, also asking for clarification of the *Hospital Z* case. Acting on this second petition, a three-judge panel in December 2002 stated that while the *Hospital Z* Court correctly held that the privacy rights of the doctor with HIV in that case were not violated, the rest of that decision, including the section on marriage rights for people with HIV, was "unnecessary" and "uncalled for."¹⁴⁵ At least one prominent activist has interpreted the language of this 2002 ruling "as restoring the right to marry of an HIV positive person."¹⁴⁶ But it is important to note that the three-judge panel did not explicitly overturn *Hospital Z*. Until such an affirmative proclamation is made giving people with HIV the right to marry, doctrinally, it remains unclear whether these individuals possess what ought to be their fundamental right.

IV. CONCLUSION: ASSESSING THE INDIAN JUDICIARY'S HIV JURISPRUDENCE

Conventional wisdom suggests that disadvantaged communities in India have their constitutional rights best protected by using the tactic of public interest litigation. The argument is that the constitution of India provides the means for groups to have their voices heard and courts accordingly safeguard their rights. This study has sought to challenge this argument on two different levels. First, a review of the literature indicates that there are various institutional impediments that prevent claimants from effectively using public interest litigation. Second, an in-depth analysis of the case law involving one highly disadvantaged group, the HIV community, reveals that the courts have been at best partially helpful.

For these individuals, a smattering of judgments has recognized the importance of tackling the HIV/AIDS crisis in a direct, forthright manner. In the *Common Cause* case, the Supreme Court of India exhibited significant leadership when it ordered a total reform of how blood banks operate. In ending the commercialization of blood donation, the Court sought to protect those who might otherwise be exploited by unscrupulous vendors. In different ways lower courts also have demonstrated a willingness to

144. The Bombay Court noted that another case very similar in nature is also in front of the Supreme Court. See *id* (stating that "a person suffering from AIDS has moved the Hon'ble Supreme Court, on the very same issues raised in this Petition . . .").

145. Mr. "X" v. Hospital "Z" 2002 SCCL. COM 701.

146. Author Correspondence with Ketki Nagarkar, AIDS Unit Official, Lawyers Collective (15 Jan. 2003) (on file with author).

address and safeguard the rights of people affected by HIV. In the *MX* case, the Bombay High Court rejected the argument that HIV status alone could disqualify an individual from employment. We also discussed how other state High Courts have demanded that the government exhibit more public openness in the way HIV policy is designed.

The success of these past public interest campaigns presumably has had some impact on litigants who continue to bring HIV-related cases to court. Consider that three different courts have issued orders prohibiting individuals from advertising and pedaling untested drugs that claim to cure AIDS.¹⁴⁷ A Bombay High Court also just ordered the state of Maharashtra to pay for all medical care for a 13-year-old girl who contracted HIV in a government-run hospital.¹⁴⁸ And in 2001, a High Court in the state of Andhra Pradesh ruled that a patient who received HIV-tainted blood should obtain substantial damages from a company that owned the hospital where the transfusion occurred.¹⁴⁹ In this particular case, the Andhra court, following the contours of the *Common Cause* holding, directed the state to revamp its management of HIV policy. Among its recommendations the court held that:

- blood banks should increase their standards for accepting donations;
- health care providers should undergo special training to deal with HIV;
- the state should promote a large-scale public awareness campaign; and
- hospitals and health care facilities should adopt strict policies on hygiene.¹⁵⁰

147. These are, again, interim orders that have not been published. One of the interim orders, issued 20 Apr. 2000 by the Bombay High Court, barred T.A. Masjid from selling Ayurvedic, or homeopathic, drugs that he claimed cured AIDS. (Author correspondence with officials at Lawyers Collective, 2 July 2002, on file with author.) The Supreme Court in a dismissal order, reaffirmed the Bombay High Court ruling. See *Supreme Court Dismisses Majeed's Petition*, Posting of sea-aids@healthdev.net, to sea-aids@lists.healthdev.net (4 Apr. 2002) available at <http://www.archives.hst.org.za/sea-aids/msg00199.html>. Masjid was also barred from conducting his activities by the High Court in the state of Kerala. See Press Release, Gov. India, *Kerala High Court Bans Magic Drug: Court Order to be Severe Deterrent for Quacks* (22 Feb. 2002). For a case that allowed researchers to continue with studies on Ayurvedic ways to combat AIDS, despite a claim by the plaintiff that the defendants were stealing his ideas, see *Jagdish Gandhi v. Satish B. Vaidya and Others*, 1999 Indlaw MUM 18 (holding that a court does not possess the tools for deciding whether this alternative form of medicine can or cannot cure the recognized public health calamity of AIDS, and that the evidence brought by the plaintiff was insufficient to have the defendants' research stopped).

148. This unreported judgment is noted in, *Maharashtra to Foot HIV Victim's Bill*, *INDIAN EXPRESS*, 26 Apr. 2002, available at http://www.indian-express.com/full_story.php?content_id=1658.

149. *SMT M. Vijaya v. Singareni Collieries*, A.I.R. 2001 A.P. 502. Note, the company also happened to be the patient's employer.

150. *Id.* at 518–19.

Most importantly, the court recommended that "efforts should be made to supply anti-AIDS drugs free of cost . . ." ¹⁵¹ While this landmark ruling is on appeal to the Supreme Court, another recent case from Bombay that reaffirmed the principle set forth in the *MX* case provides even more hope. In *Afcons Infrastructure v. Sonavane*, the Bombay High Court ruled that any employer making hiring decisions solely on the basis of an applicant's HIV status exhibits "total ignorance about the condition of being HIV positive."¹⁵² As the court stated, such an "attitude [by the employer] is based on a fear psychosis . . . and has to be deprecated in very strong terms."¹⁵³

These cases show that courts are more open today when considering the claims of people with HIV. But as we have also seen, this story is one side of the coin. The *Dominic D'Souza* ruling is still valid. Even a generous reading of the Supreme Court's 2002 decision cannot substantiate the claim that the *Hospital Z* judgment is formally overruled. Judgments affirming the mass arrests of suspected HIV carriers in Bombay and more recently in Hyderabad¹⁵⁴ illustrate that people with this virus do not receive full equal treatment from the courts.¹⁵⁵ Since joining in 1995, India's membership in the World Trade Organization (WTO) poses another concern. The WTO requires all members to sign the Trade Related Intellectual Property Rights agreement (TRIPS). For India, this means that by 2005, the government will have to abide by the agreement's strict patent protection procedures. This raises the question of what will happen to patients presently receiving low-priced AIDS medication from non-TRIPS compliant pharmaceutical companies. HIV-activists fear that once the agreement takes effect, the judiciary • will do little to ensure that the needs of these individuals are met.¹⁵⁶

151. *Id.* 518. It is important to note that one of the first of these types of rulings in the world came from the Supreme Court of Venezuela in 1999, which ruled that all anti retro-viral HIV drugs be made free to patients who suffer from this virus. If the Supreme Court of India does uphold this case, one question that arises is how exactly the government would pay for this cost. Currently India devotes only .7 percent of its gross domestic product to health care. An affirmation by the Supreme Court would force the government to make very difficult economic and policy choices.

152. *Afcons Infrastructure v. Babu (Bapu) Fakira Sonavane* 2000 (4) Mh. L.J. 555.

153. *Id.*

154. See *P.S. Swamy v. S.H.O. Hyderabad* (1998) 1 Andh. LD 755.

155. Two state High Court cases that involve prisoners with advanced AIDS also highlight the fact that these equal protection issues can sometimes be morally and legally difficult. In both cases convicted felons who had committed brutal offenses sought release from prison so that they could die in their home villages. In *Surla Alias Sudalaimuthu v. State*, 1997 Indlaw MAD 90, the Madras High Court refused to grant bail to two inmates who were awaiting trial for throwing acid on a woman's face. Conversely in *Vakil Chand v. State*, 1996 Indlaw PNH 51, the Punjab and Haryana High Court granted an early release to an AIDS prisoner who was convicted of murdering a person during a robbery.

156. For information on this topic, see Richard Gerster, *How WTO/TRIPS Threaten Indian Pharmaceutical Industry*, THIRD WORLD NETWORK, Aug-Sept. 2000, available at <http://www.twinside.org.sg/title/twr120h.htm>. The website from the World Trade Organization produces an immense amount of literature presenting its view, available at <http://>

We see then that there are limited options for those who have HIV in India. The findings from this study call into question whether using litigation is the best way to remedy this hardship. Hopefully, future observers will now investigate the type of relief courts have offered for other disadvantaged groups. Only after this process is completed will we know whether the conventional wisdom that views the courts as the insurer of minority rights is accurate.

No doubt some observers will contend that my measuring of success in court, mainly in terms of whether a party "wins" or "loses," ignores other factors behind why claimants litigate. In India, the political process is viewed by much of the public as corrupt and inaccessible.¹⁵⁷ The courts—at least the higher courts—routinely receive praise for their independence and integrity.¹⁵⁸ Going to court thus may provide a legitimate forum for those seeking to advocate a cause when they might otherwise not have an opportunity to do so.¹⁵⁹ Also there is evidence showing that when done in a coordinated, structured, and repeated fashion, litigation has the potential for creating a culture of rights-consciousness within a society.¹⁶⁰ And in addition to winning, claimants may pursue litigation out of dedication to an ideology or commitment to other partners within a policy network.¹⁶¹

But even these studies recognize that there is considerable merit in acquiring substantive legal rights from courts. Furthermore, because the benefits from these alternative perspectives manifest over time, they amount

www.wto.org/english/tratop_e/trips_e/trips_e.htm. See generally Vandana Shiva, one of the world's leading environmental and technology advocates and the chair of the Research Foundation for Science, Technology and Ecology, who offers a counterposition, available at <http://www.vshiva.net>.

157. For a selected sample of readings on corruption in India, see generally VINOD PAVARALA, *INTERPRETING CORRUPTION: ELITE PERSPECTIVES INDIA* (1996); U. Agarwal, *Politics of Crime, Corruption and Waste, Caste and Creed*, 41 INDIAN J. PUB. ADMIN. 462–71 (1995); Robert Wade, *The System of Administrative and Political Corruption: Canal Irrigation in South India*, 18 J. DEV. STUD. 287 (1982); P.K. Doraiswamy, *Tackling Corruption—Some Relevant, Difficult Issues*, THE HINDU, 5 Aug. 1997, at 25. Col. a.
158. Accounts of the higher judiciary's prominence within Indian society are well noted. For a select set of readings, see EPP, *supra* note 13, at 71–89; Marc Galanter, *Fifty Years On*, in SUPREME BUT NOT INFALIBLE 57 (B.N. Kirpal et al. eds., 2000); Dhavan, *Law as Struggle*, *supra* note 8; Baar, *supra* note 8.
159. For scholars who make this point in other contexts, see MICHAEL McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978); STUART SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974); KAREN O'CONNOR, *WOMEN'S ORGANIZATIONS' USE OF COURTS* (1980).
160. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 201 (1974); EPP, *supra* note 13.
161. Galanter & Krishnan, *supra* note 106; Krishnan & den Dulk, *supra* note 13; Jayanth K. Krishnan, *Perceptions and Interpretations of Law from Past to Present in the Subcontinent*, GEO. WASH. INT'L L. REV. 639 (2002).

to little more than cold comfort for those who need help immediately. Delay is endemic within the Indian judiciary, a fact that effectively forecloses using litigation to gain quick payoffs. The courts also follow the principle of precedent in an *ad hoc* manner, which adds angst to an already desperate community.¹⁶² Having to choose between a political process that is flawed and a judicial system that is inconsistent, time-consuming, and haltingly helpful amounts to little choice at all. Until serious political reform is undertaken or there is a reevaluation of the benefits courts provide, people such as those with HIV will continue to serve as the newest class of untouchables within Indian society.

162. Regarding this point on precedent, in the important *Hospital Z*, right to marry case, consider that the Supreme Court did not cite one previous HIV judgment. One can make the argument that the lack of citation does not necessarily mean that past cases played no role in the Court's opinion. For a discussion of this point see NEIL DUXBURY, *JURISTS AND JUDGES: AN ESSAY ON INFLUENCE* (2001). But Duxbury's argument also rests on what the cultural norms are of a particular judiciary—i.e. where there is a culture of not citing works, then citation should not be used as a measure. In India courts cite precedent all the time. Here, although an elliptical reference is made to the *MX* case, the fact that the Supreme Court omitted any direct citation of previous HIV rulings, I would argue is a telling point in its own right.